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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

Docket Nos. 50-329A
50-330A

APPEAL BOARD DECISION ON REVIEW OF ANTITRUST
DECISION OF LICENSING BOARD

DECEMBER 30, 1977

(ALAB - 452)



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Michael C. Farrar
Richard S. Salzman

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

December 30, 1977

(ALAB-4,2)

Opinion of the Board by Mr. Salzman, in which Messrs. Rosenthal and Farrar join:

The question in this case is whether licensing Consumers Power Company to build and operate a commercial nuclear power

plant at Midland, Michigan, would "create or maintain a situation inconsistent with the antitrust laws" within the meaning of section 105c of the Atomic Energy Act of 1954, 42 U.S.C. §2135(c). The Licensing Board held that it would not and therefore declined to place antitrust restrictions on the Midland "construction permit", Consumers' license from the Commission^{1/} to build the plant. LBP-75-39, 2 NRC 19. This appeal is taken by the three parties who prosecuted the section 105c proceeding -- the Commission's anti-trust staff, the intervening Michigan municipalities and cooperatives, and the Attorney General of the United States. It brings before us the first full-fledged anti-trust decision on the merits rendered by a licensing board.

NATURE OF THE CASE

A. Introductory

The antitrust laws embody fundamental national economic policy.^{2/} It is a "now settled axiom that after Otter Tail Power Co. v. United States, 410 U.S. 366, 'there can

^{1/} The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission on January 19, 1975, and transferred its regulatory responsibilities to the Nuclear Regulatory Commission. See 42 U.S.C. §§5814 and 5841. In this opinion, "Commission" refers either to the AEC or the NRC as the context requires.

^{2/} FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Gulf States Utilities Co. v. FPC, 411 U.S. 747, 759 (1973); Otter Tail Power Co. v. United States, 410 U.S. 366, 372-75 (1973); United States v. Topco Associates, 405 U.S. 596, 610 (1972); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218-19 (1966).

be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities.'" City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314, 1321 (7th Cir. 1977), quoting from Cantor v. Detroit Edison Co., 428 U.S. 579, 596 n. 35 (1976).

Congress has given the Commission specific antitrust responsibilities.^{3/} Under section 105c of the Atomic Energy Act, it must review applications for permits to construct commercial nuclear power facilities to determine if the activities sought to be licensed would create or maintain situations inconsistent with the antitrust laws or their underlying policies. Where such a result would follow, the Commission may refuse a license (or rescind one previously issued) or attempt to rectify the anticompetitive consequences by attaching appropriate conditions to the license.^{4/} As the Commission has reiterated, the Atomic Energy Act's anti-trust provisions reflect "a basic Congressional concern over access to power produced by nuclear facilities" and represent legislative recognition "that the nuclear industry originated

^{3/} Even without express statutory obligation to do so, federal regulatory agencies must structure their decisions to ameliorate if not avoid anticompetitive consequences. Gulf States Utilities Co. v. FPC, *supra*, 411 U.S. at 759-61; Denver and Rio Grande W. RR. Co. v. United States, 387 U.S. 485 (1967); California v. FPC, 369 U.S. 482, 484-85 (1962). See also, Cities of Statesville v. AEC, 411 F.2d 962 (D.C. Cir. 1969); Municipal Electric Assoc. v. SEC, 413 F.2d 1052 and 419 F.2d 757 (D.C. Cir. 1969).

^{4/} Section 105c(6), 42 U.S.C. §2135(c)(6); see Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 564 (1965) (Wolf Creek I).

as a Government monopoly and is in great measure the product of public funds [which] should not be permitted to develop into a private monopoly via the [NRC] licensing process, * * *."^{5/}

B. The Attorney General's recommendation.

We have previously described the procedures under section 105c in some detail.^{6/} For purposes of this appeal it is sufficient to note that in due course the Commission referred Consumers' application to build the Midland facility to the Attorney General of the United States for advice about its possible antitrust ramifications.^{7/} That official responded^{8/} with a critique of Consumers' relationships with neighboring smaller utilities, mostly competing municipally-owned systems

^{5/} Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit 3), CLI-73-7, 6 AEC 48-49 (1973) (Waterford I), and CLI-73-25, 6 AEC 619, 620 (1973) (Waterford II).

^{6/} See ALAB-279, Wolf Creek I, supra, fn. 4.

^{7/} Section 105c was amended in 1970 to impose prelicensing antitrust review. Consumers had applied for permission to construct Midland in 1969. Because a construction permit was not issued before the effective date of the amendment, antitrust review of its application was necessary. Under a "grandfather clause" in the amending legislation, however, it was not necessary to complete that review before a construction permit could issue. See Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, 3 NRC 331 (1976). Construction of Midland is currently underway.

^{8/} The letter of advice to the Commission over the signature of Richard McLaren, then Assistant Attorney General in charge of the Antitrust Division, appears at 26 Fed. Reg. 17881.

or rural electric cooperatives. The Attorney General stressed that Consumers is one of Michigan's largest utilities, that its service area extends over the state's "lower peninsula" save for its southwest corner and areas in and around metropolitan Detroit, and that it dominates the generation and transmission of electricity in its area of operations. The Attorney General's concern was the likelihood that the utility had impermissibly used its "substantial market power vis-a-vis its smaller competitors" to preserve its market position and to foreclose competition. The letter raised the possibility that Consumers' actions had violated antimonopoly provisions of section 2 of the Sherman Act, 15 U.S.C. §2.^{9/} The Attorney General advised the Commission that granting Consumers' application for the Midland facility might well serve to "maintain a situation inconsistent with the antitrust laws". Accordingly, he recommended "that a hearing be held pursuant to Section 105 of the Atomic Energy Act to provide a factual basis upon which the Commission may appropriately determine those questions."

^{9/} The Sherman Act ("'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred and ninety") is among the antitrust laws the Commission must apply under section 105 of the Atomic Energy Act.

C. The proceedings below.

The Atomic Energy Act makes the Attorney General's "recommendation" for a section 105c antitrust hearing in connection with a construction permit application binding on the Commission.^{10/} This being so, the Commission convened a Licensing Board^{11/} comprised of two lawyers and an economist to hear and decide the antitrust allegations.^{12/} Four separate parties took active roles at the antitrust trial before that Board: the Attorney General (represented by attorneys from the Antitrust Division of the Department of Justice) exercising his statutory right under section 105c(5) "to participate as a party in the proceedings"; Joint Intervenors (the Michigan Municipal Electric Association; the municipalities of Coldwater, Grand Haven, Holland, Traverse City and Zeeland, Michigan; and Northern Michigan and Wolverine rural electric cooperatives);^{13/} the antitrust staff of this Commission; and the applicant, Consumers Power Company.

^{10/} Wolf Creek I, supra, ALAB-279, 1 NRC at 565.

^{11/} The antitrust aspects of an application to build a nuclear power plant are reviewed by a separate licensing board and not referred to the one convened to consider its health, safety and environmental features. Public Service Co. of Indiana (Marble Hill, Units 1 & 2), ALAB-316, 3 NRC 167 (1976).

^{12/} One of the lawyer-members died after the record closed but before the decision was rendered. The parties agreed to have the surviving Board members decide the matter rather than retry the case. See 2 NRC at 40 fn. 3.

^{13/} The intervening municipalities and cooperatives generate or distribute electricity within or adjacent to areas served by Consumers Power Company.

The three complaining parties sought to establish a case against Consumers along the lines of the federal government's successful civil antitrust action against another electric utility. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). The Supreme Court there affirmed a district court decision^{14/} that a regulated electric utility violates the antitrust laws by acting unjustifiably to foreclose competition, to gain competitive advantages or to destroy competitors. The Court held, among other things, that Otter Tail's use of its "strategic dominance" over the power transmission network to prevent municipalities from reaching other sources of electricity and forming competing power systems was an exercise of monopoly power that violated the Sherman Act. 410 U.S. at 317.

^{14/} United States v. Otter Tail Power Co., 331 F. Supp. 54 (D.Minn. 1971).

In this case the complaining parties led by the Department of Justice attempted to demonstrate, first, that Consumers Power possessed "strategic dominance" not only over the transmission but also over the generation of electric power in its service area by virtue of its control over key transmission lines and the number and size of its power plants and, second, that Consumers had used its dominance to foreclose the possibility of competition from smaller cooperative and municipal systems in its service area. In particular, they introduced evidence purporting to demonstrate that Consumers had consistently and unjustifiably refused to "wheel" (i.e., transmit from sources outside Consumers' system)^{15/} power to the municipalities and the cooperatives, or to "coordinate" (plan and operate their power plants jointly to achieve reliability and efficiency not otherwise attainable)^{16/} with those smaller systems on any reasonable basis, although Consumers both transmitted power for and regularly coordinated with other,

^{15/} "Wheeling" is a term of art in the electric power industry; it refers to the "transfer by direct transmission or displacement of electric power from one utility to another over the facilities of an intermediate utility." Otter Tail Power Co. v. United States, supra, 410 U.S. at 368.

^{16/} "Coordination" has been defined by the Federal Power Commission as "joint planning and operation of bulk power facilities by two or more electric systems for improved reliability and increased efficiency which would not be attainable if each system acted independently". FPC 1970 National Power Survey, Part 1, p. I-17-1.

larger utilities close by. These and other anticompetitive acts on Consumers' part,^{17/} the smaller companies said, blocked their access to cheaper sources of power, prevented them from using their own generating capacity most efficiently, and kept them dependent on purchases of wholesale power from Consumers, thereby preventing them from competing effectively against that larger company and preserving its dominant market position. It was also contended that Consumers' conduct violated section 5 of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1), which makes unlawful "unfair methods of competition" and "unfair or deceptive acts or practices in commerce."^{18/}

^{17/} The other anticompetitive acts charged were that Consumers had (1) prevented the small utilities from joining the coordination agreement between it and the Detroit Edison Company; (2) acted to preclude coordination among the smaller utilities; (3) forestalled competition with nearby larger utilities for the sale of wholesale power to small utilities by entering wholesale territorial agreements with these larger utilities; (4) acted to acquire certain of the small utilities; (5) limited the right of small utilities to interconnect with third parties by inserting a provision to that effect in its wholesale and coordination contracts with the small utilities; and (6) prohibited the use of its old hydroelectric facilities for electric power generation by inserting restrictive covenants to that effect in their deeds of sale.

^{18/} The Federal Trade Commission Act ("An Act to create a Federal Trade Commission, to define its power and duties, and for other purposes" approved September twenty-six, nineteen hundred and fourteen") is another of the antitrust laws the Commission must apply under section 105.

According to the complaining parties, this anticompetitive situation would be "maintained" in violation of section 105c of the Atomic Energy Act by allowing Consumers to build and operate the Midland facility. This situation would not be cured, the complaining parties contended, by acceptance of Consumers' offer to sell the intervening utilities power from the nuclear plant. They pointed out that the offer to sell is at rates based on the average wholesale cost of power on Consumers' entire system. This, they asserted, retains the cost advantages of the nuclear facility for Consumers, thus enhancing its monopolistic dominance over the available sources of cheaper power.

Consumers denied all the charges against it, asserting either their untruth or their justification as accepted practices in sound public utility management. Consumers also defended on the ground that even were it guilty of those accusations they were unrelated to its operation of the nuclear plant. Without such a "nexus" with the nuclear facility, Consumers argued, as a matter of law relief under section 105c is not available. Consumers accordingly insisted that the placement of anticompetitive restrictions on its license was not in order.

D. The decision below.

1. Section 105c analysis. Authority under section 105c of the Atomic Energy Act to condition an applicant's license to alleviate antitrust problems is keyed to the existence of a "situation inconsistent with the antitrust laws" or the likelihood of one arising as the result of granting the license. That critical provision, however, is not further defined in the Act. The Licensing Board therefore began its decision by analyzing what it deemed "basic legal concepts" in an effort to elucidate what Congress intended. Starting from the premise that the antitrust laws' goal is to promote and to preserve competition, the Board below reached the conclusion "that a 'situation inconsistent with the antitrust laws' must mean anticompetitive conduct." (2 NRC at 49, emphasis in original). It declined to limit such conduct to practices which either the federal courts or the Federal Trade Commission had previously held to be antitrust violations. Rather, the Board ruled that Congress intended section 105c to reach as well conduct (id. at 50):

(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 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.

The Board did state that anticompetitive conduct alone does not justify invoking the sanctions of section 105c. It rested this ruling on the Commission's statement in Waterford II, supra, that there is "an overriding requirement that there be a reasonable nexus between the alleged anticompetitive practices and the activities under the particular nuclear license." 6 AEC at 621. The Board therefore went on to consider the kind of connection between the proscribed conduct and a nuclear facility which must be demonstrated in order to justify placing antitrust conditions on an applicant's license. After sketching the use of the term by authorities ancient and modern, the Board held that (2 NRC at 55):

[n]exus exists between otherwise lawful activities under a license or 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 of which is to cause the creation of maintenance of said situation.

This distinction between the "use" and the "misuse" of licensed activities the Board derived from patent and

labor cases cited in its opinion. It read these as laying down a rule of law that (id. at 60):

the use of activities under a Federal grant within the scope and for the very purpose contemplated by the grant is immunized from the antitrust laws.

It deduced therefrom the proposition that activities licensed by the Commission cannot "create or maintain a situation inconsistent with the antitrust laws" unless "misused".

Ibid.

2. Antitrust analysis. The Licensing Board required the complaining parties to bear the burden of proving their accusations against Consumers. These the Board understood as amounting to charges, first, that Consumers had engaged in "anticompetitive conduct" vis-a-vis the smaller utilities in the relevant geographic and product markets and, second, that licensing Consumers to build Midland would maintain that anticompetitive situation unless the license were freighted with appropriate antitrust restrictions. The Board found the geographic market to be "all of the lower peninsula of Michigan except the eastern section served by the Detroit Edison Company and the southwest section served by * * * subsidiaries of American Electric Power Company", the areas where Consumers is franchised to sell power or into

which it could reasonably extend its service (2 NRC at 45).

Based on its interpretation of representations made by Justice and assertedly accepted by the other parties regarding the scope of the matters in controversy, the Board determined the product market to be one for "coordination services" (ibid). "Coordination" refers to the electric power utilities' practice of interchanging power and sharing responsibility for building new generating facilities to achieve economic benefits unattainable by an individual utility acting alone.^{19/} The practice encompasses both "operational coordination," which is the unified control of generation and transmission facilities,^{20/} and the sharing

^{19/} The Licensing Board defined "coordination" as "the interchange of beneficial services between cooperating electric utilities through an agreement which confers on each party a net benefit not attainable by such electric utilities operating independently". 2 NRC at 34-35. See also fn. 16, supra.

^{20/} "Unified control or economic dispatch of generation or transmission facilities" means the control of the generation or transmission facilities of each of two or more utilities by one central control authority. 2 NRC at 35.

of one or more of reserve,^{21/} emergency,^{22/} maintenance,^{23/} economy,^{24/} dump,^{25/} seasonal and time diversity^{26/} power or energy, and "developmental coordination", which includes the cooperative planning of new facilities to allow their construction as joint ventures or on staggered time schedules (2 NRC at 34-35).

- 21/ "Reserves" means extra generating capacity maintained to generate power in the event of unexpected demand for power or loss of a generating facility or unit or scheduled outage of a generating facility or unit. Ibid.
- 22/ "Emergency Energy or Power" means energy or power needed, supplied, or received in an emergency situation, i.e., an unscheduled outage. Ibid.
- 23/ "Maintenance energy or power" means energy or power supplied or received to replace needed energy or power which is unavailable because a generating unit or transmission unit is out for scheduled maintenance. Ibid.
- 24/ "Economy Energy or Power" means energy or power supplied to or received by a utility from another utility which power costs less than the receiving utility's current production cost. Ibid.
- 25/ "Dump Energy or Power" is energy or power available from a utility and which energy or power must be produced anyway. (An example is a hydroelectric plant which must be run to monitor river flow or lake level and the production of energy or power is in excess of needs of the utility owning the plant). Ibid.
- 26/ "Diversity" means the difference in electric loads on two different utilities resulting from noncoincident maximum load demands of two different utilities. "Seasonal Diversity" means diversity caused by differences in load demand during different seasons of the year. "Time Diversity" means diversity caused by differences in load demand during the day. (Usually occurs between two time zones and if so, is called "time zone diversity".) Ibid.

The Board also believed that certain additional legal concepts governed the decision it was being called upon to make. Foremost among these was what it denominated the "net benefit rule." Purportedly derived from strictures against wasting corporate or utility assets, in the Board's understanding the rule permits coordination between utilities only if each receives a "net benefit" from the arrangement because (2 NRC at 66):

To coordinate with a competitor without any net benefit would either injure the public served or the stockholders or both and would be a waste of the assets of the corporation. The officers and directors are obligated to do just the opposite.

From the above, we conclude as a matter of law, that the management of Applicant is forbidden from entering into alleged coordination agreements which said management believes will result in a net detriment to Applicant.

Another rule the Board thought applicable was one it analogized to the parable of the Good Samaritan. In the Board's view, a large utility has no legal duty to come to the "aid" of a smaller competitor -- either by entering into a coordination agreement or otherwise -- where the former did not cause the latter's distress. Only where the refusal is part of an "anticompetitive scheme," the Board held, may

an "otherwise lawful refusal to coordinate * * * give rise to a situation inconsistent with the antitrust laws."

2 NRC at 73.

The Licensing Board also ruled that a utility's refusal to wheel power for a competitor is not per se anti-competitive conduct but must be shown to be part of a scheme to violate the antitrust laws. In that Board's judgment, this remained true even where the utility controls the high voltage lines necessary to transmit the power and its refusal to cooperate blocks the transaction. In reaching this conclusion, the Board noted but declined to apply the "bottleneck theory" of monopolization. Under that theory, those with strategic dominance over an essential facility which is impractical to duplicate may be obliged to allow competitors to use the "bottleneck" on reasonable terms. In the judgment of the Board below, however, "all of the bottleneck cases involve conspiracies" and, therefore, "as a matter of law, the bottleneck situation applies only to conspiracies and hence is inapplicable to a unilateral refusal to wheel." 2 NRC at 76-78.

Finally, the Board below held that a finding of anti-competitive conduct may not rest simply on a utility's unilateral refusal to grant access to a nuclear facility. As in its "nexus" analysis, supra pp. 12-13, the Board reasoned that (2 NRC at 79):

the use of activities under a grant authorized by Congress is immune from the reach of the antitrust laws. Only if it can be shown that the activities under the license will be misused as a material element and substantial factor in an anticompetitive scheme or conspiracy is it possible to deem refusal of access by joint ownership or unit power to be unlawful.

This led it to the legal conclusion that (id. at 80):

if an Applicant for a license intends to construct and operate a nuclear power facility solely for the purpose of supplying power to its customers, unilateral refusal to provide its competitors with access to such facilities is not anticompetitive conduct and is not 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.

The Licensing Board then examined the evidence underlying the charges against Consumers Power Company in light of the foregoing legal principles. It viewed the charges as falling naturally into eight "situations," but, having held the contested issues to be limited to "coordination activities,"^{27/} ruled only five of them properly before it.^{28/} These were (using the numbers assigned by the Board below) whether to deprive the smaller utilities of the advantages of coordination, Consumers (1) inserted provisions in its contracts with them limiting their right to coordinate with each other or with nearby larger utilities absent Consumers' consent, (2) refused to coordinate its own operations with them on reasonable terms, (3) excluded them from the Michigan Power Pool,^{29/} (4) refused to wheel power among them and (5) refused them access to power from the Midland nuclear facility on reasonable terms.

^{27/} "The relevant matters in controversy in this proceeding all deal with 'coordination' activities." 2 NRC at 64; see also id. at 40-45; 105; and p. 14, supra.

^{28/} See 2 NRC at 92-102.

^{29/} A "power pool" in the electric utility industry "is two or more interconnected electric systems planned and operated to supply power in the most reliable and economical manner for their combined load requirements and maintenance program." Edison Electric Institute, Glossary of Electric Utility Terms (1970 ed.) p. 64 (hereafter "EEI glossary"). The Michigan Power Pool is comprised of Consumers Power Company and the Detroit Edison Company, which serves the city of Detroit and environs. D. J. Exh. No. 67.

The Board reviewed these five situations separately without determining whether Consumers had monopoly power in the relevant market. In each instance the Board exonerated Consumers of the charges of anticompetitive conduct and, additionally, found no "nexus" between the utility's conduct and activities under the Midland license. 2 NRC at 92-102.

3. Matters outside the "issues in controversy."

Evidence suggestive of anticompetitive actions on Consumers' part was noted by the Licensing Board in two of the three situations it had held beyond the issues in controversy. (The Board evaluated these "for the sake of completeness.") With respect to "situation (6)," the Board below found that Consumers had specifically sought to monopolize relevant retail and wholesale power markets by acquiring neighboring smaller utilities, thereby "destroying competition from a group of healthy, growing, effective and aggressive competitors". 2 NRC at 104. The Board determined that Consumers had acquired three such competitors and "found as a fact" that these, together with a larger number of unsuccessful attempted acquisitions, were part of an "anti-competitive scheme to monopolize" on Consumer's part, and that, in the Board's words, "the scheme still exists." Ibid.

The Board concluded, however, that this course of conduct did not run afoul of the Sherman Act, but only because Consumers lacked the "power to carry out the scheme," and that in any event there was no "nexus" between the "scheme" and activities under the Midland license. 2 NRC at 102-05.

Situation (7) involved allegations of "gentlemen's agreements" not to compete between Consumers and its large neighboring utilities. Although labelled "Conspiracies to Limit Retail Competition," this section of the Board's opinion covered evidence relating to restrictive wholesale practices as well. It characterized the evidence in the record bearing on these allegations as having "no substance," although it did discern evidence of an informal "boundary agreement" between Consumers and the Detroit Edison Company. On investigation, the Board decided that, rather than precluding the right of a customer near a service area boundary to choose which utility will serve it, the arrangement merely called for the utilities "to accept the customer's decision as final." The Board concluded that this fairly implemented Michigan Public Utility Commission policy. 2 NRC at 105-07.

The last "situation," number (8), concerned Consumers' obligation to wheel power to the smaller utilities from

the "regional power exchange market," i.e., from utilities other than Consumers itself. The Board found that the smaller utilities were, as a practical matter, too remotely situated to obtain power economically from those outside sources unless Consumers wheeled it to them (2 NRC at 108), that Consumers, however, had evidenced "a general refusal to wheel" for them (id. at 99), and, consequently, that the smaller utilities were left dependent on Consumers for bulk power except to the extent they could afford to build or operate their own generating plants (id. at 108). The Board expressed the opinion that "[i]f as a matter law the smaller utilities have a right to exchange wholesale power with utilities outside the relevant geographic market using [Consumers'] transmission facilities * * * then we cannot excuse [Consumers] on the plea that the smaller utilities can build their own * * *." The Board added, however, that in its judgment they "have no such right", that even if they did an NRC antitrust proceeding "is the wrong forum for enforcement thereof", that "the alleged right to such wheeling * * * is not within the scope of this proceeding", and that even if it were, no nexus exists between Consumers' refusal to wheel and its activities under the Midland license. Id. at 108-09.

4. Matters not dealt with below.

The complaining party also attacked two other actions undertaken by Consumers. First was a charge of "pre-emptive coordination," i.e., that Consumers had entered into anticompetitive agreements with two smaller systems that effectively precluded their coordinating with other small systems.^{30/} The other was an allegation that Consumers had inserted restrictive covenants in the deeds for its old hydroelectric facilities to prevent the purchasers from selling electric power to the smaller utilities.^{31/} The opinion below discusses neither.

5. The result.

The Licensing Board found no "situation inconsistent with the antitrust laws" which would be "maintained" by the activities under the Midland license within the meaning of section 105c of the Atomic Energy Act. Accordingly, it allowed Consumers Power Company to retain its permits to construct the Midland nuclear plant "as issued * * * without the imposition of any antitrust conditions." 2 NRC at 114.

^{30/} See Justice's Prehearing Brief, pp. 48-50, and Brief and Proposed Findings of Fact, p. 160.

^{31/} See Justice's Prehearing Brief, pp. 51-52, and Brief and Proposed Findings of Fact, p. 121.

II

THE APPLICATION OF SECTION 105c

As we mentioned, this is the first antitrust case under section 105c in which a comprehensive decision on the merits has been rendered by a licensing board. Appreciating this, the Board below rendered a lengthy opinion seeking to explain fully the reasons for the course it chose and the result it reached.

Appellants have launched a broad-gauged attack on that decision, asserting that the Board below misconstrued key principles under both section 105c and the antitrust laws it calls into play. Those misconceptions, say appellants, distorted the Board's view of the facts, causing it to overlook well recognized patterns of anticompetitive conduct. Consumers Power Company, on the other hand, without endorsing every ruling of the Board below, urges that we uphold its decision as permissible in approach, correct in result and supported by the record.

In light of the precedential nature of this case and the profound legal and factual disagreements between the parties, our discussion will follow a format similar to that used in the Licensing Board's opinion. We will examine

here (part II) what we perceive as the governing legal principles in section 105c proceedings. In the next part (III) we discuss certain antitrust law concepts that are key to evaluating this case. In part IV we paint the background against which the charges against the company are based. The succeeding parts evaluate those charges.

A. Situations inconsistent with the antitrust laws.

1. Violation of antitrust policies. Under section 105, antitrust conditions are added to construction permits where the licensed activities would create or maintain a "situation inconsistent with the antitrust laws." The circumstances intended to be included thereby are not further explained in the Act. The Board below held such a "situation" to embrace more than actual violations of the antitrust laws and to reach activities running counter to the "public policy" embodied in such legislation as well. 2 NRC at 47-49. It ruled that there may be considered in determining whether an inconsistent situation exists (2 NRC at 50):

(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. The term "violations of the antitrust laws" as used in this Board opinion means practices which have been determined to be violations of the antitrust laws in authoritative Federal court opinions.

The Licensing Board was correct in holding that proof of an actual violation of the antitrust laws is not required to show the existence of a situation "inconsistent with" them for section 105c purposes. The Congressional framers of the section (the members of the Joint Congressional Committee on Atomic Energy) were originally divided between those who favored proof of an antitrust violation before allowing section 105c remedies to be imposed and those who thought a showing of circumstances merely "tending" to such a violation should suffice to allow that relief. An accommodation between the two views was eventually reached. The members of the Joint Committee agreed that proof of conditions which ran counter to the policies underlying those laws, even where no actual violation of statute was made out, would warrant remedial license conditions under section

105c. ^{32/} We need not linger over the matter; this compromise is expressly manifested in the report of the Joint Committee ^{33/} and is reflected in the Commission's decisions. ^{34/}

^{32/} S. Rep. No. 91-1247 and H. R. Rep. No. 91-1470, 91st Cong., 2nd Sess., 14-15 (1970). (Reports of the Joint Committee on Atomic Energy on Amending the Atomic Energy Act of 1954 to Provide for Prelicensing Antitrust Review of Production and Utilization Facilities, inter alia.) (Hereafter the "Joint Committee Report"). An earlier draft report had been issued wherein arguably a majority of the committee intended that a situation inconsistent with the antitrust laws be tantamount to one in violation of those statutes. See, Joint Committee on Atomic Energy, Draft Report on H. R. 18679, 14-15 (July 1970). Senator Aiken, a strong proponent of prelicensing antitrust review, wrote a vigorous dissent urging defeat of the amendments to section 105c unless the Joint Committee's report were revised. See Senator Aiken's Dissenting views on H. R. 18679, September 14, 1970, in particular pp. 11-12. The committee's report was rewritten to Senator Aiken's satisfaction and accordingly he supported passage of amended section 105c. 116 Cong. Rec. 19254 (Daily ed. December 2, 1970).

^{33/} Joint Committee Report at 14-15: "The legislation proposed by the committee provides for a finding by the Commission 'as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a.' The concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is 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 these laws. It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws." (Emphasis supplied.)

^{34/} See, e.g., Waterford I, supra, 6 AEC at 49: "The specific standard which Congress intended the Commission to use in such reviews -- 'whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a' -- is a limited one. The standard requires that: (1) the allegations raised by petitioners describe a situation inconsistent with the antitrust laws or the policies clearly underlying those laws, * * * (emphasis supplied).

We have touched this point because the Justice Department raises it to counter what it perceives as a contention by Consumers that only proof of violation of the antitrust laws authorizes the triggering of section 105c relief.^{35/} We think Justice has misconstrued the company's position on this question. In its brief on appeal, Consumers acknowledges that it told the Licensing Board that an "inconsistent situation" could be found "by showing that the Company had violated the antitrust laws or the policies thereunder,"^{36/} a position which it reiterates for our benefit.^{37/} In light of this, Consumers' brief can not be fairly read as asserting that a "situation inconsistent with the antitrust laws" can exist only in the presence of an actual statutory violation; on the contrary, it recognizes unqualifiedly that relief under section 105c is also available if needed to remedy a situation in conflict with antitrust policies.^{38/} (Of course the company asserts that no such situation exists here.) As we discuss next, the company's dissatisfaction with the standards announced by the Board below is focused elsewhere.

^{35/} Compare p. 34 of Consumers' Appeal Brief with p. 38.

^{36/} Consumers' Appeal Brief, p. 33 (emphasis supplied).

^{37/} See, e.g., id. at pp. 34-35, 38.

^{38/} Let there be no doubt about our own position. If Consumers is indeed insisting that a situation contrary to anti-trust policy, albeit not an actual violation of law, is insufficient to allow remedial conditions under section 105c, we reject that position. See pp. 33-36, infra.

2. FTC Act jurisprudence as a guide in section 105c cases. Consumers Power Company does object to certain criteria which the Licensing Board said were appropriate for determining whether section 105c had been violated (see pp. 25-26, supra). In the company's view, the Board improperly read section 105c as reaching conduct that "offends public policy" generally or is "immoral" in a broad sense. These "open ended" criteria, Consumers urges, are inapposite under section 105c. It argues that the provision is directed at actions that transgress antitrust law and antitrust policy only. The company therefore contends that assessments of "contemporary mores, traditional ethical and religious standards and the public weal", divorced from an antitrust setting, have no place in Commission proceedings and "cannot be reconciled with the language and legislative history of section 105c."^{39/}

Consumers has missed the point which the Licensing Board was making. Its reasoning does not meander in realms of abstract morality. On the contrary, the passages that Consumers finds objectionable were explicitly addressed by the Board

^{39/} Consumers' Appeal Brief, p. 34.

to "guidelines for construing section 5 of the FTC Act."^{40/}
The Federal Trade Commission Act is of course one of the laws
which Congress expressly commanded the Commission to apply
in section 105c proceedings.^{41/} Section 5 of that Act, 15
U.S.C. §45(a)(1), forbids "unfair methods of competition in
commerce, and unfair or deceptive acts or practices in commerce."
The criteria recited by the Board below with which Consumers finds
fault are none other than those adopted by the Trade Commission
itself as an aid in determining whether given business practices

^{40/} 2 NRC at 50. The quoted passage is in the paragraph
of the Board's opinion immediately preceding the one
containing the standards to which the company objects.
Indeed, the paragraph containing those guidelines
itself refers to "practices determined to be unfair
by the use of the criteria quoted in Heater v. FTC."
Heater in turn quotes from FTC v. Sperry & Hutchinson
Co., 405 U.S.233(1972), a Supreme Court decision
(also cited by the Board below) commenting favorably
on the use of those criteria for judging whether business
practices are deceptive. Although Consumers devotes 6 pages
of its brief on appeal to the proposition that the Board's
standards are overly broad and open-ended, it nowhere
mentions, much less discusses, the cited cases or section
5 of the Federal Trade Commission Act. The company
evidently overlooked these points.

^{41/} See fn.3 , supra.

are deceptive or unfair within the meaning of section 5. It was, of course, entirely appropriate for the Licensing Board to "apply [antitrust] principles developed by the * * * Federal Trade Commission."^{42/} Indeed, these particular criteria have been cited with approval by the Supreme Court of the United States.^{43/}

That Congress intended FTC jurisprudence to be used in Commission antitrust proceedings under section 105c is scarcely debatable. The FTC Act is expressly included among the laws this Commission must apply under section 105c and the Joint Committee's final report on the amendments to section 105c stressed that its inclusion among them was quite deliberate.

It is important to note that the antitrust laws within the ambit of subsection 105c of the bill are all the laws specified in subsection 105a. These include the statutory provisions pertaining to the Federal Trade Commission, which normally are not identified as antitrust law. Accordingly, the focus for the Commission's finding will, for example, include consideration of the admonition in section 5 of the Federal Trade Commission Act, as amended, that "Unfair methods of competition in commerce, and unfair and deceptive acts in commerce, are declared unlawful."^{44/}

^{42/} Houston Lighting and Power Co. (South Texas Project, Units Nos. 1 & 2), CLI-77-13, 5 NRC 1305, 1316 (1977).

^{43/} See FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972).

^{44/} Joint Committee Report, p. 14 (emphasis supplied).

To the extent that Consumers wishes its conduct judged on some "established antitrust law and policy" standard which ignores the Federal Trade Commission Act in general (or section 5 in particular), we can not be accommodating. The company's desire comes too late and is pressed in the wrong forum; Congress has decided otherwise.

Again, we need not give this point more space than it deserves. It is true that section 5 permits proscription of unfair or deceptive business practices that infringe neither the letter nor the spirit of what Consumers calls the "established" antitrust laws,^{45/} i.e., the Sherman and Clayton Acts. But no accusations of this

45/ FTC v. Sperry & Hutchinson Co., supra, 405 U.S. at 239:

"The Commission presented two questions in its petition for certiorari, the first being [w]hether Section 5 of the Federal Trade Commission Act, which directs the Commission to prevent 'unfair methods of competition ... and unfair or deceptive acts or practices,' is limited to conduct which violates the letter or spirit of the antitrust laws.

* * *

"In reality, the question is a double one: First, does § 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws? Second, does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition? We think the statute, its legislative history, and prior cases compel an affirmative answer to both questions."

nature are levelled in this proceeding. The "unfair conduct" charges against Consumers relate strictly to assertedly anticompetitive actions on its part akin to those proscribed by the Sherman Act.^{46/} And in evaluating such charges, the FTC itself looks to Sherman (and Clayton) Act precedents for guidance in judging whether conduct is "unfair" within the meaning of section 5.^{47/} Thus, though the broadly phrased criteria articulated by the Board below may be appropriate in other section 105c proceedings, they did not and do not come into play in this case.^{48/}

We do not mean that decisions rendered under section 5 are irrelevant here. It is to be recalled that in section 5 proceedings proof of a full-blown violation of the Sherman or Clayton Acts is not required; there need only be shown a "conflict with the basic policies of [those]

^{46/} See App. Tr. 82-83.

^{47/} Atlantic Refining Co. v. FTC, 381 U.S. 357 at 369-70 (1965), and other cases cited in fn. 40, infra.

^{48/} There will be time enough to deal with allegations of unfair competitive practices that violate neither the letter nor the spirit of the "traditional" anti-trust laws when, as and if such charges come before us.

Acts"^{49/} because, as has been explained, "the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act...to stop in their incipency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as 'unfair methods of competition' existir violations of them."

FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966), quoting FTC v. Motion Picture Adv. Co., 344 U.S. 392, 394-95 (1953).

Section 105c similarly applies to situations in conflict with the policies underlying the antitrust laws. Like section 5 of the FTC Act, section 105c was also designed by Congress to "nip in the bud any incipient antitrust situation," albeit via the NRC prelicensing review process. Wolf Creek I, supra, ALAB-279, 1 NRC at 572 (quoting the Joint Committee Report, p. 14). This similarity in purpose and standards leads us to agree with the staff^{50/} that section 5 precedents may be helpful guides to determining whether a situation not violative of the antitrust laws is,

^{49/} FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966); Atlantic Refining Co. v. FTC, supra, fn. 47; FTC v. Texaco, Inc., 393 U.S. 223 (1968); L.G. Balfour Co. v. FTC, 442 F.2d 1, 9 (7th Cir. 1971).

^{50/} See Staff Opening Brief, p. 38.

nevertheless, inconsistent with their underlying policies.^{51/}

3. "Anticompetitive conduct" as the basis of situations inconsistent with the antitrust laws. Starting from the premise that "the purpose of the antitrust law is to promote and preserve competition" (2 NRC at 49), the Licensing Board reasoned that a "situation inconsistent with the antitrust laws" within the meaning of section 105 amounts to "anticompetitive conduct", presumably on the part of an applicant for a Commission permit or license. Ibid. The Department of Justice is highly critical of this analysis, arguing in its opening brief (p. 15) that

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.

^{51/} Obviously we do not share the Licensing Board's view (2 NRC at 49) that cases dealing with violations of the Sherman or Clayton Acts provide little guidance regarding their underlying policies.

The Department contends that by working from this "false premise" -- i.e., that the focus of a section 105c inquiry is conduct -- the Board below was led to a distorted understanding of the law of monopolization, an inappropriate antitrust analysis, and an isolated, abstract evaluation of the allegations of anticompetitive conduct instead of one undertaken in the context of relevant market realities.

We do not agree that the Licensing Board's determination to concentrate on the applicant's conduct necessarily caused it to go astray in the manner suggested by the Department. What an inquiry is labelled is of lesser moment than how it is carried out. In our judgment, evaluation of business "conduct" in a case like this one, exploring charges essentially bottomed on section 2 of the Sherman Act and its underlying policies, requires the application of the same monopolization and policy concepts as an investigation of an anticompetitive "situation". This is so because, as with other statutes, actions permissible under the antitrust laws in one situation may be proscribed in

another.^{52/} An antitrust analysis of an applicant's conduct must therefore be undertaken in the context of the "situation" in which that conduct occurred -- in other words, against the background structure of the relevant market.^{53/} Of course that analysis of a utility's

^{52/} E.g., Schine Chain Theatres v. United States, 334 U.S. 110, 119 (1948) (citations omitted): "Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce. Agreements not to compete have at times been used for that unlawful purpose. If we had here only agreements not to compete, the inferences drawn by the District Court might not be warranted. But in the setting of this record and against the background of Schine's other monopolistic practices, it seems to us that the District Court might infer that the requisite purpose was present and that these agreements were additional weapons in Schine's arsenal of power through use of which its monopoly was sought to be extended."

See also, United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 344-45 (D. Mass. 1953), affirmed per curiam, 347 U.S. 521 (1954); United States v. IBM, Trade Cases (CCH) par. 60,495 (at p. 67,176) (S.D.N.Y. 1975).

^{53/} "To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the [challenged conduct] in terms of the relevant market for the product involved. Without a definition of the relevant market there is no way to measure [a defendant's] ability to lessen or destroy competition." Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965).

conduct must (among other things) be sensitive to judicial and FTC antitrust rulings that the actions of a dominant business enterprise have to be tested against a more stringent standard than applies to actions of smaller concerns in highly competitive markets,^{54/} and must also take account of the general rule that electric utilities are not exempt from the federal antitrust laws, particularly where they voluntarily enter into commercial relationships governed in the first instance by business judgment and not regulatory coercion.^{55/}

Finally, on this point, it should hardly be necessary to add that where a series of anticompetitive actions are alleged, the entire course of conduct must be reviewed for a

54/ United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945); American Tobacco Co. v. United States, 328 U.S. 781, 812-14 (1946); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 342-46 (D. Mass. 1953), affirmed per curiam, 347 U.S. 521 (1954); cf. U.S. Steel Corp. v. Fortner Enterprises, __ U.S. __, 51 L.Ed 2d 80, 85 fn. 1 (1977).

55/ Otter Tail Power Co. v. United States, supra, 410 U.S. at 373-75 (Sherman Act); Cantor v. Detroit Edison Co., supra, 428 U.S. at 594-98 (Sherman Act); International Tel. & Tel. Corp. v. General Telephone and Electronic Corp., 518 F.2d 913, 935-36 (9th Cir. 1975) (Clayton Act); Almeda Mall, Inc. v. Houston Lighting and Power Co., __ F. Supp. __, Trade Reg. Rep. par. 61,485 at p. 71,880 (S.D. Tex. 1977).

monopolistic pattern. The courts have stressed

the importance of viewing the evidence as a whole to give the antitrust plaintiff the full benefit of his proof, rather than tightly compartmentalizing the case and wiping the slate clean after considering each piece of evidence.^{56/}

We have ourselves observed in a related context that the Commission's task under section 105c necessarily obligates it to consider an applicant's activities in context, not in isolated segments. Wolf Creek I, supra, 1 NRC at 572. As the Commission's delegate, that obligation devolves on us and the other adjudicatory boards assigned to hear these cases.

^{56/} United States v. Empire Gas Corp., 537 F.2d 296, 299 (8th Cir. 1976), certiorari denied, ___ U.S. ___ (1977). See also, United States v. IBM, Trade Cases (CCH) par. 60,495 (S.D.N.Y. 1975), where the court explained that (p. 67,176): "The government in a monopolization case under 15 U.S.C. §2 need not prove that each practice of the defendant is in itself illegal. 'Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce.' Schine Chain Theatres v. United States, 334 U.S. 110, 119 (1948). When a practice concededly not in and of itself illegal is alleged to have been used in violation of the Sherman Act, 'facts and circumstances must be adduced to show that it was in purpose or effect employed as an instrument of monopoly power'. Schine Theatres, supra, 334 U.S. at 120-21. Though the constituent elements of the alleged scheme * * * may be lawful if examined separately, 'they are bound together as parts of single plan. The plan may make the parts unlawful' Swift & Co. v. United States, 196 U.S. 375, 396 (1905)". See also, Continental Ore Co. v. Union Carbide and Carbon Co., 370 U.S. 690, 699 (1962).

In sum, for antitrust purposes, whether an applicant's "conduct" was impermissibly anticompetitive usually depends on the "situation" in which the actions took place; in most instances proper consideration of one factor requires evaluation of the other.^{57/} A review of the decision below indicates that the Licensing Board at least purported to measure Consumers' conduct against the background of the electric power generation and distribution situation in lower Michigan, discussed relevant market considerations, and touched on allegations of applicant's monopoly power. See 2 NRC at 45, 84-91, 102-03 and 112-13. (Whether its analysis was correct is a discrete question which we address in Part VII, below.) We therefore reject the Department's criticism of the Licensing Board for electing to approach this case by focusing on the applicant's conduct. This does not strike us as an inherently unreasonable way to begin an antitrust review under section 105c.

^{57/} Exceptions would involve activities of the kind held to be "per se" violations of the antitrust laws. E.g., Otter Tail Power Co. v. United States, supra, 410 U.S. at 378; United States v. Topco Associates, supra, 405 U.S. at 608; Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

B. "Nexus."

Proof of a situation inconsistent with antitrust law or policy is only one of the basic prerequisites for relief under section 105c. The second is a showing that "the activities under the [NRC] license would create or maintain" the anticompetitive situation. The Commission has characterized the latter as "the overriding requirement that there be a reasonable nexus between the alleged anticompetitive practices and the activities under the particular nuclear license." Waterford II, supra, 6 AEC at 621 (emphasis supplied).

The Licensing Board devoted a considerable portion of its opinion to analyzing the meaning of "nexus" and to discussing its application in section 105c cases. After reasoning by analogy to patent and labor law decisions (among other authorities), the Board concluded in essence that (1) nuclear activities licensed by the Commission are "immunized" from the antitrust laws; (2) therefore, any "nexus" between licensed activities and an anticompetitive situation must entail some "misuse" of the license; (3) accordingly, such a connection would exist "if, and only if," the licensed activities were "misused" so as to

be a material element and a substantial factor in a scheme or conspiracy the purpose or effect of which [was] to cause the creation or maintenance" of a situation inconsistent with the antitrust laws. 2 NRC at 60-61. The staff, intervenors and Justice challenge this analysis and Consumers Power Company does not defend it.^{58/} We agree that it is mistaken.

To begin with, "nexus" is not a term of art; the Atomic Energy Act and Commission regulations assign it no special meaning. Similarly, neither of the Commission's Waterford decisions -- whence use of the term stems -- suggests that the word was employed in some sense other than that ordinarily ascribed to it.^{59/} On the contrary, Waterford II, for example, uses "nexus" interchangeably with and as the equivalent of phrases such as "meaningful tie," "substantial connection," and "relationship," essentially the word's dictionary definitions.^{60/} See 6 AEC at 620-621.

^{58/} See the Staff's Opening Appeal Brief, p. 43; Intervenors' Opening Appeal Brief, pp. 35-38; Justice's Opening Appeal Brief, pp. 172-73; and Consumers' Appeal Brief, pp. 342-52.

^{59/} See Waterford I, supra, 6 AEC at 51; Waterford II, supra, 6 AEC at 620-21.

^{60/} E.g., The American College Dictionary (Random House Ed. 1970) at 818 ("Nexus * * * 1. a tie or link; a means of connection. 2. a connected series.")

It appears that the motivating force behind the Board's analysis was an axiomatic belief that activities authorized by a federal license, so long as within the bounds of the grant, are beyond antitrust purview. We need not decide if that concept is valid for the purposes of the patent and labor law cases relied on by the Board below. Be that as it may, the proposition runs counter to generally accepted antitrust canons. The cases teach that legislative grants of antitrust immunity are to be strictly construed and that repeals of those statutes by implication are "strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provision." Federal Maritime Commission v. Seatrain Lines, Inc., *supra*, 411 U.S. at 733, quoting from United States v. Philadelphia National Bank, 374 U.S. 321, 350-51 (1963); *accord*, Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963); California v. Federal Power Commission, 369 U.S. 482 (1962); United States v. Radio Corporation of America, 358 U.S. 334, 350-52 (1959); United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956); United States v. Borden Co., 308 U.S. 188 (1939). Certainly since Otter Tail was handed down by the Court four years ago, it has been settled that

electric power utilities are normally subject to the anti-trust laws. 410 U.S. 366; accord, Cantor v. Detroit Edison Co., supra, 428 U.S. at 596 fn. 35. And Congress made plain that there is no "repugnance" between the Atomic Energy Act and the antitrust laws. It did so, of course, by inserting at the very outset of section 105 the provision that "[n]othing contained in this Act shall relieve any person from the operation of the [antitrust laws]." 42 U.S.C. §2135(a).^{61/}

^{61/} The Licensing Board voiced the belief that it "stretches credulity to the breaking point" to argue "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 * * *". 2 NRC at 79.

We would have thought that notion was dispelled by Otter Tail. The Supreme Court there reiterated that (410 U.S. at 372-73)

[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.

In California v. FPC, 369 U.S. 482, 498, the Court held that approval of an acquisition of the assets of a natural gas company by the Federal Power Commission pursuant to §7 of the Natural Gas Act "would be no bar to [an] antitrust suit." Under §7, the standard for approving such acquisitions is "public convenience and necessity." Although the impact on competition is relevant to the Commission's determination, the Court noted that there was "no 'pervasive regulatory scheme' including the antitrust laws that ha[d] been entrusted to the Commission." Id., at 485. Similarly, in United States v. Radio Corp. of America, 358 U.S. 334, the Court held that an exchange of radio stations that had been approved by the Federal Communications Commission as in the "public interest" was subject to attack in an anti-trust proceeding.

See also South Texas, supra, CLI-77-13, 5 NRC at 1312, fn. 8.

The Licensing Board's concept of licence "misuse" falls with our rejection of its holding (on which that concept depends) that an NRC license conveys antitrust immunity of any sort. Honest industrial transactions as well as illegal maneuvers may serve to maintain monopoly power in violation of the antitrust laws. Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 496-99 (1968); American Tobacco Co. v. United States, supra, 328 U.S. at 809 (1946); United States v. Aluminum Company of America, supra, 148 F.2d at 431-32; see also Poller v. Columbia Broadcasting System, Inc., 768 U.S. 464, 468-49 (1962).

In short, the Licensing Board misapprehended the application of the "nexus" requirement. For reasons elaborated in Wolf Creek I, the appropriate test is whether "anticompetitive situations [are] intertwined with or exacerbated by the award of [the] license to construct or operate a nuclear facility."^{62/} Accordingly, we must reexamine the anticompetitive situations alleged here to determine whether, properly evaluated, the requisite connection -- nexus -- is present. We do so in Part VIII, infra.

^{62/} Wolf Creek I, supra, 1 NRC at 569; see also, 114 Cong. Rec. H9446 (daily ed. Sept. 30, 1970) (remarks of Rep. Hosmer).

III.

KEY ANTITRUST CONSIDERATIONS

The ultimate question here is whether, without appropriate remedial conditions in the company's licenses, allowing Consumers Power Company to build and operate the Midland nuclear facility would maintain a "situation inconsistent with the antitrust laws" contrary to section 105c of the Atomic Energy Act.^{63/} Those who urge that the question must be answered in the affirmative -- and who therefore seek the addition of such remedial conditions -- contend that Consumers has "monopolized" the generation and distribution of electricity in violation of section 2 of the Sherman Act, section 5 of the Federal Trade Commission Act, and policies underlying those two provisions. The opinion of the Board below offers little general guidance about the requirements of those laws. Evidently the Board assumed that (in contrast to section 105c) those long-standing antitrust statutes are well understood. Perhaps

^{63/} We find no charge before us that the issuance of an unconditioned license would "create" rather than "maintain" an anticompetitive situation. The case has been tried on the theory that to award such a license would assist the company to continue or to expand its monopoly position. See Justice's Opening Appeal Brief, pp. 6-8 and Staff Opening Appeal Brief, p. 25; and Intervenors' representations to the Licensing Board at Tr. 46-47 (July 12, 1972); but cf. Intervenors' Opening Appeal Brief, pp. 185-86.

so; nonetheless, a brief review may aid in appreciating their application to this case.

A. The Sherman Act.

1. Section 2 of the Sherman Act, 15 U.S.C. §2, makes it a crime to "monopolize" any part of interstate trade or commerce. The elements of that offense were defined by the Supreme Court in Grinnell^{64/} as

- (1) the possession of monopoly power in the relevant market and
- (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Defining monopolization is easier than recognizing it, each of its constituents having developed a gloss of its own. The meaning of "monopoly power" is relatively straightforward, having been characterized as the ability to control prices or exclude competition when it is desired to do so.^{65/} Stated another way, the "cases determine that a party has monopoly power if it has, over 'any part of the trade or commerce among the several states', a

^{64/} United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

^{65/} Id. at 571.

power of controlling prices or unreasonably restricting competition."^{66/} We have also been instructed "that the material consideration in determining whether a monopoly exists" for purposes of section 2 of the Sherman Act "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." American Tobacco Co. v. United States, supra, 328 U.S. at 811.

Where aspects of an industry's operations are subject to government regulation, the determination whether a business enterprise has monopoly power requires assessment of the effects of the public controls. Even where (as in this case) the statutes do not exempt those subject to regulation from the antitrust laws, official action pursuant to that legislation may dictate prices, exclude competitors and restrict competition wholly apart from any instigation by the regulated entity itself.^{67/}

^{66/} United States v. du Pont, 351 U.S. 377, 389 (1956), quoting Standard Oil Co. v. United States, supra, 221 U.S. at 58.

^{67/} See Otter Tail Power Co. v. United States, supra; Cantor v. Detroit Edison Co., supra.

Because a regulated utility may "enjoy" (in all senses of the word) the protection thus afforded does not necessarily make it an illegal monopolist; monopoly power may have been "thrust upon it."^{68/} Indeed, in the United Shoe Machinery case, supra, Judge Wyzanski included among possible examples of such circumstances the power conferred upon a utility in "franchises granted directly to the enterprise by a public authority." 110 F. Supp. at 342.

The extent of the protection afforded by government regulation is not self-evident; neither is it coincident with the scope of the regulatory agency's authority. To avail itself of this defense, a company charged with monopolization must demonstrate that the anticompetitive conduct which is sought to be laid at its doorstep was dictated in the first instance by "regulatory coercion" and not by private business judgments in which the

^{68/} See United States v. Aluminum Co. of America, supra, 148 F.2d at 429. Possession of monopoly power is not automatically unlawful. United States v. Standard Oil Co., 221 U.S. 1, 62 (1911). Assuming that Consumers does have monopoly power, the allegation that the power was acquired initially in violation of the antitrust laws was neither put in issue nor actually tried. See 2 NRC at 112-13; Justice's Opening Brief on Appeal pp. 6-7, 80; Staff Opening Brief on Appeal, pp. 21-23, 51; Intervenors' Opening Brief on Appeal, pp. 73-85. See also, Tr. 60-61 and fn. 63, supra.

regulators later acquiesced.^{69/} As the Ninth Circuit put it:

This is not to say that the nature and extent of regulation is, in the absence of an exemption, irrelevant from a factual perspective. The impact of regulation on pricing and other competitive factors is too obvious to be ignored. In the absence of an exemption claim, the fact of regulation is significant but not because it embodies a doctrinal scheme different from the antitrust law; the sole legal perspective is that afforded by the antitrust law. Rather, the impact of regulation must be assessed simply as another fact of market life.^{70/}

Accordingly, we must also determine whether that assessment was made in this case and, if it was, whether made correctly.

^{69/} Otter Tail, supra; Cantor, supra. For recent applications of the rule that a regulator's leave to engage in given practices does not prevent those same practices from forming the basis of an antitrust violation, see Wolfson v. Artisans Savings Bank, No. 76-179 (D.Del., filed March 24, 1977) (slip opinion, pp. 16-17); Litton Systems, Inc. v. Southwestern Bell Tel. Co., 539 F.2d 418 (5th Cir. 1976).

^{70/} International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., supra, 518 F.2d at 935-36. See, also, United States v. Marine Bancorporation, 418 U.S. 602 (1974). While these are cases under the Clayton Act, these considerations are also relevant in Sherman Act proceedings. See United States v. Citizens National Bank, 422 U.S. 86 (1975); Mullis v. Arco Petroleum Corporation, 502 F.2d 290, 298 n. 23 (7th Cir. 1974) (per Stevens, C.J.).

2. The existence vel non of monopoly power is not an abstract question. Such power is by definition a measure of a company's control over the competitive arena, or the "relevant market." For antitrust purposes, therefore, the evaluation of a company's market power and the anticompetitive consequences of its conduct must be made against the backdrop of that market.^{71/}

It is now hornbook law that delineation of the boundaries of any relevant market is a "question of fact, heavily dependent upon the special characteristics of the industry involved",^{72/} that "turns on discovering patterns of trade which are followed in practice"^{73/} and "correspond[s] to the commercial realities."^{74/} In addition, the relevant market is a two dimensional concept:

^{71/} Walker Process Equip. v. Food Mach. & Chem. Corp., supra, 382 U.S. at 177-78; Sulmeyer v. Coca Cola Company, 515 F.2d 835, 849 (5th Cir. 1975); Mullis v. Arco Petroleum Corp., supra, 502 F.2d at 295 and notes 14 and 15; Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-299, 2 NRC 740, 747 (1975) ("Wolf Creek II").

^{72/} Sulmeyer v. Coca Cola Company, supra, 515 F.2d at 849. Accord, Telex Corp. v. International Business Mach. Corp., 519 F.2d 894, 915 (10th Cir. 1975); Acme Precision Products, Inc. v. American Alloys Corp., 484 F.2d 1237, 1241-42 (8th Cir. 1973).

^{73/} United States v. United Shoe Machinery Corp., supra, 110 F. Supp. at 303.

^{74/} Brown Shoe Co. v. United States, supra, 370 U.S. at 336.

it requires consideration not only of the goods or services being provided -- the "product market" -- but also of the territory within which actual or potential competition exists to provide them -- the "geographic market."^{75/} Each of these markets may in turn encompass "submarkets", the monopolization of any of which may also be an antitrust violation.^{76/}

Finally, we have been cautioned not to expect bright lines separating the various markets. For example, the cluster of products and services generally denoted by the term "commercial banking," though by no means uniformly offered by all competing institutions, has been held to be a product market in terms of trade realities.^{77/} The

^{75/} Brown Shoe Co. v. United States, 370 U.S. at 324; Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U.S. 268, 279 (1934); United States v. Dupont, 351 U.S. 377, 395 (1956); Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs. Inc., 531 F.2d 910; 918 (8th Cir. 1976); Mullis v. Arco Petroleum Corp., supra, 502 F.2d at 295.

^{76/} See Brown Shoe Co. v. United States, supra, 370 U.S. at 329; United States v. Grinnell, supra, 384 U.S. at 572; Heattransfer Corp. v. Volkswagenwerk, A. G., ___ F.2d ___, Trade Reg. Rep. ¶ 61,473; Cass Student Adv., Inc. v. National Adv. Serv. Inc., 516 F.2d 1092, 1099-1100 (7th Cir. 1975); Whitten v. Paddock Pool Bldrs., Inc.; 508 F.2d 547, 553-54 (1st Cir. 1974), certiorari denied, 421 U.S. 1004 (1975); L. G. Balfour Co. v. FTC, supra, 442 F.2d at 9-11.

^{77/} United States v. Philadelphia National Bank, supra, 374 U.S. at 356; see also Crown Zellerbach Corp. v. FTC, 296 F.2d 800, 811 (9th Cir. 1961).

geographic market similarly need not be precisely defined; literal "metes and bounds" are not required to be shown.^{78/} Such markets, we are told, probably cannot be outlined with scientific precision, but the complaining parties do have the burden to come forward with a "rough approximation" of the localized market in question.^{79/}

Not surprisingly then, a number of different product and geographic markets have been found in the electric power generation and distribution industry. In Otter Tail, for example, the retail distribution of electric power and the utility's service area were respectively held to be the product and geographic markets. 410 U.S. at 368-69. In two other section 105c cases before this agency, one licensing board found product markets in the industry to include the provision of "bulk power services [and] regional power exchange transactions",^{80/} and another, "wholesale bulk

^{78/} United States v. Pabst Brewing Co., 384 U.S. 546, 549 (1966); United States v. Philadelphia National Bank, supra, 374 U.S. at 360-61.

^{79/} United States v. Connecticut National Bank, 418 U.S. 656, 669-70 (1974).

^{80/} Toledo Edison Co. (Davis Besse Nuclear Power Station), LBP-77-1, 5 NRC 133, 160 (1977) (appeal pending).

power" supplies.^{81/} The relevant market findings in those cases turned, of course, on the particular facts developed in the respective litigations.

In the instant case, however, the Licensing Board's relevant product market delineation does not rest on its analysis of the evidence. The Board's determination is based instead entirely on its understanding of the "relevant matters in controversy" set out in that Board's first pre-hearing conference order, which reads in pertinent part that^{82/}

The basic thrust of Justice's case is that (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 utility systems; (c) applicant's said use of its power has brought into existence a situation inconsistent with the antitrust laws, which situation would be maintained by activities under the licenses that applicant seeks. Neither the intervening parties nor the Atomic Energy Commission's regulatory staff enlarge this scope. Hence, the scope of the relevant matters in controversy is as herein outlined.

^{81/} Alabama Power Company (Joseph M. Farley Nuclear Plant), LBP-77-24, 5 NRC 804, 890 (April 8, 1977) (appeal pending). See also, Meeks, Concentration in the Electric Power Industry: the Impact of Antitrust Policy, 72 Colum L. Rev. 64, 81-100 (1972). Meeks suggests the existence of four submarkets in the wholesale product market: "base load power, peaking power, reserve power and economy power." Id. at 83. See pp. 14-15, supra, for definitions of these terms.

^{82/} Prehearing Conference Order of August 7, 1972, p. 3.

During the course of the trial the Board had admitted documentary evidence, heard witnesses and accepted trial briefs about the wholesale bulk power and retail power markets (as well as about various submarkets).^{83/} Nonetheless, when deciding the case, the Board held that the parties' acquiescence in the prehearing order was the equivalent of a stipulation to the effect that the only relevant product market in the case was that for "coordination services."^{84/} 2 NRC at 40 and 45.

With respect to the relevant geographic market, the Board below said it had perused "the entire record" in finding it to be the area of Michigan's lower peninsula where Consumers "is now franchised to [serve]" and where it "could reasonably and feasibly extend service." 2 NRC at 45. The Board's opinion, however, offers no elucidation of either the reasoning or the facts underlying that determination.

The correctness of the relevant market determinations made by the Board below is challenged by Justice and Consumers Power Company. We review those determinations

^{83/} See, e.g., Wein, fol. Tr. 3979, and Pace, fol. Tr. 7239.

^{84/} The nature of such services are discussed infra, pp. 121-30.

in part V of this opinion, infra.^{85/}

3. "Mere monopoly power in a relevant market, however, is not sufficient in itself to constitute a violation of section 2 [of the Sherman Act]."^{86/} We are concerned here with "monopolization" -- the use of monopoly power to preserve or extend an existing monopoly, to foreclose actual or potential competition, to gain competitive advantage, or to destroy competitors.^{87/} This is illustrated by Otter Tail Power Co. v. United States, supra, where the Supreme Court found that Otter Tail had violated section 2 of the Sherman Act through "anticompetitive uses of its

^{85/} Some of the cases cited for relevant market principles are decisions under the Clayton Act, 15 U.S.C. §18, rather than the Sherman Act. For most purposes, however, the considerations under both statutes are similar. United States v. Grinnell, supra, 384 U.S. at 572-73; United States v. Empire Gas Corp., supra, 537 F.2d at 303-04; Cass Student Adv. Inc. v. National Ed. Adv. Serv., Inc., supra, 516 F.2d 1092; Twin City Sportservice, Inc. v. Charles O. Finley, 512 F.2d 1264, 1270-71 (9th Cir. 1975); L.G. Balfour Co. v. FTC, supra, 442 F.2d at 11; Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1304-07 (5th Cir. 1971), certiorari denied, 404 U.S. 1041 (1972).

^{86/} Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1307 (5th Cir. 1971); see fn. 68, supra, and Wolf Creek II, supra, ALAB-299, 2 NRC at 749 and cases there cited.

^{87/} United States v. Griffith, supra, 334 U.S. at 107.

dominant economic power" over retail electric power distribution in a number of municipalities, rather than simply through possession of that power.^{88/}

^{88/} 410 U.S. at 320 (emphasis added). Specifically, the Court concluded that Otter Tail had endeavored to prevent some of the communities from forming independent competing retail power distribution systems.

Consumers contends that the Supreme Court did not find the Otter Tail Power Company guilty of "monopolization" but of an "attempt to monopolize." Consumers' Appeal Brief, p. 66; app. tr. 120-28. Section 2 of the Sherman Act makes an attempt to monopolize a separate offense, discrete from that of monopolization. To prove the former, a "specific intent to monopolize" (i.e., "an intent which goes beyond the mere intent to do the act", United States v. Aluminum Co. of America, supra, 148 F.2d at 431-32) and a "dangerous probability of success" must be shown. Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (Holmes, J.); American Tobacco Co. v. United States, supra, 328 U.S. at 785. Monopolization, on the other hand, requires proof of only monopoly power and a general intent to do the act charged. See fn's. 91-92, infra, and the accompanying text.

Consumers concedes that Otter Tail possessed monopoly power (as both courts held). See App. Tr. 127-28. Its point is that the Supreme Court found Otter Tail's conduct sufficiently predatory to constitute evidence of the specific intent required to prove an attempt to monopolize and did not reach the question of monopolization.

We do not agree. In Otter Tail, the Court was reviewing a decision resting almost entirely on findings that the utility had "monopolized" the retail power market. See 331 F. Supp. at 58-59. The trial court had discussed (FOOTNOTE CONTINUED ON NEXT PAGE)

Otter Tail's actions exhibited a willful maintenance of monopoly power -- an intent to monopolize. Intent is the second requisite element of "monopolization", but only a general intent need be shown. Further, because a monopolist is chargeable with the probable and natural consequences of its actions,^{89/} the requisite intent may be inferred if the probable result of the firm's actions is the furtherance or maintenance of its dominant position in the relevant market.^{90/} As we have indicated, the actions need not be

88/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
the company's attempt to monopolize only in passing, and then merely to find the company guilty of that offense too. Id. at 63 and 65. Before the Supreme Court, the Government successfully defended the lower court's decision as correct on both grounds (see 35 L.Ed. 2nd at 310). With respect to the "monopolization" charge, the Court specifically stated that (410 U.S. at 377) "the record makes abundantly clear that Otter Tail used its monopoly power in the cities in its service area to foreclose competition or gain a competitive advantage, or destroy a competitor, all in violation of the antitrust laws. See United States v. Griffith, 333 U.S. 100, 107." This is, of course, the offense of "monopolization" and, as Consumers' counsel acknowledged to us (App. tr. 124), Griffith is a "monopolization" case.

89/ United States v. Griffith, supra, 334 U.S. at 105.

90/ "In order to fall within §2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read this passage as demanding any 'specific intent' makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing." American Tobacco Co. v. United States, supra, 328 U.S. at 814, quoting from United States v. Aluminum Co. of America, supra, 148 F.2d at 432.

illegal^{91/} or predatory^{92/} in themselves; rather, their anticompetitive effects are tied to the firm's monopoly position.^{93/}

The Licensing Board divided this case into eight "situations" and determined that Consumers' conduct in each was not inconsistent with the antitrust laws. Appellants attack that approach, contending that the Board failed to judge Consumers' conduct in the light of its dominant market position and neglected to consider the monopolistic effects of Consumers' overall course of conduct. In Justice's view, the Board below judged Consumers' conduct under an "illegal per se" standard, i.e., one "requiring each element of [Consumers'] monopolization to be a per se violation of the antitrust laws."^{94/} We consider those criticisms in Part VII below.

^{91/} See pp. 37 and 45, supra, and cases there cited.

^{92/} Hanover Shoe v. United Shoe Mach. Corp., supra, 392 U.S. at 498-99 and fn. 14. Consumers argues that in a "natural monopoly" setting -- such as the electric utility industry -- proof of predatory intent is required. See Consumers' Appeal Brief at 186-96. We deal with this argument below at pp. 263 ff.

^{93/} United States v. Aluminum Co. of America, supra, 148 F.2d at 431-32; United States v. United Shoe Machinery Corp., supra, 110 F. Supp. at 344-45; Cass Student Adv. v. National Ed. Adv. Service, 407 F. Supp. 520, 522-24 (N.D. Ill.), affirmed, 537 F. 2d 282 (7th Cir. 1976); Mullis v. Arco Petroleum, supra, 502 F.2d at 296 fn. 19.

^{94/} Justice's Opening Brief on Appeal, page 21.

B. The Federal Trade Commission Act.

The staff reminds us that section 5 of the FTC Act authorizes the invalidation of trade practices that conflict with Sherman Act policies,^{95/} and points to instances where the FTC has branded illegal under section 5 conduct that would have passed muster under the Sherman Act standing alone.^{96/} Building on these, the staff argues that section 5 authorizes us to hold a situation inconsistent with Sherman Act policies without the need to decide whether Consumers has monopoly power in the relevant market, a finding necessary to sustain monopolization charges brought directly under section 2 of the Act.^{97/}

^{95/} FTC v. Brown Shoe Co., supra, 384 U.S. at 321, and see pp. 32-35, supra.

^{96/} Compare FTC v. Cement Institute, 333 U.S. 683 (1947), with Cement Manufacturers Ass'n. v. United States, 268 U.S. 588 (1925) (absence of combination or conspiracy needed for violation of Sherman Act §1 does not foreclose finding of violation of FTC Act §5); Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965), and FTC v. Texaco, 393 U.S. 223 (1968) (actual tying arrangement needed to establish Sherman Act §1 violation unnecessary under FTC Act §5 where the central competitive characteristics of the agreement in question are similar to those of a tying arrangement).

^{97/} See pp. 47-55, supra.

In essence, the staff reasons that even if the evidence does not establish that Consumers has monopoly power, it does show (1) that the company controls the bulk of the electric power generation and transmission facilities in its service area, giving it "dominance" over the market, and (2) that the company used its dominant economic power to maintain its market position. Accepting arguendo this reading of the evidence, according to the staff it follows that a situation inconsistent with the antitrust laws has been established. The rationale is that (1) such use of dominant market power contravenes the policies underlying section 2 of the Sherman Act, (2) Consumers' actions are therefore tantamount to an unfair method of competition in violation of section 5 of the FTC Act, and (3) as such, they constitute an "inconsistent situation" under section 105c to be remedied by the insertion of appropriate antitrust conditions in Consumers' licenses.^{98/}

In response, Consumers asserts that

In assessing monopolization charges brought against a single entity under Section 5, the Federal Trade Commission has required the same substantive showing that is necessary to sustain monopolization complaints brought under Section 2 of the Sherman Act, i.e., the showing set forth in the Grinnell case * * * relating to relevant markets, monopoly power, and the willful maintenance of that power.^{99/}

^{98/} See Staff Opening Brief on Appeal, pp.14-19 and 25 (summary of argument).

^{99/} Consumers' Appeal Brief at 71, fn. 2 (citations omitted).

In other words, for purposes of the monopolization charges being pressed in this proceeding, the company argues that the same antitrust analysis "is applicable whether reliance is placed on Section 2 of the Sherman Act or Section 5 of of the Federal Trade Commission Act."^{100/}

The staff disagrees; in its judgment, we may find violations of section 5 in circumstances which the Trade Commission has not yet addressed. Neither in its reply brief nor in its oral argument, however, does the staff challenge Consumers' characterization of actual FTC practice in monopolization cases.^{101/}

We are in agreement with Consumers on this point. True, as the staff says, in enacting section 5 Congress gave the Federal Trade Commission wide authority to proscribe business practices as "unfair" whether or not they violate other antitrust laws. And the FTC has done so, rendering illegal practices otherwise permissible under the Sherman Act. Nevertheless, we have found no case (and have been cited to none)

^{100/} Ibid.

^{101/} See, Staff Reply Brief on Appeal, pp. 1-5, and App. Tr 105-07.

where the FTC has held conduct to be "monopolization" under section 5 without first having shown that the respondent possessed monopoly power in a relevant market. Golden Grain Macaroni Co., 78 FTC 157 (1971), affirmed sub nom. Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972), certiorari denied, 412 U.S. 918 (1973); L.G. Balfour Co., 74 FTC 494, 497-506 (1968), affirmed sub nom. L. G. Balfour Co. v. FTC, 442 F.2d 1, 12-14 (7th Cir. 1971).

Congress gave the task of defining unfair methods of competition within the meaning of section 5 to the Federal Trade Commission. That body -- not the NRC -- is charged with the duty in the first instance of applying "the rule enacted by Congress to particular business situations, so as to eradicate evils, with the least risk of interfering with legitimate business operations." FTC v. Texaco, supra, 343 U.S. at 225-26. Just as the federal courts defer to the expertise developed by the FTC precisely because it is charged with (and experienced in) the practical administration of the statute (id. at 226), so too it is appropriate that we respect that agency's decisions on matters in its primary jurisdiction.^{102/}

^{102/} See, e.g., Safir v. Gibson, 432 F.2d 137, 143 (2nd Cir.), certiorari denied, 400 U.S. 942 (1970).

We need not decide whether we must always defer to our "sister agency" when charges cognizable under the FTC Act are in issue. Neither must we wait for an FTC decision involving electric utility practices before section 5 may be invoked in our proceedings. But the Trade Commission has been administering the FTC Act since the days of President Wilson. And it is settled FTC jurisprudence in section 5 cases that, under a charge of monopolization, one element to be proven is the respondent's possession of monopoly power.^{103/} In the circumstances, the appropriate (and wiser) course calls for us to take the same approach.

^{103/} It may also be possible to attack such conduct under section 5 in terms of Clayton Act or Robinson-Patman Act violations. See Golden Grain Macaroni Co., supra, and L.G. Balfour Co., supra. But no such charges are levied here.

One further point remains for clarification. It concerns the degree of proof of monopoly power needed to sustain monopolization charges in a section 5 proceeding. At least one court of appeals has indicated that a lesser level of evidence will uphold monopolization charges under section 5 than might be needed to sustain similar charges in a court proceeding under section 2 of the Sherman Act. L. G. Balfour Co. v. FTC, supra, 442 F.2d at 13-14.^{104/}

Be that as it may, the quantum of proof needed to prevail in proceedings under section 105c was specifically fixed by the framers of that section themselves. The Joint Committee Report (at p. 15) states explicitly that in determining whether a situation inconsistent with the antitrust

^{104/} The Seventh Circuit there commented:

While we believe that it was error for the Commission to conclude that the petitioners controlled 86.9% of the market, without evidence of the sales of all the firms in the market, we hold that petitioners' exclusive dealing contracts with over 90% of the fraternities supports a finding of monopoly power. The most effective proof, we admit, would be a total sales figure which included all competitors in the market. Absent this, however, the other evidence which revealed that the petitioners were under exclusive dealing contracts with nearly all of the national fraternities, satisfies us that petitioners possessed illegal monopoly power. The case before us, we repeat, is not a Section 2 monopolization case, but one under Section 5, a flexible and remedial law. See Rader v. Balfour, 440 F.2d 469 (7th Cir., March 22, 1971).

laws exists, we are to apply the standard of "reasonable probability" applicable in cases under the Clayton Act^{105/}

Accordingly (id. at 14):

The concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is 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 these laws. It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.

Whether (as may well be true) this "reasonable probability" test is also the standard of proof applied by the FTC generally, or corresponds to the one approved by the Balfour court, is immaterial. In antitrust cases before this agency, the Commission and its boards are governed by section 105c and must apply the evidentiary standards incorporated by that provision.^{106/}

^{105/}"The committee is well aware of the phrases 'may be' and 'tend to' in the Clayton Act, and of the meaning they have been given by virtue of decisions of the Supreme Court and the will of Congress -- namely, reasonable probability. The committee has -- very deliberately -- also chosen the touchstone of reasonable probability for the standard to be considered by the Commission under the revised subsection 105c of the bill." Joint Committee Report at 15. See, Brown Shoe Co. v. United States, supra, 370 U.S. at 323, fn. 39, for a discussion of proof under the Clayton Act.

^{106/} See also, Wolf Creek I, supra, 1 NRC at 570.

IV

BACKGROUND

A. The setting.

Consumers Power Company serves Michigan's lower peninsula together with four other investor-owned electric utilities, 29 municipally-owned electric systems, 2 generation and transmission ("G and T") rural electric cooperatives and 10 distribution rural electric cooperatives. Consumers has common service area boundaries with the investor-owned utilities and with all 12 cooperatives. Of the 29 municipal systems, 23 are also located within or adjacent to Consumers' service area.^{107/}

^{107/} Justice Department's Exhibit No. 19. Also see Steinbrecher, Tr. 1110; Keen, Tr. 4463-8; and Paul, Tr. 7805-06.

Hereinafter Justice's exhibits will be cited as "D.J. Exh. No. ____", Consumers' as "C.P. Exh. No. ____", and intervenors' as "Int. Exh. No. ____." The staff introduced no exhibits.

Throughout the opinion transcript references will include the names of the witness whose testimony is being cited. We list here alphabetically the principal witnesses along with a brief background description. More complete descriptions appear where deemed necessary to the opinion.

Alphonse Aymond, Chairman of the Board and President of Consumers Power Company; Earl Brush, General Manager of the Lansing Municipal Electric System; Janjai Chayavadhanangkur, Electric Engineer with Southern Engineering Company of Georgia (Intervenors' expert witness on bulk power supply); Kenneth Croy, employed by the Michigan Public Service Commission; Stephen Fletcher, President of Alpena Power Company; Peter Gutman, Professor of Economics at the Bernard M. Baruch College of the City University of New York (Intervenors' expert economic witness);
(FOOTNOTE CONTINUED ON NEXT PAGE)

1. Consumers' service area. Consumers distributes electric power in 61 of the 68 counties in Michigan's lower

107/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Samuel Helfman, consulting engineer (Justice's expert witness on bulk power planning); William Jefferson, Consumers Executive Director in charge of wholesale and retail electric rates; John Keen, General Manager of Wolverine Electric Cooperative; Robert Kline, Vice Chairman and Chief Executive Officer of Edison Sault Electric Company; Jack Lundberg, Principal Engineer with the analytical and consulting engineering firm of R. W. Beck and Associates (Justice's expert witness on power pooling principles); William Mayben, partner in the firm of R. W. Beck & Associates, analytical consulting engineers (Justice's expert witness on power pooling principles); Jack Mosley, Vice President of Consumers in charge of electric planning; Dr. Frederick W. Muller, former Chief for Power Marketing for one of the Bureau of Reclamation's Regional Offices (Staff's expert economic witness); Harold Munn, President of the Board for the Coldwater Municipal Electric System; Joe Pace, Economist and Vice-President of National Economic Research Associates (Consumers' expert economic witness); Robert Paul, Consumers' General Supervisor of commercial electric sales; Ronald Rainson, General Manager of the Holland Municipal Electric System; O. Franklin Rogers, member of the Southern Engineering Company of Georgia (Intervenors' expert witness on wholesale power and power pooling); Wilbur Slemmer, Consulting Engineer (Consumers' expert witness on power pooling principles); David Lapinski, Senior Supervisor and General Engineer of Consumers Power Resources Planning Section; Arthur Steinbrecher, General Manager of the Northern Michigan Electric Cooperative; Irwin Stelzer, Economist and President of National Economic Research Associates (Consumers' expert economic witness); Warren Sundstrand, Attorney associated with the Village of Paw Paw's Municipal Electric System; Harold Wein, Professor of Economics at Michigan State University (Justice's expert economic witness); Roger Westenbroek, General Manager of the Top O'Michigan Rural Electric Company; Joseph Wolfe, former General Manager of Traverse City Municipal Electric System, 1966-1972, currently with the Lansing Municipal Electric System.

peninsula.^{108/} The company does not serve the Detroit metropolitan area, however. That City and all or part of the thirteen counties in the "eastern thumb" of the lower peninsula are served by the Detroit Edison Company. In terms of electrical load, Detroit Edison is fifty percent larger than Consumers.^{109/} Two American Electric Power subsidiaries, Indiana & Michigan Electric Company and the Michigan Power Company, serve all or part of five counties in the lower peninsula's southwest corner.^{110/} Consumers' general service area spreads over the remainder, the bulk of the lower peninsula.

^{108/} D.J. Exh. No. 21A, page 12. (Consumers Power Company 1973 Annual Report to its shareholders) The Company's 1973 annual report to the Federal Power Commission and its 1973 Uniform Statistical Report (filed with Edison Electric Institute, among others) were filed with the Licensing Board pursuant to its June 12, 1974 order with the understanding of all the parties that the Board would take official notice of these documents. Tr. 9278-81. (Also see order of June 20, 1974 acknowledging receipt). The parties and the Licensing Board have referred to these documents respectively as D. J. Exh. No. 21A, C.P. Exh. No. 12,022 and D.J. Exh. No. 228A. We will do likewise.

^{109/} D. J. Exh. No. 19; Mosley, Tr. 8493.

^{110/} D. J. Exh. No. 19; Westenbroek, Tr. 928. The major portion of Indiana & Michigan Electric Company's service area is in Indiana. See Westenbroek, Tr. 931; D. J. Exh. No. 1.

It extends from Lake Erie and the Michigan-Ohio/Indiana border in the east and south, to Lake Michigan in the west and north and Lake Huron in the north and east.^{111/} Consumers does not serve every square mile of this territory. There are rural areas in the north and west central part of the peninsula where the company is not franchised that are served exclusively by electric cooperatives.^{112/} The company also is not franchised in most of those municipalities lying within Consumers' overall service area that operate their own independent power systems.^{113/} Nor does the company serve the City of Alpena and its rural surroundings; these are covered by a small investor-owned system, Alpena Power Company.^{114/}

^{111/} D. J. Exh. No. 19; D. J. Exh. No. 204 A & B. There is some minimal overlap of Consumers' service area with that of other investor-owned utilities. For example, in 1968 there were only 8 townships in which both Consumers and Detroit Edison were franchised to serve. D. J. Exh. No. 110. Also see Paul, Tr. 7862-66; Aymond, Tr. 6558.

^{112/} D. J. Exh. No. 19; Paul, Tr. 7844-45.

^{113/} D. J. Exh. No. 19; Paul, Tr. 7818-19.

^{114/} D. J. Exh. No. 19; Fletcher, Tr. 4255. Alpena is on the shores of Lake Huron in the northeastern part of the lower peninsula.

In 1973, Consumers served some 27,846 square miles or approximately 70 percent of lower Michigan.^{115/}

2. Municipal systems. Twenty three cities within or adjacent to Consumers' general service area operate their own electric systems, 19 of which (including the intervening cities of Grand Haven, Traverse City, Holland, Zeeland and Coldwater) are entirely inside that area.^{116/} Each of the 23 municipal systems serves its particular city and immediately adjacent areas. The typical municipal system extends only one mile beyond its city limits; the maximum is approximately ten miles.^{117/} In twelve of these 23 cities, retail customers are also served by Consumers Power Company.^{118/} However, in only two -- Bay City and Traverse City -- is there vigorous,

^{115/} D. J. Exh. No. 228A, page 3.

^{116/} D. J. Exh. No. 19. The other 14 municipal systems operating within Consumers' general service area are Harbor Springs, Petosky, Charlevoix, Bay City, Hart, St. Louis, Lowell, Portland, Lansing, Eaton Rapids, Chelsea, Marshall, Union City, and Hillsdale. Those adjacent to Consumers' general service area are Clinton, Paw Paw, South Haven and Sturgis. See D. J. Exh. No. 19; C. P. Exh. No. 11,302.

^{117/} Paul, Tr. 7813; also see D. J. Exh. No. 19; C. P. Exh. No. 11,302.

^{118/} C. P. Exh. No. 11,302.

citywide, door-to-door competition between Consumers and the municipal system.^{119/} In the other ten, Consumers serves a restricted number of retail customers within the city limits.^{120/} In addition, both Consumers and the municipals serve the areas bordering the 19 municipalities with their own power systems that lie within Consumers' service area.^{121/}

3. Cooperatives. The two G and T rural electric cooperatives operating in the lower peninsula are intervenors Northern Michigan and Wolverine Electric.^{122/} These

^{119/} Paul, Tr. 7806, 7874-75. Consumers in 1972 served 7,400 customers in Bay City and 1578 in Traverse City. The municipal systems served respectively 11,343 (Bay City) and 4993 (Traverse City) customers within the city limits. C. P. Exh. No. 11,302.

^{120/} Consumers served 186, 115, and 56 respectively in the intervening cities of Holland, Zeeland, and Coldwater. In the remaining seven, it served sixty customers. C. P. Exh. No. 11,302.

Consumers, with one exception, does not have a general right to serve in these 10 cities. Paul, Tr. 7818. For example, in Holland and Coldwater Consumers is restricted to serving annexed areas in which it had been franchised before annexation. The municipal systems, however, can extend service into these areas in competition with Consumers. In Zeeland, where Consumers was at one time the sole supplier of electric energy, Consumers may continue to serve existing customers only. Paul, Tr. 7812-18.

^{121/} Paul, Tr. 7821, 8011-12; C. P. Exh. No. 11,302.

^{122/} Steinbrecher, Tr. 1110; Keen, Tr. 4468.

sell wholesale firm bulk power to distribution cooperatives for retail distribution. Northern Michigan supplies wholesale power to three distribution cooperatives which operate in 19 northern counties of the lower peninsula; Wolverine Electric supplies four that operate in 23 west-central counties.^{123/} Except in a few areas, these distribution cooperatives are not the sole available suppliers of retail electrical power where they operate. Consumers Power Company is also franchised to serve roughly 80 percent of the cooperatives' service territory.^{124/}

Three additional distribution cooperatives (beyond those described above as associated with Northern

^{123/} Westenbroek, Tr. 958-59; D. J. Exh. No. 19. The distribution cooperatives served by Northern Michigan are Cherryland Rural, Top O'Michigan Rural and Presque Isle Electric; the four served by Wolverine Electric are Western Michigan, Oceana, O&A and Tri County. Ibid.

^{124/} D. J. Exh. No. 19. Approximately one-third of Presque Isle electric cooperative's service area, the greater portion (more than 50%) of Top O'Michigan, Western Michigan and Oceana electric cooperatives service areas; the substantial part (greater than 90 percent) of Cherryland and O&A electrical cooperatives and all of Tri-County electric cooperative's service area, overlap areas where Consumers is also franchised to serve. Paul, Tr. 7844-45; also see D. J. Exh. No. 19.

Consumers does not actually distribute retail power in all the rural areas where it is franchised. Westenbroek, Tr. 948-51; Paul, Tr. 7845. Areas definitely exist, however, where there is duplication of service by the cooperatives and Consumers. Ibid.

Michigan and Wolverine Electric) operate in lower Michigan. Their service areas also partly overlap Consumers'.^{125/} In total, distribution cooperatives operate in somewhere between one-quarter and one-third of Consumers' franchised territories.^{126/}

4. Interconnections. a. Consumers' transmission network consists of nearly nine thousand (9,000) miles of transmission lines. These carry current at voltages varying from 46 to 345 kilovolts (kv).^{127/} See p. 88 infra.

^{125/} These three distribution cooperatives are Fruit Belt, South Eastern Michigan and Thumb Electric. Thumb Electric operates in four counties between Saginaw Bay and Lake Huron; its service area, except for a minute overlap with Consumers, coincides with areas where Detroit Edison also operates. Fruit Belt Electric operates in seven southwestern counties; about one-third of its service area overlaps portions of Consumers' franchised area; the remaining two-thirds overlaps areas where Indiana & Michigan Company and Michigan Power Company operate. Southeastern Michigan Electric operates in Lenawee County, Michigan, and in northern Ohio; all of its service area in Michigan overlaps areas where Consumers is franchised to serve, but it is at several points adjacent to Detroit Edison's service area. D. J. Exh. No. 19; Paul, Tr. 7844-45.

^{126/} See D. J. Exh. No. 19.

^{127/} The amount of power that a transmission line can carry efficiently depends on a combination of factors. One major limiting factor on that efficiency is the power loss caused by the line's resistance. Essentially such power losses vary inversely as the square of the operating voltage. In other words, for a given amount of (FOOTNOTE CONTINUED ON NEXT PAGE)

Consumers has interconnected its transmission grid with those of the major nearby utilities. The company's most extensive physical tie is with Detroit Edison; there are six 345 kv connections and several 138 kv connections between these two utilities.^{128/} Consumers also has 345 kv ties with the Indiana & Michigan Electric Company and the

127/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

power to be transmitted, the power loss caused by line resistance decreases significantly as the operating voltage increases. See FPC, 1964 National Power Survey, p. 151; 1970 National Power Survey, pp. I-13-5 to 8.

Thus high voltage lines transmit power with substantially less power losses per mile than low voltage lines. Accordingly, it is much more economical to use high voltage transmission lines when transporting large blocks of power over long distances. For example, it is not economical to use 69 kv transmission lines to carry "20 megawatts more than 25 miles, or 30 miles". Wolfe Tr. 1712, 1727-29. Also see Mayben Tr. 2566.

Another advantage of high voltage lines is that the additional cost of construction compared to lines of lower voltages does not eat up the economic gains available by reason of the greater efficiency of the former. Thus, for example, "a 230 kv line with a wire size of 795 MCM can carry approximately 235,000 kilowatts of load and its construction cost is approximately \$55,000 per mile. A 115 kv line with a wire size of 477 MCM can carry approximately 95,000 kilowatts of load and its construction cost is approximately \$34,200 per mile. The 230 kv line can carry approximately 2.5 times more than the 115 kv line; however, the construction cost of the 230 kv line is only approximately 1.6 times the construction cost of the 115 kv line." Chayavadhanangkur, Tr. fol. 5090 at 26.

128/ See D. J. Exh. No. 21A, p. 2.

Toledo Edison Company, which serves Toledo and surrounding environs.^{129/} Detroit Edison in turn has 345 kv ties with the Hydro-Electric Power Commission of Ontario; Indiana and Michigan Electric Company has 345 kv ties with Commonwealth Edison Company (which serves Chicago and surrounding environs), Northern Indiana Public Service Company and Ohio Power Company (another subsidiary of American Electric Power); and Toledo Edison Company is also connected to Ohio Power Company and Ohio Edison Company.^{130/} These utilities are further interconnected with other major utilities operating in the east-central region of the United States.^{131/} As a consequence of these interconnections, Consumers is able to -- and does -- undertake coordination transactions with its large neighbors and, as well, with large utilities beyond them to which it is not directly connected. See pp. 100-02, infra.

In addition to its ties with these major utilities, Consumers is directly connected with most of the small utilities operating within or adjacent to its general service

^{129/} See D. J. Exh. No. 74, No. 75 and No. 21A, p. 2.

^{130/} See D. J. Exh. No. 1, No. 20, No. 73, No. 75, No. 76 and No. 237.

^{131/} see D. J. Exh. No. 1, No. 77 and No. 237.

area. The company has electrical ties to 14 of the 23 municipal systems (including the intervenors Coldwater and Holland)^{132/}, with three of the cooperatives (intervenors Northern Michigan and Wolverine Electric plus South Eastern Michigan Cooperative)^{133/} and with two small investor-owned systems, Alpena Power Company^{134/} and Edison Sault Electric Co. (which operates in Michigan's upper peninsula just across the Mackinac Straits).^{135/} These interconnections are currently used for the most part to transmit wholesale power sold by Consumers to the small utilities.^{136/}

b. In contrast, the small utilities' transmission facilities are limited in size and scope. The only ones of consequence are 1,182 miles of 69 kv and 46 kv transmission lines operated by intervenors Northern Michigan

^{132/} Other municipal systems to which Consumers is directly connected are Harbor Springs, Petosky, Charlevoix, Bay City, St. Louis, Lansing, Eaton Rapids, Chelsea, Marshall, Union City, Portland and Hillsdale. See D. J. Exh. No. 91, No. 92, and No. 100; C. P. Exh. No. 11,307; Mosley, Tr. 8458.

^{133/} Keen, Tr. 4499-4500; Paul, Tr. 7897; Mosley, Tr. 8458.

^{134/} Fletcher, Tr. 4285.

^{135/} Kline, Tr. 4377.

^{136/} See C. P. Exh. No. 11,307.

and Wolverine Electric cooperatives. See p. 93, infra.

In addition to the distribution cooperatives which they serve, the G. and T. cooperatives are also interconnected with the municipal systems of Traverse City, Grand Haven, Zeeland, Hart, Lowell and Portland.^{137/} The only major utility to which the network is tied, however, is Consumers Power Company. Other major utilities in the area are reachable only via Consumers' lines. Consequently, all the foregoing utilities are isolated from any major outside source of electric power other than that company.^{138/} And, as the Board below found, it is not economically feasible for those small utilities (or for the others similarly isolated within Consumers' general service area) to interconnect with other large nearby utilities by building or extending their own transmission networks. 2 NRC t 108.

^{137/} Steinbrecher, Tr. 1138, 1289-90; also see D. J. Exh. No. 18, No. 109, No. 181 and No. 240.

^{138/} This is not the case with those small utilities located adjacent to but south of Consumers' general service area. Most of these are connected to Detroit Edison (Clinton, Thumb Electric and Southeastern cooperatives) or to Indiana & Michigan Electric Company or Michigan Power Company (Fruit Belt Electric Cooperatives, Sturgis, Paw Paw, and South Haven). See Paul, Tr. 7897; D. J. Exh. No. 14, No. 18 and No. 109.

B. The electric utilities.

1. Consumers Power Company. Consumers is a combined gas and electric utility^{139/}, the seventh or eighth largest in the United States.^{140/} In 1972, Consumers had outstanding 26,233,838 shares of common stock and 2,179,338 shares of preferred stock with a total capitalization (including long term debt) of more than two billion dollars.^{141/} The company in that year had more than 1.6 billion dollars invested in electrical plant (original cost) to serve over one million retail customers.^{142/} These customers bought 21,352,570 megawatt hours (Mwh) of electric energy. This, combined with 725,904 Mwh of electric energy sold at wholesale, gave the company a total electric sales revenue of \$416,994,066 and a 1972 net income for electrical operations of \$69,405,227. The peak load demand on Consumers system for 1972 was 4080 Mw.^{143/}

a. Consumers' franchises. Before Consumers may distribute electric power at retail in a city or township, under Michigan law it must have a franchise either from the

^{139/} D.J. Exh. No. 21.

^{140/} Tr. 94.

^{141/} D.J. Exh. No. 21.

^{142/} Ibid.

^{143/} D. J. Exh. No. 21. Peak load is the maximum demand for power that a utility experiences within a specified period of time.

State under the "Foote Act"^{144/} or one granted by the municipality or township served. The company serves 45 percent of its retail customers under 53 Foote Act franchises.^{145/} This Act, on the Michigan Statute books only from 1905 to 1909, granted utilities the right to construct distribution lines and to sell power at retail without first obtaining permission from the local government.^{146/} Foote Act franchises are of indefinite duration but confer no exclusive rights.^{147/} Another utility may be franchised in such areas by the local government. And if that government is a municipality,^{148/} it may establish its own competing power system.^{149/}

Where Consumers' right to serve does not stem from the Foote Act it holds franchises from the local governments.^{150/}

^{144/} Michigan Public Acts 1905, No. 264. See D. J. Exh. No. 6.

^{145/} Pace, Tr. fol. 7239 at 10; Paul, Tr. 7866-67; C. P. Exh. No. 11,306.

^{146/} Pace, Tr. fol. 7239 at 14.

^{147/} See City of Lansing v. Michigan Power Co., 183 Mich. 400, 150 N.W. 250 (1914); Michigan Public Service Co. v. City of Cheboygan, 324 Mich. 309, 37 N.W. 2d 116, 122 (1949).

^{148/} The Michigan Constitution, Article VII, section 24, allows municipalities to establish their own electric systems; no similar constitutional grant exists for townships.

^{149/} Consumers has Foote Act franchises in Bay City and Traverse City where it is in vigorous door-to-door competition with municipal electric systems. Aymond, Tr. 6542; Paul Tr. 7808, 7866.

^{150/} Michigan Constitution, Article VII, Section 29.

These are limited by the Michigan State Constitution to a maximum period of 30 years^{151/} and are not exclusive.^{152/} A city or township is not legally precluded from granting a franchise to a second utility or, in the case of a city, from establishing its own electric system before the 30 year period expires.

Consumers has 965 current franchise agreements with cities and townships. Under them it serves the remaining 55 percent of its customers. All but four are for the maximum 30 year period and may not be revoked within that period.^{153/} Of these, however, 215 will expire by the end of 1985.^{154/} Consumers must then have them renewed if it wishes to continue to serve those municipalities.

b. State and Federal regulation of Consumers.

Consumers is subject to the jurisdiction of the Michigan Public Service Commission (PSC), which regulates the retail rates of private utilities operating in the

^{151/} Michigan Constitution, Article VII, Section 30.

^{152/} Paul, Tr. 7872. The Michigan Attorney General has ruled that municipalities lack authority to grant exclusive franchises. See Opinion, Attorney General, 62 (1928) (D.J. Exh. No. 2).

^{153/} Pace, Tr. fol. 7239 at 10; Paul, Tr. 7868; C.P. Exh. No. 11,306. For a franchise granted by a municipality to be irrevocable, it must be approved by 60 percent of the electors voting on such a proposal. Michigan Constitution, Article VIII, Section 25. For a franchise granted by a township to be irrevocable, it must be approved by a majority. Michigan Constitution, Article VII, Section 19.

^{154/} C.P. Exh. No. 11,306.

state.^{155/} A private utility must file its retail rates with the PSC. Those rates are effective only when approved by that body,^{156/} which after review may adjust them to a level it deems reasonable.^{157/} Rates thus approved may not be altered or amended without the PSC's leave.^{158/}

The Michigan PSC also limits retail competition among private utilities. Under Michigan law, a private utility must obtain a certificate of public convenience and necessity from the PSC before it can extend service to an area already served by another private utility.^{159/} Moreover, where two or more private utilities operate in the same general area, PSC regulations restrict aspects of retail competition among them.^{160/} In particular, the PSC prohibits competition for existing single phase (residential and small

^{155/} Michigan Statute Annotated, Section 22.13(6) [cited as M.S.A. §22.13(6)].

^{156/} M.S.A. §22.152.

^{157/} M.S.A. §22.4; Jefferson, Tr. 8297-98.

^{158/} M.S.A. §22.13(6a).

^{159/} M.S.A. §22.142.

^{160/} See Adoption of Rules Governing Extension of Single Phase Electric Service in Areas Served by two or more Utilities, M.P.S.C. case U-2291 (1966) (D.J. Exh. No. 9). Also See Westenbroek, Tr. 964 ff.

commercial) customers and limits competition for new ones.^{161/}
At the close of the record the PSC had under consideration similar restrictions for application to three phase (industrial and large commercial) customers with loads under 75 kw.^{162/}

In 1970, Consumers interconnected with Toledo Edison Company and Indiana & Michigan Electric Company. By doing so, it came under the jurisdiction of the Federal Power Commission, now the Federal Energy Regulatory Commission. See P.L. 95-91, 91 Stat. 565, 42 U.S.C. §§7101ff. For convenience, in this opinion we continue to refer to that agency as the FPC.^{163/}

^{161/} The restrictions placed on competition for new single phase customers are the following:

"Prospective customers for single-phase service located within 300 feet of the distribution facilities of two or more utilities shall have the service of their choice."

"Prospective customers for single-phase service located at a distance greater than 300 feet and within 2,640 feet from the distribution facilities of two or more utilities shall be served by the closest utility."

"Prospective customers for single-phase service located more than 2,640 feet from the distribution facilities of any utility shall have the service of their choice * * *."

D.J. Exh. No. 9 at Exhibit "A", page 1.

^{162/} D.J. Exh. No. 11; Westenbroek, Tr. 970.

^{163/} FPC jurisdiction extends over the transmission and sale of electric energy at wholesale in interstate commerce. 16 U.S.C. §824. See Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964). In 1965 the Commission began an investigation of possible jurisdiction over Consumers Power and Detroit Edison. Starting in 1966, Consumers filed its wholesale and coordination contracts with the FPC without conceding its jurisdiction. After interconnecting with Indiana & Michigan Electric and Toledo Edison in 1970, however, Consumers acquiesced in the Commission's jurisdiction. See D.J. Exh. No. 172.

The Federal Power Act, 16 U.S.C. §824 et seq., requires utilities to file with the Power Commission all "rates and charges" for the "transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce."^{164/} On an initial filing rates are immediately effective, but where the filing would change existing rates, the new rates are not effective for 30 days.^{165/} In either situation the FPC may hold a hearing to determine whether the rates filed are "just and reasonable".^{166/} If the FPC decides they are not, it may adjust them to that level.^{167/} Consumers' coordination contracts and its wholesale service tariffs are on file with the FPC.^{168/}

^{164/} 16 U.S.C. §§824d(c) and 824.

^{165/} 16 U.S.C. §824d(d).

^{166/} 16 U.S.C. §§824d(e), 824e(a).

^{167/} 16 U.S.C. §824e(a).

^{168/} Jefferson, Tr. 8410, 8439-40. A utility may file with the FPC either individual contracts with attached rate schedules or a general tariff. The latter is a compilation of the utility's rate schedules and terms of service under which it is willing to contract to supply wholesale or transmission services. See 18 C.F.R. §35.2(b); Municipal Electric Utility Ass'n of Alabama v. Federal Power Commission, 485 F.2d 967, 969 (D.C. Cir. 1973).

c. Consumers' bulk power facilities. Bulk power in the electric utility lexicon denotes large blocks of power generated and then transmitted at high voltages to distribution points where it is transformed to lower voltages for distribution and delivery to the ultimate user. Beyond the distribution point the power is no longer considered bulk power by the industry.^{169/} A utility's bulk power facilities are thus comprised of the generating units which produce that power and the high voltage transmission lines which carry it to the distribution points. Transmission lines can thus be distinguished from distribution (or "subtransmission") lines. The former connect the utility's generating plants with distribution points; the latter carry the power at lower voltages to the ultimate retail users. Transmission lines are designed for operation from 34.5 Kv to 765 Kv; distribution lines are usually designed to operate at 13.2 Kv or less.^{170/}

^{169/} Wolfe, Tr. 1708-09; Brush, Tr. 2326-28.

^{170/} Steinbrecher, Tr. 1273-74; Brush Tr. 2326. Also see FPC, 1970 National Power Survey, pp. I-13-1 to 4.
(FOOTNOTE CONTINUED ON NEXT PAGE)

Consumers operates a mix of generating units located throughout its service area.^{171/} In 1972, the company had on line seven fossil-fueled steam stations capable of generating 2974 Mw, two nuclear power plants with a 656 Mw capacity, seven gas turbine stations with a 522 Mw capacity, and 14 hydroelectric plants with a 133.6 Mw capacity, for a total generating capacity of 4285.6 Mw.^{172/} In addition, in 1973 Consumers and Detroit Edison jointly brought on

^{170/} (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Based upon usage, the industry further divides transmission lines into two categories: bulk power supply lines and subtransmission lines. Normally bulk power supply lines carry power from generating sources to load centers from which the subtransmission lines carry it to the various distribution points. Subtransmission voltages are usually 69 Kv or less. Bulk power supply lines usually employ above 69 Kv. Steinbrecher, Tr. 1272-76. See United States v. Otter Tail Power Company, supra, 331 F. Supp. at 59, affirmed, 410 U.S. 366 (1973).

^{171/} See fn. 272, infra, for a description of the different types of generating units.

^{172/} D. J. Exh. No. 228, page E-18. A generating station or plant may be comprised of more than one generating unit. Generating capacity is either stated in terms of its nameplate capacity, i.e., the expected generating capacity of the plant or the plant's "demonstrated capability," i.e., the generating capacity the plant is actually capable of delivering. Mosley, Tr. 8706. The figures given here are the latter. Normally, variations between the two are slight and we will not specify which standard is being used.

line the Ludington pump storage station which is to supply peaking power.^{173/} Consumers' share of generating capacity from this plant is 983 Mw.^{174/}

At the close of the record in June 1974, Consumers' largest operating generating unit was the Palisades Nuclear Power Plant, Unit No. 1. Palisades has a name plate capacity^{175/} of 812 Mw but the maximum generation available from it in mid-1974 was 700 Mw.^{176/} The next largest generating unit operated by Consumers at that time was a conventional fossil fueled steam unit of 375 Mw.^{177/} Units 1 and 2 of the Midland facility, which were expected to be on line by 1980, will have generating capabilities of 485 Mw and 815 Mw respectively.^{178/} In addition, according to the company's 1973 annual report, Consumers planned to have in

^{173/} Mosley, Tr. 8708.

^{174/} D. J. Exh. No. 228A.

^{175/} See fn. 172, supra.

^{176/} Mosley, Tr. 8531.

^{177/} Mosley, Tr. 8590; C.P. Exh. 12,022.

^{178/} The generating capacity of the two units differ because Consumers has sold part of the energy produced by unit 1 as processed steam to the Dow Company rather than use it to generate electricity. See Mosley, Tr. 8507.

operation by 1974, 1975 and 1977 respectively three additional fossil fuel units of 644 Mw, 663 Mw, and 800 Mw.^{179/}

As we mentioned earlier, Consumers in 1973 operated 8985 miles of transmission lines, comprised of 1422 miles of 345 Kv lines, 3,339 miles of 138 Kv lines, 24 miles of 120 Kv lines, 4,205 miles of 46 Kv lines and 89 miles of lines of 41.6 Kv or less.^{180/}

As the foregoing reveals, Consumers power operates an extensive, vertically integrated power system.^{181/} The company generates and transmits firm bulk power to distribution points; from there, Consumers, or a utility that has bought the power at wholesale, distributes the power to the ultimate retail user.

^{179/} D. J. Exh. No. 21A, p. 11.

^{180/} D. J. Exh. No. 228A, p. E-21. These statistics include underground lines; also they are in circuit miles, not pole miles. (Consumers in 1973 operated 47,039 miles of distribution lines. Ibid.)

^{181/} See Wein, Tr. fol. 3979 at 45; also fn. 352 infra.

2. The small utilities. Intervenors are some of the small electric utilities operating within Consumers' service area together with the Michigan Municipal Electric Association, an organization comprised of officials of the municipal electric systems.^{182/} Understanding of the full situation before us requires a general awareness of the small utilities' operations, with a focus on the operations of those who have intervened.

a. The cooperatives. The electric cooperatives operating in lower Michigan have financed construction of their electrical plants in part with low interest loans under the Rural Electrification Act of 1936, 7 U.S.C. §901 et seq.^{183/}

^{182/} "The Michigan Municipal Electric Association * * * is an organization comprised of officials of thirty-four (34) municipal electric departments or utility boards in the State of Michigan [whose objective is to assist] member utilities in the production, distribution and use of electricity for public service and [to resist] any pressures brought that are harmful to its members' mutual well being or that encourage the sale of municipal utility systems." Intervenors' Joint Petition to Intervene, page 2.

^{183/} Most currently REA loans are at five percent interest (originally they were 2 percent). Usually, REA finances about 50 percent of the cost of new electrical plant; the rest is financed by the Cooperative Financing Corporation, an organization of most of the cooperatives in the United States whose purpose is to obtain money from private markets. Steinbrecher, Tr. 1277-83.

This means that they are precluded from extending service to towns of more than 1500 population.^{184/} The ten distribution cooperatives in lower Michigan accordingly operate only in rural areas. In 1972 they served more than 110,000 customers whose total demand for electric energy was 938,576 Mwh, somewhat less than 5 percent of Consumers' retail sales in the same period.^{185/}

Like investor-owned utilities, cooperatives must be franchised by communities they serve.^{186/} The record does not, however, reveal the total number of franchises they hold. Cooperatives are also subject to the jurisdiction of the Michigan PSC. That body did not elect to exercise its jurisdiction over them until 1965, when urged to do so by the cooperatives themselves.^{187/} Since that time the cooperatives have filed and received PSC approval of their retail rates . The cooperatives are also

^{184/} 7 U.S.C. §§904, 913; Westenbroek, Tr. 963.

^{185/} D. J. Exh. No. 106; C. P. Exh. No. 11,307; D. J. Exh. No. 21.

^{186/} Michigan Constitution, Article III, Section 29; Westenbroek, Tr. 951.

^{187/} D. J. Exh. No. 8.

subject to the PSC's regulations limiting retail competition among private utilities for single phase customers.^{188/} Competition between Consumers and the distribution cooperatives in areas served by both is therefore governed by those PSC rules.^{189/}

Each individual distribution cooperative may install generating and transmission facilities to supply its bulk power needs or it may elect to band with others and form a joint G. and T. cooperative. The Rural Electrification Administration, however, will approve loans for the initial construction of a bulk power plant only if there is no adequate or dependable source of bulk power available to the

^{188/} The Commission's issuance of the single phase rules (see fn. 161) governing competition among private utilities was within four months of the Commission's exercise of jurisdiction over the cooperatives. Before these two events there was competition in certain areas between Consumers and the distribution cooperatives for existing single phase customers, competition which the cooperatives apparently were losing because their retail rates were higher than Consumers'. Westenbrook, Tr. 982-83. It was to avoid this loss of customers that several of the cooperatives sought Commission jurisdiction and its subsequent protection in the form of the single phase rules. Westenbrook, Tr. 988-91; Keen, Tr. 4507-08; Paul, Tr. 8117-21.

^{189/} Cooperatives are not subject to the Federal Power Commission's jurisdiction. Salt River Project Agr. Dist. v. FPC, 391 F.2d 470 (D.C. Cir.), certiorari denied, 393 U.S. 857 (1968).

distribution cooperatives, or if such power is significantly more expensive than power that could be generated and transmitted by the proposed REA financed facilities. The REA criteria for approving loans for expansion of existing bulk power facilities, however, are less restrictive. All that need be shown in such instances is that the proposed additional facilities constitute "the most effective and economical arrangement" for meeting increased power demand.^{190/}

As we mentioned earlier, seven distribution cooperatives in lower Michigan formed the two G. and T. cooperatives which have intervened here: Northern Michigan and Wolverine Electric.^{191/} The member distribution cooperatives are bound by long term contracts to obtain all their bulk power requirements from these two generation and transmission cooperatives.^{192/} The three remaining distribution cooperatives in the lower peninsula buy bulk power at wholesale from investor-owned utilities.^{193/}

^{190/} D. J. Exh. No. 7, revised Bulletin 20-6 of the Rural Electrification Administration issued May 7, 1969.

^{191/} See fn. 123, supra, and accompanying text.

^{192/} Westenbroek, Tr. 958-59, 1060. The Board of directors of Northern Michigan and Wolverine Electric are composed of two representatives from each of their member distribution cooperatives. Keen, Tr. 4637; Westenbroek, Tr. 958.

^{193/} Thumb Electric, except for the 10% which it generates itself, buys its bulk power requirements at wholesale from Detroit Edison; Fruit Belt Electric buys all its bulk power at wholesale from Indiana & Michigan Electric; Southeastern Michigan buys wholesale from both Consumers and Detroit Edison. Steinbrecher, Tr. 1259-61.

The 1970 peak load for Northern Michigan and Wolverine was 55 Mw each.^{194/} To meet that load these cooperatives had facilities capable of generating 61 Mw and 57 Mw respectively, comprised in the main of diesel fueled, gas turbine and steam turbine units.^{195/} At the close of this record, Northern Michigan's largest unit was a 23.5 Mw steam turbine;^{196/} Wolverine's a 23 Mw "combined cycle" gas and steam-powered generator.^{197/}

To supply power from their generating plants to the distribution cooperatives they serve, both Northern Michigan and Wolverine Electric operate transmission networks. The two networks are interconnected and, combined, total 1182 miles of 69 Kv and 46 Kv transmission lines. Of the 1182, Wolverine Electric operates 696 miles and Northern Michigan 486.^{198/} These cooperatives are contemplating reinforcing their existing transmission network with approximately 525 miles of 138 Kv transmission lines.^{199/}

^{194/} D. J. Exh. No. 109.

^{195/} D. J. Exh. No. 106 and No. 109; Steinbrecher, Tr. 1114-1117; Keen, Tr. 4494-95. (These are 1971 statistics).

^{196/} C. P. Exh. No. 12001; D. J. Exh. No. 106 and No. 109.

^{197/} Keen, Tr. 4495.

^{198/} Steinbrecher, Tr. 1285-86; D. J. Exh. No. 18 and No. 20.

^{199/} Steinbrecher, Tr. 1135; D. J. Exh. No. 20 (map scale was used). About 40 miles of the cooperatives' present transmission net work is designed for 138 Kv voltages but currently it is being operated at only 69 Kv. Ibid.

b. The municipalities. As noted, under the Michigan Constitution a municipality may own and operate an electric power system, and such municipal systems are explicitly exempted by statute from the Michigan PSC's jurisdiction.^{200/} The municipals' retail rates are therefore not subject to PSC scrutiny and its regulations governing retail competition do not apply to competition between municipal and private systems.^{201/}

State law, however, does restrict a municipal system's sale of electric energy outside the limits of the city which owns it. Before 1974, Michigan limited such sales to 25 percent of the municipal's urban sales.^{202/} The law was amended in 1974, and now allows a municipal system to sell an unlimited amount of energy at retail in "any city, village or township which is contiguous" to its boundaries,

^{200/} M.S.A. §22.13(6). Municipal electric systems are also excluded by section 201(f) of the Federal Power Act, 16 U.S.C. §824(f), from the jurisdiction of the Federal Power Commission.

^{201/} Brush, Tr. 2361; Westenbroek, Tr. 993.

^{202/} Michigan Constitution, Article VII, section 24.

providing, however, the consent of any pre-existing power supplier is obtained first.^{203/}

The municipal systems actually now serve only their respective cities and small areas beyond.^{204/} In 1972, the municipals had 146,744 retail customers who bought 3,031,364 Mwh of electric energy, the equivalent of 14 percent of Consumers' retail sales that year.^{205/} The largest municipal system is the City of Lansing's. Lansing sold 1,758,422 Mwh of

^{203/} Michigan Public Acts 1974, Acts No. 174 and 157 amending M.S.A. §§5.1534 and 5.4083. (The Constitution allowed change of the 25% limitation by statute.) A municipal system may continue to serve any cities or townships in which it was distributing retail power at the time of this statutory change even though they are not contiguous to its boundaries. Ibid.

The effective dates of the above statutes were respectively June 20 and June 23, 1974, Ibid.; the record was closed June 20, 1974. The parties are in dispute as to whether these statutes should be considered by the Board.

^{204/} Michigan franchise law is apparently applicable to municipal systems when they serve areas beyond their city limits. See Bay City Plumbing & Heating Co. v. Lind, 235 Mich. 455 (1926). The record indicates, however, that only Lansing has franchises for areas in which it operates beyond its boundaries. Brush, Tr. 2248. The record suggests, however, that there are instances where both Consumers and the cooperatives operate in areas where they are not franchised. Croy, Tr. 1547; Paul, Tr. 7864; D. J. Exh. No. 110. In such situations, the local government could, if it so desired, require the non-franchised utility to remove its electrical facilities. See City of Detroit v. Detroit United Railway, 172 Mich. 136, 137 N.W. 645, affirmed, 229 U. S. 39 (1936).

^{205/} C. P. Exh. No. 11,302 and No. 11,307; D. J. Exh. No. 21.

electric energy to 70,000 retail customers in 1972; its peak load (for 1973) was 373 Mw; ^{206/} and its total generating capacity, 628 Mw. The system's facilities were then comprised almost entirely of fossil fueled steam units, the largest having a 160 Mw generating capacity. ^{207/}

The next largest municipal system is that of intervenor Holland. Its system, about one-eighth the size of Lansing's, sold 220,182 Mwh of energy at retail in 1972; ^{208/} its peak load that year was 44.5 Mw. ^{209/} Holland operated five generating units with a total generating capacity of 81.5 Mw, the largest having a capacity of 31 Mw. ^{210/}

The remaining intervening cities, Grand Haven, Traverse City, Coldwater and Zeeland, had retail sales in 1972 of 119,944 Mwh, 106,588 Mwh, 81,549 Mwh and 42,503 Mwh respectively. ^{211/} Their peak loads that year were 23 Mw, 17.2 Mw, 12.5 Mw and 8 Mw, ^{212/} and their generating capacities 38.6 Mw,

^{206/} C. P. Exh. No. 11,307; Brush, Tr. 2299, 2327.

^{207/} C. P. Exh. No. 12,008, page E-2.

^{208/} C. P. Exh. No. 11,307.

^{209/} C. P. Exh. No. 11,111, Supplemental Agreement No. 4, Exhibit A.

^{210/} Ibid.

^{211/} C. P. Exh. No. 11,307.

^{212/} D. J. Exh. No. 108 (1971 statistics).

35.6 Mw, 16.6 Mw and 14 Mw.^{213/} Only the City of Cold-water needed to supplement its generating capacity with wholesale power, which it purchased from Consumers Power Company.^{214/}

The remaining 17 municipal systems' 1972 retail sales ranged from Union City's 10,897 Mwh to Bay City's 141,280 Mwh. Of these 17, only 3 systems generate their entire firm bulk power requirements; seven others buy all their firm bulk power requirements; and the remaining eight satisfy their needs partly by self-generation and partly through wholesale power purchases.^{215/}

Because municipal systems serve compact areas, their need for transmission facilities for intra-system bulk power transfers is minimal. Only Lansing, which operates 27 miles of 138 Kv lines, has transmission lines greater than 69 Kv.^{216/} Among the intervening municipalities,

^{213/} D. J. Exh. No. 109 (1970 statistics).

^{214/} C. P. Exh. No. 11,307.

^{215/} C. P. Exh. No. 11,307.

^{216/} Brush, Tr. 2325; D. J. Exh. No. 109.

only Traverse City operates any transmission facilities and these are limited to two miles of 69 Kv lines.^{217/} Several of the other municipal electric systems do operate transmission lines but all are 69 Kv or less.^{218/}

c. Investor-owned systems. Alpena Power Company and Edison Sault Company (the latter serves Michigan's upper peninsula) are the only small investor-owned utilities located within or adjacent to Consumers' general service area. The two are of course subject to the same State franchise and PSC regulations as Consumers. Alpena Power Company serves about 12,000 retail customers who purchased 245,117 Mwh of electric energy in 1972.^{219/} Its peak load that year was 57 Mw, which it met by generating 7 Mw itself and buying the remainder at wholesale from Consumers.^{220/} Alpena operates 38 miles of power lines with voltages of 40 Kv or less and 11 miles of 138 Kv transmission lines.^{221/}

^{217/} Wolfe, Tr. 1706; D. J. Exh. No. 109.

^{218/} See D. J. Exh. No. 109.

^{219/} Fletcher, Tr. 4255; C. P. Exh. No. 11,307.

^{220/} Fletcher, Tr. 4256 (1973 statistics).

^{221/} D. J. Exh. No. 108; Fletcher, Tr. 4285.

Edison Sault Company serves about 14,000 retail customers who in 1972 bought 314,225 Mwh of electric energy.^{222/} This demand, coupled with bulk power supplied to a distribution cooperative operating in the upper peninsula, gave it a peak load that year of 73 Mw.^{223/} Edison Sault either owns or has the right to draw upon 73 Mw of generation, 47 Mw of which is produced by hydroelectric units.^{224/} It supplements this generated power with wholesale purchases from Consumers.^{225/}

d. Summary. The total 1972 retail sales for the small utilities as a group was approximately 4,500,000 Mwh, roughly 20 percent of Consumers' retail sales that year.^{226/} Their total generating capacity was approximately 800 Mw, which supplied approximately 70 percent of their own firm bulk power requirements; the remaining 30 percent they obtained by buying firm bulk power at wholesale. Consumers Power sold slightly more than half of the wholesale power bought by the small utilities, roughly 16 to 17 percent of

^{222/} Kline, Tr. 4376; C. P. Exh. No. 11,307.

^{223/} Kline, Tr. 4376-78 (1973 statistics).

^{224/} D. J. Exh. No. 89.

^{225/} D. J. Exh. No. 80; C. P. Exh. No. 11,307.

^{226/} C. P. Exh. No. 11,307; Pace, Tr. fol. 7239 at Attachment JDP-2, D.J. Exh. No. 109.

the small systems' total firm bulk power requirements.^{227/} Except for limited transactions between some of the smaller systems themselves, Consumers supplied the total wholesale power requirements of small utilities located inside its geographic service area.

3. The parties' coordination arrangements. Consumers' coordination practices with the small utilities form the primary focus of this proceeding. Coordination and Consumers' coordinating policies are therefore discussed at length elsewhere in this opinion. For reference, however, we briefly enumerate here the existing coordination arrangements to which Consumers and the small utilities are parties.^{228/}

a. Consumers' coordinating arrangements. Consumers has entered into coordinating arrangements with its large neighboring utilities. The first such agreement, the Michigan Pool Agreement,^{229/} was entered into by Consumers

^{227/} Ibid. Most of the small systems located near another large utility bought their wholesale requirement from that utility rather than Consumers. Ibid. Also see D. J. Exh. No. 19.

^{228/} Detailed discussions of their terms appear in Parts V and VI, infra.

^{229/} A pooling agreement is simply a comprehensive coordination arrangement. See fn. 297, infra.

Power Company and Detroit Edison Company in 1962.^{230/} In 1972 the combined peak load for Consumers and Detroit Edison was 10,475 Mw; their combined generating capacity was 12,239 Mw.^{231/} (In 1973, the 1962 Michigan Pool agreement was superseded by a new coordination agreement between the two utilities.^{232/})

In 1966, Consumers and Detroit Edison jointly entered into coordination agreements with Toledo Edison Company,^{233/} Indiana & Michigan Electric Company,^{234/} Commonwealth Edison Company^{235/} and Northern Indiana Public Service Company^{236/}

^{230/} D. J. Exh. No. 71 (Electric Power Pooling agreement between Consumers Power Company and the Detroit Edison Company). Some coordination had been taking place between Consumers and Detroit Edison since 1928. See D. J. Exh. No. 66, page 1.

^{231/} Mosley, Tr. 8469; C. P. Exh. No. 11,104.

^{232/} D. J. Exh. No. 67 (Electric Coordination Agreement between Consumers Power Company and the Detroit Edison Company).

^{233/} C. P. Exh. No. 11,108 (Operating Agreement Among Consumers Power Company, the Detroit Edison Company and the Toledo Edison Company).

^{234/} C. P. Exh. No. 11,109 and D. J. Exh. No. 78 (Operating Agreement Among Consumers Power Company, the Detroit Edison Company and Indiana & Michigan Electric Company).

^{235/} D. J. Exh. No. 76 (Area Coordination Agreement Among Consumers Power Company, the Detroit Edison Company, Commonwealth Edison Company, Northern Indiana Public Service Company, the Toledo Edison Company and Indiana & Michigan Electric Company).

^{236/} Ibid.

to the south and west. The physical interconnections to implement these agreements, however, were not completed until 1970. See fn. 163, supra. Also in 1966, Consumers and Detroit Edison entered into a coordinating arrangement with the Hydro-Electric Power Commission of Ontario.^{237/}

In addition to the coordinating arrangements with its larger neighbors, Consumers has entered coordination agreements with some of the small utilities within its general service area: Lansing (1964),^{238/} Holland (1967)^{239/}

^{237/} C. P. Exh. No. 11,106 and D. J. Exh. No. 73 & 23A (Interconnection Agreement Between Consumers Power Company and Detroit Edison Company and the Hydro-Electric Power Commission of Ontario). The agreement in evidence was executed in 1969 and superseded an earlier agreement entered into in 1966. Id. at page 1.

In addition the two Michigan utilities in 1967 joined the East Central Area Reliability Group (ECAR). This is not an actual coordination arrangement; rather, the purpose of this organization is to develop criteria and procedures for bulk power coordination among the signatory utilities which come from an eight state region. D. J. Exh. No. 77; Mosley, Tr. 8522.

^{238/} D. J. Exh. No. 91 (Agreement for Electric Service Between Consumers Power Company and the City of Lansing). Some coordination had been occurring between Lansing and Consumers since 1941. See D. J. Exh. No. 66, p. G-6.

^{239/} C. P. Exh. No. 11, 111 and D. J. Exh. No. 100. (Agreement for Electric Service Between Consumers Power Company and the City of Holland). Some coordination between Holland and Consumers had been taking place since 1955. See D.J. Exh. No. 99 and D. J. Exh. No. 66, p. G-7.

and the "M-C Pool," comprised of Northern Michigan, Wolverine Electric, Traverse City and Grand Haven (1973)^{240/} Consumers' agreements with Lansing and Holland were superseded by broader agreements executed respectively in 1970^{241/} and 1974.^{242/}

b. Coordination among the small utilities. Only Northern Michigan, Wolverine Electric, Traverse City and Grand Haven among the smaller utilities in question have coordination agreements with one another. In 1968 these four formed the Michigan Municipals and Cooperatives Power

^{240/} D. J. Exh. No. 105 (Interconnection Agreement between the Consumers Power Co. and Wolverine Electric Cooperative Inc., Northern Michigan Electric Cooperative, Inc., the City of Grand Haven, the City of Traverse (Members of the Michigan Municipals and Cooperative Pool)).

^{241/} C. P. Exh. No. 11,112 and D. J. Exh. No. 92 & 92A (Interconnection Agreement between Consumers Power Company and the City of Lansing, Michigan).

^{242/} C. P. Exh. No. 12,024 (Interconnection Agreement between Consumers Power Company and the City of Holland, Michigan). This agreement was executed subsequent to the close of the record. The agreement is essentially identical to the interconnection agreement between Consumers and the M-C Pool and accordingly we will take official notice of it, as Consumers has requested, under section 2.743(i) of the Commission's Rules of Practice. 10 C.F.R. §2.743(i).

Pool (MMCPP), the "M-C Pool" mentioned in the preceding paragraph.^{243/} In 1971 the combined peak load for the four member utilities was 160 Mw; their combined generating capacity was 192 Mw.^{244/} The record discloses no other coordination agreements among the smaller utilities located inside Consumers' service area. Neither does it reflect any coordination agreements between these small utilities and any large utility aside from the ones mentioned with Consumers itself.

^{243/} D. J. Exh. No. 104A (Michigan Municipals and Cooperatives Power Pool Agreement between Wolverine Electric Cooperative, Inc., Northern Michigan Electric Cooperative, Inc., Grand Haven Board of Light and Power, and the City of Traverse). Previously, Northern Michigan and Traverse City had a coordination agreement dating back to 1958. D. J. Exh. No. 240.

^{244/} Steinbrecher, Tr. 1287, 1115-17.

THE RELEVANT MARKETS

A. Geographic Market.

For reasons previously set forth, the relevant market must be analyzed in terms of its geographic and product dimensions both.^{245/} With respect to the former there is little controversy. The parties have essentially accepted the Licensing Board's determination that it embraces the territory currently served by Consumers Power Company plus those areas which the company could reasonably serve, viz., "all of the lower peninsula of Michigan except the eastern section served by the Detroit Edison Company and the southwest section served by the Indiana and Michigan Electric Company and the Michigan Gas and Electric Company, * * *." 2 NRC at 45. In light of the characteristics of electric power generation and distribution in the lower peninsula (described in Part IV, above), we agree that this adequately delineates the "area in which the seller operates and to which the purchaser[s] can practicably turn for supplies," and therefore corresponds to the relevant geographic market.^{246/}

^{245/} See pp. 51-53, supra.

^{246/} United States v. Philadelphia National Bank, supra, 374 U.S. at 359, quoting from Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327(1961).

Consumers further contends that this overall geographic market must be divided into retail and wholesale bulk power submarkets, each with different boundaries. The Licensing Board, however, rejected those two product markets as not in the case. In its judgment, only a product market for "coordination services" was before it for consideration. The Board based that conclusion on its reading of an agreement among all the litigants, Consumers Power Company included. See p. 14, supra. Consequently, before we undertake to determine whether the company is correct in its view that the actualities of competition require the geographic market to be broken down into appropriate wholesale and retail power submarkets, we must first decide what product markets are in this case. We turn now to that preliminary question.

B. Product Markets.

1. The Coordination Services market.

a. The "agreement" that the only relevant product market is for coordination services. In determining the product market, the Board eschewed the traditional market analysis. It concluded instead that the only relevant product market was one for "coordination services"^{247/} because the parties had agreed that the matters in controversy had focused on these. As a direct consequence

^{247/} The nature of these services is described briefly at pp. 14-15 above and discussed more extensively below at pp.121-30.

the Board below refused to consider as relevant markets those for retail power or wholesale bulk power. 2 NRC at 40, 45. Justice and Consumers take sharp issue with the Board's action in this regard and challenge the premise on which it rests. Both parties contend that wholesale bulk power and retail power are relevant product markets for this proceeding (They disagree, however, about whether those markets are in addition to or in in lieu of the coordination services market; Justice taking the former and Consumers the latter position.)

Justice maintains that the basic thrust of its case "is and always has been that [Consumers] has the power to grant or deny meaningful access to coordination and has exercised this power with the purpose and anticipated effect of monopolizing the wholesale for resale firm power market." ^{248/} According to Justice, by "agreeing to the relevant matters in controversy, the parties only intended to limit the scope of evidence concerning [Consumers'] efforts to preserve its alleged monopoly position in the relevant markets," and did not intend to stipulate the product market to be solely one for coordination services. ^{249/}

^{248/} Justice's Reply Brief on Appeal, p. 9; see also Justice's Prehearing Brief, p. 38.

^{249/} Justice's Opening Brief on Appeal, pp. 39-40.

Consumers sides with Justice on this point. It, too, stresses that the "Board's holding [concerning the relevant matters in controversy] referred only to a limitation as to the evidence which would be adduced concerning the Company's conduct, not to the parameters of the relevant product market".^{250/} A review of the record convinces us that Consumers and Justice are correct; there was in fact no inter-party agreement about the relevant product markets.^{251/}

^{250/} Consumers' Appeal Brief, pp. 154-55.

^{251/} The staff supports the Board's product market delineation. Its support rests not on the "agreement" of the parties, but on the staff's analysis of the electric utility industry in lower Michigan and on its understanding that the Board's "coordination services" market is equivalent to its own proposed "bulk power services" market.

In their appellate briefs, Joint Intervenors assume the existence of relevant product markets for coordination services and for supplies of wholesale and retail power. But their briefs lack any analysis of the record supporting the correctness of those assumptions. Because relevant market delineation is essentially a factual question, the absence of that analysis renders intervenors' relevant market arguments of little use for our purposes.

(i) The Board dealt with the relevant matters in controversy in its first prehearing conference order. This in itself was not improper because an express purpose of that conference was the establishment of issues to be considered in the forthcoming hearing. 10 CFR §2.751a(a)(1) and (d).^{252/} Justice -- which took the lead among the proponents of license conditions -- accordingly set out for consideration at that conference its theory of the case.^{253/} In the course of doing so the Department represented, inter alia, that it saw the situation in violation of antitrust principles as Consumers' "maintenance of the power to grant or deny [the small utilities] access to coordination" and its use of that power "in an anticompetitive fashion against [them]." Justice described this as "[forming] the basic thrust of [its] case"; it made no reference to relevant

^{252/} Indeed, in ordering an antitrust hearing in Midland, the Commission expressly instructed the Licensing Board

to establish on as timely basis as possible, a clear and particularized identification of those matters related to the issue in this proceeding which are in controversy. As a first step in this prehearing process, the Board shall obtain from the parties a detailed specification of the matters which they seek to have considered in the ensuing hearing.

37 Fed. Reg. 7726, 7727 (April 19, 1972).

^{253/} See Tr. 47-66.

markets.^{254/} When questioned explicitly, Department counsel announced his intention to base Justice's case on relevant markets and submarkets in both "bulk power supply and retail distribution".^{255/} In short, in representing that Consumers' coordination practices formed the basic thrust of its case, Justice was describing the means by which it intended to show how Consumers had monopolized, not the market in which it had done so.

The terms of the Licensing Board's prehearing order, which purport to adhere to Justice's representations, portend no more. (See page 54, supra, for the order.) The first two matters paraphrase Justice's charges against Consumers; the third questions whether that conduct is sufficient to show the existence of a situation inconsistent with the antitrust laws that licensing Midland would maintain. None of the three defines the relevant markets to be considered in making that determination. We find nothing on the face

^{254/} Tr. 59-60. Also see 2 NRC at 41-42.

^{255/} Tr. 80. Also see Tr. 50-51 where, in reply to a question concerning the legality of Consumers' acquisition of its present market position, Justice represented that

* * * the greater part of our case will consider whether or not even if the dominance and the market structure was lawfully obtained, whether it is unlawfully using that monopoly power to obtain and extend its monopoly both in bulk power supply and in retail distribution market.

of that prehearing order that should have alerted counsel that the Board meant it to serve that purpose.

Even accepting that all the material issues in controversy were related to coordination practices, the Licensing Board's reasoning that the relevant product market was thereby limited to that for coordination services is faulty.^{256/} As we indicated, monopolization consists of two elements requiring separate analyses. The first involves identification of the relevant market and a determination whether the respondent possesses monopoly power in it. See pp. 47-56, supra. The second looks to whether the respondent has willfully acquired or maintained that monopoly position. See pp. 56-59, supra. Proof of the second element, monopolistic intent, is frequently established by showing that the accused party has engaged in anticompetitive conduct.^{257/} The link between the two

^{256/} See 2 NRC at 45. Also see 2 NRC at 40 (emphasis supplied) where the Board stated:

In the areas of the southern peninsula of Michigan in which [Consumers] is franchised [Consumers] is by far the largest utility whether measured by generation capacity or by sales of firm power, or any other reasonable yardstick. Impressed with these facts, the Parties have attempted to define the relevant market in terms of electric power as a relevant product. Such attempts ignore the material issues in controversy which are all concerned with coordination.

^{257/} See pp. 283-84, infra.

is whether that conduct affected a relevant market.

Because conduct may have a detrimental impact in more than one marketplace, the same actions may have monopolized a number of markets.^{258/} Consequently, where monopolization is charged, proof of anticompetitive conduct alone does not automatically define the relevant market and therefore the fact that Justice's charges all involved Consumers' coordination practices did not perforce limit the relevant market to that for coordination services. Rather, the relevant market or markets might be any in which Consumers' practices facilitated the company's acquisition, maintenance, or extension of monopoly power -- including (of course) the coordination services market.

A review of the evidence confirms our judgment. The record makes clear that, by accepting the Board's definition of the relevant matters in controversy, the parties neither stipulated the existence of a relevant product market for coordination services nor agreed that it was the only relevant market. As described, throughout this proceeding

^{258/} See, e.g., United States v. United Shoe, *supra*, 110 F. Supp. at 302 (dictum); Luria Brothers and Co., 62 FTC 597 (1962), affirmed sub nom. Luria Brothers v. FTC, 399 F.2d 847 (3rd Cir. 1968); *cf.*, Brown Shoe Co. v. United States, *supra*, 370 U.S. 294.

Justice consistently proposed two relevant product markets -- retail power and wholesale power -- in addition to one for coordination services.^{259/} On its part, Consumers just as uniformly argued against a separate market for coordination services and that these belong in the bulk power market.^{260/} Both parties introduced considerable evidence, including expert testimony,^{261/} to support their respective views. And each elaborated its position in proposed findings of fact and conclusions of law, and bolstered them with extensive briefs.^{262/} Manifestly, neither would have followed that course had it believed that acceptance of the Board's definition of the matters in controversy was acquiescence in one relevant product market limited to "coordination services."

(ii) Thus the question of the relevant product market or markets was not settled by the Licensing Board's order

^{259/} Justice's Prehearing Brief, pp. 29-31.

^{260/} Consumers' Prehearing Brief, pp. 98-109.

^{261/} See e.g. Mayben, Tr. 2538-2805; Wein, Tr. fol. 3979 and Pace, Tr. fol. 7239.

^{262/} See, Consumers' Proposed Findings of Fact and Conclusion of Law, pp. 29-40, 85-97; Consumers' Opening Brief Below, pp. 79-145; Justice's Opening Brief Below, pp. 36-86 and Justice's Proposed Findings of Fact and Conclusions of Law at pages 258-67 of its Opening Brief Below.

defining the relevant matters in controversy; its contrary conclusion is simply mistaken. Of course, that the Board below erred about the parties' agreement that coordination services was a relevant product market does not eliminate that market from the case. Justice and intervenors contend that it is a proper market; whether they are right or not is a question of fact. Fortunately, the issue was the subject of extensive litigation at each stage of the proceeding below with the result that a sufficient record was developed to enable us to resolve the matter.^{263/} Accordingly, we undertake the required analysis.

The four parties propose essentially three different relevant product markets: (1) coordination services; (2) retail firm power; and (3) wholesale bulk power. There was no unanimity, however, about whether all three are appropriate or indeed exist. And among those who agree to their existence, there is neither consensus about what is properly includable within each nor concurrence about whether some further division into submarkets is called for. We consider each proposed market in turn.

^{263/} Niagara Mohawk Power Corp. (Nine Mile Point, Unit 2), ALAB-264, 1 NRC 347, 354 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-422, 5 NRC 33, 42 (1977).

b. Coordination services as a relevant market. It is accepted antitrust law that product markets are not limited to goods or commodities transactions in a traditional mercantile sense. Relevant markets and submarkets may also be comprised of services or even "clusters of products and services."^{264/} Whether "power coordination services" (to use Justice's term) qualify as a separate product market under those tests is a factual question, the answer to which calls for an appreciation of the function and nature of those services in the electric power industry. We begin by sketching these briefly.

(i) Benefits of coordination arrangements. The usefulness of coordination is traceable directly to the nature of electricity and the preferences of consumers. For utilities that generate and distribute electric power, both factors cause difficult, costly problems. The Board below observed and no one disputes that "[m]ost customers

^{264/} United States v. Philadelphia National Bank, supra, 374 U.S. at 356 (commercial banking services); accord, United States v. Grinnell, supra, 384 U.S. at 572 (central station alarm services); Cass Student Adv., Inc. v. National Ed. Adv. Service, Inc., supra, 516 F.2d at 1092 (solicitation of advertising); Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780, 789-90 (S.D. Tex. 1971), affirmed on the opinion below on this point, 476 F.2d 989 (5th Cir. 1973) (insurance reports and credit reports); United States v. Tidewater Marine Service, Inc., 284 F. Supp. 324, 328-31 (E.D. La. 1968) (waterborne transportation of supplies and equipment).

of electric energy need or desire firm power." 2 NRC at 36.^{265/} "Firm" power is essentially a utility commitment to supply electric energy to a customer on demand for as long as needed. One contracting for firm power (whether at retail or wholesale) is buying not merely energy, but assurance that (barring some extraordinary unforeseen occurrence) the utility will make that power available without interruption when called for.^{266/}

It is an acknowledged fact of life in the industry that the demand for firm power "fluctuates significantly from hour to hour, day to day, and season to season."^{267/} Unfortunately, it is not practicable to generate electricity in slack periods and store it for use in times of peak demand.

^{265/} Applicant's economic witness, Dr. Pace, confirmed that "The ultimate objective [of any utility] is to come out with something they can turn around and sell to a customer as firm power." Tr. 7543-44. See also Tr. 7560.

^{266/} EEI Glossary, p. 63; See also Tr. 1132, 1741, 2076, and 2573-74; FPC, 1970 Electric Power Survey, Pt. 1, at I-24-3. Consumers' witness testified that wholesale power is firm power in bulk. Mosley, Tr. 8459.

^{267/} Gainesville Utilities v. Florida Power Corp., 402 U.S. 515, 517 (1971).

Utilities in the business of distributing electric power must therefore have access to generating facilities capable of satisfying firm power demands on their systems during those relatively few peak hours. And this means they need to have at hand a margin of "reserves." Reserves are, as we noted,^{268/} generating capacity above and beyond that needed at peak times to which resort may be had when generating units are down, whether in an emergency or simply for routine overhaul and maintenance.^{269/} In short, the nature of the industry is such that to meet firm

^{268/} See p. 15, supra, fn. 21.

^{269/} "The industry distinguishes between various types of 'reserve' requirements. Since time is required to start up equipment that is not operating, a certain amount of equipment must be maintained in such a state that it can begin generating power immediately. The industry calls these instantaneous or 'spinning' reserves, and they must be available to meet load variations and breakdowns of equipment as they occur. A utility must always maintain 'spinning' reserves equal to the size of the largest generator currently in service producing power, in order to protect against a breakdown of that unit. As 'spinning' reserves are called upon a utility must start up more equipment in order to maintain 'spinning' reserves at an adequate level. These reserves are called 'quick-start' or 'ready' reserves and must be available on short notice -- usually 10 minutes or less. Both spinning and quick-start reserves are collectively referred to as 'operating' reserves, in contrast to 'installed' reserves. Installed reserves refers to the remaining generating capacity of a utility, those generators that are not ready to be operated, or in operation. Accordingly, the expense associated with 'reserve' requirements includes both capital expense -- building the necessary 'installed' reserve generating capacity -- and operating expense -- running the necessary 'spinning' reserves and maintaining the readiness of 'quick-start' reserves." 2 NRC at 37-38, quoting from Gainesville, supra, 402 U.S. at 518, fn. 2. Also see Mosley, Tr. 8465-67; Mayben, Tr. 3879-82, 87-88.

power demand, a utility must have available considerable amounts of surplus generating capacity, which capacity is by necessity often idle.

The amount of excess generating capacity that an isolated utility^{270/} must maintain is directly related to the size of the generating units in use on its system. A rough rule of thumb is that such a utility must have reserves at least equal to its largest unit in operation to insure a continual flow of power to its customers if that unit fails.^{271/}

Large generating units produce electricity at significantly lower costs than small ones. This is particularly true with respect to "baseload" units, generators operated steadily to supply the constant portion of the demand

^{270/} An isolated utility is one that is not interconnected with any other utility and thus must depend entirely on its own resources to meet its customers demands. See Gainesville Utilities v. Florida Power and Light Corp., supra, 402 U.S. at 518.

^{271/} See the Initial Decision, 2 NRC at 36. Also see Mayben, Tr. 2548-49, 2553-54; Mosely, Tr. 8530. The largest unit criterion for calculating reserves is only valid for small systems. As the number of generating units increase the utility would have to carry more reserves to cover the possibility that two units may fail at once. Mayben, Tr. 2577-78. Consumers calculates its reserves level by probabilistic methods. Mosley, Tr. 8272-73. Also see FPC 1970 National Power Survey, Part II, pp. II-1-41-46. The method of calculating reserves will be discussed more fully in Part VI, infra.

on a utility's system.^{272/} The cost per kilowatt hour of electricity generated by such units is inversely proportional to

^{272/} Generating units are classified, depending on their function, either as baseload, intermediate or peaking. Chayavadhanangkur, Tr. fol. 5090 at 6-8. This division results from the fact that customer demand for electric power fluctuates significantly as a function of time. In approximate terms, only 50 per cent of a utility's daily peakload is constantly experienced; demand for the remaining 50 percent is intermittent. FPC, 1964 National Power Survey, Part I, pages 119-20; FPC, 1970 National Power Survey, Part I, pages I-3-1 to 3-3. Mosley, Tr. 8617. "Baseload" units are designed to run continuously (except for maintenance) to meet that constant portion of the utility's load. Intermediate and peaking units are utilized to meet the intermittent demand, with intermediate units generally being used to meet demand that is continuous for 12 or more hours and peaking units being used to meet demand that is less than 12 hours in duration. Wolfe, Tr. 1676; Mayben Tr. 2556; FPC, 1964 National Power Survey, Part I, pp. 119-20; FPC, 1970 National Power Survey, Part I, pp. 3-1 to 3; Int. Exh. No. 1005, pp. 22-24; Chayavadhanagkur, Tr. fol. 5090 at 6-8.

Because baseload units are operated continuously, they are designed to produce electricity as economically as possible. Wolfe, Tr. 1676, Mayben, Tr. 2556; Keen, Tr. 4483. Such units usually are nuclear and fossil fueled steam generating units designed for efficient operation. Mayben Tr. 2558. With peaking units other considerations, such as capital cost and ease of startup and shutdown, are more important. Keen, Tr. 4483; FPC, 1970 National Power Survey, Part I, p. I-8-1. Typical peaking plants are gas turbines, conventional and pump storage hydroelectric units, specially designed oil or gas fired steam units and diesel fired units. (Intermediate units are often former baseload units which have been replaced by newer, more efficient facilities). FPC, 1964 National Power Survey, Part I, pp. 119-129; FPC, 1970 National Power Survey, Part I, pp. 5-8, 7-4 to 6, and 8-1 to 7, Also see D.J. Exh. No. 236, pp. 5.2-2 to 7.

the size of the unit.^{273/}

Thus, in planning its system, a utility must balance the economies of scale attainable with larger generating units against the increased amount of reserve capacity that their use necessitates.^{274/} Not unexpectedly, then, all electric utilities strive to plan and to use their generating capacity as efficiently as possible. Each seeks to reduce its need to maintain surplus capacity and each also tries to meet growth on its system by building new facilities that attain economies of scale without requiring unreasonably large reserve margins. For reasons which will become apparent, no utility system can accomplish these things in isolation as effectively as it can in conjunction with others. As the Board below recognized, "coordination", "coordinating services", or "coordination arrangements" are shorthand terms in the electric power industry for contractual arrangements among utility companies to achieve economies in their overall power supply operations.^{275/}

^{273/} Wolfe, Tr. 1677; Mayben, Tr. 2558. Economies of scale in baseload generation are attainable up to the 800 to 1300 Mw range. Mosley, Tr. 8697-98. Corresponding economies are ordinarily not achievable in peaking units. Wolfe, Tr. 1677; Mayben, Tr. 2557-58. However, pump storage hydroelectric units are one exception. Ibid.

^{274/} The size generating unit that any system can economically build is also related to that system's load growth. Mr. Mosley testified that "[i]t is not uncommon, and it's generally good economics, that you can put a unit in a system that is not greater than two years' anticipated load growth". Tr. 8531. Also see Id. at 8616-19; Mayben, Tr. 2649-50, 3694; Wein, Tr. fol. 3979 at 64-65.

^{275/} 2 NRC at 34-35; see also, FPC, 1970 National Power Survey, Part I, at I-24-2.

(ii) Coordination transactions. Coordination may be broken down into two broad classifications: operational and developmental.^{276/} The former is essentially a contractual arrangement among two or more utilities to exchange surplus power and associated energy; the contract terms vary depending on the operating conditions of their respective systems. These arrangements generally provide for a host of differing types of surplus power transactions which serve to increase the efficiency and often the reliability of the respective utility's bulk power supply operations.^{277/} Developmental coordination, on the other hand, is understood in the industry to embrace the joint planning and construction of new bulk power facilities, in particular new base-load generating units, in an endeavor to achieve economies of scale.^{278/} There is, however, no magic formula after

^{276/} Wolfe, Tr. 1599-1604; D. J. Exh. No. 167 (Edison Electric Institute, Principles of a Coordination Agreement). Also see FPC, 1970 National Power Survey, Part I, Ch. 17.

^{277/} Ibid.

^{278/} There are usually two methods by which utilities coordinate construction of new generating plants; joint venture and staggered construction. See D. J. Exh. No. 167, pp. 15-18; D. J. Exh. No. 234 (Edison Electric Institute, Methods of Owning and Selling Generating Capacity). In a joint venture, as its name implies, the utilities jointly own and finance a facility large enough to meet the immediate power needs of all. In staggered construction, one utility will "be elected or will choose to build a generating unit that is larger than [it] immediately needs" and it "will sell the surplus [power in excess of its system's needs] to (FOOTNOTE CONTINUED ON NEXT PAGE)

which coordination agreements are patterned. Rather, each reflects the needs, resources, and managerial views of the particular contracting utilities.^{279/}

Normally a key step in operational coordination is a contract to share reserves.^{280/} We need not draw up our own hypothetical to illustrate how reserve sharing permits lowered operating costs by allowing more efficient use of generating capacity. Rather, we follow the lead of the Board below and use for this purpose the Supreme

^{278/} (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
the other part[ies] until such time as [it] needs" that unit's total power output. "It is then implied and expected" that at a later time the buying parties will construct plants larger than their needs and supply a similar type of service to the original selling party. Mosely, Tr. 8499; also see Mayben, Tr. 2649-50; Brush, Tr. 2137. Power transferred under such arrangements is referred to as "unit power", the party being entitled to receive power only when that unit is in operation. Accordingly, the rates for such power are based solely on the capital and operating costs of the particular unit. And because the selling utility is under no contractual obligation to deliver power when the unit is down, either due to forced or scheduled outages, the buying utility must have available alternate sources of bulk power. See Mosley, Tr. 8505-06; Slemmer, Tr. fol. 3838 at 20; D. J. Exh. No. 234 at 25-29. By utilizing either joint ventures or staggered construction utilities can build generating units with substantial economies of scale while at the same time avoiding capital investment in electric plant that would not otherwise be needed for a considerable time into the future. See fn. 274, supra.

^{279/} FPC, 1970 National Power Survey at I-17-1.

^{280/} See 2 NRC at 66. Also see Wolfe, Tr. 1609-10.

Court's example in Gainesville, supra, 402 U. S. at 519,
fn. 3:

Assume that four electric systems operate in isolation and that each has an annual peak load of 500 mw served by several generating units the largest of which is 200 mw. At a minimum each system would have to provide 700 mw of installed generating capacity (500 mw to cover the annual peak load plus 200 mw of installed reserves equal to the largest unit). If we assume further that each system operates its 200 mw unit near capacity throughout the year, spinning reserves equal to the output of that unit would constantly be required. If the four systems are to be interconnected pursuant to the Florida Operating Committee formula, total generating capacity need not exceed 2300 mw (total annual peak load -- plus operating reserves of 300 mw, *i.e.*, 1-1/2 times the largest generating unit). This 2300 mw capacity requirement would be met by requiring each system to maintain generating capacity equal to 115 percent of its annual peak load. Each system would thus have to maintain only 575 mw of generating capacity -- 125 mw less than would be required if operating in isolation. The interconnected system as a whole would require the constant maintenance of 200 mw of spinning reserves and 100 mw of quick-start reserves; each system's pro rata share of operating reserves would amount to only 75 mw. Thus, interconnection of the four systems would result in substantial capital savings by reducing installed generating capacity requirements and substantial operating savings by reducing operating reserve requirements.

The conclusion supported by the example is clear: "To the extent that the utility may rely upon the interconnection to supply this deficiency [in reserve generating capacity] the utility is freed of the necessity of constructing and maintaining its own equipment for the purpose." Id. at 520.

It is also manifest that "[s]uch coordination results in substantial cost savings in furnishing reserves, * * *."^{281/}

^{281/} Meeks, Concentration in the Electric Power Industry, supra, 72 Colum. L. Rev. at 102. Professor Meeks offers a similar example of the cost saving and other advantages of reserve sharing. Id. at 103:

To illustrate, consider a system with ten generators and a total capacity of 1500 megawatts, the largest unit being 300 Mw. The system, if operating alone, must have spinning reserves of at least 300 Mw to cover the largest unit should it fail. If the 300 Mw unit and another unit should go out at the same time, the system could not continue to serve all its customers if it had only 300 MW spinning reserve. On the other hand, the probability that several units will go out at the same time is less than one will fail. If the system just described were to pool its spinning reserve with a neighboring system that also had a total capacity of 1500 MW in ten units, the largest being 300 MW, the unlikelihood of both 300 MW units going out at the same time might lead the systems to decide that their reliability standard would be sufficient if together they provided 500 MW of spinning reserve. Thus, operating separately, each system would have to provide at least 300 MW reserve, whereas together they could attain the same degree of reliability with less idle capacity. Although this is a highly simplified illustration, the point to be emphasized is that the more units involved, the less spinning reserve as a percent of capacity will be needed to achieve the same degree of reliability. In addition, the more generating units that are interconnected, the greater will be the system's transient stability -- its ability, due to the inertial effect of the combined generators to absorb temporary instability in some of its component units. (Footnotes omitted.)

Consumers' witness agreed that interconnected operations lower the overall costs of its bulk power supply. See, Mosely, Tr. 8516.

In short, under a reserve sharing agreement, the contracting utilities "pool" their respective reserve capacities, thereby reducing the overall level of reserves that must be maintained for emergency purposes.^{282/} Because each utility in the pool is thus relying partially on the reserve capacity of the others, the parties to the agreement may be called upon to supply power to a pool member that has a temporary generating deficiency because of an unexpected outage. Their obligation to supply that power, however, is not firm. These are "if and when available" arrangements. No utility is obliged to supply power where doing so would jeopardize "service to [its] own customers."^{283/}

Power transferred among utilities pursuant to such arrangements is referred to in the industry as "emergency" power.^{284/} Emergency power -- like all power furnished under reserve sharing arrangements -- is not provided free of charge. Rather, the supplying utility is paid for the energy transferred at a rate specified in the governing coordination contract or agreement.^{285/} Most common

282/ Wolfe, Tr. 1635; Mosley, Tr. 8467.

283/ Mosley, Tr. 8462; Wolfe, Tr. 1554. Also see for example C.P. Exh. no. 11,109, Service Schedule A (Coordination agreement among Consumers Power Co., the Detroit Edison Co. and Indiana & Michigan Electric Co.).

284/ Wolfe, Tr. 1554; Also see Mayben, Tr. 2697-98.

285/ Mosley, Tr. 8462-62A.

(and illustrated by agreements in evidence here) is a charge that covers the "out-of-pocket cost" of the supplying utility plus 10 percent of that cost.^{286/}

Reserve sharing in emergencies is but one type of coordination service. There are literally thousands of such arrangements reflecting the need (or desires) of the particular utilities concerned.^{287/} Examples involved in this case include agreements to purchase and sell "maintenance power," "short term power", "seasonal power," "economy energy", "dump energy", "diversity power", "off-peak power" and "unit power." All fall under the coordination service rubric. For purposes of this appeal we

^{286/} See, e.g., C.P. Exh. no. 11,108, Service Schedule A, (Coordination agreement among Consumers' Power Co., the Detroit Edison Co. and the Toledo Edison Co.). Several of the contracts provide, at the option of the supplying utility, for return of equivalent energy in kind to that utility. Ibid. Also several of the contracts not only have a charge based on the out of pocket costs of the supplying utility but also include a capacity charge. See, e.g., D.J. Exh. no. 105 Supplement B (Coordination agreement between Consumers Power Co. and the M.C. Pool); D.J. Exh. no. 67 Supplement D (Coordination agreement between Consumers Power Co. and the Detroit Edison Co.) Capacity charges are discussed at pp. 147-54, infra.

^{287/} "There are thousands of arrangements among systems from all segments of the industry providing for various degrees and methods of electrical coordination. These variations reflect differences in load density, characteristics of generating resources, geography, and climate. They are also a product of managerial views with respect to planning, marketing, competition, and retention of prerogatives." FPC, 1970 National Power Survey, at I-17-1.

need describe them only summarily in the margin below.^{288/}

All are in essence variations on one leitmotif: the utilities' attempt to reduce their production

^{288/} Maintenance power, short term power and seasonal power all involve the sale, over a limited time period -- be it a week, month or generating season -- of power and energy by a utility with a temporary surplus of generation to one with a temporary generating deficiency. In such instances "the surplus party *** will contract to deliver, for a given period of time, a given number of kilowatts of power with associated energy." Mosley, Tr. 8497-98 (Mr. Mosley referred to power exchanges of this general nature as "supplemental" power transactions). Maintenance power is specifically contracted for, usually in weekly periods, to cover (as its name implies) generating deficiencies created by scheduled maintenance outages. Utilities often jointly plan their scheduled maintenance outages and sometimes -- but not always -- arrange for power received by one to be repaid in kind when the other utility undergoes its scheduled maintenance; differences, however, in actual power and associated energy exchanged are compensated by cash payment. See Wolfe, Tr. 1617-18; C.P. Exh. No. 11,109, Service Schedule B; C.P. Exh. No. 11,108, Service Schedule B; C.P. Exh. No. 11,106, Supplement M (Coordination Agreement between Consumers Power Co., The Detroit Edison Co. and the Hydro-Electric Power Commission of Ontario); D.J. Exh. No. 105, Supplement C. "Short term" power and "seasonal power" may be contracted to cover temporary generating deficiencies due to any cause, be it unexpectedly high customer demand, delay in bringing a new generating plant on line or an extended emergency and corresponding maintenance needs. See Mosley, Tr. 8497; Wolfe, Tr. 2062; C.P. Exh. No. 11,106 Article V, Sections 2 and 3, C.P. Exh. No. 11,112, Article 4 Section 2 and Service Schedule B-1 (Coordination agreement between Consumers Power Co. and the City of Lansing). These are usually cash transactions. See e.g., C.P. Exh. No. 11,109 Service Schedule D; D.J. Exh. No. 105 Supplement A. The rates for short term and

(Footnote continued on next page).

costs by either purchasing or selling "surplus" power. or, to put it more accurately, power from the surplus generating

288/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
seasonal power both consist of a capacity charge and an energy charge. Ibid. Also see Mosley, Tr. 8498. The difference between the two is explained at pages 147-48, infra.

Economy energy transactions differ from those described above. They are not used to cover a temporary generating deficiency but are a means by which coordinating parties arrange to use their most efficient generating units. In such a transaction, a utility generating electricity with a unit whose operating costs are higher than one its neighbor temporarily has in reserve, will shut down the costly unit and receive power from its neighbor's economical unit. The receiving utility pays the supplier's operating costs plus half the difference of the operating costs of the two units, thus splitting the savings 50-50 between them. Economy energy, too, is supplied only on an "if available" basis and "the supplying utility can retract the service on an instant's notice." Mosley, Tr. 8495-97; Wolfe, Tr. 1590-92. See e.g., C.P. Exh. No. 11,108 Service Schedule C; C.P. Exh. No. 11,106 Supplement E; D.J. Exh. No. 67, Supplement E.

"Diversity power," "dump energy" and "off-peak power" are surplus power transactions with particular characteristics. Diversity power is exchanged between utilities whose peak loads do not coincide. For example, a utility with a winter peak load may during that season obtain power and associated energy from a utility with a summer peak load; vice-versa in the summer. Differences in actual power
(FOOTNOTE CONTINUED ON NEXT PAGE)

capacity inherent in the industry.^{289/} This brings us directly

(Footnote continued from previous page)

288/ and energy exchanged are compensated in cash. See Slemmer, Tr. fol. 8838 at 16-17; C.P. Exh. No. 11,106 Supplement D; D.J. Exh. No. 76 Service Schedule C (Area Coordination Agreement Among Consumers Power Co., The Detroit Edison Co., Commonwealth Edison Co., Northern Indiana Public Service Co., The Toledo Edison Co. and Indiana & Michigan Electric Co.); D.J. Exh. No. 167, p.11. "Dump energy" refers to surplus hydroelectric energy that must be produced because of the generating characteristic of the facility; it is priced below the operating costs of other generating facilities. Mayben, Tr. 2702-03; D.J. Exh. No. 167, p. 11. See D.J. Exh. No. 80, section 11 (contract for electric service between Consumers Power Co. and the Edison Sault Electric Co.). "Off-peak" power is, obviously, power and associated energy sold in non-peak hours, e.g. 10:00 p.m. to 7:00 a.m. See C.P. Exh. No. 11,109, Service Schedule E.

We have already described how unit power transactions are utilized by utilities who agree to stagger the construction of their new generating facilities. See fn. 278 supra (The original Michigan Pool agreement, D.J. Exh. No. 71, provided in essence for unit power transactions in conjunction with a program of staggered construction. Mosley, Tr. 8499.) In addition, however, unit power transactions may occur outside a staggered construction program. See Mosley, 8505-06. An example of this in the record is Consumers' sale to Commonwealth Edison of a portion of its share of the Ludington pumped storage plant (a joint venture between Detroit Edison and Consumers). The sales agreement which is 15 years in duration, provides that during the first 10 years Commonwealth Edison is to purchase one-third of Consumers' share; during the last five years of the agreement Commonwealth will buy one-sixth of Consumers' share. C.P. Exh. No. 11,118 (Agreement for sale of portion of generating capability of Ludington Pumped Storage Plant by Consumers Power Company to Commonwealth Edison Company). Also see Mosley, Tr. 8506-07.

289/ Certain aspects of coordination obviously serve to increase system "reliability," and these transactions are entered into for that purpose also. But it remains the case that an isolated system may be just as "reliable" as an interconnected one; however, "the cost would be astronomical." Meeks, supra, 72 Colum.L. Rev. at 102.

to the question we must answer: whether these purchases and sales of surplus electric power and energy -- transactions in coordination services -- comprise a relevant market or submarket for antitrust purposes.

(iii) Market analysis. Consumers Power Company denies the existence of a discrete product market for electric power provided under coordination arrangements.^{290/} It considers that power simply one part of an overall market for bulk power. The company's position rests on a line of cases beginning with the Supreme Court's duPont-Cellophane decision.^{291/} It reads those cases to lay down the rule that products which have "reasonable interchangeability" are part of the same relevant product market for antitrust purposes. The company asserts that small utilities within its general service area can satisfy their bulk power needs three ways: (1) resort to self-generation; (2) wholesale power purchases from Consumers (or others); or (3) power available under coordination arrangements. The particular source (or sources) to which any individual utility will turn for its bulk power -- according to Consumers -- depends simply on the relative cost of power from the source available. This analysis implies that these three

^{290/} See Consumers' Appeal Brief, pp. 154 et seq.

^{291/} United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956).

sources of electric power are functionally interchangeable and therefore in one and the same relevant product market under the duPont rationale, a conclusion Consumers urges upon us.^{292/}

Justice takes issue with Consumers on this point. The Department sees coordination services and wholesale power as forming quite separate markets. The wholesale power market, it asserts, is one "in which producers of firm electric power sell [firm] power in bulk * * * to electric distribution systems." Coordination power and associated services are, in Justice's view, but "factors of production or inputs" in producing firm bulk power.^{293/} Because they are thus only an element of firm bulk power, they are not "reasonably interchangeable" with it and accordingly are not in its product market under the duPont test, which requires "price, use and qualities" to be considered when characterizing the market.^{294/}

^{292/} Consumers' Appeal Brief, p. 164.

^{293/} Justice's Opening Brief on Appeal, p. 43; also see Justice's Opening Brief Below, p. 63.

^{294/} United States v. E. I. du Pont, supra, 351 U.S. at 404.

In support of its position, Justice relies principally on the testimony Dr. Harold H. Wein, its economic expert and a university business school professor.^{295/}

Dr. Wein testified that, in addition to retail and wholesale markets for firm electric power, there is a third separate relevant market, a

bulk power exchange market between [generation and transmission] utilities sometimes called the regional power exchange market. The "Michigan Pool" consisting of Consumers Power (CPCO) and Detroit Edison (DE) is an instance of this market. This pool is also connected with a larger grouping including large private utilities in Indiana, Illinois, and Ohio, and also Ontario-Hydro in Canada via connections of CPCO and DE.

^{295/} Dr. Wein is a professor at the Graduate School of Business Administration at Michigan State University, a position he has held since 1959. From 1961 through 1963 he was on leave while serving as Chief Economist and Head of the Office of Economics of the Federal Power Commission. Thereafter, with the aid of Mr. Aymond, Chairman of the Board of Consumers, and others he established the Institute of Public Utilities at Michigan State University in 1965. Before becoming a professor at Michigan he was Associate Professor of Economics and Industrial Administration at the Carnegie Institute of Technology, a consulting economist for industry, principal economist of the antitrust division of the Justice Department (where he also served as special advisor to the Attorney General on antitrust problems in the steel industry), principal economist in the Office of Price Administration, a senior statistician with the Army Air Forces, a principal economist in the War Production Board and a junior economist in the U.S. Commerce Department. He holds a masters degree in economics from Columbia University and a Ph.D. in economics from the University of Pittsburgh. Tr. fol. 3979 at 1-7.

Various kinds of purchases and exchanges of bulk power occur in this market such as short term firm power exchanges, emergency and scheduled maintenance exchanges resulting from outages of particular units, seasonal exchanges, economy energy and energy from shared pool units under the earlier Michigan Pool Agreement [O.J. Exh. No. 71] and wheeling services.^{296/}

After describing Consumers' coordination transactions within this market and in particular its contractual relationships with the Detroit Edison Company in the Michigan Pool,^{297/} Dr. Wein explained that (Tr. fol. 3979 at 61):

A "pool" is, thus, a market because energy flows to and from the members are in fact paid for according to predetermined agreement between the members. It is the market which I have previously referred to as the bulk energy exchange market, or the regional power exchange market. This "market" is a very special market; it is not entered to sell electric power to the other members for the purposes of making a profit thereon, but rather for the purposes of reducing the costs of generation for each pool participant in order thereby to effectively compete in final electric power markets. It is a method of enabling each company to optimally combine the factors of production, which without this "market" would result in higher costs of operation and higher capacity costs.

^{296/} Tr. fol. 3979 at 54-55.

^{297/} Id. at 57-60. A "pool" agreement is a comprehensive coordination arrangement between two or more utilities, usually encompassing both operational and developmental coordination, whereby the utilities essentially plan and operate their system as one. Id. at 60.

Consumers rebuts Dr. Wein's position with the argument,^{298/} succinctly presented by its own economic expert, Dr. Pace, that

The Department's attempt to differentiate between firm or wholesale power and nonfirm or coordinating power ignores the substitutability that actually exists in the market. By definition, firm power results from the electrical interconnection of a series of nonfirm sources of power. The mutual emergency support available from an interconnection with an adjacent system, for example, is identical in function to the emergency backup provided by the installation of a new gas turbine generating unit on one's own system and, to be acceptable, the terms of any interconnection arrangement must be competitive with the cost of installing additional generation. Similarly, firm wholesale purchases are substitutable and therefore must be competitive with the power that could be obtained from the combination of several nonfirm sources.^{299/}

For the reasons which follow we find the Department's position the one soundly based. We therefore conclude, as Justice would have us do, that electric power supplied

^{298/} Dr. Pace is an economist and vice president of National Economic Research Associates, Incorporated (NERA), consulting economists. He joined NERA in 1970 after earning in that year a Ph.D. in economics (specializing in the areas of industrial organization and public utility economics) from the University of Michigan. Since joining NERA, Dr. Pace has directed or assisted in projects dealing with competition and regulation in the electric utility industry. Tr. fol. 7239 at 1-2.

^{299/} Tr. fol. 7239 at 33.

under coordination agreements is distinct from firm bulk (i.e., wholesale) power and comprises a discrete product market of its own.^{300/}

^{300/} The staff pressed but one relevant product market on the Board below, that for "bulk power services" consisting of (but not necessarily limited to):

1. bulk power or energy at wholesale for resale;
2. bulk power or energy for coordination of expansion of generating capacity;
3. coordinated planning;
4. coordinated operations;
5. interconnection and coordination of reserve capacity levels; and
6. transmission services including "wheeling".

The staff argues that it is appropriate to group these various transactions in one market because each "has one, and only one function, i.e., to produce firm power" Staff's Proposed Findings and Conclusions, pp. 32-33

Except for its inclusion of bulk power sold at wholesale, the staff's proposed market is essentially identical to the "coordination services" market urged by Justice. However, as we explain in the following pages, wholesale power and power obtained under coordination arrangements do not fall within the same product market. Accordingly, we reject the staff's proposed bulk power service market. Our main point of disagreement is that the raison d'etre for wholesale power transactions is not, as the staff suggests, "to produce firm power", wholesale power is firm power in bulk. See fn. 266, supra.

(a). Functional differences. We have no quarrel with the relevant product market tests that Consumers would have us apply. DuPont, supra, is, as the company says, the leading Supreme Court decision in the area. It holds in essence that after due consideration has been given to their "price, use and qualities", products belong in the same market where they have "reasonable interchangeability." 351 U.S. at 404. Put another way by the Court, the "[d]etermination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use [and] how far buyers will go to substitute one commodity for another." Id. at 393. Our difficulty with Consumers' position centers not on the test but in its application .

No one disputes that electricity is fungible; a user cannot distinguish between electricity generated by a nuclear power plant and that generated by a facility which burns a fossil fuel. Nor does any party assert that the recipient of power delivered in bulk can tell by its physical characteristics whether it has been furnished under a coordination arrangement or a wholesale power contract. What distinguishes the latter two are the terms under which

power is supplied. This is the consideration that is significant for relevant market purposes.^{301/}

The product marketed by electric utilities to their wholesale (and for that matter to their retail) customers is "firm power". As Dr. Pace, Consumers' principal economic expert, expressed it: "the product really being demanded by the electric utilit[ies] is firm power to turn around and sell to [their] customers". Tr. 7543. We observed earlier that "firm power" has a specific meaning in the industry. It refers to a dependable, uninterrupted, long-term supply of electric power; "wholesale power" is firm power in bulk.^{302/} And Consumers' vice-president for electric planning, Mr. Mosley, testified that a commitment to supply wholesale power "involves an obligation and responsibility to provide uninterrupted service to the extent that it is practicable, just as * * * to any retail customer."

^{301/} We note in passing that identity in physical characteristics does not preclude products from being in different antitrust markets depending on their price and use. See, e.g., Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 478-79 (E.D. Mo. 1965), affirmed, 368 F.2d 679 (8th Cir. 1966) (raw milk for retail fluid purposes forms one market; the same milk wholesaled for manufacture into cheese or other dairy products forms another).

^{302/} See p. 85 supra.

Tr. 3452, 8459. A supplier of wholesale power consequently plans and operates its system to insure that a continuous flow of firm power in bulk is available to the buyer.^{303/} For this reason a utility serving retail customers may rely entirely and confidently on purchases of wholesale power for its needs.^{304/}

Electric power furnished under coordination agreements, however, is supplied under conditions such that a utility may not rely on it exclusively -- or even in large measure -- to satisfy the power demands of its customers. This is inherent in the nature of coordination agreements. These generally oblige the supplying utility to deliver power if it has power surplus to its own needs but impose no duty on the supplier to insure the availability of such a surplus. For example, both emergency power and economy power (types of coordination services) are supplied solely on an "if and when available" basis; to the extent either is available

^{303/} See Paul, Tr. 7940-41; Aymond, Tr. 6065; Brush, Tr. 2076.

^{304/} As we pointed out in Part IV, nine of the small utilities within the relevant geographic market rely entirely on purchases of wholesale power to meet the sum power demands of their retail customers. See p. 92 and fn. 193 supra.

a purchaser may have them -- but there is no guarantee that either will be available at any specific time.^{305/} Short term power, maintenance power and seasonal power -- also under the coordination services rubric -- are contracted for on a relatively short-run basis. The selling utility will agree to make such power available only where, in its own judgment, it believes it will have surplus capacity temporarily available on its system and usually reserves the right to terminate the service where unforeseen events eliminate that surplus capacity.^{306/} Mr. Mosley confirmed

^{305/} See p. 125 and fn. 288, supra.

^{306/} See, e.g., C.P. Exh. No. 11,108, Service Schedule D; C.P. Exh. No. 11,112 Article IV, Sections 2 and 3; D.J. Exh. No. 105, Supplements A & C. Also see Mosley, Tr. 8497-98.

Short term power is on occasion referred to as "short term firm power". See, e.g., Mayben, Tr. 2698, Wein Tr. fol. 3979 at 55. It is firm power in the sense that a utility will not enter a contract to deliver short term power unless it has at the outset the necessary surplus capacity beyond its system's needs to provide power on a continual basis during the contract period. See Mosley, Tr. 8497. It thus differs from emergency power and economy energy transactions; under these the supplying utility makes no such commitment and accordingly can essentially stop service on an instant's notice.

(FOOTNOTE CONTINUED ON NEXT PAGE)

this important distinction. He agreed that coordination arrangements did not obligate utilities to supply power

306/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Most coordination contracts, however, allow the supplying utility to limit delivery of short term power even after it has been contracted for, where conditions not reasonably foreseeable (such as an emergency), arise which would make it "burdensome" for the supplying utility to continue delivery. C.P. Exh. No. 11,108, Service Schedule D; C.P. Exh. No. 11,109, Service Schedule D; C.P. Exh. No. 11,106, Article V, Section 3; C.P. Exh. No. 11,112, Article IV, Sections 2 and 3; D.J. Exh. No. 105, Supplements B and C; C.P. Exh. No. 12,024, Supplements B and C. Thus short term power is contracted on a more limited and less reliable basis than wholesale power.

Seasonal power, as its name suggests, is contracted for a winter or summer generating season. Among the coordination agreements in evidence, seasonal power transactions are included only in those which impose a reserve responsibility for one or more of the parties. See pp. 358-62, infra.

These agreements provide that if a utility does not have generating capacity, or other sources of power sufficient to meet its reserve responsibility for the forthcoming season, that utility must either obtain power from outside sources or buy seasonal capacity, if available from the other party to the coordination agreement.

The supplier party then undertakes the responsibility for that generating season to deliver the power contracted for when called upon by the temporarily deficient party. D.J. Exh. No. 105, Sections 2 and 3; C.P. Exh. No. 12,024; D.J. Exh. No. 67, Article III, Section 2; D.J. Exh. No. 104A, Article 8, Service Schedule A. Thus, seasonal power transactions are in essence a means by which the contracting parties buy and sell reserve capacity on a seasonal basis, dividing the capacity costs for the group's reserves according to the reserve responsibility of each. Short term power transactions are used in these agreements to divide capacity costs on a weekly basis. See, e.g., D.J. Exh. No. 67, Article III, Section 3; D.J. Exh. No. 105, Supplement C; C.P. Exh. No. 12,024.

on a sustained basis.^{307/}

The point we are driving at is this. An obligation to supply power under coordination arrangements is of a substantially lesser magnitude than an undertaking to supply wholesale power. The latter is a firm commitment upon which the purchaser can rely to meet the demands of its customers; the former is no more than one factor of production in the makeup of firm power (p. 161, infra), but is by no means the functional equivalent of that power.

^{307/} Mr. Mosley testified (Tr. 8461) that in operational coordination arrangements "there are three major kinds of power transfers * * * mutual emergency support, economy energy, and supplemental power." The amount of emergency power that a party to a coordination contract will deliver when requested depends on what "[it] can make available at the time without jeopardizing the service to [its] own customers." Tr. 8462. He also stated that (Tr. 8496) "[Economy energy] is not a firm transaction. The arrangements involve a privilege that the supplying party can retract on an instant's notice." With respect to "supplemental power" transactions [e.g., short term power, maintenance power and seasonal power], he explained that (Tr. 8497-98) "one party may find himself in a generally surplus condition for some period of time. That usually will be for a week, or a month or a few months, and another party, an interconnected party is temporarily deficient, possibly for such causes as new generation being delayed or by an extensive maintenance program. And the surplus party then will contract to deliver for a given period of time, a given number of kilowatts of power with associated energy."

There is no serious dispute about the fact that a utility without any generating capacity of its own -- the situation of nine of the smaller utilities in this case -- cannot rely on coordination power to meet its customers' firm power demands. Indeed, with commendable candor Consumers' witness Dr. Pace, on cross-examination by counsel for the Department of Justice, acknowledged "there would be no point" for such a utility to contract for coordination power and associated services.^{308/} That utility, until it acquires its own generating facilities, has no choice but to satisfy its bulk power requirements by purchasing wholesale power. Coordination power services are not useful to it and for its purposes are not functionally interchangeable with wholesale power.^{309/} In short, given the nature of coordination power, such buyers literally cannot substitute coordination power for wholesale power as a long term source of firm electric power. Consumers does

308/ (Tr. 7547):

- Q. [By Justice's counsel] * * *. Now if I'm full-requirements distribution system would I be interested in purchasing economy energy or emergency power?
- A. [By Dr. Pace]. Well, you're getting that through the wholesale purchase.
- Q. No sir. Would I go around looking for a contract for the supply of emergency power or economy energy?
- A. There would be no point.

309/ Mayben, Tr. 2679, 2697-98. Also see Pace, Tr. 7544, 7547.

not dispute the point.^{310/}

Of course a utility with some generating capacity of its own can make use of coordination arrangements. This is because, as we describe shortly, power delivered under coordination arrangements is -- or can be used as -- an element in producing firm power. But it does not follow even in this situation that coordination power and wholesale power are "reasonably interchangeable" in the sense that the term was used by the Court in duPont. The reason why not is cost.

Manifestly a long-term source of firm bulk power -- i.e., wholesale power -- is physically substitutable for a relatively short term, interruptable supply of bulk power -- i.e. coordination power. From purely a functional standpoint, a utility could cover outages with a reserve of wholesale power in lieu of emergency power or some other suitable form of coordination arrangement. But while one could conceivably carry coal in Cadillacs, prudent businessmen

^{310/} "Of course, a system cannot rely upon coordination power exchanges independent of self-generation and/or wholesale [power] for the purpose of providing firm power to retail customers -- the ultimate product in this industry." Consumers' Appeal Brief, p. 162, fn. 233.

normally do not do so. To be in the same market, products must not only be functionally interchangeable, they must be reasonably so.^{311/} And case law (and common sense) teaches that the relative cost of the different products plays is a key factor in determining that reasonableness. United States v. duPont, supra; also see Brown Shoe Company v. United States, supra, 320 U.S. at 325.^{312/} We therefore examine what the record shows about the costs of wholesale versus coordination power.

(b) Price differentials. We have already described the differing terms on which wholesale power and coordination power are contracted. Because these differences have direct effect on their respective prices, we rehearse them briefly here.

^{311/} Both Justice and Consumers cite United States v. Charles Pfizer & Co., 246 F. Supp. 464 (E.D. N.Y. 1965) as a leading case. There the court pointed out that two questions must be answered in determining whether, under the duPont test, two products are competing in the same market: first, whether the two are functionally interchangeable -- i.e., "whether they can be used for the same purpose" and, if so, whether they are reasonably interchangeable -- i.e., the "willingness or readiness [of purchasers] to substitute one for the other". 246 F. Supp. at 468.

^{312/} Even if there is some overlap, products with significant economic disparities belong in distinct submarkets. United States v. Tidewater Marine Services, Inc., 284 F. Supp. at 330 (crew boats capable of carrying relatively small amounts of cargo form a different submarket than utility boats which can carry personnel, but are capable of transporting hundreds of times the amount of cargo). Also see United States v. Grinnell, supra, 384 U.S. at 574.

In a wholesale arrangement the selling utility undertakes a contractual obligation, normally for a period of 3 to 5 years,^{313/} to meet some or all of the firm bulk power requirements of its wholesale customer and the seller must plan and operate its bulk power system accordingly.^{314/} The seller thus must not only allocate a sufficient amount of its baseload, intermediate and peaking generating capacity to meet its wholesale customer's fluctuating power demands but, as described, must also have sufficient reserve capacity on hand to cover forced or scheduled outages of

^{313/} Mr. Paul who, among other duties, is Consumers' General Supervisor for wholesale sales (Tr. 7805-06) testified that the majority of Consumers' wholesale contracts run for an initial time period of three to five years. Tr. 7948. See, e.g., C. P. Exh. No. 11,309, section 10 (contract for electric service between Consumers Power Co. and the City of Charlevoix dated 1973); C. P. Exh. No. 11,310, Section 11 (contract for electric service between Consumer Power Co. and the City of Coldwater dated 1972). (Mr. Paul testified that these two contracts are representative of Consumers' wholesale agreements. Tr. 7939.) After the initial term expires the agreements are automatically renewed on a yearly basis unless either party gives written notice to the other, normally 24 months prior to the date it desires termination of the contract. See C. P. Exh. No. 11,310, section 11; C. P. Exh. No. 11,309, section 10.

^{314/} Consumers' wholesale contracts specify the amount of power contracted for delivery. This is referred to as a "capacity reservation". Paul, Tr. 7940. See, e.g., C. P. Exh. No. 11,309, section 1. The company plans its system on the basis of this capacity reservation (Paul, Tr. 7940-41), but it will permit an increase in the capacity reservation if it has the power available. See e.g., C. P. Exh. No. 11,309, section 1.

these plants. In short, as alluded to by Dr. Pace, a purchaser of wholesale power is buying a "package of services", of which coordination power is but a segment.^{315/}

In a coordination agreement, on the other hand, the utilities are not contracting to buy and sell power on a long-term, firm basis. Rather it is an arrangement whereby the parties agree to buy (or to sell) energy from surplus generating capacity on terms designed to reduce the overall cost of production to both of them. The seller's production cost is reduced by its ability to make use of (and charge for) some of its surplus generating capacity; the buyer's by satisfying part of its power needs at surplus prices. In these arrangements there is obviously no duty on the seller to insure continual availability of surplus power.

These differences between the terms under which coordination power and wholesale power are marketed are reflected in the prices charged for each product. Wholesale power rates are generally based upon the supplying utility's system-wide average costs, each wholesale buyer paying a share of the selling utility's total cost of production

^{315/} Pace, Tr. 7543, 7547 (see fn. 308, supra).

and, accordingly, all the capital and operating costs associated with the selling utility's bulk power facilities (generation and transmission) are included in the wholesale rate calculation.^{316/} Coordination power rates, on the other hand, tend to reflect in large measure the supplying utility's out-of-pocket or incremental costs.^{317/}

Typical of the industry, Consumers' wholesale rates are comprised of two components: A "capacity" or "demand" charge based on the maximum power demand (i.e., kilowatts) that the buying utility places on Consumers' system, and an "energy" charge based on the actual amount of electric energy (i.e., kilowatt-hours) delivered.^{318/} The energy charge is designed to recover actual production costs, e.g., fuel, labor and maintenance. It is calculated on the number of kilowatt hours of energy that Consumers

^{316/} See Jefferson, Tr. 8287-95. Mr. Jefferson is Consumers' Executive Director of Rates, Research and Data Control (Tr. 8274). The departments under his direction are generally responsible for formulating Consumers' wholesale and retail electric rates, Tr. 8275, but not the rates used in coordination agreements. Tr. 8333-34.

^{317/} See p. 150, infra. Also see Brush, Tr. 2086.

^{318/} C. P. Exh. No. 11,003 (Consumers' wholesale rate schedule which became effective June 7, 1973, Jefferson, Tr. 8430). Also see Jefferson, Tr. 8311 and Wolfe, Tr. 1755-56. Consumers files with the Federal Power Commission a wholesale rate generally applicable to its wholesale customers. Jefferson, Tr. 8310-11.

delivers to the buying utility.^{319/} The capacity charge serves another purpose. It is designed to recover that portion of Consumers' capital investment in electric plant necessary to supply the buyer's power needs. Because Consumers must have generating capacity to meet the buyer's demands at all times, Consumers bases the monthly capacity charge on the maximum power demand (called the "billing demand"^{320/}) that the buying utility places on Consumers' system in that month. There is one important exception, however, known in the industry as the "ratchet clause." Under the ratchet clause, "a customer's billing demand [for any particular month] can never be less than 60 percent of the highest billing demand which [it] created in the previous [eleven] months."^{321/} The ratchet clause has a purpose; it serves to insure that the wholesale customer pays some portion of Consumers' continuing investment costs in the electric plant that the company must maintain to serve the purchaser's intermittent power needs on a firm

319/ See C. P. Exh. No. 11,003.

320/ The billing demand is the "30-minute period of maximum use in the billing month". C. P. Exh. No. 11,003.

321/ Jefferson, Tr. 8309-12.

power basis.^{322/} (Apparently similar in purpose is the "minimum charge" provision included in Consumers' wholesale contracts^{323/}.) For a wholesale customer obtaining all its bulk power needs from Consumers, the ratchet clause is normally of little practical consequence. Such a system's power demand in any given month will most likely exceed 60 percent of its highest demand for the preceding eleven.^{324/} The situation is likely to be otherwise, however, where less than all bulk power needs are purchased.^{325/}

^{322/} Ibid. Ratchet clauses, though common in the industry, are not universal. Id. at 8407.

^{323/} See C. P. Exh. No. 11,310, section 6 (A minimum monthly charge of \$10,000); D. J. Exh. No. 64, section 6 (contract for electric service between Consumers Power Co. and Northern Michigan Electric Cooperative, dated 1967; minimum monthly charge of \$5,000). The capacity reservation (see fn. 314, supra) in both contracts was 10 MW.

In Consumers wholesale rate schedule filed with the FPC which took effect in June 1973, C. P. Exh. No. 11,003, Consumers' PP-1 rate (the wholesale rate offered to utilities which buy only part of their firm bulk power requirements from Consumers) sets out a standard formula for calculating the minimum charge for partial requirements customers. This charge is computed by applying the capacity charge to the capacity reservation in effect. Thus if a utility contracted for 10 MW of power from Consumers, it would, using the 1973 rates, pay at least \$26,140 per month.

^{324/} Chayavadhanangkur, Tr. 5212-13.

^{325/} It is possible for a utility to purchase wholesale power and coordination power simultaneously, the former in lieu of self-generation to meet a portion of its firm power requirement, the latter to supplement its own generation by which it meets the rest of its firm power demands. This possibility is explored below, pp. 345-50.

Charges under coordination arrangements vary depending on the particular coordination contract and the type of transaction involved. Some power exchanges are normally compensated for solely on the basis of an energy charge. Examples of such exchanges are economy energy (see fn. 288, supra), dump energy (ibid.) and emergency power. (As indicated earlier, the charge for emergency power is often based on the supplying utility's out-of-pocket cost plus 10 percent. See pp. 125-26, supra, and fn. 286.) Other coordination arrangements, maintenance power, short term power and seasonal power, for example, usually carry both a capacity charge and an energy charge.^{326/} Because these transactions are short term, however, a utility may contract for generating capacity for the specific period in which it expects to be deficient, be it a week, a month or a generating season, thus avoiding the ratcheting effect of capacity charge for succeeding periods. See fns. 306 and 307, supra. Again, the energy charges for these transactions are most often calculated as cost plus 10 percent of the supplying utility's out-of-pocket costs.^{327/}

^{326/} Mosley, Tr. 8498. Also see fn. 288, supra. Unit power is also comprised of a capacity charge and an energy charge both of which are based on the cost of the particular unit. See fn. 278, supra.

^{327/} See e.g., C. P. Exh. No. 11,108, Schedule D; C. P. Exh. No. 11,109, Schedule D; D. J. Exh. No. 105, Supplements A & C.

The cost difference between wholesale and coordination power stems principally from the wholesale "capacity charge" and the "ratchet clause" associated with it. Coordination agreements have either no capacity charge or one limited to the period when the excess capacity is actually needed. Not so under wholesale power agreements. Consumers' wholesale rate schedules, for example, include capacity charges based on the largest demand during a given month and 60% of that charge for the next eleven months. That capacity charge must be paid each month if no wholesale power were supplied by Consumers during those succeeding months. This "ratchet clause" imposes an enormous cost on a buyer who needs, let us say, only 10 Mw of power for a limited time to cover an emergency outage and is restricted to using wholesale power for this purpose.

To illustrate this, assume for the moment that a utility's reserve capacity is 10 Mw shy of that needed to cover the loss of its largest generating unit, that the unit is down for a week, and that the utility is so interconnected that it may either (a) rely on a reserve sharing agreement with some other utility or (b) purchase wholesale power from Consumers. Whether it takes option (a) or (b), the cost of the energy delivered to it --

the energy charge -- would be roughly the same.^{328/} With regard to the capacity charge, however, the picture changes dramatically. Under the reserve sharing arrangement (option (a)), the utility would incur a capacity charge at a rate of \$5,000 per week for one week, or \$5,000.^{329/}

^{328/} Under Consumers' wholesale rate schedule (PP-1 rate) the energy charge would be \$12,600 if the 10 MW of power were utilized for the entire week. C.P. Exh. No. 11,003. Under most coordination arrangements the energy charge would be 110 percent of the supplying utility's out-of-pocket costs. Using the coordination agreement between Consumers and the MC pool (which has a minimum energy charge), the cost of energy would be at least \$13,440.

^{329/} Strictly speaking, most of the coordination agreements in evidence limit the supplying utility's obligation to provide emergency power to 48 hours, and for this period impose no capacity charge. Thus, under most of the coordination agreements in evidence, the utility would pay no capacity charge whatsoever if it were able to repair generation and thus quit drawing emergency power within 48 hours. It would pay only an energy charge for the energy actually delivered.

Under these coordination arrangements, if the emergency continues beyond 48 hours the utility with the emergency may contract for short term power (or its equivalent) assuming the supplying utility has excess power available. Normally this power is contracted for on a weekly period, and involves a weekly capacity charge. See C. P. Exh. No. 11,112, Article IV, sections 1 and 2 and Service Schedule B-1; D. J. Exh. No. 105, Supplement B; C. P. Exh. No. 11,109, Service Schedule A; C. P. Exh. No. 11,108, Service Schedule A; C. P. Exh. No. 11,106, Article V, Sections 2 and 3. Also see Wolfe, Tr. 2062; Gutmann, Tr. 4702-03.

In general terms the actual capacity charge per kwh per unit of time provided for in the coordination agreements in evidence appears to be roughly 15 to 25 percent less than that in Consumers' wholesale rates. Compare D. J. Exh. No. 105 Supplements A, B & C; C. P. Exh. No. 11,112 Service Schedules B & C, and C. P. Exh. No. 12,024 with C. P. Exh. No. 11,003 (PP-1 rates). Also compare C. P. Exh. No. 11,106, Supplement S; C. P. Exh. No. 11,108, Service Schedule D; C. P. Exh. No. 11,109, Service Schedule D, and D. J. Exh. No. 76, Service Schedule D with D. J. Exh. No. 64, section 6.

But under option (b), the wholesale contract with Consumers, the buyer would have to pay a capacity charge for a full month figured on the highest power demanded, some \$26,140.^{330/} Additionally, even if the receiving utility never demanded another kw under the wholesale power agreement with Consumers, the ratchet clause in the agreement would add a capacity charge of \$15,860 for each of the next 11 months, or some \$200,600 in total.^{331/} The cost disparity is, obviously, substantial. Our conclusions in this respect

329/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

The capacity charge in the example above was calculated on the basis of the highest weekly capacity charge in these coordination agreements, which is \$0.50 per kilowatt of capacity per week. See D. J. Exh. No. 105, Supplement B; D. J. Exh. No. 92, Service Schedule B. Thus 10,000 kw of power bought at this rate would cost \$5000.

330/ Under Consumers' wholesale rate schedule for those customers that buy only part of their firm bulk power from Consumers, the monthly capacity charge is \$2.77 per kw for the first 2200 kw of the billing demand (see fn. 320 *supra*) and \$2.57 per kw for demand above 2200 kw. Applying this rate to 10,000 kw demand gives a monthly capacity charge of \$26,140. C. P. Exh. No. 11,003 (PP-1 rate).

331/ As we noted above, the ratchet clause results in a wholesale customer's billing demand for any month never being less than 60 percent of the highest billing demand it created in the previous eleven months. See page 148, *supra*. Thus, given that the utility drew 10 mw during the month that the emergency occurred, its billing demand in each of the next 11 months would be at least 6 mw. Applying Consumers' wholesale rate to this amount (see fn. 330, *supra*) yields a capacity charge of \$15,860 per month for each of the eleven months following the emergency. C. P. Exh. No. 11,003 (PP-1 rate).

are confirmed in the testimony of Mr. Mayben, Justice's principal expert witness on bulk power supply practices. He used a different but analogous example to illustrate the cost difference between wholesale power and coordination power. He assumed a forced outage for one hour of a 25 Mw unit. In an approximate calculation using earlier rates, under Consumers' wholesale contract the capacity charge would have been \$300,000; under a coordination arrangement, \$1,750.^{332/} No responsible utility would invoke option (b) (wholesale power from Consumers) to make up a temporary generating deficiency in circumstances where option (a) (the reserve sharing arrangement) was open to it; the former simply costs too much. And similar cost disparities exist between most other kinds of coordination

331/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Moreover, if the utility in our example has entered a wholesale contract with Consumers for 10 MW as standby to cover the possible failure of its generation, it could not avoid that \$26,000 cost. Under Consumers' minimum charges it would have to pay \$26,140 per month regardless of whether it even drew upon the 10 MW of power. See fn. 323 *supra*. In our example, we utilized the ratchet provision because some of Consumers' wholesale customers generate part of their firm bulk power requirements and the witnesses' testimony from which this example is drawn utilized the ratchet clause by way of explanation. Mayben, Tr. 3838-43. Also see Wolfe Tr. 1564-73; Munn, Tr. 4071-72.

332/ Mayben, Tr. 3838-43.

power arrangements on one hand and wholesale power on the other.^{333/}

We do not mean to imply that the seller of wholesale power in our example, whether it be Consumers or any other utility, is necessarily overreaching or gouging the buyer. As we explained before, in terms of obligation placed on the supplier, wholesale power is a vastly different animal than coordination power; the price differential is intended to reflect the cost of meeting that higher obligation. Our point is, rather, that wholesale power and coordination power are two different products. A buyer with needs that could be satisfied by power supplied under available coordination arrangements would scarcely be likely to contract for wholesale power for that purpose. It makes little sense to lease a furnished apartment for a year to accommodate an unexpected visitor where renting a motel room for a week would suffice.

^{333/} For example, both economy energy (which involves only an energy charge equal to half the incremental difference of the operating costs of the two units involved) and dump energy (which involves sale of surplus hydroelectric energy) are manifestly less expensive than wholesale power. See fn. 288, supra. One exception, however, may be unit power. As indicated in fn. 278, supra, the charge for unit power is based on the capital and operation costs of the particular unit. For a new unit this may be higher than the system's average cost which would include plants of older vintage. See Jefferson, Tr. 8293. However, assuming that the purchase were for the life of the unit, this would change. See Aymond, Tr. 6352-53. Moreover, with respect to purchases in a staggered construction arrangement, it must be kept in mind that the utility is also benefitting by deferring the costly construction of a generating facility of its own; see fns. 274 and 278, supra.

In sum, this substantial price disparity is another indication -- and we think a compelling one -- that these products are not in the same market. "To ignore price in determining the relevant line of commerce [i.e., product market] is to ignore the single most important, practical value in business." United States v. Aluminum Company of America, 377 U.S. 271, 276 (1964).^{334/}

^{334/} The Court in that case held a 50 percent price differential between aluminum conductors and copper conductors to place them in separate antitrust markets. It reasoned in full as follows (ibid.):

The choice between copper and aluminum for overhead distribution does not usually turn on quality of the respective products, for each does the job equally well. . . . vital factors are economic considerations. . . . It is said, however, that we should put price aside and [United States v. Brown Shoe, supra] is cited as authority. There the contention of the industry was that the District Court had delineated too broadly the relevant submarkets -- men's shoes, women's shoes, and children's shoes -- and should have subdivided them further. It was argued, for example, that men's shoes selling below \$8.99 were in a different product market from those selling above \$9. We declined to make price, particularly such small price differentials, the determinative factor in that market. A purchaser of shoes buys with an eye to his budget, to style, and to quality as well as to price. But here, where insulated aluminum conductor pricewise stands so distinctly apart, to ignore price in determining the relevant line of commerce is to ignore the single most important, practical value in business.

Accord, Avnet, Inc. v. FTC, supra, 511 F.2d at 77; Reynolds Metals Co. v. FTC, 309 F.2d 223, 229 (D.C. Cir. 1962); A. G. Spalding & Bros., Inc. v. FTC, 301 F.2d 585 (3rd Cir. 1962).

(c) Commercial practices. Consumers cites two occasions on which the smaller utilities allegedly chose not to exchange coordination power but to rely exclusively on self-generation and wholesale power. The company would have us conclude from them that "the record clearly establishes that coordination power is also reasonably interchangeable with wholesale purchases and self-generation." The instances to which Consumers points are not persuasive; none of the utilities involved turned to wholesale power where the option of engaging in coordination transactions was available.

The first involves "the municipal systems of Hart, Zeeland, Lowell and Portland" which, the company says, "desired to continue their existing purchase agreements with Wolverine rather than become 'full-fledged participants' in the [M-C] Pool".^{335/} But that is not the true picture. Article XII, section 12.01, of the M-C Pool Agreement (D.J. Exh. No. 104A), indicates that the pool members do engage in coordination transactions with Lowell, Hart and Zeeland. The transactions, however, are accounted for under the agreement as transactions between the cities as "associates of Wolverine" and Wolverine.

^{335/} Consumers' Appeal Brief, at 162, fn. 234. The M-C Pool is described at pp. 103-04, above.

The second instance is Traverse City's 1967 search for a "stronger interconnection to support its own generation".^{336/} With this in mind, the City entered negotiations with the Northern Michigan and Wolverine cooperatives and the City of Grand Haven which led eventually to formation of the M-C Pool.^{337/} When the discussions were fairly far advanced, Traverse City asked Consumers about an "interconnection agreement". The company responded by offering its standard wholesale partial purpose (PP-1) rate and an interconnection arrangement based on the "Holland formula." (See pp. 358-59, infra.) Traverse decided that the M-C "power pooling arrangement" and additional generation " * * * was the most economical and best alternative for the city,"^{338/} and rejected wholesale power purchases from Consumers as an alternative. These examples thus confirm rather than undercut the lack of reasonable interchangeability between coordination services and wholesale power.^{339/}

^{336/} Wolfe, Tr. 1561.

^{337/} Tr. 1562.

^{338/} Tr. 1563-64.

^{339/} Indeed, the record shows that three years earlier Consumers' divisional manager for the Traverse City area wrote Consumers' vice president "that it is most useless to try and sell the City of Traverse City a wholesale contract while this condition exists", the condition being a coordination agreement between Northern Michigan and Traverse City to exchange emergency energy. D. J. Exh. No. 175. Also see Wolfe, Tr. 1552; Steinbrecher Tr. 1956-59; D. J. Exh. No. 240.

Consumers' own coordination practices afford further support for the view that power acquired under wholesale contracts is not considered a substitute for power under coordination agreements. During the years 1970-73, for example, Consumers was deficient in generating capacity because of delay in bringing new plants on line and because of extended outages at its Palisades plant.^{340/} Consumers did not buy long-term wholesale power to cover that deficiency. Rather, it invoked the terms of its own coordination agreements to obtain seasonal capacity, short term power, and other coordination services for itself to make up that generating shortage.^{341/} Indeed, in 1973 alone Consumers acquired nearly 20% of its power -- at a cost of \$51,000,000 -- under coordination arrangements with other large utilities.^{342/} Consumers points out that this was a unique situation and that it does not and never has planned its system in contemplation of purchasing its bulk power requirements from other suppliers.^{343/} But this is precisely

^{340/} Mosley, Tr. 8500-8503, 8692-94. Also see D.J. Exh. No. 21, pp. 8-9 and D.J. Exh. No. 21A, p. 4.

^{341/} C.P. Exh. No. 12,022 at p. 424A-H (Consumers 1973 annual report to the Federal Power Commission). Also see citations in fn. 340, supra.

^{342/} Consumers' Appeal Brief, p. 171 fn. 252; C. P. Exh. No. 12,022 at p. 424-A.

^{343/} Consumers' Appeal Brief, p. 170.

our point. Coordination arrangements are not looked upon in the industry as a source of long-term firm bulk power, but rather as a low cost means of covering relatively short-term deficiencies of various types and for other temporary purposes. In short, because of its different "price, uses and quantities," power supplied under coordination arrangements is a discrete product and in a different market than wholesale power.

(d) Industry structure. Consumers offers one additional argument for placing wholesale power supplies and power supplied under coordination arrangements in the same product market. Premised on the undisputed fact that "firm power results from the electrical interconnections of a series of non-firm sources of power," Consumers argues that because differing combinations of non-firm sources of bulk power are economically substitutable for wholesale power, all must be in the same product market. That product, in Consumers' view, is "bulk power supplied to electric utilities for distribution and resale to ultimate customers."^{344/} Justice does not dispute that self-generation and wholesale power are reasonable substitutes for one another.^{345/} But it does not agree that coordination power exchanged among utilities to supplement their self-generation and reduce their production costs is in that same market.

^{344/} Pace, Tr. fol. 7239 at 33; see also Consumers' Appeal Brief, pp. 152-64.

^{345/} See Justice's Reply Brief Below, p. 56.

We think Justice is plainly correct not only for the reasons we have already set forth but for another as well: coordination transactions occur at a different level in the electric utility industry structure than wholesale power transactions.^{346/} The final output of any utility operating generating and transmission facilities is firm power in bulk delivered to distribution points -- their own or their wholesale customers' -- where the power is transformed to lower voltages and subdivided for actual delivery to the retail customer. Exchanges of coordination power services are surplus power transactions among generating utilities which go into producing that firm bulk power. In other words, as Justice's witness Dr. Wein testified,^{347/} as Dr. Pace acknowledged,^{348/} and as we stressed before, coordination power and associated services are factors of production, not the final product.

In most instances such a distinction, which relates to the structure of the industry, would automatically place the two in different markets (e.g., the market for sugar is different than that for candy). Nevertheless, Consumers'

^{346/} Cf., Avnet v. FTC, supra, 511 F.2d at 78.

^{347/} Dr. Wein illustrated this point thus (Tr. 4000):

If you are a particular Company X and you enter a pool with Y or a set of agreements with Y in which you engage in reserve sharing and in which you are engaged in wheeling for each other and other practices of coordination of that sort, what you are dealing with then is a set of practices which allows you to combine the factors of production most optimally, so your output then is available for you at lower cost than a company absent these privileges would be engaged in, * * *.

See also Mayben, Tr. 3702-03.

^{348/} Pace, Tr. 7562.

witness Dr. Pace had doubts whether a factor of production that functioned solely as one component in the final product could constitute a separate market.^{349/} We harbor no such doubts for the cogent reasons expressed by the Ninth Circuit in Case-Swayne Co. v. Sunkist Growers, Inc.^{350/} In that case involving "product oranges" (sold not as fresh produce but for making juice), the court of appeals explained:

While product oranges may have little, if any, value per se, the same is true of many raw products. The market for raw products is among the processors rather than the ultimate customer. We see no reason why the raw product may not be the relevant product market, even though it has little value in its raw state.

The fact that coordination power is used to augment a utility's self-generation in the production of firm bulk power, which is in turn economically substitutable for wholesale power, does not place all three in the same market. Consumers, by defining the product market to be all "bulk power supplied to utilities for distribution and resale to ultimate customer," has ignored the structure of the industry; it has collapsed two different functional aspects of electric utility operation -- i.e., generation and distribution -- into one.

^{349/} Tr. 7562-65.

^{350/} 369 F.2d 449, 457 (9th Cir. 1966), reversed on other grounds, 389 U.S. 384 (1967); also see Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561, 585 (10th Cir. 1961).

In the electric utility industry as in others, the manufactured product (here firm electric power) will eventually be sold to the retail customer. However, as is also true in most industries, there are on one side manufacturing and wholesale operations and on the other retail operations. Operators on the retail level seek sources of wholesale supply -- i.e., firm power in bulk -- from those at the manufacturing level. This defines the buyers and sellers of one product market: wholesale firm bulk power. See pp. 200-12 infra. Because of the peculiar characteristics of electricity (see pp. 115-20, supra), operators on the manufacturing level buy, sell and exchange surplus bulk power and associated services to improve the efficiency (i.e., lower the cost) and reliability of their own operations. This delineates the buyers and sellers in another product market: coordination services.^{351/}

Of course, those at the retail level have an alternative to buying at wholesale -- they can enter the manufacturing level themselves; viz., become "vertically integrated" in the antitrust lexicon. And it is true that many if not most large utilities (including Consumers) are vertically

^{351/} In some instances a utility may utilize both **self-generation and wholesale power to meet its retail load**. To the extent that it depends on wholesale purchases it is not a producer of firm bulk power but solely a buyer in the wholesale power market. However, such a utility would seek coordination services to supplement the generation it does have. Chayavadhanangkur, Tr. 5314. Also see Pace, Tr. 7558. Thus, a utility could simultaneously enter transactions in both the coordination services market and the wholesale power market. See pages 345-50, infra.

integrated. But this does not detract from the fact that the electric utility industry is recognized as structured into discrete levels of operation -- production and delivery of firm bulk power to distribution points, and retail distribution of power from those points ^{352/} -- with separate relevant product markets at each level.

^{352/} "There are three distinct functions in supplying electricity to the ultimate consumer: generation, transmission and distribution. These functions correspond to the manufacture, transportation to market, and retail distribution of many products, except that electricity moves from the point of generation to the point of ultimate use in a continuous flow with the speed of light, 186,000 miles per second.

"Generation takes place at hydroelectric plants which transform the energy of falling water into electricity or at steam-electric plants which generate electrical energy with heat derived from the fossil fuels and nuclear fission. Transmission is the transportation of electrical energy at high voltage from generating plants to bulk delivery points. Distribution completes the process of delivery to the individual consumer at lower voltage.

"Generation and transmission facilities are as a general rule economically interdependent in that the choice of location, design, and scale of generating capacity must take into account the associated costs of transmission and vice versa. Responsibility for generation and transmission customarily go together. Distribution can be, and frequently is, conducted efficiently as a separate operation from generating and transmission."

FPC, 1964 National Power Survey, Part I at page 12. Also see Wein, Tr. fol. 3979 at 45-54.

That generation and transmission of firm bulk power is a function separate from that of retail distribution is evidenced by the fact that of the approximately 3500 electric utilities in the United States slightly more than two-thirds operate solely at the retail distribution level. Wein, Tr. fol. 3979 at 27-8; FPC, 1970 National Power Survey, pp. I-1-19 to 12.

(e) Coordination as a "bundle of services." As the Licensing Board recognized, coordination arrangements usually comprise several differing types of surplus power transactions and associated services. 2 NRC at 45. For the reasons detailed at length above, these various power transactions are not reasonably interchangeable with wholesale power. But neither are they necessarily interchangeable with one another. All, however, serve an essentially similar function. That function is facilitating production of firm bulk power at lower cost and with greater reliability by making profitable use of otherwise surplus generating capacity. These arrangements constitute a "bundle of services" which merits recognition as a distinct market similar to the way various services offered by commercial banks fall in one and the same product market. United States v. Philadelphia National Bank, supra, 374 U.S. at 356.

A similar conclusion was recently reached in closely analogous circumstances in United States v. Hughes Tool Co., 415 F. Supp. 637 (C.D. Cal. 1976). The court there accepted as being in the same relevant product market a group of 36 different tools on the theory that they functioned together in the drilling, completion and working over of oil and gas wells. Id. at 640-41. Coordination services contracts serve similarly complementary functions. We find them fairly grouped together

in one product market. Accord, United States v. Grinnell, supra, 384 U.S. at 572 (relevant market comprised of all central station alarm services); Balfour v. FTC, supra, 442 F.2d at 9-11 (relevant market comprised of all national college insignia-bearing goods even though members of each fraternity would only buy goods with their insignia); British Oxygen Co., ___ FTC ___, 3 CCH Trade Reg. Rep. Par. 21,063 at p. 20,910 (1975) (relevant market comprised of all industrial gases), reversed on other grounds, British Oxygen Co. v. FTC, ___ F.2d ___ (2d Cir. 1977).

Before we leave this area there are some loose ends to be tied up. One is the parties' disagreement over whether wheeling is properly considered a coordination transaction as Dr. Wein testified.^{353/} Consumers agrees that transmission services are a necessary corollary service to coordination power exchanges, but contends that a wheeling arrangement as such -- one utility facilitating a power exchange between two others -- is usually not included in coordination agreements.^{354/} The record is to the contrary. For example, two coordination agreements in evidence specifically provide for wheeling services.^{355/}

^{353/} Tr. 4000.

^{354/} See Slemmer, Tr. fol. 8838 at 21-22.

^{355/} D. J. Exh. No. 104A, Service Schedule E; C. P. Exh. No. 11,109, Schedule G.

Moreover, the Edison Electric Institute (an association of large U. S. utilities) in its document, Principles of a Coordination Agreement, specifically includes "[t]ransmission capacity made available by one system for the interchange of power and energy between or among other systems" -- in other words, wheeling -- among the types of coordination services.^{356/} We therefore find wheeling transactions properly classified as coordination services.

Finally, there is the question of "developmental coordination," the construction of power plants on a staggered basis or as joint ventures by two or more utilities with the intention of sharing the power generated by them. We find it difficult to conceptualize how a joint venture project forms part of what Justice describes as a "market in which producers of firm electric power transact with one another for the necessary factors of bulk power production", although the purchase and sale of "unit power" from such plants is within that market.^{357/}

^{356/} D. J. Exh. No. 167, p. 11. Also see Wolfe, Tr. 1603.

^{357/} See fn. 288, supra.

(f) Geographic market for coordination services.

Our finding that coordination services constitute a separate product market answers only half the problem; there remains the question of the relevant geographic market for that product. As we discussed earlier, it is in the context of that market that we must view the evidence bearing on the monopolization charges against Consumers.

The Board below noted that the Department of Justice did not attempt to establish exact metes and bounds for the "regional power exchange market" (as Justice terms the overall market for power supplied under coordination arrangements). 2 NRC at 107-08. Justice's economic witness, Dr. Wein, did suggest that the "Michigan Pool" (viz., Consumers Power and Detroit Edison) is an example of such a market. His testimony, however, went on to indicate that, through interconnections and agreements with other utilities and pools, the bounds of that market might also be viewed as going beyond the immediate service areas of the two utilities. Tr. fol. 3979 at 54-55.

The Department took the position that the "regional power exchange market by its very nature does not lend itself to precise geographic market definition. Electric utilities with access to this market range far and wide

in search of useful power exchange transactions; they are not restricted to specific geographic limits or certain identified utilities with whom they may deal".^{358/} For these reasons, Justice argued that it need not establish the exact perimeter of this entire geographic market to show monopolization. In the Department's view, it suffices to focus attention on Consumers' actions in a smaller economic entity or "submarket" within that broader market.

We agree with Justice's legal position. Where a discrete submarket exists within an overall geographic market, monopolization of the submarket is itself an anti-trust violation. Brown Shoe Co. v. United States, supra, 370 U.S. at 336-37; Case-Swayne Co. v. Sunkist Growers, Inc., supra, 360 F.2d at 455-59; In re Luria Brothers and Co., supra, 62 FTC at 612-14. A submarket must correspond to commercial realities and be economically significant, Brown Shoe, supra, and its existence is a question of fact that must be "charted by a careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for suppliers." United States v. Philadelphia National Bank, supra, 374 U.S. at 359.

^{358/} The passage is quoted from pp. 85-86 of Justice's Opening Brief Below. See also Mayben, Tr. 2767, 3703-05.

The record discloses that the area to which the small utilities may turn for coordination services is limited to Consumers' service territory and nearby environs, as described above in Part IV. This is because where the smaller utilities are located, Consumers owns and operates the only transmission network interconnecting with larger neighboring utilities. As the Licensing Board found, "[m]ost of the small utilities in the relevant geographic market are too remote from" those larger utilities to build interconnecting transmission lines of their own at a reasonable cost. 2 NRC at 108. That Board was consequently led to find -- correctly in our judgment -- that the small utilities could enter bulk power transactions in the broader regional power exchange market only if Consumers would wheel power to them (ibid.), a finding that Consumers does not dispute.

Manifestly, absent appropriate electrical interconnections between them, utilities cannot engage in coordination transactions. The smaller utilities are thus limited to (1) coordinating with one another, (2) coordinating with Consumers Power Company itself, or (3) using Consumers' lines to have coordination power wheeled to them from the

regional power exchange market. The last option Consumers has so far foreclosed. These being the only choices open to them, there exists a geographic submarket for coordination services corresponding essentially to Consumers' general service area, for this is the area in which the smaller utilities, a significant group of purchasers, are confined by commercial realities.^{359/}

^{359/} Case-Swayne Co. v. Sunkist Growers, Inc., supra, 369 F.2d at 455-58; Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289, 304-06 (D.Colo. 1969); Luria Bros. and Co., supra, 62 FTC at 612-13. See also Brown Shoe Co. v. United States, supra; United States v. Pabst Brewing Co., 384 U.S. 546, 551-52 (1966); United States v. Kimberly-Clark Corp., 264 F. Supp. 439, 455-56 (N.D. Cal. 1967).

2. The Retail Market

a. Only Justice and Consumers analyzed the retail market in lower Michigan. Both agree that the product involved is firm electric power supplied by distribution systems to the ultimate retail user. Both parties also accept the Licensing Board's determination that the geographic market encompasses Consumers' present service area plus those additional areas which it could reasonably serve. The two disagree, however, about whether that market should be broken into submarkets reflecting the "commercial realities" of retail power distribution in lower Michigan as Consumers perceives them.^{360/} The company proposed the existence of "two distinct relevant geographical markets": One "open", embracing those areas "where purchasers of

^{360/} Consumers developed this argument at length before the Licensing Board in its Opening Brief Below at 97-111 and in its Reply Brief Below at pp. 62-70. Consumers' appeal brief omits a retail market analysis as unnecessary "because retail sales are far removed from the question of bulk power supply and coordination with which this case is centrally concerned." Consumers' Appeal Brief, p. 179. We disagree. A utility's bulk power practices can have serious anticompetitive effects on the retail market as exemplified by the situation in Otter Tail v. United States, *supra*. Justice presses this issue on appeal. Accordingly, we will resolve it, the parties having fully litigated the question below.

retail power presently have a choice of electric supplier"; the other "closed", covering areas where "no present choice [of supplier] exists * * * and there is little likelihood that such a choice will exist in the foreseeable future".^{361/} This closed market Consumers would subdivide into (a) a "perpetual closed" submarket, consisting of those cities where the company is the sole supplier of electric power pursuant to a Foote Act franchise, and (b) a "long-run closed" submarket of cities and townships served by Consumers or some other private utility under 30 year franchises together with most cities served by municipal electric systems.^{362/}

Consumers justifies the division of the retail geographic market into "open" and "closed" areas on what it

^{361/} Consumers' Opening Brief Below, pp. 97-111. In the open market Consumers includes "(1) the municipalities of Bay City and Traverse City, (2) the areas immediately surrounding the twenty-three neighboring municipalities which operate electric systems where the distribution facilities of these systems overlap or interface with those of Consumers Power Company, and (3) the areas where the distribution facilities of the Company and the cooperatives overlap" -- to the extent the Michigan Public Service Commission's regulations, discussed above, see page 83, supra, permit retail customers a choice of electric suppliers. Id. at 100-101.

^{362/} Id. at 103-111. Consumers excludes Bay City and Traverse City from this submarket. See fn. 361, supra.

perceives as differing "legal and economic barriers" to competition in each.^{363/} Consumers says that in lower Michigan, legal and economic restraints effectively preclude retail competition in the "closed" market and only in the "open" market is retail competition actually feasible. Reasoning from those premises, Consumers arrives at two related but distinct conclusions. The first is that the relevant geographic area in which to measure its retail market strength should be limited solely to those areas it denotes as "open" to competition. The second, as a corollary of the first, is that the legal and

^{363/} Briefly, the "legal barriers" on which Consumers relies to support its position are (1) the statutory requirement that a private utility obtain a certificate of public convenience and necessity from the Michigan Public Service Commission before extending its service into an area already being served by a different private utility; (2) the MPSC's restrictions on door to door competition between private utilities; (3) Michigan law limiting retail service by a municipal electric system beyond its incorporated boundaries; (4) federal law precluding rural electric cooperatives from initiating service in towns exceeding 1500 in population; and (5) the current franchise laws in Michigan. (These legal constraints are described in detail in Part IV above.) The "economic barrier" on which Consumers relies is the large capital investment and attendant economic risks associated with entering the electric utility business, particular in the perpetually closed submarket where a newcomer would be forced, according to Consumers, to compete at a door to door level. See Consumers' Opening Brief Below, pp. 97-111; Consumers' Proposed Findings of Fact and Conclusions of Law, pp. 12-18; Consumers' Appeal Brief, pp. 144-50.

economic barriers to competition in the "closed market" preclude any inference that it possesses monopoly power in that market by virtue of its high market shares -- 77 percent of the "long-run closed" submarket and of course 100 percent of the "perpetual closed" submarket.^{364/}

Consumers made both these arguments below; in its appeal brief it presses only the latter.^{365/} Both, however, hinge on what Consumers perceives as insurmountable barriers to competition. We discuss here the impact of these barriers and whether they justify subdividing the geographic market for retail power. Discussion of whether those barriers also preclude drawing any inferences about Consumers' possession of monopoly power from the size of its market share we defer to Part VI, infra.

b. We have previously set out the judicial guidelines for fixing the boundaries of geographic markets and therefore need not rehearse them here. As we have noted, Justice and Consumers agree that the area where Consumers now distributes or reasonably could distribute electricity at

^{364/} Consumers further argues that state and federal regulation in fact preclude it from having monopoly power in any market. We discuss this in Part VI, infra.

^{365/} Compare Consumers' Opening Brief Below, pp. 97-111 and 136-45 with Consumers' Appeal Brief, pp. 132-51 and 179-84.

retail defines the overall spread of the relevant geographic retail power market. As we see it, whether there are submarkets within that overall market depends on acceptance of the thesis that the relevant retail market should be limited to areas where the individual retail customers currently have a choice of electric supplier. There are few such areas in lower Michigan. That choice exists principally in Bay City and Traverse City, where there is door-to-door competition between Consumers and the city-owned electric systems.^{366/} The other areas where a choice of electric supplier may exist are the regions surrounding the 19 municipal systems located within Consumers' general service area and the rural areas where Consumers' distribution lines overlap the cooperatives'. The record confirms that door-to-door competition

^{366/} Aymond, Tr. 6542; Paul, Tr. 7808. Also see D. J. Exh. Nos. 190-194. Consumers has Foote Act franchises for these cities.

can, and to a certain extent does, exist in these areas^{367/} and

367/ We have described in Part IV, supra, the potential for door-to-door competition between Consumers and the small utilities in lower Michigan. To recapitulate, the MPSC's single phase rules, issued in 1966, preclude competition between the distribution cooperatives and Consumers for existing single phase (residential and small commercial) customers and place restrictions on competition for new single phase customers. See fn. 161 supra. No similar restrictions existed at the close of the record on competition for existing or new three phase (industrial and large commercial) customers. The MPSC apparently does frown on competition for existing three phase customers, Paul, Tr. 7846, and it does on occasion express its opinion as to which utility should serve a particular three phase customer. See Paul, Tr. 7854-56.

The municipal systems do not fall under the jurisdiction of the MPSC and thus the MPSC's rules restricting door-to-door competition do not apply to possible competition between Consumers and municipal systems. However, the state laws enacted in 1974, which allow a municipal system to sell an unlimited amount of electric energy in areas contiguous to its boundaries, require the city to obtain the permission of the pre-existing power supplier before extending service to its existing customers. Thus in practice competition in areas bordering the municipalities is limited to serving new customers.

We briefly list some of the actual and potential competition that is possible for individual retail loads in lower Michigan. For example: (1) Prior to the adoption of the MPSC's single phase rules there was significant competition between the cooperatives and Consumers for both existing and new single phase customers. Westenbroek, Tr. 982-87. The MSPC's single phase rules "virtually" eliminated competition for existing single phase customers. Westenbroek, Tr. 932; Paul, Tr. 7846.

(FOOTNOTE CONTINUED ON NEXT PAGE)

that in instances it may be vigorous. ^{368/} The total amount of

368/ There is, however, still some competition for new customers. Westenbroek Tr. 985, 1039; Paul, Tr. 8180. (2) In regard to three phase loads, roughly speaking it is economical for a utility to extend a distribution line one mile to pick up a retail load of 1000 Kw. See Paul, Tr. 8085-90. Of Consumers' customers with loads over 3000 kw, of which there are 129, 12 are within three miles of an existing cooperative's distribution line and located outside a community of 1500, thus making it both economically and legally feasible for the cooperatives to serve them. Paul, Tr. 8085-90; C.P. Exh. No. 11, 305. (Mr. Westenbroek testified that larger industrial loads would help even out a cooperative's load demand, which is largely residential, and thus be beneficial to them. Tr. 952-53, 1034-35.) Also, there were some 4500 to 5000 new three phase customers who from 1966 to 1971 located in the rural areas where both the cooperatives and Consumers are franchised to serve. See Pace, Tr. fol. 7239 at 29-30. (3) There may be door to door competition between Consumers and a municipal system in those areas the city has annexed. Paul, Tr. 7812-18. Further, there is actual competition outside corporate limits between Consumers and approximately half of the municipal systems within its general service area. See Paul, Tr. 7831-33. (4) In regard to possible competition between municipal systems and Consumers for new industrial loads, in 1972 for example, of the "68 industrial plants constructed within [Consumers] general service area, * * * 6 were located within or near municipalities that operated municipal electric systems." Paul, Tr. 7836. Also Consumers serves industrial customers within several of the municipalities that operate electric systems and thus there is the possibility of competition between Consumers and municipal systems to serve these loads. See Paul, Tr. 7816, 7829-30, 8018. (5) Finally Mr. Paul testified that there is competition between Consumers and cooperatives or municipal systems to serve new housing subdivisions. Tr. 8225-26.

This list of actual and potential competition for individual retail customers is not intended to be exhaustive. To summarize, it would appear that the greatest potential for such competition is with respect to new commercial and industrial loads and for new housing subdivisions.

368/ For example, see D. J. Exh. No. 114-19.

electric power sold in these areas, however, is small in terms of the total power sales in lower Michigan.^{369/}

Given the nature of electric power this is hardly surprising. Manifestly, a retail user cannot travel to different shopping malls in search of electric power. It is the supplier who must literally bring his product to the user's door. Moreover, to provide that retail service, a utility must build and operate a costly distribution network -- towers, lines, transformers, etc. Duplicate systems would be inefficient not to mention unaesthetic. Consequently, as the Supreme Court observed in Otter Tail, supra, it is recognized throughout the electric utility industry that "[e]ach town * * * generally can accommodate only one distribution system;" thus "making each town a natural monopoly market for the distribution and sale of electric power at retail." 410 U.S. at 369. One would, therefore, generally expect little door-to-door competition for the sale of electric power at retail and

^{369/} See Pace, Tr. fol. 7239 at 17-19.

that those areas where such competition did occur to be near the boundaries of the individual natural monopolies.

It is, however, precisely to those limited areas between natural monopolies (in addition to Bay City and Traverse City) to which Consumers urges that we restrict our attention in determining the relevant retail market and in measuring its retail market strength. While we can certainly agree with Consumers that door-to-door competition in such areas deserves antitrust protection, at least equally deserving is competition for the right to be the sole distributor in these individual natural monopolies. We are ineluctably drawn to this conclusion by the Supreme Court's teachings in Otter Tail v. United States, supra, which Consumers apparently would have us ignore.

As detailed in the trial court's opinion in that case, the Otter Tail Power Company was a vertically integrated electric utility providing retail service to 465 municipalities in the States of North Dakota, South Dakota and Minnesota "pursuant to franchise agreements awarded to it by the city or town. By state law in each of the three states the franchises [were] nonexclusive and, depending upon the state, the franchise terms [were] limited to periods ranging from ten to twenty years." These "franchises customarily [granted] Otter

Tail the right to construct and maintain electric distribution systems" within the municipality's boundaries.

331 F. Supp. at 57.

The events that led to the government's Sherman Act civil antitrust suit against Otter Tail were initiated when four municipalities decided not to renew that utility's franchises and to establish their own retail power distribution systems instead. In an effort to prevent its displacement as their sole retail supplier, Otter Tail refused either to sell wholesale power or to wheel power from outside sources to the four prospective municipal systems. The district court was thus called upon to determine (inter alia) the appropriate relevant geographic market in which to gauge the anticompetitive effect of the utility's refusals to deal. The court found that market to be the 465 towns that Otter Tail served at retail, together with the 45 towns in Otter Tail's service area served exclusively by municipal electric systems. 331 F. Supp. at 58-9. The Supreme Court upheld that relevant geographic market determination, observing that (410 U.S. at 369-70):

The aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the towns at retail. That competition is generally for the right to serve the entire retail market within composite limits of a town and that competition is generally between Otter Tail and a prospective or existing municipal system.

In short, what the courts held entitled to protection from Otter Tail's anticompetitive practices was not door-to-door competition between retail distributors, but the potential competition that exists by virtue of each local government's right to replace its existing retail power supplier. As the district court in Otter Tail phrased the point (331 F. Supp. at 64):

Of course, it should be remembered that a public utility which operates without exclusive franchises from its customers does not have a right to be free of competition. Rural Electrification Administration v. Central Louisiana Electric Company, 354 F.2d 859 (5th Cir. 1966). This has long been the law and extends to competition from municipally owned facilities. Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938).

There is nothing startling about this idea. Consumers' own economic witness, Dr. Stelzer, candidly acknowledged the existence of such "potential competition" in his testimony:

Although local distribution remains a monopoly service, however, the identity of the monopolist is, in a number of instances, open to competition -- which may become more extensive. This is really a form of potential competition in that the utility currently serving a locality may be supplanted if it fails to perform adequately.^{370/}

^{370/} Tr. fol. 7224 at 16, emphasis in original. Dr. Stelzer was testifying about the electric utility industry in general, not the market situation in lower Michigan. Also see Paul, Tr. 7994.

Thus, although most retail electric customers have no individual choice of electric supplier, they may (as in Otter Tail) have that opportunity collectively through their local governments. Because that possibility existed, the district court defined and the Supreme Court concurred in a relevant geographic market embracing all the municipalities which Otter Tail could or did serve, though no "door-to-door" competition existed or was likely to develop.

c. Consumers' proposed "open" and "closed" market divisions would require us to disregard any potential competition to be the sole electric power distributor within each of the individual natural monopolies. Consumers' position rests on its perception of legal and economic barriers in lower Michigan which it says make changes in electric suppliers in its proposed closed market remote and unlikely.

We decline to follow that course. In those areas in lower Michigan where utilities serve under limited term franchises (i.e., Consumers' proposed "long-term closed" submarket), we perceive no legal barriers to competition significantly different from those faced in Otter Tail, and Consumers points to none.^{371/} As we have described (Part IV above), the Michigan Constitution vests cities and townships with authority to grant, upon approval of their electors, franchises to public utilities to serve within their boundaries. As in Otter Tail, these franchises are non-exclusive and of limited duration; the maximum period for which a local government can grant a franchise is thirty years. True, this period is longer than the franchise periods involved in Otter Tail. This is a distinction without a difference. Its significance is confined to the fact that it limits the occasions when a private utility is vulnerable to displacement. Sooner or later, however, that utility must seek renewal of its

^{371/} Consumers stresses that the States of Minnesota and South Dakota did not regulate retail rates in the period leading up to the Otter Tail litigation. North Dakota, however, did regulate retail rates.

franchises. When it does, a locale dissatisfied with the reliability, cost or other aspects of the utility's service may refuse. And as Consumers acknowledges, no less than 215 of its franchises will expire by the end of 1985.^{372/}

It is undisputed that the Michigan Constitution empowers a city (with its electors' approval) to establish its own municipal electric system. Thus, as in Otter Tail, when Consumers' franchise expires, a city may elect to do just that. Alternatively, a city with a municipal electric system could at any time decide to discontinue its operation and substitute a private utility. In other words, the competitive choices of municipalities in Consumers' "long-run closed" submarket parallel those of the municipalities in Otter Tail.^{373/}

The situation is somewhat different respecting

^{372/} C. P. Exh. No. 11,306.

^{373/} Townships may not substitute their own electric systems in lieu of the existing supplier, but might franchise a different private utility, e.g., a cooperative. (The Rural Electrification Act bars cooperatives from extending service to cities of more than 1,500 population but not to townships.) See pp. 89-90, supra.

Consumers' Foote Act franchises.^{374/} Under these, the local government may not displace a utility by refusing to renew its franchise. But Foote Act franchises are not exclusive and establishment of a retail distribution system in direct door-to-door competition with the Foote Act franchisee is permissible. (See p. 80, supra.) A municipality also possesses the right to condemn the private utility's distribution facilities. Consumers does not contend that either route is legally barred. Rather, the company premises its position on what it deems the sheer unlikelihood of those eventualities occurring.^{375/}

374/ Consumers asserts that Foote Act franchises are perpetual in duration. Justice contends that Michigan court rulings on the matter leave open the real possibility that some time limit will be placed on these franchises. We need not become embroiled in that controversy. For our purposes we assume that Foote Act franchises are perpetual.

375/ Consumers' contends that condemnation by a city is more difficult in Michigan than in most states because Michigan law does not vest "municipal governments with unrestrained powers of eminent domain; rather, before any property can be condemned a jury or independent commission must find that the condemnation is a 'necessity'. MSA 8.20, 8.78, 5.1858 (fourth class cities) and 5.1432 (villages)." Consumers' Appeal Brief, p. 146 fn. 194. Consumers does not, however, point us to any Michigan case law describing what constitutes "necessity". Moreover, this does not mean that condemnation of its distribution system is impossible, only that the procedures and requirements for doing so are difficult.

We can agree with Consumers that setting up a retail distribution system in a Foote Act franchise area in direct competition with the existing franchisee would be risky business.^{376/} However, if Consumers should fail to give satisfactory service, or charge retail rates excessively above those which a prospective municipal system could offer, Consumers' own witnesses did not deny that the municipality might well consider entering the market itself.^{377/} Stated differently, the legal right of the municipalities to elect to compete with Consumers is a form of potential competition not without influence in the marketplace.^{378/}

^{376/} See Consumers' Appeal Brief, p. 149. Consumers cites testimony of Mr. Wolfe to this effect. Tr. 2039.

^{377/} Dr. Pace admitted that a significant disparity in retail rates "might be" sufficient to overcome what he perceived as barriers to entry in Foote Act franchise areas. Tr. 7270-71. Also see Paul, Tr. 8064.

^{378/} See quotation from Dr. Stelzer, P. 182, supra.

Indeed, contrary assertions in Consumers' briefs notwithstanding, the chief executive of Consumers himself testified that his company was concerned about municipalities setting up their own power distribution systems in competition with his company and, eventually, forcing Consumers to sell out. Mr. Aymond went so far as to testify that "it is definitely a possibility, and it could happen in certainly all of the larger communities and the cities that [Consumers] serve[s]."^{379/}

^{379/} Tr. 6468. Mr. Aymond testified in full, id. at 6465-68:

- Q. [By counsel for the Department of Justice] * * *
In other words, my question really is: Why is it that you made this decision to sell out in Lansing [see fn. 380, infra] but haven't made the decision to sell out in Bay City and Traverse City?
- A. [By Mr. Aymond, Chief Executive Office of Consumers Power Company] We have succeeded in Bay City in maintaining a good share of the business there despite the lower rates on the municipal system. Now in the case of Lansing, the differential in rates was greater, I believe, and our analysis of the situation was that we would not retain very much of the business and it would be a losing proposition for us to try to compete with the City. If that had been our only business, for example, we would have gone broke at it. We couldn't afford to compete with them. They were underselling us in the marketplace and we couldn't recover our costs at our standard rates and, of course, if we lowered our rates we would still not be recovering our costs so we had no alternative.
- Q. [Justice's Counsel] Well, if the gap had been greater, the disparity had been greater in Traverse City and Bay City, would that have affected your decision there as well?
(FOOTNOTE CONTINUED ON NEXT PAGE)

In sum, though a Foote Act franchise is certainly a higher barrier to potential competition than a limited term franchise, in neither case does Michigan law bar a municipality from entering into door-to-door competition with Consumers or from displacing it through condemnation.

379/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

A. [Mr. Aymond] It very well might, because then we would lose the business and we would have no return on our investment whatsoever, and the only thing we could do then would be to bail out and there would no longer be any competition in the municipality. They would have all the business.

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. [Justice's Counsel] Are you concerned with this possibility?

A. [Mr. Aymond] Yes, sir.

* * *

Q. [Justice's Counsel] But are you concerned that this could happen if they had the ability to create a considerable gap between their rates and your rates? * * * meaning that your company would be forced to sell their facilities to them from the competitive pressures.

A. [Mr. Aymond] 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.
(FOOTNOTE CONTINUED ON NEXT PAGE)

d. Even though Consumers does not consider its retail market position immutable, and despite the fact that in at least one instance business practicalities forced Consumers to sell out part of its system to a municipality,^{380/} and notwithstanding that on at least two occasions since 1960 serious questions arose about whether the company's franchises would in fact be renewed,^{381/}

379/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Q. [Justice's Counsel] Yes, sir.

A. [Mr. Aymond] But it is definitely a possibility it could happen in certainly all of the larger communities and the cities that we serve.

380/ Lansing annexed what is referred to as the North School District about 1960. At that time Consumers was the sole supplier of electric power therein. Immediately upon annexation the residents petitioned Lansing to furnish electric service. Rather than face door-to-door competition with Lansing, Consumers sold its distribution system to Lansing. (See fn. 379, *supra*.) As part of the bargain, Lansing sold some of its distribution lines in rural areas to Consumers and agreed to buy wholesale power from Consumers for 10 years to serve the retail demand in the North School District. Brush, Tr. 2073-74; Aymond, Tr. 6461-63; Wein, Tr. fol. 3979 at 73.

381/ Mr. Paul testified that there have been two instances since 1960 where Consumers' franchises have not been routinely renewed. "In one case [the company] accepted an interim revocable franchise and in the other case [the company was at the time of the evidentiary proceeding] working with the municipality to resolve the franchise matter." Tr. 7867.
(FOOTNOTE CONTINUED ON NEXT PAGE)

it is nevertheless true that Consumers has not lost any of its retail distribution systems to other existing or emerging utilities since 1950.^{382/} The converse, however, is not true. In that same period (i.e., post-1950), Consumers has gained control of 8 electric utilities, 7 municipal and one privately owned -- three since 1960.^{383/} Consumers has also bought outlying distribution lines from existing municipal systems and since 1960 the company has attempted, albeit unsuccessfully, to acquire three other small utilities.^{384/} We therefore find

381/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

The record does reveal, however, that the City of Zeeland did in the 1930's, with the aid of PWA funds, establish a municipal system. Prior to that time Consumers had been the only system franchised to operate in the city. After the city established its system, it did not renew Consumers general franchise to serve but did allow the company to continue serving those existing customers who desired not to switch to the city's system. Westenbroek, Tr. 938-39; Pace, Tr. 7257-58; Paul Tr. 7814-15.

382/ Wein, Tr. fol. 3979 at 72; D.J. Exh. No. 12.

383/ Paul, Tr. 7992-93. Also see Westenbroek, Tr. 1025-27.

384/ Consumers formally offered to buy the municipal systems in Charlevoix (1962) and St. Louis (1965); and to lease Traverse City's system for 30 years (1965). D.J. Exh. No. 12; D.J. Exh. No. 188; C.P. Exh. No. 11,308.

the retail market situation nowhere near as stable a picture as Consumers would paint it. The record indicates that changes of electric supplier for groups of retail customers can and do occur -- albeit mostly in Consumers' favor.

e. In sum, legal barriers do not preclude all retail competition in Consumers' proposed closed market.^{385/} To the contrary, Mr. Aymond's own testimony confirms that Consumers is itself aware of both actual and potential

^{385/} The cases that Consumers cites, United States v. Marine Bancorporation, Inc. 418 U.S. 602 (1974) and United States v. Connecticut National Bank, 418 U.S. 656 (1974) (see Consumers' Opening Brief Below, p. 110-11) to support its division of the retail market into "closed" and "open" areas are inapposite to the factual situation in lower Michigan. In Marine Bancorporation state law forbade branch banking by a bank outside the city and unincorporated areas of the county in which the headquarters were located. 418 U.S. at 609-10. In Connecticut National Bank state law specifically barred branch banking by a commercial bank in those towns where the main office of another bank was located. 418 U.S. at 659, fn. 1. (Also both were potential competition cases brought under section 7 of the Clayton Act, see fn. 465, infra). As we have shown, no comparable legal bars exist with respect to prospective municipal power systems in lower Michigan.

retail competition in lower Michigan.^{386/} Moreover, the presence of small independent systems in lower Michigan

^{386/} See fn. 379, supra. Also see Tr. 6059-62. There Mr. Aymond testified that granting the small utilities either joint venture access or unit power access to nuclear power or other large baseload units could provide them with "artificial and unfair competitive advantages". Tr. 6059. This testimony prompted the following colloquy between the initial Licensing Board Chairman and Mr. Aymond (Tr. 6060-62):

CHAIRMAN GARFINKEL: But, Mr. Aymond, let me ask you this question -- and we have been hearing this term "competition," "competitive advantage," bandied around in this proceeding, and the Board Chairman -- I am not speaking for my colleague, Mr. Clark -- is having some difficulties in terms of this question of competition.

How do you have competition, really, when the municipal which is franchised has a complete monopoly [in] its area? Each municipal has a monopoly and you have certain -- I am not saying "improper," now, but certain monopolies.

So, therefore, does it really make any difference whether someone gets a better unit price -- whether one municipal obtains a better unit price -- whether one municipal obtains a better unit price as against a second municipal? The prices are passed on to the consumer, let's say.

(FOOTNOTE CONTINUED ON NEXT PAGE)

in general exerts a procompetitive influence at the retail level in the form of "yardstick competition." Dr. Stelzer

386/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

But where is the competitive advantage? And the Board is interested in this area.

THE WITNESS: The competition comes in, Mr. Chairman, in the way the customer feels about our situation.

For example, Lansing, which is the largest municipal system, as I referred to, is really in the heart of our service area, sells power at a considerably lower rate than can Consumers. They can do that today without buying from us at below our system cost. They can do that today just with their tax and interest subsidies.

Now, this makes our customers unhappy with us, and this is published in the newspapers. "Lansing has another great year; rates are 20 percent below Consumers Power Company" -- or whatever the percentage is. And pretty soon you find that the people in the environs of Lansing want to leave Consumers Power Company and become a part of the Lansing system.

And the Lansing system at this very instant is seeking to have the law change[d] so that they can expand beyond Lansing without limit.

CHAIRMAN GARFINKEL: But right now they can't obtain -- they can't take those customers away from you, is that correct?

THE WITNESS: Only if they -- and they have done this on several occasions -- only if they expand their corporate boundaries.

Under the law as it now exists, they are limited to selling only 25 percent of their sales within the community outside the community, and they are seeking to have that law changed so that they would have no limit on their expansion.

So this is one of the things we are concerned about.

(Consumers' economic witness) explained that the industry uses this term to describe comparisons of the cost and efficiency of operation of two electric utilities made by regulatory bodies in an endeavor to measure the adequacy of a utility's performance, and that the existence of such a "yardstick" generally serves "as a goad to dynamic efficiency". Tr. fol. 7729 at 7, 12-13. Dr. Stelzer further testified that "[t]his yardstick competition can and does exist on the distribution level" and acknowledged that "[i]t may be an important incentive to efficiency for regulated companies." Id. at 16.^{387/}

^{387/} Dr. Stelzer went on to point out that subsidies of the municipalities and cooperatives made a perfect comparison between private and public utilities impossible. Id. at 17-18. But he concluded nevertheless that "such subsidized firms do make a contribution, for example, in providing the dynamic pressure on privately owned utilities, such as Consumers Power, of yardstick competition and, in general serving as an alerting irritant." Id. at 18. Indeed, the Michigan Public Service Commission has asked Lansing for information about its retail rates. Brush, Tr. 2359-61. Also see Meeks, Concentration in the Electric Power Industry: The Impact of Anti-trust Policy, 72 Colum. L. Rev. 64, 77-79 (1972).

The existence of the small utilities thus exerts a procompetitive influence in the overall retail market in lower Michigan. Cf., Municipal Electric Ass'n v. SEC, 413 F.2d 1052, 1058 (D.C. Cir. 1969).

This is not to suggest that competition to distribute electric power in lower Michigan is totally free and open, or even that major market changes are in the offing. But because this potential competition manifests itself only periodically and is more limited than that found in some unregulated markets, it is not for those reasons less deserving of antitrust protection. To accept Consumers' position on the relevant retail geographic market would in effect nullify that protection. That result is simply out of line with the recent Supreme Court decisions in this area.^{388/}

It must also be kept in mind that Consumers was not born with a 77% or 100% portion of that retail market. Rather, it acquired its large share in no small part by the same slow competitive processes that it now suggests

^{388/} Otter Tail v. United States, supra. As Justice Blackmun wrote in Gulf States Utilities Co. v. FPC, 411 U.S. 747, 759 (1973): "Indeed, within the confines of a basic natural monopoly structure [of the electric power industry], limited competition of the sort protected by the antitrust laws seems to have been anticipated [by the drafters of the Federal Power Act]", (citing Otter Tail among other authorities).

are too unlikely and remote for us to consider.^{389/}

^{389/} As Dr. Wein explained (Tr. fol. 3979 at 50-51, emphasis supplied), historically

"[t]he early electric company (private or public) was a very small generating company distributing electricity via direct current at tiny voltages to its customers within a small town or to part of a larger city.

* * *

There followed a frenetic merger and acquisition program from the earlier years of the first decade through the twenties, and thirties [in an endeavor to achieve economies of scale made possible by technical improvement]. It has not yet ceased. The existing large systems such as Consumers Power are the results of such mergers and acquisition, pursued by astute and farsighted men who not only recognized the inherent economies of large scale generation and transmission and attendant profits, but also knew how to develop and attain the financial connections which made these acquisitions possible. They recognized, earlier than others, that the key element in obtaining these economies was the interconnection of many separate geographic markets selling retail power, i.e., the interconnection of many separate distribution systems."

The Department's proposed exhibits D. J. Exh. No. 16 and 17 list the acquisitions and mergers that have resulted in Consumers' present market position. The Licensing Board rejected these exhibits because it believed an analysis of that market structure and Consumers' conduct therein from 1960 was sufficient to determine whether licensing the Midland facility would maintain a situation inconsistent with the antitrust laws. Tr. 4012-13. Although urged to do so by Justice (Opening Brief on Appeal, pp. 55-56), we do not overrule the Licensing Board's ruling. We merely take note of the accepted fact, as testified to by Dr. Wein, that large systems today, including Consumers, came about by merger and acquisitions of many small systems. Consumers does not deny that this is so and neither the legality of Consumers' acquisitions nor its market position as of 1960 is being litigated here.

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We do recognize that, though not barring all competition as Consumers suggests, the barriers to potential retail competition in the electric power industry in lower Michigan are high and vary from area to area, depending on such factors as whether two or more electric suppliers serve the same or adjacent areas, and on whether a private utility is serving the area under a Foote Act or limited term franchise. In other circumstances, the differences between these market barriers might justify dividing the retail market into the various submarkets that Consumers proposes.^{390/} But, as the Supreme Court has twice stated, "submarkets are not a basis for the disregard of a broader line of commerce that has economic significance."^{391/} This is especially true where the charge is that a firm has monopolized that broader line of commerce. Consumers' arguments in effect seek to focus our attention on those

^{389/} (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

The point we emphasize is simply that the so-called legal barriers to competition that Consumers now argues preclude a change of electric supplier in its proposed closed market existed throughout the period of Consumers' growth, see pp. 81-83 *supra*, and yet did not prevent the company from acquiring its present market position.

^{390/} For example, if a court were analyzing a merger of two electric utilities for Clayton Act purposes conceivably it might focus on the existing door-to-door competition between the two. We note that the cases on which Consumers relies are all decisions of that quite different stripe. See fn. 385, *supra*.

^{391/} United States v. Greater Buffalo Press, 402 U.S. 549, 553 (1971); United States v. Phillipsburg National Bank, 399 U.S. 350, 360 (1970).

areas where door-to-door competition is now taking place and to have us ignore those areas where the company has already acquired dominance. To do so would be to manifest tacit acceptance of Consumers' present market position as sacrosanct. This is simply not the case, legally or factually.^{392/}

We therefore reject Consumers' proposed "open" and "closed" submarkets. We hold instead that the relevant retail market most appropriate for this case encompasses essentially the entire area delineated by the Licensing Board in its initial decision (2 NRC at 45): "all of the lower peninsula of Michigan except the eastern section served by Detroit Edison Company and the southwest served by the Indiana and Michigan Gas and Electric Company".^{393/} We

^{392/} Moreover, accepting Consumers' reasoning would lead to a paradoxical result: were Consumers to acquire all the small utilities in the relevant geographic area there would be (according to Consumers) no competition; therefore logically there would be no relevant market, and thus it would be impossible to find Consumers guilty of monopolization even if it had used predatory means to acquire the small systems. We think that a relevant market concept that leads to such a distorted result is of doubtful validity.

^{393/} Justice would include Edison Sault and Thumb Electric in the retail market; Consumers would not. (Both parties agree, however, that these two utilities are within the wholesale market.) Both lie at the market's edge and there are arguments either way. We therefore elect to include them for purposes of geographic market unity. "Fuzziness at the boundaries [is] inherent in any attempt to delineate the relevant geographic market." United States v. Philadelphia Nat. Bank, supra, 374 U.S. at 360 fn. 37. Accord, United States v. Pabst Brewing Co., supra, 345 U.S. at 549; United States v. Connecticut National Bank, supra, 418 U.S. at 669-71.

do so because the record shows that it is in this area that Consumers is faced with both existing and prospective electric systems competing for the right to serve retail customers.

3. The Wholesale Power Market.

a. Consumers and Justice are in accord that wholesale electric power is one relevant product market in this case, but they dispute the makeup of that market. Their disagreement is over two basic points: First, whether that wholesale market includes bulk power supplied under coordination arrangements and, second, the extent to which a vertically integrated utility's own firm bulk power production is to be counted in that market.^{394/} We disposed of the first controversy earlier in connection with our discussion of coordination services. For reasons explored at length, we held that a market for coordination power exists separate and distinct from that for wholesale power. See pp. 106 ff, supra. We turn here to the second issue, the proper allocation of "self-generation" used "in-house."

^{394/} Both Justice and Consumers concur on the geographic scope of the wholesale market as essentially that delineated by the Licensing Board. See p. 105, supra. (Compare D.J. Exh. No. 197 with Pace, Tr. fol. 7239 at Attachment JDP-2.) We agree, particularly as Consumers' Chief Executive testified that it is doubtful his company would seek to sell wholesale power outside this area. Tr. 6071.

Some electric power utilities engage primarily in manufacturing and wholesale operations and some confine themselves to retail distribution. (Slightly more than two-thirds of all electric utilities within the United States operate only at the retail level. See fn. 352, supra.) As in other industries, however, some companies do both and these are described in the economic lexicon as "vertically integrated." Consumers Power Company and several of the smaller utilities in this case are vertically integrated entities. In other words, they generate firm electric power in bulk with their own facilities and then market that power either via their own "captive" retail distribution networks (i.e., use "in-house") or sell the power at wholesale rates for resale over retail distribution networks of other utilities.

Justice takes the position that the wholesale market properly includes all firm bulk power production, whether retained for "in-house" retail purposes or wholesaled "outside" for independent retail distribution. It stresses that firm bulk power is the product every utility operating a retail distribution system must have and, whether purchased at wholesale or self-generated, the product is identical. The Department therefore contends that all bulk power production belongs in the relevant wholesale power market if a fair picture of

the relative market strengths of the various competing utilities is to be obtained. Using Justice's market definition, in 1971 Consumers controlled an 85% share of the wholesale market in lower Michigan with sales of 21,123,360 Mwh; all the remaining utilities accounted that year for only 3,655,861 Mwh, less than 15%^{395/}

Consumers does not deny that self-generation and wholesale power are, if not identical, certainly interchangeable products. And it agrees that bulk power produced by its competitors and used in their "in-house" retail operations belongs in the wholesale power market because it competes to supply those needs by selling them wholesale power. Nevertheless, Consumers argues that its own in-house production must be omitted from the wholesale market. It reaches that result on what amounts to a theory of present competition. The company argues that while it competes to supply the firm bulk power needs of the small utilities, they do not and cannot compete to supply Consumers' needs because the company plans its operations to satisfy all its "in-house" needs entirely on its own. This lack of present competition, Consumers says, places its own production of firm bulk power for "in-house" distribution outside the relevant wholesale market for purposes of determining its share of that market.^{396/}

^{395/} See p. 242, infra. (1971 statistics).

^{396/} Consumers' Appeal Brief, pp. 170-73.

Use of Consumers' definition of the wholesale market reverses the picture painted by Justice. Instead of Consumers controlling 85% of the market, it would control only 15%, and of a much smaller market.^{397/} Indeed, the largest competitor in the wholesale market as Consumers structures it would be the Lansing municipal system with a 40% market share, 2-1/2 times larger than Consumers' own.^{398/}

A market definition is supposed to reflect commercial realities. A definition which leads to the conclusion -- as Consumers' does -- that the Board of Water and Light of the City of Lansing, Michigan (with 5 power plants having a combined generating capacity of 639 Mw) overshadows Consumers Power Company, the eighth largest in the nation (29 plants with a combined generating capacity of 4285 Mw), is manifestly askew.^{399/}

^{397/} See C.P. Exh. No. 11,307. (1972 statistics). In its appeal brief (p. 153) Consumers states that its market share as it defines the market is 17 percent. This, however, includes the bulk power requirement of the three small distribution systems, now part of its vertically integrated system, that it has acquired since 1960. See Pace Tr. fol. 7939 at attachment JDP-2. Also see Paul, Tr. 7878-81.

^{398/} If Consumers' production for "in-house" use is excluded and the smaller utilities included, the total wholesale market in 1972 would have been 4,529,282 Mwh, of which Consumers' share would be 718,424 Mwh and Lansing's share 1,758,422 Mwh. See C.P. Exh. No. 11,307.

^{399/} Compare C.P. Exh. No. 12,008, p. S-2 with D.J. Exh. No. 228A, p. E-18.

The antitrust law does not force acceptance of any such lopsided market picture. The proposition that the "in-house" production of the dominant firm must be excluded from the wholesale market is hardly new. The same arguments were raised and rejected more than 30 years ago by Learned Hand in United States v. Aluminum Company of America, 148 F.2d 417 (2nd Cir. 1945), the only Sherman Act Section 2 monopolization case brought to our attention (or which we could find) that discusses the issue. In that case, as in this one, the company charged with monopolization sought to define the relevant wholesale market to exclude its in-house use of the wholesale product. In Alcoa, as here, the company argued that its own use of the raw product -- there aluminum ingots -- had no effect on the market for that product and, therefore, its in-house production was properly excluded from the relevant market. There, as here, acceptance of the company's theory would have reduced its market share beneath the level from which monopoly power might be inferred.^{400/} The company's arguments

^{400/} The well known quotation from Alcoa is, of course, Judge Hand's statement that "[t]he percentage we have already mentioned -- over ninety -- results only if we both include 'Alcoa's' production and exclude 'secondary.' That percentage is enough to constitute a monopoly; it is doubtful whether sixty or sixty-five percent would be enough; and certainly thirty-three percent is not." 148 F.2d at 424.

were found wanting. In so concluding, Judge Hand wrote for the court that (148 F.2d at 424):

[T]he ingot fabricated by "Alcoa", necessarily had a direct effect upon the ingot market. All ingot -- with trifling exceptions -- is used to fabricate intermediate, or end products; and therefore all intermediate, or end, products which "Alcoa" fabricates and sells, pro tanto reduce the demand for ingot itself. The situation is the same, though reversed, as in Standard Oil Co. v. United States, 221 U.S. 1, 77, where the court answered the defendants' arguments that they had no control over the crude oil by saying that "as substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other." We cannot therefore agree that the computation of the percentage of "Alcoa's" control over the ingot market should not include the whole of its ingot production.

The court's reasoning in Alcoa is applicable to the situation in this case. Indeed, Consumers cites the quoted passage from Alcoa as authority for including the small utilities' in-house production.^{401/} Given that Consumers is unquestionably the dominant utility in the relevant geographic area, Judge Hand's rationale would apply with greater force to Consumers' in-house requirements than to the small utilities'. We also note that Judge Hand did not find it necessary (as Consumers would have us do) to focus on whether there was any competition to supply Alcoa's

^{401/} Consumers' Appeal Brief, p. 160, fn. 228.

in-house requirements. Obviously there was none.^{402/}

As we pointed out earlier, there are two distinct functional levels of operation in the electric utility industry, production and transmission of bulk firm power to distribution points on one hand and the distribution of retail power from those points on the other. Neither

^{402/} In any event, there is no magic in the fact that Consumers plans to supply the firm bulk power demands of its retail distribution systems by self-generation; several of the small systems similarly have planned and structured their systems. For example, Grand Haven, Traverse City and Holland were self-sufficient in 1960-1972. Also Lansing, except for buying wholesale power as part of the agreement in which it purchased the North School District, in that time frame met its firm bulk power requirements by self-generation. (Lansing's peak load in 1973 was 373 Mw, its generating capacity was 628 Mw.) See pages 95-96, supra. Also see C. P. Exh. NO. 11,307. Nor do most of the small utilities currently face legal restrictions that would preclude them from selling wholesale power to Consumers. It is true, as Consumers argues, that Northern Michigan and Wolverine Electric would be precluded under federal law from selling wholesale power to Consumers. However, as Consumers acknowledges (Appeal Brief, p. 174, fn. 258), recent changes in the Michigan law would allow the municipalities to sell an unlimited amount of wholesale power for use beyond their incorporated boundaries. See pp. 94-95, supra. Finally, Edison Sault Company and Alpena Power Corp. have never been legally barred from selling wholesale power to Consumers. Rather, Consumers is unlikely to turn to the small utilities for wholesale power simply because of the disparity in size between itself and them. As Dr. Wein testified, "given the economies of scale [that Consumers is able to achieve, the small utilities] can scarcely hope to do to [Consumers] what it does to them, i.e., persuade [Consumers] to abandon generation or not increase it." Tr. fol. 3979 at 75. Also see Pace, Tr. fol. 7239 at 37.

Consumers nor any other party offers any technical or economic reasons that require the two functions to be combined in one company. And, as we have already mentioned, slightly more than two-thirds of all electric utilities in the United States engage only in retail distribution. See fn. 352, supra. Thus, the situation at bar is analogous to that in Alcoa, and vertical integration, whether on Consumers' part or on that of the small utilities, reduces pro tanto the demand for wholesale bulk firm power by individual retail distribution systems that would otherwise exist in lower Michigan.^{403/}

^{403/} We note that the antitrust board in Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP-77-24, 5 NRC 804, 890-96 (1977) (appeal pending) has similarly concluded that a vertically integrated electric utility's "wholesale sales" to its captive distribution systems are properly includable in the wholesale market. As the Farley board explained (id. at 894):

* * * the supply of firm bulk power to any retail distribution system, even if not transacted at a money price within a vertically integrated business stratification, does encompass two different and widely recognized functions. The functional view of the electrical power industry is: generation, transmission and distribution. Consequently, the shadow price at which bulk firm power may be supplied to a captive or member distribution system is a wholly different animal from the shadow price at which say a toaster without a cord is supplied from one employee to the next one who attaches the cord to the appliance. This is a key distinction in defining the market this way. One must rise to the realm of abstraction and speculation to imagine a firm selling a toaster without a cord to another firm that attaches the cord. One need not rise to such a realm of abstraction or speculation to imagine
(FOOTNOTE CONTINUED ON NEXT PAGE)

b. The cases which Consumers cites as authority for excluding its in-house production from the wholesale market do not support its position. As we mentioned, the only monopolization case under the Sherman Act in point, Alcoa, is squarely against it. Consumers relies on a series of decisions under the antimerger provisions of the Clayton Act, section 7. None of them, however, even purports to distinguish Alcoa. Moreover, the principal case Consumers cited to the Board below, International Tel. & Tel. Corp. v. General Tel. and Electronics Corp., has in the interim been reversed on appeal on the very point.^{404/} In doing so, the Ninth Circuit held "that vertical foreclosure in itself does not justify defining a customer market to exclude 'captive' sales" (518 F.2d at 931) and ruled that it was more appropriate to focus on the overall market for telephone equipment that included the Bell system's in-house production rather than on the "submarket" the district court had chosen, which had

^{403/} (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
two firms selling and buying wholesale power with each other. This happens. So, for one, there is a functional reason for viewing [Alabama Power's] sales to seemingly "captive" entities as constituting wholesale sales (see J. Hirshleifer, "On the Economics of Transfer Pricing," 29 Journal of Business 172 (1956)).

^{404/} 351 F. Supp. 1153 (D. Haw. 1972), reversed, 518 F.2d 913 (9th Cir. 1975).

excluded those "captive sales".^{405/}

We have also reviewed the other lower court and agency cases cited by Consumers. We agree with the Justice Department that none of those merger cases justifies -- much less compels -- the exclusion of Consumers' "in house" production

^{405/}In reversing, the Ninth Circuit reasoned (518 F.2d at 930-31):

Acknowledging that the Bell System was the "largest single purchaser of telephone equipment" in the United States, 351 F. Supp. at 1175, the district court refused to include Bell purchases in computing the market share foreclosed by GTE because it viewed the non-Bell -- or "independent" -- market for telephone equipment as constituting an "economically significant submarket" within the meaning of Brown Shoe Co. v. United States 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L.Ed. 2d 510 (1962). 351 Supp. at 1180. While the non-Bell market does display certain characteristics of a distinct submarket, it is clear that the Supreme Court did not intend the Brown Shoe concept to be used to exclude, in all cases, consideration of purchases by integrated "captive" customers of an appropriately defined line of products. In Brown Shoe itself, the Court computed market share by including manufacturers' sales to captive customers, see 379 U.S. at 301-303, 82 S.Ct. 1502, despite the fact that opportunities for "independent" sales to such retailers were on the decline, id. at 301, 82 S. Ct. 1502. Similarly, in Ford Motor Co. v. United States, 405 U.S. 562, 92 S.Ct. 1142, 31 L.Ed. 2d 492 (1972), the court tacitly approved a market defined to include "captive" purchases. See id. at 566-569, 92 S.Ct. 1142.

From these cases it follows only that vertical foreclosure in itself does not justify defining a customer market to exclude "captive" sales.

The court went on to point out that a government/Bell antitrust consent decree did not immunize Bell from a private antitrust suit, and, therefore, concluded that

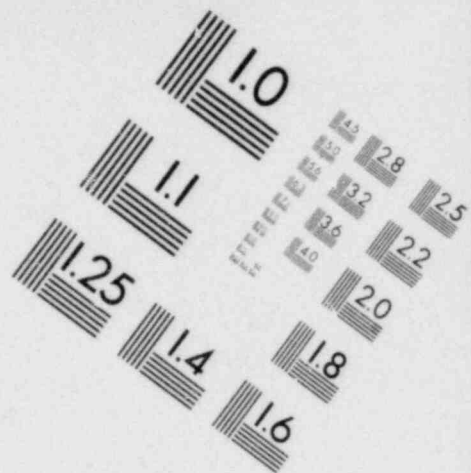
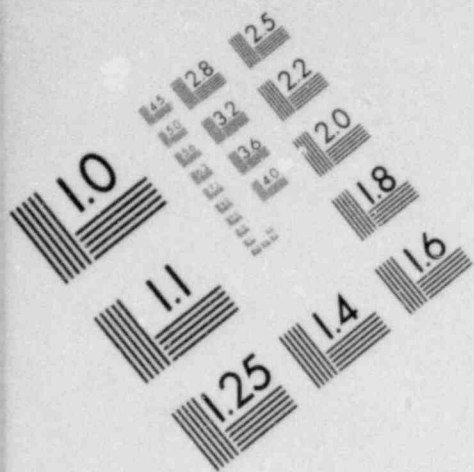
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from the relevant wholesale market in this case.^{406/}

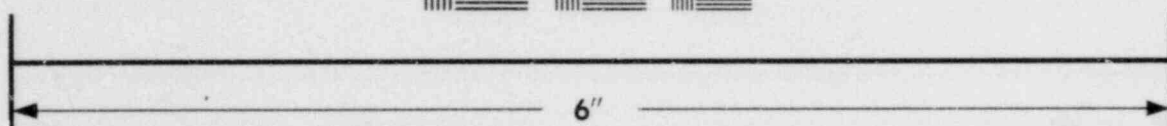
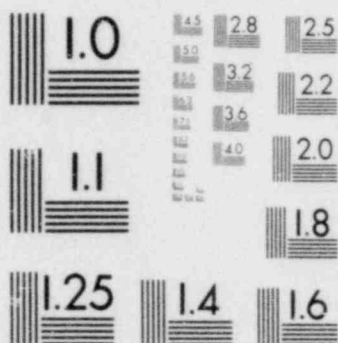
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"Bell's purported foreclosure of a large fraction of the telephone equipment market [was] not an immutable fact of market life." 518 F.2d at 931. The Court of Appeals did not find it necessary to discuss the import of the fact that Western Electric had supplied 99% of the Bell's internal systems needs in the past.

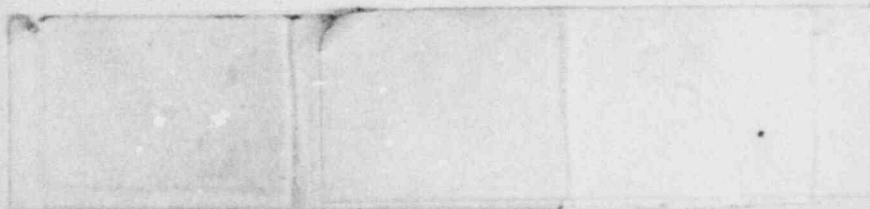
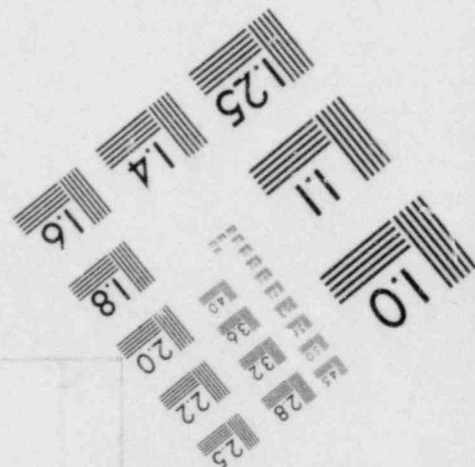
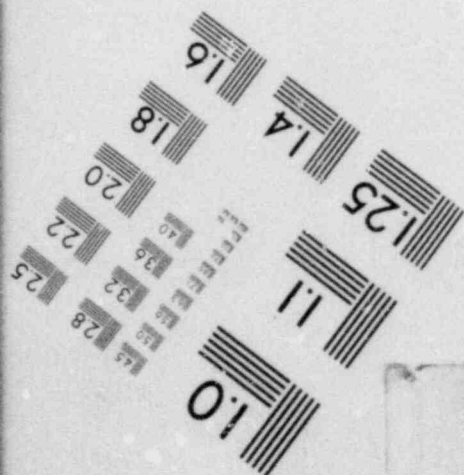
406/ In Elco Corp. v. Microdot, Inc., 360 F. Supp. 741 (D. Del. 1973), and British Oxygen Co., 3 CCH Trade Reg. Rep. Par. 21,063 (FTC 1975), the court and the FTC analyzed submarkets after determining that the merger proposed was acceptable in more broadly defined markets; neither ignored statistically significant concentration in the broader markets. It bears repeating that "[s]ubmarkets are not a basis for the disregard of a broader line of commerce that has economic significance." United States v. Phillipsburg National Bank, *supra*, 399 U.S. at 360. United States v. Greater Buffalo Press, 402 U.S. 549 (1971), involved a merger of two wholesale printers of newspaper comic supplements. The Court excluded certain newspapers' in-house comic production from the relevant market because technological factors made their competition with the specialized printers impossible. In the case at bar, the applicant actively competes at both wholesale and retail levels with the smaller utilities. If anything, Greater Buffalo Press supports exclusion of the smaller companies' "in-house" production, not Consumers'. A similar analysis applies to Avnet, Inc., 82 FTC 391, 541-54, affirmed, sub nom. Avnet, Inc. v. FTC, *supra*. The lower court opinion in U.S. v. Associated Press, 52 F. Supp. 362 (S.D. N.Y. 1943) can be read to support Consumers' arguments, but it antedates Alcoa. A one-line statement in U.S. v. ITT, 324 F. Supp. 19 (D. Conn. 1970), also favors Consumers' position. If it be a "holding", we are disinclined to follow it in the absence of any reasoned analysis and in light of the other authorities cited. U.S. v. Blue Bell, Inc., 305 F. Supp. 538 (M.D. Tenn. 1975), involved the merger of two industrial laundries, neither of which were vertically integrated. If relevant to the case before us, its rationale calls for the exclusion of all "in-house" production, not just Consumers'.

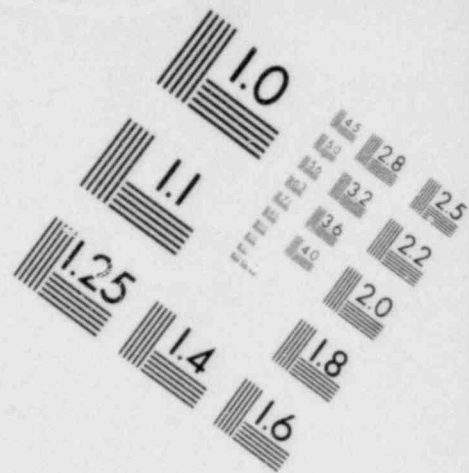
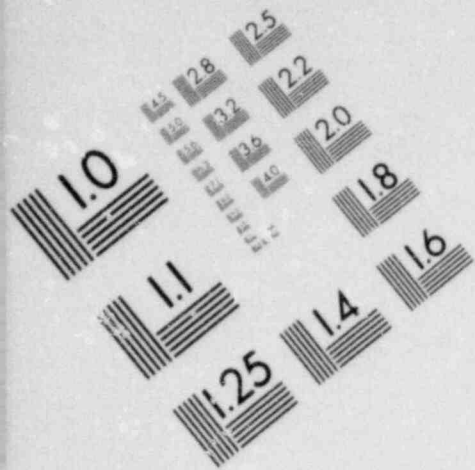


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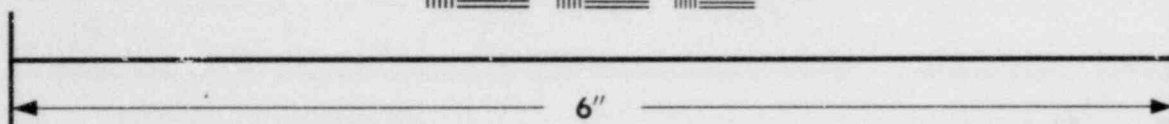
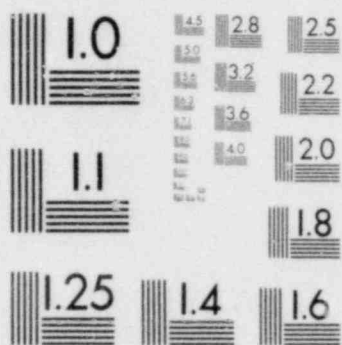


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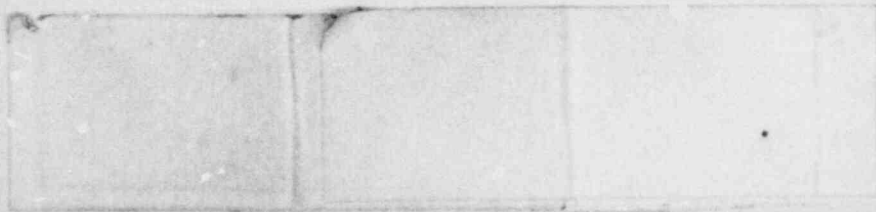
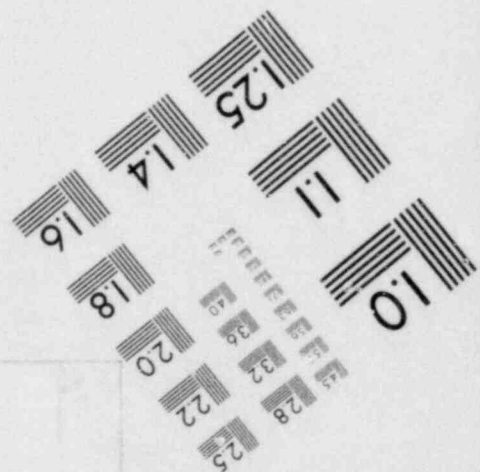
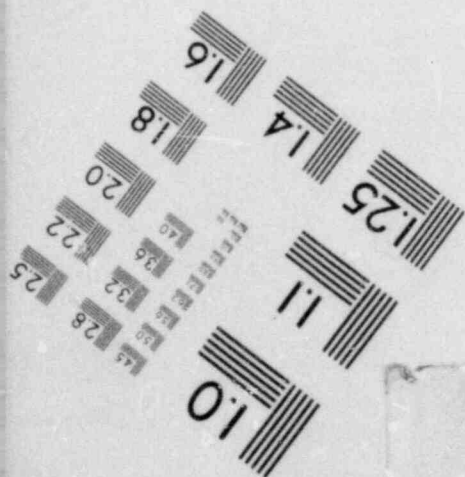




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c. In sum, use of Consumers' "present competition" theory to define the relevant wholesale market leads to anomalous results. To give another example, assume for the moment that Consumers, a large vertically integrated power company, acquires a smaller competitor in the wholesale market having its own generation facilities and then integrates the acquired company into its own operations. Under Consumers' definition, the acquired company's production is now excluded from the relevant wholesale market for the purposes of comparing the strength of the utilities still active in that market. Let us further assume that the acquisition left but one small competitor remaining independent. Under Consumers' thesis, were that utility self-sufficient in generation, it would have a 100 percent share of the wholesale market and Consumers none. This result follows from the underlying assumption in Consumers' theory that it competes to supply the firm bulk power needs of smaller utilities but not vice-versa. And, finally, were Consumers to absorb that last competitor, then, under its definition, the relevant market would disappear entirely. Of course what really would have happened is just the opposite; the market would remain but the competition would be gone.

To state the result to which use of Consumers' market definition would lead is to refute its validity. Manifestly, no law merits an application antithetical to its purposes. For the reasons given earlier, we accept the Department of Justice's characterization of the wholesale power market as consistent with law, logic and common sense.^{407/}

Determination of the scope and dimension of the relevant markets sets the stage for the next important issue to be faced: whether in any of those markets Consumers possesses monopoly power. We turn to this in Part VI, which follows.

^{407/} We are aware that somewhat different relevant product markets were found by the antitrust licensing boards in Alabama Power Company (Joseph M. Farley Nuclear Power Plant, Units 1 and 2, LBP-77-24, 5 NRC 804, 885-92 (1971) (appeal pending), and Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), LBP-77-1, 5 NRC 133, 160-164 (1977) (appeal pending). It should not be inferred from our decision in this case, however, that either the Farley or the Davis-Besse Boards necessarily erred. As we have stressed, delineation of a relevant market is essentially a question of fact. We have not yet reviewed the basis of either the Farley or the Davis-Besse determinations.

VI.

MONOPOLY POWER

We discussed earlier why determining that an enterprise possesses monopoly power is not tantamount to finding it in violation of the antitrust laws. As we explained, the principal significance of the determination lies in the standard of conduct demanded of an enterprise with that degree of economic control. Firms dominant in the market place may be foreclosed from business practices acceptable when undertaken by others.^{408/} Therefore we must decide whether Consumers Power Company possesses monopoly power in any or all the relevant markets before we can gauge whether the charges leveled against it are valid.

Our task is not materially assisted by the decision of the Licensing Board. Although the question of Consumers' monopoly power was raised before it, that Board purposely refrained from resolving the question in the mistaken belief that it was not necessary to do so. See 2 NRC at 112-13. We therefore must undertake the analysis ourselves and begin by assessing the submarket for coordination services.

^{408/} See fn. 92, supra, and pp. 282-86 infra.

A. Coordination services submarket.

Broadly speaking, monopoly power is the ability to control prices or exclude competition when it is desired to do so. Its existence can be -- and often is -- established indirectly, by inference from a firm's predominate share of the market. United States v. Grinnell, supra, 384 U.S. at 571.

The nature of the coordination services market does not, however, lend itself to an easy calculation of market shares. A utility is both buyer and seller in this market. Whether in any given time period it is a net buyer or a net seller is in part fortuitous, depending on operating conditions in its own and its neighboring power supply systems. Justice therefore undertook to show Consumers' possession of monopoly power in this market directly, by proving that its control of access to the market and its domination of power generation and transmission within it gives the company that power. This is a valid approach.^{409/}

^{409/} Denver Petroleum Corp. v. Shell Oil Co., 306 F.2d 289, 304 (D. Col. 1969): "the existence of monopoly power" can be shown "by determining actual ability to exclude competition and control prices, * * *"; accord, Woods Exploration & Pro. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1305 (5th Cir. 1971), certiorari denied, 404 U.S. 1047 (1972).

1. As described in Part IV, Consumers operates a vertically integrated system. That system includes a 9000 mile transmission network within the relevant geographic market that is in turn interconnected with the transmission network of all the major nearby utilities. We also previously noted our concurrence in the Licensing Board's finding that, with few exceptions, the smaller utilities' remoteness makes it uneconomical for them to build their own interconnections to major utilities outside the relevant market.^{410/} As the Licensing Board found and Consumers does not dispute, the practical result is that in order to engage in bulk power transactions with the utilities (other than Consumers) in the broader regional power exchange market, the small utilities must "obtain wheeling services from [Consumers]".^{411/}

Consumers' control of high voltage transmission lines within the relevant geographic submarket thus enables it, by refusing to wheel power to them, to preclude the small

^{410/} See p. 170, supra.

^{411/} 2 NRC at 108 and Consumers' Appeal Brief, pp. 105-114. The Licensing Board's opinion refers only to wholesale power transactions. Obviously the same holds true for coordination transactions.

utilities from coordinating with the other nearby large utilities outside that market. This does not mean that such a refusal to deal cuts off the smaller utilities entirely from all coordination services. But it does limit their choice of coordinating partners to (a) one another or (b) Consumers Power Company (or some combination of the two).^{412/} In practical terms, whether Consumers has the power to control the "price and output" of coordination services to the small utilities turns on whether coordination among themselves is a reasonable substitute for coordinating with Consumers or with other utilities in the broader regional power exchange market. If it is not a reasonable substitute, then the question is whether Consumers can dictate the economic terms under which the small utilities may enter this market. If it can, then it may be fairly said that Consumers has monopoly power in the relevant submarket for coordination services.^{413/}

^{412/} The M-C Pool, for example, has a coordination agreement with Consumers.

⁴¹³ A basic controversy in this case is over Consumers' argument that valid business reasons require coordination between large and small utilities to be on different terms than coordination between two major utilities. This controversy, however, does not involve whether Consumers possesses monopoly power in the coordination submarket. Rather, it goes to a different question: if Consumers has monopoly power in the coordination submarket, then has Consumers used that power unreasonably, i.e., "to monopolize"? We address this in Part VII, below.

2. Whether coordination inter sese is a satisfactory alternative for the small utilities to coordination with a major utility -- Consumers or another -- is a question which can be viewed from several perspectives. The best approach is a practical one, to examine the issue in the light of a real problem the smaller companies face: their need to satisfy the steady growth in demand for power on their systems. The usual industry response is to add additional "baseload"^{414/} capacity. But how large a facility? The optimal answer is that size facility which will provide the necessary power at the lowest practicable cost per kwh. In this regard there is no dispute that the larger the baseload plant, the lower the kwh cost. But several factors constrain utilities in general and small ones in particular from building the plants that are most economical in those terms.

First, such plants are expensive. Years might pass before a small utility could use the entire generating capacity of a large plant on its own system. Until it could, that utility would have a substantial capital investment tied up in a generating facility greater than necessary to

^{414/} See fn. 272, supra, for the definition of a baseload facility.

meet its load demands. One reason for coordination is, manifestly, to spread the cost of the large plants among several utilities, and, by doing so, to reduce this problem to a manageable size for each. See fns. 274 and 278, supra.

Second, a large plant might necessitate a significant increase in the reserve capacity that must be maintained to insure reliability. A rough rule of thumb calls for an isolated system to have reserve capacity at least equal to its largest generating facility. See p. 118, supra. Another reason utilities engage in coordination is, therefore, to reduce the amount of reserves required to backstop the operation of large units.^{415/} The nub of the matter is that for most utilities to take advantage of the economies achievable by use of large baseload units, they must coordinate with their neighbors. And, as we shall see, Consumers is no exception.

^{415/} See pp. 122-26 supra, in particular the example given from the Supreme Court's Gainesville decision.

3. As the foregoing observations suggest, by reason of their size, coordination among themselves does not allow the small utilities to obtain the benefits available by coordinating with larger systems. Even in combination, **they are too small to achieve the maximum economies of scale now technologically possible in the industry.** By themselves, they cannot afford generating facilities of the capacity of the typical modern nuclear power plants^{416/}, although these are among the most economical in terms of cost per kwh of electrical energy generated.

This can be illustrated by reference to the operations of the Michigan Municipals and Cooperatives Pool (the "M-C Pool"), which we have previously touched upon (see pp. 103-04 supra).^{417/} This Pool operates under the only coordination agreement currently in existence among the

^{416/} See pp. 224-25, infra.

^{417/} In addition to Wolverine Electric Corp., Northern Michigan Electric Corp., and the Grand Haven and the Traverse City municipal systems, the pool has three smaller associate members which participate for certain purposes. These have a combined peak load of 17.6 Mw. We have omitted them from the example as too small to affect the point being illustrated in significant fashion. See Int. Exh. No. 1001.

small utilities. In 1971 the combined load of the four M-C Pool members was 160 Mw; their combined generating capacity was 192 Mw; and their largest generating unit, 23 Mw. See p. 104, supra. By coordinating their operations, the M-C Pool member can install larger generating units than they could on an isolated basis. Nevertheless, because of the small size of the pool, they still cannot obtain the significant economies of scale now available in the generation of electric power.

For illustrative purposes, assume that in an effort to take advantage of the economies of scale offered by larger generating units, the Pool desired to add to its system in 1971 a 175 Mw unit. While larger and more efficient than the Pool's existing generating facilities, it is still small scale when compared to the 800 Mw Midland Nuclear Unit No. 2. Putting to one side for the moment the Pool's problem in making capital investment in a plant not needed until a considerable time into the future, adding a 175 Mw unit to its system would automatically increase the Pool's reserve requirements enormously. The Pool would have had to maintain at least 175 Mw in reserve to

backup this plant, a reserve of more than 91 percent.^{418/} Thus, although the Pool would have increased its overall generating capacity by 175 Mw, the increase available to sell to their wholesale and retail customers would be limited to the output of only 32 Mw of additional capacity; all the rest would be needed in reserve. If, however, the M-C Pool had been able to join a larger coordinated system in which each utility maintained reserves of 20 percent -- a typical reserve level in the electric utility industry^{419/} -- the M-C Pool would have needed to maintain in reserve only

^{418/} The 91 percent reserve figure assumes that the M-C Pool members sold as much power as possible while still maintaining adequate reserves under the single largest unit criterion to maintain system reliability. The percentage of reserves that a system is carrying is calculated by taking its on line generating capacity in excess of peak load requirements and dividing that figure by the peak load. For example, in 1971 (without installation of the hypothetical 175 Mw unit) the M-C Pool's reserve was $(192-160) \div 160 = .20$ or 20 percent. Immediately upon installation of the hypothetical plant, the Pool need hold 175 Mw (the size of the largest plant) in reserve. Thus, the Pool's peak load could grow only 32 Mw (to 192 Mw total) under the single largest unit criterion. At that point the Pool would still be carrying a reserve in excess of 91 percent -- i.e., $(367-192) \div 192$.

^{419/} See FPC, 970 National Power Survey, Volume II, pp. 1-52, 53, 2-43. Also see fn. 634 infra.

62 Mw.^{420/} In this situation, upon building the 175 Mw plant the Pool would have had available an additional 145 Mw of firm power. This 145 Mw would have been considerably more than that needed by the Pool members to meet their immediate load growth. For the next several years -- at that time roughly 25 Mw per year.^{421/} Thus, access to the regional power exchange market -- i.e., ability to engage in coordination services transactions outside the submarket to which they were confined -- would have placed the M-C Pool in a position to market this excess capacity and associated energy, for example, on a unit power basis, as short term power, or in some other type of economy energy transaction. As we have described, such transactions in the coordination service markets can and do reduce the cost of a utility's bulk power operations and are regularly entered into for that purpose. See pp. 121-30 supra.

^{420/} In arriving at the 62 Mw reserve figure in the example, it was assumed that the M-C Pool members sold as much power as possible while still maintaining at least a 20 percent reserve level -- i.e., their peak load after building the plant could increase to 305 Mw, an increase of 145 Mw, and, as their total generating capacity would be 367 Mw, they would still have reserves of 62 Mw, 20 percent of their peak load. Obviously, until their peak load actually reached 305 Mw, they would be carrying reserves substantially in excess of 20 percent.

^{421/} See D. J. Exh. No. 200, Schedule No. 6-c.

Thus, coordination among the M-C Pool members is not equivalent to their becoming associated with a larger coordinated system. Moreover, even if the M-C Pool were to interconnect with the Holland and Lansing municipal systems -- which the Licensing Board found to be economically feasible^{422/} -- coordination among the three

422/ On this issue, the Licensing Board found that (2 NRC at 98):

Lansing is only about 20 miles from the M-C Pool's projected 18 Kv line and a less distance from the M-C Pool's existing 69 Kv line. Holland is only about 10-12 miles from the M-C Pool's existing 69 Kv line and less from the projected 138 Kv line [Exhibits D.J. 18 and 20]. When we consider the 1182 miles of transmission facilities projected for M-C Pool, these distances are very short. About all that can be said in favor of wheeling over [Consumers] system is that it might possibly be cheaper.

Justice contends that the Board's finding on this matter is factually erroneous. Our own review of the record leads us to concur in the Licensing Board's conclusion concerning the City of Holland as in accord with the weight of the evidence. See, e.g., Helfman, Tr. 3495, and D. J. Exh. No. 200. With regard to Lansing we are less sure. However, given the relatively short distance between the M-Pool and Lansing and the relatively low cost of interconnection compared to their total operations, it would appear to be economical for Lansing and the M-C Pool to interconnect at either 69 Kv (or 138 Kv in the future) and to engage in at least small scale coordination. (We note that the M-C Pool and Lansing were at the time of the hearing having a formal study done to determine the feasibility of interconnecting the two systems. Brush, Tr. 2335.) Accordingly, while the question is a closer one, we accept the Licensing Board's finding on this point also.

still would be on a plane below that attainable by access to the regional power exchange market. Moreover, even with such an interconnection, the evidence indicates that it still would not be economically feasible for Lansing, Holland, the M-C Pool and Coldwater^{423/} to install a 500 Mw unit without reserve sharing and other coordination arrangements with larger nearby utilities.^{424/} Indeed,

^{423/} The Licensing Board did not consider whether it would be economical for the intervenor Coldwater to interconnect with the M-C Pool, or indeed whether it would be feasible for other small systems to connect to the M-C Pool because, in that Board's judgment, these systems were not "capable of coordination". 2 NRC at 98. We review the correctness of this conclusion at pp. 340-50, infra. Our own review of the record indicates that it would not be economical for Coldwater and the M-C Pool to interconnect. Coldwater is at least 50 miles from the M-C Pool transmission network and Mr. Helfman characterized an interconnection between the two as being "very expensive". He went on to testify that "[I]t would have been so expensive, in fact, that, by comparison, it would be far cheaper to rely upon [Consumers] to wheel power to Coldwater, which is sold by the M-C Pool to Coldwater * * *. It would be far cheaper". Tr. 3535. Also see Munn, Tr. 4075.

Several other of the small utilities, e.g., Hillsdale and Union City, are in situations similar to Coldwater. See D.J. Exh. No. 18.

^{424/} Mr. Mayben testified as follows (Tr. 3700-01):

"Mr. Ross [counsel for Consumers], 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 to be able to install [in 1980] a 500 [Mw unit], and I won't pass any judgments with regard to whether or not 500 [Mw] 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.

(FOOTNOTE CONTINUED ON NEXT PAGE)

absent such a reserve sharing agreement, the three utilities as a group would be required, upon installation, e.g., of a 500 Mw unit in 1980, to maintain at least a 50 percent reserve level.^{425/} (Had such a unit come on line in 1972, they would have needed reserves in the 80 percent range.)^{426/} This

424/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Again, with a unit that large, coordinated maintenance scheduling and maintenance service would be important. I think when we get units 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 [wheeling] 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.

In regard to the need for "wheeling" from Consumers, Mr. Mayben was referring specifically to Coldwater. Tr. 3701. See fn. 423, supra.

425/ The projected peak load, based on 1973 estimates for these utilities as a group in 1980, is 1035 Mw. See D.J. Exh. No. 254, schedules 1, 2 and 3, and D.J. Exh. No. 255. Also see Tr. 3699.

Dr. Wein testified that "[a] system of 1000 Mw with a load growth of 80 Mw per year could not build a 500 Mw unit economically, both because of its lack of utilization and the severe reserve requirement." Tr. fol. 3979 at 64.

426/ The 1972 peak load of these utilities approached 600 Mw. See pp. 93, 96, supra.

compares to the approximately 20 percent reserve level that Consumers maintains, see fn. 634, infra, even though it currently has on line a 700 Mw nuclear power unit.^{427/}

4. Consumers' ability to maintain a low level of reserves despite the large size of its generating units is attributable in no small part to its coordination arrangements in the regional power exchange market. The company's internal reviews confirm this. A 1962 "Preliminary Report on Pool Studies" by Consumers indicated that the company could lower its reserve level from 24 to 19 percent by coordinating with Detroit Edison, to 15 percent if Detroit Edison and Consumers coordinated with Ontario-Hydro, and to 12.5 percent if in addition they coordinated with the large systems to the south.^{428/} Further, in 1964,

^{427/} Studies undertaken by Justice's bulk power planning expert, Mr. Helfman, suggest that it would be economical for the M-C Pool, Holland, Lansing and Coldwater to install in 1980 a 529 Mw nuclear power plant in conjunction with Dow Chemical Company (Dow's share of the plant would be 180 Mw) if these utilities had, in addition to wheeling, a reserve sharing agreement so that the percentage of reserves they maintain was equal to that carried by Consumers. D. J. Exh. No. 201. Also see Helfman, Tr. fol. 3210 at 32-33.

We note also that the record indicates that the M-C Pool along with Alpena Power Co. and Edison Sault Co. are considering installation of coal units in the 250-350 Mw range, See C. P. Exh. No. 12,017. However, Mr. Fletcher, President of Alpena, testified that the "primary problem" the group was experiencing in this regard was a lack of transmission. Tr. 4334.

^{428/} D. J. Exh. No. 65. Also see Wein, Tr. fol. 3979 at 65-66.

those engaged in planning Consumers' bulk power supply system found that to install nuclear units in the 500 to 600 Mw range that, "in order not to have an adverse impact on reserve requirements, large third party inter-connections [were] necessary at [Consumers' then present] load levels."^{429/} (Consumers' peak load in 1964 was 2375 Mw).^{430/} And Mr. Wall, Consumers' former Vice-Chairman, acknowledged that if Consumers were to disconnect itself from the utilities in the power exchange market and operate in isolation, it would have to increase its installed reserves to support the large scale units projected for installation on its system.^{431/} Indeed, without its inter-connections with these utilities, Consumers would have been in an extremely precarious situation from 1970 to 1973 because of the extended outage of its Palisades plant and

^{429/} Int. Exh. 1005, pp. 36-37. (Consumers' internal Memorandum quoted in the deposition of Mr. Harry Wall). See fn. 431, infra.

^{430/} C. P. Exh. No. 21A, p. 29 (Consumers' 1973 Annual Report to its Shareholders).

^{431/} Int. Exh. No. 1005, p. 38. Also see id. at 33. (Deposition of Mr. Harry Wall, May 30, 1973). Prior to becoming Vice-Chairman in 1972, Mr. Wall had been Vice-President in charge of "production and transmission" (1954) and "senior Vice-President of electric operations" (1969). Id. at 4. Mr. Wall was not able to testify in the proceeding because of his sudden death in December of 1973, prior to Consumers' presentation of its direct case. See C. P. Exh. No. 21A, p. 2.

other unexpected occurrences (see p. 159, supra), particularly so in 1971, when its generating capacity in actual operation was less than its peak load.^{432/}

Thus, even though Consumers' generating capacity is more than four times that of all the small utilities combined,^{433/} it still finds coordination power transactions with the utilities in the regional power exchange market not merely helpful but necessary to produce reliable firm bulk power at low cost.^{434/} As Consumers' own Vice President for Electric Planning, Mr. Mosley, candidly acknowledged in his direct testimony, "the bulk power supply of Consumers Power Co. is made available to its customers at a lower cost and with better reliability because of [its coordination arrangements] than could be done under any other alternative."^{435/}

^{432/} See D. J. Exh. No. 21A, p. 29.

^{433/} See Part IV. supra.

^{434/} Indeed, engineering studies suggest that the percentage of reserve capacity needed to meet a given reliability standard is "reduced significantly" until a coordinated system reaches 40,000 to 50,000 Mw. See Breyer and McAvoy, The Federal Power Commission and the Coordination Problem in the Electrical Power Industry, 46 S. Cal. L. Rev. 661, 682-87 (1973).

^{435/} Tr. 8516. Later, on cross-examination, Mr. Mosley reiterated that "the reason we have [coordination agreements] 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." Tr. 8652.

5. In sum, we find that coordination among the small utilities alone is no substitute for their coordination as part of a larger interconnected system. This finding is not really surprising; the Federal Power Commission, for one, published a similar conclusion years ago. Its 1970 National Power Survey stated that "[m]ost electric utilities are too small by themselves to construct and take full advantage of the largest modern fossil and nuclear fueled generating units, so they are able to obtain the economic benefits associated with large generating units only by joining with neighboring systems in coordinating arrangements."^{436/} And, as the record makes plain, even Consumers finds it advantageous to do so despite its large size.

Consumers' strategic dominance over high voltage transmission gives the company control over the small utilities' access to other large nearby utilities. The small utilities are thus forced to turn to Consumers for their needs, either directly in the form of coordination power and services, or indirectly to have these wheeled into them from "outside" utilities. Consequently, Consumers has monopoly power in the coordination services market submarket,

^{436/} FPC 1970 National Power Survey, p. I-17-2. Also see Wein, Tr. fol. 3979 at 64.

for it can control the terms by which the small utilities can obtain these important coordination services. Stated in terms of the Licensing Board's order delineating the relevant matters in controversy (see p. 54, supra), Consumers "has the power to grant or deny [the small utilities] access to coordination" by virtue of undeniable dominance in the ownership and control in transmission facilities (85% of all transmission lines and 98% of lines 138 kv or higher) and in generating capacity (80%) in the relevant geographic market.^{437/}

6. One matter remains to be considered. This is Consumers' contention that regulation by the Federal Power Commission precludes it from exercising monopoly power in any bulk power market. Consumers bases its argument on

^{437/} To be sure, the small utilities are able to derive limited benefits from their ability to coordinate operations with one another. But, as we described, these benefits are a far cry from those attainable through coordination with Consumers or with some "outside" utility. Be that as it may, "absolute success in excluding competition is [not] an essential element to proving monopoly power under section 2 [of the Sherman Act]. It is enough that defendants' market position is such that they have substantial power to thwart competition." Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1307 (5th Cir. 1971), certiorari denied, 404 U.S. 1047 (1972). See also, United States v. Aluminum Company of America, supra, 148 F.2d at 426.

section 202(b) of the Federal Power Act, 16 U.S.C.

§824a(b).^{438/} This provision authorizes the Federal Power Commission in appropriate circumstances to order an inter-connection established between two electric power utilities. Consumers' argument is unpersuasive.

438/ Section 202(b) provides:

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

First, it is undisputed that the Federal Power Commission has no authority to force an electric utility company to wheel power.^{439/} For reasons we have already described, unless Consumers will wheel power to them, the same utilities cannot engage in coordination transactions with the larger nearby utilities outside the coordination services submarket. They are literally landlocked in Consumers' service area. Their access to the outside depends on Consumers' willingness to wheel. The Federal Power Act does not change that picture.

Second, as Consumers acknowledges, the Federal Power Commission cannot order developmental coordination under section 202(b).^{440/} That section expressly withholds authority from the FPC "to compel the enlargement of generating facilities."^{441/} And, more generally, as the

^{439/} Otter Tail Power Co. v. United States, *supra*, 410 U.S. at 376; City of Paris, Kentucky v. Kentucky Utilities Co., 41 FPC 45 (1969).

^{440/} See Consumers' Appeal Brief, p. 90.

^{441/} See fn. 438, *supra*.

Federal Power Commission has itself conceded, its "jurisdiction does not extend to the 'facilities' used for the generation of electrical energy."^{442/} As we have just explained, to take advantage of the economies of scale inherent in large baseload units above 500 Mw, the small utilities need either to be part of a joint venture with a nearby larger utility, or must buy unit power from such a plant built by a larger utility. Absent wheeling by Consumers, they can look only to that company for access to large scale baseload generating capacity. The Federal Power Commission cannot compel Consumers to grant that access; FPC decisions acknowledge that the agency has no right "to exercise jurisdiction over the size of nuclear generating unit [or] to allocate the bulk power generating therefrom, such unit being subject to the licensing provisions of the Atomic Energy Act, * * *."^{443/}

^{442/} Northern California Power Agency v. FPC, 514 F.2d 184, 186-87 (D.C. Cir.), certiorari denied, 423 U.S. 863 (1975), quoting the FPC's decision in that case, 45 FPC at 1153 and 1155 (1971).

^{443/} Ibid. See 16 U.S.C. §824a(b), set out in fn. 438, supra.

Third, it is true as Consumers says, that the Federal Power Commission has power in certain circumstances under section 202(b) to order utilities to enter into operational coordination arrangements such as reserve sharing and sales of economy energy.^{444/} But as we have explained, these involve but one aspect of Consumers' monopoly power in the coordination services submarket. More significantly, however, in the Otter Tail decision, the Supreme Court squarely held that the existence of that FPC authority to order interconnections does not displace the operation of the antitrust laws. In that case, the Otter Tail Power Company argued -- essentially as Consumers does here -- "that its refusals to deal should be immune from antitrust prosecution because the Federal Power Commission [had] the authority to compel involuntary interconnections of power pursuant to §202(b) of the Federal Power Act." 410 U.S. at 373. In rejecting the argument, the Court pointed out (ibid.,

^{444/} Gainesville Utilities v. Florida Power Corp., 40 FPC 1227 (1968), 41 FPC 4 (1969), reversed, 425 F.2d 1196 (5th Cir. 1970), reversed, 402 U.S. 515 (1971).

emphasis supplied):

The essential thrust of §202, however is to encourage voluntary interconnections of power. See S Rep No. 621, 74th Cong, 1st Sess 19-20, 48-49; HR Rep No. 1318, 74th Cong, 1st Sess 8. 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.

After reviewing the Federal Power Act's legislative history, the Court concluded (id. at 374-75, emphasis supplied):

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 anti-trust laws. See *United States v. Radio Corp. of America*, supra, at 351, 5 L Ed 2d 354. This is particularly true in this instance because Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with "restraint of free and independent competition" among public utility holding companies. See 15 USC §79a(b)(2).

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.

We think Otter Tail is dispositive. There is no doubt that the terms of coordination agreements are governed in the first instance by business judgment and not regulatory coercion. The FPC itself has stressed that there are literally thousands of different types of coordination arrangements and that their individual terms reflect the needs, resources and managerial views of the different utilities.^{445/} Apparently in recognition of the precedential force of Otter Tail and other Supreme Court decisions,^{446/} Consumers does not make a bald assertion that its individual coordination transactions are exempt from antitrust scrutiny because of the Federal Power Act. Rather, it appears to be arguing that simply because the FPC might someday order it to interconnect with the smaller utilities, ipso facto the company lacks monopoly power. We fail to perceive how a regulatory scheme that admittedly grants no immunity from the antitrust laws, by its mere existence,

^{445/} See quotation in fn. 287, supra, from the FPC's 1970 National Power Survey.

^{446/} Other Supreme Court cases in addition to Otter Tail hold that where business judgment is not in the first instance supplanted by state or federal regulatory coercion, a firm is held accountable under the anti-trust laws for its conduct, though its activities may be subject to the jurisdiction of a regulatory agency. United States v. Radio Corp. of America, 358 U.S. 334, 350-51 (1951); Cantor v. Detroit Edison Co., 428 U.S. 579, 596-98 (1977). Also see Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-90 (1976).

alters the character of what is otherwise monopoly power. Consumers' argument is an attempt to slip in via the back door a proposition the courts have barred at the front, namely, that regulation for other purposes can attenuate the antitrust laws. That argument has been rejected. Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687, 691-92 (9th Cir. 1977); International T. & T. Corp. v. General T. & E. Corp., 518 F.2d 913, 935-36 (9th Cir. 1975), and cases cited. The best that can be said for it is that "the impact of regulation must be assessed simply as another fact of market life." Id. at 936. We find no evidence in this case -- certainly Consumers cites none -- that the responsibility for limiting the coordination between Consumers and the smaller utilities can be laid at the doorstep of the FPC.^{447/}

^{447/}Moreover, it is settled that even conduct formally approved by a regulatory agency may be the basis of an antitrust violation where agency approval conveys no exemption from the antitrust laws. United States v. Radio Corp. of America, supra, 358 U.S. at 350-51; Cantor v. Detroit Edison Co., supra, 428 U.S. at 596-98; California v. FPC, 369 U.S. 482, 489 (1962); United States v. Philadelphia Bank, supra, 374 U.S. at 350-52; Litton Systems, Inc. v. Southwestern Bell Tel. Co., 539 F.2d 418, 422-24 (5th Cir. 1976); City of Mishawaka v. Indiana and Michigan Electric Co., supra; Alameda Mall, Inc. v. Houston Power and Light Co., supra, Trade Reg. Rep. Par. 61,485(S.D. Tex. 1977).

In sum, the regulatory authority vested in the FPC by section 202(b) of the Federal Power Act does not preclude Consumers from having monopoly power in the coordination services market. The section gives the FPC no right to order wheeling or coordinated development and, for the reasons discussed, Consumers' attempt to minimize their importance as "two among many" viable bulk power supply alternatives is unconvincing. Nor does the FPC's power to order operational coordination blunt Consumers' monopoly power. The emphasis under section 202 (b) is on voluntary interconnection; business judgment, not regulatory coercion, governs in the first instance both whether and under what terms a utility will coordinate. The record before us confirms this: of the coordination agreements described in Part IV, none are attributable to FPC insistence. Moreover, when the Power Commission does elect to exercise its section 202(b) authority, "antitrust considerations may be relevant, but they are not determinative." Otter Tail Power Co. v. United States, supra, 410 U.S. at 373. In the circumstances, Consumers' monopoly power over the coordination services submarket is not vitiated by the existence on the statute books of the Federal Power Act.

B. The wholesale and retail power markets.

1. In contrast to the coordination services submarket, both the wholesale and retail product markets lend themselves to the traditional market share analysis. In the latter market the product is firm electric power supplied by electric distribution systems to the retail customer, the ultimate user of that power. We may determine the share of the utilities in this market with relative ease by calculating the amount of such electric energy in megawatt hours (Mwh) that each sold. Using 1971 as an index,^{448/} Consumers that year distributed some 19,874,396 Mwh of electric energy to customers in the retail market; the small utilities combined, some 3,751,242 Mwh. On this basis Consumers held more than

^{448/} The market shares of the respective utilities do not vary significantly from year to year. See D. J. Exh. No. 197.

an 84 percent share of the relevant market for retail power.^{449/}

For reasons described earlier (pp. 200 ff.), the relevant wholesale product market embraces not only wholesale power sold to other utilities for retail distribution, but also the firm bulk power that vertically integrated utilities furnish to their own "in-house" or captive distribution systems. In other words, this market includes the firm bulk power requirements of all the distribution systems in the relevant geographic market, whether or not a particular system is a component of a vertically integrated utility.

^{449/} D. J. Exh. No. 197.

Were we to exclude Consumers' retail sales in its Foote Act franchise areas (except Bay City and Traverse City), Consumers' market share would not be drastically reduced. In 1971, Consumers sold 10,582,416 Mwh in areas where it serves under limited term franchises. Pace, Tr. fol. 7239 at Attachment JDP-1. In addition, it sold 271,000 Mwh in Bay City and Traverse City. This places Consumers' sales of power at the retail level (excluding those Foote Act Franchise areas where there is no current door-to-door competition) at 10,853,416 Mwh. Comparing this to the 3,751,242 Mwh that the small utilities sold at retail still leaves Consumers a 74.3 percent of the retail market.

This percentage differs slightly from the 77% market share that Consumers had calculated for itself in its proposed closed market (see Pace, Tr. fol. 7239 at Attachment JDP-1) because we included in our calculation both Consumers' retail sales in Bay City and Traverse City and those of the municipal systems. Also Consumers excluded Edison Sault and Thumb Electric from the relevant retail market systems, which we include. (See fn. 393, supra.)

Because all power delivered to distribution systems is, except for distribution losses and certain minor exceptions, ultimately sold at retail, the wholesale power market is essentially equivalent in size to the retail market.^{450/} In calculating each utility's wholesale market share, we look, as we did in the retail market, at the amount of electric energy it delivers to distribution systems in the form of firm bulk power. Before making this calculation, however, we reiterate a point we made in discussing the coordination services market. Wholesale power is "firm" power in bulk. While it can be generated by a single utility's own facilities, more often than not it is now produced to some extent by combining bulk power from the coordination services market with bulk power generated internally. Accordingly, when calculating a utility's share of the wholesale power market, one must add to (or subtract from) its in-house production of bulk power the utility's net purchases (or sales) in the coordination services market. We have calculated the wholesale power market and Consumers' share of it under that principle.

^{450/} See Wein, Tr. fol. 3979 at 73.

In 1971, Consumers generated 18,273,104 Mwh of electric energy; it purchased (net) 2,850,256 Mwh additional in the coordination services submarket, making a total of 21,123,360 Mwh that it either supplied as firm bulk power to its captive distribution systems or sold at wholesale to other utilities serving the relevant geographic market. The total firm bulk power requirements for all distribution systems (including Consumers and the small utilities) for that year -- the market -- was 24,779,221 Mwh. Thus Consumers' portion of the wholesale firm bulk power market amounted to somewhat more than an 85 percent share.^{451/}

2. Consumers thus controls a high percentage of the market both at retail (84 percent) and at wholesale (85 percent). "Percentages of this magnitude", the Justice Department contends, "'leave no doubt' that [Consumers] possesses monopoly power."^{452/} A review of monopolization cases confirms that the courts have indeed inferred the existence of monopoly power from market shares of comparable

^{451/} D. J. Exh. No. 197.

^{452/} Justice's Opening Brief on Appeal, p. 55.

dimension. For example, in United States v. Aluminum Co., supra, 148 F.2d at 425, the court found monopoly power from defendant's control over 90 percent of the market; in United States v. American Tobacco Co., supra, 221 U.S. at 162, from 86 percent; in United States v. United Shoe Mach. Corp., supra, 110 F. Supp. at 343, from 75 percent; in International Boxing Club of New York v. United States, supra, 358 U.S. at 249, from 81 percent; and in United States v. Grinnell, supra, 384 U.S. at 567, from 87 percent of the relevant market. Seen in the light of those decisions, Consumers' percentages of sales in the relevant retail and wholesale markets are certainly well in the range that permits the inference that it possesses monopoly power in both markets.

Consumers urges, however, that peculiar characteristics of the electric utility industry preclude our drawing that inference. It prefaces its argument with the Supreme Court's "warn[ing] that '[o]bviously no magic inheres in numbers [reflecting market share because] the relative effect of percentage command of a market varies

with the setting in which that factor is placed'".^{453/}

It contends that the Court's warning not to give talismanic effect to market shares "applies particularly where there are economic and legal restraints upon competition in the relevant market", such as those which Consumers says exist in the electric utility industry.^{454/} In support of its

position Consumers relies principally on three cases:

United States v. General Dynamics Corp., 415 U.S. 486 (1974);

United States v. Marine Bancorporation, 418 U.S. 602 (1974);

and United States v. Citizens National Bank, 422 U.S. 86

(1975). The company contends that in those cases the Court eschewed reliance on market shares because of legal and economic restraints on competition and urges us to follow suit for similar reasons. Consumers' position is, basically, that to the extent the electric utility industry in lower Michigan is not competitive, this is attributable

^{453/} Consumers' Appeal Brief, p. 134, quoting from Times Picayune Pub. Co. v. United States, 345 U.S. 594, 612 (1953) and United States v. Columbia Steel Co., 334 U.S. 495, 528 (1948). In both cases, the defendant's share of the relevant market was roughly 40%.

^{454/} Consumers' Appeal Brief, pp. 134-35.

to legal and economic facts of life in Michigan's electric utility industry. Consumers asserts that those factors negate the inference that it possesses monopoly power solely because it controls the lion's share of the relevant markets.^{455/}

a. We need not be long detained by the legal barriers to competition on which Consumers relies. Our analysis of the retail market sets out at length the reasons why that reliance is misplaced.^{456/} To recapitulate briefly, those barriers do not cast the present market structure in concrete. Michigan law allows municipalities and townships to franchise other private utilities in lieu of Consumers. More importantly, those municipalities may establish their own electric systems within their respective jurisdictions in place of Consumers as the retail and even the wholesale supplier. And, as we also observed, these self-same legal barriers did not preclude Consumers from reaching its present market position by acquisition

^{455/} See Consumers' Appeal Brief, p. 151.

^{456/} See pp. 183-89, supra.

of other companies; indeed Consumers has acquired three more utilities since 1960. In short, there is nothing written into Michigan Law that guarantees the current market position of Consumers in Michigan. Rather, each utility's market share is subject to the ebb and flow of competitive market forces. Those forces are admittedly periodic and limited in strength, but nevertheless they exist and are protected by the antitrust laws. Otter Tail Power Co. v. United States, supra; Cantor v. Detroit Edison Co., supra; City of Mishawaka v. Indiana & Michigan Electric Co., supra.

b. It is true that the economic barriers to the entry of new competitors in the relevant markets (and in the electric utility industry generally) are high ones.^{457/} For example, to start up its own retail electric system, a municipality would have to make a considerable capital investment in a distribution network.^{458/} A similarly large capital investment would be required for any existing retail system to "integrate vertically," i.e., become a

^{457/} See Wein, Tr. 3993-99.

^{458/} According to the FPC, 1970 National Power Survey, p. I-14-1, "distribution systems account for nearly 40 percent of the total investment in electric power facilities."

bulk power supplier as well.^{459/} Simply because of the expense involved, we accept that no municipality would undertake either step lightly. Before doing so it would have to satisfy itself that it would (at least eventually) be able to provide electric service to its citizens at rates significantly below those being offered by the private utility it would displace.^{460/}

But the existence of these high economic barriers to market entry hardly negates the idea that Consumers possesses monopoly power. The opposite is true: the presence of high entry barriers reinforces -- if not confirms -- the

^{459/} For example, Holland's total electric utility plant (generation and distribution) in 1974 was valued at 21 million dollars. Holland's 1974 Annual Report, Form 1-19, p. 3, line 2 (quoted in Consumers' Appeal Brief at p. 111).

As we described in Part IV, Holland is vertically integrated and is the second largest municipal electric system in the relevant geographic market. In 1972 it served 12,048 customers whose peak power demand was 44.5 Mw. Holland met this demand by operating five generating units with a total capacity of 81.5 Mw. See p. 96, supra.

^{460/} Testimony with respect to Foote Act franchises suggests that a potential rate disparity in the neighborhood of 20 percent might be needed before a municipality would consider establishing a system in competition with Consumers. See fn. 377, supra.

inference of monopoly power suggested by Consumers' high market shares. The reason for this was cogently explained in the Federal Trade Commission's Golden Grain Macaroni Co. decision:^{461/}

Under our analysis, it is necessary to consider the existence of other factors which may either confirm or rebut the presumption [of monopoly power] that arises from respondents' [high] market share. The most important such factor in this case is entry barriers. If barriers to entry are low and unimportant, then the existence of numerous potential entrants on the edge of the market would effectively preclude respondents' control of price or exclusion of competition and thus would rebut the presumption of monopoly power. But in this case, the record reveals the existence of high and significant barriers to entry into the dry paste market in the Pacific Northwest, and this fact strengthens the monopoly power presumption based on market share. [Emphasis supplied].

^{461/} 78 FTC 63, 180 (1971) (concurring opinion). The majority agreed on this point:

Barriers to entry * * * would be relevant only if we found that respondents' market share was so large that they enjoyed monopoly power. For, if the barriers were not high, the potential entrants would operate as a deterrent to price increases and demonstrate respondents' incapacity to exclude competitors (the earmarks of a monopolist). In the same way, if we concluded that respondents' performance or conduct was that of a monopolist, we would measure entry barriers so as to gauge better the market power of respondents. But since we have found that under none of these tests (structure, performance or conduct) do respondents have the ability to exclude competitors or raise prices, it is not necessary for us to determine what the record shows respecting entry barriers. Id. at 163 fn. 9.

To reiterate, low barriers to entry rebut the inference of monopoly power suggested by high market shares because the ease with which new firms may enter the market deters the dominant firm from increasing prices and demonstrates its incapability of excluding competition.^{462/} In contrast, high entry barriers reinforce the inference of monopoly power implied by large market shares cause the difficulty of new firms entering the relevant market allows the dominant firm greater leeway in raising prices or excluding competition. Golden Grain Macaroni Co., supra; United States v. United Shoe Machinery Corp., supra, 110 F. Supp. at 343-44.

The three Supreme Court cases that Consumers cites to support its contrary argument are simply not in point. Marine Bancorporation, General Dynamics, and Citizens National Bank involved mergers attacked under Section 7 of the Clayton Act, not monopolization challenged under Section 2 of the Sherman Act.^{463/} The pivotal factor in each was the factual determination that the merger between two existing companies

^{462/} See Judge Lacey's recent lucid discussion of the point in Weber v. Wynne, 431 F. Supp. 1048, 1054-56 (D.N.J. 1977).

^{463/} United States v. Citizens National Bank also involved a charge under Section 1 of the Sherman Act. Consumers does not rely on that portion of the Court's opinion.

did not substantially lessen competition, actual^{464/}

464/ In both United States v. General Dynamics and United States v. Citizens Bank, the Court found that the merging companies' market shares were sufficiently high to support a finding of undue concentration. Clayton Act, section 7, was held not to have been violated because of proof that the merger would in fact not substantially lessen competition.

In General Dynamics, the Court focused on the coal industry's practice of selling coal under long-term fixed price contracts. Because of this, the Court concluded that the best measure of a coal producer's competitive power was the size of its uncommitted reserves of recoverable coal. The Court found that the acquired company had relatively small amounts of coal reserves, most of which were already committed under long-term contracts, and that it did not have possibility of acquiring more reserves. Thus, the Court was led to conclude that though the acquired company was at the time a highly profitable and efficient producer of coal, it had dim long term prospects and therefore no substantial lessening of competition would result from the merger.

In United States v. Citizens Southern Bank, the Court found that the merger would not substantially lessen competition because, under a pre-existing commercial relationship between the merging firms, "no real competition had developed or was likely to develop." 422 U.S. at 121. (The Court had expressly found that this previous commercial relationship did not violate section 1 of the Sherman Act).

These two cases stand for the proposition that factors other than market concentration are important when determining a violation of section 7 of the Clayton Act. While that principle is applicable also under section 2 of the Sherman Act, it is not material in determining the roles that barriers to market entry play in determining the existence vel non of monopoly power.

or potential,^{465/} the statutory test for proscribing a

465/ In United States v. Marine Bancorporation, the government's case rested on the potential competition doctrine. Its essence is that fear of the potential entry of the acquiring firm into the relevant market previously forced an otherwise oligopolistic market to function competitively to deter that entry. Upon merger of the potential competitor with a firm already in the market, the former procompetitive influence vanishes. Accordingly, the merger lessens competition within the relevant market. See United States v. Marine Bancorporation, supra, 418 U.S. at 623-41; United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973). See also Kennicott Copper Corp., 78 FTC 744 (1971), affirmed sub nom. Kennicott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972). Thus, as the Supreme Court observed in Marine Bancorporation, "ease of entry [into the relevant market] on the part of the acquiring firm is a central premise to the potential competition doctrine", 418 U.S. at 628. And in that case, the Court found that state regulatory restraints on branch banking made the acquiring firm "an insignificant potential entrant except by merger" and thus the "procompetitive influence" the acquiring firm exerted in the relevant market "by standing 'in the wings'" was minimal. 418 U.S. at 639-40. The Court therefore concluded that because no potential competition existed, the merger could not have the effect of substantially lessening competition in the relevant market.

Manifestly, the rationale of Marine Bancorporation is not pertinent to deciding whether a firm already within the relevant market possesses monopoly power. In no way did the Court hold (as Consumers would have us do here) that the legal barriers to entry rebutted the presumption suggested by the market shares that the relevant market in that case was oligopolistic. Indeed, the Court recognized that these legal barriers reinforced the oligopolistic nature of the relevant market. 418 U.S. at 630-32 and 639-42.

merger under section 7 of the Clayton Act. None of these cases, however, suggests (much less holds) that high "barriers to entry" in a market negate the idea that the dominant firm in that market possesses monopoly power.^{466/}

Moreover, the testimony of both Consumers' economic experts supports the validity of the proposition that high entry barriers enhance, not diminish the likelihood that

^{466/} Consumers contends that the "basic natural monopoly" characteristics of the electric utility industry, with concomitant barriers to competition, make it "'hardly surprising' * * * that only one large firm will be present in a given market area". Consumers' Appeal Brief, p. 143. Consumers appears to be suggesting that because it is natural (at least from its viewpoint) for it to be the only large firm in its own general service area, it cannot have monopoly power. To the extent that Consumers is making such an argument it is in error. Because a firm's monopoly is "natural" hardly suggests that it lacks monopoly power. It merely means that the antitrust law may not penalize acquisition of that power. See United States v. Aluminum Co., supra, 148 F. 2d at 429-30.

an enterprise which dominates the market has monopoly power.^{467/} Consumers' contrary assertions are simply at war with accepted economic tenets.^{468/}

^{467/} Dr. Pace, in response to hypothetical questions, testified that (Tr. 7300, 7302):

If one * * * had 80 percent of the market but there were substantial competitors standing on the edge of that market, obviously facing relatively little barriers to entry, the possession of 80 percent of the existing market by a single server could be, in fact, consistent with completely efficient performance.

* * *

[But] if he possesses 80 percent of the market, he is not regulated, and potential competition is barred from the market, I would tend to conclude he has monopoly power.

Similarly, Dr. Stelzer testified (Tr. fol. 7224 at 16):

[t]o the extent that [the possibility that a utility may be supplanted by entry of a new utility], exists, it reduces the economic meaningfulness of any market share competition since given the threat of entry, a firm has to behave as if his market share were under continuous threat.

^{468/} Even if an absolute legal barrier to new entry were to exist (not the situation in lower Michigan), Consumers' proposition would be invalid. For example, a holder of a patent is protected by law from possible competitors manufacturing and selling its product -- i.e., an absolute legal barrier to competition in the selling of that product exists. If no reasonable substitutes existed for that product, the patentee would be totally free to set a monopoly price for its product. In short, he would have unmitigated albeit lawful monopoly power because of that barrier. Of course, as long as he does not misuse his patent, he is not subject to attack under the antitrust laws. But this does not detract from the fact that he possesses monopoly power.

3. In the final analysis, our conclusion that Consumers possesses monopoly power in the retail and wholesale markets stands on three legs: the permissible inference to that end from the company's predominant share of those markets; the high market barriers that face any new entrant to those markets (and serve to confirm the existence of Consumers' monopoly power); and, lastly, Consumers' strategic dominance of generation facilities and, perhaps more importantly, the transmission network serving those markets. We have already described how this last factor enables Consumers to curtail the smaller utilities' access to the coordination services necessary to obtain economies in the production of firm bulk power -- making them more likely to have to meet their bulk power needs by purchases of wholesale power from Consumers. But it is also manifest that Consumers' control of the transmission network enables it, simply by refusing to wheel, to block other utilities from entering the markets and

competing to serve the smaller company's bulk power needs.^{469/}
This in turn ultimately affects the smaller utilities' cost
of producing retail power, again to Consumers' competitive
advantage, and discourages potential new entrants in that
market as well.^{470/}

4. Consumers insists, nevertheless, that it does not
possess monopoly power in either market because of state
and federal government regulation of its rates and other
activities. We do not agree.

a. To begin with, as Dr. Wein explained, "the
fact that [there is] regulatory review of [utility] com-
panies' rates, whether it is on a federal or state level,
is only because these companies do have monopoly power,
i.e., * * * if they had no monopoly power to set the rates
there would be no reason for regulation".^{471/} The courts

^{469/} Id., Alabama Power Company (Joseph M. Farley Nuclear
Plant, Units 1 & 2), 5 NRC 804, 899-901 (1977) (appeal
pending).

^{470/} We stress again that the question addressed here is
whether Consumers possesses monopoly power. Whether
it has used that power to monopolize, an offense under
the Sherman Act, is a separate question addressed in
the next part of this opinion.

^{471/} Tr. 3996.

agree. "[P]ublic utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation". Cantor v. Detroit Edison Co., supra, 428 U.S. at 595-96.

The effectiveness of rate regulation -- whether it really precludes regulated enterprises from exercising monopoly control over prices -- is debatable.^{472/} The two principal economists who testified in this case disputed the point.^{473/} With respect to the retail market, however, we need not become embroiled in debate over the extent of the Michigan PSC's ability to control monopoly profits. As we have described at some length (see Part V, supra), at the retail distribution level each locale may be thought of as a natural monopoly with only the identity of the monopolist open to competition. The critical question for purposes of this case is, therefore, whether state

^{472/} See for example, Hale and Hale, The Otter Tail Power Case; Regulation by Commission or Antitrust Laws, the Supreme Court Review, 99, 104-14 (1973); Turner, The Scope of Antitrust and Other Economic Regulatory Policies, 82 Harvard L. Rev. 1207, 1231-41 (1969); Posner, Natural Monopoly and Its Regulation, 21 Stanford L. Rev. 548, 592-606 (1969).

^{473/} Compare Wein, Tr. fol. 3979 at 31 and Tr. 3993-96, with Pace, Tr. fol. 7239 at 15-16, 24-25 and Tr. 7277-78.

or federal regulation precludes Consumers from using its dominant economic power to foreclose competition for the right to provide retail service to the individual communities. As we have already discussed, Consumers' control over transmission and generation facilities enables it to prevent potential retail competitors from looking elsewhere than to itself for wholesale power and coordination services. It was precisely the existence of this kind of power -- and its use by an electric utility in analogous circumstances to foreclose its replacement as the sole supplier of retail power in several municipalities -- which the Otter Tail Court characterized as "monopoly power" (410 U.S. at 377). And the Court did so notwithstanding the existence of FPC and local regulatory authority.^{474/} Indeed, at oral argument, counsel for Consumers acknowledged that the Supreme Court had found that the Otter Tail Power

^{474/} The Supreme Court was well aware that the FPC had in 1968 ordered a temporary interconnection between Otter Tail and Elbow Lake (one of the cities involved) and made this interconnection permanent in 1971, four days after the district court had entered its decree. See 410 U.S. at 392 fn. 8, and 40 FPC 1262 (1968) and 46 FPC 675 (1971).

Company possessed monopoly power. (App. Tr. 127-28.) ^{475/}
The Otter Tail decision is thus dispositive and compels
our rejection of the argument that government regulation
precludes Consumers' possession of monopoly power in the
retail market. ^{476/}

^{475/} In its appellate brief (p. 89, fn. 54), Consumers
attempts to distinguish Otter Tail by arguing that
it is not a "monopolization" case but rather (in
the Supreme Court at least) involved charges of
"attempting to monopolize" an unregulated retail
market. We have previously rejected that reading
of the case. See fn. 88, supra. (In any event, an
element of an attempt to monopolize is a dangerous
probability of success.) It is true that Minnesota
and South Dakota did not regulate retail rates at
the time, but North Dakota -- also involved -- did.
This lack of rate regulation is of no significance.
The Supreme Court found that Otter Tail had monopolized
by anticompetitive uses of its dominant economic
power -- other than its rate structure -- to exclude
competition. See 410 U.S. at 377. Regulation of
its rates would not block a utility company's
exercise of monopoly power in this fashion in any
event.

^{476/} Consumers also argues in its appellate brief
(pp. 88-89) that because Michigan Law (MSA 22.156)
provides that the state PSC may "order the Company
to deliver power suitable 'for distribution' at
any appropriate primary voltage in any 'city,
village or township' through which its transmission
lines run", this means the company lacks the ability
to exclude competition. Consumers does not press
the point and makes no mention of any instance in
which it was compelled to furnish power by virtue
of this provision. This is merely another version
of the argument that the existence of latent state
regulatory power exempts business conduct from the
antitrust laws. The point is not well taken. See
pp. 230 ff., supra.

b. Consumers' argument that FPC regulation of bulk power transactions precludes its having monopoly power in the wholesale market is no stronger. Indeed, we have already considered and rejected that same line of reasoning when Consumers proffered that argument in connection with the coordination services submarket. See p. 230 ff., supra. Similar considerations call for its rejection here as well. In essence, these boil down to the fact that Consumers' power to exclude competition by virtue of its dominance over transmission and generation facilities is not effectively curtailed by the FPC's regulatory authority. We therefore find no occasion to discount Consumers' possession of monopoly power in the wholesale market on the basis of such FPC regulation.^{477/}

^{477/} While we do not pursue the point, it is worth noting that the FPC's power to control wholesale rates apparently does not effectively bar a utility from exercising monopoly power in the wholesale market by means of "price squeeze" tactics. These tactics involve charging municipalities higher wholesale rates than the utility's own retail rates, thereby foreclosing the municipalities' competition for its customers or for new industrial users. See, City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977). Indeed, even in straightforward cost-of-service situations, the efficacy of FPC procedures to preclude rate-gouging is problematical. Under the law, the Commission may only suspend a rate increase for 5 months while investigating whether it is just and reasonable. If the investigation is not then complete, the higher rate becomes effective. Thus, for example, after
(FOOTNOTE CONTINUED ON NEXT PAGE)

5. Finally, Consumers argues that the "competitive success and comparative financial strength of the Company's smaller neighbors" confirms its lack of monopoly power. The logic of this argument eludes us. Manifestly, every company that possesses less than 100 percent of the relevant market will have some viable competitors. That they continue in business -- even successfully -- does not mean that the dominant enterprise is without monopoly power. See, e.g., United States v. United Shoe Machinery Corp.,

477/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
the Otter Tail litigation had been resolved in the Supreme Court, the utility agreed in 1973 to wheel wholesale power to the town of Elbow Lake, but only after filing a tariff which charged 500% more for that service than other towns were then called upon to bear. Elbow Lake promptly protested to the Commission, but the FPC proceedings on that rate filing are not yet close to completion. See, Alexandria v. FPC, 555 F.2d 1020 (D.C. Cir. 1977). If the higher wheeling rate is held not "just and reasonable," the FPC might eventually be able to order a refund. But see, Indiana & Michigan Electric Co. v. FPC, 502 F.2d 336, 342-45 (D.C. Cir. 1974), certiorari denied, 420 U.S. 946 (1975) (FPC without power to order a refund of charges paid under an initial rate filing as distinguished from refunding an increase over a previously filed rate). Moreover, as the 7th Circuit dryly observed in City of Mishawaka, supra, "Delay, combined with the multiple rate increases, could mean that the customer has been put out of business by his supplier-competitor. You cannot give refunds to a corpse." 560 F.2d at 1325.

supra, 110 F. Supp. at 339, 345-46.^{478/} "[W]e do not think that absolute success in excluding competition is an essential element to proving monopoly power under section 2. It is enough that defendants' market position is such that they have substantial power to thwart competition".^{479/}

Neither are we able to perceive how certain financing and tax advantages enjoyed by the municipalities and cooperatives negate Consumers' predominant market position and its control over the strategic transmission lines. Aside from the fact that anticompetitive conduct cannot be justified on the ground that a competitor has a tax advantage, see American Federation of Tobacco Growers v. Neal, 183 F.2d 869, 872 (4th Cir. 1950), those tax and financing advantages are a matter of federal policy. If Consumers finds them unpalatable, its remedy lies with the Congress; in the interim it must take its competitors as it finds them.

^{478/} The cases cited by Consumers do not hold to the contrary. United States v. Columbia Steel Co., 334 U.S. 495 (1948); United States v. General Dynamics Corp., supra, 415 U.S. at 502; and Budd Co., 3 CCH Trade Reg. Rep. par. 20,998 (FTC 1975), concerned mergers attacked under section 1 of the Sherman Act or section 7 of the Clayton Act; the factual situations and legal questions involved in those cases are not analogous to those presented here. The Tenth Circuit declined, in Cole v. Hughes Tool Co., 215 F.2d 924 (1954) certiorari denied, 348 U.S. 927 (1955), to accede to the trial court's inference of monopoly power from Hughes' 75% share of the drilling tool market. The court attributed that share to Hughes' legal monopolies under valid patents and expressed skepticism about the evidence to the contrary. The court's remark about the continued successful existence of certain competitors (who had been held infringing on Hughes' patents) was a makeweight at best.

^{479/} Woods Exploration & Pro. Co. v. Aluminum Co. of America, supra, 438 F.2d at 1307.

VII

MONOPOLIZATION

Our determination that Consumers Power Company possesses monopoly power in the relevant markets does not end the inquiry. It is not monopoly power but its willful use to preserve or extend a monopoly, to foreclose actual or potential competition, to gain competitive advantage or to destroy competitors -- i.e., "monopolization" -- which section 2 of the Sherman Act condemns. (See pp. 56 ff., supra).

Were this a district court proceeding, the question would be whether Consumers has monopolized one or more of the relevant markets in violation of the Sherman Act. That question is indeed present. But section 105c calls upon us to answer a further inquiry. Even if Consumers' conduct falls short of a full-fledged statutory violation, does it run counter to the policies underlying the Sherman Act so that remedial conditions on the company's nuclear licenses are called for nevertheless? Before we may reach those substantive questions, however, there are some preliminary matters which must be addressed.

A. Preliminary questions.

1. Matters "beyond" the scope of the controversy.

On the basis of its assumption that the issues were limited to charges involving coordination (see Part V), the Licensing Board declined to consider charges that Consumers had monopolized the wholesale and retail markets. In so doing, it excluded charges that the company had monopolized those markets by (a) acquiring smaller utilities within them, (b) entering into agreements not to compete with neighboring large utilities, and (c) refusing to wheel bulk power from outside sources to the smaller utilities. See 2 NRC 40-45 and 104-109. In the Board's view, those charges were not concerned with coordination and hence were beyond the scope of this proceeding.

We have already held, as Consumers urged, that the Board erred in excluding consideration of the wholesale and retail markets. Consumers now insists, however, that it would be prejudiced by our consideration of the additional charges because it had no fair opportunity to defend against them below. Appellants disagree, contending that those allegations were fully litigated before the Licensing

Board. If they are correct, we may consider those allegations. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 354-55 (1975).

In resolving this question, whether the allegations have been formally charged in a complaint or specified at the outset in another manner is relevant but not decisive. In an administrative proceeding the "complaint"^{480/}

^{480/} The closest document to a formal complaint in this proceeding is the Attorney General's letter to the Commission recommending an antitrust hearing. See pages 4-5 supra. It was certainly his objections to Consumers' coordination practices with smaller utilities that formed the primary basis for his recommendation.

The primary agency document defining the scope of the proceeding is the Licensing Board's order delineating the relevant matters in controversy. See 2 NRC at 42. A fair reading of that order indicates that the "basic thrust" of Justice's charges of anticompetitive conduct levied against Consumers concern the company's coordination policies with respect to the small utilities, including their effect on the wholesale and retail markets. Wheeling is a form of coordination and thus certainly within the scope of the Board's order. At the hearing Consumers presented a general statement concerning its wheeling policies. It made no attempt to distinguish between wheeling for coordination and wheeling wholesale power.

need not "enumerate precisely every event to which [the agency] may finally attach significance."^{481/} The crucial factor is whether the opposing party is given a reasonable opportunity to know and defend against the case as it unfolds. It is sufficient that such an opportunity has been provided and the matters have been fairly litigated and argued. In administrative proceedings, claims of prejudicial error are not sustainable on technical deficiencies in formal statements of charges.^{482/}

^{481/} L.G. Balfour Co. v. FTC, 442 F.2d 1, 19 (7th Cir. 1971).

^{482/} L.G. Balfour Co. v. FTC, supra, fn. 481. Accord, Avnet v. FTC, supra, 511 F.2d at 76; Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972), certiorari denied, 412 U.S. 918 (1973). Rea Trucking Co. v. NLRB, 439 F.2d 1065, 1066 (9th Cir. 1971); Rogers Mfg. Co. v. NLRB, 485 F.2d 644 (6th Cir. 1973).

Our review of the record satisfies us that the three allegations supposedly beyond the issues in controversy were fully litigated. (Indeed, we note that the Board below itself purported to resolve them "for the sake of completeness". 2 NRC at 102.) Each was addressed throughout the proceeding by all the parties, including Consumers. For example, the appellants sought discovery relating to these allegations^{483/} and Consumers responded without objection.^{484/} Moreover, in its prehearing brief Justice specifically made these allegations against Consumers, setting forth the particular factual situations that formed the basis for the charges.^{485/} And, contrary to Consumers' contention, Justice and the NRC staff introduced testimonial

^{483/} For example, see First Joint Request of [the appellants] for Production of Documents from Consumers, July 26, 1972, requests no. 3(a), 3(d), 5(c), 5f(1), 5f(2), 5f(2)(i), and 6(a); Justice's Further Request for Admission and Interrogatories, August 22, 1973, requests no. 9, 11, 12, 24, 25, 26; Deposition of Mr. Aymond Consumers' Chief Executive Officer, Intervenors' Exhibit no. 1004, pages 183-190, 193-205.

^{484/} It should be noted that Consumers did raise numerous objections concerning the proper scope of discovery but none concerning the relevancy of requests concerning the three allegations in question. For example, see Consumers' Objections to Document Requests and Motion for a Protective Order, October 26, 1972.

^{485/} Justice's Prehearing Brief, 39-42, 47-48, 50-51. Also see Intervenors' Trial Brief, 17, 23, 41 and Consumers' Prehearing Brief, pages 158, 186-88.

evidence in support of their allegations.^{486/} Consumers did not object and, again contrary to the representation in its appeal brief, actually conducted extensive cross-examination on these matters. See fn. 486 supra. Moreover, in making its direct case, Consumers itself offered witnesses who sought in their testimony to contradict evidence on these questions previously placed in the record by the appellants.^{487/} Finally, Consumers filed proposed findings

^{486/} Testimony concerned with Consumers' acquisition of small utilities and related matters appears at Wolfe, Tr. 1585-89, cross examination by Consumers, Tr. 1791-97; Steinbrecher, Tr. 1233-49, cross examination by Consumers, Tr. 1882-92; Keen, Tr. 4487-88, cross examination by Consumers, Tr. 4540-49.

Testimony related to general wheeling services from Consumers appears at Wolfe Tr. 1729, cross examination by Consumers, Tr. 1829-32; Munn, Tr. 4073-77, 4136 cross examination by Consumers, Tr. 4209-11; Keen Tr. 4510-15, cross examination by Consumers, Tr. 4529-34; Fletcher, Tr. 4329, 4354.

Testimony related to wholesale territorial agreements appears at Sundstrand, Tr. 3890-3917. Mr. Sundstrand did not testify on any other topic. Consumers chose not to cross examine. Tr. 3917.

^{487/} Direct testimony related to Consumers acquisition of the small utilities appears at Aymond, Tr. 6063-4; Paul, Tr. 7907-20. Moreover, Consumers' exhibit No. 11,308 lists both Consumers' acquisitions of small utilities and its offers to buy small systems.

Direct testimony related to general wheeling services appears at Aymond, Tr. 6046-52 and Paul, Tr. 7934-36. (FOOTNOTE CONTINUED ON NEXT PAGE)

of fact and conclusions of law with the Board below covering each of the allegations it now says were beyond the scope of the proceeding. Indeed, it did so without once urging the Licensing Board to find them beyond the relevant matters in controversy. ^{488'}

487/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
Direct testimony related to wholesale territorial agreements appears at Aymond, Tr. 6070-71 and Paul, Tr. 7950.

Consumers cannot contend that its direct testimony was entirely in response to evidence introduced by the appellants, for in summaries of testimony prepared prior to the evidentiary hearing Consumers included these topics as matters which its witnesses would address.

For example, in summarizing testimony to be given by Mr. Aymond its chief executive officer, Consumers represented:

Specifically, he will discuss the applicant's past and current policies, where they exist, with respect to wheeling power for other utility systems, sales of power at wholesale, mergers or acquisitions, and sales of unit power and equity participation in nuclear plants: He also will discuss the company's policies with respect to competition for wholesale and retail load.

Consumers' Summary of Testimony of A.H. Aymond (Emphasis supplied). See Justice's Reply Brief on Appeal p. 22.

488/ See Consumers' Proposed Finding of Facts and Conclusions of Law, pp. 61-68; Consumers' Opening Brief Below pp. 185-86, 205-212; Consumers' Reply Brief Below, pp. 128-36, 152-169 and Consumers Supplemental Proposed Findings of Fact Attached to its Reply Brief Below.

These circumstances amply satisfy us that Consumers was afforded reasonable opportunity to defend itself against the allegations in question and that in fact it took advantage of the opportunity at each stage of the proceedings below. Notwithstanding its current assertions to the contrary (pressed for the first time on appeal), the company will not be prejudiced by our consideration of these allegations.^{489/}

^{489/} L. G. Balfour Co. v. FTC, supra fn. 482 and other cases cited in that footnote.

The case which Consumers primarily relies upon, Rodale Press, Inc. v. FTC, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968), is simply inapposite. The FTC decided that case on a theory not advanced at trial and without allowing the parties "the opportunity to present argument under the new theory of the violation". We have no quarrel with the case or the result reached there. It simply is not what occurred here.

2. Deference due the Licensing Board's findings.

The remaining preliminary matter concerns the weight to be given the Licensing Board's findings. By way of background, we note that in general practice we accord licensing board decisions presumptive validity; we do not scan every line of testimony or examine each document in evidence de novo.^{490/} But in conducting our review, we are not in the position of a federal appellate court. A court of appeals must accept the findings of the trier of fact (the district court) unless it can fairly say that they are "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure. We do not owe that same degree of deference to the Licensing Board. For reasons elaborated in Catawba^{491/}, final responsibility for weighing evidence, making findings, drawing inferences and arriving at an appropriate decision is vested in the Commission itself, not in its subordinate hearing officers. Consequently, in our role as the Commission's delegate in these cases, we may substitute our judgment of the facts as well as of the law for that of the Board below.

^{490/} See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 866-67 (1975); Niagara Mohawk Power Corporation (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975).

^{491/} Duke Power Company (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 403 (1976) and cases cited at 402-05.

In this case, Justice and the staff urge that no weight at all be accorded those findings which exculpate Consumers from the charges of anticompetitive conduct. The claim is made that the Licensing Board improperly evaluated those charges by considering them individually rather than as components of a course of anticompetitive conduct (see pp. 38 ff.) and by neglecting to include the factor of Consumers' monopoly power when weighing those charges in the balance. Consumers disputes this. It points among other things to an express passage in the Board's opinion which recites in so many words that, even "[a]ssuming without deciding that [Consumers] has or had monopoly power", the eight anticompetitive situations "dealt with hereinabove" show no "misuse of such power."^{492/}

^{492/} This portion of the Board's opinion provides in its entirety (2 NRC at 112-13):

IV. APPLICANT'S MONOPOLY POWER

At the first prehearing conference, Justice took the position that Applicant had monopoly power and that such monopoly, insofar as was known at that time, was a lawful monopoly. Justice's case was that said monopoly power had been used in such a way that it violated the principles of the antitrust laws [Tr. 60-61]. There is no evidence in the record that any monopoly possessed by Applicant on January 1, 1960 was other than lawful in and of itself. As agreed by Justice, we take the Applicant as we find Applicant on January 1, 1960 [Tr. 62]. The only evidence involving situations of possible unlawful use of or extension of monopoly power by Applicant in the wholesale

(FOOTNOTE CONTINUED ON NEXT PAGE)

Justice acknowledges that passage but insists nonetheless that the Board improperly measured Consumers' culpability because it failed "to understand the legal significance of its own assumption".

We find some merit in appellants' contentions. For example, the only product market the Board considered relevant was that for coordination services. In discussing that market, however, the Board did not evaluate Consumers' conduct in light of its monopoly position in that market, much less in the retail and wholesale markets. The Board's treatment of the charges involving monopolization of those two markets ("situation six," 2 NRC 102-105) confirms this. Despite finding from Consumers' actions an intent "to monopolize the retail and wholesale power markets by destroying competition from a group of healthy, growing, effective and aggressive competitors" (2 NRC at 104), the Board saw no situation inconsistent with the antitrust laws "because the evidence totally fails to show the power to

492/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

and retail market were dealt with in Situations 1 to 3 and 5 to 7 hereinabove. The only evidence involving situations of possible use of monopoly power in the transmission field were dealt with in Situations 4 and 8 hereinabove. Assuming without deciding that Applicant has or had monopoly power in the relevant geographic market, situations involving misuse of such power have been dealt with hereinabove.

carry out the scheme" (id. at 105). But "dangerous probability of success" is material only in an "attempt to monopolize" case. See fn. 88, supra. In contrast, under the present charge of "monopolization" -- use of existing monopoly power to preserve or enlarge market dominance -- the Board's findings (if correct) could mean only that the Sherman Act had been violated. See pp. 56 ff., supra. The opposite determination makes sense only if the Board assumed that Consumers lacked monopoly power and was charged with attempting to achieve it. That the Board apparently so assumed indicates that it indeed considered each "situation" in isolation and neglected to evaluate them all in light of Consumers' monopoly status.

This is further confirmed by the Board's evaluation of Consumers' wheeling policy (situations "four" and "eight"). Although concluding that the company's conduct "amounted to a general refusal to wheel", the Board saw no adverse antitrust consequences "arising out of that refusal" because it found "no evidence" that it "was part of a larger scheme or conspiracy." Yet it also determined (situation "six") that "[Consumers'] goal [was] to acquire all of the small utilities within the relevant geographic market", that this was an "anticompetitive scheme to monopolize" the "wholesale and retail markets" as "forbidden by Section 2

of the Sherman Act."^{493/} Nowhere did the Board even question whether the refusal to wheel was part of the scheme to monopolize covered in situation "six". This incongruity, it seems to us, confirms that the Board passed on Consumers' conduct in each situation in isolation.

The passage in the opinion below relied on by Consumers -- suggesting that even if the company possessed monopoly power it had not engaged in anticompetitive conduct -- does not persuade us otherwise. As we have indicated, the Board's own findings would demand the opposite conclusion under the correct standard.^{494/}

These considerations do not lead us to conclude that the Licensing Board's basic findings of fact are worthless and merit no deference. But they do suggest that the Board somewhat misunderstood the applicable law. For that reason the inferences and determinations based on those findings may well be vulnerable. Accordingly, these will be given particular scrutiny.

^{493/} Compare 2 NRC 99 with 104.

^{494/} Moreover, the structure of the opinion below suggests that the passage is at best an afterthought; it appears late in the decision, well after the substantive discussions and, in contrast to them, is devoid of any attempt at reasoned analysis.

B. Refusals to deal.

A principal charge against Consumers is that it wheels power for and coordinates with large electric utility systems that do not compete with it but declines to do so on reasonable terms with competing small systems. Appellants contend that Consumers' selective refusals to deal take unjustified advantage of its small competitors and demonstrate the company's intent to monopolize.

The Licensing Board analyzed the charges in light of the parables of the Good Samaritan and of the Rich Man and Lazarus.^{495/} The Board concluded that Consumers had no obligation to coordinate with or wheel power for the small utilities because (a) no statutory duty required the company to do so and (b) the refusals to wheel and coordinate had not caused the small competitors economic distress (although provision of those services might alleviate it). On the basis of these holdings, the Board ruled that a monopolist's refusals to deal are not inconsistent with the antitrust laws unless proven to be substantial and material elements in a "scheme" to monopolize. See 2 NRC at 72-79.

^{495/} "Down through the ages, refusal to assist another who is in dire distress has been lawful in the absence of a specific statutory duty to act. Thus, in the parable of the Good Samaritan (Luke 10:29-37) and of the Rich Man and Lazarus (Luke 16:19-31), while those who failed to help the unfortunate met with divine disapprobation, there is no indication of the breach of a legal duty." 2 NRC at 71.

The Department of Justice takes sharp issue with those rulings. It alleges that the company's refusals to coordinate, to share reserves and to sell transmission services raise artificial barriers to market entry and therefore constitute exclusionary conduct having the effect of maintaining Consumers' monopoly market positions. According to Justice, evidence of these refusals to deal is therefore sufficient by itself to establish "willfulness", the element of general intent needed to prove the offense of monopolization.^{496/} The Department contends that the "scheme of monopolization," repeatedly adverted to by the Board below, is a term unknown to the law of monopolization, but adds that the Board erred if it used the term to mean that a "specific intent" must be shown to prove monopolization.^{497/}

Consumers responds by insisting that the Board below correctly held it free of any obligation to deal with the small utilities. Citing United States v. Colgate & Co.,

^{496/} Citing principally Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Packaged Programs, Inc. v. Westinghouse Broadcasting, 255 F.2d 708 (3rd Cir. 1958); Six Twenty Nine Productions v. Rollins Telecasting, Inc.; 365 F.2d 478 (5th Cir. 1966); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); and Otter Tail Power Co. v. United States, supra. See Justice's Opening Brief on Appeal, pp. 27 ff., and Reply Brief on Appeal, pp. 37 ff.

^{497/} Justice's Opening Brief on Appeal, p. 24 fn.

250 U.S. 300 (1919), the company contends that "it is axiomatic that a firm has a right to exercise its business judgment in choosing those with which it wishes to deal, absent specific proof of monopolistic intent."^{498/} Discounting the Department's authorities as no more than "several cases holding that a predatory discontinuance of vital prior dealings is sufficient to establish requisite specific intent in attempt-to-monopolize cases", Consumers argues that "[t]hey have no application here where that motivation has not been established and where there is no allegation that Consumers Power refused to provide a previously-provided service."^{499/} In short, Consumers supports the Licensing Board's ruling with the assertion that "even a firm with a monopoly share" is not required to deal "absent 'bold' predatory conduct which results in the destruction of competition."^{500/}

For the reasons which follow, we hold that the Licensing Board has misconstrued the law and that Consumers' attempts to buttress the Board's decision in this area are unavailing.

^{498/} Consumers' Appeal Brief, p. 205.

^{499/} Id. at 205, fn. 34.

^{500/} Id. at 206-07.

To begin with, there are circumstances in which the antitrust laws impose an affirmative duty on business firms to deal with their competitors. As evidenced by decisions following Colgate, unilateral refusals to deal by a firm with a dominant market position have regularly been held to constitute either "monopolization" or an "attempt to monopolize" in violation of section 2 of the Sherman Act.^{501/} In Eastman Kodak Co. v. Southern Photo Co., supra, for example, Kodak violated section 2 by refusing to sell except at retail prices to the plaintiff, a former retail distributor of Kodak products.^{502/} (Kodak, already holding a monopoly of

^{501/} Our discussion excludes cases arising under section 1 or 2 of the Sherman Act involving conspiracies or concerted refusals to deal.

^{502/} The Court's decision is unclear on whether Kodak was guilty of monopolization or an attempt to monopolize. The Court was affirming a jury verdict and its discussion was brief. It stated:

although there was no direct evidence -- as there could not well be -- that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose, as a matter of just and reasonable inference to warrant the submission of this question to the jury.

273 U.S. at 375.

production and at wholesale, was expanding into the retail market and had purchased other retail outlets in the area.)^{503/} In Lorain Journal Co. v. United States, supra, the sole newspaper in a town was guilty of an attempt to monopolize by refusing to sell advertising space to those who advertised on the town's new radio station. In Packaged Programs, Inc. v. Westinghouse Broadcasting, supra, plaintiff, an advertising agency, averred that Westinghouse, owner of the only television station in Pittsburgh, was attempting to monopolize the advertising market by refusing to air commercials produced by the plaintiff. (Westinghouse also produced commercials.) The court held that this complaint stated a claim cognizable under section 2 of the Sherman Act. In a factual situation paralleling Packaged Programs, the court in Rollins Telecasting, supra, reversed summary judgment for the defendant television station. And in Otter Tail Power Co. v. United States, supra, the Supreme Court held Otter Tail guilty of monopolization when that vertically integrated electric utility refused to wheel power for and to sell wholesale power to municipalities seeking to displace it as their retail distributor of electricity.

^{503/} Two cases similar to Kodak, i.e., a wholesale supplier-monopolist found guilty of monopolization by refusing to deal with independent retailers in favor of an integrated system, are Poster Exchange, Inc. v. National Screen Serv., 431 F.2d 334 (5th Cir. 1970), certiorari denied, 401 U.S. 912 (1971) and United States v. Klear-flax Linen Looms, 63 F. Supp. 32 (D. Minn. 1945). See also, Woods Exploration & Pro. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1308 fn. 9 (5th Cir. 1971), certiorari denied, 404 U.S. 1047 (1972).

In a word, as the Second Circuit recently ruled, cases such as Lorain Journal and Eastman Kodak^{504/} are Supreme Court decisions "which do stand for the proposition that where a single trader refuses to deal in order to enhance its monopoly position, a [Sherman Act] section 2 violation may be found." International Railways v. United Brands, 532

^{504/} The common thread running through these and similar cases is the possession of a monopoly or a near monopoly in a relevant market by the company refusing to deal. Thus, for example, Kodak possessed a monopoly at the wholesale level; the Journal was the sole newspaper in town and possessed a monopoly over advertising in Lorain until the radio station began broadcasting; Westinghouse Broadcasting and Rollins Telecasting possessed a monopoly -- via FCC licensing -- in local television broadcasting; and Otter Tail held a monopoly over retail distribution of electricity. In each case, through unilateral refusals to deal, the monopolist had used its dominant economic power in efforts either to maintain its current market position (e.g., Otter Tail) or to extend its monopoly (e.g., Kodak, Westinghouse Broadcasting, Rollins Telecasting). In essence, these companies ran afoul of the Supreme Court's warning in Griffith that "use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor is unlawful." 334 U.S. at 107. As Judge Wyzanski cogently observed: "An enterprise that by monopolizing one field, secures dominant market power in another field, has monopolized the second field, in violation of §2 of the Sherman Act." United States v. United Shoe Machinery Corp., supra, 110 F. Supp. at 346.

F.2d 231, 239, certiorari denied, 50 L.Ed.2d 100 (1976).^{505/}

The decisions relied on by Consumers are not to the contrary. They are cases where the court was persuaded that the respondent business enterprise lacked dominant market power. See, e.g., Daily Press v. United Press International, 412 F.2d 126 (6th Cir. 1969); Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir. 1974). As then Circuit Judge Stevens noted in Mullis:

Claims that refusals to deal were violative of §2 have often failed because the plaintiff incorrectly assumed that proof of the so-called monopoly which a manufacturer has over his own product is tantamount to proof of dominance in an economic market. See e.g., Bushie v. Stenocord Corp., 460 F.2d 116, 120-21 (9th Cir. 1972); Cal Distributing Co. v. Bay Distributors, Inc., 337 F.Supp. 1154, 1157-1159 (M.D. Fla. 1971); South End Oil Co. v. Texaco, Inc., 237 F. Supp. 650, 655-656 (N.D. Ill. 1965). On the other hand, courts which have been persuaded that such dominance exists have held refusals to deal violative of §2. See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed. 2d 359; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684; Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970), cert. denied, 401 U.S. 912, 91 S.Ct. 880, 27 L.Ed. 2d 811.^{506/}

^{505/} Whether Consumers' refusal of access to its transmission lines presents a "bottleneck" situation is irrelevant in our analysis. Such denials may be treated as instances of refusals to deal. Otter Tail Power Co. v. United States, *supra*, 410 U.S. at 371; Mullis v. Arco Petroleum Corp., 502 F.2d 290, 296 fn. 19 (7th Cir. 1974) (per Stevens, Cir. J.); see Note, Refusals to Deal by Vertically Integrated Monopolists, 87 Harv. L. Rev. 1720 (1974). The Licensing Board's assumption, supported by Consumers, that bottleneck cases must involve conspiracies (see 2 NRC at 78) is a misreading of Otter Tail.

^{506/} 502 F.2d at 296 fn. 19.

Consumers' attempts to distinguish the authorities on which we rest are unpersuasive. It is not true, as the company contends, that all those cases rest on the "attempt to monopolize" rather than the "monopolization" clause of section 2. Otter Tail Power Co. v. United States, for one, is a monopolization case. See fn. 88 supra. Even if those cases all had involved "attempt" situations, Consumers' position would not be advanced. If the specific intent needed to prove an attempt to monopolize may be inferred from a monopolist's "predatory conduct", then a general intent to monopolize -- the lesser degree of proof needed where actual monopolization is charged -- may also be inferred from that conduct a fortiori. As for Consumers' assertion that all the cases cited involved some discontinuance of a previously provided service, the short answer again is that Otter Tail did not. The Otter Tail Power Company neither wheeled power for or sold wholesale power to the municipalities prior to its refusals to deal with them. Nevertheless, the Supreme Court agreed that those refusals were anticompetitive.^{507/}

Consumer's reading of Otter Tail and the other refusal to deal cases reflects its general misconception of the standard for determining monopolistic intent. The company

^{507/} 410 U.S. at 378.

asserts as a general proposition that it must be shown to have "acquired or maintained its position through unfair or predatory conduct" to be found guilty of monopolization and that "research reveals and opposing counsel have cited no case in which the requisite willfulness was found without a showing of predatory conduct." (Br. pp. 187 and 192). The company has confused the elements of an "attempt to monopolize" with those of "monopolization". Both are offenses under section 2 of the Sherman Act. Only where an "attempt" is charged, however, must a conscious desire or specific intent to monopolize be proven. Evidence of anticompetitive actions without legitimate business purpose, i.e., "predatory conduct," are often the source from which that specific intent is inferred.^{508/} But no predatory conduct (or any other proof of specific intent) is required to sustain "monopolization" charges. (See pp. 56-59, supra.) Indeed, a general intent

^{508/} See, e.g., Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Chisholm Bros. Farm Equipment Co. v. International Harvester Co., 498 F.2d 1137, 1144-45 (9th Cir. 1974), certiorari denied, 419 U.S. 1023 (1974); Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 975 (8th Cir. 1968), certiorari denied, 395 U.S. 961 (1969). See also E. H. Cooper, Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich. L. Rev. 375, 392-400 (1974).

to monopolize may even be inferred from business practices (sometimes called "exclusionary conduct"^{509/}) permissible to enterprises without monopoly power. As explained by Judge Wyzanski in United States v. United Shoe Machinery Corp., supra, 110 F. Supp. at 344-45, with reference to United Shoe's leasing practices:

They are the sort of activities which would be engaged in by other honorable firms. And, to a large extent, the leasing practices conform to long-standing traditions in the shoe machinery business. Yet, they are not practices which can be properly described as the inevitable consequences of ability, natural forces, or law. They represent something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster. They are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market. While the law allows many enterprises to use such practices, the Sherman Act is now construed by superior courts to forbid the continuance of effective market control based in part upon such practices.

^{509/} See Cooper, op. cit. supra, fn. 508, 72 Mich. L. Rev. at 389-92.

Judge Wyzanski went on to point out that United Shoe's monopoly did "not rest on predatory practices." 110 F. Supp. at 345. Consumers' contention that the courts have never found monopolization without a showing of predatory conduct is simply wrong. We need not prolong our discussion for the Supreme Court has settled that predatory practices need not be proven to establish that a firm has monopolized in violation of the Sherman Act. Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 495-500 (1968), and cases there cited.^{510/}

^{510/} Consumers' brief points us to cases which have held that success in a natural monopoly situation cannot be unreasonable per se, Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506, 515 (6th Cir.), certiorari denied, 409 U.S. 1001 (1972) (competition for the only cable TV franchise in the town); Union Leader Corp. v. Newspaper of New Eng. Inc., 284 F.2d 582 (1st Cir. 1960), certiorari denied, 365 U.S. 833 (1961) (two newspapers competing in a town large enough to support only one); and to cases which hold that legal and ordinary marketing methods do not constitute monopolization. Telex Corp. v. International Business Machines Corp., 510 F.2d 894, 919-28 (10th Cir. 1975), certiorari denied, 423 U.S. 802 (1975) (IBM had lowered its prices, but not below cost, and it had instituted a vigorous advertising and market campaign.); Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80, 85 (3rd Cir.), certiorari denied, 414 U.S. 1093 (1973) (Blue Cross because of its size was able to negotiate favorable contracts with hospitals). Accepting all those cases as correctly decided, they do not (and in light of Hanover Shoe obviously cannot) stand for the proposition that proof of "predatory conduct" is required to establish monopolization.

We do not imply that a monopolist must continue (or enter into) a money-losing line of business to avoid a Sherman Act violation. The complaining party has the burden of persuading that the refusal to deal in light of all the circumstances is evidence of a purpose to exercise monopoly power. If the respondent "in fact had no reasonable business alternative but to abandon an unprofitable and uncomfortable operation," then its refusal to deal may be justified. International Railways v. United Brands, supra, 532 F.2d at 239. We have not overlooked this possibility in our evaluation of the charges against Consumers.

C. Consumers' acquisitions of other utilities.

We begin our review of the activities assertedly inconsistent with antitrust law and policy by looking at Consumers' actual and attempted acquisitions of smaller utilities in its locale. We start here because the Licensing Board expressly found that the company's conduct constituted an "anticompetitive scheme" intended "to monopolize the retail and wholesale power markets by destroying competition from a group of healthy, growing, effective and aggressive competitors." 2 NRC at 104. The Board's reasons for declining to hold the scheme inconsistent with the antitrust laws -- that only markets not in controversy were involved and evidence of potential success was lacking (id. at 105) -- are erroneous for reasons previously discussed.^{511/} Consequently, if the Board's assessments are correct, they virtually compel a finding of a Sherman Act violation.

The Board's findings rest in large measure on facts that are undisputed: (1) Consumers' acquisitions since 1960 of the three small electric power systems, (2) Consumers' attempted acquisitions of other small systems, and (3) statements by Mr. Robert Paul, a Consumers official, to the

^{511/} See pp. 106-114, 273, supra.

effect that:

The first goal of our [i.e., Consumers] marketing activity or program concerning utility systems in our service area is, of course, to acquire these systems. [D.J. Exh. No. 188, Tr. 8043].

It was principally^{512/} these factors that led the Board to conclude that (2 NRC at 104):

we are not here concerned with individual acquisition or with a group of individual acquisitions. We are concerned with a goal or policy to acquire all of the smaller utilities in the relevant geographic market. The goal is not really to improve economy or reliability of service by retiring small utilities which are either nonviable or on the verge of becoming nonviable. The intent is to monopolize the retail and wholesale power markets by destroying competition from a group of healthy, growing, effective and aggressive competitors. We find as a fact that constitutes an anticompetitive scheme. Each acquisition or attempted acquisition whether or not innocent, in and of itself, is a material element and a substantial factor in such scheme. [Consumers'] goal to acquire all of the smaller utilities in the relevant geographic market is an anticompetitive scheme to monopolize. Such schemes are forbidden by Section 2 of the Sherman Act. Mr. Aymond's

^{512/} In reaching its conclusion, the Licensing Board also referred to Consumers' attempt to block an REA loan and thereby forestall certain of the cooperatives from adding new generation. Consumers' actions regarding the loan bear on the character and purpose of Consumers' actual and attempted acquisitions. See pp. 352-55 and fn. 627 infra.

[Consumers' Board Chairman and President] disavowal of the scheme is an assertion that it never existed. The testimony shows no intent to abandon an existing scheme. [Tr. 6063]. We find that as matters of fact that the scheme still exists and that the matter is not moot.

Consumers contends on appeal that it "has never been [company] policy" to seek acquisition of all the small utilities within the relevant geographic market.^{513/} The company argues, first, that because the three utilities it acquired accounted for only a de minimis share of the markets, the acquisitions were lawful under section 7 of the Clayton Act.^{514/} The company argues from this that the acquisitions cannot be used to support an inference of monopolistic intent.^{515/} But "[i]ntent is not a necessary element of a violation of §7 of the Clayton Act," United States v. Jerrold Electronics Corp., *supra*, 187 F. Supp. at 568 fn. 50, and a violation of the Sherman

^{513/} See Aymond, Tr. 6064; Consumers Appeal Brief, p. 327.

^{514/} See Consumers' Appeal Brief, p. 322, quoting Brown Shoe v. United States, *supra*, 370 U.S. at 329.

^{515/} "Even acquisitions which would be struck down under the incipency standard of [Clayton Act] Section 7 provide no support for charges of monopolization here where the standards of Section 2 of the Sherman Act are applicable." Consumers Appeal Brief, pp. 323-24, citing United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 566, 568 (E.D. Pa. 1960), affirmed per curiam, 365 U.S. 567 (1961).

Act may be predicated on acquisitions that have not been challenged under section 7.^{516/}

Consumers also urges this Board to give "little substantive weight" to the goal espoused by Mr. Paul on the ground that it was made in an "informal talk" to company employees. In its appellate brief the company depicts Mr. Paul as "a middle-level salesman" who is not charged with formulating company policy and whose remarks therefore neither represented company policy nor bound the

^{516/} United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665 (1964).

Further, as the district court pointed out in Jerrold, supra, fn. 515, the Supreme Court has held that the specific intent required for a finding of conspiracy or attempt to monopolize "need not be proven by direct evidence but can be inferred from practices of the defendants." 187 F. Supp. at 567, citing Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). The Jerrold court held that Jerrold's acquisitions could not support such an inference because their primary purpose was investment. Consumers has misapplied this determination, which was a factual finding based on the particular circumstances in Jerrold. The court's legal analysis there indicates that acquisitions that are lawful under section 7 (which can be violated even without specific intent, United States v. E. I. du Pont de Nemours & Co. 353 U.S. 586, 589 (1957)) may, in appropriate circumstances, support a finding of a specific intent to monopolize. A fortiori, Consumers' acquisitions may support a finding that Consumers has a general intent to monopolize.

company in this regard.^{517/} In support of its position, Consumers refers us to judicial decisions where the courts purportedly declined to find "monopolistic purpose" on the basis of "general statements of subordinate personnel unrelated to actual conduct."^{518/}

^{517/} Consumers argues that Mr. Paul's speech, as an intramural statement from one subordinate company employee to another, "would have been excluded from evidence in a conventional lawsuit." Consumers' Appeal Brief, pp. 327-28. In support of this conclusion it points to a quotation of Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F. Supp. 349, 354 (D. Mass. 1950) and to Restatement (Second) of Agency §287 (1958). Although not arguing that this document is inadmissible in the context of an administrative antitrust hearing, it contends that its inadmissibility in a court proceeding is indicative of the lack of substantive weight inherent in such communications. In its reply brief Justice takes issue with Consumers on this point. It contends that although the quotation in United Shoe does indicate the general law, a different rule applies in antitrust proceedings. Indeed, Justice points out that Judge Wyzanski noted this difference and held that such documents "were, in fact, admissible in a conventional antitrust lawsuit." Justice's Reply Brief on Appeal, pp. 59-60. (Emphasis in original). A review of Judge Wyzanski's opinion reveals that Justice is correct in its characterization of the decision. As admissibility is not an issue here, this topic will not be explored further.

^{518/} Consumers' Appeal Brief, p. 329. Consumers refers us to Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971); Scott Publishing Co. v. Columbia Basin Publishers, Inc., 293 F.2d 15, 21 (9th Cir.), certiorari denied, 368 U.S. 940 (1961), and South End Oil Co. v. Texaco, Inc., 237 F. Supp. 650, 655 (N.D. Ill. 1965).

1. First, Consumers' actual and attempted acquisitions have not, as the company would have us believe, occurred on an isolated basis. Rather, the record reflects a continual pattern of actual and attempted acquisitions that certainly suggest (if not compel) the conclusion that it is a company policy to acquire the remaining small systems in the relevant geographic market. As the Licensing Board pointed out, 2 NRC at 103, Consumers acquired municipal systems in Grayling and Allegan in 1961 and 1968, respectively, and in 1967 bought a small private utility that served the City of Rogers.^{519/} In addition, the company made formal offers to purchase the Charlevoix and St. Louis municipal electric systems in 1962 and 1965 respectively, and extended a formal offer in 1965 to lease Traverse City's system for a period of 30 years.^{520/} Moreover, the record indicates other instances short of formal offers in which Consumers has suggested to a small utility the possibility of selling out its system to Consumers.^{521/} For example, in 1970, Consumers' initiated steps toward the

^{519/} C.P. Exh. No. 11,308. (The exhibit indicates Allegan was acquired in 1967.)

^{520/} C.P. Exh. No. 11,308; D.J. Exh. No. 12. Consumers says its attempt to lease the Traverse system is shielded from antitrust scrutiny by the "Noerr-Pennington Doctrine." However, efforts to influence a government's business decisions, such as this one was, are outside that Doctrine's protection. See fn. 627, *infra*, and Hecht v. Pro-Football, Inc., 444 F.2d 931, 940-42 (D.C. Cir. 1971), certiorari denied, 404 U.S. 1047 (1972), and Geo. R. Whitten, Jr., Inc., v. Paddock Pool Builders, Inc., 424 F.2d 25, 31-34 (1st Cir.), certiorari denied, 404 U.S. 850 (1970).

^{521/} D.J. Exh. No. 141.

acquisition of the Eaton Rapids electric system.^{522/} And Mr. Westenbroek testified that in approximately 1960, when he was manager of the Lowell municipal system, Consumers indicated a desire to purchase that system.^{523/}

Consumers has also attempted to purchase city street lighting systems from the cities of Wyoming, Grand Rapids and Saginaw.^{524/} Municipalities that operate such systems are likely entrants in the electric utility business. Indeed, the system operated by the City of Zeeland, which displaced Consumers as the supplier of electricity within that municipality, evolved from a municipal street lighting system. See fn. 381, supra. That Consumers recognizes this threat is illustrated by the recommendation to Mr. Aymond in 1966 by Mr. Campbell, vice-president in

522/ Int. Exh. No. 2155 and 2172; the acquisition was not consummated, however. See D.J. Exh. No. 158; Paul, Tr. 7913-14. Also, as the Licensing Board noted, the company in 1969 sought to acquire Southeastern Michigan Cooperative. 2 NRC at 104. See also D. J. Exh. No. 125.

523/ Westenbroek, Tr. 1025-29. The City had initially approached Consumers in order to sell several rural lines to Consumers. The Company responded that it was not interested in purchasing the rural lines but it did desire to purchase Lowell's entire system. However, once Tri-County Electric Cooperative expressed an interest in purchasing the rural lines, Consumers changed its position and subsequently did purchase the rural lines from Lowell. Ibid.

524/ Int. Exh. No. 2040; D. J. Exh. No. 111, No. 158 and No. 188.

charge of marketing, that Consumers acquire the Wyoming street lighting system because "[t]his purchase will eliminate another potential municipal electric system."^{525/} Consumers thereafter made a formal offer to buy that system.^{526/}

2. Second, we find Consumers' attempt to minimize the import of Mr. Paul's speech unpersuasive. Mr. Paul is admittedly not a company officer. His duties and responsibilities, however, encompass far more than those of a "middle-level salesman." His responsibilities as "General Supervisor of Commercial Electric and Governmental Service"^{527/} include giving "functional supervision and direction to the company's programs and activities dealing with commercial electric sales, governmental gas and electric sales, steam sales, and wholesale to other utilities,

^{525/} D. J. Exh. No. 111.

^{526/} D. J. Exh. No. 158, p. 2.

^{527/} Paul, Tr. 7805. Mr. Paul, who holds a B.S. in electrical engineering, joined Consumers Power in 1949. In 1951 he was assigned to the company's Kalamazoo Division as a power sales engineer. In 1964 he was brought to the company's general office as a general power sales engineer; in 1967 he became General Supervisor of Governmental Sales and in 1970 he acceded to his current position. *Id.* at 7804-05. Mr. Paul reports directly to Mr. Condon, "who is the Manager of the Energy Consulting Services Department" and in turn reports to Consumers' vice-president in charge of operations. Tr. 7950.

and related matters" such as "competition [and] administration of service area policies."^{528/} It is also his duty to keep the Consumers marketing personnel abreast of company policy in these areas.^{529/} In short, although Mr. Paul does not make company policy, it is his job in the company to be aware of current policy and "to transmit [the] policy of the company to others in the company."^{530/}

Further, evidence confirms that Mr. Paul played an important and highly visible role in Consumers' dealings with the small utilities. Thus it was Mr. Paul who (1) informed Northern Michigan in 1967 that it did not meet Consumers "established criteria" for entering a coordination arrangement;^{531/} (2) similarly advised Edison Sault in 1972 that Consumers would not enter a coordination agreement with it;^{532/} (3) was principal spokesman for Consumers, at least initially in the negotiation of the current coordination agreement between the company and the M-C pool;^{533/}

^{528/} Paul, Tr. 7805, 7959.

^{529/} Paul, Tr. 7959.

^{530/} Tr. 8267-68.

^{531/} D. J. Exh. No. 49.

^{532/} D. J. Exh. No. 85.

^{533/} D. J. Exh. No. 54, 55, 56, 57, 59 and 60.

These documents are letters exchanged by Mr. Paul and Mr. Keen concerning the various draft proposals leading to the current coordination agreement between the M-C Pool and Consumers. These communications cover a two year span, from 1970 to 1972.

and (4) was the person to whom several of the intervenors in this proceeding directed their requests for access to the Midland nuclear facility.^{534/} Indeed, in this proceeding Mr. Paul was Consumers' principal witness concerning the company's competitive relationship with the small utilities,^{535/} and has been a person proffered by Consumers to testify about the acquisitions that the company has made or considered making since 1960.

We perceive no reason to doubt that, in delivering the speech on which the Licensing Board relied, Mr. Paul was carrying out his obligation to inform other employees of company policy. The speech, according to the outline of it that was introduced into evidence,^{536/} dealt entirely with Consumers' competitive relationship with the small

^{534/} D. J. Exh. No. 22, No. 23 and No. 58. Also see D. J. Exh. No. 28.

^{535/} Counsel for Consumers represented to the Board that Mr. Paul would discuss (Tr. 7803):

competition within the municipal limits of municipal electric systems; service and competition of municipals outside of their permissible limits; competition for new industrial customers; competition with rural electric cooperatives -- REA's --; competition with other investor-owned utilities -- IOU's; bulk power supply competition; retail franchises; acquisitions; interconnections with other systems; wholesale contracts -- and the company's division and general office organization.

^{536/} D. J. Exh. No. 188.

utilities. Personal knowledge of this area was part of Mr. Paul's job, as we have just seen. Further, Mr. Paul represented to the Board below that he made statements on company policy only when he believed that Consumers' management had "enunciated" and "approved" the policy.^{537/}

The cases Consumers cites as authority for ignoring Mr. Paul's remarks deal with statements of monopolistic intent that are either contradicted by other evidence or unsupported by actions implementing that intent.^{538/} They are inapposite in the face of numerous actual and attempted acquisitions contemporaneous with Mr. Paul's statements of policy.^{539/} In context, therefore, Mr. Paul's assessment

^{537/} Tr. 8268; see also 2 NRC at 102. Consumers now insists that the Licensing Board merely "felt itself constrained to 'conclude as a matter of law' that the company is bound by Mr. Paul's remarks", a conclusion the company characterizes as "purely formalistic" and "contrary to the law of agency." Consumers' Appeal Brief, p. 331. In our opinion, however, the Board's holding here rests on a reasoned analysis in accord with the record. In addition, it is not apparent, as Consumers urges it is, that the Board accepted Mr. Aymond's disavowal of the acquisition scheme. See 2 NRC at 102, 104. In any event, considering Consumers' actual and attempted acquisitions, Mr. Aymond's testimony is after-the-fact and self-serving and thus merits little, if any, weight.

^{538/} See fn. 518, *supra*.

^{539/} The Supreme Court observed in two related antitrust contexts that "knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences." Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 696, fn. 12 (1967); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 372 (1933). In other words, an expression of actual intent helps determine the anticompetitive purpose or effect of related conduct.

of Consumers' acquisition policy appears a responsible statement of corporate position and intent. The Licensing Board was entitled to rely on it and we agree that it was justified in doing so.

3. We therefore conclude that there is ample evidence in the record to support the Licensing Board's finding that it is "[Consumers] goal to acquire all of the small utilities in the relevant geographic market". We agree with that Board that this goal certainly suggests that Consumers' "intent is to monopolize the retail and wholesale power markets". 2 NRC at 104. Before determining whether Consumers has actually monopolized or engaged in conduct inconsistent with the anti-trust laws, however, we turn to the other allegations against it, the next being the company's wheeling policy and practices.

D. Consumers' refusal to wheel for the smaller utilities.

Consumers wheels electric power for its neighboring large utilities. As a direct result of its arrangements to that end, the company can and does engage in coordination power transactions with utilities not directly linked to it. 2 NRC at 97.^{540/} Consumers has had a markedly different attitude, however, toward wheeling for the small utilities in its service area. In the succinctly stated finding of the Board below, Consumers' "conduct amounted

^{540/} Under the Michigan pool agreement, Consumers regularly transmits power across its transmission network for Detroit Edison and vice versa. Each is thereby able to engage in bulk power transactions with utilities with which it is not directly connected, e.g., Consumers with Ontario-Hydro and Detroit Edison with Toledo Edison Co. and Indiana & Michigan Electric Company. See C. P. Exh. No. 12,022, p. 434 A-H. Consumers, although insisting that this is technically not a "wheeling arrangement", acknowledges that under the Michigan Pool it can "be said" that Detroit Edison and Consumers "exchange transmission services." Consumers' Appeal Brief, pp. 296-97. We agree. While the Michigan Pool transmission provisions differ somewhat from other arrangements, the point remains that it still is a means by which the two utilities in effect wheel power for each other and reap the benefits of such transactions.

Consumers also has a wheeling arrangement with Indiana & Michigan Electric Co. This enables the company to coordinate its operations with Commonwealth Edison Co. and Northern Indiana Public Service Co., though Consumers is directly connected to neither. See D. J. Exh. No. 76 and C. P. Exh. No. 11,109.

to a general refusal to wheel." Id. at 99. ^{541/}

As was the case with its evaluation of Consumers' acquisition policy, the Licensing Board's exoneration of these refusals to deal rests on invalid grounds. ^{542/} Consequently,

541/ Consumers refused to wheel power not only from outside sources to small utilities within its service area, but also among the small utilities themselves. Ibid.; see also 2 NRC at 107-08.

542/ The Board below concluded that those smaller utilities with "adequate reserves to enter into a mutual benefit agreement" could coordinate without having power wheeled over Consumers' transmission system. 2 NRC at 98. Consequently, it held, Consumers "does not have the power to grant or deny operational or planning coordination between or among the smaller utility systems capable of coordination", id. at 99 -- such capability being, in the Licensing Board's view, a prerequisite to any obligation to coordinate. In our discussion of Consumers' coordination practices, we reject the Licensing Board's analysis of a "mutual benefit" requirement, see pp. 320 ff. infra.; we must similarly reject it here.

The Licensing Board also held that, assuming the aforementioned power existed, Consumers would have to misuse it as "part of a larger scheme or conspiracy to bring into being a situation inconsistent with the antitrust laws"; the Board declined to view Consumers' refusals to wheel in that light. As with the "mutual benefit" argument, earlier conclusions compel us to reject this analysis and determination.

Finally, the Board below dismissed as outside the relevant matters in controversy the issue of Consumers' refusal to wheel power to and from the "regional power exchange market." It suggested, however, that the small utilities have no right to such wheeling and that their contention otherwise "is another instance of assertion of a legal duty to be a good Samaritan." 2 NRC at 108. As we have already discussed the Licensing Board's analytical errors concerning the relevant matters in controversy and the duty to assist competitors, we may reject its determinations here without further comment.

given Consumers' monopoly power and the fact that it would be compensated for wheeling, the company's conduct is suspect under the antitrust laws.

Consumers attacks the Licensing Board's finding on several bases.^{543/} Primarily, the company argues that to find a refusal to deal in an antitrust context there must first have been a "formal request" to the defendant for the services in question. We understand Consumers to mean that a formal request for wheeling services would be one asking for transmission services to facilitate a "particular" bulk power transaction, as opposed to a general inquiry about whether Consumers would be willing to wheel power.^{544/}

^{543/} Consumers' Appeal Brief, pp. 298-304.

^{544/} Aymond, Tr. 6163.

According to Consumers, such a request would have to specify, inter alia, the amount of power to be wheeled and "where the transmission across [Consumers] system would commence and where it would terminate".^{545/} In other words, the utility seeking the transmission services must spell out in detail the contractual terms for the proposed wheeling transaction before Consumers need consider it.^{546/}

Consumers contends that none of the small utilities ever lodged an appropriate request with it "for the purchase of transmission services". The instances referred to by the Licensing Board, the company argues, were merely "preliminary and generalized inquiries, not concrete demands," and, therefore, do not support the conclusion that it had a general policy of refusing to wheel for those utilities.

1. We find Consumers' insistence on the necessity of such formalities unpersuasive; to say that an

^{545/} Consumers' Appeal Brief, p. 304; Aymond, Tr. 6166.

^{546/} Aymond, Tr. 6167-68. Mr. Aymond acknowledged there that by a specific proposal for wheeling he was "talking in terms of contractual relationships where the terms and conditions [of the proposed transaction] are spelled out".

anticompetitive refusal to deal can be found only if "a formal request" was rejected exalts form over substance. That is particularly true here, where the basic issue is whether Consumers has had a general policy against wheeling power for the small utilities. If Consumers operated under such a policy -- and the Licensing Board determined that it did -- one would expect the smaller utilities to be aware of it and not waste time on useless negotiations for power from outside sources.

Antitrust jurisprudence does not require us to accept Consumers' position. The cases on which Consumers relies involve private antitrust suits for treble damages brought under Section 4 of the Clayton Act.^{547/} The plaintiff in this kind of antitrust action must prove not only a violation of the antitrust laws but also injury to his business or property "by reason of" that violation.^{548/} Absent an

^{547/} Dahl, Inc. v. Roy Cooper Co., 448 F. 2d 17 (9th Cir. 1971); Royster Drive-In Theatre, Inc. v. American Broadcasting Paramount Theatres, Inc., 268 F.2d 246 (2nd Cir.), certiorari denied, 361 U.S. 885(1959); Milwaukee Towne Corp. v. Loew's, Inc., 190 F. 2d 561 (7th Cir. 1951), certiorari denied, 342 U.S. 909(1952); Hamilton Street Corp. v. Columbia Pictures Corp., 244 F. Supp. 193 (E.D. Pa. 1965).

^{548/} See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U. S. 477 (1971).

allegation of such injury, the private party lacks standing to sue.^{549/} The "specific demand" requirement elucidated in those cases relates to whether a private plaintiff has in fact suffered cognizable injury and not to whether an antitrust violation exists itself.^{550/} This distinction is a crucial one. For example, in United States v. Loew's, Inc.,^{551/} the very arguments put forward by Consumers here were expressly rejected as a defense to an antitrust suit brought by the government. The court explained that (189 F. Supp. at 381) a "demand" as a prerequisite to a finding of refusal to deal

may well be a rule of law applicable as to the allowance of damages in an action in a private anti-trust action, but it can hardly be laid down as a rule of law in an action in which the Government is seeking an injunction. * * * The Court does not believe that a specific "demand" is a necessary prerequisite of a finding of refusal if there is sufficient other evidence to justify a finding that there was a refusal on the part of the [defendant] to deal * * *.

^{549/} See e.g., In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F. 2d 122 (9th Cir.), certiorari denied, 414 U.S. 1045 (1973); SCM Corporation v. RCA, 407 F.2d 166 (2nd Cir. 1968), certiorari denied, 395 U.S. 943 (1969).

^{550/} For example, in Milwaukee Towne Corp. v. Loew's, Inc., supra, fn. 547, there was no serious dispute that the antitrust laws had been violated. 190 F.2d at 565. Rather the sole question was whether the plaintiff was entitled to damages. The court disallowed damages prior to the date of the plaintiff's demand and allowed damages for the period after the demand.

^{551/} 189 F. Supp. 373 (S.D. N.Y. 1960), modified on other grounds, 371 U.S. 38 (1962).

Moreover, the Supreme Court has rejected the notion that a "formal request" must always be established even in a private antitrust action. Continental Ore Co. v. Union Carbide & Carbon Corp., supra, 370 U.S. at 699. In overturning a Ninth Circuit decision^{552/} that had relied on the line of cases cited to us by Consumers in ruling that the private plaintiff had failed to show causation of damages, the Court held that (370 U.S. at 699, emphasis supplied):

* * * we do not believe that respondents' liability under the antitrust laws can be measured by any rigid or mechanical formula requiring Continental both to demand materials from respondents and to exhaust all other sources of supply. * * * The cases relied upon by the Court of Appeals clearly do not support any such formula * * *.

The core of the matter is that there is no requirement in antitrust law that a finding of an anticompetitive refusal to deal be tied to the making of a "formal request". Perforce in a section 105c proceeding, where actual violation of anti-trust law need not be established, such a concrete demand is also unnecessary. With this understanding we review the support for the Licensing Board's finding that Consumers had a general policy against wheeling.

552/ 289 F.2d 86.

2. It is common in the electric power industry for one utility to transmit electricity across its lines to facilitate bulk power transactions between two other utilities not directly connected. As we mentioned earlier, Consumers' own dealings with its larger neighbors reflect this.

However, it is undisputed that, prior to the close of the record, Consumers had never granted the small utilities access to its transmission networks. As we pointed out in our discussion of monopoly power, without such access the small utilities are foreclosed from making bulk power transactions with other large nearby utilities. The testimony of the managers for the small utilities evidences a prevalent desire to enter into such transactions.^{553/}

The record reflects that they have not sought to do so because of the general understanding that Consumers would not provide the necessary wheeling services. For example, although at one point Traverse City considered buying wholesale power from Lansing, Indiana-Michigan Electric Company or Detroit Edison, it did not actively pursue the matter because Mr. Wolfe, the City Manager, "felt it was futile" to ask Consumers for transmission services.^{554/} Similarly,

^{553/} See Munn, Tr. 4073-74; Steinbrecher, Tr. 1217-19; Keen, Tr. 4511-12; Fletcher, Tr. 4333-34; and Wolfe, Tr. 1726-28.

^{554/} Wolfe, Tr. 1727-29, 1989-91.

Mr. Fletcher, President of Alpena Power Company, testified that although he had never heard directly from Consumers that wheeling was not available, it was understood that such was the case.^{555/} He indicated that if such services were available, Alpena would consider alternatives to buying at wholesale from Consumers.^{556/} And Mr. Keen, in

555/ Q. [By Mr. Verdisco, counsel for NRC staff] Have [Consumers' personnel] ever advised you that wheeling would be out for your system?

A. [Mr. Fletcher]. Well, I don't believe we have ever heard it directly from any of Consumers' people that wheeling would be out. However, inasmuch as we have, in the two men who are working as superintendent and assistant general superintendent, some 32 years experience with Consumers, they have advised us that Consumers has never wheeled for small utilities.

Fletcher, Tr. 4329. (Alpena's general superintendent had previously been employed by Consumers for 12 years; the assistant for 20 years. Fletcher, Tr. 4328).

556/ Mr. Fletcher testified (Tr. 4334):

* * * [T]he primary problem of [smaller utilities located in Northern Michigan] 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.

explaining why Wolverine failed to ask Consumers for wheeling in its 1964 negotiations with the Company (see pp. 330-34, infra), stated:

[A]s far as wheeling is concerned, I had my ears chopped off by a Consumers Power representative prior to that date and I -- in regards to wheeling -- and I never asked them again for the reason of the reaction I had at that time from the Consumers Power representative.^{557/}

^{557/} The quotation is from Mr. Keen's deposition. Consumers introduced it into evidence to show that Mr. Keen had not requested wheeling in Wolverine's 1964 negotiations with Consumers. See Tr. 4531-33. In its initial decision, the Licensing Board relied on this evidence in concluding that Consumers' conduct amounted to a refusal to wheel. On appeal, Consumers contends that the background of the incident referred to -- brought out in other parts of Mr. Keen's deposition not in evidence -- "involved * * * the company's rejection" of an offer by Mr. Keen "to wheel over Wolverine's transmission system for the Company and not vice-versa." Consumers argues that but for the Licensing Board's understandable misinterpretation of this as "a prior refusal to wheel" by Consumers, it would not have found a general refusal to wheel. Consumers' Appeal Brief, pp. 302-03.

In oral argument the point was raised whether we should look at the portion of Mr. Keen's deposition not in evidence. Intervenors, although not voicing an objection, pointed out that the intervenors and Consumers had stipulated what portions of the depositions would be entered into evidence (see Tr. 5200) and represented that certain excluded portions of the depositions dealt with refusals to wheel. Thus, intervenors asked us to look at other deposition material allegedly concerned with the topic
(FOOTNOTE CONTINUED ON NEXT PAGE)

In short, the small utilities were uniformly of the impression that it would be a useless gesture to request wheeling from Consumers and thus refrained from proposing transactions dependent on access to Consumers' transmission network.

The instances in the record in which Consumers was approached about wheeling confirm that the small utility managers were not mistaken in their judgment. When in 1969 Southeastern Cooperative broached the topic of wheeling, Consumers simply informed it that the Company "[had] no provisions for wheeling power" -- and that ended

557/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

of refusals to wheel if we were to refer to Mr. Keen's deposition. In the circumstances, we declined to ask for submission of the remainder of the Keen deposition. App. Tr. 80; also see 109-15.

In any event, we believe that Consumers misreads the Board's opinion. The Board did not rely on Mr. Keen's testimony as a "prior refusal to wheel" by Consumers, for at the beginning of its discussion the Board pointed out that there was no evidence in the record that a small utility had ever formally requested wheeling from Consumers. Rather, the Board relied on this material to show the belief of the small utilities that it was futile to request any wheeling from Consumers. Regardless of the factual background, Mr. Keen's testimony definitely shows that he believed it to be a waste of time to ask Consumers for transmission services. It is only for this purpose that we refer to Mr. Keen's testimony.

the matter. ^{558/} As Mr. Paul acknowledged, the company intended its response to discourage Southeastern from taking further action in regard to wheeling. ^{559/} And in 1971 Consumers declined to discuss wheeling when Coldwater requested it to do so. ^{560/} In short, the record substantiates the Licensing Boards' finding

558/ D. J. Exh. No. 125. In its appeal brief Consumers attempts to discount this incident as an "isolated, preliminary and generalized verbal inquiry" and contends that its "response was truthful if not especially enthusiastic". According to Consumers, the burden was on Southeastern to follow up its initial inquiry with a "formal request" for wheeling. We cannot agree with Consumers, however, particularly in light of Mr. Paul's testimony (referred to in the text above) that Consumers expected its "unenthusiastic" response to kill any further inquiry into wheeling. Further inquiry manifestly would have been futile in these circumstances.

559/ CHAIRMAN GARFINKEL: And what was the response [to Southeastern's inquiry]?

[MR. PAUL]: Our response was that at that time -- our response was we didn't have a policy or rate on wheeling, but that also such wheeling would involve other systems over which we had no control.

CHAIRMAN GARFINKEL: Well, let's put it this way. Could I make an assumption now that you did not intend further pursuit with respect to wheeling?

[Mr. Paul]: That's right. We just -- That was our response.

Tr. 7936.

560/ D. J. Exh. No. 26; C. P. Exh. No. 12,014; Munn, Tr. 4076-77.

In its appeal brief, in addition to arguing that Coldwater's inquiry is not a "formal request", Consumers urges that we give no weight to this incident because it was a "litigation letter". (The reason that Consumers (FOOTNOTE CONTINUED ON NEXT PAGE)

that whenever the small utilities approached Consumers about wheeling, the company brushed them aside.

3. Although Consumers argues that it has never refused to wheel, it has never represented to us (or to the

560/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

gave for not discussing wheeling with Coldwater was because its wheeling policy had "been raised" as an issue in the instant proceeding. C. P. Exh. No. 12,014.) However, Coldwater's request to discuss wheeling was only one of four topics which Coldwater raised in its "litigation letter"; Consumers agreed to discuss the other three. Moreover, several of the highly contested matters in this proceeding focus on events that have occurred subsequent to the initiation of these proceedings, e.g., the provisions of Consumers' coordination agreement with the M-C Pool executed in 1973 and Consumers' refusals to grant access to the Midland nuclear facility. Thus we believe it is proper to take Consumers' response to Coldwater's request as indicative of the fact that Consumers -- prior to this proceeding -- had a policy not to wheel for the small utilities.

At this point we note that Justice and the staff refer us to letters from Traverse City (D. J. Exh. No. 24) and from the M-C Pool (D. J. Exh. No. 58) requesting wheeling services from Consumers. However, these letters were requests for joint venture or unit power access to Midland and the wheeling services referred to therein were ancillary to that request -- i.e., the small utilities were only asking for transmission services to carry power from Midland to their systems. We discuss access to the Midland facility later in this opinion.

We note in this connection, however, that the Coldwater letter to Consumers did not seek access to Midland.

Board below for that matter) that it would have wheeled power had it been presented with what it deemed a satisfactory "formal request". Rather, Consumers states that it had no formal provision for wheeling because it had no need to draw one up in the absence of a specific request. This line of argument is disingenuous. It may well be that Consumers had no wheeling policy in the sense that its Board of Directors had never put it down in a written resolution. But there are obvious reasons why they would not do so. We are convinced -- as was the Board below -- that Consumers in fact has operated under a policy not to wheel for the small utilities.

It should be kept in mind that we are not called upon to rule on this question in a vacuum. As the Licensing Board correctly determined, Consumers has sought to acquire all the small utilities in the relevant geographic market. Refusing to wheel power would certainly aid Consumers in this quest. Mr. Aymond (Consumers' chief executive) himself testified that Consumers would probably not wheel power where doing so would affect "the ability of Consumers Power Company to maintain its present markets."^{561/}

^{561/} Int. Exh. No. 1004, pp. 183-84 (Mr. Aymond's deposition).
They, in response to an inquiry whether Consumers would be willing to wheel power from Ontario Hydro or some other
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Given the Supreme Court's Otter Tail decision, it is simply no longer open to dispute that a utility's refusal to wheel in order to protect its monopolistic market position is anticompetitive conduct. See 410 U.S. at 378.

561/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

entity willing to sell power, Mr. Aymond replied that before doing so he would want to know

for one thing, whether or not our lawyers felt we were obligated to do so. For another, * * * 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. [Intervenor's Counsel]: 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. [Mr. Aymond]: I think that would be a factor.

Q. A large factor?

A. [Mr. Aymond]: I think so.

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

A. [Mr. Aymond]: Well, I think the size of the transaction would be a factor.

Q. Why is that?

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

4. Thus, our assessment of the evidence leaves us in agreement with the Licensing Board that Consumers' "conduct amounted to a general refusal to wheel." There is also no doubt that Consumers' refusal to wheel has an anti-competitive effect. Without access to the company's transmission network, the small utilities cannot coordinate with or buy wholesale power from large nearby utilities other than Consumers. The obvious consequence of the refusal, as we detail below, is to retain those utilities as Consumers' customers.

5. Consumers' changed wheeling policy "post-hearing".

In the presentation of its direct case, Consumers introduced a new official company policy on wheeling which the company had just formulated. The Licensing Board refused to consider that policy because it "deemed [the change] to be timed to influence the Board" thus offering "little assurance of a permanent change in policy".

2 NRC at 92. The Board's conclusion was the proper one in the circumstances.^{562/} We deem it appropriate,

^{562/} Consumers presented its wheeling policy to the Board and other parties through the testimony of Mr. Aymond on February 12, 1974. See Tr. 6048-58. Mr. Aymond acknowledged that formulation of the policy had begun two weeks earlier and that it was not completed until (FOOTNOTE CONTINUED ON NEXT PAGE)

however -- particularly in light of our disposition of this case -- to comment briefly on Consumers' "new" wheeling policy.

In essence, under that new policy Consumers will wheel power for other utility systems if four conditions are satisfied. The first two concern the technical capacity of Consumers' transmission network and appropriate compensation. On their face we perceive no antitrust difficulties with either.^{563/} Conditions 3 and 4, however, are quite

562/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

the day before his testimony. Aymond, Tr. 6156-61. Further, at that time the Board of Directors had not seen the policy, much less approved it. Ibid. Moreover, the policy actually adopted by the Board of Directors included an additional condition not part of Mr. Aymond's original presentation. Compare Tr. 6049-50 with Tr. 8106-07, and see Aymond, Tr. 6093-97. Against this background, the Board was entitled to conclude that the policy was timed to influence this litigation.

563/ The first two conditions are (Consumers' Appeal Brief, p. 305):

- (1) 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 or commitments or endangering our system reliability;
- (2) that we be properly compensated for the 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.

another matter. Condition 3 provides that Consumers will wheel only if

provision of bulk power wheeling service will not result in a significant loss to Consumers Power Company, directly or indirectly, of existing load or services areas, with resulting idle facilities and social wastes.^{564/}

In its appellate brief, Consumers defends this condition on the ground that the company is "clearly justified" in preventing wasteful transactions such as "creamskimming". In the electric utility industry that term "refers to the practice of one utility, with no general obligation to serve [an area], competing away only the most profitable customers", thereby leaving the original supplier with "the obligation to serve a decreasingly profitable group of customers" and the need to "charge higher prices in order to earn a reasonable return".^{565/} "Creamskimming" usually occurs at the retail level,^{566/} and whether competition of this kind is socially desirable has been questioned by authorities who cannot be charged with bias for large utilities.^{567/}

^{564/} Ibid.

^{565/} Pace, Tr. fol. 7239 at 76. Also see Stelzer, Tr. fol. 7224 at 21.

^{566/} See Aymond, Tr. 6099.

^{567/} See Meeks, Concentration in the Electric Power Industry: The Impact of Antitrust Policy, 72 Colum. L. Rev. 64, 94-95 (1972).

However, even assuming that Consumers is justified in refusing to wheel for that reason, it does not follow that condition 3 is permissible policy for an enterprise with monopoly power. As Mr. Aymond acknowledged, condition 3 in terms encompasses more than just avoidance of cream-skimming. Indeed, he went so far as to indicate that the company would probably invoke this condition and refuse to wheel where a competing utility was seeking to acquire an entire portion of Consumers' retail service area.^{568/} Moreover, by adhering to the terms of this condition, Consumers could also refuse to wheel wholesale power to a prospective system seeking to displace it at retail. As we have stressed before, however, the Supreme Court has held that the Otter Tail Power Company's refusal to wheel for precisely that reason violated the Sherman Act. See 410 U.S. at 380. Moreover, under condition 3, Consumers could refuse to wheel wholesale power from outside sources to one of its existing wholesale customers. In short, condition 3 offers no assurance whatsoever that Consumers will refrain from anticompetitive refusals to wheel. On the contrary, adherence to its terms if anything invites refusals

^{568/} Aymond, Tr. 6099-6102.

to wheel for reasons unacceptable under the antitrust laws.^{569/}

Condition 4 poses a similar problem. It provides that Consumers will wheel power only if


[p]rovision of bulk power wheeling services will not result in significant loss to Consumers Power of access to interchange power transactions with third parties.^{570/}

In contrast to the other three, Consumers does not defend this condition in its appellate brief. We do not find this surprising. In light of governing antitrust principles,

^{569/} It should be noted that, since the close of the record, Consumers has agreed to wheel (presumably pursuant to its new wheeling policy) 20 MW of firm bulk power to the M-C Pool from Detroit Edison. See Consumers' Appeal Brief, pp. 105, 297, 299, 303, 409. However, that Consumers has wheeled in this one instance is no assurance that it has abandoned its previous anticompetitive wheeling policy.

We also note that Justice questions the terms and motive of Consumers' agreement to wheel in this instance. See Justice's Reply Brief on Appeal, pp. 86-88. Obviously, since it was entered into after the record closed, appellants have not had opportunity to present evidence or cross-examine witnesses concerning this agreement. We therefore only consider it in conjunction with Consumers' new statement on wheeling policy, a statement which, as we noted, was patently timed to influence the outcome of this litigation.

^{570/} Consumers' Appeal Brief, p. 305.



we can perceive no rational defense for it. It amounts to a direct statement of policy approved by Consumers' Board of Directors that the company will exercise its monopoly power in the coordination services market to exclude the small utilities from that market when it is to its competitive advantage to do so. That course of action exemplifies misuse of monopoly power.

To conclude, we find firmly imbedded in Consumers' "post hearing" policy the principle that the company will not wheel power where doing so would erode its market position. Although formulated to influence this case, that policy is still inconsistent with the policies underlying the antitrust laws and quite possibly the laws themselves.^{571/}

^{571/} Because Consumers holds public franchises, possesses eminent domain authority and has a monopoly, intervenors press the further argument that it is a "common carrier" with a duty to wheel power for them to the extent of its capacity to do so. Intervenors' Reply Brief on Appeal, p. 9. By those lights, the Otter Tail Power Company would also have been a common carrier. A conclusion to that effect would have offered an easy solution to the wheeling aspects of that litigation, common carriers having the duty to serve all who ask. Nevertheless, neither the district court nor the Supreme Court adopted that ratio decidendi. We also decline to rest on that disputed ground (see Consumers' Appeal Brief, pp. 298ff.) and do not reach the question.

E. Consumers' Coordination Practices.

Justice, intervenors and the staff argue that Consumers has exercised its monopoly power over coordination services in an anticompetitive fashion against the small utilities. They contend on three specific grounds that Consumers has refused to coordinate with those utilities on fair and reasonable terms, thereby creating a competitive advantage for itself in the relevant wholesale and retail power markets. The first charge is that Consumers unjustifiably refused to enter operational coordination agreements with Northern Michigan and Wolverine Electric in 1964, with the City of Allegan in 1966, with Northern Michigan in 1967 and with Edison Sault in 1972. The second is that where Consumers agreed to coordinate with small utilities, it did so only on unreasonable terms, particularly in refusing to share reserves with them on an equal percentage basis. The third charge is that Consumers has unjustifiably refused to coordinate development of baseload generation with the small utilities. This final allegation is based primarily on Consumers' refusal to allow or even to consider participation by members of the M-C Pool in the Midland facility when that possibility was broached in 1971.

For the most part, Consumers does not challenge the facts underlying the appellants' assertions but, rather, seeks to justify its coordination dealings with the small utilities. A refusal to deal by one with monopoly power is not a violation of the anti-monopolization clause of section 2 of the Sherman Act if there are reasonable grounds for that refusal. We therefore look first at the standard for measuring the reasonableness of Consumers' coordination practices.

1. The applicable standard.

a. The Licensing Board's decision. The Board below held that Consumers was bound by law to receive a "net benefit" in any coordination agreement, ones with the smaller utilities not excepted. The Board failed to explain, however, the precise nature and the magnitude of that benefit. Moreover, that Board's determination rested not on antitrust principles but on what it perceived as the duty of an investor-owned utility to include only legitimate expenses in its rate base and not to waste corporate assets.^{572/} We have no quarrel with the Board's

^{572/} Application of these two legal principles led the Board to "conclude as a matter of law, that the management of [Consumers] is forbidden from entering into alleged coordination agreements which said management believes will result in a net detriment to [the company]." 2 NRC at 66.

analysis of these general principles. We simply do not believe that they are helpful in answering the question at hand. The antitrust laws do not generally require one company to enter into or maintain an unprofitable relationship with another, see p. 286, supra. Consequently, measurement of Consumers' conduct under applicable antitrust standards will not result in holding that company at fault for actions compelled by its duties to shareholders or customers. The principles expounded by the Licensing Board are thus the starting point, not the conclusion, in determining the standard to be applied.

b. The parties' proposed standards. Consumers professes to have a "long-established" policy of entering into "coordination arrangements which offer the Company benefits significantly in excess of its costs, i.e., meaningful net benefits".^{573/} The company contends that its insistence on receiving a net benefit is a "reasonable and necessary aspect of its coordination policies"^{574/} and is in accord with industry and FPC standards. It further contends, however, that net benefits can result only if each coordinating party possesses the "willingness and

^{573/} Consumers' Opening Brief Below, p. 187.

^{574/} Consumers' Appeal Brief, p. 227.

ability to engage in comparable coordinating transactions on a reciprocal basis"^{575/} -- that is, transactions which, over time, will yield a roughly even energy flow between the parties.^{576/} Consumers argues that such reciprocity is necessary both because the parties need "incentive" and because coordination power is generally based on incremental rather than average costs. A small system that disproportionately utilized its interconnection would thus allegedly be "leaning on" Consumers. This, the company argues, would unduly discriminate against Consumers' wholesale and retail customers.^{577/}

Justice acknowledges that Consumers "is not obligated to coordinate with small systems where the coordinating transactions would result in no net benefit or in a net detriment". It contends, however, that a "[n]et benefit (and no net detriment) necessarily results whenever the cost (including a reasonable return on investment, i.e., profit) is recovered from any given coordination transaction". Moreover, it argues that

^{575/} Id. at 212.

^{576/} See Slemmer, Tr. fol. 8838 at 8-16; Mosley, Tr. 8459-60.

^{577/} See, Consumers' Opening Brief Below, 190-91; Consumers Appeal Brief, 219-222; Slemmer, Tr. fol. 8838 at 14.

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 (Consumers) 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 Consumers.^{578/}

Intervenors urge essentially the same standard.^{579/}

The NRC staff, on the other hand, would examine whether a coordination arrangement would place "an undue burden" on Consumers and make it unable to render services to its customers. The staff argues that "the net benefits to be achieved from the transaction are irrelevant" where a refusal to deal is determined to have an anticompetitive effect.^{580/}

c. Analysis. We agree generally with Justice's and intervenors' position. The relevant inquiry is whether coordination with the smaller utilities would enhance Consumers' ability to produce firm power economically, the usual reason for coordination arrangements. Accordingly, it is irrelevant

^{578/} Justice's Opening Brief on Appeal, p. 82.

^{579/} Intervenors' Reply Brief on Appeal, p. 81, fn. 1.

^{580/} NRC Staff's Opening Brief on Appeal, pp. 6, 60-64.

whether, as a byproduct of coordination, the smaller utilities would be able to reduce their dependence on Consumers for wholesale power or to improve their competitive stance vis-a-vis Consumers. Indeed, a contrary result would allow Consumers to exercise its monopoly power in the coordination services submarket to its competitive advantage in the wholesale and retail markets, at direct odds with judicial teaching. United States v. Griffith, supra; United States v. United Shoe Machine Corp., supra, 110 F. Supp. at 346.

Underlying the allegations discussed in this section is concern with the disparity between the respective benefits that a small and a large utility receive from coordinating with each other. There is no dispute that in this situation, the smaller utility receives relatively greater benefits. It will most likely be able to achieve a greater reduction in reserve capacity^{581/} and be

581/ Mr. Mayben testified that (Tr. 3744-45):

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.

able to increase the comparative size of its generating units to a greater extent than the larger system.^{582/} Any large utility, simply by virtue of size, has typically achieved some of the economies of scale now attainable in the electric utility industry. And in this case, in addition to its own large size, Consumers' existing coordination arrangements with large neighboring utilities have opened to it the possibility of even greater economies. Consequently, the relative benefits available to Consumers from coordinating with small utilities may well be minimal from that company's perspective.

582/ Mr. Slemmer testified as follows (Tr. 8939-40):

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 in cost 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 enable the small company, the small utility, let's say co 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.

Accepting all this, it must be kept in mind that Consumers possesses monopoly power over coordination services within the relevant geographic market. In practical terms, this means that the small utilities can turn only to Consumers for such services and their attendant benefits.^{583/} In a competitive situation where the small utilities had other alternatives, Consumers might be entitled to concern itself solely with the benefits it might obtain through coordination. But we think the case is otherwise where Consumers' refusals to deal not only deny coordination benefits to its small competitors but also give Consumers an edge over them in other markets. In such circumstances -- at least where it obtains some benefits from coordination -- Consumers can neither justify its refusal to coordinate on the grounds that the small utilities will obtain relatively greater benefits than it will, nor seek to impose on those utilities terms that effectively transfer to Consumers a portion of the benefits

^{583/} See Part VI, supra.

they would otherwise gain.^{584/} In judging the reasonableness of Consumers' coordination policies, therefore, we need focus only on whether Consumers would have benefited at all from coordinating with the small utilities.

Finally, we note that "reciprocity" as Consumers defines it is not a prerequisite to the company receiving a benefit in a coordinating arrangement. The example in the margin involving economy energy transactions exposes the flaw in Consumers' proposed standard, for both parties to such transaction undeniably receive "net benefits", even though the

^{584/} Our conclusion in this regard is buttressed by Gainesville Utilities v. Florida Power Corp., 402 U.S. 515 (1971). There, in rejecting Florida Power's argument that the FPC should have required the City of Gainesville to pay half its interconnection benefit to the much larger private utility, the Supreme Court observed (402 U.S. at 528; emphasis supplied):

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. An airplane seat may bring greater profit to a passenger flying to California to close a million dollar business deal than to one flying west for a vacation; as a consequence, the former might be willing to pay more for his seat than the latter. 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.

energy flow between them is not reciprocal.^{585/} Moreover, Consumers' witness testified that Consumers' reciprocity standard is in essence a means of dividing equally the benefits that two utilities achieve under a coordinating

^{585/} Utilities engage in economy energy transactions in order to utilize their most economical generating unit. See fn. 288 supra. Briefly, in such a transaction a utility generating electricity with a unit whose operating costs are higher than one its neighbor temporarily has in reserve, will cease operation of its more costly unit and receive power from its neighbor's more economical unit. The receiving utility pays the supplier's operating costs plus have the difference in operating costs between the two units, in effect splitting the savings on a 50-50 basis. A prerequisite to such a transaction is that the receiving utility have idle generating capacity -- i.e., it cannot utilize economy energy for emergency purposes or to meet a general deficiency in capacity. And as stated earlier, economy energy is supplied only on an "if available basis" -- i.e., the supplying utility can retract service on an instant's notice.

Under Consumer's reciprocity standard as explained by Mr. Slemmer, Consumers' expert witness, a reciprocal net benefit with respect to economy energy transaction can be achieved only if "over time * * * each participating system ha[s] lower generating costs than the other participants a reasonable amount of time," so that energy can "flow in both directions". Tr. fol. 8838 at 16. However, given the nature of economy energy transactions, benefits do not hinge on receiving similar service in the future for, by definition, the seller has profited on each individual transaction. And because the receiver has capacity available (albeit more expensive to operate), it cannot be said to be "leaning" on the seller. This is made even more evident because the supplying utility can stop delivery any time that it needs the particular generating capacity for its own use. In short, both the receiving and the supplying utilities benefit in economy energy exchanges even where the power always flows in one direction. See Wolfe, Tr. 1591.

arrangement.^{586/} This was in effect confirmed by Mr. Aymond's testimony that Consumers could justifiably refuse to coordinate with a small utility that received "much larger benefits in proportion" than Consumers.^{587/} For reasons which we discuss below, the company's proposed standard for reasonableness is out of harmony with the governing antitrust principles when applied to transactions with the smaller utilities in its service area.^{588/}

2. Consumers' refusals to coordinate.

a. Facts. We turn first to those instances where Consumers has refused to coordinate on any terms with the smaller utilities. Since Consumers gives the same justification for each refusal, we will describe the factual situations before discussing the parties' positions and the Licensing Board's determination.

(i) Consumers' refusal to coordinate with Northern Michigan and Wolverine Electric. In December 1963 Mr. Daverman, the cooperative's power consultant, wrote Mr. Campbell, Consumers' Vice-President in charge of marketing, requesting that Consumers make alternative

^{586/} Slemmer, Tr. 8860-61, 8929-31.

^{587/} Int. Exh. No. 1004, p. 266. (Mr. Aymond's deposition). Also see Aymond Tr. 6262-68.

^{588/} Whether that standard is objectionable when applied strictly to transactions between large utilities is a question we need not and do not reach.

proposals for supplying bulk power to the cooperatives.^{589/}
At that time the cooperatives were meeting their load requirements by both generation and wholesale power purchases. Northern Michigan had a generating capacity of 22.97 Mw, which it supplemented with purchases of 18.75 Mw of firm power from Consumers to meet its 30.19 Mw peak load.^{590/} Wolverine then supplemented its generating capacity of 32.96 Mw with purchases of 2.5 Mw of wholesale power from Consumers to meet its peak load of 29.65 Mw.^{591/}

Mr. Daverman's letter to Mr. Campbell initiated formal negotiations between the cooperatives and Consumers. These

^{589/} D. J. Exh. No. 32.

^{590/} Steinbrecher, Tr. 1411-16. These figures are from Northern Michigan's report to the Federal Power Commission for the year ending 1964. Ibid. At that time the largest units on Northern Michigan systems were two units with **generating capacities** of 8.5 Mw each. Also, Northern Michigan then had a coordination agreement with Traverse City which provided for mutual emergency support of 4 Mw. D.J. Exh. No. 240; Steinbrecher, Tr. 1949-59. As explained in our discussion on coordination, this would be non-firm power.

^{591/} Steinbrecher, Tr. 1417-21. These figures are from Wolverine Electric's report to the Federal Power Commission for the year ending 1964. Ibid. In addition to the sources mentioned, Wolverine also received electric energy from Hart and Lowell. The record does not reveal if these transactions were on a firm power basis. Steinbrecher, Tr. 1418-19.

extended over the better part of a year.^{592/} Throughout the negotiations Consumers expressed a definite strong desire to assume all the future load growth of the cooperatives^{593/} and to this end submitted a wholesale power proposal running for 15 years.^{594/} The cooperatives, however, found the Consumers' offer unsatisfactory because they considered themselves "established power suppliers"; as a counter to Consumers' wholesale power offer, they suggested negotiation for "some form of an interchange agreement" between the cooperatives and Consumers.^{595/}

^{592/} See D. J. Exh. No. 33, No. 34, No. 35, No. 36, No. 37, No. 38, No. 39, No. 40 and No. 41.

^{593/} D. J. Exh. No. 35, No. 36 and No. 37

Mr. Campbell opened the meeting with generalities to the effect that Consumers was not interested in short term standby arrangements (such as the present [wholesale] contract), that Consumers wanted to obtain all 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.

D. J. Exh. No. 36 (Summary of a meeting held between representatives of the cooperatives and Consumers, prepared by Mr. Hodge, an associate of Mr. Daverman).

^{594/} D. J. Exh. No. 37.

^{595/} When viewing your proposal in the light of the existing supply and transmission facilities of Northern Michigan and Wolverine, including their interconnections with other systems, your proposal is not responsive to

(FOOTNOTE CONTINUED ON NEXT PAGE)

In a meeting with the cooperatives, however, Mr. Campbell indicated that Consumers "was definitely not interested in entering such agreements with any small companies at [that] time" and that "the company was not disposed to pursue this approach further."^{596/}

The cooperatives, however, persisted in their efforts to obtain a coordination agreement with Consumers.^{597/} Consumers again rejected the idea, explaining that

^{595/} (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

their present needs. We have previously suggested in correspondence and in meetings with your people that there might be other avenues of approach to explore. Northern Michigan Electric 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 pattern of pooling agreements which have been developed in recent years in other states.

D. J. Exh. No. 38 (Letter from Mr. Daverman to Mr. Campbell). Also see D. J. Exh. No. 39.

^{596/} D. J. Exh. No. 39 (Summary of Meeting held May 27 between Consumers Power Company personnel and the cooperative's managers and power consultants, prepared by Mr. Daverman.)

^{597/} D. J. Exh. No. 40. (Letter from Mr. Daverman to Mr. Campbell dated June 30, 1964).

As indicated in [Mr. Steinbrecher's] letter to Mr. Lee, 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.^{598/}

Failing to obtain a coordination agreement with Consumers, the cooperatives continued as wholesale power customers of the company.

(ii) Refusal to coordinate with Northern Michigan.

In January 1967, Northern Michigan wrote Consumers seeking to negotiate a coordination agreement to replace their existing wholesale power arrangement scheduled to terminate at the end of the year. Northern Michigan's system peak load at that time was 43.52 Mw, its installed capacity 45.10 Mw, and the size of its largest unit 23.5 Mw. To supplement its generation, Northern was purchasing 11.5 Mw of wholesale power from Consumers. In addition, Northern Michigan, Wolverine, Traverse City and Grand Haven were interconnected. Their projected generating capacity as a group by late 1967 was expected to be 160 Mw while their projected load was but 100 Mw.^{599/} (This included

^{598/} D. J. Exh. No. 41 (Letter dated November 16, 1964).

^{599/} D. J. Exh. No. 47 (Letter from Mr. Paul to Mr. Daverman).

three new plants totalling 63 Mw expected to come on line in late 1967).^{600/} Under the interconnection agreements then in existence among these utilities (this was prior to execution of the M-C Pool agreement), Northern Michigan could receive emergency power from both Traverse City and Wolverine.^{601/}

After meeting with the cooperative's representative, Consumers requested, among other things, copies of the interconnection agreement between the cooperatives and the municipalities.^{602/} Northern did not send the copies but instead informed Consumers of the general characteristics of the interconnected systems, e.g., the generating capacity of each individual system, number of generating units, and the size of the largest unit. Apparently with no further communications, Mr. Paul of Consumers wrote Northern Michigan on July 14, 1967 that it would be unable to coordinate with the cooperative but that it would be glad to

^{600/} Steinbrecher, Tr. 1441-46. The 23.5 Mw unit was planned to be in operation by November 1967. C.P. Exh. No. 12,001 (May 18, 1967).

^{601/} D. J. Exh. No. 48.

^{602/} C. P. Exh. No. 12001 (Letter dated April 21, 1967).

continue the present wholesale type of agreement. His letter stated in pertinent part:

Consumers Power Company has established criteria based on established utility practices for evaluating the relative costs and benefits to be derived from interconnected systems and makes available to other utilities interconnections based on such criteria. Applying this criteria to the preliminary load and generating data supplied by you, we find that Northern Michigan Rural Electric Cooperative has insufficient reserve capacity to benefit from or to comply with minimum provisions for this type of agreement.603/

(iii). Consumers' Refusal to coordinate with Edison Sault. In 1972 Consumers and Edison Sault were renegotiating their existing wholesale power arrangement.^{604/}

As indicated earlier (p. 99, supra), Edison Sault then had a peak load of about 73 Mw. From a series of communications with Consumers' personnel, Edison Sault had received the definite impression that it had a choice between a standard wholesale contract and a coordination agreement.^{605/} Under the latter, Edison would have been required to maintain reserves equal to 15 percent of its peak load. It was Edison Sault's understanding that, to the extent its generating capacity was less than 115 percent of peak load, it could make up the deficiency either by installing the necessary generating capacity itself or by purchasing the power from Consumers. At a subsequent meeting, Mr. Paul

^{604/} Kline, Tr. 4416.

^{605/} According to Edison Sault personnel, both Bob Conden and Gene Kaiser of Consumers had indicated that the decision on whether to enter into an interconnection agreement or negotiate our present wholesale contract was Edison Sault's to make. D.J. Exh. No. 83 (Edison Sault memorandum of October 16, 1972, summarizing negotiations with Consumers personnel.) See also fn. 606, infra.

of Consumers attempted to convince Edison Sault that a wholesale power arrangement was more advantageous to it than the coordination agreement. Only after failing to do so did he advise Edison Sault's representative that they had misunderstood comments of Consumers' personnel about the availability of the coordination arrangement and that, in fact, Consumers would not coordinate with Edison Sault.⁵⁰⁶ Edison Sault was left with no choice but to renew

/ D.J. Exh. No. 85 (summary of that meeting by Mr. Kline, president of Edison Sault):

At this point in the discussions, [i.e. after failing to convince Edison Sault that a wholesale power arrangement was more advantageous than coordination] Mr. Paul advised us that Edison had misunderstood the comments which had been made by Consumers Power Company representatives during the various conferences in which we concluded that either a wholesale agreement or an interconnection agreement was available to us. Mr. Paul stated that it was the Company's policy that if the utility was deficient in its base capacity, that they were not entitled to the benefits of an interconnection agreement.

It had been our understanding and without question throughout our discussions with Consumers Power Company that an interconnection agreement was available to us and that where our system was deficient, we would be required to install capacity or purchase the reserve capacity equal to fifteen (15%) percent.

In view of the fact that [Consumers] had announced that the interconnection agreement was not available to us, we terminated the conference and Mr. Paul stated that they would furnish us a proposed wholesale contract, that being the only contract available to Edison at [that] time.

its wholesale power arrangement with Consumers. ^{607/}

607/ In addition to the instances just mentioned, Justice contends that Consumers refused to coordinate with the City of Allegan in 1966, an action that assertedly swung the balance in favor of Allegan selling its electric system to Consumers. Justice rests its allegation on Allegan's request in 1966 that Consumers supply it with either "standby or supplemental power". The only documentation of this request is an internal memorandum written by Mr. Paul. D.J. Exh. No. 178. In its appellate brief (p. 243) Consumers argues that Mr. Paul testified that "the 'standby power' referred to there was simply one variety of wholesale service" and thus Allegan's request was "not [related] at all to coordination." This is not entirely correct. See Paul, Tr. 7979-81. Nevertheless, Mr. Paul did testify that Allegan's request was one for wholesale power, to be used for standby or emergency purposes, which the company subsequently offered. Paul, Tr. 7977-78. The weight of the evidence in our judgment does not confirm that Allegan's request was one for coordination.

Justice in its appellate brief (pp. 99-104) also refers to instances where Consumers refused to coordinate on reasonable terms with the M-C Pool (1969-1973), Lansing (1970) and Traverse City (1968). Whether the terms of Consumers' current coordination agreements are anticompetitive is considered at pp. 358 ff., infra.

b. Consumers' position. Consumers acknowledges that it refused to coordinate in the instances described above. It contended to the Board below, however, that those refusals were justified because the small utilities were "deficient" in generating capacity -- i.e., they had insufficient generation to meet their peak load plus some reasonable reserve level^{608/} -- and therefore could not give assurances of "reciprocal emergency power support" comparable to that which Consumers would be providing. Consumers argued that for this reason it would have received no "net benefit" had it coordinated with the small systems. The Licensing Board agreed with Consumers, concluding that "true coordination with benefits to both parties was not feasible" in those circumstances. 2 NRC at 94-95. The Board did not attempt to explain, however, just why a utility partly dependent on purchases of wholesale power -- firm power in bulk -- could not be a viable coordinating partner.

c. Appellants' position. Justice points out that the small utilities, although lacking sufficient generating

^{608/} Consumers' Opening Brief Below, pp. 192-94.

capacity of their own to meet their peak load and reserve requirements, were buying wholesale power to make up that difference and therefore had sufficient "firm power" to meet those obligations. The Department argues that a coordinating partner could rely on the small utilities' purchased reserves. It supports its position by pointing out that Consumers itself was in precisely that situation -- i.e., the company for various reasons has been short of generating capacity in recent years (most notably in 1971^{609/}) and therefore has been purchasing power under coordination arrangements to meet its required reserve level. The intervenors support Justice's argument and offer a theoretical analysis to demonstrate its soundness.^{610/}

609/ In 1971 Consumers' installed generating capacity was 3,443 Mw; its peak load was 3,667 Mw. See D. J. Exh. No. 21, pp. 9, 28.

610/ The intervenors suggest that a non-sufficient utility can be thought of as two separate systems, one self-sufficient and the other relying totally upon wholesale power. They give an example of a system with a 20 Mw load, 11.5 Mw of generation and a 15% reserve requirement, the conceptual analog of which is two separate systems each having a 10 Mw load, one having 11.5 Mw of generation and the second purchasing 10 Mw of wholesale power. The former would meet Consumers' test for coordination because it would have a 15% reserve to serve the 10 Mw load. The intervenors assert that the combined system with the 20 Mw load "should be equally entitled to coordination for the 11.5 Mw of generation." Intervenors' Opening Brief on Appeal, pp. 160-62; reply brief, pp. 83-86.

Both Justice and the intervenors argue that Consumers would have benefited by coordinating with the small utilities in the instances described. Consumers' refusals to coordinate, they contend, were motivated by that company's desire to preserve and extend its monopoly position at both the wholesale and the retail levels.

d. Discussion. One who contracts for wholesale power has the right to demand the amount contracted for at any time. The selling utility accordingly must have planned its system to deliver that amount; in other words, it must have reserves sufficient to back its wholesale sales.^{611/} For this reason, a utility without sufficient generating capacity of its own to meet its peak load can contract for wholesale power to cover

^{611/} For example, a utility that operates under a 20 percent reserve margin must in effect allocate 12 Mw of generating capacity to serve a customer to whom it sells 10 Mw of wholesale power.

Thus, to the extent that Consumers contracted to sell wholesale power as reserve capacity to the small utilities, it had to maintain sufficient generating reserve capacity to meet that commitment. In case of a power outage on Consumers' own system, Consumers would be able to draw on this capacity absent an emergency on the buyer's system.

its deficiency and provide the necessary amount of reserves. This is precisely what the small utilities had done in each of the instances described above. For example, in 1964 Northern Michigan had 42 Mw available from either self-generation or wholesale contracts to meet its 30 Mw peak load. It therefore had at its disposal at least 12 Mw of power which was available to a utility with an emergency. This is not theoretical. At the time in question, Traverse City and Northern Michigan were operating under a coordination agreement under which they were exchanging emergency power.^{612/} An electric utility that obtains its firm bulk power partly by self-generation and partly by wholesale power purchase is, therefore, not inherently disqualified as a coordinating partner.

This conclusion is buttressed by statements of Consumers' counsel at oral argument. There, counsel represented to us that "[Consumers has] never taken the position that a coordinating partner could not go out and buy firm power from somebody else, as long as it isn't from [Consumers]".^{613/} In other words, according to counsel, a utility partly dependent on wholesale power purchases is an

^{612/} D.J. Exh. No. 240; Steinbrecher Tr. 1950-53.

^{613/} App. Tr. 135.

acceptable coordinating partner for any other utility except the one supplying the wholesale power. This limitation is necessary, counsel argued, because the utility buying at wholesale from Consumers would not be able to supply power to Consumers in the event of an outage on Consumers' own system.^{614/}

Assuming arguendo that the reason advanced by counsel was in fact Consumers' rationale for refusing to coordinate, we find it self-serving and unpersuasive given the company's policy against wheeling power for the smaller utilities. Absent that wheeling, they could not obtain the wholesale power which Consumers insists is needed to make them viable coordinating partners. In other words, Consumers was

^{614/} App. Tr. 135-36. Nowhere in its briefs to this Board or the Board below did Consumers make the distinction urged by counsel at oral argument. Rather, as shown by the argument made to the Board below, Consumers has asserted that its refusals to coordinate with the small utilities were justified simply because these systems were deficient in generation, apparently regardless of where they obtained the additional power to make up for that deficiency. See Consumers' Opening Brief Below, pp. 192-94.

In its brief below as well as in its appeal brief Consumers refers to the accepted proposition that a utility must maintain a reserve of at least 10 to 20 percent of its peak load as support for its position. However, in light of counsel's representations at oral argument, Consumers can no longer rely on that proposition, for it does not support the distinction counsel now urges upon us.

telling the small utilities on the one hand that to coordinate with the company they needed to obtain wholesale power elsewhere than from Consumers, while on the other hand it was denying them the use of its transmission network, their only access to those outside sources. Thus, if we accept counsel's explanation, Consumers created the situation that made it impossible for the small utilities to become "viable coordinating partners" by Consumers' lights.

At all events, counsel's argument is plainly a post hoc rationalization. This becomes clear when the actual negotiations leading up to Consumers' current coordination agreement with M-C Pool are examined, for there the company took the opposite position. The negotiations were opened in 1969 by Wolverine Electric's request to buy 10 to 20 Mw of power from Consumers and also to coordinate with the company.^{615/} Consumers eventually responded with a "Preliminary Proposal Interchange and Wholesale Power Purchase" agreement. That proposal would have allowed Wolverine to buy wholesale power from Consumers and for the two utilities to undertake mutual emergency energy power transactions.^{616/}

^{615/} D. J. Exh. No. 53.

^{616/} C. P. Exh. No. 12002 and No. 12003.

Indeed, it was the manager of Wolverine Electric, not the Consumers representative, who questioned how the mutual emergency support transactions could be undertaken and billed when the cooperative was drawing wholesale power from Consumers.^{617/} The company's response, given by Mr. Paul, was the following:

Simultaneous deliveries of firm wholesale power to Wolverine and emergency support to Consumers Power Company would be treated as though they were being handled through two separate connections. As an example:

If Consumers Power Company were delivering 10 megawatts of wholesale power to Wolverine and then Consumers called for 20 megawatts of emergency support, the net delivery to Consumers would be 10 megawatts. Consumers would pay six mills per kilowatt-hour for this energy at a rate of 10 megawatts per hour or return it in kind at Wolverine's option. Wolverine in turn would pay for that month the standard wholesale rate for 10 megawatts of firm power capacity and the appropriate energy charge for the net kilowatt-hour received. Assume again that Consumers is delivering 10 megawatts of wholesale power to Wolverine and calls for 5 megawatts of emergency support. Deliveries to Wolverine would be reduced to 5 megawatts during this period. Consumers would pay Wolverine six mills per kilowatt-hour for energy at the rate of 5 megawatts per hour or return it in kind. Wolverine would pay the standard wholesale charges that month for delivery of 10 megawatts of capacity and the appropriate energy charge for the net kilowatt-hour received.

If Wolverine were purchasing 10 megawatts of firm power and at the same time required 20 megawatts of emergency support, Consumers would deliver a total of 30 megawatts, of which all in excess of the 10 megawatts firm purchase would be treated and billed in accordance with the interchange provisions of the agreement.^{618/}

^{617/} D. J. Exh. No. 54.

^{618/} D. J. Exh. No. 55.

Mr. Paul's explanation on behalf of Consumers confirms our judgment that there is no inherent physical or economic barrier to Consumers' engaging in simultaneous wholesale and coordination transactions with the same utility. Consumers itself initiated this proposal to Wolverine; it would hardly have done so were a wholesale-coordination agreement not beneficial to it.^{619/}

Under a wholesale-coordination agreement of the type Consumers offered Wolverine, the small utility would be required to buy wholesale power both to supply the difference between its generating capacity and peak load and also to provide it with a reasonable reserve margin.^{620/} Because

^{619/} Mr. Paul's illustrations, and the derivative conclusion that Consumers would benefit from the transaction, is true not only with respect to the circumstances exist- in 1970. As we subsequently explain, Consumers could generally benefit from coordinating with a "deficient" utility. Moreover, in the instances where Consumers refused to coordinate, the small utilities had substantial generation and their reliance on wholesale power was minimal. See "a", supra, at pp. 330 ff.

^{620/} It goes without question that a utility buying whole- sale power from, as well as coordinating with, Consumers must (assuming no other outside sources of power) buy sufficient wholesale power to provide it with a reason- able reserve margin above its peak load requirements. Not to require purchases of wholesale power for reserve purposes would be, to use Consumers' terminology, to allow the small system "to lean" on Consumers, for the buyer would not be paying for the maintenance of gen- erating capacity necessary to cover emergency or scheduled outages of its generating facilities.

reserve capacity is not used on a continued or even a daily basis but is tapped in case of an unexpected or scheduled outage of a generating unit, Consumers can count on that increment of power as a reserve for its own system. This is true whether the small utility draws the maximum amount of wholesale power contracted for from Consumers, utilizes its own generating capacity as much as possible and draws wholesale power only when needed, or follows some intermediate course.^{621/} Thus, while being paid on a firm power basis, Consumers can, in an emergency, generally utilize the power generated by this capacity as though it were

^{621/} Under a wholesale-coordination agreement, if the small utility draws the maximum amount of wholesale power, Consumers could in an emergency reduce its flow of wholesale power to the small utility, thus forcing it to operate the generation it is holding in reserve. (See Mr. Paul's illustration in text above). If the parties had strictly a wholesale arrangement (rather than a wholesale-coordination agreement) Consumers would not be entitled to reduce the flow of wholesale power to the small system but would be required to look elsewhere for power to meet its emergency.

Similarly, under a wholesale-coordination type of agreement, if the small utility as a matter of course used its generating capability to the maximum, Consumers could rely in an emergency upon that portion of wholesale power the small utility had contracted for as reserve capacity, because the utility would call for that power only if it experienced an emergency.

being produced by the small utility's own generators. This is a clear benefit to Consumers, notwithstanding the absence of the reciprocal power flow that the company focuses on. Indeed, the "burden" on Consumers' generation and reserves is less under a wholesale-coordination arrangement than under a wholesale power contract.^{622/}

We need not reach here the question of the reserve level a small utility must maintain so as not to burden Consumers' system. Consumers has defended its refusals to coordinate on the ground that it could never benefit by coordinating with a deficient utility that was also purchasing wholesale power from it. As we have seen,

^{622/} For example, assume that Consumers is dealing with Utility A, a system of the size that Northern Michigan was in 1967: peak load of 43.5 Mw, installed capacity of 45.1 Mw, largest unit 23.5 Mw in capacity. Assume further that Utility A's largest unit fails during peak load conditions. Under a strictly wholesale arrangement, Consumers will have to deliver 21.9 Mw of power to make up for this outage ([peak load + largest unit capacity] - installed capacity). In contrast, under a hybrid wholesale-coordination agreement with a 20 percent reserve requirement, Consumers will have to deliver only 7.1 Mw of power to Utility A (.20 [peak load] - [installed capacity - peak load]). The remaining 14.8 Mw (21.9 Mw - 7.1 Mw) would be delivered only if Consumers had excess capacity available either on its own system or via short term power purchases from other systems. Thus, by insisting on a strictly wholesale arrangement, Consumers assumes an unnecessarily large share of the reserve burden -- a doubly unwise course in light of Consumers' own capacity shortfalls. Of course selling wholesale power is more profitable than selling coordination services. See p. 144 ff., supra.

that position does not withstand analysis. 623/

623/ Coordination between a utility deficient in generation and one which is self-sufficient can also lower the reserve levels each must carry. Assume, for example, that Utility A has a 200 Mw peak load and a 200 Mw generating capacity, its largest unit being 50 Mw. Assuming that the "largest unit criterion" for calculating reserves is valid, Utility A's reserve requirement before coordination would be 50 Mw, which it purchases from Utility B under a wholesale power arrangement. Assume that Utility B has a peak load of 850 Mw (including the 50 Mw wholesale purchase by Utility A) and generating capacity of 1050 Mw, its largest unit being 200 Mw. Utility B's reserve requirement before coordination would be 200 Mw.

Upon coordination the combined peak load of the two systems would be 1000 Mw (viewing the two systems as one, the 50 Mw wholesale purchased by A would not be part of the combined system's load). Again assuming that the largest unit criterion is valid, the reserve requirement for the combined system is 200 Mw, or 20 percent of their combined peak load. If the utilities were to share reserves on an equalized basis, see fn.631 *infra*, Utility A's reserve requirement would be 20% of 200 or 40 Mw; Utility B's reserve requirement would be 20% of 800 or 160 Mw. Thus, both could reduce their reserve requirements upon coordination: Utility A need buy only 40 Mw of power from Utility B, and B need maintain only 160 Mw of reserves.

Of course, if Utility B could not market elsewhere the extra power that it would have available through coordination with Utility A, B would naturally prefer to continue selling wholesale power to that utility rather than coordinate.

e. Effect of Consumers' refusals to coordinate. Having determined that Consumers could have benefited by coordination with the small systems, we must now consider whether its refusals to do so were anticompetitive in purpose or effect.

(i) The extent of competition in the wholesale power market depends in large measure on the small utilities' ability to obtain firm bulk power at reasonable cost. As the Licensing Board recognized (2 NRC at 108), their options in this case are limited to installing new generating facilities of their own or purchasing wholesale power from Consumers.^{624/} We have explained, however, that

^{624/} Consumers does not dispute this; indeed, its proposed wholesale market definition was built around this competition. Mr. Aymond testified that Consumers has "actively solicited wholesale business from other utility systems in [its general] service area". Tr. 6064. This is borne out by the record. For example, in 1962 Consumers was actively seeking to sell wholesale power to Zeeland, Allegan and St. Louis. D. J. Exh. No. 15; in 1964 to Northern Michigan and Wolverine Electric, D. J. Exhs. No. 36, 37; in 1966 to Petosky and Holland, D. J. Exh. No. 188; in 1968 to Traverse City, D. J. Exh. No. 31; in 1969-70 to Wolverine Electric, C. P. Exh. No. 12002, 12003; and in 1971 to Portland. Int. Exh. No. 2032. Moreover, Consumers has been at least partially successful in its efforts. For example, in 1962 St. Louis, Charlevoix and Hillsdale were self-sufficient; by 1972, however, St. Louis and Charlevoix were obtaining over 90 percent of their requirements at wholesale from Consumers and Hillsdale over 50 percent. C. P. Exh. No. 11,307; also see D. J. Exh. 15. During that period the cities of Petosky, Union City and Marshall similarly increased their wholesale purchases from Consumers instead of building new power plants of their own.

the small utilities can construct and operate large, economically efficient plants without experiencing an unmanageable rise in required reserve levels only if they have suitable coordination arrangements. Consumers' refusals to coordinate with them thus have a two-pronged anticompetitive effect: they prevent the small utilities from building the most efficient (i.e., least costly per Kwh produced) new facilities and, as a result, tend to ensure those systems' ever-increasing reliance on wholesale power purchases from Consumers.

(ii) We also find that Consumers' refusals to coordinate were purposefully anticompetitive. In 1964, Wolverine Electric and Northern Michigan had been studying several options for meeting the new load growth of their member distribution cooperatives.^{625/} They considered expansion of old facilities, construction of a new plant, wholesale power purchases from Consumers, and a combination of expanded generation and purchases from Consumers.^{626/} As pointed out above, Consumers itself was interested in supplying the future increased power needs of those cooperatives for the next 15 years but through sales of wholesale

^{625/} Steinbrecher, Tr. 1423-28.

^{626/} Ibid.

power. When the company failed to convince the G. & T. cooperatives to accept its offer, it sought to forestall the grant of REA loans to the cooperatives to finance that new generation.^{627/} The company hoped thereby to force the cooperatives to turn to Consumers for wholesale power. In so doing, Consumers undertook an intensive public effort (using arguments based on cost comparison figures that were,

^{627/} Consumers invokes the rule protecting the right to petition the government for the proposition that we may not take notice of its attempts to influence REA officials against making the loan. See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 557 (1965). To begin with, it is doubtful that the "Noerr-Pennington Doctrine" applies to actions of the kind involved here. It protects persons attempting to influence government policy, not those seeking to impede officials carrying out policies previously made. Hecht v. Pro-Football, Inc., *supra*, 444 F.2d at 940-42; Geo. R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., *supra*, 424 F.2d at 31-34. But even were the doctrine applicable to the facts before us, it would only serve to insulate the attempts to influence the government officials from forming the basis of antitrust liability. The fact that such attempts took place, however, need not be ignored where they shed light on the anticompetitive nature of other actions. The Supreme Court itself drew this distinction in Pennington, observing that evidence of such conduct may be introduced and considered "if it tends reasonably to show the purpose and character of the particular transaction under scrutiny." 381 U.S. at 670 fn. 3. It is for this purpose that we take the circumstances surrounding the loans into account.

at best, misleading), to show that the G. & T. cooperative was needlessly increasing the power costs of the distribution cooperatives and their retail customers by electing to build new generating plants in lieu of buying wholesale power from Consumers.^{628/} The record further reveals that

^{628/} REA will lend money to finance construction of new generating plants only where the proposal constitutes "the most effective and economical arrangement" for meeting increased power demand. (See Part IV, above.) In an attempt to show that its own wholesale power would be more economical than the cooperatives' installation of new facilities, Consumers took several steps: (1) Mr. Campbell, Consumers' vice president in charge of marketing, registered the company's opposition to the REA loan with the REA administrator both by mail and, at least once (in September 1965), in person in Washington, D. C. (D.J. Exh. Nos. 143 and 188; see also Paul, Tr. 7900-05, 8067); (2) in December 1965, Mr. Campbell wrote to the manager of each distribution cooperative served by Wolverine Electric and Northern Michigan (which are generation and transmission cooperatives), setting forth calculations purporting to show the relative high cost of plant expansion over wholesale purchases (D.J. Exh. No. 143); (3) a few days later Consumers issued identical representations in a press release (D.J. Exh. No. 145). These were culled from a power-cost study by Mr. Paul that simply compared, for the period since 1950, the distribution cooperatives' average cost per kwh under their existing agreement with the G. & T. cooperatives to that paid by Consumers' wholesale customers. (Paul, Tr. 8068. See also D.J. Exh. Nos. 143, 145 and 224; the last is an extension of the study through 1967). The study's conclusions are misleading: First, according to uncontradicted testimony, that study omitted the costs of transmitting power from points on Consumers' system to the cooperatives' load centers (Steinbrecher, Tr. 1244-45; Keen, Tr. 4487-88, 4540-50), thereby significantly understating Consumers' actual costs. See D.J. Exh. No. 45. Second, by using only past costs in his comparison, Mr. Paul unfairly excluded the capital expenditures that the G. & T. cooperatives had already made on their existing bulk power facilities by 1964; the comparison should have been between the G. & T. cooperatives' future incremental generating costs and partial wholesale purchases.

Consumers' goal in seeking to block the REA loan was not only to increase the company's wholesale sales,^{629/} but also

^{629/} The following example shows how Consumers' sales of wholesale power could be favorably affected by a refusal to coordinate. Assume that Utility A's peak load is 43.5 Mw, its installed capacity 45.1 Mw, and its largest unit 23.5 Mw in capacity. If Utility A relies on wholesale purchases from Consumers for all additional power necessary to cover possible outage of its largest unit, it will have to buy 21.9 Mw of such power: Utility A's minimum power requirement equals the sum of its peak load plus a reserve equivalent to the capacity of its largest generating unit ($43.5 + 23.5 = 67$ Mw); because the utility's installed capacity is only 45.1 Mw, it will have to buy the difference ($67 - 45.1 = 21.9$ Mw) from Consumers. Under a wholesale-coordination arrangement that required it to maintain reserves of 20 percent of peak load, however, Utility A would need only 7.1 Mw of wholesale power. (20% of 43.5, less the difference between 45.1 and 43.5, or $8.7 - 1.6 = 7.1$ Mw.) As a result of Consumers' refusal to coordinate, Utility A would have to buy an extra 14.8 Mw of wholesale power at a substantial additional cost. See pp. 144 ff., supra.

These figures are taken from the statistics for Northern Michigan in 1967, when officials of that utility sought a coordination agreement with Consumers but were rebuffed. The example and result are hypothetical only because Northern Michigan fortuitously had been able to reduce in part its wholesale power needs by interconnecting with Grand Haven, Traverse City and Wolverine Electric. Even so, Northern Michigan had to contract with Consumers for 10 Mw of wholesale power, 2.9 Mw more than if it had been able to coordinate with Consumers at a 20 percent reserve margin. See D.J. Exh. No. 64.

to prevent further development of an independent bulk power system within its service area.^{630/}

Against this backdrop, there can be no doubt that Consumers was motivated by anticompetitive purposes in dealings with the G. & T. cooperatives in 1964. By refusing to coordinate, the company hoped to head off the development of an alternative power supply system within its service area while increasing its level of wholesale sales.

We find a similar anticompetitive purpose in Consumers' refusal to coordinate with Northern Michigan in 1967 even though that cooperative was interconnected with Grand Haven, Traverse City and Wolverine Electric and the four

^{630/} That Consumers feared the growth of such a system is evidenced in Mr. Paul's speech, discussed at pp. 294-98. He dealt at length with the "real problem" of the cooperatives "attempting to achieve a completely independent power source", depicting them as obstacles to Consumers' acquisition of other small systems in its service area. (D. J. Exh. No. 188).

There is further evidence that Consumers entered into several bulk power transactions with small utilities in order to prevent their interconnecting with the G. & T. cooperatives and strengthening of their overall bulk power supply. For example, Messrs. Paul, Moseley and Conden recommended to Mr. Aymond that Consumers negotiate a coordination agreement with the City of Holland, "[o]ur prime reason being that if Consumers did not maintain this interconnection undoubtedly the City and Wolverine Electric Coop. would enter into such an agreement" (D. J. Exh. No. 150. See also D. J. Exh. No. 178.)

as a group shortly would have been virtually self-sufficient. We reject Consumers' defense that Northern Michigan failed to provide the company with the interconnection agreements it requested, thus precluding its assessment of their value. Northern Michigan provided the company with substantial information about the four systems and the agreements. See C. P. Exh. No. 12001. If more was necessary, Consumers could have said so instead of flatly refusing to coordinate.

To sum up, Consumers' refusals to coordinate with the small utilities were both unreasonable and anticompetitive. That company would have benefited from coordination; by declining to do so, it sought to enhance its monopoly position in the wholesale power market and to impede the growth of an independent bulk power supply system within its general service area. Consumers was at least partially successful in both endeavors. The anticompetitive consequences of its unwillingness to coordinate were compounded by its simultaneous refusal to wheel power for the small systems. That refusal effectively cut off the small systems' chances of negotiating coordination agreements with some large utility, hampering their ability to serve their own customers and to compete against Consumers.

3. Consumers' refusal to share reserves on an equalized percentage basis with the small utilities.

Consumers has entered into coordination agreements with Holland, Lansing and the M-C Pool. None, however, calls for Consumers and the smaller system to share reserves on an "equalized percentage basis." Appellants challenge as unjustified and anticompetitive Consumers' refusal to agree to such a provision; Consumers defends its position as reasonable and in line with FPC and industry standards.

a. Background. Reserve sharing on an equalized percentage basis means simply that each coordinating party maintains in reserve an identical percentage of its peak load.^{631/} In its coordination agreements with Holland and the M-C Pool, however, Consumers insisted on following what we shall call the "Holland formula", under which the smaller utility must carry reserves equal to the sum of (1) one-half the generating capacity of its largest unit,

^{631/} Under this system, the amount of total reserve and the appropriate percentage of peak load are calculated in this manner: Assume that utilities with peak loads of 50 Mw, 100 Mw and 150 Mw respectively agree to share reserves on an equalized percentage basis. They would first determine the amount of reserves that three systems combined must carry to meet their combined peak load of 300 Mw. See Slemmer, Tr. 8901-02. Assume that this amount is found to be 60 Mw, which is 20 percent of the combined peak load. Each system would then be required to maintain a reserve equal to that percentage of its peak load. The utility with 50 Mw peak load would thus be responsible for 10 Mw, the one with a 100 Mw peak for 20 Mw and the one with 150 Mw for 30 Mw of reserves. See fn. 418, supra.

(2) one-fourth the capacity of its second largest unit and (3) 10 percent of its annual peak load.^{632/} Using 1972 statistics for the City of Holland as an example, we find that the smaller utility would have a reserve requirement of approximately 26 Mw under the Holland formula^{633/}

632/ The coordination agreement between Consumers and the City of Lansing differs in that it requires the city to "utilize all reasonable efforts under normal non-emergency operating conditions to maintain a minimum spinning reserve" of 70 Mw through Nov. 30, 1977 and 35 Mw thereafter. (D.J. Exh. No. 92).

633/ In 1972 Holland's two largest units had generating capacity of 31 and 24.5 Mw respectively. The city's peak load for the year was 44.5 Mw. See C.P. Exh. No. 11,111, Supplemental Agreement No. 4. Applying the "Holland formula", Holland was required to maintain reserves equal to $(1/2 \times 31 \text{ Mw}) + (1/4 \times 24.5 \text{ Mw}) + (1/10 \times 44.5 \text{ Mw})$ or 26.075 Mw.

In actuality, the reserves that Holland was required to maintain in 1972 amounted to 25 Mw, not 26 Mw. Ibid. The formula given in the text above is the one in Consumers current coordination agreement with Holland, executed in 1974, see fn. 242 supra, which is slightly different from the formula in Consumers' 1972 coordination agreements with Holland and the M-C Pool.

but only about 9 Mw on an equalized percentage basis.^{634/}

Although all three aforementioned agreements specify reserve requirements for the small utilities, none does so for Consumers. Instead, they all merely provide that the company shall use "all reasonable efforts to provide and maintain sufficient electric generation reserves * * * including formally executed power purchase transactions * * * to at all times meet its load requirements including reserves."^{635/}

^{634/} The calculation in the text is based on a 20 percent reserve requirement for Consumers; for purposes of this portion of the opinion, we consider insignificant the difference between the 18 percent reserve requirement that Consumers deemed desirable for the Michigan Pool (D. J. Exh. No. 236, p. 5.3-1) and the "22 to 24 percent" requirement that is evidently included in Consumers' current system plans (Mosley Tr. 8488).

We should note here that the M-C Pool's current reserve requirement, as calculated under the Holland formula, is 20 percent. As our discussion and findings below demonstrate, however, this is a coincidence tied directly to the size of the M-C Pool's current facilities.

^{635/} D. J. Exh. No. 105, section 3; C. P. Exh. No. 12,024, section, D. J. Exh. No. 92, Article I, Section 2(d).

In contrast, under the Michigan Pool agreement^{636/} Consumers shares reserves with Detroit Edison on an equalized basis. Consumers' coordination agreements with Toledo Edison Company, Commonwealth Edison Company, Indiana & Michigan Electric Company, Northern Indiana Public Service Company and the Hydro-Electric Power Commission of Ontario

636/ D.J. Exh. No. 71, Article II; D.J. Exh. No. 67, Article III; Mosley, Tr. 8490-92. The 1973 agreement added a provision requiring each utility to maintain reserves equal to the capacity of its largest generating unit if its reserve responsibility as computed under the equal percentage basis were less than that amount. D.J. Exh. No. 67, Article III, section 2(b)(2). As Consumers peak load in 1972 was 4000 Mw and its largest unit planned to come on line in the near future in Midland Unit No. 2 (815 Mw to be installed in 1980), this provision does not immediately affect Consumers. See also our discussion in section F, infra, pp. 402 ff.

contain no rigid formula for calculating reserve requirements. Rather, in all these agreements the parties heed practical considerations in establishing those requirements. Indeed, four of the five contracts provide for a joint study to determine the adequacy of a system's generating reserves and transmission facilities if that system has been unable over time to supply emergency service as requested.^{637/}

^{637/} D.J. Exh. No. 76, Schedule A, Section 3.4; Schedule B, Section 3.5; C.P. No. 11,108, Schedule A, Section 2.4; C.P. No. 11,109, Schedule A, Section 2.5; Mosley Tr. 8480. Moreover, the agreements with Indiana & Michigan Electric Company and Northern Indiana Public Service Company provide for a joint system study if current information "indicates that during a subsequent period of four years" one system will not be able to supply emergency services. If the study shows that the system's provisions for future capacity will not be adequate to assure that emergency power "will be available 90 percent of the time" when requested, that system must take "immediate steps" to provide adequate capacity for the future or else enter into arrangements for "equitable compensation" with other utilities party to the agreement. C.P. Exh. No. 11,109, Schedule A, Section 2.4; D.J. Exh. No. 76, Schedule A, Section 3.4; D.J. Exh. No. 76, Schedule B, Section 3.4; Mosley Tr. 8480-81.

The agreement with Ontario-Hydro reaches the same end without a contractual provision, because a planning committee periodically reviews the adequacy of each utility's reserves. Mosley, Tr. 8478. See also C.P. Exh. No. 11,106.

b. The Licensing Board's decision. The Board below declined to decide whether Consumers' refusals to share reserves with the small utilities on an equalized percentage basis contravened antitrust law or policy. Instead, holding that Gainesville was not controlling and that reserve sharing on an equalized percentage basis might (at least theoretically) increase one party's reserve obligations, the Licensing Board ruled "as a matter of law" that it was the Federal Power Commission's task, not its own, to apply antitrust standards to coordination agreements. 2 NRC at 68-71.

Appellants challenge that deferral to the FPC, and Consumers does not defend it. We agree that the Board erred. Congress has directed this Commission to explore the anti-trust ramifications of granting nuclear power plant licenses. Fulfillment of that responsibility entails an evaluation of the relationships between a license applicant and its competitors. It is simply too late in the day to argue that an electric utility's dealings -- or refusals to deal -- with its competitors are exempt from antitrust scrutiny in the absence of prior FPC review. The courts have decided otherwise, rejecting the excuses proffered by the Board below. Otter Tail Power Co. v. United States, supra, 410 U.S. at 372-73; City of Miskawaska v. Indiana & Michigan Electric Co., supra, 560 F.2d at 1318-24.

c. Gainesville. All the parties rely to some extent on the Federal Power Commission and Supreme Court decisions in Gainesville Utilities v. Florida Power Corp.,^{638/} litigation that followed the City of Gainesville's unsuccessful attempt to persuade the utility to share reserves with it.

The characteristics of Gainesville's electric system in 1965 were similar to Holland's in this case. At that time Gainesville operated an isolated system. It had a generating capacity of 108.4 Mw, a peak load of 51.1 Mw, and a largest unit of 50 Mw capacity. The city's 1970 projections anticipated a 30 Mw increase in its generating capacity to 138.4 Mw and a 50 Mw increase in peak load to 102 Mw.^{639/} The projection indicated that in 1970 Gainesville's installed capacity would be inadequate to meet peak load with its largest generating unit out of operation. This left the city two options: to construct additional generating capacity or to reduce its need for reserves by coordinating with nearby utilities; it chose the latter.

^{638/} 40 F.P.C. 1227 (1968), reversed sub nom. Florida Power Corp. v. F.P.C., 425 F.2d 1196 (5th Cir. 1970), reversed and remanded for entry of a judgment enforcing the Commission's order sub nom. Gainesville Utilities v. Florida Power Corp., 402 U.S. 515 (1971).

^{639/} See 402 U.S. at 520-21.

After failing to negotiate a reserve sharing agreement with Florida Power, ^{640/} in 1965 the City petitioned the Federal Power Commission to order the two utility systems interconnected. (See Section 202(b) of the Federal Power Act, 16 U.S.C. §824a(b).) The matter was referred to an FPC hearing examiner, before whom Florida Power argued that the sole purpose of the interconnection agreement was "to supply instantaneous emergency backup service to Gainesville", 40 FPC at 1256, and that it "neither need[ed] nor want[ed] emergency electric service from" the City. 40 FPC at 1252. The utility therefore urged that two conditions be made part of any coordination agreement between it and the City. The first was that Gainesville maintain a reserve capacity of 25 percent (as opposed to the 15 percent that

⁶⁴⁰ Florida Power's 1966 peak load was 1232 Mw and its generating capacity that year was 1595 Mw. Its 1970 projections were for a 1826 Mw load and a 2114 Mw generating capacity -- its largest unit in 1970 being 525 Mw. Florida Power at the time was interconnected with four other utilities. As a result of this interconnection it needed to maintain a reserve capacity of only 15% of its peak load. This amount for 1970 was 274 Mw, less than the generating capacity of Florida Power's largest unit. Ibid.

Florida Power itself was carrying) to assure that the City would "materially contribute to its own support and not depend entirely on Florida Power for an extended period of time in the event of a sustained outage of Gainesville's largest unit." 40 FPC at 1257. Company witnesses justified this condition as "necessary because Gainesville's largest unit constitute[d] such a high percentage of its summer long duration peak load." Ibid.

The second condition demanded by Florida Power was a "standby charge" on Gainesville to compensate the company for providing emergency service.^{641/} Florida Power reasoned that this extra payment (above the charge for electric energy actually used) was proper because, in its view, the benefits of the interconnection agreement all flowed to the City.

^{641/} The standby charge proposed was an amount equal to \$3.08 per kw per year, multiplied by the capacity of the city's largest generating unit (40 FPC at 1256), which would yield estimated revenue to Florida Power from Gainesville of \$150,000 annually. See 402 U.S. at 522.

The examiner rejected Florida Power's proposed standby charge but did recommend that the parties divide equally the benefits arising from the interconnection.^{642/} However, he rebuffed Florida Power's bid to have the City maintain a higher reserve margin than the company, ruling instead in effect that the City should maintain the same percentage of reserves that Florida Power did as a member of the Florida Operating Committee. 40 FPC at 1257-58.

The Federal Power Commission adopted the examiner's conclusion regarding the City's reserve responsibility, stating (40 FPC at 1234-35):

[W]e are satisfied that an appropriate basis has been shown for evaluating Gainesville's generating resources and for assigning to the City a reserve responsibility. Briefly, they are those requirements which apply to Florida Power as a member of the Florida Operating Committee, and those which the Corporation applies to itself by reason of its utility operating practices.

^{642/} 40 FPC at 1257. There was no dispute that the interconnection would bring greater benefit to Gainesville by enabling it to defer installation of additional generation capacity. 40 FPC at 1252, 1256.

The FPC rejected, however, both Florida Power's argument for a standby charge and the examiner's ruling that the benefits of the interconnection be divided equally (40 FPC at 1237-38, emphasis supplied):

The reasoning of both Florida Power and the Examiner is inconsistent with what we have determined to be the appropriate analysis of the basic issues here presented: sharing the responsibilities of interconnected operations. As we have explained, that sharing must be based upon, and follow the proportionate burdens each system places upon the interconnected system networks, not the benefits each expects to receive. Benefits received in any given situation may approximate these responsibilities or they may not. In the course of negotiation of voluntary pooling arrangements, benefits received may, on occasion, serve to offset burdens imposed in determining the appropriate charge for particular services rendered or facilities supplied. But where, as here, the cost of providing such services and facilities and the appropriate charges therefor have equitably been determined after a careful analysis and apportionment of the burdens and responsibilities of each party, there is no basis for any further consideration of relative benefits as proposed by the Examiner.

The evidence before us shows that Gainesville will be contributing its proportionate share of instantaneous emergency service and installed generating capacity, including reserve capacity.^{643/}

The FPC stressed in particular that "the specific type of demand charge requested by Florida Power, namely, the imposition of a charge based upon the size of Gainesville's largest generating unit, would discourage future coordinated planning and operation by reducing the economic incentive for Gainesville to install larger and more efficient generating units." Id. at 1238. The Commission

643/ Earlier in the opinion the Commission had set forth the following as general criteria applicable to interconnection agreements (40 FPC at 1233):

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

added that "[w]ithout such a demand charge, Gainesville could participate more fully in coordinated planning including staggered construction with Florida Power and other systems in Florida to the mutual benefit of all such systems."

40 FPC 1238.

In short, the FPC held that, because Gainesville bore its equitable share of the responsibility for the interconnected operation, coordination between Gainesville and Florida Power upon an equalized reserve sharing basis was proper and the terms of the agreement should not be drawn to divide the benefits that the City might receive under it. ^{644/}

^{644/} The Commission also pointed out that Florida Power itself received significant benefits from interconnecting with Gainesville on an equalized reserve sharing basis, observing that (40 FPC at 1238):

"The financial benefits are those which could result from coordinated planning and more intensive utilization of existing generating resources. Savings from coordinated planning of new facilities might involve deferral of future generating units or revisions in power supply contracts with other systems. As to the electrical operating benefits, this record shows that the City will have an additional 60,000 kva energy source continuously connected to the City's distribution circuits. For the Company, the interconnection will add an additional energy source to its network in a geo-

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The Fifth Circuit modified the agency's decision on the company's appeal.^{645/} The court held that the interconnection order failed to "provide Florida Power with the 'reimbursement reasonably due' it" under section 202(b) because in the court's opinion only the City obtained substantial benefits and only Florida Power incurred a substantial burden. This burden, the court reasoned, would be reflected in Florida Power's "cost-based rates" and thus eventually borne by Florida Power customers.^{646/}

644/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

graphic area where the Company has a substantial load (customer demands), but does not have generating plants of its own. Because of that, the expected benefit to Florida Power may be very substantial since the governors have a faster rate of response setting than Florida Power's. Also of great importance to Florida Power is the improved system reliability which the Company will gain through the proposed intertie. That is shown in studies submitted by staff from engineering analyses of loss of load probabilities. They establish that the interconnection will have the effect of improving the reliability of Florida Power's system."

Also see 41 FPC at 5-6 (quoted by the Supreme Court, 402 U.S. at 524 n. 5), where the FPC, in its denial of a rehearing in Gainesville, expanded its discussion of the benefits attained by Florida Power.

645/ 425 F.2d 1196 (1970).

646/ The relevant part of the court of appeals' opinion is as follows (425 F.2d at 1203):

But, although there is no direct cost, Florida Power, really its customers, will bear a substantial burden. They must bear the allocated fixed cost represented by the added obligation imposed under the terms of

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The Supreme Court rejected the court of appeals' analysis and reinstated the FPC's order as amply supported by evidence in the administrative record. The Court deemed irrelevant that the benefits to Florida Power would be of less value than those to Gainesville, observing that (402 U.S. at 527-28, emphasis supplied):

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. An airplane seat may bring greater profit to a passenger flying to California to close a million dollar business deal than to one flying west for a vacation; as a consequence, the former might be willing to pay more for his seat than the latter. 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

646/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

the ordered interconnection. And this burden will be reflected in their cost-based rates. They are entitled to not have to carry the entire responsibility for providing an extremely valuable service.

The Commission's policy of proportionate utility responsibility really works only one way. The small system receives high benefits and, because of its size, no real obligations. The large system, however, receives no benefit but does incur real, substantial responsibilities. Such imaginary equity is not reasonable compensation.

fair return and with assuring the public reliable and efficient service, at a reasonable price. 647/

d. The parties' positions. Justice acknowledges that neither the FPC nor Supreme Court decision in Gainesville mandates equalized reserve sharing in all situations. However, Justice, the NRC staff and the intervenors all argue that those two decisions are "benchmarks" in determining the reasonableness of a reserve sharing agreement. Justice further stresses that the factual setting in Gainesville is remarkably similar to that in lower Michigan. The appellants assert that, in light of Gainesville, Consumers' insistence on the "Holland formula" in its coordination agreements with the intervenors is unreasonable.

Consumers differs sharply with the appellants about the implications of Gainesville. The company finds no suggestion in either the FPC or the Supreme Court opinion that the equalized reserves sharing formula approved in Gainesville had applicability in any other setting. Rather, Consumers emphasizes that, in determining Gainesville's reserve level, the FPC took into account the attributes of the two systems involved, i.e., the "load characteristics, capacity of generation, size of individual generating units, forced outage rates and scheduled maintenance requirements" of each

647/ Because substantial evidence supported the finding of a benefit accruing to Florida Power, the Court found it unnecessary to decide whether the FPC was correct in its conclusion that it could order interconnection even when one party received no benefits beyond compensation for services and power actually exchanged. 402 U.S. at 529.

(40 FPC at 1257-58). The company argues that it did no less when "establishing coordination terms" for the small utilities in order to assure that they would not lean on Consumers.^{648/} The FPC's order was affirmed, Consumers contends, because the Court found substantial evidence in the administrative record that Florida Power would receive some benefits under the terms of the agency's interconnection order.^{649/}

The company next urges that rejection of appellants' misconception of Gainesville leads to acceptance of its own reserve practices with the small utilities as being in accord with FPC standards and fundamental system planning principles. Consumers notes that both the M-C Pool and Lansing are currently maintaining reserves in the range of 20 percent, roughly equivalent to its own. Although acknowledging that the City of Holland must maintain much higher reserves -- 58 percent in 1972 -- the company contends that this "is the direct result of [Holland's] decision to rely on a 31 Mw generating unit to serve a system with a peak load less than twice that amount". According to Consumers, this situation "affects Holland's system reliability, and therefore its desirability as a coordinating partner, in two significant ways": First,

^{648/} Consumers' Appeal Brief, p. 251.

^{649/} See fn.647 supra.

"Holland's concentration of generation capacity in such a large unit means that ... if the city's single largest unit is for any reason out of service at or near peak load, Holland has insufficient capacity to carry its load and must look to the Company for assistance." In contrast, Consumers points out that it "maintains reserves at least as large as its largest unit so, if that unit is out of service at the time of the Company's peak, it need not look to Holland for help." Second, Consumers argues that in terms of statistical probabilities, "Holland's concentration of capacity in a relatively small number of units sharply increases the likelihood that Holland will need emergency support from the Company." From these circumstances Consumers reasons that for the City of Holland "to provide reciprocity to its coordination partner, [it] must maintain a higher percentage of reserves in relation to peak load than does the Company."^{650/}

Stated another way, Consumers' contention that the "Holland formula" is reasonable hinges on reliability problems that it perceives as inherent in small systems depending on generating units that are large in relation to their peak load. According to Consumers, a small utility system

^{650/} Consumers' Appeal Brief, pp. 258-59.

that decides to install larger, more economical units must maintain a higher reserve level in order to assure Consumers a net benefit from coordination between them.

e. The Holland formula measured against FPC standards elucidated in Gainesville. On the whole, we agree with the appellants' reading of Gainesville. In light of the FPC's opinion in that case, the "Holland formula" must fall as unreasonable. Several paths lead us to this conclusion.

First, as Consumers argues and Justice acknowledges, the FPC in Gainesville did not explicitly mandate equalized reserve sharing as the invariable standard for section 202(b) proceedings. It did, however, establish as a general governing principle for interconnections the notion that each utility "should bear its proportionate share of [the] responsibility" of the interconnected operation. In other words, the terms of an interconnection agreement should be based on a proportionate sharing of the burdens and not of the benefits. Adherence to this general rule, the Commission observed, has the advantage of assuring "no economic penalties for being the last one on the interconnected network." See fn. 643 , supra.

As is made clear by the testimony of Mr. Slemmer (Consumers' own expert, on whose testimony the company bases

its argument on this issue), Consumers' proposed standard conflicts directly with the FPC teachings in Gainesville. Mr. Slemmer testified that under the "reciprocity standard" espoused by Consumers, the last system to join a larger interconnected network would inevitably be penalized. This is the case simply because the others have already achieved many of the benefits attainable from coordination. ^{651/}

651/ See Slemmer, Tr. 8860-61, 8883-84, 8938-42. Throughout his testimony Mr. Slemmer stated his belief that the sharing of reserves should be done on an equal reliability basis as opposed to an equal percentage basis. Under the equal reliability concept, reserves are apportioned on the basis of the reserves that each party maintained prior to entering a coordination agreement. Mr. Slemmer's testimony suggests that both the Holland formula and Consumers' general theory of reciprocity are akin to the equal reliability concept. See generally Slemmer, Tr. fol. 8838 at 23-4, 26-9. Mr. Slemmer acknowledged, however, that no engineering reason dictates this method of sharing reserves. Slemmer, Tr. at 8929-31.

That the equal reliability concept results in penalizing the last system joining a pool is clearly illustrated by D. J. Exh. No. 285, prepared by Mr. Lundberg, one of Justice's experts on coordination, Tr. 9112-16. One of the examples in that exhibit assumes that three identical utilities, A, B, and C, each operate two units 10 Mw in size. Prior to any coordination among them each must maintain 10 Mw in reserves, 100% of peak load. Assume next that A and B form a pool that sells as much power as possible while maintaining adequate reserves (see fn. 418, supra) -- i.e., the peak load equals the combined capacity of three of the four pooled 10 Mw units (30 Mw), and the fourth unit provides reserves equal to the capacity of the pool's largest unit (10 Mw). The reserve requirement, although still 10 Mw, is thus reduced from 100% of peak load to 33-1/3%

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Moreover, Mr. Slemmer acknowledged that he perceived the reciprocity standard as one way of evenly dividing the

651/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

of peak load. Under both the equal reliability and equal percentage concepts, A and B would each maintain 5 Mw in reserves. If C were to join the pool, the amount of reserves needed would still be 10 Mw, (again assuming that the pool's peak load was as large as possible -- five of the six pooled 10 Mw units). By sharing reserves on an equal percentage basis, each utility would maintain reserves of 3-1/3 Mw or about 19% of peak load. Under the "equal reliability" concept expounded by Mr. Slemmer, however, the reserves that each utility would maintain after C joined the pool would be apportioned on the basis of the reserves that each maintained prior to C's joining the pool. Before joining the AB pool, C maintained 10 Mw reserves and AB together maintained 10 Mw. Because C's reserves before joining the pool are equal to AB's after pooling, C would maintain half the reserves for the ABC pool or 5 Mw and A and B together the other half or 5 Mw. This results in C carrying a reserve of 33-1/3% and A and B 14.3% each.

Manifestly, under the equal reliability concept, the last system to join the pool would always be faced with a penalty. If nothing else, this result is at war with the general standards of the FPC laid down in Gainesville.

benefits from an interconnection, which he deemed important for incentive purposes.^{652/} Again, this is at direct odds with the general principles laid out in Gainesville, where Florida Power's argument that it should share equally in the benefits was rejected explicitly, not only by the FPC but also by the Supreme Court.

Nor does Gainesville stand alone. The FPC has subsequently observed that the case embodies its views on the appropriate criteria for evaluating interconnection proposals.^{653/} And the FPC staff has recently characterized the Gainesville decision (as well as a later one) as setting out "the well accepted interconnection principle of equalized reserves (the sharing of reserves must follow the proportionate burdens each system places upon the interconnection, not the benefits each system expects to receive)".^{654/}

In short, although in Gainesville the FPC did not lay down an iron-clad rule in favor of equalized sharing

^{652/} Slemmer Tr. 8929-31, 8860-61.

^{653/} Village of Elbow Lake v. Otter Tail Power Co. 46 FPC 675, 678-79 (1971), affirmed as modified sub nom. Otter Tail Power Co. v. FPC, 473 F.2d 1253 (8th Cir. 1973).

^{654/} New England Power Pool Agreement (NEPOOL), Opinion No. 775, Docket No. E-7690 (FPC, September 10, 1976), slip op. at 17. For discussion of this opinion, see fn.656, infra, and accompanying text.

of reserves, it did establish the general principle that each utility should carry a proportionate burden under the agreement. And from FPC jurisprudence to date, this has resulted in sharing of reserves on an equalized basis.^{655/}

Second, the "Holland formula" has the same failing as Florida Power's proposed standby charge in the Gainesville case. It fixes a small utility's reserve requirements according to the capacity of its largest plants, thereby tending to discourage the small system from building more economical facilities. The FPC in Gainesville found fault with Florida Power's proposed standby charge precisely because it had that effect, noting expressly that this prevented Gainesville from engaging in more sophisticated coordination with Florida Power to their mutual benefit. 40 FPC at 1238. In a similar vein, on reviewing the New England Power Pool agreement, the FPC again struck down a reserve formula that penalized a utility for depending in large part on one unit, explaining that provisions of this kind "discriminate against

^{655/} We also note that the NEPOOL and Kentucky and Indiana Power Pools provide for reserve sharing on an equalized basis even though each includes small utilities as members. See New England Power Pool Agreement (NEPOOL), supra, fn. 654, and Mayben, Tr. 3753-54.

the smaller systems".^{656/} Thus there can be no doubt that Consumers' insistence on pegging the small utility's reserve requirement to its largest two units runs contrary to Federal Power Commission policy.

Finally, Consumers' seeks to defend the "Holland formula" by arguing that a small utility's reliance on comparatively large units in relationship to its peak load inherently affects its desirability as a coordinating partner. According to Consumers, such a system must invariably maintain a higher percentage of reserves than its larger coordinating partner to assure the larger system of receiving a net benefit. As we noted earlier, however, not only the hearing examiner but the FPC itself rejected that argument when the Florida Power Corporation made it in the Gainesville case. The Commission further pointed

^{656/} New England Power Pool Agreement (NEPOOL), supra, at p. 25. The provision that the Federal Power Commission struck down was one which provided that any system which obtained in excess of thirty percent of its annual peak load from one generating unit had to make a penalty payment to the NEPOOL fund. The provision was applicable only to generation coming on line subsequent to 1975, and the Executive Committee had argued that it was a "necessary incentive to lessen the possibility that a participant would abuse the equalized reserves established * * * by taking an unduly large entitlement in the most economic generating units." Ibid. The Commission was unimpressed. It noted that the larger members of the pool could avoid this provision "since 30% of their annual peak load" was greater than the largest units that NEPOOL planned. Ibid. Moreover the Commission noted "pool reliability would be unimpaired by participants taking entitlements in individual units in excess of 30% of their annual peaks." Id. at 26; emphasis supplied.

out that Florida Power would receive significant benefits by coordinating with Gainesville on an equalized reserve basis, notwithstanding the city's reliance on a comparatively larger unit.

In short, we harbor no doubts that Consumers' insistence on the "Holland formula" in its coordination agreements with the small utilities runs contrary to the principles laid down by the Federal Power Commission under section 202(b) of the Federal Power Act. Although standards under that section are not necessarily controlling for antitrust purposes, they have been formulated by the agency charged with reviewing and regulating these aspects of electric utility operation. We therefore accept those standards as an appropriate guide for measuring the reasonableness of reserve sharing agreements.^{657/}

^{657/} The Supreme Court noted in Otter Tail that the district court could properly consider Federal Power Commission policies under section 202(b) in fashioning prospective antitrust relief. 410 U.S. at 381-82. Indeed, Consumers argues that the Court in Otter Tail "expressly recognized the propriety of evaluating proposed interconnection arrangements for antitrust purposes under the 'policies embodied in the Federal Power Act'". Consumers' Appeal Brief, p. 212, fn. 49.

f. Benefit to Consumers. Consumers would benefit, albeit less than the small utilities, by sharing reserves on an equalized basis with them. By doing so, Consumers could draw on the small systems' reserves in the event of an emergency on its own system. Manifestly, this would be of some benefit to the company even if the coordination arrangement did not permit it to reduce the level of its own reserves.^{658/} It must be kept in mind that, although a small system's reserves may be diminutive compared to Consumers', Consumers operates large base load units, which are generally recognized as having a higher forced outage rate.^{659/} Moreover, because Consumers has more generating units by far than a small system, it is more likely to have two or more units down simultaneously. Even with sufficient reserves to cover the outage of its largest unit, Consumers could well, through a series of failures, find itself without adequate backup to cover its forced or scheduled outages. In such circumstances, the ability to draw upon the reserves of a small system such as Holland would be beneficial to it. And, indeed, the record confirms that Consumers has in fact called upon the City of Holland in the past to

^{658/} See discussion at pages 122-26, supra.

^{659/} Lundberg, Tr. fol. 8996 at 9.

supply it with a significant amount of emergency power.^{660/}

Consumers nevertheless argues that it will receive no benefit if its smaller coordinating partner is a greater user of the interconnection, which Consumers argues will be the case if reserves are shared on an equalized basis. As indicated above, Consumers urges in support of this argument that, because emergency power is priced on an incremental (rather than average cost) basis, its own customers will be unduly discriminated against.

Even assuming that a smaller utility would draw emergency power from Consumers more often than the reverse, we are unpersuaded.^{661/} The Fifth Circuit reversed the FPC in Gainesville on this ground only to be reversed in turn by the Supreme Court, for the argument is simply incorrect. Neither Consumers nor its customers will be discriminated against unless Consumers is forced to increase its reserve capacity as a result of the agreement, an unlikely situation given the disparity in size between Consumers and the small utilities and the relatively small

^{660/} Rainson, Tr. 3189; Helfman, Tr. 3241.

^{661/} In this regard we note that Consumers has in fact relied on its interconnection with the City of Holland substantially more than the city has. Rainson, Tr. 3189.

size of the latter's generating units as compared to Consumers'.^{662/} Each utility must maintain reserves

662/ Under the Michigan Pool agreement, Consumers and the other members jointly plan and operate their systems as one. Mosley, Tr. 8492-93. In 1972, their combined peak load was approximately 10,475 Mw and their combined generating capacity about 12,239 Mw. See page 101, supra. At that time or shortly thereafter, Detroit Edison had four 800 Mw units (Mosley, Tr. 8494). Large units control system reliability. Lundberg, Tr. 9106. Indeed, this fact forms the basis for Consumers' justification of the "Holland formula". Thus, in general, interconnecting a small system (such as the M-C Pool) with small units to a large system with large units will have little or no effect on the reserves needed by the large system, see Lundberg, Tr. 9096, or may lessen that need slightly. See Mayben, Tr. 3744.

Nevertheless, in its appeal brief (p. 252) Consumers represents that "[i]n fact in 1972 had the Company agreed to enter into emergency power exchange arrangements under an equal percentage formula with systems of the size and generation capacity of the MMCP members, and had these systems experienced the same generation outage record as the Company, the record demonstrates that the Company would have had to increase its reserves by 29 Mw over its preagreement level." As support for this proposition, Consumers refers us to Mr. Mosley's testimony (Tr. 8469-72) and to one of its exhibits (C. P. Exh. No. 11,104).

We find Consumers' suggestion unpersuasive. First, larger units generally have a higher forced outage rate. See fn. 659 supra. Second, as indicated above, the Michigan Pool with its large units would dictate the reserve levels of any interconnection between it and the M-C pool. Third, the evidence that Consumers refers us to is a hypothetical example prepared by Mr. Mosley to show that, theoretically, sharing reserves on an equalized basis could result in increasing a utility's reserve requirement. To illustrate his point, Mr. Mosley picked two hypothetical systems with
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that are idle most of the time to assure delivery of firm power to its customers. Regardless of whether it coordinated with a small utility, Consumers would therefore have to maintain approximately the same reserve capacity and bear the capital costs of that capacity. Thus, coordination with a small utility on an equalized basis would force neither the company nor its customers to foot the bill for additional generating capacity.

The "no benefit" argument is similarly flawed with regard to Consumers' supplying emergency power to a smaller coordinating partner. Because the charge for such energy is normally at least 110 percent of Consumers' out-of-pocket costs (see pp. 125-26, 150, supra), providing this power could not burden Consumers or its customers; to the contrary, by supplying power from capacity otherwise idle, Consumers would in fact be engaging in a profitable transaction.

662/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
general characteristics similar to that of the Michigan Pool and that of the M-C Pool. He stressed, however, that his illustration was "intended entirely as an example". Tr. 8469. (Moreover, even in his example the percentage of increase that the large system experienced was statistically insignificant). Finally, Justice introduced an extensive study showing that connecting the M-C Pool with Consumers in fact would not adversely affect Consumers' reserve levels. See Lundberg, Tr. fol. 8996.

Indeed, Consumers has utilized its emergency tie with the City of Holland substantially more than Holland has -- which Mr. Rainson, the city's manager, characterized as a "small source of income for [the city]" rather than an unfair situation.^{663/} The profit to Holland is further confirmed by the testimony of Mr. Helfman, Justice's expert witness on bulk power supply planning, who testified that

at the present time, Holland is selling some 11 million kilowatt-hours a year net to [Consumers] at a price of ten mills, for a total revenue of over one hundred thousand dollars. And, over and above the cost of fuel, most of that is profit, because, as I say, it does not increase their operation and maintenance one whit.^{664/}

In our judgment, Consumers would benefit by sharing reserves on an equalized basis with the small utilities. Moreover, because the small utility is carrying its fair share of the burden in the interconnected system -- i.e., it (and its customers) are paying for the same percentage of the reserve capacity as Consumers in relation to peak load -- neither Consumers nor its customers will be burdened or discriminated against.^{665/} Indeed, requiring a smaller utility to maintain a higher level of reserves discriminates

^{663/} Tr. 3189.

^{664/} Tr. 3241. We note that one of the benefits in Gainesville which the FPC foresaw Florida Power receiving was a "financial [benefit]" from "more intensive utilization of existing generating resources".

^{665/} Only if the smaller utility carries a lesser percentage of reserves than the company is Consumers' argument valid. See 40 FPC at 1233-39.

against the customers of that utility, for they must then absorb a greater proportion than Consumers' customers of the capital costs of the total pool reserve capacity.

g. Summary. On the basis of the foregoing, we have concluded that Consumers' insistence on requiring the small utilities to maintain reserves under the "Holland formula" is unreasonable.^{666/} Moreover, because that policy discourages the small utilities from installing larger, more economical generating units, it definitely has anti-competitive consequences. These affect the wholesale market directly, because they increase the probability that small utilities will turn to Consumers for wholesale power purchases rather than install their own additional generation. And it has direct adverse consequences in the retail market as well, in locations where there is door-to-door competition between Consumers and the small utilities (i.e., Traverse City and other areas where Consumers' lines overlap those of its smaller

666/ We do not find Consumers' reserve sharing arrangement with Lansing to be unreasonable. That arrangement essentially requires that Lansing maintain 20 percent "spinning reserves" through November, 1977, and only 10 percent thereafter. It should be noted that although Consumers carries reserves of roughly 20 percent, not all of those are necessarily 'spinning reserves'. A utility normally maintains only a certain percentage of its reserve requirement in that status. (E.g., in Gainesville, Florida Power carried 15 percent installed reserves and 10 percent spinning reserves.) Thus 20 percent spinning reserves may be high. However, the 10 percent spinning reserves that Lansing is to maintain after 1977 does not appear unreasonable.

competitors). Of course, as the smaller competitors' production costs are forced up, they become correspondingly less useful as "yardsticks" for measuring Consumers' own efficiency.^{667/}

4. Consumers' refusal to grant the small utilities access to the Midland facilities.

a. In 1971, after the congressional amendments creating the prelicensing antitrust review scheme of section 105c, several of the small utilities requested that Consumers discuss their possible participation in the Midland nuclear facility via either a joint venture or a unit power arrangement.^{668/} At that time, Consumers refused to consider -- much less allow -- the small utilities access to Midland. (But see pp. 430-31, infra.) The appellants argue that Consumers' denial is an unreasonable refusal to engage in developmental coordination with the small utilities.

^{667/} See Municipal Elec. Ass'n v. SEC, 413 F.2d 1052, 1057-59 (D.C. Cir. 1969) (applying the yardstick competition test to the acquisition of stock of a nuclear power generating company under the Public Holding Company Act of 1935, 15 U.S.C. §79-79z); see also, Meeks, Concentration in the Electric Power Industry, supra, 72 Colum. L. Rev. at 77-79.

^{668/} Consumers received written formal requests for negotiations concerning participation in the Midland Nuclear Facility from Traverse City on May 24, 1971 (D. J. Exh. No. 24), from Northern Michigan on July 20, 1971 (D. J. Exh. No. 22) and from Grand Haven on July 29, 1971 (D. J. Exh. No. 27). In addition, Mr. Keen of Wolverine Electric raised the question of access to Midland in the negotiations leading up to current coordination agreement between Consumers and the M-C Pool (D. J. Exh. No. 58) and Consumers received oral inquiries from Alpena Power Company and the City of Coldwater. Fletcher, Tr. 4350; Munn, Tr. 4141-42.

Consumers counters that its refusals were justified because the small utilities did not make their requests until 1971, four years after the size of the Midland units was established and planning for the facility was well along. The company argues that in 1971 the power from the Midland facilities was committed to meet future growth on its system and that its accession to those requests would have led to an increase in its own bulk power generation costs, which costs would in turn have been "borne by the Company's customers in the form of higher rates". Thus, according to Consumers, "[u]nder these circumstances, having been denied the prospect of receiving net benefits from the proposed transaction, the Company was clearly justified in refusing to discuss participation in the Midland units." ^{669/}

Justice, on the other hand, points to Consumers' refusals to coordinate with the smaller utilities prior to the sizing of the Midland units in 1967 and argues:

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. ^{670/}

^{669/} Consumers' Appeal Brief, pp. 272-73.

^{670/} Justice's Opening Brief on Appeal, p. 136. See generally Justice's Opening Brief on Appeal, pp. 132-39; Justice's Reply Brief on Appeal, pp. 94-101.

Because Consumers' own actions "chilled specific requests"^{671/} until section 105c was amended, Justice continues, a determination that the 1971 requests were untimely would "[reward Consumers] for its persistent course of monopolistic conduct."^{672/}

Asserting that it has always coordinated with small systems capable of doing so, Consumers argues in response that its coordination policies could not have chilled requests by the small utilities (particularly Holland and Lansing, with whom Consumers had coordination agreements in 1967).^{673/}

b. The Licensing Board found in Consumers' favor, concluding that by 1971 the company had planned its system to utilize all the power from the Midland facilities to meet internal demands and that its refusal to consider the small utilities' "belated inquiries concerning access to Midland" could therefore not be deemed "a refusal to enter developmental coordination". 2 NRC at 100-101.

The Licensing Board's conclusion does not square with the record. Rather, given the cooperatives' unsuccessful earlier bids for a reserve sharing arrangement with Consumers,

^{671/} Justice's Opening Brief on Appeal, p. 137.

^{672/} Id. at 136.

^{673/} Consumers' Appeal Brief, pp. 275-79. The company also reiterates here its position that there can be no finding of refusal to deal without a prior specific demand. We have already refuted this contention.

there was no reason to expect success from a request for more sophisticated pooling transactions involving access to Midland in 1967 and 1968.^{674/} Moreover, because as we previously noted, Consumers' refusals were motivated by a desire to prevent the development of an independent bulk power supply within its general service area, we have no hesitation in concluding on this record that Consumers would have rejected out of hand any inquiries along that line.

Nor do Consumers' 1967 coordination agreement with Holland and its 1968 offer to coordinate with Traverse City suggest otherwise. Not only are the terms of the "Holland formula" unfairly discriminatory against small systems, in effect depriving them of many of the benefits of true coordination, but the "prime reason" (to use Consumers' own words) that the company coordinated with Holland in 1967 was to prevent the city from interconnecting with the G. & T. cooperatives.^{675/} As for the 1968 negotiations with Traverse City, Consumers representative, Mr. Paul, urged that a wholesale power arrangement was "the only way the City could benefit from the economies of scale" inherent in larger generating units.^{676/} In light of this, it is bootless to suggest that a year earlier Traverse City might have received a favorable response to a request

^{674/} Consumers refused in 1964 to share reserves with Northern Michigan and Wolverine Electric and refused another Northern Michigan request in 1967.

^{675/} See fn. 630, supra.

^{676/} D. J. Exh. No. 31.

for participation in Midland. 677/

As Justice argues, the small utilities' request for access to Midland was not untimely in view of Consumers' previous anticompetitive refusals to coordinate. When the amendments to section 105c gave them a "reasonable expectation" of obtaining participating in Midland, the small systems

677/ Consumers contends that "[i]n 1967, an officer of Consumers Power outlined for representatives of Northern Michigan cooperative, the [M-C Pool] engineering consultants, and the staff of the Michigan Public Service Commission the availability to other systems of unit power from [the Ludington pumped storage project]". Consumers' Appeal Brief, p. 269 This, according to Consumers, refutes the Chilling effect argument expounded by Justice. Id. at 275-76. While it is true that Consumers mentioned the possibility of other systems buying unit power from Ludington (see C.P. Exh. No. 12,007, Steinbrecher Tr. 1897-1900, 1929-30; Paul, Tr. 8165-66), the company did not make a specific proposal to that effect. Rather, according to Mr. Paul's summary of the meeting, Mr. Campbell said "that at an appropriate time the Company would be willing to consider a sale of peaking power to the cooperatives from [Ludington.]" C.P. Exh. No. 12,007. We are not persuaded that this amorphous statement overcame the effects of Consumers prior unreasonable refusals to coordinate with the cooperatives, particularly as the company had refused that year to coordinate with Northern Michigan. Indeed, the very purpose of the meeting was to negotiate a renewal of Consumers' wholesale contract with Northern Michigan, made necessary by the company's anticompetitive refusal to coordinate. Ibid.

made their request with due dispatch. See fn. 668, supra.^{678/}

Events subsequent to 1971 confirm that the company's policy at the time the record closed was to deny the small utilities access to nuclear power. First, in early 1971, just before the small utilities requested participation in Midland, Consumers' projected peak load for 1980 was 7790 Mw; by 1973 its estimated demand for 1980 had dropped to 7020 Mw; and by mid-1974 it dropped further to 5870 Mw.^{679/} Although in 1971 Consumers may have required use of the entire output from Midland to meet projected load growth on its system, the outlook changed drastically in a short period

678/ In this regard, Mr. Wolfe testified (Tr. 1625-26):

Well, I became aware of the change in the Federal law which required that applications 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.

679/ Stafford, Tr. 9170-76.

of time. Rather than engage in negotiations with the small utilities for sale of some of the excess planned capacity, however, Consumers voluntarily delayed construction of other generating units originally planned to come on line in 1978 and 1982. ^{680/} In other words, the company has continued to plan its system as though it never received the requests from the small systems. ^{681/}

^{680/} Stafford, Tr. 9187-91.

^{681/} Consumers argues that the company would incur an additional cost of \$57 million over an eight year period if it sold 220 Mw of Midland's output to the small systems and \$141 million if it sold 440 Mw. Consumers Appeal Brief, p. 272. Also see C. P. Exh. No. 12018 and Stafford, Tr. 9161-65. This amount, according to Consumers, "represents the cost of replacing that portion of the Midland output which would * * * become the property of other systems". Ibid.

We find Consumers' argument irrelevant in light of its delay of additional generation. As we have recently observed in another antitrust context, "the need to readjust, on a regular basis, planned operations and power plant construction schedules is virtually endemic in the electric utility industry" (citations omitted). Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 628 (1977).

Second, Consumers did not represent to the Licensing Board or to this Board that it would seriously consider allowing the small utilities to participate in future nuclear generation. Indeed, the company entered into the record below a policy statement that gives every indication that it will not grant the small utilities access to future nuclear plants.^{682/} Moreover, in its argument concerning appropriate relief assuming an inconsistency is found, Consumers contends that "wholesale purchases [are] the most reasonable and equitable form of participation"

682/ The policy statement, Tr. 8107-08, is as follows:

As to unit power sales:

Unit power transactions may be justified as a part of a program of coordinated development where there are truly reciprocal coordinated development benefits derived by each party. [The company does] not understand that those Intervenor which seek the right to make unit purchases from Midland are willing or able to enter into such programs on a basis that would genuinely reduce Consumers Power's costs and, thus, benefit its customers.

As to equity participation:

Equity participation, apart from a genuine, mutually beneficial program of coordinated development, suffers from the same vice as unit power transactions -- namely, discrimination against wholesale, as well as retail, customers which do not derive the same benefits of discriminatory access to the unit. In view of the investment subsidies possessed by the intervenors, such transactions could also provide artificial and unfair competitive advantages to them.

in Midland. It argues that joint venture or unit power access to Midland for the small utilities would "unduly burden the Company's other customers".^{683/} Given those actions and attitudes, Consumers can hardly expect us to credit the suggestion that it would have seriously considered the small utilities' requests to participate in Midland had they only been received in 1967.

c. The next consideration is whether Consumers' refusal was a justifiable action taken to avoid an unfair burden on its customers. Because, as the FPC has observed (see p. 229, supra), most electric utilities cannot afford to construct and operate the larger, more economical units on their own, joint ventures and unit power arrangements are not uncommon in the electric utility industry; Consumers' practices reflect this.^{684/} It is in this context that

^{683/} Consumers' Appeal Brief, pp. 384-87. But see part IX, infra.

^{684/} Under the original 1962 Michigan Pool agreement, for example, Consumers and Detroit Edison engaged in staggered construction of new units, allowing them to achieve economies of scale beyond those justified by additional growth on their individual systems, D.J. Exh. No. 21; Mosley, Tr. 8499. Moreover, the two utilities constructed and currently operate the Ludington Pumped Storage Hydroelectric Generating Plant as a joint venture; D. J. Exh. No. 72; C.P. Exh. No. 11,114, No. 11,115, and No. 11,116; and Consumers sold a part of its share in Ludington to Commonwealth Edison for a period of 15 years on a unit power basis, C.P. Exh. No. 11,118; Mosley, Tr. 8506-07. Finally, Consumers had contracted to sell processed steam from the Midland Unit No. 1 to the Dow Chemical Company for the life of the plant, Mosley, Tr. 8507. Although this technically is not a joint

Consumers' denial of access to Midland must be evaluated.

Because of Consumers' past refusals to negotiate with the small utilities, the amount of power those utilities seek to obtain from Midland is not precisely established.

684/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

venture or unit power arrangement with another electric utility, the beneficial effect to Consumers is essentially identical to such an arrangement, Mr. Mosley testified that Consumers' arrangement with Dow could be thought of as a "unit steam sale" to Dow, Tr. 8507. It allows Consumers to obtain the economic benefits associated with an 800 Mw nuclear unit although system demand would justify only the construction of a 500 Mw unit. As noted above, the electric power output of Units 1 and 2 is 485 and 845 Mw, respectively. However, the ultimate power level of each is identical. Consumers Power Company (Midland Plant, Units 1 and 2) LBP-72-34, 5 AEC 214, 217 (1972). The sole difference is that rather than using it to generate electricity, a portion of the steam produced by one of the units is delivered to (and paid for by) Dow. Although this may result in some differences in the cost of electricity per Kwh generated by each (see Stafford, Tr. 9240), given the units' identical size, the capital costs of construction for each would be essentially the same. And it is capital costs that constitute the major expenditure for electricity generated by nuclear power.

However, figures in the range of 220 to 440 Mw have been mentioned in this proceeding.^{685/} Even the lower end of this range constitutes a sizable block of power; and Consumers could have benefited from allowing the small utilities to participate in Midland on a unit power or joint venture basis, just as it benefits from its arrangement with Dow Chemical Company.^{686/}

Indeed, Consumers' own expert witnesses, Dr. Pace and Mr. Slemmer, acknowledged that Consumers would generally benefit by having the small utilities participate in a nuclear facility (at least on a joint venture basis)

^{685/} See Stafford, Tr. 9164.

^{686/} Consumers argues that unit power transactions can be undertaken only as part of a program of staggered construction. However, its sale of unit power from Ludington to Commonwealth Edison for a period of 15 years belies this contention. Indeed, Mr. Mosley testified that a unit power sale could "extend for a large number of years." Tr. 8506. Confirmation of this appears in the Farley proceeding, where Alabama Power Company offered Alabama Electric Cooperative long term unit power access, but not joint venture access, to the Farley nuclear plant. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP-77-41, 5 NRC 1482, 1491 (1977) (appeal pending).

when a block of power of that size was involved.^{687/} In light of the fact that Consumers can actually lower its generating costs by granting the small utilities access to nuclear power, we find it difficult to perceive how Consumers customers would be burdened. To the contrary, they would receive a slight benefit.^{688/}

d. The remaining question is whether Consumers' refusal to allow the small utilities participation in the Midland plant is anticompetitive. The facts compel an affirmative answer. Consumers has refused to wheel power for the small utilities. This effectively precludes them from making joint venture or unit power arrangements with other large nearby utilities that might give them other access to nuclear power. Consumers has also refused to enter into reasonable reserve sharing agreements with the small systems. This impairs (if not eliminates) their ability to construct large baseload units, coal or nuclear, on their own.^{689/} In short, by its other

687/ Pace, Tr. 8965; Slemmer, Tr. fol. 8838 at 25-26.

688/ Consumers' argument in this regard hinges on its perception of the small utilities simply as customers. Only from this viewpoint can it be argued that their joint venture or unit power access to Midland would constitute "preferential treatment". However, these utilities are not only Consumers' customers; they are also independent bulk power producers in their own right and the antitrust law requires this to be taken into consideration.

689/ See discussion in Part VI, supra.

anticompetitive practices, Consumers has blocked the small utilities from looking elsewhere to attain those economic benefits which can be derived from the generation of base-load power in large scale units.

Consumers' denial of access to nuclear power from Midland completes the circle foreclosing the small systems from economical generation.^{690/} Their inability to obtain that access increases their power production costs, and this in turn enhances Consumers' competitive position at both the wholesale and retail levels. In the circumstances of this case, therefore, Consumers' refusal to allow participation by the small utilities in Midland will have an anti-competitive effect in the relevant retail and wholesale markets when Midland comes on line, and Consumers' monopoly position in those markets will be enhanced commensurately.

The nuclear industry originated as a government monopoly developed in great measure with public funds. Section 105c reflects "a basic Congressional concern over access to power produced by nuclear facilities" and legislative intent that nuclear power not be used as a tool to further the monopolization of electric generation. Waterford, supra, fn. 5.

^{690/} See Wein, Tr. fol. 3979 at 65-66.

The record in this case reveals that Consumers' refusal to allow the small utilities access to Midland is part and parcel of its monopolization of electric generation within the relevant geographic market. That refusal thus falls within the proscriptions of section 2 of the Sherman Act and is counter to antitrust law and policy.

F. Exclusion of the small utilities from the Michigan Pool.

In addition to the particular refusals discussed above, Justice alleges that Consumers "has taken steps to eliminate the Michigan Pool as a potential avenue by which the small systems might obtain access to coordination." Specifically, Justice alleges that Consumers (1) purposely drafted a provision concerning third party membership to avoid participation by small utilities in the pool, and (2), when a third party membership provision was included upon Justice's urging, purposefully changed key provisions of pool agreements in order to discourage "pool participation" by the small systems.

1. Consideration of third party membership in 1968.

In support of the first allegation, Justice refers us to internal communications among Consumers' personnel in

1968. The company was then considering revisions to the Michigan Pool agreement, including one draft provision concerning third party admission to the pool. Mr. Paul reviewed this draft and criticized as overly general the proposed criteria for joining the Michigan Pool -- i.e., the requirement that new members "must provide facilities to permit a meaningful and mutually advantageous interchange of capacity and/or energy between itself and the Pool". He told the drafters that the criteria "[would] not effectively limit future participation by [undesirable] third parties", particularly "the group consisting of Northern Michigan and Wolverine Electric cooperatives and Traverse City and Grand Haven municipal systems", which had "just entered into a so-called new pooling agreement". He suggested the establishment of "definite minimum standards or levels of mutual benefits that must be available before third parties will be considered". After an apparent redraft, Mr. Paul expressed satisfaction with the criteria.^{691/} Although a draft provision had been prepared, no new express policy concerning new members was actually added to the pool agreement at that time.

691/ D.J. Exh. Nos. 170 and 171.

In response to this portion of Justice's allegation, Consumers emphasizes that no action was taken on this proposal. Moreover, it defends Mr. Paul's recommendation as fully reasonable.^{692/} The Licensing Board agreed with the Consumers, viewing self-sufficiency as a prerequisite to reciprocal benefits and therefore finding "nothing sinister" in Mr. Paul's suggestion.

We cannot agree with either the Licensing Board or Consumers on this point. Mr. Paul made no reference to the requirement of self-sufficiency; his obvious concern was preclusion of the newly formed M-C Pool from seeking membership in the Michigan Pool. As Consumers itself acknowledges, however, the combined resources of the M-C Pool members met the self-sufficiency requirement. Indeed, negotiations began in 1969 for what eventually became the current coordination agreement between Consumers and the M-C Pool.

We also find unpersuasive Consumers' defense that Mr. Paul's suggestion prompted no action on the draft provision. The company cannot defend a draft provision designed

^{692/} The company refers to its present policy of self-sufficiency and implies that this is what Mr. Paul intended. Consumers' Appeal Brief, pp. 262-64.

to exclude the small utilities from the Michigan Pool on the ground that no provision allowing third party membership was formally adopted. The effect is identical, and we agree with Justice that Consumers' actions are indicative of its anticompetitive intent to exclude the small utilities from coordination.^{693/}

2. The current provision for third party membership.

a. In 1971, the Department of Justice reviewed the opportunity for third-party participation in the Michigan Pool in connection with its antitrust review of Detroit Edison's Fermi 2 Nuclear Power Plant. In order "to obviate a Department recommendation of antitrust hearing, Detroit Edison" agreed "to exert its best efforts" to secure agreement with Consumers "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".^{694/} The new Michigan Pool agreement executed by the two utilities in May 1973 did include

^{693/} Consumers may have believed it was better to have no provision concerning third party admission rather than one patently discriminatory on its face. Moreover, had there been a legitimate reason for not adopting any provision, Consumers could have offered testimony to that effect. It failed to do so.

^{694/} Justice's Opening Brief on Appeal, p. 110. Also see Consumers' Appeal Brief, pp. 260-61 and Tr. 1684-87 (Statement by Detroit Edison officials to that effect incorporated into the record.)

such a provision. However, the new agreement made important changes in two other provisions of the 1966 agreement by (1) completely eliminating the provision for pool units (i.e., developmental coordination) and (2) requiring each member utility to maintain reserves equal to its largest single generating unit if the capacity of that unit is greater than the member's reserve responsibility calculated under an equal percentage basis. Justice asserts that these changes effectively eliminated the advantages the smaller utilities could have obtained from Pool membership and were but another manifestation of Consumers' intent to monopolize. Consumers argues that legitimate business reasons, as opposed to anticompetitive purposes, prompted these changes.^{695/}

The Licensing Board dealt with this allegation simply by stating its finding "as a fact that the requirements for membership approved by Justice and incorporated in the existing Pool agreement are fair and reasonable," and its conclusion as "a matter of law that they are not anticompetitive".

^{695/} According to Consumers, the two utilities had been discussing the need for these amendments since 1970 and 1967, respectively, long before the Justice Department review in 1971. The company also makes much of the fact that the provision for admitting third parties was adopted at Justice's behest. It characterizes "the Department [as] the author of the Pool's admission standards" and contends that Justice found "no cause for complaint" with the new provision when it considered Detroit Edison's application for the Greenwood facility in 1974. Consumer' Appeal Brief, pp. 261,264.

2 NRC at 97. It discussed neither the purpose nor the consequences of the major changes that were made in the pool agreement when the new third party admission provision was adopted.

b. Contrary to both Consumers and the Licensing Board, no significance can be attached to Justice's role in the adoption of the current third party admission rules. The heart of Justice's allegation in this proceeding is that Consumers Power and Detroit Edison have negated the impact of this provision by simultaneously taking more subtle steps to remove any incentive for the small utilities to join the pool. Thus, whether the third party admission rules were approved or authorized by Justice -- which in fact they were not -- ^{696/} is of no relevance, for Justice played no role whatsoever in the other changes in the Pool agreement. The latter were solely the product of Consumers' and Detroit Edison's own business initiative, be it legitimate or anticompetitive in purpose. ^{697/} Being unable to accept the Licensing Board's conclusion, so summarily reached, we will look into the purpose and impact of the changes effectuated by the 1973 agreement.

^{696/} See, Tr. 1684-87 and 36 Fed. Reg. 17883 (Sept. 4, 1971).

^{697/} Nor is Consumers aided by the fact that Justice did not find fault with the new Michigan Pool agreement in its 1974 antitrust review of the Greenwood Energy Center. As a result of that review, Detroit Edison agreed to accept license conditions that required it, inter alia, to (1) grant small utilities within its general service

There can be no serious doubt that these changes had the effect of discouraging the small utilities from seeking participation in the Pool. ^{698/} Elimination of the pool unit concept precluded the possibility that they could directly obtain the advantages of large baseload units by participating in the Pool. And the new requirement that a member maintain reserves at least equal to its largest unit eliminated the possibility that the small systems could, as pool members, build larger, more economical units and still maintain reasonable reserves. ^{699/} The 1973 changes in the Pool agreement thus undercut most of the benefits that the small utilities could receive by joining the Pool. ^{700/}

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

^{697/} access to new generating capacity including the Greenwood nuclear facility, (2) share reserves with these utilities on reasonable terms and (3) wheel power for them on reasonable terms. See 39 Fed. Reg. 12373 (April 5, 1974). These conditions gave the small utilities certain access to the coordination even if they were not members of the Michigan Pool.

^{698/} Mr. Wolfe gave considerable testimony to this effect. Tr. 1684-93; 1697-1702.

^{699/} Mr. Wolfe explained the result of this provision as follows (Tr. 1691-92):

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.

^{700/} Wolfe, Tr. 1701-02.

We conclude, after reviewing the reasons given by Mr. Mosley,^{701/} that the deletion of the pool unit concept may well have been based on valid business reasons -- we will not pursue that matter further -- but its effect was plainly anticompetitive. In any event, we cannot excuse the provision concerning minimum reserves even to that extent.

Mr. Mosley testified in essence that this provision was adopted to insure that members would carry sufficient reserves on their own systems to back up unusually large units they might install. In fact, the provision had no such effect; the projected reserve levels and planned installations for both Consumers and Detroit Edison^{702/} demonstrates that the change had no immediate^{703/} or

^{701/} Tr. 8500-05.

^{702/} Tr. 8669-71. Mr. Mosley testified that Consumers' "present planning calls for reserve percentages in the range of 22 to 24%". Applying that percentage (23%) to Consumers' 1973 estimates for its projected 1980 peak load of 7020 Mw, see Stafford, Tr. 9173, establishes the 1980 reserve level at 1614 Mw. In 1973, however, the largest units planned for Consumers' system were two 1,150 Mw nuclear units, the first of which would have come on line in 1982. Assuming the same percentage of increase in Detroit Edison's projected load growth in 1973, it would have been planning its systems to have reserves for 1980 in the range of 2400 Mw.

^{703/} Mr. Mosley's testimony suggests that there was an immediate impact from this change in Michigan Pool operations. Tr. 8669-71. However, in 1973 Consumers largest unit was Palisades, which was operating at a 700 Mw level; Detroit Edison had four 800 Mw units; with respective peakloads of approximately 4000 and 6000 Mw. Thus, even with an 18% reserve in effect, see fn. 634, supra, the provision added in 1973 had no immediate effect on either Consumers or Detroit Edison.

prospective impact^{704/} on either utility. In light of all the circumstances, only one fair conclusion is possible: the new provision was artfully designed to discourage small systems from seeking to join the Michigan Pool.

c. Even if its purpose were valid, the largest unit/minimum reserve requirement is intrinsically unreasonable under applicable legal precedent. The Michigan Pool situation parallels that in Associated Press v. United States, 326 U.S. 1 (1945). In that case, the publishers of 1200 newspapers formed a news gathering agency with bylaws that enabled current members to exclude their competitors. The Supreme Court held these restrictions violative of the antitrust laws because of the competitive advantage members enjoyed over non-members.

Membership in the Michigan Pool enables Consumers to obtain the advantages of coordination, advantages we have shown it withholds from the small utilities. A competitively advantageous arrangement like the Michigan Pool would be suspect under the antitrust laws absent the national policy, as expressed in the Federal Power Act, of encouraging coordination among electric utilities.^{705/} That Act expresses

^{704/} In his testimony, Mr. Mosley did refer to 2500 Mw units, but only in passing. His testimony stresses instead the fact that the industry was seriously considering going from units 1100 Mw in size only to units of 1300 Mw. Tr. 8669-71.

^{705/} See Meeks, supra, Concentration in the Electric Power Industry, 72 Colum. L. Rev. at 110-11.

no policy to keep small utilities from coordinating; Consumers therefore cannot rely on it as justifying, implicitly or explicitly, any policy to exclude the small utilities from the Michigan Pool. Rather, the Pool must be formulated and justified according to legitimate technical or business principles. Associated Press v. United States, supra. Also see United States v. Terminal Railroad Assn'n, 224 U.S. 383 (1912); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Gamco, Inc. v. Providence Fruit & Produce Building, 194 F.2d 484 (1st Cir.), certiorari denied, 344 U.S. 817 (1952). For reasons we have previously discussed at some length, a requirement that a small utility maintain reserves equal to its largest unit cannot be justified on legitimate business or technical grounds, and runs counter to the Federal Power Commission standards under section 202(b) of the Federal Power Act.

3. Conclusion.

In sum, we find that (1) Consumers has purposefully sought to exclude the small utilities from the Michigan Pool and (2) the terms of the present pool agreement are unreasonable as applied to the small utilities. If the smaller utilities were able to share reserves on an equalized percentage basis and engage in developmental coordination

with Consumers, their participation in the Michigan Pool might well be unnecessary. Because Consumers has consistently refused to coordinate with the small utilities on reasonable terms, however, its efforts to prevent the small utilities' membership in the Michigan Pool constitute but another attempt to block the small utilities' reasonable access to coordination.

G. Other Allegations of Anticompetitive Conduct.

1. Contract Provisions Precluding Interconnections.

a. In a number of its coordination and wholesale power contracts with the small utilities, Consumers has included provisions limiting interconnections between the small utility and third parties. For example, the company's coordination agreement with the City of Lansing of May 15, 1964, ^{706/} provided:

9. CONNECTIONS WITH OTHERS INVOLVING INTERSTATE OR FOREIGN COMMERCE: Lansing agrees that without the written consent of Consumers it will 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 the transmission or sale at wholesale of electric energy in interstate or foreign commerce.

^{706/} D.J. Exh. 91. Similar provisions are contained in Consumers' contracts with Northern Michigan (1967 D.J. Exh. No. 64), Edison Sault Electric Company (1966 D.J. Exh. No. 80), City of Holland (1967 D.J. Exh. No. 100), Southeastern Michigan Rural Electric Cooperative (1967 D.J. Exh. No. 93), the City of Bay City (1967 D.J. Exh. No. 94), Alpena Power Company (D. J. Exh. No. 95) and the Village of Chelsea (1964 D.J. Exh. No. 98).

Justice argues in general that this provision was unreasonable and had an anticompetitive effect. It points to testimony of Mr. Brush, general manager of Lansing, which suggests that in 1968 the City eschewed negotiations for an interconnection with the M-C Pool because of that provision.^{707/}

Consumers denies that the provisions had an exclusionary purpose or effect, averring that they were inserted "to avoid inadvertently becoming subject to the jurisdiction of the FPC" and have since been removed from all contracts. Moreover, the company contends that no small utilities ever requested or were denied permission to interconnect with a third party.^{708/}

The Licensing Board agreed with Consumers. It also found "no evidence that an interconnection between any two smaller utilities in the relevant geographic market would result in the transmission or sale of wholesale electric energy in interstate or foreign commerce", concluding therefrom that "Provision 9" in Lansing's contract

^{707/} Mr. Brush testified that Lansing "advised" the M-C Pool "that until [it] "had consummated [current] negotiations [with Consumers it] didn't see where [it] could pursue the matter very far in that the existing contract that [Lansing was] working under, the 1964 agreement precluded third party interconnections." Brush 2235; also see Tr. 2090.

^{708/} Consumers' Appeal Brief, p. 286.

"is a nullity" and "Mr. Brush's interpretation * * * is completely unrealistic." 2 NRC at 92-93.

b. We cannot agree with the Licensing Board.^{709/} Our review of the record leads us to conclude that Consumers' actions had an anticompetitive effect and were at least in part motivated by anticompetitive purpose.

First, Consumers unquestionably had the power to insist on the inclusion of this provision in its contracts with the small utilities; the Licensing Board made an express finding to this effect. 2 NRC at 92. Moreover, the record reveals that, in 1966, Bay City sought to have this provision eliminated from its contract with Consumers and the company refused.^{710/}

^{709/} One must question why Consumers would take the trouble to include such a provision if it were a "nullity." Consumers contends that "the contracts in question were long-term and the company had a bona fide interest in protecting against future expansion which involved interstate commerce." Consumers Appeal Brief, p. 285 fn. 216. It is at least problematical that avoidance of federal regulation is a bona fide interest; our finding here obviates consideration of that question, however.

^{710/} Mr. Paul stated:
"it appears here that the city may want this eliminated so they could conceivably make an interconnection with the G. & T.'s for emergency or standby purposes." Paul, Tr. 8076; D.J. Exh. No. 94.

See also D. J. Exh. No. 272. We recognize that Bay City buys all of its power at wholesale from Consumers. However, Mr. Paul still apparently perceived this clause as inhibiting interconnection with the cooperatives.

Second, we do not believe that Consumers can avoid antitrust consequences of this clause by claiming that the small utilities paid too much attention to it. As Consumers has sought to preclude interconnection among the small utilities, its conduct certainly was not likely to erase their purported false impressions of the clause; Mr. Brush's interpretation is therefore significant. Moreover, Mr. Paul's summary of Bay City's reasons for seeking deletion of the clause reveals that Consumers and the small utilities both perceived this clause as having an inhibiting effect. See fn. 710, supra.

Finally, in addition to limiting third party interconnections, most of the contract provisions in question limit resale of the electric energy that Consumers furnished thereunder. In particular, Consumers' 1967 coordination agreement with the City of Holland (D.J. Exh. No. 100) provides in part:

It is agreed that the electric energy to be supplied by Consumers 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.

In other words, Holland was precluded from reselling the energy it received from Consumers. This is especially noteworthy given that Consumers' professed

"prime reason" for entering the 1967 agreement with Holland was to avert the city's possible interconnection with the G. & T. cooperatives. Consumers therefore not only took away the city's incentive to interconnect with the cooperatives but also contractually barred the city from doing so without accepting similar restrictions on its own use of the electric energy it received from Holland. Consumers cannot argue that the above restriction is in any way related to a desire to avoid FPC regulation.^{711/}

2. Reverter provisions in deeds disposing of Consumers' old hydroelectric facilities.

Consumers has had a policy of including in deeds disposing of its obsolete hydroelectric facilities restrictive covenants prohibiting their future use for electrical generation.^{712/} According to Mr. Aymond:

[W]e were disposing of these on the grounds that they were no longer economic for us to operate, and we were disposing of them for a very nominal consideration, perhaps \$1 in most instances.

^{711/} Other agreements containing similar limitations are Consumers contracts with Northern Michigan, Edison Sault, Southeastern Michigan, Bay City, Alpena Power and Chelsea. See fn. 706, supra, and fn. 737, infra.

^{712/} As noted earlier, the Licensing Board did not consider this matter.

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.^{713/}

It suffices for us to agree with Justice that, although Consumers certainly need not give away old hydroelectric facilities to competitors, its insistence on a restrictive covenant of this nature is one more manifestation, if a minor one, of its monopolistic intent.^{714/}

3. Wholesale Territorial Agreements.

Justice charges that Consumers had informal "gentlemen's agreements" with its major neighbors limiting wholesale competition, which in effect blocked the small utilities' access to alternate sources of firm power. The Licensing Board found as a "matter of fact" that there was "no substance" to Justice's evidence on this charge. 2 NRC at 105-07. Justice challenges that finding as erroneous.

There is some evidence of agreements not to compete among the larger utilities. For example, in a letter to Mr. Campbell in 1960 concerning the possibility of selling

^{713/} Tr. 6433-34.

^{714/} Consumers' argument that Justice failed to show why these facilities would be economical for the small utilities -- as Justice noted they had been for Alpena Power Co. and Edison Sault -- misses the point that Consumers took no chances of these facilities being useful to actual or potential competitors.

wholesale power to the Village of Constantine, an employee of Consumers stated:

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.^{715/}

And in late 1962 and early 1963, the Village of Paw Paw, which was being served by Michigan Gas & Electric, sought unsuccessfully to purchase wholesale power from the applicant. Mr. Sundstrand, attorney for the village testified that he was advised by Mr. Paul that Consumers refused the city's offer because of a "gentlemen's agreement" between Consumers and Michigan Gas & Electric.^{716/} And as additional support for its position, Justice points to an internal company memorandum where Mr. Paul stated in part:

they [Paw Paw officials] are expecting to point out that the gentlemen's agreement not to infringe on other power company's territory even when no franchise or contract exists, is an act of undue restraint of trade.^{717/}

^{715/} D.J. Exh. No. 157.

^{716/} Mr. Sundstrand testified to the existence of "more or less of a gentlemen's agreement that so long as one company wanted to serve a municipality that the other company would not compete with it." Tr. 3903.

^{717/} D.J. Exh. No. 235. Consumers denies the existence of a gentlemen's agreement. The reason for its decision not to serve Paw Paw, it claims, was due

However, the record also contains evidence pointing the other way. For example, in 1966 Paw Paw again sought wholesale power service from Consumers, and in October of that year the company made an offer that would have saved Paw Paw \$50,000 per year. American Electric Power, which was in the process of acquiring Michigan Gas & Electric, made a counter offer that was substantially better than Consumers'. Paw Paw accepted the latter offer, and Consumers' accordingly withdrew its offer. Also in 1966 the Southeastern Electric Cooperative turned to Detroit Edison in lieu of Consumers as its major source of wholesale power.

This concrete evidence of competition is more persuasive than the testimony that secret gentlemen's agreements prompted Consumers to refuse service. In effect, therefore, we agree with the Licensing Board that the weight of the evidence in this case does not support Justice's allegation concerning restrictive agreements.

717/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

solely to the fact that "service by the Company would have required a significant investment in transmission facilities", and that "there was some legal doubt as to the Company's right to serve without MPSC approval." Consumers Appeal Brief, p. 313.

VIII

"NEXUS"

We have detailed our reasons for concluding that Consumers Power Company has monopolized the relevant markets for coordination services, wholesale electric power and retail electric power in violation both of the letter and the spirit of Section 2 of the Sherman Act. The Nuclear Regulatory Commission's antitrust responsibility, however, is not plenary; authority to remedy the anticompetitive situation is limited to the right to impose conditions on Consumers' license to build and operate the Midland plant.^{718/} And we may do so in the case now before us only if we find that "the activities under the [Commission] license would * * * maintain a situation inconsistent with the antitrust laws". 42 U.S.C. §2135(c) (5) and (6).

We have no difficulty in making the requisite connection on the basis of this record.^{719/} One reason we have written at length -- perhaps prolixly -- is precisely to demonstrate that nexus between the existing anticompetitive situation

^{718/} See Houston Lighting & Power Co. (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1312 fn.8, 1316 (1977) (appeal pending).

^{719/} See also pp. 41 ff., supra.

and the introduction of the Midland generating capacity. Without repeating our findings chapter and verse, fair access to efficient, dependable and economical baseload generation is at the heart of the competitive situation before us. In the modern era of generating technology, this means resort to power plants of a size only dreamed of a generation ago. These plants, because of the economies inherent in their large scale operations, are efficient to use but costly to build.

And there is the rub. The small utility systems isolated in Consumers' service area are not in a practical position to build such plants. In part this is undeniably a product of their limited financial resources -- but not wholly so. The record amply demonstrates that Consumers' refusals to coordinate with them on reasonable terms insures their inability to construct a large plant economically, because building one would necessitate their building another to be held in reserve. And Consumers has compounded the smaller systems' problems by refusing to wheel power in to them, effectively eliminating their ability to coordinate with or even buy cheaper power from outside sources. Finally,

Consumers has (thus far) refused to allow any of those smaller utilities to join with it in developing new large-scale baseload generating units.

These actions by Consumers have effectively prevented the small systems -- Consumers' competitors in many instances -- from turning to the most economical sources and making the most efficient uses of baseload power. The result is to give Consumers a competitive edge over the small utilities -- an edge attributable not to that company's efficient operations but to its exercise of monopoly power.

Now Consumers wishes to increase its efficiency by installing large nuclear powered generating units. Manifestly, this will exacerbate the anticompetitive situation. What we said at the beginning of this opinion bears repeating at the end: the tremendous costs of developing the technology underlying nuclear plants was borne by the Treasury and, as the Commission emphasized in Waterford, Congress did not intend that public expenditure to benefit only the few; one of the reasons for its amending section 105c to its present form was the desire to prevent the foreclosing of the advantages of nuclear power to all but the very largest electric utilities.^{720/} But unless we step in,

^{720/} Waterford I, supra, 6 AEC at 48; Waterford II, supra, 6 AEC at 620.

that is precisely what will happen in this case: Consumers will have successfully used its monopoly power to retain the benefit of nuclear-powered baseload generation for itself, to the disadvantage of its "landlocked" smaller competitors.

We stress that we do not rest our conclusion that the necessary "nexus" exists solely on the fact that Consumers is large and its competitors small. But Consumers' size is a relevant consideration. The Supreme Court has warned in antitrust cases that "... size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."^{721/} Having held that Consumers has previously used the "opportunity for abuse" that its size affords, we cannot turn a blind eye to the further opportunity it will have to do so through its activities under the Midland licenses. That possibility is heightened by the fact that the Midland units represent

^{721/} United States v. Swift & Co., 286 U.S. 106, 116 (1932) (Cardozo, J.).

substantial growth in Consumers' size and overall capacity.^{722/}

We recognize also the applicability of certain timely truths about the electric utility industry. As we said, the record is replete with evidence of the impending unavailability of fossil fuels and the increasing expense of utilizing those that remain;^{723/} it also contains repeated references to the unique status of nuclear power and to

^{722/} Statistics compiled by Justice indicate that the 1300 Mw of power to be generated by the Midland units will equal 16 percent of Consumers' total generation capacity as of the time those units are installed and will increase to 36 percent the portion of Consumers' power generated by nuclear facilities. The Midland units will operate almost full-time and are expected to provide the cheapest available power. Justice's Opening Brief on Appeal, pp. 142, and Stafford, Tr. 9160, 9166, 9240. We acknowledge that the characterization of nuclear power as relatively low-cost was not universally accepted in this proceeding. Criticizing its adversaries' evidence as "a potpourri of outdated and off-the-record data", Consumers strenuously contends that current information (dealing with rising costs for financing, construction and fuels) provides no "economic support for the view that nuclear generation provides unique advantages to its owners". Consumers Appeal Brief, pp. 114-120. In our judgment, however, the record -- including testimony by some of Consumers' own witnesses -- bears out the assertion that nuclear generation is comparatively cost-effective. We conclude that, despite its irrefutable capital intensiveness, nuclear power will ultimately be the most economical available form of baseload power. See, e.g., Aymond, Tr. 6351-6353; Brush, Tr. 2480-2485, 2496-2502; Stafford, Tr. 9240. We should note particularly that, contrary to Consumers' contention (Consumers Appeal Brief, pp. 115-16), Mr. Brush (Lansing's system manager) "in no way conceded that the nuclear and non-nuclear bulk power alternatives were comparable from a cost standpoint." See Justice's Reply Brief on Appeal, pp. 127-30.

^{723/} See, e.g., Steinbrecher, Tr. 1225-27; Mayben, Tr. 2807; Brush, Tr. 2502-2504; Chayavadhanangkur, Tr. fol. 5090 at 17.

Congress' intent that access to it not be limited to a small number of large utilities.^{724/} Consumers criticizes its adversaries' insistence on such factors as

simply another incarnation of the simplistic theme that nuclear generation is inherently the "wave of the future" and therefore must be made available to smaller systems whatever the economic realities of the market place and of nuclear generation and without regard to the requirements of law.^{725/}

We think Consumers' assessment is an inaccurate characterization of critical facts. Far from reciting simplistic themes, appellants are pinpointing essential issues. In the present setting of monopolization by Consumers, the already significant issues of fuel cost and availability take on even greater urgency. For if traditional fuels become scarce or prohibitively expensive, and if the Midland licenses do not require Consumers to grant the small utilities fair access to a new source of available energy, then this nuclear plant represents far more "than a routine addition of generation capacity". It represents a means of perpetuating a monopoly and a threat to the continued existence of competitors. That situation amply satisfies

^{724/} See, e.g., Joint Committee Hearings at 9-11, 128. See also Justice's Opening Brief on Appeal, pp. 134-135; Justice's Reply Brief on Appeal, pp. 113-114; Staff's Opening Brief on Appeal, p. 66, n. 95. This point was also emphasized in our decision in Wolf Creek I, supra, 1 NRC at 565.

^{725/} Consumers' Appeal Brief, p. 355.

the needed link between the activities sought to be licensed and the situation inconsistent with the antitrust laws.

Consumers nevertheless denies the existence of a proper nexus on the basis of an assertion it makes repeatedly in other connections: that the benefits derived by the small utilities from access to wholesale power -- whether from Consumers or other utilities or from nuclear or fossil fuel plants -- are comparable to those they would derive from proper coordination and access to the Midland units. From this contention (among others) Consumers would have us conclude that "the smaller systems' failure to obtain unit power sales from, or ownership interest in, the Midland Units will not affect, or in any way jeopardize their continued financial and competitive viability" and that, therefore, the requisite nexus is nonexistent.^{726/}

Consumers is simply wrong about this. We reiterate that "wholesale power" is an amalgam of all types of power generated by a utility's system, including peaking and reserve power, and its cost reflects all the costs on the system. The power to be generated by the Midland

^{726/} See, Consumers' Appeal Brief, p. 359.

units, on the other hand, is baseload power. The evidence demonstrates that a substantial price differential normally exists between wholesale power and coordination power.^{727/} Congress was aware of this cost disparity and, as we already noted, this knowledge contributed to the formulation of section 105c^{728/}. On the basis of the legislative history, the statutory provisions and the record before us, we hold that access to a nuclear facility's output via wholesale purchases alone does not constitute fair and adequate access and does not counteract the maintenance of a situation inconsistent with antitrust law or policy. On the contrary, keeping in mind our findings of monopolization, we agree with the Department of Justice that

The advantage accruing to Applicant from its ability to integrate low-cost nuclear generation with its system is manifest. Its average cost is reduced and to the extent Applicant

^{727/} As we concluded in the course of analyzing the relevant markets, wholesale power and coordination power are not reasonably interchangeable, although they may be physically substitutable for one another. Wholesale power entails a greater obligation on the part of the seller than does coordination power, and the selling prices of the two types of power reflect this difference. The price gap is therefore a characteristic of the industry rather than, by itself, an indication of anticompetitive conduct or intent. See pp. 136-56, supra.

^{728/} See, e.g., Joint Committee Hearings at 109-110, 128.

is able to do this while denying its competitors the same advantage, its competitive position vis-a-vis these systems improves. ^{729/}

Finally, that excerpt highlights an error of law which Consumers makes in its nexus argument. The company contends that the construction and operation of the Midland units will not "change, or have any impact whatever, upon its competitive or coordinating relationships with any other system." ^{730/} Even assuming arguendo that this were so and that the wholesale/coordination cost disparity is irrelevant, Consumers is pressing the wrong point. As Justice notes,

If the small Michigan utilities could achieve power costs identical to those Applicant enjoys from the Midland Units, Midland would nevertheless contribute in a significant manner to the maintenance of the situation existing in Michigan . . . [T]his is all that Section 105(c) requires. ^{731/}

For all the reasons elucidated, we find it reasonably probable ^{732/} that Consumers' activities under the Midland licenses would maintain the present situation inconsistent with the antitrust laws.

^{729/} Justice's Reply Brief on Appeal, p. 124.

^{730/} Consumers' Appeal Brief, p. 357 (emphasis added).

^{731/} Justice's Reply Brief on Appeal, p. 127 (emphasis added).

^{732/} See pp. 26-27 and 65-66, supra.

IX

REMEDIES

The Joint Committee on Atomic Energy instructed, in its report on the bill enacted into section 105c, that a finding of a nexus between an anticompetitive situation and a proposed nuclear plant calls for "Commission-imposed conditions [on the nuclear license] to eliminate the concerns entailed in [that] finding".^{733/} Significant developments following the close of the record below, however, make manifest that in this case the proper course is a remand to the trial Board for formulation of those conditions.^{734/} Specifically, Consumers' willingness to sell an ownership interest in the Midland plant to the intervening utilities has undergone a notable change.

As recently as 1976, Consumers was insisting that requiring it to convey such an interest "could unreasonably burden the Company", that the resultant cost to Consumers

^{733/} Joint Committee Report, supra, at 31. In subsection (6), section 105c calls also for an evaluation of other factors, including "need for power in the affected area", that may bear on the formulation of those conditions. The Joint Committee emphasized, however, that "except in an extraordinary situation", the license conditions should normally be able to harmonize any such factors and the antitrust considerations. Ibid.

^{734/} Cf., Alcoa, supra, 148 F.2d at 445-48.

might be "as high as \$141 million", and that imposition of a license condition requiring such a conveyance would be "inappropriate and contrary to the public interest". See Consumers' Appeal Brief at 279 and 388-89. We were therefore surprised to learn, in the course of our review in another proceeding involving Consumers, that the company is now (and has been for some time) actively negotiating the sale to Northern Michigan and Wolverine electric cooperatives -- intervenors in this case -- of "an undivided interest in the [Midland] plant not exceeding 12 percent".^{735/} Though that representation was not made by antitrust counsel, we have no reason to doubt its accuracy.

We are well aware that conditions can change rapidly even in the public utility industry. We do not find it hard to imagine legitimate reasons why Consumers would not care to sell an interest in Midland a few years ago but desires to do so now. Be that as it may, our point is

^{735/} See pp. 101-103 of the transcript of oral argument of November 17, 1977, in Docket Nos. 50-329 and 330, Consumers Power Company (Midland Nuclear Power Plant, Units 1 and 2) (on motion to suspend construction pending completion of judicially-remanded proceedings.)

simply that this change cautions against drawing up licensing conditions on a stale record. Accordingly, we will refer that task to the Board below with instructions that it allow the parties to supplement the record with evidence concerning the proposed sale and any other significant changes that have occurred since the record closed.^{736/}

In fashioning a remedy, we offer the Licensing Board one further caution. We believe that no type of license condition -- be it a requirement for wheeling, coordination, unit power access, or sale of an interest in the plant itself -- is necessarily foreclosed as a possible form of relief. Section 105c imposes no limits in this respect; it gives the Commission "authority ...to issue a license with such conditions as it deems appropriate."^{737/} But as broadly

^{736/} On June 15, 1977, the Licensing Board hearing the remanded Midland construction permit proceeding forwarded three exhibits in that case to us. Two appear to be excerpts from contracts between Consumers and Dow Chemical Corporation for the sale of electricity and steam from the Midland plant. These contain clauses restricting Dow's resale rights. The other, dated 1976, is a copy of confidential minutes of a meeting between officials of Dow and Consumers confirming the existence of that restriction.

We have not relied on those exhibits and we draw no inferences from them now. However, the Licensing Board may consider them in drawing up appropriate license conditions after giving each party opportunity to demonstrate their relevance, if any.

^{737/} See Wolf Creek I, supra, 1 NRC at 571.

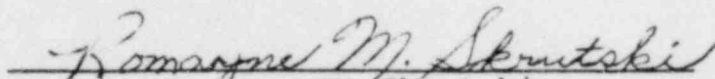
as it is framed, that discretion is not carte blanche. The authority to act may not be divorced from the purposes of the legislation. The congressional goals as we understand them are these: to insure the smaller utilities a fair access to nuclear power under conditions which permit them a reasonable opportunity to make effective use of its potential, and to see that activities undertaken pursuant to Consumers' licenses neither create nor maintain an anticompetitive situation.

Section 105c is one provision in a statute that regulates the use of nuclear power. Nothing on the face of the section or in its legislative history suggests that, except as reasonably necessary to achieve the goals just outlined, it may be employed as an implement to restructure the electric utility industry. In formulating "appropriate" license conditions, the Licensing Board should proceed accordingly.

Reversed and remanded.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD



Romayne M. Skrutski
Secretary to the
Appeal Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CONSUMERS POWER COMPANY) Docket No.(s) 50-329A
) 50-330A
(Midland Plant, Units 1 and 2))
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
30 day of DEC 1977.

C. M. Williams
Office of the Secretary of the Commission