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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Hugh K. Clark, Chairman
J. Venn Leeds, Jr., Member

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

HEADNOTES:

1. A "situation inconsistent with the antitrust laws" means anticompetitive conduct. In determining the existence of anticompetitive conduct, each of the following criteria should be considered: (a) conduct which is a violation of the antitrust laws enumerated in Section 105a of the Atomic Energy Act including conduct heretofore determined to be unfair by the FTC pursuant to Section 5 of the FTC Act, and (b) conduct, without necessarily having been previously considered unlawful, (1) which offends public policy as it has been established by statutes, the common law, or otherwise,

or 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.

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

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

4. Activities under a license issued by the Commission pursuant to statute, can create or maintain a situation inconsistent with the antitrust laws if, and only if, such activities constitute a material element and a substantial factor in a scheme or conspiracy the purpose or effect of which is to cause the creation or maintenance of a situation inconsistent with the antitrust laws.

5. Unilateral refusal to assist competitors per se is not anti-competitive 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.

6. Unilateral refusal to enter voluntarily into coordination agreements with competitors per se 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.

7. Unilateral refusal to wheel power for competitors per se 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.

8. 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.

9. The record in this proceeding does not disclose substantial evidence of any fact or facts within the relevant matters in controversy which constitute 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.

10. Applicant's activities under the Midland licenses are not a material element and significant factor in any actual or alleged scheme or conspiracy the purpose or effect of which is to cause the maintenance of a situation inconsistent with the antitrust laws.

11. No nexus exists between Applicant's activities under the Midland licenses and any actual or alleged situation inconsistent with the antitrust laws.

APPEARANCES

Wm. Warfield Ross, Esq., Keith S. Watson, Esq., Thomas W. Brunner, Esq., Gerald B. Wetlaufer, Esq., Toni K. Golden, Esq., (Wald, Harkrader & Ross), and Harold P. Graves, Esq., James B. Falahee, Esq., and Wayne B. Kirkby, Esq., of Counsel, for the Applicant, Consumers Power Company.

Thomas E. Kauper, Esq., Assistant Attorney General, Donald I. Baker, Esq., Deputy Assistant Attorney General, Joseph J. Saunders, Esq., Milton J. Grossman, Esq., Wallace E. Brand, Esq., David A. Leckie, Esq., Mark Levin, Esq., and C. Forrest Bannan, Esq., for the United States Department of Justice.

Joseph Rutberg, Esq., Benjamin H. Vogler, Esq., Robert J. Verdisco, Esq., and Andrew F. Popper, Esq., for the Regulatory Staff of the Nuclear Regulatory Commission.

George Spiegel, Esq., James F. Fairman, Jr., Esq., Robert A. Jablon, Esq., and James Carl Pollock, Esq., (Spiegel & McDiarmid) for the Intervenors.

INITIAL DECISION
(ANTITRUST)

This proceeding involves the antitrust aspects of the application of Consumers Power Company for construction permits authorizing the construction of two pressurized-water nuclear power reactors, designated as the Midland Plant, Units 1 and 2, to be built on the Applicant's site adjacent to the Tittabawasee River in Midland County, Michigan. (Consumers Power Company application for licenses for Midland Units - Docket Nos. 50-329, 50-330)

The proceeding is being held pursuant to Section 105 of the Atomic Energy Act as amended on December 10, 1970 [42 USC 2135] Sec. 105 is reproduced for convenient reference in Appendix A. This statutory provision will hereinafter be referred to as "Section 105 of the Act" or more briefly as "Sec. 105". Appendix A also includes relevant portions of the Federal Power Act and of the antitrust laws.

The application for license having been on file at the time of enactment of Section 105 of the Act, this proceeding falls under the grandfather clause [Sec. 105c(8)] and, hence, has not delayed the issuance of construction permits. Such permits issued on

December 15, 1972, were made subject to the outcome of this proceeding.[1/]

The Attorney General of the United States, in a letter dated June 28, 1971 addressed to the Associate General Counsel of the Commission, presented his recommendation that a hearing be held:

> "For the foregoing reasons, we believe that granting the license sought herein may maintain a situation inconsistent with the antitrust laws. Accordingly, we recommend 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 these questions." (Emphasis added)

On the 11th of April, 1972, the Commission issued a "Notice of Antitrust Hearing on Application for Construction Permits." This Notice was published in the Federal Register [37 FR 7726] on the 19th of April, 1972. That Notice contained the following instructions to the Board established in the Notice:

> "The issue to be considered at the hearing is whether the activities under the permits in question would create or maintain a situation inconsistent with the antitrust

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1/ As required by the Atomic Energy Act, 42 USC §§ 2131-33, Consumers Power Company applied to the former U.S. Atomic Energy Commission for a construction permit on January 13, 1969. Thereafter, the Energy Reorganization Act of 1974 [Act of October 11, 1974, P.L. 93-438, 88 Stat. 1233, 42 USCA § 5801] abolished the A.E.C., established the Nuclear Regulatory Commission, and transferred the A.E.C.'s licensing functions under the Atomic Energy Act (including those performed by the Atomic Safety and Licensing Boards and the Atomic Safety and Licensing Appeal Boards) to the new Commission. For convenience, we use the term "Commission" in this opinion to refer to both the A.E.C. and the N.R.C.

> laws as specified in Subsection 105a of the Act. In its initial decision, the Board will decide those matters relevant to that issue which are in controversy among the parties and make its findings on the issue.
>
> A cardinal prehearing objective will be to establish, on as timely a 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." (Emphasis added)

At the first Prehearing Conference held in Washington, D.C. on the 12th of July 1972, the first order of business was the Petitions to Intervene filed by a collection of municipalities and cooperatives[2/] operating and located in the lower peninsula of Michigan (the Petitions to Intervene were filed on September 30, 1971 and October 4, 1971). After reviewing Petitions to Intervene and the written Answers thereto filed, and hearing oral argument, the group collectively were admitted as one set of joint intervenors (hereinafter called "Intervenors") [Admission as Intervenors at Tr 33-35]. In addition to the Intervenors, the other parties to the proceeding are the Department of Justice (hereinafter called

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2/ Wolverine Electric Cooperative, Inc., Northern Michigan Electric Cooperative, Inc., and the cities of Traverse City, Grand Haven, Holland, Zeeland, Coldwater, and the Michigan Municipal Electric Association.

"Justice"), the Regulatory Staff of the Commission (hereinafter called "Staff"), and Consumers Power Company, the Applicant for the Construction Permits (hereinafter called "Applicant").

As directed by the Commission and as a result of the First Prehearing Conference, the Board issued "Prehearing Conference Order of the Atomic Safety and Licensing Board" on the 7th of August, 1972 stating the "Relevant Matters in Controversy":

> "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."

Essentially, this initial opinion is a determination of the broad issue based on conclusions as to the "Relevant Matters in Controversy" as stated in the Board's Order of August 7, 1972. Yet the Board recognizes a wider duty. This proceeding is a case of first impression. Thus, the Board, in addition to the holdings on the "Relevant Matters in Controversy", will address itself to alternate holdings. Some matters considered to be beyond the scope

of "Relevant Matters in Controversy" will also receive attention. At the least, any appellate body will have the benefit of the Board's thinking on the subjects discussed.

During the hearing, many terms of art of the electric utility industry were used. The meanings of these terms were not uniform. Thus, the Board defines the terms and uses these definitions consistently throughout this opinion.

1. In the electric industry, the terms "power" and "electric energy" are used interchangeably where accurate measurements are not involved. Where accurate measurements are involved, "power" means the capacity to supply electricity and "energy" means the quantity of electricity supplied.

2. The watt is the unit of power. (Large units of power are: Kilowatt (Kw) = 1000 watts, megawatt (Mw) = 1,000,000 watts)

3. The kilowatt hour (Kwhr) is the unit of energy. The megawatt hour (Mwhr) = 1000 Kwhr.

4. "Generation" means the production of electric energy or power by means of a hydro, fossil fueled or nuclear facility.

5. "Utility" means an organization, a principal business of which is performing one or more of the following function; e.g., generation, transportation, and sale of electric power which power is for the use of others.

6. Retail power is power sold to ultimate consumers.

7. Distribution system is a utility's facility for the transportation of retail power.

8. Wholesale power is power sold to customers for resale.

9. Bulk power is power supplied by a utility either (1) to its own distribution system, or (2) to a wholesale customer.

10. Transmission system is a utility's facility for the transportation of bulk power.

11. Wheeling is the transportation of wholesale power between the facilities of two utilities over the transmission system of a third utility.

12. "Mutual Assistance" means the interchange of beneficial services between cooperating business concerns in the same industry through an agreement which confers on each party a benefit not attainable by such concerns operating independently.

13. A "Mutual Assistance Agreement" is an agreement which controls the interchange of beneficial services between cooperating concerns.

14. "Coordination" means mutual assistance in the electric utility industry.

15. Thus, "Coordination" means 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.

16. A "Coordination Agreement" is a mutual assistance agreement in the electric industry which confers on each party a net benefit.

17. "Emergency Energy or Power" means energy or power needed, supplied, or received in an emergency situation, i.e., an unscheduled outage.

18. "Maintenance energy or power" means energy or power supplied or received to replace needed energy or power which is unavailable because a generation unit or transmission unit is out for scheduled maintenance.

19. "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.

20. "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.)

21. "Diversity" means the difference in electric loads on two different utilities resulting from noncoincident maximum load demands of two different utilities.

22. "Seasonal Diversity" means diversity caused by differences in load demand during different seasons of the year.

23. "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".)

24. "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 schedule outage of a generating facility or unit.

25. "Reserve Sharing" means the sharing of reserves by two or more utilities.

26. "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.

27. "Operational Coordination" means the interchange or sharing of one or more of the following: Reserve sharing, emergency energy or power, maintenance energy or power, economy energy or power, dump energy or power, seasonal or time diversity energy or power, unified control of generation transmission facilities.

28. "Developmental Coordination" means the joint planning of facilities. (It may be carried out by staggered construction of facilities or by construction of a facility as a joint venture or by a combination of both.)

29. "Firm power" means highly reliable power (obtained by adequate reserves and suitable transmission alternatives) such that service interruptions, even of short duration, seldom occur. While not capable of exact definition, electric service with interruptions averaging a total of one day occuring over a period of seven or more years is usually considered to be firm power. Most industrial, commercial and residential customers buy firm power.

30. Interruptable power has less reliability than firm power (usually due to inadequate reserves) and is bought at a reduced price by industrial customers whose operations will not be seriously damaged by interruption of service.

31. "Unit Power" means power which is available to entities entitled to receive that power only when the designated unit is operating. Thus, unit power is a species of interruptable power.

A brief summary of the electric industry is used to introduce the subject-matter herein discussed. Electric energy in commercial quantities is produced by a stream of a fluid either water or steam or a gas causing rotation of a turbine which is mechanically coupled to an electric generator. An electric generator is a device which converts mechanical energy into electric energy. Thus it performs the reverse function of an electric motor which latter device converts electric energy into mechanical energy. If the fluid is water, then the generator is called a hydro or hydroelectric unit in the industry. If the fluid is steam resulting from the combustion of coal, oil or natural gas, the unit is called a fossil or a fossil fired unit. If

the fluid is steam resulting from nuclear fission, the plant is called a nuclear plant. If the fluid is the gases resulting from the combustion of gas or oil, the unit is called a gas turbine generator. The commercial electric energy produced in the United States is universally an alternating current of a frequency of 60 hertz at some constant voltage. The user of the electric energy cannot tell the source of the energy used to generate the electricity.

Significant differences exist in the cost of producing power, and the availability of various fuels is subject to change.

Most customers of electric energy need or desire firm power. In order to sell firm power, a utility must have reserve generating capacity to cope with (1) scheduled facility shutdown for maintenance, (2) unscheduled facility shutdown due to various causes, and (3) variations in load on the system.

For a small utility, generating and selling firm power in isolation from other utilities, a rough rule of thumb requires that reserve generating capacity equal the capacity of the utility's largest generating unit. (Actually, the rule states that the reserve capacity should equal the largest load on a single generator. The assumptions are that, (1) only one generator is likely to have an emergency shutdown, and (2) the largest loaded unit may be the unit that is lost.

Because the largest unit is often the most economical unit to produce power and thus fully loaded, the rule is often stated that a reserve equal to the rating of the largest unit must be kept in reserve. The criterion is often called the "largest unit" criterion.)

For a large utility having many generating units and operating in isolation from other utilities, the reserve generating capacity usually exceeds the capacity of such utility's largest unit and is expressed as a percentage of the greatest amount of firm power sold in any specified short (often 15 minutes) interval in a year. (In other words, a percentage of the annual peak requirements.)

Assuming the largest unit criterion, and all generating units of approximately the same size, an increase in the number of generating units results in a decrease in the percentage reserve capacity requirement. At some point, the probability that two units are down simultaneously may become large enough to require that the reserve capacity equal to the two largest units. When the utility reaches this size, the percentage reserve may actually increase when the next unit is added.

Much more sophisticated methods of determining reserves are currently in use in the industry. The process of calculating the reserves by these methods is quite complicated. These methods attempt to determine the probability that a failure will occur and the reserves will not be adequate. The probability may actually be expressed

in familiar units. For example, failures may be expected to occur such that over a 7 year period interruptions will average a total of one day.

Reserve requirements can be decreased if a way can be found to increase the number of units. Of course, as the load grows, the number of units increases. Yet another way is to join with a neighboring utility so that the number of units jumps as does the load. The advantages of such an arrangement was discussed in Gainesville Utilities v. Florida Power Corp. [402 US 515, 29 L. Ed. 2d 74, 91 S. Ct. 1592] [1971] at page 519, footnote 3. As shown below, the decrease in reserves if allocated to both utilities can result in each system being able to sell more power or to have a more reliable system because each system has to carry less reserves. If something other than the decrease in reserves is allocated, one system may have to carry increased reserves. But if any decrease in reserves is allocated, then each utility benefits.

Reserves are of two types. The Supreme Court in Gainesville, supra at page 518, note 2, describes these:

> "2. 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. In general, this opinion will not differentiate between the different reserve requirements."

The cost of generating power has two components: (1) the demand cost, primarily based on cost of capital invested in facilities, (demand cost continues whether or not the facility is operated) and (2) energy cost which is the cost of operating the facility and which includes primarily labor, overhead, maintenance and fuel cost. Energy cost essentially is an operational cost. Fuel is the principle energy cost for fossil facilities, when the facilities operate most of the time at reasonably full load. The demand cost per Kw of installed capacity of a particular type of generating facility tends to decrease as the size of the facility increases. To a lesser extent, fuel consumption per Kwhr of energy produced tends to decrease as the size of

the facility increases. Such decrease in both demand cost and energy cost is known as the economy of size or scale. However, different types of facilities are not directly comparable as to demand cost or energy cost. Nuclear generating facilities have high demand (capital) cost and low energy (fuel) cost compared with fossil fuel generating facilities.

The amount of electrical energy taken by firm power customers varies from day to day and from time to time within each day. These variations cause peaks and valleys in the amount of electrical generation needed to supply the demand. The quantity of energy required to meet the demand during the valleys in demand is called the base load. Base load generating units are units that are normally operated continually (except for maintenance and accidents). Peak load units are units that are operated only a part of the time and are usually comparatively small units. Increased fuel cost is more than made up by decrease in demand cost during periods of idleness. Thus, economy of size applies primarily to base load generating units which operate, as nearly as possible, continually.

A large utility, with many generating units, may employ units intermediate in size between base load units and peaking units. To some extent, economy of size may apply to the intermediate units.

For purposes of this opinion, we shall not again mention intermediate units, since they add nothing but complication to an already complicated subject.

In addition to base load units and peaking units, a utility must have reserve units which operate only a small part of the time. Reserve units are an economic waste in two ways: (1) the depreciation and maintenance cost of such units must be added into the selling price of electrical energy, and (2) if reserve units could be used to generate energy, the same capital investment would produce more electrical energy. (Moreover, human energy employed in building reserve units, if not so employed, could be utilized to produce other desirable things.) In other words, the greater the reserve generating capacity, the greater the economic loss.

The concept of using the most efficient units having the lowest overall power production costs is called economic dispatch in the industry. Essentially, economic dispatch means that for the loads to be supplied and for the location of those loads, units are selected so that cost of producing the power delivered to the loads at the various locations is minimized. This allocation of power production may mean that some units are fully loaded while other units are not. The reasons for differences in loading is differences in thermal efficiency of the units (the amount of energy produced per unit cost of fuel), and the incremental cost of transmission of the energy to

the load, (usually loses in power caused by the ohmic resistance of the lines.) In addition, energy may be available from other utilities which cost less than the energy produced by the utility's own plants (economy energy). In that case, such energy may be procured as part of operational coordination. A utility will at all times attempt to minimize cost of power production.

The calculation of the best (i.e., least cost) configuration of plants is quite complicated. Older methods of economic dispatch used mathematical tables, but more modern methods utilize digital computers to make the calculations.

From the above, the conclusion can be reached that some units are loaded close to the rating of the unit if the alternative is using another unit which would result in higher costs.

At this point, these concepts should be clear:

(1) A system will have a variety of generating facilities of different size, and producing a unit of electrical energy at a different cost.

(2) Large facilities are expected to have lower demand costs and to have lower energy costs.

(3) A system with a few large generating units will require more reserves than the same system with a greater number of smaller generating units.

(4) A system will at a minimum keep spinning reserves equal to the largest load on a single generating facility or unit.

(5) A system should supply the loads from the most efficient generating units on the system so that the cost of producing the electrical energy is minimized.

(6) Supplying power from the large generating units to achieve lower energy costs is in conflict with achieving a reliable system with adequate reserves.

If a method can be found so that large efficient units can be utilized without increasing the reserve requirements significantly, then the cost of producing power can be decreased. Reserve sharing between two utilities is a way to accomplish this desirable result. Once two utilities have agreed to mutual assistance in reserve sharing, other opportunities for increasing reliability of firm power and economy in production of firm power by mutual assistance become apparent. In each case, the number and variety of opportunities may vary with the particular circumstances.

One opportunity is to have both systems controlled as one larger system so that the most efficient units of the combined system are used (called joint economic dispatch). Another is to plan a construction program of the combined systems jointly and construct plants in time sequence. Such plants could be larger than justified by the growth of either utility. The power from such plants is controlled jointly utilizing joint economic dispatch. Another is scheduling maintenance outages jointly so reserves and costs of power production is optimized.

As an electrical utility, the Applicant is in the business of (1) acquiring firm power by operation of its own facilities (self generation) supplemented by purchase of firm power when needed and further supplemented by the assistance provided by coordination agreements, and (2) selling such firm power at both wholesale and retail. In the areas of the southern peninsular of Michigan in which Applicant is franchised, Applicant 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.

RELEVANT MATTERS IN CONTROVERSY

During the First Prehearing Conference, Counsel for Justice was asked to clarify the areas to be explored in the evidentiary hearing and he did so [Tr 46]. The Chairman of the Atomic Safety and Licensing Board (hereinafter "Chairman"[3/]) asked if Justice contemplated introducing any evidence with respect to the Midland units

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3/ Subsequent to closing of the record in this proceeding, Jerome Garfinkel, Esq., was killed in an automobile accident. Reference to "Chairman", unless otherwise noted, is to Chairman Garfinkel. This decision is rendered by the two remaining Board Members as stipulated by the Parties to this proceeding (Justice, September 13, 1974; Staff and Intervenors [joint letter], September 13, 1974; Applicant, September 13, 1974), and by Order of the Chairman of the Atomic Safety and Licensing Board Panel (September 20, 1974).

creating a situation inconsistent with the antitrust laws. Justice answered "No" [Tr 46]. The Chairman then asked the Counsel for the Regulatory Staff the same question and again the answer was "No" [Tr 46]. Last, the Chairman asked the Counsel for the Intervenors the same question and the reply was "I am in agreement with Counsel's statement." [Tr 46] The Chairman then checked the replies to which all Parties adverse to Applicant agreed, that no evidence would be introduced with respect to creating a situation inconsistent with the antitrust laws [Tr 46-47]. The Board continued to explore possible issues in controversy:

> "CHAIRMAN GARFINKEL: In response then are you saying the activity that is contrary to the antitrust laws purposes is the refusal to permit these municipals to participate in the coordination?
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> MR. BRAND: [Justice] Yes, your Honor, of various types. One kind of coordination is such reserve sharing. Another kind of coordination is what we call coordinative development. ... One way is to engage in joint ventures. ... Another way is the sale of unit power. ... A third way is to have staggered development which I have just described. ... The net effect is we take the full advantage of the new technology, but we can't do that unless we have access to coordination through high voltage transmission." [Tr 55-56]
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> "MR. CLARK: [Board] Yes, but what is the situation: That is what I am trying to find out.
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> MR. BRAND: [Justice] Ah, yes. The situation, as we have mentioned, more briefly is maintenance of the power to grant or deny access to coordination. In other words, so far as

these smaller systems are concerned, the Applicant has the power to grant or deny access to coordination.

MR. CLARK: Has the Applicant used that power?

MR. BRAND: Yes, your Honor, it has used it in an anticompetitive fashion against the smaller systems.

MR. CLARK: And you intend to introduce evidence to that effect?

MR. BRAND: Yes, your Honor.

MR. CLARK: All right, that is one thing that you wish us to explore. You are going to introduce evidence that the Applicant has used its power to deny coordination activities with the smaller companies [Tr 59].

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"MR. CLARK: All right. Now what else do you suspect the Applicant of having done which is in violation of the antitrust laws?

MR. BRAND: I think that forms the basic thrust of our case.

MR. CLARK: That is the thrust of your case?

MR. BRAND: Yes, your Honor. Now there will be evidence to show what has created the situation which the Applicant now uses to maintain its position." [Tr 60].

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"CHAIRMAN GARFINKEL: It is not a question of relief. The question is the maintaining of a situation that is bothering us, and the question comes out we are interested in that situation. In your brief, you talked about the situation prior to the operation of the plant." [Tr 65].

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DR. LEEDS: [Board] So it would be things that have happened in the past that would tend to maintain, and the injuries that were created in the past?

MR. BRAND: Your Honor, the situation was created in the past. The installation of the Midland unit would maintain the situation, because by its very installation Applicant demonstrates its own power to use large units and maintain its cost advantage and prevent the proposed intervenors from doing so -- excuse me -- the intervenors from doing so." [Tr 65-66]

"CHAIRMAN GARFINKEL: ... Do you have any comments, any additions you want to make?

MR. RUTBERG: [Staff] No, Mr. Chairman.

CHAIRMAN GARFINKEL: Mr. Fairman, do you want to make any additional statements?

MR. FAIRMAN: [Intervenors] I think perhaps at the close the question from the Board did satisfy my concern. I think that the history is important because whether it is proper or improper it shows a pattern of practice which did not spring up over night and was not devised with the advent of the Midland plant, but is a continuation of the kind of policy determinations that I, based on my recent experience, see no evidence of any modification. ..." [Tr 66-67]

Subsequent to the First Prehearing Conference, the Board issued "Prehearing Conference Order of the Atomic Safety and Licensing Board" on the 7th of August 1972 stating the "Relevant Matters in Controversy":

"The basic thrust of Justice's case is that (a) applicant has the power to grant or deny access to co-ordination; (b) applicant has used this power in an anti-competitive 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."

No party to these proceedings objected to or requested revision to this statement of Relevant Matters in Controversy at any time except Intervenor's attempt to broaden them to include "create", discussed hereinafter.

For example, counsel for Justice on January 15, 1974 [Tr 4011-4012], Staff in its Proposed Findings of Fact and Conclusion of Law page 4, October 8, 1974, Intervenors in "Answer of Intervenors to Applicant's Objection to Document Request and Motion for Protective Order", page 5, November 1, 1972, and Applicant in "Applicant, Objections to Document Requests and Motion for Protective Order", page 12, October 26, 1972, all quoted with no adverse comment the issues as defined by the Board in the August 7, 1972 Prehearing Conference Order.

In the letter from counsel for intervenors dated March 5, 1974, urging that "maintain" be changed to "maintain or create", on page 3, counsel states "Intervenors do not question the statement of issues in the Board's prehearing conference order, although we note their extreme generality."

Proceedings under Section 105 of the Atomic Energy Act are not in the nature of a full antitrust suit by Justice in a Federal court. Except in grandfather clause cases, Section 105 proceedings

are intended to be a part of the "construction permit" phase of nuclear power plant licensing, to be held concurrently with the "health and safety" and "environmental" hearings, and to be completed within the same interval as required by those hearings.

Determining the relevant matters in controversy is fundamental to the hearing process. The Board was directed by the Commission to "decide those matters relevant to that issue which are in controversy among the Parties". Without determining the relevant matters in controversy, the Board could not decide the issue in this case and limit the scope of discovery and testimony. In the absence of a limitation on the scope of discovery and testimony, discovery would become a fishing expedition, the proceedings would be filled with irrelevant testimony and evidence, and the proceedings would be prolonged intolerably all of which would be contrary to administrative procedure, case law and the purpose and intent of Section 105 of the Atomic Energy Act.

The Board has consistently reminded the parties when the opportunity occurred that this proceeding was concerned only with the matters in controversy as defined in the Board's Order of August 7, 1972. For example, the relevant matters in controversy were read on 27th of October 1972 in the opening statement of the Chairman at the

beginning of the hearing [Tr 824] and again in its Order of the 28th of November 1972, "Order Ruling on the Applicants' Objections to Document Requests, the Department of Justice's Motion to Compel the Production of Four Categories of Documents, and the Applicant's Motion for Protective Orders", the Board stated:

> "Applicant next objects to requests for documents relating to Applicant's political activities (Request 3(e)). The Department argues that under the guise of appropriate political activities, the Applicant may have practiced a mere sham to engage in forbidden activities. Whether or not Applicant has engaged in unfair practices through political maneuvers is a matter not relevant to the issues in controversy; more particularly, issues pertaining to coordination. Under the Commission's Notice of Antitrust Hearing dated April 11, 1972, this Board may not address itself to matters not in controversy. Consequently, we agree with Applicant's arguments concerning the invalidity of the request. The objection is sustained."

In another instance, the Chairman was questioning a witness of Justice:

> "CHAIRMAN GARFINKEL: The question is coordination, now. That's the issue in this case."
>
> THE WITNESS: Well, the question is coordination, of course. ... get as much evidence as I can, because I know through long experience in this industry that an isolated act, if one looks at a particular act and says, does this act in and of itself violate the antitrust laws, and someone shows me that there's another company which engages in precisely the same act, I can't answer that question.
>
> On the other hand, this act, in the context of a pattern of actions, has quite a different meaning and implication than if it were simply viewed as an isolated event. As a consequence, then, the answer here was twelve years, and suppose in these twelve years a particular company did not acquire one further."

> CHAIRMAN GARFINKEL: ... but there is no allegation in this proceeding that we are challenging the acquisition program of the Applicant. ... but as you read the statement of issues, we are here to show whether or not --- whether the Applicant has the power to prevent or influence coordination, and whether they used that power in an anticompetitive fashion, the power of coordination in an anticompetitive fashion." [Tr 3986-3987]

The Counsel for Justice clearly understood the issue in the proceeding because in argument over the admission of documents during the Justice's direct case stated:

> "MR. BRAND: [Justice] ... The issues set out in the Board's order are the existence of a power and the use of the power. We fully agree, and we do not intend any conduct to be shown prior to 1960 concerning the use of the power. The only use that we propose to be made of evidence of what can be described as conduct prior to 1960 is only the conduct as it affects the later market structure.
>
> In other words, when we are concerned with the existence of the power to grant or deny access to coordination, then we are concerned with how did the power come about, because it is useful to understand how the power came about to determine whether or not that power actually exists." ... [Tr 4011-12] [See also Tr 5920, 5923 and 6279]

RELEVANT MARKET

In view of the scope of the relevant matters in controversy, which were accepted by all Parties, the relevant market is not a product market but is a service market and that market in coordination

services. As witness Gutman testified: "you're dealing with a whole bundle of services." [Tr 4693]

From the entire record, it is clear that the "smaller utility systems" in issue "(b)" refers to the smaller utility systems in the area of the lower peninsula where Applicant is now franchised to sell power and that area into which Applicant could reasonably and feasibly extend service. Accordingly, the relevant geographic market is 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, both subsidiaries of American Electric Power Company. [Exhibits DJ 18, 19, 20A which are maps of the area].

BURDEN OF PROOF

In litigation, the burden of proof rests with the party accusing another of unlawful behavior. In the present proceedings, Justice, with the acquiescence of Staff and Intervenor, proposes an order that the activities under the licenses sought by Applicant would maintain a situation inconsistent with the antitrust laws. Justice, based this proposal on Applicant's behavior with regard to coordination. The Board's Order of August 7, 1972 merely stated the relevant matters in controversy in terse language.

In this country, persons or entities accused of criminal or tortious conduct do not have the burden of proving a negative; i.e., that no such misconduct exists. The Commission's Rules of Practice 10 CFR § 2.732 which follows § 556(d) of the Administrative Procedure Act, provide: "Unless otherwise ordered by the presiding officer, the Applicant or the proponent of an order has the burden of proof." The presiding officer has not ruled otherwise in this proceeding. Therefore, in accordance with the usual principles of law and the Commission's Rules of Practice, the burden of proof rests upon Justice, Staff and Intervenors.

BASIC LEGAL CONCEPTS

The Board has a duty and obligation to explain its reasoning [Rule 2.760c Rules of Practice]. Beyond the normal requirement in any case, the Board in a case of first impression expects that its decision will be widely read. This part of the opinion collects in one place several legal concepts developed as a result of independent Board research on the legal basis for Board actions. Not all such concepts are collected here but only those on especially important aspects of the case. Others are contained throughout the text of the decision.

In seeking the meaning of a statute containing language which has never been construed and the meaning of which is not clear, it is not unusual to review the legislative history. In the instant case, the legislative history contains various expressions of the interest of witnesses and lawmakers each having a point of view different from the other. Sec. 105 as amended by Public Law 91-560 represented a compromise acceptable to the Joint Committee on Atomic Energy and to the Congress. In the Legislative History of PL 91-560, the matter is expressed at page 7130 as follows:

> "Of course, the committee is intensely aware that around the subject of prelicensing review and the provisions of subsection 105c, hover opinions and emotions ranging from one extreme to the other pole. At one extremity is the view that no prelicensing antitrust review is either necessary or advisable and that the first two subsections of section 105 concerned with violation of the antitrust laws and the information which the Commission is obliged to report to the Attorney General are wholly adequate to deal with antitrust considerations. Additionally, there are those who point out that it is unreasonable and unwise to inflict on the construction or operation of nuclear power plants and the AEC licensing process any antitrust review mechanism that is not required in connection with other types of generating facilities. At the opposite pole is the view that the licensing process should be used not only to nip in the bud any incipient antitrust situation but also to further such competitive postures, outside of the ambit of the provisions and established policies of the antitrust laws, as the Commission might consider beneficial to the free enterprise system. The Joint Committee does not favor, and the bill does not satisfy, either extreme view.

Senator Pastore told the Senate:

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

While the legislative history makes clear the general intent of the Joint Committee and of Congress, many hours of study of history and hearings which formed a basis for PL 91-560 were sterile in the sense of not providing guidance as to the appropriate construction of the specific language of the Act. Of necessity, such guidance has been sought elsewhere.

SITUATION INCONSISTENT WITH THE ANTITRUST LAWS

The first legal concept which needs clarification is the term "situation inconsistent with the antitrust laws". The antitrust laws have for their purpose the promotion and preservation of competition among business entities engaged in interstate or foreign

commerce. In other words, the antitrust laws recognize the right of business entities to compete and the principle that such entities must be prepared to encounter competition by others. In considering alleged violations of the Sherman Act, it is competition which must be preserved and not competitors. The elimination of one or more competitors by competitive conduct is not inconsistent with the Sherman Act.

In U.S. v. Aluminum Co. of America, 148 F. 2d 416, 429 (2nd Cir. 1945), Judge Hand stated:

> "It does not follow because "Alcoa" had such a monopoly, that it "monopolized" the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it.
>
> - - -
>
> Nevertheless, it is unquestionably true that from the very outset the courts have at least kept in reserve the possibility that the origin of a monopoly may be critical in determining its legality; and for this they had warrant in some of the congressional debates which accompanied the passage of the Act. In Re Greene, C.C. Ohio, 52 F. 104, 116, 117; United States v. Trans-Missouri Freight Association, 8 Cir., 58 F. 58, 82, 24 L.R.A. 73. This notion has usually been expressed by saying that size does not determine guilt; that there must be some 'exclusion' of competitors; that the growth must be something else than 'natural' or 'normal'; that there must be a 'wrongful intent', or some other specific intent; or that some 'unduly' coercive means must be used. At times there has been emphasis upon the use of the active verb, 'monopolize', as the judge noted in the case at bar. United States v. Standard Oil Co., C.C. Mo., 173 F. 177, 196; United States v. Whiting,

> D.C., 212 F. 466, 478; Patterson v. United States, 6 Cir., 222 F. 599, 619; National Biscuit Co. v. Federal Trade Commission, 2 Cir., 299 F. 733, 738. What engendered these compunctions is reasonably plain; persons may unwittingly find themselves in possession of a monopoly, automatically so to say; that is, without having intended either to put an end to existing competition, or to prevent competition from arising when none had existed; they may become monopolists by force of accident. Since then Act makes 'monopolizing' a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress, to include such instances. A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins. The most extreme expression of this view is in United States v. United States Steel Corporation, 251 US 417, 40 S. Ct. 293, 64 L. Ed. 343, 8 ALR 1121, from which we quote in the margin; and which Sanford, J., in part repeated in United States v. International Harvester Corporation, 274 US 693, 708, 47 S. Ct. 748, 71 L. Ed. 1302 (Emphasis added). 4/

(See also Cole v. Hughes Tool Co., 215 F. 2d 924 (10 Cir. 1954), cert. den., Ford v. Hughes Tool Co., 348 US 927, 99 L. Ed. 726, 75 S. Ct. 339 (1955)).

4/ Alcoa was found to have violated the Sherman Act because of an illegal scheme to maintain its existing monopoly.

An explanation of the aim of Section 7 of the Clayton Act is suggested in a footnote in Brown Shoe Co. v. U.S., 370 US 294, 72, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962), and in the main decision in U.S. v. Philadelphia National Bank, 374 US 321, 370, 10 L. Ed. 2d 915, 949, 83 S. Ct. 1715 (1963). The Court stated:

> "(S)urely one premise of an antimerger statute such as Sec. 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition."

In the traditional antitrust cases (Sherman and Sec. 7 of the Clayton Act), the emphasis is on "monopoly" and "competition". In this context, if competition flourishes, competitors may be injured or destroyed (see quotation from Alcoa above). In the FTC Act, the emphasis is on prctection of "competitors" and "consumers" from unfair practices regardless of whether or not the forbidden activities affect competition. Thus, when Sec. 5 of the FTC Act is included in the expression "the antitrust laws", one is hemmed in and must move with care between the Scylla of forbidden injury to competition and the Charybdis of forbidden injury to competitors and consumers. Injury to (1) competition, (2) competitors, and (3) consumers are all taboo. For privately owned utilities, there is, for other reasons, a fourth taboo; to wit, injury to stockholders. Thus, one is forbidden (1) to have a scheme to cause forbidden injury to these four

classes, (2) to enter a conspiracy to cause forbidden injury to these four classes. When used alone, the term "scheme" includes also plans, programs or other form of conscious unilateral behavior, the effect of which is to cause the forbidden injury. When used alone, the term "conspiracy" includes contracts, combinations, joint ventures or other form of conscious joint action with others the effect of which is to cause the forbidden injury.

Since the purpose of the antitrust laws is to promote and preserve competition, it follows that a "situation inconsistent with the antitrust laws" must mean anticompetitive conduct. Such anticompetitive conduct may violate the antitrust laws by monopolization, conspiracies in restraint of trade, acquisitions which substantially lessen competition or tend to create a monopoly, unfair methods of competition, or deceptive acts or practices in commerce. For purposes of Sec. 105, such conduct need not amount to a statutory violation if it meets appropriate criteria for determining anticompetitive conduct. The cases dealing with violation of the Sherman Act and the Clayton Act provide little guidance in the selection of appropriate criteria for determining anticompetitive conduct which does not amount to a violation of antitrust laws.

Section 5 of the Federal Trade Commission Act (15 USC 45) is indefinite in that the terms "unfair methods of competition" and "unfair or deceptive acts or practice in commerce" used therein are of uncertain scope. The Supreme Court in a recent decision held that Section 5 of the Federal Trade Commission Act empowered the Federal Trade Commission (hereinafter FTC) 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 and 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. FTC v. The Sperry and Hutchinson Company, 405 US 233, 31 L. Ed. 2d 170, 92 S. Ct. 898 (1972). The court concluded that violations of the antitrust law include conduct that the FTC has defined as an "unfair method of competition" or "unfair or deceptive acts or practices" pursuant to its powers under Sec. 5.

The exploration of the scope of Section 5 of the FTC Act has lead to the development of criteria which we find useful.

The Supreme Court in Sperry gives guidance in quoting from an earlier Supreme Court case giving a broad interpretation to the authority of the FTC. The authority of the FTC was held to reach acts

which were long deemed to be against public policy as evidenced by common law and criminal law, FTC v. R.F. Keppel and Bro., Inc., 291 US 304, 78 L. Ed. 814, 54 S. Ct. 423 (1934):

> "Thenceforth, unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws: nor were unfair practices in commerce confined to purely competitive behavior." Sperry, supra at 244.

The Court also quoted in Sperry at p. 243, a statement from Keppel:

> "It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation." Keppel, supra, at 310.

Similarly, it would not have been a difficult feat of draftsmanship to have restricted the operation of Section 105 of the Atomic Energy Act to violations of the antitrust laws including Section 5 of the FTC Act including "unfair methods of competition" or "unfair or deceptive acts or practices" as determined by the FTC. In fact, the Board in the last sentence essentially drafted such a restriction. However, Congress did not.

In approving FTC's guidelines for construing Section 5 of the FTC Act, the Court in Sperry, p. 244, note 5, quoted factors which the FTC deemed suitable for its use in declaring practices unfair, thus making such practices a violation of Section 5. The Ninth Circuit

quoted the aforesaid list of factors as suitable for the said purpose. Heater v. FTC, 503 F. 2d 321, 323 (9th Cir. 1974). After careful consideration, we deem the use of the aforesaid factors as criteria to be appropriate in supplementing "violation of" the antitrust laws so as to cover the entire area of conduct "inconsistent with" said laws.

In summary, we conclude as a matter of law that "situation inconsistent with the antitrust laws" means anticompetitive conduct, which term includes both violations of the antitrust laws and practices determined to be unfair by the use of the criteria quoted in Heater v. FTC supra. In determining the existence of anticompetitive conduct, each of the following criteria should be considered: (a) conduct which is a violation of the antitrust laws enumerated in Section 105a of the Atomic Energy Act, including conduct heretofore determined to be unfair by the FTC pursuant to Section 5 of the FTC Act; and (b) conduct, without necessarily having been previously considered unlawful, (1) which offend 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.

CAUSAL CONNECTION - NEXUS

Once a Board has found an actual or prospective situation inconsistent with the antitrust laws (anticompetitive conduct), it must consider whether such situation will be created or maintained by activities under the license. The said activities must have a causal connection with the creation or maintenance of the said situation.

The term nexus has been used in City of Lafayette, Louisiana v. SEC consolidated with City of Lafayette, Louisiana v. FPC, Gulf States Utilities Co., intervenor, 147 App. D.C. 98, 454 F. 2d 941 (1971) especially at pages 953 and 956, affirmed sub nomine Gulf States Utilities v. FPC, 411 US 747, 93 S. Ct. 1870, 36 L. Ed. 2d 635 (1973), reh. den. 412 US 944, 93 S. Ct. 2767, 37 L. Ed. 2d 405 (hereinafter called the Gulf States case).

The Commission recognized the need for nexus in the Matter of Louisiana Power and Light Company (hereinafter the LP&L case), Docket No. 50-382A, Memorandum and Order of September 28, 1973, RAI-73-9, pp. 619-622. The Commission pointed out, that the fact of the comingling of power from the licensed facility with the power from the Applicant's other generating facilities "should not be utilized to support the view that an application to construct one nuclear plant somehow authorizes an inquiry into all alleged anti-competitive practices in the electric utility industry." The Commission further said:

> "The hearing issues cannot and should not be divorced from the overriding requirement that there be a reasonable nexus between the alleged anticompetitive practices and the activities under the particular nuclear license" ... We remind the Board and the parties that if it becomes apparent at any point that no meaningful nexus can be shown, all or part of the proceedings should be summarily disposed of."

In this case of first impression, the disagreement of the Parties as to the facts and as to the interpretation of the law, lead the Board to defer rulings on nexus until after a full hearing.

The question of nexus remains a primary and predominant matter which must be resolved as to each alleged anticompetitive practice.

Neither the Gulf States case or the LP&L case defined nexus in such terms as to give assurance in applying the doctrine to proceedings under Section 105 of the Act. The brief of the Parties did not close the hiatus. The Board has, therefore, analyzed the matter in order to reach a modus operandi in the application of the doctrine to this proceeding.

Section 1 of the Act reads, in part, as follows:

> "Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that ... the development, use and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise."

Section 3 of the Act reads, in part, as follows:

> "It is the purpose of this Act to effectuate the policies set forth by providing for ... a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public."

Chapter 10 (Sections 101-110) of the Act carries out the quoted policy and purpose of the Act by authorizing licensing, which includes the licensing of nuclear power plants for the production of electric energy. Such licenses grant to the licensees permission and authorization to carry out the licensed activities. Where the Congress has by legislation provided for the grant for specified rights, it

is axiomatic that the use of activities authorized by such a grant or license cannot create or maintain a situation inconsistent with the antitrust laws. The use of the licensed activities are immune from the antitrust laws. Yet Section 105 of the Act requires a determination that such activities will not create or maintain a situation inconsistent with the antitrust laws. The problem, then, becomes one of determining how activities which are lawful can create or maintain a situation inconsistent with the antitrust laws.

As Judge Hand pointed out in the quotation above from the Alcoa case, since the antitrust laws are criminal as well as civil, intent is an important factor in weighing alleged anticompetitive conduct. If there is evidence of intent to carry out a scheme or conspiracy to achieve an anticompetitive result, the execution of such a scheme is anticompetitive conduct. If the result of the scheme is so clearly anticompetitive that reasonable men would not differ in so characterizing it, then the intent may be presumed.

The means for carrying out an anticompetitive scheme need not be illegal. It is not important whether means for carrying out an illegal scheme are in themselves lawful or unlawful. American Tobacco Co. v. U.S., 328 US 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946).

If lawful activities can be the means of carrying out an anticompetitive scheme, then "activities under the license" can be

causally connected to the anticompetitive conduct. Should this occur, we may appropriately characterize such behavior as the misuse of activities under the license. However, the causal connection must be more than incidental or inconsequential.

Nexus and nexum are both latin nouns derived from the verb necto. The dictionary definitions and the use of these words by outstanding Romans provide a good starting point for our study of "nexus". Cassell's Latin-English and English-Latin Dictionary published by Funk and Wagnalls Co. of New York and London[5/] provides both definitions and usage. On pages 361 and 363, we find the following:

> "necto, nexui and nexi, nexum, 3. I. Lit., A. to tie, bind, fasten, connect, weave or fasten together; catenas, coronam, Hor.; comam myrto, Ov. B. to bind, fetter, enslave, in consequence of debt, Liv.; eo anno plebi Romanae velut aliud initium libertatis factum est, quod necti desierunt, Liv. II. Transf., A. to affix, attach; ex hoc genere causarum ex aeternitate pendentium fatum a Stoicis nectitur, Cic. B. to connect; Cic.; dolum, to plot, Liv.; causas inanes, bring forward, Verg.; numeris verba Ov.
>
> nexum -i, n. (necto), a formal transaction between debtor and creditor, by which the debtor pledged his liberty as security for his debt, Liv.; meton., the obligation created by nexum, Cic.; quum sunt propter unius libidinem, omnia nexa civium liberata nectierque postea desitum, Cic.
>
> nexus - us, m. (necto). I. a binding, tying together, entwining, connecting; atomorum, Cic.; serpens, baculum qui nexibus ambit, Ov. II. Fig., A. legis nexus, Tac. B. the relation or obligation arising from nexum; nexu vincti, Liv.; se nexu obligare, Cic.

5/ The copy used is without date or edition identification. The only clues are the statement that it is in the "231st thousand" and that it was bought about 1920-1925.

In the case of the debtor, the unpaid debt is the proximate and sole cause of the resulting slavery. Thus, in this usage of Livy (T. Livius Patavinus, historian, died 16 BC), nexus is the proximate and sole causal relationship.

Nexus as "entwining" in the quotation from Ovid (P. Ovidius Naso, a poet who died in 16 AD) references a serpent or snake entwined around a rod or staff. This is obviously an allusion to the caduceus which was originally the wand or staff of the Mercury and later was the staff of office used by heralds. In modern times, the caduceus has been adopted as a professional insigne by our medical bretheren.

For those in the nuclear power industry, the most interesting use is that by Cicero (M. Tullius Cicero, orator and philosopher who died 43 BC) who related nexus to the binding force of the atom ("atomerum, Cic."). In his day, this force was so great that the parts of the atom could not be separated. Cassell's Dictionary at page 59, states it thus:

> atomus -i, f. (aropos), that which is incapable of division, an atom, Cic.

Centuries were to pass before Paracelsus Phillippus Aureolus Theophrastus Bombastus von Hohenheim, Swiss born alchemist and

physician (1493-1541), and his fellow alchemists tried in vain to split the atom in order to transmute baser metals such as lead into gold. More centuries were to pass until the beginning of the atomic age, which was ushered in by the successful experiment carried out under the stadium of the University of Chicago in 1942. Even now, while the atom has been harnessed to produce electric energy, the splitting of the atom is no easy task. It requires the exercise of great force in a complex reactor.

If we visualize nexus as meaning a tie, binding events together as tightly as the parts of the atom are bound, then nexus is an extremely tight and intimate bond. If we accept the debtor relationship of Livy, then nexus means the proximate and sole cause of the injury.

While the meaning of nexus to the Romans is instructive and not to be slightingly disregarded, nevertheless we all know that the meanings of words tend to change with the passage of time. Turning now to more recent authorities, we retain the concept that nexus is a shorthand way of expressing a bond or causal connection. The inquiry is still: "how tight a bond?" or "how much causal connection?".

Guidance is provided by Prosser, Handbook on the Law of Torts, 3rd edition (1964) at page 244:

> "The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about. Whether it was such a substantial factor is for the jury (i.e., the trier of facts) to determine, unless the issue is so clear that reasonable men could not differ. It has been considered that 'substantial factor' is a phrase sufficiently intelligible to the layman to furnish an adequate guide in instructions to the jury, and that it is neither possible nor desirable to reduce it to any lower terms. As applied to the fact of causation alone, no better test has been devised."

This concept of causal connection has been used by the courts in treble damage cases. In Zenith Vinyl Fabrics Corp. v. Ford Motor Company, 357 F. Supp. 133, 137 (E.D. Mich. 1973), the court states:

> "In addition, plaintiff must establish that the alleged violation of the antitrust laws was a "material cause" of or a "substantial factor" in the occurrence of his injury. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 US 690, 702, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962); Bigelow v. RKO Radio Pictures, 327 US 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946); Note, Standing to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 Colm. L. Rev. 570, 575-6 (1964)."

In Karseal Corp. v. Richfield Oil Corp., 221 F. 2d 358, 362 (9th Cir. 1955), the Court stated:

> "Our problem is whether the facts as alleged show the necessary causal relationship. Richfield relies on an absence of <u>proximate cause</u> and directness of injury from the facts pleaded. In a private antitrust suit, the plaintiff must not only allege a violation of the antitrust laws, but <u>damage to the plaintiff proximately resulting</u> from the acts and conduct which constitute the violation. Feddersen Motors v. Ward, 10 Cir., 1950,

> 180 F. 2d 519, 522; Clark Oil Co. v. Phillips Petroleum Co., 8 Cir., 1945, 148 F. 2d 580, 582, certiorari denied 326 US 734, 66 S. Ct. 42, 90 L. Ed. 437; Northwestern Oil Co. v. Socony-Vacuum Oil Co., 7 Cir., 1943, 138 F. 2d 967, certiorari denied 321 US 792, 64 S. Ct. 790, 88 L. Ed. 1081; Glenn Coal Co. v. Dickinson Fuel Co., 4th Cir., 1934, 72 F. 2d 885, 887; Myers v. Shell Oil Co., D.C.S.D. Cal. 1951, 96 F. Supp. 670, 674 (Emphasis added).

The Staff's shot was in the bull's eye when it cited Municipal Electric Association of Massachusetts v. SEC, 413 F. 2d 1052 (DC Cir. 1969). That case was remanded to SEC because the allegations of the plaintiffs, if proved, would be a basis for a finding of a situation inconsistent with the antitrust laws. Plaintiff alleged the existence of conspiracy to monopolize by exclusion of Plaintiffs from participation in nuclear power plants. Moreover, the capital structure of Yankee was such that the acquisition of the stock carried with it acquisition of all of the low cost power to the exclusion of the municipals. In this connection, the Court said:

> "The control challenged by Municipals is tied in significant manner to the organization of the stock ..."

In other words, the refusal of access was tied in significant manner (had nexus) to a conspiracy which allegedly created or maintained a situation inconsistent with the antitrust laws (an illegal conspiracy to monopolize).

Justice and Intervenors argue that the existence of a situation inconsistent with the antitrust laws and the simultaneous existence of activities under licenses to build and operate a nuclear reactor automatically supply a bond which is a basis for nexus. Thus Justice on p. 226 of its Brief and Proposed Findings of Fact dated October 8, 1974 states:

> "This power will not and cannot be marketed in isolation ... the Midland units will be integrated into Applicant's system and coordinated with generation of other systems through the regional power exchange market."

Intervenors in their Memorandum Considering the Effect of Commission's Opinion in the Matter of Louisiana Power and Light Company dated October 18, 1973 at page 13 states:

> "In judging the closeness of the relationship that should be shown between the relief claimed necessary and the operation of the plant, it should again be stressed that Consumers Power is operating an integrated system."

After careful consideration, the very tight, almost unbreakable, causal bond of Cicero and his compatriots is rejected as a basis for finding nexus. Also, the very loose incidental and inconsequential bond urged by Justice and Intervenors is rejected as a basis for finding nexus. In the middle ground used by current legal authorities, the kind of bond which is a basis for nexus is found. Nexus 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 or effect of which is to cause the creation or maintenance of said situation.

MISUSE OF ACTIVITIES UNDER THE LICENSE

The problem now becomes one of distinguishing between use and misuse of activities under the license. Upon reflection, it appears that a study of a more mature branch of the law which deals with an analogous problem can be enlightening.

The best analogy is found in the patent law. Both the license granted by the Nuclear Regulatory Commission and the patent granted by the Commissioner of Patents stem from statutory Congressional actions. In both, activities within the scope of the grant are immune from the reach of the antitrust laws. In both, misuse beyond the scope of the grant is subject to antitrust scrutiny. In both, misuse may, but need not, amount to a violation of the antitrust laws. In both, the penalty for misuse is a requirement that the misuse be purged before the benefits of the grant may be enjoyed. Thus, in the nuclear power facility license case, the grant may be

withheld or suspended or conditioned to bring about discontinuance of the misuse and, in the patent case, enforcement by the courts of the patentee's exclusive rights is denied pending discontinuance of the misuse. Accordingly, the differentiation between use and misuse in the patent law is completely analogous and gives reliable guidance.

Pursuant to public policy and statues implementing it, inventors are granted, for a period of time, an exclusive right to practice the inventions described and claimed in their Letters Patent. The exercise of this exclusive right is not per se anticompetitive conduct.

The owner of a patent has the right to sell it or to keep it, to manufacture the article himself or to license others to manufacture it, to sell such article himself or to authorize others to sell it. E. Bement & Sons v. National Harrow Co., 186 US 70, 46 L. Ed. 1058, 22 S. Ct. 747 (1902); Heaton - Peninsula Button Fastener Co. v. Eureka Specialty Co., 35 ALR 728, 732, 25 CCA 267, 274, 47 US App. 146, 160, 77 F. 228, 294 (quoted with approval in the Bement case); Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 US 405, 52 L. Ed. 1122 (1908); Hartford Empire Co. v. U.S., 323 US 386, 65 S. Ct. 373, 89 L. Ed. 322 (1944). U.S. v. Line Material Co., 333 US 289, 309, 92 L. Ed. 701, 718, 68 S. Ct. 550 (1947). All such conduct is proper use of the grant and is immunized from the antitrust laws.

Patents have an interesting feature: A patentee receives financial rewards by the practice of the patented invention. In doing this, he automatically provides to the public the advantages thereof, either by making available to the public a new product, a better product or cheaper product. In other words, activities under a patent redound to the benefits of the public.

This same principle applies to license for the construction and operation of a nuclear reactor. In order to derive a benefit, the licensee must operate the reactor to generate electric energy and sell such energy. Every customer, wholesale and retail, receives the benefit of a nuclear power source, which is independent of fossil fuel, and the benefit of lower costs which will be part of the pricing procedure. Also, the retail customers of the licensee's wholesale customers will similarly benefit. Thus, the public automatically has access to and receives benefits by the availability of the electric energy from activities under the license.

There are many instances where the conduct of a patentee has been held to be a violation of the antitrust laws. Let us review a few instances of violation and then evolve a broad conclusion as to how this can be.

A patent owner who exercised his exclusive legal right under the patent grant to sell a patented produce and who as a part of that

sale attempts to fix the price of another product containing the patented product violates the antitrust laws. Ethyl Gasoline Corp. v. U.S., 309 US 436, 60 S. Ct. 618, 84 L. Ed. 852 (1940); U.S. v. Univis Lens Co., 316 US 241, 62 S. Ct. 1088, 86 L. Ed. 1408 (1942).

The sale of a patented product on condition that the vendee must also purchase an unpatented product (a tying contract) is a misuse of the patent. Mercoid Corporation v. Mid-Continent Co., 320 US 661, 88 L. Ed. 376, 64 S. Ct. 268 (1953). It is also a violation of the antitrust laws. International Salt Co. v. U.S., 339 US 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947). White Motor Co. v. U.S., 372 US 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963).

Misuse of patent licenses, which licenses are legal activities under the patent grant, as part of a contract or conspiracy to monopolize or restrain trade is a violation of the antitrust laws. U.S. v. Masonite Corp., 316 US 265, 62 S. Ct. 1070, 86 L. Ed. 1461 (1942); U.S. v. Singer Manufacturing Co., 374 US 174, 83 S. Ct. 1773, 10 L. Ed. 2d 823 (1963), U.S. v. Line Material Co. supra.

The formation of joint ventures in Canada and other countries to exploit the patented inventions of the joint venturers (agreement not to compete) is a violation of the antitrust laws since it adversely affected the foreign commerce of the United States, U.S. v. ICI, 100 F. Supp. 504 (S.D.N.Y. 1951).

In each of the above instances, the misuse of activities under the patent grant constituted a material element and a significant factor of the scheme or conspiracy which violated the antitrust laws. In other words, a meaningful tie or nexus existed between the misuse of activities under the patent grant and the conduct which violated the antitrust laws.

The grant of a patent, while immunizing activities under the patent, does not immunize from the reach of the antitrust laws conduct not fairly or plainly within the grant, U.S. v. Masonite, supra. To state the proposition another way; a scheme forbidden by the antitrust laws does not become immunized because a significant factor or material element in carrying out the scheme is, per se, lawful. American Tobacco Co. v. U.S., supra.

If patent misuse exists, such misuse need not amount to a violation of the antitrust laws. The Supreme Court in Morton Salt Co. v. Suppiger Co., 314 US 488, 86 L. Ed. 363, 62 S. Ct. 402 (1941) stated that courts sitting as courts of equity would not grant injunctions in patent infringement suits while the patentee was engaged in practices contrary to the public policy as evinced by the Constitution and patent law. See also United States v. U.S. Gypsum Co., 333 US 364, 92 L. Ed. 746, 68 S. Ct. 525 (1948), Zenith Radio Corp.

v. Hazeltine Research, Inc., 395 US 100, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1968), Berlenbach v. Anderson and Thompson Ski Co., 329 F. 2d 782 (9th Cir. 1964) and Laitram Corporation v. King Crab, Inc., 245 F. Supp. 1019 (D. Alaska 1965) quoted in Zenith supra at 140.

While patent law has been discussed because patent law is completely analogous to our problem, other analogies can be found. One is the field of labor law. Just as we did not discuss patent law in detail, we will not discuss labor law in detail.

The Supreme Court recently decided a case involving labor and the antitrust laws. This case contains an excellent summary of the present status of the law and discussion of the principles involved:

> "The basic source of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 15 USC § 17 and 29 USC § 52, and the Norris-La-Guardia Act, 29 USC §§ 104, 105 and 113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts from the operation of the antitrust laws. See United States v. Hutcheson, 312 US 219 (1941). They do not exempt concerted action or agreements between unions and nonlabor parties. UMW v. Pennington, 381 US 657, 662 (1965). The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. Meat Cutters Local 189 v. Jewel Tea Co., 381 US 676 (1965).

The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. See UMW v. Pennington, supra, at 666; Jewel Tea, supra, at 692-693 (opinion of MR. JUSTICE WHITE). Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, e.g., American Federation of Musicians v. Carroll, 391 US 99 (1968), the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market. See Allen Bradley Co. v. IBEW Local 3, 325 US 797, 806-811 (1945); Cox, Labor and the Antitrust Laws - A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965).

. . . .

Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the antitrust laws strive to protect.

. . . .

This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from nonunion firms. But the methods the union chose are not immune from antitrust sanctions simply because the goal is legal." (Emphasis added) Connel Construction Co., Inc. v. Plumbers and Steamfitters, Local Union No. 100, etc. ___US ____, Slip opinion 73-1256, June 2, 1975, pages 4-8.

Though the Supreme Court did not employ the words use and misuse, the principles are the same. The granted exemption from the antitrust laws only applies as long as the said exemption is used within the exemption and not misused as evidenced by conduct beyond the scope of the exemption.

Furthermore, in Allen Bradley Company et al v. Local Union No. 3, 325 US 797, 809, 810, 89 L. Ed. 1939, 1948, 65 S. Ct. 1533 (1944), the Court said:

> "Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to agree to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers [illegible] with one another to monopolize all the business in New York City, to bar all other businessmen from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. Apex Hoisery Co. v. Leader, supra, (310 US 503, 84 L. Ed. 1329, 60 S. Ct. 982, 128 ALR 1044). But when the unions participated with a combination among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.
>
> . . . .

> Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. This, it is argued, brings about a wholly undesirable result - one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. Apex Hoisery Co. v. Leader, 310 US 469, 84 L. Ed. 1311, 60 S. Ct. 982, 128 ALR 1044, supra." (Emphasis added)

No clearer statement has been found of the reasoning followed by this Board. The unions ran afoul of the antitrust laws because their activities became a part of a larger scheme or conspiracy which created a situation inconsistent with the antitrust laws.

Providing additional support is United Mine Workers v. Pennington, 381 US 657, 665, 667, 14 L. Ed. 2d 626, 633, 634, 85 S. Ct. 1585 (1954):

> "We have said that a union may make wage agreements with a multiemployer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." (Emphasis added)

Further guidance has been found in other cases cited in Connel supra.

In summary, the activities of a union under the Congressional grant of immunity from the antitrust laws are lawful provided said activities are within the scope of the grant, as provided by Congress in statutes and as interpreted by the courts. However, when the activities under the grant are misused by being a material element and a substantial factor in a scheme or conspiracy which creates a situation inconsistent with the antitrust laws, then the said activities are no longer immune from the reach of the antitrust laws.

From the above authorities, we learn that 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. The aforesaid use of activities under a Federal grant cannot create or maintain a situation inconsistent with the antitrust laws.

Similarly, the misuse of activities under a Federal grant by conducting activities under the guise of the grant which go beyond its scope and for a different purpose is not immunized from the antitrust laws. The aforesaid misuse of activities under a Federal grant can create or maintain a situation inconsistent with the antitrust laws where there is nexus between said activities and said situation.

We conclude as matters of law that:

(a) Nexus exists between otherwise lawful activities under a proposed license and a situation inconsistent with

the antitrust laws, if, and only if, the said activities are misused so as to be a material element and a substantial factor in a scheme or conspiracy the purpose or effect of which is to cause the creation or maintenance of said situation.

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

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

TIME PERIODS

In weighing the evidence, consideration must be given to the time period relating to alleged situations inconsistent with the antitrust laws and alleged misuse of activities under the license.

Save in unusual circumstances, the findings of fact and conclusion of law in an antitrust proceeding under Section 105 of the Act will be based on the record of the antitrust proceeding.

If the question is creation of a situation inconsistent with the antitrust laws; then the alleged situation and the alleged misuse of activities under the license must occur after the grant of the license. The only relevant and material facts of record will be those tending to prove or disprove the existence of a scheme or conspiracy to create such situation by said misuse. (In the case of a conspiracy, no implementing acts are needed to create a situation inconsistent with the antitrust laws.)

If the question is the maintenance of a situation inconsistent with the antitrust laws; then the alleged situation must be in existence on the date the record is closed and the alleged misuse of activities under the license must occur after the grant of the license. The relevant and material facts of record will be those tending to prove or disprove the existence of said alleged situation and those tending to prove or disprove the existence of an alleged scheme or conspiracy to maintain such situation by said alleged misuse.

The present proceeding is under the grandfather provision of subsection 105(c)(8) of the Act. The construction permits for Midland

Units 1 and 2 were issued on December 15, 1972. Theoretically, there could have been misuse of activities under the license between December 15, 1972 and the close of the antitrust evidentiary hearing on June 20, 1974. Actually, the allegation of misuse is related to future activities under the operating license which had not been granted prior to June 20, 1974. Accordingly, the findings of fact and conclusions of law will follow the rules above stated.

MOOTNESS

A situation inconsistent with the antitrust laws in existence at the close of the evidentiary record could have begun at any previous time. With agreement of the Parties, to keep the record within reasonable bounds, only situations with regard to which there is evidence of existence after January 1, 1960 will be considered.

There must also be considered whether a situation inconsistent with the antitrust laws, which was in existence at some time in the period January 1, 1960 to June 20, 1974, ceased to exist at some time prior to June 20, 1974. If, in fact, such a situation ceased to exist prior to the close of the record, activities under the license cannot maintain the nonexistent situation. The difficulty, of course, will be the determination as to whether the last act disclosed in the record was the end of the situation. While this determination is one of fact, the cases provide some guidance.

> "When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of antitrust laws, courts will not assume that it has been abandoned without clear proof. ... It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." United States v. Oregon State Medical Soc., 343 US 326, 333, 96 L. Ed. 978, 985, 72 S. Ct. 690 (1952).

In United States v. W.T. Grant Co., 345 US 629, 97 L. Ed. 1303, p. 1309, 73 S. Ct. 894 (1953), the Court said:

> "Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.
>
> . . .
>
> The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one. Here the defendants told the court that the interlocks no longer existed and disclaimed any intention to revive them. Such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts."

Under some circumstances, a discontinuance of twelve years duration is not long enough to render the matter moot. U.S. v. Aluminum Co. of America, 148 F. 2d 416 at p. 447. Further guidance is supplied by a holding of mootness by the Eighth Circuit Court of Appeals in Dyer v. Securities and Exchange Commission, 291 F. 2d 774, (8th Cir. 1961).

In that case, no evidence was presented that, in the three years after the defendant had originally violated the rules of the SEC, that the defendant had violated any rules even though similar opportunities existed. The defendant had continued all of his previous activities except that he did not violate any SEC rules.

The Third Circuit Court of Appeals in Independent News Co. v. Williams 404 F. 2d 758, 761 (3rd Cir. 1968) held:

> "While it did not make any specific finding as to the bona fides of defendant's future intent with respect to resuming the complained of practice, the district court did find that defendant's sources have dried up as a result of plaintiffs' effective policing of their contracts and that the complained of practice has been discontinued for several years. It is a reasonable inference that the complained of practice cannot be resumed so long as plaintiffs continue policing the contracts. Therefore the likelihood of defendant's being in a position, even if he so desired, to resume the practice is minimal at best, and we think that, in these circumstances, the district court was acting well within its prescribed discretionary limitations in refusing injunctive relief. U.S. v. W.T. Grant Co., 345 US 629, 73 S. Ct. 894, 97 L. Ed. 1303 (1952); U.S. v. Article of Drug, etc. supra, 362 F. 2d 923, 928 (3rd Cir. 1966)."

In Independent News, the plaintiff was actively enforcing plaintiff's contractual obligations with third parties who were dealing with the defendant. The Applicant's contracts with other utilities are now under the jurisdiction of the FPC which must consider antitrust aspects of matters submitted to it. Though not strictly analogous to

Independent News, a factor in determining mootness as to a discontinued contractual activity would be the present jurisdiction of the FPC. Furthermore, agressive smaller utilities could be relied upon to alter the FPC to evidence of renewed anticompetitive contractual provisions.

The Board concludes that a situation is "maintained" if the situation is in existence on the close of the record or if there is a reasonable expectation that the wrong will be repeated based on some cognizable danger of recurrent activity beyond the mere possibility of such a happening. In making its determination of cognizable danger of recurrent activity, the Board will consider subsequent events that make it absolutely clear that the behavior could not reasonably be expected to reoccur, including but not limited to evidence of continuing activities which no longer exhibit the behavior, changes in status of the Applicant which prevents or obviates any necessity or reason for the behavior, observation of the demeanor of any witnesses testifying to cessation of such activities, or other additional factors which would bear on the cessation of the activities.

COORDINATION - NET BENEFITS

The relevant matters in controversy in this proceeding all deal with "coordination" activities. Much testimony, including

documents and exhibits, was concerned with benefits of coordination. Justice, Staff and Intervenors seek the benefits of coordination for the smaller utilities in the relevant geographic market. The Applicant through the hearing espoused the view that any alleged agreement to coordinate must provide a net benefit to the Applicant. However, no party discussed the legal requirement for a net benefit in their briefs. The law, as we read the law, imposes the requirement of a net benefit upon each party, including the Applicant, and hence, imposes a duty upon the management of the Applicant to seek such benefits. A brief exposition of this legal principle is in order.

First, the Applicant is both a public utility and a private corporation. The Applicant, as a public utility, provides retail electric power to the public and wholesale electric power to the smaller utilities in the lower peninsular of Michigan. The retail sales of Applicant are regulated by the Michigan Public Service Commission (hereinafter MPSC); its wholesale sales are regulated by the FPC. The Applicant has stockholders and creditors as a private corportation. Thus, to analyze the need for the requirement of a net benefit, we must examine public utility law and private corporation law.

As a public utility, the Applicant has the obligation to serve the public in its area which no private corporation would have. A private corporation may at will discontinue an unprofitable line of business but a public utility may be required by a regulatory commission in the public interest to continue service, Michigan Consolidated Gas Co. v. FPC, 283 F. 2d 204, 205 (DCCA 1960), rehearing den. (1960), or to serve some parts at less profit or a loss, Minneapolis Gas Company, Inc. v. FPC, 278 F. 2d 870 (DCCA 1960), reh. den. (1960). These requirements to serve and the rate that service is provided are regulated by a public body, a regulatory commission. The choice is not up to the utility.

Yet within this area, the utility does have an obligation to "operate with all reasonable economies" which applies "to tax savings as well as economies of management.", El Paso Natural Gas Co. v. FPC 281 F. 2d 567, 573 (5th Cir. 1960), cert. den. 366 US 912, 6 L. Ed. 2d 236, 81 S. Ct. 1083 (1961), reh. den. 366 US 955, 6 L. Ed. 2d 1247, 81 S. Ct. 1901 (1961). That Court continued:

> "This we consider to be the natural and necessary consequence of rate regulation." El Paso supra at 573 (Emphasis added).

The rates that a utility may charge must not be confiscatory and must provide just compensation. Ames v. Smith, 169 US 466, 42 L. Ed. 819 (1897). Over the years, many rate cases have occurred,

and the general principle is that the method of setting the rate is unimportant (FPC v. Hope Natural Gas Co., 320 US 591, 88 L. Ed. 333, 64 S. Ct. 281 (1934)). However, the ordinary purpose of the rate is to provide "actual compensation for the services" and includes "reimbursement for expenses incurred in performing the service, return on investment used in the service, and a reasonable profit on the transaction." Summerfield v. Civil Aeronautics Board, 207 F. 2d 200, 204 (DCCA 1953) affirmed, sub nomine, Western Airlines v. C.A.B., 347 US 67, 98 L. Ed. 508, reh. den. 347 US 924, 98 L. Ed. 1078 (1954). The same Court defines:

> "A 'just and reasonable' rate is one that assures that all the enterprise's legitimate expenses will be met, and that enables it to cover interest on its debt, pay dividends sufficient to continue to attract investors, and retain a sufficient surplus to permit it to finance down payments on new equipment and generally provide both the form and substance of financial strength and stability." D.C. Transit System v. Washington Metropolitan Area Transit Commission, 350 F. 2d 753, 778 (DCCA 1965)."

(See also Payne v. Washington Metropolitan Area Transit Commission, 415 F. 2d 901, 913 (DCCA 1968)). Last, the 'costs of service that a regulated utility provides should, as far as possible, be borne by those who are served as they are being served." Williams v. Washington Metropolitan Area Transit Commission, 415 F. 2d 922, 951 (DCCA 1968). As a corollary, those not being served should not bear the cost of serving others, "as far as possible."

In summary, those served by a utility should be charged a rate which includes all legitimate expense, a return on investment, and profit to the owners, and customers should bear only the cost of being served.

Now turning to a private corporation: first, a private corporation is organized to make a profit for the owners. The officers and directors are obligated not to waste the assets of the corporation:

> "It is the general law, as well as that of California and Utah, that in the absence of statute or corporate chapter provision, a corporation cannot divert its property by gift or by indirect means without consideration or benefit to the corporation and such acts cannot be ratitifed by the Board of Directors." In re John Rich Enterprises, Inc., 481 F. 2d 211, 214 (10th Cir. 1973) (Emphasis added).

That Court then immediately quoted Knox v. First Security Bank of Utah, 196 F. 2d 112, 117 (10th Cir. 1952) which in part stated that:

> "[T]he alienation or disposition of property of a corporation in that manner constitutes a violation of the rights of the stockholders and is ultra vires."

The Seventh Circuit Court of Appeals has also discussed transfer of property:

> "Its disposition without adequate consideration would generally, if not always, constitute a fraud on the stockholder." MacDonald v. Commissioner of Internal Revenue, 230 F. 2d 534 (7th Cir. 1956)."

Though the charter of the Applicant permits donations for public welfare, such a provision is limited to an eleemosynary class comprising scientific, educational and charity purposes. (An early Michigan Supreme Court held that a corporation could not spend large amounts of the money available for dividends for a public purpose to the detriment of the stockholders, Dodge v. Ford Motor Company, 204 Mich. 459, 170 N.W. 668, 3 ALR 413 (Sup. Ct. Mich. 1919). The cases cited supra on rates indicate that the corporation must make money if it can do so (see D.C. Transit System, and Summerfield, supra).

In summary, the officers and directors of a corporation have an obligation not to waste the assets of the corporation by donation of assets for noneleemosynary purposes.

Thus, the officers and directors of a public utility, which is also a private corporation, have a dual set of obligations: to the public served and to the owners. The officers and directors must do all that they can to make the operation efficient. Congress has encouraged and therefore permitted coordination arrangements between utilities. These coordination arrangements often result in decreased costs to the utility. The officers and directors should enter into coordination arrangements if a benefit to the utility results. They do not have an obligation to enter into alleged coordination agreements

from which no net benefit results. (Obviously, part of the arrangement may be a benefit and part may result in a detriment. The benefits must outweigh the detriments, i.e., a net benefit to the utility must result.) To coordinate with a competitor without any net benefit would injure either 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. Definitions 12 through 16 hereinabove were written with this legal principle in mind.

RESERVE SHARING

In the introductory discussion of the electric industry, the advantages of reserve sharing between two utilities were mentioned briefly. Since reserve sharing is the first step in operation coordination (see definitions nos. 25 and 27), it is a matter of prime importance in considering coordination. It deserves a more detailed discussion both as to its practical and its legal ramifications.

The record abounds with hypotheticals not based on facts concerning the benefits of reserve sharing. The general assertion gleened

from literally hundreds of pages of testimony and cross examination is: if two isolated systems are combined, the reserves in Mw required by the combined system are less than the sum of the reserves required by the systems when isolated. The Board has been shown no fact situation nor even a hypothetical that is to the contrary. But that is really not in dispute among the Parties. The dispute is how that difference shall be divided among the systems joining together and how the reserve requirements should be calculated.

If the combined system requires less reserve in Mw than the sum of the Mw reserve required of the isolated systems, then all the utilities of the combined system benefit if each utility receives some of that difference. This is a truism. The difficulty occurs if the required reserves of the combined system are allocated rather than the difference between the reserves in Mw of the combined system and the sum of the required reserves of systems in isolation.

Intervenors and Justice put forth the general proposition that each system should maintain reserves in the same proportion to system load as the combined system must maintain reserves in relation to the combined system load (alleged to be the "Gainesville Formula" or the "Equal Percentage" formula). The implication is that all Parties benefit because each contributes the same "percentage"

of its load as reserves and each is required to keep less actual reserves. If one counter example can be shown which would require one system to increase its reserve in Mw under such an arrangement,[6/] this would mean that the difference in reserves would not be split so that each system receives some benefit. The Applicant has produced such a counter example [Exhibit CP 11104]. The Board has constructed several less elaborate counter examples. Two examples are shown in the footnote.[7/] Furthermore, the implication has been that even if one Party were to have to keep increased reserves, that Party would be the larger utility. The Board's counter examples not only

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6/ Consider the following which illustrates this principle:

STATEMENT: The square root of each number from 1 to 16 is a whole number

Proof by hypotheticals: (1) suppose the number is 4;
$\sqrt{4} = 2$, a whole number

(2) suppose the number is 9;
$\sqrt{9} = 3$, a whole number

(3) suppose the number if 16;
$\sqrt{16} = 4$, a whole number

FALSE CONCLUSION: Statement is true

COUNTER EXAMPLE: Suppose the number is 2
$\sqrt{2} = 1.414$, not a whole number

CORRECT CONCLUSION: Statement is false

7/ See pages 75 and 76

7/ Example 1:

Two systems each using the "largest unit in reserve" criterion are combined to form another system which also uses the "largest unit in reserve" criterion. The loads, required reserves, and capabilities are shown below:

	System A	System B	Combined System
Required reserves	40	5	40
Load (4x40)	160	(9x5) 45	210
Capability	200	50	250
Required reserves (% of load)	25.000	11.111	19.047

(NB Required Reserves + Load = Capability, i.e., the load is the maximum load permitted while maintaining the required reserves. The phrase (4x40) means 4 units rated at 40. Similarly for 9x5.)

The required reserves of the combined system is (40/210) x 100% or 19.047 of the load on the combined system.

If each system is required to keep required reserves equal to the same percentage of its load as the combined system, then the load required reserves and capabilities are shown below.

	System A	System B	Combined System
Required reserves	32	8	40
Load	168	42	210
Capability	200	50	250
Required reserve (% load)	19.047	19.047	19.047

Obviously, the smaller system's (System B) reserve requirement has increased from 5 to 8 as a result of Coordination on an "Equal Percentage Reserves" sharing basis.

Footnote 7/ continued

Example 2:

Two systems each using the "largest unit in reserve" criterion are combined to form another system which also uses the "largest unit in reserve" criterion. The loads, required reserves, and capabilities are shown below:

	System A		System B	Combined System
Required reserves	10		20	20
Load (9x10)	90	(1x20)	20	120
Capability	100		40	140
Required reserves (% of load)	11.11		100.00	16.67

The required reserves of the combined system is (20x120) x 100% or 16.67% of the load on the combined system.

If each system is required to keep required reserves equal to the same percentage of its load as the combined system, then the load required reserves and capabilities are shown below.

	System A	System B	Combined System
Required reserve	14.29	5.71	20.00
Load	85.71	34.29	120.00
Capability	100.00	40.00	140.00
Required reserve (% load)	16.67	16.67	16.67

Obviously, the larger system's (System A) reserve requirement has increased from 10 to 14.29 as a result of coordination on an "Equal Percentage Reserves" sharing basis.

disprove the general statement that both Parties benefit but also disproves the more restricted statement that the smaller system always benefits. Clearly, the "Gainesville Formula" applied indiscriminately is impractical and may be unfair to either the larger or the smaller Party. In other words, the general statement is: Sharing reserves on "an equal percentage" basis does not always result in each party receiving a benefit but may actually require increased reserves of one party or the other.

THE GAINESVILLE FORMULA

Because the "Gainesville Formula" has been discussed at length (but mainly in hypothetical context, not based on facts in this case) in this hearing, we feel that we must discuss the case which is alleged to have approved the "Gainesville Formula". Florida Power Corporation v. Federal Power Commission, 425 F. 2d 1196 (5th Cir. 1970), reversed in part sub nomine, Gainesville Utilities Department v. Florida Power Corporation, 402 US 515, 29 L. Ed. 2d 74, 91 S. Ct. 1592 (1971).

The history of the case is illuminating. Gainesville, after efforts to negotiate an interconnection with Florida Power Corporation had failed, filed an application with the FPC seeking an order under § 202(b) requiring Florida Power to interconnect with Gainesville, and at the same time filed a complaint with the FPC charging

Florida Power with unlawful disconnection under §§ 205 and 206 of the Federal Power Act, 16 USC §§ 824d, 824e for failure to agree to an interconnection. (Gainesville, supra, at 521 and footnote 4, at 521)

> "Following extensive hearings, an examiner for the FPC ruled that the interconnection was in the public interest and that it would not place an undue burden on Florida Power. The Commission affirmed the findings and further found that the interconnection would neither compel Florida Power to enlarge its generating facilities nor impair its ability to serve its customers. The Commission ordered the interconnection but on conditions (1) that Gainesville pay the entire $3 million cost of the interconnection, and (2) that Gainesville would maintain generating capacity resources at least equal to 115% of its peak load [the so-called 'Gainesville Formula'] ... The order also fixed the rates of compensation to be paid for actual energy transfers across the interconnection." (Gainesville supra at 522)

Florida Power appealed that order on grounds (1) "the Federal Power Act, 16 USCA § 791a, et seq., does not give the Commission jurisdiction to order a privately owned power company to interconnect with those of a municipally owned system that both generates and distributes its own power" and, (2) "the Commission's basic policy concerning terms upon which an interconnection will be ordered is questioned" (Florida Power, supra, at 1197). The Fifth Circuit Court of Appeals held that the FPC could order that interconnection but refused to enforce the order 'insofar as it fails to compensate Florida Power for making available large quantities of backup power at the interconnection" and this was inconsistent with the statute (Florida Power,

supra at 1197).

Both Gainesville and the FPC appealed (Gainesville, supra, at 515). "Respondent, Florida Power, does not challenge the Commission's order except in its omission of a term or condition that Gainesville pay approximately $150,000 annually as "Compensation or reimbursement reasonably due" respondent for backup service effected by the interconnection." (Gainesville, supra, at 522). The FPC had rejected that contention. "The Court of Appeals for the Fifth Circuit held that, because of the omission of such a term or condition, 'the terms of the connection do not adequately satisfy the statutory requirements' because they do not provide Florida Power with the 'reimbursement reasonably due' it." (Gainesville, supra, at 517). The Supreme Court reviewed this holding and remanded the case "for the entry of a new judgment enforcing the Commission's order in its entirety." (Gainesville, supra, at 517). N.B., the only issue before the Supreme Court was the omission of the standby charge. That omission was the only subject objected to by respondent, Florida Power, and the only subject held to be faulty by the Court of Appeals. The Supreme Court based its holding on general law and Section 313(b) of the Federal Power Act, 16 USC § 8251(b): "the finding of facts, if supported by substantial evidence, shall be conclusive." The Supreme Court then examined the studies of the FPC as reported with record of

the hearings in the Commission and concluded that substantial evidence existed. Then the Court stated: "[T]he Court of Appeals erred in not deferring to the Commission's expert judgment." (Gainesville, supra, at 527).

Thus, neither the Supreme Court nor the Court of Appeals for the Fifth Circuit either explicitly or implicitly approved the "Gainesville Formula". Neither Court had that "formula" before it. Neither commented on the "formula". The Supreme Court merely deferred to the expertness of the Commission.

Last, as discussed previously, no formula would be correct in all situations. As the engineering witness for Justice testified:

> "Q. Would it require a specific study to determine this?
>
> A. Very definitely. If you are attempting to coordinate a small system with a large system, you have to examine the impact upon the large system's reliability or the requirement for additional reserves on his part, and this would be accomplished through the appropriate probability studies."

The Gainesville order emphasizes complexity of the balancing. See Florida Power, supra.

The "Gainesville Formula" as shown in the discussion of reserve sharing supra, does not provide benefits to all Parties, including the smaller utility, in all cases. The "Gainesville Formula"

applied indiscriminately may be unfair to either Party. We find as a matter of fact that the "Gainesville Formula" was not explicitly approved by the courts and is not of universal application. The task of weighing and approving coordination agreements has been alloted by the FPC Act to the FPC. It has primary jurisdiction and is staffed to perform this function. We conclude on a matter of law that any approval of a coordination agreement should be determined after a careful study by the agency with the jurisdiction in the area: The Federal Power Commission.

REFUSAL TO COORDINATE

One specific type of conduct covered by the relevant matters in controversy is refusal by Applicant to coordinate with the smaller utilities in the relevant geographic market. Before examining the facts, we shall explore the legal aspects of such a refusal, assuming that it has occurred. Normally the antitrust laws are concerned with activities as distinguished from refusal to act.

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. At common law, there is no duty to save a drowning man. In order for a statute to impose such a duty, it must be clearly spelled out. For example, statutes requiring that:

> "The Coast Guard ... shall develop, establish, maintain and operate ... rescue facilities for the promotion of safety ..." [14 USC § 2].

and further that:

> "In order to render aid to distressed persons, vessels and aircraft ..., the Coast Guard may (1) perform any and all acts necessary to rescue and aid persons and protect and save property ..." [14 USC § 88a].

have been uniformly held to fall short of creating a government duty of affirmative action to aid a person in distress, Frank v. U.S., 250 F. 2d 178 (3rd Cir. 1957), cert. den. 356 US 962, 78 S. Ct. 1000, 2 L. Ed. 2d 1069, U.S. v. Sandra & Dennis Fishing Corp., 372 F. 2d 189 (1st Cir. 1967), cert. den. 389 US 836, 88 S. Ct. 48, 19 L. Ed. 2d 98 (1967). Of course, if the Coast Guard undertakes a rescue, it has a duty not to cause injury by its negligence, U.S. v. Sandra & Dennis Fishing Corp., supra. U.S. v. Gavagan, 280 F. 2d 319 (5th Cir. 1960), cert. den. 364 US 933, 5 L. Ed. 2d 365, 81 S. Ct. 379. However, this latter point is not reached if there is a refusal to give assistance.

The reason that a refusal to give aid is not unlawful is that he who refuses to help does not cause injury. Since he does not participate in the events, the causation must be from some other source. On the other hand, if the erstwhile inactive party does go to the rescue, and in so doing causes injury, then liability may be found. See U.S. v. Sandra & Dennis Fishing Corp. and U.S. v. Gavagan, both supra.

In the parable of the Good Samaritan, neither the priest nor the Levite caused the condition of the man left by the roadside. The robbers did that. In the parable of Lazarus, the rich man did not cause the poverty of Lazarus or Lazarus' sores. They were caused by events extrinsic to the rich man's conduct.

Similarly, where a small utility has difficulties arising from extrinsic causes, a large utility's refusal to aid the small utility is not unlawful in the absence of a statutory duty to render such aid. Here again the reason is that the refusal does not cause whatever difficulties the smaller utility may have. The difficulties arise from extrinsic causes. In the utility field, the causes could be geographic location of the smaller utilities, high cost of operating small generating units, destruction or damage to equipment due to storms, etc., none of which were caused by the large utility or

by its refusal to aid. It is important to clearly understand this concept of causation. The Parties having the burden of proof keep insisting that Applicant's alleged refusal to aid the smaller utilities is the cause of the handicaps which actually result from extrinsic causes. In a legal connotation, such arguments are illogical, unreasonable and unsound. In law, the refusal to aid someone in trouble is NOT the cause of such trouble.

There remains to be determined whether there is a statutory duty imposed on the larger utility to aid the smaller utility. There is no specific requirement in any antitrust law that an entity must aid its competitor. An entity may choose to mind its own business and leave its competitor to do the same. Such conduct is not anti-competitive. Just as a public utility may quite properly refuse to share with a private utility the tax advantage and cost-of-money advantage accruing to it, so also the larger private utility may refuse to share the various advantages which the size of its facilities and financial assets confer on it.

Under the antitrust laws, mutual assistance agreements between competitors are suspect. See, for example, Timken Roller Bearing Co. v. U.S., 341 US 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951); U.S. v. Penn-Olin Chemical Co., 378 US 158, 84 S. Ct. 1710, 12 L. Ed. 2d 775. This is because such agreements tend to lessen competition by

fostering price fixing, division of territories, agreements not to compete, and other anticompetitive conduct.

The Federal Power Act sanctions and encourages voluntary mutual assistance agreements (coordination in the electric industry). Partly this is because much of the conduct forbidden by the antitrust laws is not likely to become a part of such coordination. The activities of the state regulatory bodies supervise retail prices of privately-owned utilities and the FPC supervises wholesale prices. To a large extent, geographic areas of service are determined by franchises and by the fact that duplication of service facilities is uneconomical. Partly, coordination is sanctioned and encouraged because it tends to increase reliability and decrease cost of service both of which ends are in the public interest (see § 824a(a) of the Federal Power Act). However, this Act does not impose voluntary coordination as a duty. Voluntary coordination is permissive and not mandatory. No other statute is known to us and none has been called to our attention which makes it a duty to engage in voluntary coordination. In fact, if such did exist, coordination would not be voluntary.

We conclude as a matter of law, that unilateral refusal to assist competitors per se 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. Such refusal causes no injury to the competitor. The utility has no duty to benefit its competitor by alleviating the competitor's injuries resulting from extrinsic causes.

We conclude as a matter of law that unilateral refusal to enter voluntarily into coordination agreements with competitors per se is not anticompetitive conduct and is not a scheme or conspiracy the purpose or effect of which is to cause the creation or mainenance of a situation inconsistent with the antitrust laws. Such refusal causes no injury to the competitors. The utility has no legal duty to benefit its competitors by alleviating injury from extrinsic causes. Such refusal would not give rise to a situation inconsistent with the antitrust laws.

If a utility has an anticompetitive scheme, such as monopolization, and if its unilateral voluntary refusal to coordination with its actual or potential competitor is a material element and a substantial factor in said scheme, then there is a misuse of its otherwise lawful refusal to coordinate. Under such circumstances, the refusal can give rise to a situation inconsistent with the antitrust

laws. American Tobacco Co. v. U.S., supra, Otter Tail v. U.S., 410 US 366, 35 L. Ed. 2d 359, 93 S. Ct. 1002, reh. den., 411 US 910, 36 L. Ed. 2d 201, 93 S. Ct. 1523 (1973).

Where a monopolist refuses to deal as part of a scheme to illegally extend or prolong his monopoly, the rule was stated by Judge Hughes as follows:

> "The principles enunciated in these three cases demonstrate that plaintiff has stated a cause of action under Section 2 of the Sherman Act. It is clear that the complaint is sufficient if the refusal of defendant to accept advertising from plaintiff by setting up unreasonable standards or by adopting an arbitrary course of action is for the purpose of destroying plaintiff as an agency and thereby furthering a course toward monopolization." Twenty-nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F. 2d 478 (5th Cir. 1966).

Next, consider not a manufacturer but a dealer in services: United Press International. In this case, United Press International did not refuse to deal completely but only refused to deal unless the terms were the same as its other contract customers:

> "As we pointed out before, our case does not even involve a refusal to deal with plaintiff. UPI was willing to deal with plaintiff on the same basis as its other contract customers. Plaintiff, being an interim newspaper and thus not knowing how long it would be in business, wanted a special deal. Failure of UPI to give plaintiff a special deal and accept its offer of $3,000 per week, did not operate to create or attempt to create a monopoly.

> It is not clear to us just how UPI's failure to come to terms with plaintiff could create a monopoly or could be an attempt to monopolize. The proof does not show that UPI had the power to control prices or unreasonably restrain trade. There was no evidence of a specific intent to monopolize. Kansas City Star Co. v. United States, 240 F. 2d 643 (8th Cir. 1957), cert. den., 354 US 923, 77 S. Ct. 1381, 1 L. Ed. 2d 1438 (1957). Daily Press Inc. v. United Press International, 412 F. 2d 126, 135 (6th Cir. 1969).

If two or more business entities enter into a conspiracy in restraint of trade, such a conspiracy automatically gives rise to a situation inconsistent with the antitrust laws. It is specifically forbidden (see Section 1 of the Sherman Act quoted in Appendix A).

If two utilities enter into a coordination arrangement thereby reaping the benefits of such arrangement and further conspire to prevent other utilities from entering the coordination arrangement with the intent to injure such other utilities, such conspiracy falls squarely within the prohibition of Section 1 of the Sherman Act. A refusal to permit a third utility to enter the coordination arrangement under these circumstances is a material element and a substantial factor in an anticompetitive agreement and is a misuse of the previously legal right to refuse to coordinate with others; provided that the third party brings to the arrangement such contribution as to result in net benefits to all three parties.

REFUSAL TO WHEEL

Another area related to coordination among competitors is involved in refusal to wheel. It is urged that refusal to wheel for competitors is anticompetitive conduct.

Dr. Harold H. Wein, an economist who testified in this case [direct testimony follows Tr 3979], has an impressive background as a teacher, Principal Economist of the Antitrust Division, U.S. Department of Justice (1945-9151), first Chief Economist of the Federal Power Commission and in other activities (direct testimony pages 1-13).

On page 23 of Dr. Wein's direct testimony, he quotes a paragraph from United States v. (1) Ohio Oil Company, (2) Standard Oil Company, (3) Standard Oil Company of Louisiana, (4) Prairie Oil and Gas Company, (5) Uncle Sam Oil Company, and (6) Robert D. Benson et al, doing business under the partnership name of Tide Water Pipe Company, Limited, 234 US 548, 58 L. Ed. 1459, 34 S. Ct. 956 (1914) which he alleges was brought under the Sherman Act. Actually, the case, usually called the "Oil Pipeline Case", was brought under the Hepburn Act of June 29, 1906 which amended chap. 3591, 34 Stat. at Large 584, U.S. Comp. Stat. Supp. 1911, p. 1288 (the Act to Regulate Commerce) so that the first section reads in part as follows:

> "That the provisions of this act shall apply to any corporation or any person or persons engaged in the transport tion of oil or other commodity, except water and except natural or artifical gas, by means of pipe lines, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act."

Dr. Wein's quotation contains all but the last sentence of the following paragraph:

> "Availing itself of its monopoly of the means of transportation, the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself. In this way, it made itself master of the fields without the necessity of owning them, and carried across half the continent a great subject of international commerce coming from many owners, but, by the duress of which the Standard Oil Company was master, carrying it all as its own. The main question is whether the act does and constitutionally can apply to the several constituents that then had been united into a single line." (Emphasis added).

The thrust of this case is in th last sentence of the above quotation (omitted by Dr. Wein). The Oil Pipe Line case was neither brought nor decided under the Sherman Act. Yet Dr. Wein considers transmission facilities for electric energy as analogous to the Oil Pipe Line case. So be it. In the electrical industry, there is no act of Congress requiring wheeling as a public utility. This failure of Congress was not an oversight.

Bills to require wheeling were repeatedly considered. The history of the Federal Power Act, its purpose, and the efforts to

include forced wheeling is concisely stated in 35 L. Ed. 2d at page 371, column 2 through page 373, column 1. Forty years of effort failed to result in Congressional enactment of a requirement to wheel. Thus, the analogy, properly applied, is that by Act of Congress, oil pipe line owners must carry oil from others whereas no statute required owners of transmission facilities to do so. Furthermore, in the Oil Pipe Line case, the court held that the Uncle Sam Oil Company which transmitted only oil from its own wells across state lines to its own refinery was not obliged by the statute to become a carrier for others. By analogy, a power company which builds and operates transmission facilities to carry power generated by itself to other points in the same state, a fortiori, would not even be forced to wheel if Congress were to pass an act concerning wheeling similar to the Hepburn Act.

The Federal Power Commission deems itself without power to order involuntary wheeling [Otter Tail v. U.S., supra]. A Federal Court, having found a party engaged in anticompetitive activities forbidden by the antitrust laws, may, as part of the remedy, require wheeling [Otter Tail v. U.S., supra]. The anticompetitive activity found in this case was <u>not refusing to wheel per se</u> but was a scheme intended to prevent the City of Elbow Lake from entering the electric

utility business. Refusal to wheel was only one of several activities used to effect the illegal scheme. In determining whether or not a scheme is illegal, it is immaterial whether or not steps taken in furtherance of the scheme are legal or illegal, See American Tobacco Co. v. U.S., supra. In Otter Tail, the courts did not need to address themselves to whether or not refusal to wheel is a per se violation of the antitrust laws and any passing remarks on this point are obiter dicta. By the same line of reasoning and on the same authorities quoted in discussing the refusal to coordinate question, we conclude as a matter of law that unilateral refusal to wheel power for competitors per se 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.

Justice, Staff and Intervenor condemn refusal to wheel as a bottleneck situation. All of the bottleneck cases involve conspiracies. We can do no better than to quote the excellent discussion by the 9th Circuit Court of Appeals in Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F. 2d 71 (9th Cir. 1969):

> "It is no doubt true that a manufacturer or supplier can do many things independently which he may not combined with others to accomplish. See e.g., United States v. Parke, Davis & Co., 1960, 362 US 29, 80 S. Ct. 503, 4 L. Ed. 2d 505; Associated Press v. United States, 1945, 326 US 1, 14-15, 65 S. Ct. 1416, 89 L. Ed. 2013; United States v. Bausch & Lomb Optical Co., 1944, 321 US 707,

722, 64 S. Ct. 805, 88 L. Ed. 1024. But the mere fact of combination or "conspiracy" does not necessarily result in per se liability.

"We turn, then, to the group boycott cases on which plaintiff relies. Such boycotts have been held to be illegal per se under Section 1 because they are "naked restraints of trade with no purpose except stifling of competition." White Motor Co. v. United States, supra, 372 US at 263, 83 S. Ct. at 702 (Emphasis added). We find that in all of plaintiff's cases there was a purpose either to exclude a person or group from the market, or to accomplish some other anticompetitive objective, or both.

"In several of them, the objective was to put one or more so-called "discounters; or "price-cutters" out of business. United States v. General Motors Corp., 1966, 384 US 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415. Ford Motor Co. v. Webster's Auto Sales, Inc., 1 Cir., 1966, 361 F. 2d 874, involved a scheme similar to, but less elaborate than the General Motors scheme. Somewhat similar is Fashion Originators' Guild of America v. FTC, 1941, 312 US 457, 61 S. Ct. 703, 85 L. Ed. 949, where a combination of manufacturers and designers sought to suppress competition by "style-pirates" who were also price cutters.

"In other cases, there was concerted action by one group to put one or more of their competitors out of business, or to impair their ability to compete with the conspirators. See Silver v. New York Stock Exchange, 1963, 373 US 341, 347, 83 S. Ct. 1246, 10 L. Ed. 2d 389; Radiant Burners v. Peoples Gas Light & Coke Co., 1960, 364 US 656, 81 S. Ct. 365, 5 L. Ed. 2d 358; Associated Press v. United States, supra.

"Another case involved the exclusion of competitors from the market by monopolistic practices violative of section 2 of the Sherman Act, together with a price-fixing conspiracy. Continental Ore Co. v. Union Carbide & Carbon Corp., 1962 370 US 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777. Binderup v. Pathe Exchange, Inc., 1923, 263 US 291, 311, 44 S. Ct. 96, 68 L. Ed. 308, is similar, although the exclusion was of a customer of some of the conspirators,

> rather than a competitor of the conspirators. Eastern States Retail Lumber Dealers' Assn'n. v. United States, 1914, 234 US 600, 34 S. Ct. 951, 58 L. Ed. 1490, involved a combination of retailers to boycott wholesalers who sold directly to consumers. See also Montague & Co. v. Lowry, 1904, 193 US 38, 24 S. Ct. 307, 48 L. Ed. 608. In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 1951, 340 US 211, 71 S. Ct. 259, 95 L. Ed. 219, there was an agreement between sellers to refuse to sell to wholesalers who would not agree to abide by maximum resale prices fixed by the sellers. Thus the boycott of the plaintiff to that case was part of a price-fixing scheme. In Klor's, Inc. v. Broadway-Hale Stores, Inc., 1959, 359 US 207, 79 S. Ct. 705, 3 L. Ed. 2d 741, on which plaintiff most heavily relies, the purpose was to put the plaintiff out of business. That was enough for the Supreme Court. And the facts show, although the Court did not rely on this, that the reason for doing so was that the plaintiff was a price-cutter. Thus, the defendant's motives were doubly anticompetitive."

Group action in denying a market to competitors was also condemned in Gamco Inc. v. Providence Fruit & Produce Bldg., 194 F. 2d 484 (1st Cir. 1952), cert. den., 344 US 817, 73 S. Ct. 11, 97 L. Ed. 636 (1952).

No better summary stated has been found than that of Judge Murran:

> "But, a mere declination to sell to competitors or to supply retail outlets in a competitive market is not illegal, unless such refusals to sell or supply can be shown to be in furtherance of a contract, combination or conspiracy to unduly suppress the free flow of trade or commerce. Shotkin v. General Electric Co., supra; United States v. Bausch & Lomb Optical Co., 321 US 707, 722, 64 S. Ct. 805, 88 L. Ed. 1024." Blue Bell Co. v. Frontier Refining Co., et al., 213 F. 2d, 354, 358, 359 (10th Cir. 1954).

(See also Zenith Vinyl Fabrics Corp. v. Ford Motor Company, 357 F. Supp. 133, 140, 141 (E.D. Mich. 1973)).

We conclude as matter of law, that the bottleneck situation applies only to conspiracies and hence, is inapplicable to a unilateral refusal to wheel.

Otter Tail, supra, is relied upon by Justice, Staff and Intervenor for the proposition that a refusal to wheel by a utility having most if not all of the high voltage transmission in relevant geographic market is illegal monopolization.

Court decisions in each and every case are affected by the whole factual situation. In Otter Tail, when the franchise from the City of Elbow Lake expired, it was not renewed. Elbow Lake decided, as it had a right to do, to provide retail power as a municipal enterprise. Thereupon Otter Tail refused to sell power or to wheel power to Elbow Lake. Otter Tail also relied on an illegal contract with the United States. Not satisfied with these negative reactions, Otter Tail sought by litigation to prevent Elbow Lake from building its own generating facilities. In other words, the refusals to deal or wheel were only part of a monopolistic scheme to completely block Elbow Lake from setting up a municipal utility. Even in this setting, the Supreme Court upheld the lower court only by a 4 to 3 majority. The minority opinion referred to the repeated failure of efforts to get Congress to require compulsory wheeling and concluded that a refusal to wheel was exempt from the antitrust laws.

The antitrust laws deal with anticompetitive business conduct. An entity not in the business of wheeling cannot violate the antitrust laws by refusing to go into business. The Congress may be able to force an entity to enter a business where the public interest is at stake, but, before Otter Tail, no court has ever forced an entity into a business which it did not wish to enter using as the bootstrap excuse refusal to voluntarily embark on such business. We do not believe that Otter Tail so held. We believe that the correct interpretation of the majority opinion in Otter Tail is that if there has been a violation of the antitrust laws by a willful combination of acts intended to and tending to interfere with lawful completion in violation of the "attempt to monopolize" clause of Sec. 2 of the Sherman Act; then, as a remedy, the defendant may be required to do acts from which it would otherwise have a right to abstain.

In our view, Otter Tail is in accord with all the cases that hold that "acts, in themselves legal, lose that character when they become material elements and significant factors of an unlawful scheme." Continental Ore Co. v. Union Carbide Corp., 370 US 690, 706, 8 L. Ed. 777, 789, 82 S. Ct. 1404 (1962) and the cases cited there. Furthermore, the facts in Otter Tail fit our analysis of nexus. The scheme was to prevent Elbow Lake from having an independent municipally owned electric plant. Several acts were substantial

factors and material elements in that scheme: Refusal to "wheel", refusal to sell, sham litigation, and contracts which the Court held illegal (see Otter Tail, supra, at 368).

In addition, the Department of Justice apparently agreed at one time with this analysis of Otter Tail (see Department of Justice "Motion to Affirm" filed in Otter Tail appeal from remand proceeding before the U.S. Supreme Court in Part II, General Material, Appendix to Consumers Power's Brief in Support of its Proposed Findings of Fact and Conclusions of Law, No. 49). On page 18 of the Brief, Justice argued:

> "These findings showed a deliberate purpose to maintain Otter Tail's monopoly position by every means available to it, including refusals to deal, refusals to wheel power, and use of restrictive contract provisions to prevent other suppliers from wholesaling power to those Otter Tail sought to control. The litigation was an integral and extremely effective part of this effort."

REFUSAL OF ACCESS TO NUCLEAR FACILITIES

Hereinabove, we have concluded that the unilateral voluntary refusal by a utility to enter into coordination agreements with its competitors, without more, is not anticompetitive conduct for the reason that causal relationship is absent between such refusal and any injury or misfortune of such competitors and for the further reason that such utility has no legal duty to benefit its competitors

by alleviating such competitors' injuries from extrinsic causes. This broad conclusion includes both operational coordination and developmental coordination. Developmental coordination is the joint planning of facilities, and includes the concepts of joint venture and unit power access to a nuclear generating facility. Accordingly, the aforesaid conclusion comprises refusal to provide competitors with either joint venture or unit power access to a nuclear facility. In addition to this basic legal principle, there is another reason why refusal of such access is not anticompetitive conduct. As has been discussed in connection with the matter of nexus, 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. The argument that activities under and within the scope of a license granted pursuant to federal statute can, in and of themselves, create or maintain a situation inconsistent with the antitrust laws is to imply that, in passing such statute, the Congress stultified itself. Such an argument stretches credulity to the breaking point.

Of course, if activities under the license were to be misused as a material element and significant factor in a scheme or conspiracy so as to create or maintain a situation inconsistent with the antitrust laws, there would be nexus between said misused activities and said situation.

We conclude as a matter of law that, 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.

EXPERT OPINIONS

This Board has on occasion [Tr 6515] informed the parties that the Board would give little weight to opinions of experts as to hypothetical fact situations not based on evidence included in the proceeding. This section discusses the legal basis for that ruling. The Commission Rules (10 CFR 2.743) and the Administrative Procedure Act (5 USC § 556(d)) give no guidance and thus we turn to case law.

The 7th Circuit Court of Appeals stated in a case involving an administrative Board:

> "Opinion evidence, to be of any value, should be based either upon admitted facts or upon facts, within the knowledge of the witness, disclosed in the record. Opinion evidence that does not appear to be based upon disclosed facts is of little or no value. The opinion witnesses here were almost wholly without facts to support their conclusions, and it was within the province of the Board to disregard the opinion evidence and base its opinion upon the facts in the record before it. The Conqueror, 166 US 110, 17 S Ct. 510, 41 L. Ed. 937; Idaho Power Co. v. Thompson (D.C.) 19 F. 2d 547." Balaban & Katz Corporation v. Commissioner of Internal Revenue, 30 F. 2d 807, 808 (7th Cir. 1929).

This holding was recently quoted by the D.C. Court of Appeals (applying to a jury case), Giant Food Stores, Inc. v. Fine, 269 F. 2d 542 (D.C. Cir. 1959), reh. den. (1959).

The Supreme Court in discussing the weight of opinions of experts stated:

> "If they have any probative effect, it is that of expressions of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury (Head v. Hargrave, 105 US 45, 49, 26 L. Ed. 1028, 1030), or to a judge (The Conqueror, 166 US 110, 131, 133, 41 L. Ed. 937, 946, 947, 17 S. Ct. 510), or to a statutory board. Uncasville Mfg. Co. v. Commissioner of Internal Revenue (CCA 2d) 55 F. Ed. 893, 897; Tracy v. Commissioner of Internal Revenue (CCA 4th) 42 F. 2d 99, 100; Gloyd v. Commissioner of Internal Revenue (CCA 8th) 63 F. 2d 649, 650." Dayton Power and Light Co. v. Public Utilities Com-mission, 292 US 290, at 299, 78 L. Ed. 1267 at 1275 (1933).

The Seventh Circuit recently stated in a case involving an administrative body citing Dayton Power supra:

> "In fact, we know of no reason why the opinion of an expert such as offered in the instant case may not in the discretion of the trier of the facts be rejected, even though there is no other evidence on the subject." R.H. Oswold Co. v. Commissioner of Internal Revenue, 185 F. 2d 6, at 9, (7th Cir. 1950), reh. den. (1950), cert. den. 340 US 953, 95 L. Ed. 687 (1950).

The witness in this case was the "sole testimony offered by the Petitioner" who answered questions based on hypotheticals and on facts which he heard in open court. (See also Tripp v. C.I.R., 337 F. 2d 432 (7th Cir. 1964))

Furthermore, it is well established that the "weight of the evidence is a matter for (Administrative Body)", Concrete Material Corp. v. Federal Trade Commission, 189 F. 2d 359 (7th Cir. 1951), citing Corn Products Refining Co. v. Federal Trade Commission, 324 US 726, 65 S. Ct. 961, 89 L. Ed. 1320 (1944) which the court stated at p. 739:

> "The weight to be attributed to the facts proven or stipulated and the inferences to be drawn from them, are for the Commission to determine, not the Courts."

The Court in Corn Products, supra at 741 also stated:

> "The only evidence said to rebut the prima facie case made by proof of the price discriminations was given by witnesses who had no personal knowledge of the transactions, and was limited to statements of each witness's assumption or conclusion that the price discriminations were justified by competition. Examination of the testimony satisfies us, as it did the court below, that it was

insufficient to sustain a finding that the lower prices allowed to favored customers were in fact made to meet competition."

In addition, Judge Morton in Cecil Corley Motor Co., Inc. v. General Motors Corp., 380 F. Supp. 819 (M.D. Tenn. 1974) stated in a section on "Applicable Legal Standards" that:

> "Plaintiff introduced its damage theory in part through the testimony of an expert witness, and in part by way of its accountant. Damages calculated by accountants and experts cannot be based upon assumptions which are not supported by the record, and cannot be based upon speculation or guesswork. All of the premises upon which their conclusions are based must be supported by, and comport with, the testimony actually offered in court. Flintkote Co. v. Lysfjord, 246 F. 2d 368 (9th Cir. 1957) cert. den., 355 US 835, 78 S. Ct. 54, 2 L. Ed. 2d 46 (1957); Sunkist Growers, Inc. v. Winckler & Smith, 284 F. 2d 1 (9th Cir. 1960); Baush Mach. Tool Co. v. Aluminum Co. of America, 79 F. 2d 217 (2d Cir. 1935); and Syracuse Broadcasting Corp. v. Newhouse, 319 F. 2d 683 (2d Cir. 1963).
>
> Experts cannot come into court and offer as proof calculations and theories which they do not themselves support or advocate, but which are designed to reach a desired conclusion, when those calculations have no sound basis in fact or reason. Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F. 2d 71 (9th Cir. 1969). And an expert opinion may not, itself, be based upon the opinion of others, either in evidence or not in evidence. Taylor v. B. Heller and Co., 364 F. 2d 608 (6th Cir. 1966).
>
> Applying these legal principles to the evidence offered by plaintiff on this issue, this Court concludes that the plaintiff failed to show actual damages sustained and failed to establish, with any fair degree of certainty, that it

lost sales or net profits during the period in question. The jury could not have ascertained plaintiff's probable loss as a matter of reasonable inference. Plaintiff's proof was based upon assumptions not found in, nor supported by, the record, and the jury was required to indulge in speculation, conjecture and guesswork in order to arrive at a figure."

and

"In summary, then, this Court finds that the damage theory proffered by plaintiff is wholly inadequate and insufficient to support any award by the jury, for the reasons that it was based: (1) on a profit figure which was not an acceptable net profit; (2) upon assumptions concerning distribution and projected sales which were not supported by the record; (3) upon assumptions and conjectures specifically disclaimed by the witnesses who drew their conclusions therefrom; (4) upon the opinion of an expert who improperly based his assumptions upon that of another witness; (5) upon assumptions which made no attempt to separate lost profits or lost sales relating only to the Pontiac aspect of plaintiff's business as distinguished from its other operations (see note 113, infra); (6) upon assumptions which made no attempt to limit damages to the applicable period of potential recovery; and (7) upon speculation, conjecture and guesswork. There being no other evidence on damages, it follows that the proof was insufficient to allow the jury to reasonably infer that plaintiff had suffered damages in any amount."

and

"For all of the above reasons, the Court has reached the conclusion that the damage theory offered by plaintiff was legally unsound, and factually unsupportable. Therefore, even if the plaintiff had established facts sufficient to support a judgment in its favor, which it did not, this

> Court would decline to sustain any award of damages for this is not an instance where the defendant's actions prevented a more precise computation of damages. Rather, the fault lies in the plaintiff's failure to introduce any evidence. To award damages under these circumstances would have been to engage in impermissible speculation and conjecture. See Siegfried v. Kansas City Star Company, 298 F. 2d 1, 5-8 (8th Cir.), cert. den., 369 US 819, 82 S. Ct. 831, 7 L. Ed. 2d 785 (1962)."

Judge Morton then reversed a jury verdict for the plaintiff.

We are guided further by the Supreme Court to be especially cautious in antitrust cases:

> "It should be said at the outset, that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." Maple Flooring Mfrs. Asso. v. United States, 268 US 563, 579, 69 L. Ed. 1093, 1100, 45 S. Ct. 578 (1924).

The above is quoted in footnote 22 in U.S. v. E.I. DuPont de Nemours and Co., 351 US 377, 395, 100 L. Ed. 1264, 1280, 76 S. Ct. 994, (1955). Based on these cases and others which follow and which elaborate these cases, this Board in writing its decision has given little weight to opinion testimony of experts relying on hypothetical fact situations which have no basis in the record.

This treatment of opinion testimony will not come as a surprise to the parties. Chairman Garfinckel, during the hearing stated:

> "I'm not arguing, but you agree that if, when you ask the witness -- now we are not talking about a legal question, but when you are asking the witness, in developing fact and you raise hypotheticals and you get answers, that if the answers come out that they are not tied into actual fact in this record, then the answers will fall." [Tr 6515]

Counsel for Justice replied:

> "Oh, indeed, your Honor. I would expect nothing otherwise." [Tr 6515-6516]

Counsel for the Applicant, Staff and the Intervenors were present [Tr 6455] and remained silent, which we deem to bind them to acquiescence in this exchange.

In view of the antitrust nature of this proceeding, the direct testimony and cross-examinations of fact witnesses were taken orally with each witness on the stand. Written direct testimony was permitted for expert witnesses with live oral cross-examination. In this way, the Board had opportunity to observe the demeanor of each witness.

BACKGROUND FACTS

After a discussion with Counsel for each party and concurrence by them [Tr 93-100] except for possible desires of Justice for

some evidence prior thereto [Tr 96]; at the First Prehearing Conference, the Board ruled that the time period to be covered by the evidence would begin January 1, 1960, any prior material being subject to specific Board action [Tr 101].

The record was closed on the 20th day of June 1974 by order of the Board. This opinion will be based on the factual situation as it existed at the close of the record on the 20th day of June, 1974, as disclosed by the entire record.

The State of Michigan is divided by the Straits of Mackinac into two peninsulas. The upper peninsula is bounded on the north and northwest by Lake Superior, on the northeast by Canada from which it separated by narrow channels (the Sault St. Marie), on the southeast by Lake Huron, on the southeastern tip by the Straits of Mackinac, on the southwest by Lake Michigan and on the west by the State of Wisconsin.

The lower peninsula, which is much the larger both in area and in population, is bounded on the northern tip by the Straits of Mackinac, on the northeast by Lake Huron, on the east by Canada from which it is separated by narrow channels, on the southeast by Lake Erie, on the eastern part of its southern boundary by the State of Ohio, on the western part of its southern boundary by the State of Indiana and on the west and northwest by Lake Michigan [Exhibits DJ 304A and 204B which are maps of the area].

Three types of electric utility systems operate in the lower peninsula of Michigan: (1) investor-owned (or privately-owned) utilities, (2) municipal systems, and (3) rural electric cooperatives [Tr 932]. The five investor-owned utilities in the lower peninsula are: Consumers Power Company, The Detroit Edison Company, Indiana and Michigan Electric Company, Michigan Power Company and the Alpena Power Company [Tr 928-933]. Another investor-owned system, the Edison Sault Electric Company, is located immediately across the Straits of Mackinac in the upper peninsula [Tr 933, Tr 4375-4376, Exhibit DJ 39]. The Indiana and Michigan Electric Company and the Michigan Power Company are subsidiaries of the American Electric Power Company [Tr 928]. The respective service areas of these companies are shown on Exhibits DJ 204A and B. It will be noted that the service area of Consumers Power Company is contiguous to each of the other investor-owned utilities. Of this group, Alpena Power Company alone may be characterized as a "smaller utility". Of the twenty-nine municipal systems in the lower peninsula of Michigan, twenty-three are within or directly adjacent to the Applicant's service area. [Exhibit CP 11,307, DJ 19] Of these 23, the largest is Lansing, followed in order of peak load size by Holland, Bay City, Grand Haven and Traverse City [Exhibit CP 11,307].

All of the municipal systems distribute electric power to retail customers and most also own generation facilities [Tr 7878; Attachment JDP-2, Schedule 1, page 1, Column 2 after Tr 7239].

The Wolverine Electric Cooperative (hereinafter called Wolverine) is a generating and transmission cooperative supplying power to four distribution (retail) cooperatives; e.g., Western Michigan Electric Cooperative, Oceana Electric Cooperative, O&A Electric Cooperative and Tri-County Electric Cooperative [Tr 4468]. The Northern Michigan Electric Cooperative (hereinafter called Northern Michigan) is a generating and transmission cooperative supplying power to three distribution (retail) cooperatives; e.g., Top O'Michigan Rural Electric Distribution Company, the Cherryland Rural Electric Cooperative Association and the Presque Isle Electric Cooperative [Tr 958, Tr 1110]. There are three other cooperatives in the lower peninsula; e.g., Southeastern Michigan Electric Cooperative which overlaps Applicant's service area, Fruit Belt Electric Cooperative which partially overlaps Applicant's service area, and Thumb Electric Cooperative which overlaps Detroit Edison's service area. Exhibit DJ 19, a map of the lower peninsula of Michigan, shows the franchise service areas of the investor-owned utilities and the general service areas of the rural electric cooperatives and municipal

systems. Its size and markings provide help in visualizing the geographic relationship of the various electric utilities in the southern peninsula of Michigan with which this opinion deals.

Applicant's service area is entirely within the lower peninsula of Michigan. It can be defined as the sum of those counties in which it is franchised, shown in buff on the mpa identified as Exhibit DJ 204A. Applicant's service area is bounded on the east by that of the Detroit Edison Company, on the southeastern part of its southern boundary by the Toledo Edison Company (in Ohio) and on the southwest by the two subsidiaries of American Electric Power Co., namely Indiana and Michigan Electric Company and Michigan Power Company [Exhibit DJ 204(a) and Exhibit DJ 21, page 18, Exhibit DJ 21A, page facing page 1]. Applicant also, for historical reasons, buys wholesale power sufficient to supply the needs of Pontiac from Detroit Edison and sells such power at retail to that community, which is geographically in Detroit Edison's service area [Exhibit CP 12,022A, page 410 and map facing page 410].

Applicant's Chairman of the Board and President testified that Applicant has no interest in serving the upper peninsula of Michigan [Tr 6463-6465] and, in fact, has no interest in serving anywhere beyond its present service area [Tr 6130-31, Tr 6976].

[Tr 6130-31, Tr 6976]. Although there are no exclusive franchises in Michigan [Tr 7872, Exhibit DJ 2], the unwillingness of The Michigan Public Service Commission (MPSC) to approve a franchise to any applicant utility in the service area of another utility in the absence of unsatisfactory service indicates that Applicant probably would not be permitted to expand its service area in Michigan even if it so desired [Tr Q, 6530, line 248, A, 6532, line 23 to 6533, line 10].

In its existing service area, Applicant has 53 so-called Perpetual Foote Act Franchises,[8/] 961 voted 30-year franchises and 4 revocable franchises. Of the 30-year franchises, 375 have expired and been renewed between January 1, 1960 and October 29, 1973. Between October 29, 1973 and December 31, 1985, 215 franchises representing 11.35% kilowatt hour sales will expire and be considered for renewal [Exhibit CP 11,306]. The communities served by Applicant are listed at page 359 of Exhibit DJ 109].

As of the end of 1973, Applicant's electric retail sales amounted to $475,720,869 and, expressed as electrical units, 23,263,781,000 kilowatt hours. It served 1,180,046 customers [DJ 21A, page 28, column 1].

8/ For details of the Foote Act, see Exhibit DJ 6 and Tr 1575-1584.

From 1960 to 1972, the system requirements (retail sales) of the municipal systems as a whole in the lower peninsula more than doubled, i.e., they increased 114% [Exhibit CP 11,307]. Northern Michigan and Wolverine more than trebled (Idem). Alpena Power Co. almost trembled while Edison Sault Electric Co. in the upper peninsula of Michigan had an increase of about 50% (Idem). During the same time period, Applicant's retail sales went from 9,303,865,000 Kwhr to 21,352,570,000 Kwhr [Exhibit DJ 21, page 28; Applicant's 1970 Annual Report to Stockholders, page 31, gives 1960 data of which we take official notice].[9/] Thus, Applicant's retail sales from 1960 through 1972 increased approximately 130 percent.

From Exhibit CP 11,307, we find that for the year 1972, the total retail sales (System Requirements) of the 23 municipal systems was 3,031,364 Mwhr; the total retail sales of Electric Cooperatives was 938,576 Mwhr; and the total retail sales of Alpena Power Co. was 245,117 Mwhr, or a total of 4,255,053 Mwhr. For the same year, Applicant sold at retail 21,352,570 Mwhr [Exhibit DJ 21, page 28]. By

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9/ The Parties were notified by conference call on 8 July 1975 of the Board's intent to take official notice of this document. By phone on 10 July 1975, the Parties advised that they had no objection.

addition, the total sales for this entire group of utilities was 25,607,623 Mwhr. Factoring, we find that Applicant had 84% and the smaller utilities had 16% of the combined retail business in 1972.

Repeating tne process for 1960, Applicant had 84% and the smaller utilities had 16% of the retail business in 1960. (Applicant's retail sales for 1960 were obtained from Applicant's Annual Report to Stockholders for 1970, page 31.)

Applicant's retail sales are made at uniform nondiscriminatory rates, terms and conditions subject to the approval of the MPSC [Tr 8286-8287]. The MPSC does a conscientious job of policing rates [Tr 6983-4, Stelzer prepared testimony page 9 after Tr 7224, Tr 8287, Exhibit CP 12,022, pages 109d, 109e, 109f and 109g]. Applicant has failed to earn its cost of equity capital for the six years ending 1973 [Tr 6409, 6983].

A study made in 1968 [Exhibit DJ 225] showed comparison of Applicant's retail rates with municipal utilities and REA Cooperative utilities. For municipals (which are not subject to MPSC jurisdiction) the average was lower than Applicant for smaller customers and higher than Applicant for larger customers, the break-even point being at about 500 Kwhr. However, for some municipals, rates were

consistently lower than Applicant. The retail rates of City of Lansing, the largest municipal system, was approximately 20% below Applicant's. This fact disturbs Mr. Aymond because it makes customers want to leave Applicant for Lansing [Tr 6061] and, because Lansing is used as a yardstick, the MPSC is reluctant to raise Applicant's retail rates [Tr 6062]. Mr. Brush, General Manager of Lansing Board of Water and Light, confirms that the MPSC takes into consideration municipal rates vis-a-vis investor owned rates [Tr 2361]. Lansing's costs of generating power are less than Applicant's wholesale power rates [Tr 2221].

The aforesaid study [Exhibit DJ 225] shows that in 1968, the retail rates of REA Cooperatives were generally higher than Applicant's rates because the Cooperatives serve sparcely settled areas. As is shown above, in spite of the rate differential, the Cooperatives are growing much faster than Applicant.

Competition at retail is limited because the cost of facilities to serve a customer (distribution lines and related equipment) is so high that duplication of facilities is generally viewed as uneconomic. Retail elect ic energy sales has been recognized as a natural monopoly for this reason. Two municipalities compete with Applicant on a house-to-house and street-to-street basis (Bay City

and Traverse City) but these cases are anachronisms resulting from the Foote Act which has long since ceased to be a mechanism for franchising. The MPSC will not permit the franchising on electric utility to serve in an area already receiving adequate services from another utility [Exhibit DJ 3, Tr 6533]. Municipalities having their own utility systems do not franchise other competitive utilities. Thus, while there are no exclusive franchises in Michigan [Tr 7872 Exhibit DJ 2], competition by dual distribution facilities is rare. In 1965, the MPSC took jurisdiction over rural electric cooperatives and by issuance of the single phase rule [Exhibit DJ 9], prevented pirating of old customers by either cooperatives or by privately-owned utilities [Tr 7850]. This rule also severely limited competition for new customers in peripheral areas where it might otherwise occur.

The statutory 25% rule limited sales by municipalities outside of city limits to 25% of sales within city limits [Page 17-18 after Tr 7239; Tr 975-976; Tr 2243; Tr 6061-6062; Mich. Const., 1963, Art. VII § 24 (Appendix to Applicant's Brief in Support of its Proposed Findings from Part I, No. 23)]. This Michigan Statute has recently been amended [Public Act No. 179 -- No. 24 to Part I of Appendix to Applicant's aforesaid Brief]. The amendment is so new that its effect on retail competition is yet to be demonstrated.

In areas where retail competition is feasible, there is competition between Applicant and the smaller utilities [Tr 985; 1013; 1052; 2026-2027].

Excluding the acquisitions by Applicant discussed hereinafter, there has been neither entry nor departure by smaller utilities during the period between January 1, 1960 and June 20, 1974. Although details of the industry prior to January 1, 1960 have been excluded in determining whether or not a "situation" exists, nevertheless, it is not improper to note that during the period of Applicant's substantial growth prior to that date, the existing municipal utilities were on the scene. All of the municipals were in existence by 1933, all but two began before 1913, and fifteen began before the turn of the century [Exhibit DJ 199, pages 3 and 4]. Seven of them serve other communities and three serve nearby summer resorts [Exhibit DJ 198, page 6]. They have been able, tough and aggressive competitors of Applicant for a long time. The growth rates of Northern Michigan and Wolverine attest to their competitive viability.

It is Applicant's policy to generate in its own facilities the electric energy needed for its sales. Hence, normally there is no competition for the bulk power requirements of Applicant. In other words, Applicant is vertically integrated from generation through

delivery of electric energy. In recent years, construction delays and operational difficulties have forced Applicant to purchase on a short-term basis substantial quantities of wholesale power [Exhibit CP 12,022, p. 423, Tr 8692, Tr 8694, Tr 9798].

Ten of the 23 municipal systems generated all of their electric energy requirement or bought from other than Applicant in 1972 [Exhibit CP 11,307]. In addition, Lansing, which bought 3.8% of its requirements from Applicant in 1972 [Exhibit CP 11,307], is now generating all of its needs [Tr 7884]. Coldwater purchased 25.4%, Hillsdale 54.8%, Portland 58.1% and nine other purchased from 81.5 to 100% from Applicant in 1972 [Exhibit CP 11,307]. The rest of their requirements were either self-generated or purchased from others. The G&T cooperatives, Northern Michigan and Wolverine, supply the needs of seven distributive co-ops, save for small amounts. Southeastern Michigan Electric Cooperative purchased 17.1% of its needs from Applicant in 1972 while Fruit Belt Electric Corporation and Thumb Electric Cooperative cooperatives were independent of Applicant. Alpena, which owns some old hydroelectric generation bought 80% of its needs from Applicant in 1972 [Exhibit CP 11,307]. Summaries for 1972 show that the smaller systems self-generated 70% of their needs bought 17% from Applicant and 13% from others [Tr 7878]. Since 1972,

there has been a trend toward self-generation among the smaller utilities [Tr 7884-7885]. Northern Michigan, Wolverine, Grand Haven Board of Light and Power, and the City of Traverse City are interconnected so as to form a power pool as the Michigan Municipal and Cooperative Power Pool [Exhibit DJ 104, Tr 1117-1118]. It is sometimes referred to as the M-C Pool and as the Muni-Co-op Pool [Tr 1117]. Its general capabilities are discussed at Tr 1285-1289. Its transmission facilities will be hereinafter discussed under the heading SITUATION 4 -- PREVENTION OF COORDINATION BY REFUSAL OF APPLICANT TO WHEEL.

Applicant has been offering firm wholesale power to the smaller utilities since prior to January 1, 1960 [Tr 8298-8300]. Applicant has never refused to sell wholesale power in its service area [Tr 6064 to 6072]. Applicant claims to have no interest in serving beyond present service area [Tr 6130]. Applicant has never had an oral or written agreement prohibiting wholesale sales beyond its present service area [Tr 6070-6071]. Because of inability to earn minimum return, Applicant would be reluctant to incur added responsibilities [Tr 6063]. Applicant's policy not to sell outside of Michigan is unilateral [Tr 6476].

Wolverine's cost to generate and deliver power to consumers is less than Applicant's wholesale rate [Tr 4489].

Bay City buys bulk power from Applicant and sells retail at 10-15% below Applicant's retail prices [Tr 1576-1577; 2023; 6463-65; 7808-7809]. Lansing can generate at less than Applicant's bulk power rate [Tr 2221; 2332].

The proposed Midland Plant (Units 1 and 2) will consist of two units each having the equivalent of 800 electrical megawatts nuclear sources; i.e., the nuclear steam supply system is sized at the 800 megawatt electrical level. Unit 2 will have a generator capable of producing approximately 815 megawatts. However, Unit 1 will have a smaller generator capable of producing approximately 485 megawatts. The surplus steam from Unit 1 will be sold to the Dow Chemical Company for use as process steam [Tr 7937; 8528-8529; 9160-9161]. The sizes of these units were fixed and the proposed plant was publicized in 1967 [Exhibit DJ 183, Tr 8529]. The estimated cost of electric energy from the Midland plant is 16 mills per kilowatt-hour. This is based on an estimated capital cost of $569 per kilowatt, 3 mills fuel cost and 6 mills for operation and maintenance cost per kilowatt-hour [Tr 8532]. This compares with Applicant's 1973 system-wide average cost of generation of 13 mills per kilowatt-hour [Tr 8532-8533]. One witness, Mr. Mosley, refused to speculate on system-wide costs when the Midland plant goes operative [Tr 8533]. Mr. Aymond

also refuses to speculate on such future system-wide costs [Tr 6352]. However, Mr. Jefferson, Applicant's Executive Director of Rates, Research and Data Control [Tr 8274], estimates that costs for Midland will be somewhat higher than the system average when Midland goes into effect [Tr 8434].

On this state of the evidence [Tr 6352; 8434; 8533], the relation of cost of power from Midland to Applicant's system average cost is speculative but the chances are that Midland costs will exceed Applicant's average system cost. Certainly, there is no evidence that Midland power will be cheaper.

The electric power generated by the Midland plant will be fully integrated into Applicant's system [Tr 9160]. Such power will be comingled with that of the Applicant's other sources of bulk power and will be utilized by Applicant solely as undifferentiated power produced by the system as a whole [Tr 9160]. Applicant requires the entire power output of the Midland plant to serve the requirements of its customers [Tr 9159].

Since this proceeding is under the grandfather provision of the 1970 amendments to the Act [Sec. 105c(8)], construction permits for the Midland units were issued December 15, 1972 and the units are scheduled to become operational in 1979 and 1980 [Exhibit DJ 21A, page 10, Tr 9161].

Applicant has a small nuclear fueled plant, 75 Mw rating, Big Rock Point, which went on stream in 1962 [Exhibit CP 12,022, pages 436A and 437A]. We compute the cost per Kwhr because the record does not disclose the figure.

To get capacity cost per Kilowatt-hour at full production:

(1) multiply cost per Kw by a percent which equals cost of money plus depreciation.

Cost per Kw for Big Rock Point = $197.53

[Exhibit CP 12,022, page 432f]

Cost of money in 1973 = 7.5%

[Exhibit DJ 228A, page 4, Schedule III (D)]

Depreciation at 40 years linear = 2.5%

$197.53 x 10% = $19.753

(2) divide product of (1) by total hours in 1 year; i.e., 8760

$$\frac{19.753}{8760} = \$ .00225 = 2.25 \text{ mills/kwhr}$$

To get capacity cost at less than full production; divide product of (1) by total number of hours of operation.

In 1973, Big Rock Point operated 6994.3 hours [Exhibit CP 12,022, page 432f].

$\frac{19.753}{6994.3}$ = $ .00282 = 2.82 mills

Total capital cost = 2.82 mills

O&M cost 6.28 "

Fuel cost 2.50

Big Rock Point Total Cost (1973) 11.60 mills/Kwhr

This cost compares favorably with system-wide average costs for 1973 of 13 mills. Applicant deems Big Rock Point an experimental plant [Tr 8077]. Yet it was so successful in 1973, that it outperformed Applicant's system average. In October 1973, it outperformed all commercial boiling water reactors in the United States regardless of size [Exhibit DJ 21A, page 11].

Applicant has a large nuclear fueled plant, Palisades, 815.7 Mw rating which became operative in 1967. Its operation in 1973 was limited by mechanical troubles [Exhibit DJ 21A, page 10, Tr 8692; 8694; 8708]. Using the formulae above and the data from page 432f of Exhibit CP 12,022, the cost of power from this plant for 1973 was:

Total capital cost = 5.17 mills

O&M cost 3.99 "

Fuel cost 2.70

Palisades Total Cost (1973) 11.86 mills/Kwhr

which compares favorably with the system average of 13 mills.

Palisades continued to be plagued by mechanical troubles in 1974. However, Mr. Aymond continued to view nuclear power as being the lowest base load power available. He thought the older nuclear power plants would have lower costs because construction costs keep going up all the time [Tr 6353].

Applicant now has no definite plans for future nuclear power plants. It needs in the near future will be supplied by fossil fuel plants, two units at Applicant's Karn site totalling 1300 Mw of capacity and one unit at Applicant's Campbell site at 800 Mw capacity [Tr 9188]. Mr. Aymond testified that Applicant does not desire to pioneer large units [1000 or over Mw] and will stay with units in the 600 Mw - 800 Mw range for a while [Tr 8500-8501]. The capital costs of the fossil fuel units are estimated to be considerably less than those predicted for Midland. Thus, for Midland, capital costs were predicted to be $569 per Kw [Tr 8532] while for the projected fossil fuel units, they are predicted to be $184 and $337.40 per Mw respectively (capacity in Mw divided by cost equals cost per Mw) [Exhibit CP 12,022, page 406; Exhibit DJ 21A, page 10 uses slightly different estimates].

In the record of these proceedings, there are references to Applicant's future nuclear plant, Quanicassee [Tr 1736-1737; 4142-

2317; 2319; 2483, Exhibits DJ 21, p. 8; DJ 21A, p. 12]. For completeness, we note that a license application for that plant was tendered to the Commission on October 29, 1973. On June 28, 1974, Applicant publically announced that it was cancelling plans to construct the Quanicassee units [CLI-74-29, RAI-74-7, p. 10]. On October 29, 1974, Applicant's request for withdrawal of its application as to these units was granted [CLI-74-37, RAI-74-10, p. 627].

APPLICANT'S NEW POLICY

The statement of Applicant's policy put in the record on February 12, 1974 [Tr 6048] and the modified statement of Applicant's policy as approved by Applicant's Board of Directors put in the record on March 6, 1974 [Tr 8106-8109] have been considered. The first statement is rejected as superseded. In general, the final statement of policy appears to reaffirm other evidence of record concerning policies dealing with coordination, acquisitions, and sales at wholesale and retail; and to announce a new policy dealing with wheeling. To the extent that the final statement [Tr 8106-8109] reflects Applicant's existing policy as shown by evidence of record, it adds nothing to the record. To the extent that the final statement is a change in policy or the enunciation of new policy, the new policy is deemed to be timed to influence the Board in this proceeding and offers little

assurance of a permanent change in policy, see U.S. v. Oregon State Medical Society and U.S. v. Grant, both supra. See also discussion hereinabove under heading MOOTNESS. The amended policy put in the record on March 6, 1974 is therefore rejected as not a change in Applicant's position which should influence the decision in this proceeding. The said amended policy does not render moot any situation existing prior thereto.

SEARCH OF THE RECORD FOR POSSIBLE SITUATIONS WITHIN THE RELEVANT MATTERS IN CONTROVERSY WHICH MIGHT BE CREATED OR MAINTAINED BY ACTIVITIES UNDER THE LICENSES

SITUATION 1. PREVENTION OF COORDINATION BY CONTRACT PROVISION

Provision 9 of an agreement dated 15 May 1964 between Applicant and the City of Lansing [Exhibit DJ 91] reads as follows:

> "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 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."

At the time this Provision 9 was incorporated in its agreements with the smaller utilities, Applicant did have the power to insist upon its inclusion. We must consider whether this was power to prevent coordination among the smaller utilities and whether such power was used in anticompetitive fashion so as to bring into existence a situation inconsistent with the antitrust laws. Applicant's reason for including this Provision in this and other similar agreements was to avoid inadvertently becoming subject to the jurisdiction of the FPC [Tr 7941; 8300].

After Applicant submitted to the jurisdiction of FPC, this Provision was omitted from its contracts as they were amended, renewed, or replaced. It has now disappeared from all of Applicant's contracts [Tr 7941-7942]. During the time the Provision was in vogue, no other contracting party requested or was denied permission to interconnect with a third party [Tr 7942].

Witness Brush of Lansing testified that Provision 9 prevented Lansing from interconnecting with the M-C Pool without permission of Applicant until the effective date (February 1973) of the current agreement [Tr 2090-2091; 2234-2239]. Northern Michigan did not so interpret the Provision. It interconnected with the City of Traverse City without consulting Applicant [Tr 7942-7943].

There is no evidence that an interconnection between any two of the smaller utilities in the relevant geographic market would result in the transmission or sale of wholesale electric energy in interstate or foreign commerce. Absent such a possibility, Provision 9 is a nullity. Mr. Brush's interpretation of the language so as to prevent coordination between Lansing and the M-C Pool is completely unrealistic. We find as a fact that the insertion of Provision 9 in Applicant's contract did not give it the power to grant or deny coordination among the smaller utilities.

Assuming arguendo that the presence of Provision 9 did give Applicant the power to grant or deny coordination, there is no evidence that Applicant ever exercised such power. The purpose of inclusion of Provision 9 in its contracts has disappeared and there is total absence of the Provision in any existing contract. Using the criteria discussed hereinabove under the heading: MOOTNESS, we find as a fact that the chance of Applicant again using the Provision or of using it in an anticompetitive fashion against the smaller utilities is so remote as to render the matter moot.

We find as a fact that if Applicant ever had the alleged power and if Applicant ever used it in anticompetitive fashion and if such use ever brought into existence a situation inconsistent with the antitrust laws; the power, the use of such power and the resulting situation have all ceased. We conclude as a matter of law that no such situation exists.

Assuming arguendo that there is, or could be, a situation inconsistent with the antitrust laws arising out of Applicant's use of Provision 9; there is no evidence of an anticompetitive scheme or conspiracy having as a material element and significant factor the misuse of activities under the licenses which would maintain or create such situation. We conclude as a matter of law that there is no nexus between the activities under the license and said assumed situation.

SITUATION 2.
PREVENTION OF OPERATIONAL COORDINATION
BY REFUSAL OF APPLICANT TO COORDINATE

The allegation that the Applicant has the power to grant or deny access to coordination has two facets: (1) coordination between Applicant and one or more of the smaller utility systems in the relevant geographic market; (2) coordination between two or more of the smaller utility systems in the relevant geographic market. The second facet will be discussed hereinafter. Coordination, as discussed under Situation 2, will be operational coordination.

With regard to the first facet, of course Applicant can deny voluntary access to operational coordination between itself and any other utility. It is equally clear that any utility in the relevant geographic market can force involuntary interconnection with Applicant to provide some of the features of operational coordination if such smaller utility initiates proceedings before FPC and convinces FPC that such interconnection is in the public interest (Section 202(b) of the Federal Power Act). (See also Gainesville Utilities Department et al v. Florida Power Corporation, 40 FPC 1227; 41 FPC 4; 425 F. 2d 1196; 402 US 515, L. Ed. 2d 74, 91 S. Ct. 1592 (1971)).

The Board finds as a matter of fact that the Applicant does have the power to deny voluntary operational coordination between itself and another utility.

In 1964, representatives of Northern Michigan and Wolverine sought alleged operational coordination with Applicant [Exhibit DJ 38, Tr 1325]. They listed benefits which they desired. Applicant refused to enter into negotiations for the alleged coordination [Exhibit DJ 39]. Applicant was urged to reconsider [Exhibit DJ 40]. Applicant, in refusing to proceed [Exhibit DJ 41], stated:

> "As indicated in my 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. We are still of the opinion that the revised proposed contract offers the best short and long-range solution to the cooperative power supply requirements."

In testimony during this proceeding, Northern Michigan's system manager, Mr. Steinbecker, conceded that both his system and Wolverine were "deficient" in 1964; i.e., that these systems had insufficient dependable generation capacity to cover projected peak load. [Tr 1411-1416] This testimony is confirmed by the systems' 1964 Forms 12 filed with the FPC which show a combined system peak load of 59.84 Mw and only 55.93 Mw in dependable generating capacity [Tr 1413-1417, 1420-1421, 1949-1953].

In 1967, the Wolverine again sought alleged operation coordination with Applicant.

Applicant again found no prospect of mutual benefits from the arrangement [Tr 7925]. Applicant's decision was clearly correct since in 1967, Northern Michigan's system peak load was 43.52 Mw, its installed capacity was 45.10 Mw and the size of its largest unit was 23.5 Mw [Tr 1441; Exhibit 12,001, May 18, 1967 letter]. Thus, Northern Michigan's 1967 installed reserves covered less than 10 percent of the system's largest unit and its total reserves amounted to approximately 1.6 Mw or 4 percent reserves [Tr 1446].

In 1968, the City of Traverse City sought alleged coordination with Applicant. It was turned down for lack of reserves [Tr 7925].

In 1972, Applicant refused to enter into an alleged coordination agreement with Edison Sault Electric Co. (located on the eastern end of the northern peninsula) because Edison Sault did not have sufficient generating capacity for its own load [Tr 4416, Exhibit DJ 85]. Edison Sault's representatives reviewed filings with FPC and MPSC and satisfied themselves that they (Applicant) did not have a (coordination) contract with anyone whose system was deficient in reserves [Tr 4419].

In all of these situations, true coordination with benefits to both parties was not feasible. We conclude as a matter of law that Applicant's management had a duty to its customers and stockholders to refuse such alleged operational coordination. (See discussion hereinabove under the heading: CORDINATION - NET BENEFITS.)

Applicant has a coordination agreement with its neighbor to the east in the lower peninsula of Michigan, Detroit Edison Company [Exhibit DJ 67]. The coordination features, which include joint economics dispatch by highly sophisticated equipment costing Applicant annually at least $1,680,000 [Tr 8518-8520], have so intimately correlated the operation of the participants as to result in it being referred to as the Michigan Pool. The members of this Pool also coordinate jointly with Indiana and Michigan Electric Company and large utilities outside of Michigan; namely, the Hydro-Electric Power Commission of Ontario [Exhibit CP 11,106], The Toledo Edison Company, Northern Indiana Public Service Co. and Commonwealth Edison Co. [Exhibits DJ 74, 75 and 76; CP 11,108, 11,109 and 11,119]. Each agreement is tailored to the capabilities and the needs of the parties so as to achieve net benefits to each party. For example, all of the agreements provide for exchange of emergency power while only one, that with the Hydro-Electric Power Commission of Ontario, provides

for exchange of diversity power. The agreements were each separately negotiated. Differences in terms reflect not only the factual differences but also the skills of the negotiators. Each agreement was approved by the FPC.

As has been described hereinabove, operational coordination usually has reserve sharing as its cornerstone. This is because a utility with no reserve capacity or with inadequate reserve capacity can not confer a net benefit on the other part to a sharing arrangement. Thus, in 1964, when Northern Michigan and Wolverine had inadequate reserves, Applicant could find no net benefit in reserve sharing with them. Again in 1967 when Wolverine sought an alleged coordination arrangement, no net benefits were found by Applicant and no arrangement resulted. Since then, both Northern Michigan and Wolverine have increased their reserves. As a result, a coordination agreement has been negotiated between Applicant and the members of the M-C Pool; e.g., Northern Michigan, Wolverine, the City of Traverse City and the City of Grand Haven [Exhibit DJ 105]. Applicant also is coordinated with the City of Lansing [Exhibit DJ 92] and the City of Holland [Exhibit CP 11,111]. Each agreement is as individually tailored to the capabilities and needs of the parties so as to achieve net benefits to each party. As in the instances of coordination with

large utilities, each agreement reflects not only factual differences but also the skills of the negotiators. Each agreement was approved by FPC. None of the agreements restrict further coordination by parties thereto with third parties. Lansing and the M-C Pool are currently negotiating a coordination agreement among themselves [Tr 2240].

Save for the smaller utilities with which Applicant is coordinated, the record shows no smaller utility in the relevant geographic market which has adequate reserves to support a coordination agreement.

We find as a matter of fact that Applicant has never refused operational coordination with a smaller utility in the relevant geographic market and that Applicant has operational coordination agreements with every smaller utility in the relevant geographic market capable of coordinating.

There is no evidence that Applicant has ever used in anticompetitive fashion its power to grant or deny voluntary operational coordination between Applicant and the smaller utilities. There is substantial and convincing evidence to the contrary. Moreover, a refusal to coordinate is not per se anticompetitive conduct -- see hereinabove under the heading REFUSAL TO COORDINATE. We conclude as a matter of law that there is no situation inconsistent with the

antitrust laws arising out of Applicant's alleged refusal to voluntarily operationally coordinate with the smaller utilities.

Assuming arguendo that there is, or could be, a situation inconsistent with the antitrust laws arising out of Applicant's alleged denial of voluntary operational coordination between Applicant and the smaller utilities; there is no evidence of an anticompetitive scheme or conspiracy having as a material element and significant factor the misuse of activities under the license which would maintain or create such situation. We conclude as a matter of law that there is no nexus between the said activities under the license and the said assumed situation.

SITUATION 3.
PREVENTION OF COORDINATION
BY EXCLUSION FROM
THE MICHIGAN POOL

As has been stated hereinbefore, Applicant is closely coordinated with the Detroit Edison Company to form the Michigan Pool. The coordination agreement between the Parties dated December 22, 1962 did not specifically foreclose the addition of additional members to the Pool. In reviewing the application of Detroit Edison for a license for the Enrico Fermi Atomic Power Plant, Unit 2, Justice negotiated certain agreements and interpretations with Detroit Edison which spelled out rights of other utilities to join the Pool [Attorney General advice letter dated Aug. 16, 1971 re Fermi Plant 2, 36 F.R. 17883 (1971)]. The December 22, 1962 agreement was replaced by a new agreement dated May 1, 1973 which incorporated the provision desired by Justice [Exhibit DJ 67, compare letter of Aug. 13, 1971 from Detroit Edison to the Commission re Docket No. 50-341]. The only smaller utility (Lansing) which has discussed admission to the Michigan Pool was advised by Applicant that Applicant would not oppose Lansing's entry in the Michigan Pool [Tr 2533].

There is evidence in Applicant's internal documents that the conditions of entry were designed to prevent "undesirable third parties"

from entry [Exhibits DJ 170 and 171]. There is nothing sinister in this language. As is noted elsewhere in this opinion, most of the smaller utilities in the relevant geographic market are so deficient in reserve generation that they cannot confer a benefit on the other party in a simple reserve sharing arrangement. Probably only a few, possibly only Lansing and the M-C Pool, have the capacity to confer sufficient benefits to be able to participate in the complex Michigan Pool. To encourage others to seek entry would be to foster a cruel disappointment at the end of useless negotiation. We find as a fact that the requirements for membership approved by Justice and incorporated in the existing Pool agreement are fair and reasonable, and we conclude as a matter of law that they are not anticompetitive.

We find as a fact that Applicant does have the power to exclude the smaller utilities from the Michigan Pool. (Applicant can renege on the terms of the agreement.)

There is no evidence that Applicant has ever exercised such power in an anticompetitive fashion against the smaller utility system.

We conclude as a matter of law that there is no situation inconsistent with the antitrust laws arising out of Applicant's alleged use of its power to exclude the smaller utilities from the Michigan Pool.

Assuming arguendo that there is, or could be, a situation inconsistent with the antitrust laws arising out of Applicant's alleged exclusion of the smaller utilities from the Michigan Pool; there is no evidence of an anticompetitive scheme or conspiracy having as a material element and significant factor the misuse of activities under the license which would maintain or create such situation. We conclude as a matter of law that there is no nexus between the said activities and said assumed situation.

SITUATION 4.
PREVENTION OF COORDINATION BY REFUSAL
OF APPLICANT TO WHEEL BETWEEN OR
AMONG THE SMALLER UTILITIES

Justice, Staff and Intervenors argue that, by having the power to grant or deny access to Applicant's transmission facilities, Applicant has the power to grant or deny access to coordination between or among the smaller utility systems.

Applicant has an extensive transmission grid to which all of the smaller utility systems are interconnected directly or indirectly. These transmission facilities were built and are maintained by Applicant for the principle purposes (1) of transporting electric energy from its sources to distribution points from whence it is distributed to Applicant's customers, and (2) of increasing the reliability of the firm power sold to its customers. To some extent, these facilities are used in carrying out coordination agreements between Applicant, Detroit Edison and other privately owned utilities outside the relevant geographic market.

The Applicant's transmission system is not a unique facility, without which the smaller system cannot coordinate among themselves as demonstrated by the exhibits of Justice. Exhibit DJ 18 dated "December 1972" [received in evidence November 29, 1973, Tr 1298] shows in red 1182 miles of lines of either 60 or 46 Kv of Northern and Wolverine [Tr 1294].

Exhibit DJ 20 [received in evidence on November 28, 1973, Tr 1134] showed in black the existing transmission network shown in red on Exhibit DJ 18 [Tr 1135], and also showed in red a proposed 138 Kv transmission line for Northern and Wolverine [legend on Exhibit DJ 20, Tr 1135]. Part of this proposed system had been constructed prior to the date of the testimony (November 28, 1973). This part is shown in red on Exhibit DJ 1 [Tr 1137].

Now returning to Exhibit DJ 20, we note that although the M-C Pool (Northern and Wolverine) already had 1182 miles of right-of-way for transmission lines in 1972, the M-C Pool was at that time planning approximately 525 miles (using map scale) of 138 Kv over entirely different right-of-ways.

From this evidence, it is fair to conclude that the M-C Pool deemed 138 Kv transmission to be adequately high voltage for its needs and that the M-C Pool deemed the construction of over 500 miles of such line over new rights-of-way (not economizing by use of old rights-of-way) to be economically feasible.

Justice witness, Mr. Steinbecker, the general manager of Northern did not testify that Applicant's transmission facilities or any facilities in excess of 138 Kv were necessary for the successful operation of the M-C Pool. On the contrary, he gave the impression of being quite self-satisfied with the plans of the M-C Pool to have its own transmission system.

It is fair to conclude from the evidence and the demeanor of the witness that neither Mr. Steinbecker nor the M-C Pool management deems the Applicant's transmission system as a "unique facility" as this term is used in the bottleneck cases.

The program of the M-C Pool to build its own transmission facilities thereby backing its opinion with its money shouts so loud that we can not hear the contrary testimony of the experts.

There is no evidence that any of the smaller utilities except those in the M-C Pool, Lansing and Holland, are capable of coordination (have adequate reserves to enter into a mutual benefit agreement). The M-C Pool (Northern Michigan, Wolverine, Grand Haven and Traverse City are coordinated without use of Applicant's transmission facilities. Lansing is only about 20 miles from the M-C Pool's projected 138 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 DJ 18 and 20]. When we consider the 1182 miles of transmission facilities and the over 500 miles of 138 Kv facilities projected for the M-C Pool, these distances are very short. About all that can be said in favor of wheeling over Applicant's system is that it might possibly be cheaper. Also, it could be more expensive [Tr 2426-2427].

We find as a fact that Applicant does not have the power to grant or deny operational or planning coordination between or among the smaller utility systems capable of coordination.

Assuming arguendo that Applicant does have the power to grant or deny coordination between or among the smaller utilities by refusal to wheel power for them, we now examine whether Applicant has used this power, and if used, whether such use is anti-competitive conduct.

There is no evidence that any two or more of the smaller utilities ever agreed to coordinate subject to obtaining wheeling, or requested wheeling from Applicant and were denied. Technically, it can be argued that there can be no refusal to deal without a specific request. However, there is evidence that a number of the smaller utilities "sounded out" Applicant and received discouraging replies. The evidence does not show what was to be wheeled where. For example, Coldwater asked about wheeling [Exhibit DJ 26] but this query does not seem to be related to coordination, especially since Coldwater has generation capacity materially less than sales requirements [Exhibit 12,010 (Addition)]. Southern Michigan Corporation Power Supply inquired as to the possibility of wheeling by Applicant and was told that Applicant had no provision for wheeling [Exhibit DJ 125]. Mr. Keen of Wolverine testified:

> "As far as wheeling is concerned, I had my ears chopped off by a Consumers Power representative prior to that date [1964-65], and I -- in regard to wheeling -- and I never asked them again for the reason of the reaction I had at that time from the Consumers Power representative." [Tr 4533].

Mr. Wolfe testified that his belief was that it would not be possible to arrange a wheeling transaction with Applicant [Tr 1971]. The state of the evidence is not very satisfactory; however, on balance, we find that Applicant's conduct amounted to a general refuse to wheel.

A refusal to wheel is not per se anticompetitive conduct -- see discussion under heading REFUSAL TO WHEEL.

There is no evidence that Applicant's refusal to wheel was part of a larger scheme or conspiracy to bring into being a situation inconsistent with the antitrust laws.

We conclude as a matter of law that there is no situation inconsistent with the antitrust laws arising out of Applicant's refusal to wheel for the smaller utilities.

Assuming arguendo that there is, or could be, a situation inconsistent with the antitrust laws arising out of inability of the smaller utilities to coordinate with each other because of Applicant's refusal to wheel, there is no evidence of an anticompetitive scheme or conspiracy having as a material element and significant

factor the misuse of activities under the license which would maintain or create such situation. We conclude as a matter of law that there is no nexus between the activities under the license and said assumed situation.

SITUATION 5.
PREVENTION OF COORDINATION BY
APPLICANTS REFUSAL TO GRANT
UNIT POWER OR JOINT VENTURE
ACCESS TO MIDLAND PLANT,
UNITS 1 & 2

In Situation 1, we discussed the topic of operational coordination between Applicant and the smaller utilities. We turn now to developmental or planning coordination between Applicant and the smaller utilities. This has to do with mutual assistance in the planning of new generating facilities and the carrying out of such plans so as to confer net benefits on each party. For example, the parties can take turns at building new facilities in accordance with a joint plan, and each may temporarily buy from the other surplus energy (unit power) generated from a facility larger than the owner needs at the time it becomes operative. Another possibility is for the parties to plan a facility large enough to meet the needs of two or more parties and then build it as a joint venture, each being entitled to the output of the facility in proportion to its capital investment share therein. In each case, the parties plan to take advantage of the economies of scale.

The electric power generated by the Midland plant will be fully integrated into Applicant's system [Tr 9160]. Such power will be comingled with that of the Applicant's other sources of bulk power and will be utilized by Applicant solely as undifferentiated power produced by the system as a whole [Tr 9160]. Applicant requires the entire power output of the Midland plant to serve the requirements of its customers [Tr 9159].

It is argued that a refusal to grant either unit power or joint-venture access to the Midland Plant is a refusal by Applicant to engage in developmental coordination. The argument is unsound. The Midland Plant was planned in 1967 and its plan was publicized in that year [Tr 8529, Exhibit DJ 183]. Four years later, in 1971, the smaller utilities showed interest in access to Midland [Tr 1202-1203; 1215; 1485-1486; 1735; 4516; 4520; 4521; 7934; Exhibits DJ 22; 24; 27; 58]. Most, but not all, of the inquiries specifically mentioned Midland. None of the smaller utilities requested participation in the Midland Plant. They wanted the option to decide whether or not they wanted access, and if so, what kind of access, when and how much [Note page 21 of Brief on Proposed Findings of Michigan Cities and Cooperatives dated October 8, 1974]. In developmental or planning coordination, each Party binds itself at the beginning of the

project as to the terms of participation in the projected facility. By no stretch of the imagination can it be deemed to be developmental coordination where a smaller utility, years after Applicant's plans and commitments are fixed, requests the right to look things over and chose such participation, if any, the smaller utility desires to have. In developmental planning involving staggered construction, surplus power is sold by the facility owner to the other party as unit power. In this case, there is no surplus power to be sold, since Applicant needs all of power from the facility to serve its own customers [Tr 9160]. In a joint-venture, each party gets the portion for which it planned. In this case, Applicant has planned for all of the power and the smaller utilities have planned for none. If the smaller utilities should get either unit power or joint-venture participation in Midland, Applicant would be short of planned power by the amount taken by the smaller utilities. Applicant would have to buy wholesale power to cover the shortage. This would increase Applicant's costs [Tr 9162]. In other words, the grant of access to either unit power or joint-venture would result in a detriment and a financial burden to Applicant and, hence, would NOT be coordination -- see topics under the heading: COORDINATION - MUTUAL BENEFITS.

Let us ignore the concept of developmental coordination and consider whether or not Applicant has any duty to offer or agree to grant to the smaller utilities access to Midland in the form of unit power or joint-venture. The argument in favor of forcing Applicant to grant such access can be stated briefly. The smaller utilities are handicapped by their small size and limited financial assets. Therefore, as a good Samaritan, Applicant should share with its small competitors the benefits which it possessed due to Applicant's larger size and greater financial assets. If Applicant does not choose of its own volition to do so, then the Board should deem Applicant's behavior to be anticompetitive and force Applicant to help its competitors. The difficulty with this argument is that neither the antitrust laws nor the policy underlying them require an entity to be a good Samaritan to its competitors -- see topics headed: REFUSAL TO COORDINATE, REFUSAL TO WHEEL and REFUSAL OF ACCESS TO NUCLEAR FACILITIES.

We find as a fact that Applicant's response, to the belated inquiries, concerning access to Midland, which response was a refusal to grant the smaller utilities an option to participate in Midland by purchase of unit power or by joint-venture is not a refusal to enter into developmental coordination with the smaller utilities.

We find as a fact that Applicant has the power to refuse to enter into voluntary developmental coordination with the smaller utilities.

There is no evidence that Applicant has ever exercised such power in an anticompetitive fashion against the smaller utilities. We conclude as a matter of law that there is no situation inconsistent with the antitrust laws arising out of Applicant's alleged use of such power to prevent developmental coordination between Applicant and said smaller utilities.

Applicant proposes to use the activities under the license in the very manner and for the very purpose for which the license grant was authorized by statute. Such conduct is not anticompetitive.

Assuming arguendo that there is, or could be, a situation inconsistent with the antitrust laws arising out of Applicant's alleged refusal to enter into developmental coordination, there is no evidence of an anticompetitive scheme or conspiracy, having as a material element and significant factor the misuse of activities under the licenses which would maintain or create such situation. We conclude as a matter of law that there is no nexus between the activities under the license and said assumed situation.

SITUATIONS NOT WITHIN THE RELEVANT MATTERS IN CONTROVERSY AND NOT WITHIN THE RELEVANT MARKET

During the hearing, evidence was presented concerning situations which were not within the relevant matters in controversy and not within the relevant market. While rulings on such situations are deemed neither essential or necessary to the disposition of the case, for the sake of completeness, several of them will be discussed. Comments as to relevancy to the proceedings and as to nexus of the discussed situations apply with equal force to any alleged situation not discussed in detail.

SITUATION 6.
ATTEMPT TO MONOPOLIZE THE ENTIRE
RETAIL AND WHOLESALE MARKETS

The record contains a copy of a speech dated May 17, 1966 by Mr. Robert Paul (then general power sales engineer [Tr 7805]) to a group of Applicant's employees in which he said:

> "The first goal of our marketing activity or program concerning utility systems in our service area is, of course, to acquire these systems" [Exhibit DJ 188, Tr 8043]."

Mr. A. H. Aymond, who is Chairman of the Board and President of Applicant, testified [Tr 6064] that the acquisition of all of the smaller utilities "has not and never has been our policy".

Mr. Paul testified that he never set Company policy [Tr 7962-63]. It was part of his duties to advise others as to company policy [Tr 7959]. He further testified that it is fair to assume that if he tells other people in the company that such-and-such is the policy, he believes that that is the policy enunciated or approved by his management [Tr 8268].

There is no direct evidence of record that Mr. Paul ever discussed his theory of company policy with his management, but it is difficult to believe that communications between him and

management were so lacking as to cause management to be unaware of Mr. Paul's thinking. Moreover, it was a duty of management to advise Mr. Paul of its policies and to assure that an employees whose duties included policy enunciation be disabused of false notions of such policy. Although we accept Mr. Aymond's testimony on policy as true, nevertheless, we conclude as a matter of law that the Applicant is bound by Mr. Paul's statement because of Mr. Paul's apparent authority to speak for management and because of management's failure to keep Mr. Paul informed of any different policy. See Continental Baking Co. v. U.S., 281 F. 2d 137 (6th Cir. 1960) at pages 149-150 and cases cited therein.

During the period January 1, 1960 through December 31, 1973, Applicant acquired franchises in three small municipalities as follows:

The municipal system of Grayling was acquired by Applicant in 1961. The system requirement for this municipality in 1960 was 7805 Mwhr [Exhibit CP 11,307, item 25].

The private utility serving Rogers City was acquired by Applicant in 1967. The system's requirement for this utility in 1960 was 19331 Mwhr [Exhibit CP 11,307, item 34]. The acquisition was approved by 100% of the stockholders of Rogers City Power Co., by the MSPC, case U-2737, June 29, 1957, and by FPC, Docket E-7803,

September 6, 1967, 38 FPC 580. The system served 1,532 residential and commercial customers [38 FPC 580]. The Rogers City Power Co. had no generating equipment and bought 100% of its power from Applicant [Exhibit CP 11,307, item 34].

The municipal system of Allegan was acquired in 1968. The system requirement for 1960 was 14,758 Mwhr [Exhibit CP 11,307, item 24]. Approximately 1822 customers were served by this system in 1967 [39 FPC 104]. This city generated 100% of its power requirements [Exhibit CP 11,307, item 24]. On a referendum to the electors, the vote was 798 for and 438 against. Thus, over the 60% majority required was in favor of the acquisition. The acquisition was approved by the MSPC and by the FPC, Docket No. E-7360, 39 FPC 103, January 29, 1968. The FPC action was unsuccessfully opposed by a minority group. The take-over was opposed unsuccessfully by a minority of the citizens in Citizens for Allegan County, Inc. v. FPC, 414 F. 2d 1129 (1969).

System requirements data for these three utilities for 1960 are 31,894 Mwhr, compared with Applicant's requirement for 1960 of 4,896,066 Mwhr Applicant's 1970 Annual Report to Stockholders, page 31, residential and commercial sales] represents less than 1% of Applicant's sales. By customers, the three acquired utilities

totaled approximately 4700 compared with either 873,834 in 1960 [Applicant's 1970 Annual Report to Stockholders, page 34] or 1,112,000 in 1972 [Tr 7917], or 1,147,507 in 1972 [Exhibit DJ 21, page 27], or less than 0.6%. See also Exhibit CP 11,308. During the same period 1960-1973, Applicant's internal growth was approximately 130%. By any comparison, these acquisitions had a de minimis effect on Applicant's growth during the period.

Applicant made an attempt to lease the electric system of Traverse City in 1965 where the City of Traverse City preferred to build new generating facilities and be independent of Applicant. It wrote a letter to the Mayor and City Commissioners of the City of Traverse City dated April 16, 1965, with copies to the City Manager, the City Clerk and the Traverse City Record Eagle [Exhibit DJ 30], which was characterized by witness as disruptive influence [Tr 1589]. The history of Applicant's activities in this matter is to be found at Tr 1585-1589, Tr 1791-1798. Traverse City defeated Applicant's position 2 to 1. The City of Traverse City installed the new generating equipment and continued to compete vigorously with Applicant [Tr 2023-2025]; the rates of Traverse City in 1965 were 10% less than Applicant's [Tr 1024].

In 1965, Applicant tried to prevent a loan of $12,446,000 to Northern Michigan and Wolverine [Exhibits DJ 143 and 145, Tr 1233-

1241, Exhibit DJ 42, DJ 224, Tr 1242, 1270] on the grounds that Applicant could supply wholesale power cheaper than Northern Michigan and Wolverine could generate it. REA was not impressed and approved the entire loan at 2% interest [Tr 1277-1278].

In 1969 Applicant sought in vain to acquire the Southeastern Michigan Cooperative [Exhibit DJ 125].

In 1970, Mr. Paul evidently still believed that company policy was to compete in the wholesale power market by acquisition of its competitors. In a memo dated March 20, 1970 to his superior, Mr. Conden, he recommended acquisition of the G & T cooperatives Northern and Wolverine [Exhibit DJ 187].

It can be argued and found as a fact that one occasional acquisition of a competitor, such acquisition having little effect on competition, is fair competition in the retail electric milieu. It can also be argued that the same philosophy applies to the acquisition of a wholesale competitor in the wholesale electric milieu. Pages 43-50 of Applicant's Brief in Support of its Proposed Findings of Fact and Conclusions of Law, dated October 8, 1974, forcefully presents this point of view. However, 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. Applicant's 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 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.

Mr. Paul's scheme in every instance has been to use the argument that "we can provide the services cheaper."

There is an important factor which prevents Mr. Paul's scheme from being a violation of the "attempt to monopolize" part of Section 2 of the Sherman Act. In order to violate this provision,

there must be not only intent but also the power to carry out the scheme. American Tobacco Co. v. U.S., 328 US 781, 66 S. Ct. 1125, 90 L. Ed. 1575 at p. 1596, (1945); U.S. v. Aluminum Co. of America, 148 F. 2d 416 at page 432, (2nd Cir. 1945); and cases therein cited.

Mr. Paul's scheme had the characteristic of a day dream totally divorced from reality. The staying power of the municipals and the growth of the cooperatives together with their aggressive and even hostile attitude as displayed by witnesses in the proceedings makes any possibility of achieving the aim so remote as to be negligible. The repeated failures of specific instances noted above reinforce this finding.

We conclude that, because the evidence totally fails to show the power to carry out the scheme, no situation inconsistent with the antitrust laws arose out of the scheme.

The Parties were advised by the Chairman at an early stage in these proceedings that acquisition program of the Applicant was not within the relevant matters in controversy [Tr 3986-3987]. The Board, as now constituted, agrees with Chairman Garfinkel's ruling and holds that, assuming arguendo that such a situation has arisen, it is not within the relevant matters in controversy, all of which relate to coordination, and hence is not a matter within the scope of this proceeding.

Moreover, assuming arguendo that there is, or could be, a situation inconsistent with the antitrust law arising out of Applicant's acquisition policy and assuming that some way can be found to bring such situation within the scope of this proceeding, there is no evidence of an anticompetitive scheme or conspiracy, having as a material element and significant factor the misuse of activities under the licenses, which would maintain or create such situation. We conclude as a matter of law that there is no nexus between the activities under the licenses and the said assumed situation.

SITUATION 7.
CONSPIRACIES TO LIMIT
RETAIL COMPETITION

The record contains a number of allegations or references to "gentleman's agreements" not to compete. A gentleman's agreement is an informal oral understanding not reduced to writing. Mr. Westerbrock, General Manager of Top O'Michigan Rural Electric, expressed opinion concerning written policies [Exhibit DJ 110 and 144]. He used the term "gentleman's agreement" but the policy agreement [Exhibit DJ 144] between Applicant and Detroit Edison is not an oral agreement. Therefore, it should not be characterized as a "gentleman's agreement". Also, his testimony is pure speculation -- "there seems to be a gentleman's agreement" [Tr 1018]. Mr. Westerbrock further characterized relations between his co-op and neighboring co-ops as "a sort of loose gentleman's agreement" [Tr 1048]. Here he means case-by-case settlement of disputes. On redirect, he changed a little to cover a continuing unilateral policy of Top O'Michigan by the term "sort of a loose gentleman's agreement" [Tr 1068].

Mr. Sundstrand, legal counsel for the village of Paw Paw [Tr 389], testified that Mr. Paul of Applicant phoned to him in

answer to his letter of December 4, 1963 [Exhibit DJ 129] and "stated that there was a more or less gentleman's agreement" between Applicant and Michigan Gas and Electric Company not to compete [Tr 3903]. Mr. Sandstrand further testified that he "felt as an attorney, and believed as an attorney that this so-called "gentleman's agreement' was illegal" [Tr 3906]. After further prodding, Applicant made an offer to serve Paw Paw in 1966 [Tr 3911]. But Paw Paw then got a better rate from American Electric Power (owner of Michigan Gas and Electric [Tr 3913]). If there was such a gentleman's agreement, Applicant broke it.

Mr. Rogers of the firm of Southern Engineering Company of Georgia, an expert witness for Intervenors, also used the term "gentleman's agreement" in his testimony. He quoted Mr. Campbell of Applicant as having said that Applicant had not taken customers away from Southern Michigan Co-op because of some gentleman's agreement. He further testified that while Mr. Campbell used the phrase "gentleman's agreement", "from the way he used it, I really could interpret it only to mean a unilateral policy of Consumers" [Tr 5615]. There was also hearsay evidence [Exhibits DJ 128] of an "understanding" between Applicant and Toledo Edison [Tr 5480]. Mr. Brush, General Manager of the Lansing Board of Water and Light which operates the city's

municipal electric system [Tr 2067], testified that there was a gentleman's agreement between Lansing and Applicant on what is service area [Tr 2259].

Exhibit DJ 153 is an internal memo among Applicant's personnel referring to the failure of the City of Holland to honor our so-called gentleman's agreement.

Applicant's Chairman of the Board and President, Mr. Aymond, testified that Applicant's policies were unilateral [Tr 6476] and that if anyone in Consumers Power were a party to such an understanding, he would discharge him immediately [Tr 6481].

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

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

We find as a matter of fact there is no substance to the testimony concerning "gentleman's agreement".

There is written evidence of an informal agreement between Applicant and its neighbor, Detroit Edison, concerning retail competition at the boundary of their territories [Exhibit DJ 110]. Mr. Paul of Applicant deems the agreement to be consistent with the

single phase rule promulgated by MPSC [Tr 7864-65]. At first blush, the informal agreement appears to be an agreement not to compete at the boundary between the two utilities. Let us, however, examine the last draft of the agreement [Letter of May 2, 1968 -- a part of Exhibit DJ 110] in detail. Provision 1 requires each party to serve only in its own franchised area. This is required by the MPSC and no exception can be made in the absence of inadequate service [Tr 6533]. Provision 1 also goes on to provide exceptions where the franchised party has no adjacent service line. This also agrees with the said MPSC policy. Provision 2 calls for a request for service from a non-franchised party to be referred to the franchised party, thereby conforming to proper Provision 1. Provision 3 calls for customer's choice in areas where both are franchised if the chosen party has or can reasonably provide facilities to give service. This does not prevent competition prior to the customer's choice, but rather is an agreement to accept the customer's decision as final. This is not legal. Where the party approached has no adjacent distribution facilities, it may refer prospective customers to the other party having such facilities. Again, this is in accord with MPSC philosophy. Provision 4 provides for "up-the-line" arbitration of disputes.

Insofar as is discernable, this is not an agreement "not to compete" but is an agreement to implement MPSC policies and minimize need to recourse to MPSC in the event of disputes. Compare the single phase rule [Exhibit DJ 9].

For the sake of conciseness, we shall refer to the above described oral and written agreements as boundary agreements.

We find no substantial evidence of a situation inconsistent with the antitrust laws arising out of boundary agreements.

Assuming arguendo that each boundary agreement is a conspiracy in restraint of trade or, alternatively, that the sum total of the boundary agreements is an industry-wide conspiracy in restraint of trade, and assuming further arguendo that a situation inconsistent with the antitrust laws arises out of each or all of such boundary agreements, no such situation has any connection with the relevant matters in controversy. Hence, we conclude that no such situation is within the scope of this proceeding.

Assuming arguendo that there is, or could be, a situation inconsistent with the antitrust laws arising out of boundary agreements and that some way can be found to bring such situation within the scope of this proceeding, there is no evidence of an anticompetitive scheme or conspiracy, having as a material element and

significant factor the misuse of activities under the licenses, which would maintain or create such situation. We conclude as a matter of law that there is no nexus between the activities under the licenses and the said assumed situation.

SITUATION 8.
THE REGIONAL POWER
EXCHANGE MARKET

Applicant is interconnected and coordinated with a number of large privately-owned utilities outside of the relevant geographic market. These interconnections have enabled Applicant to buy wholesale power in times of need which coincided with the availability of surplus power which could be delivered through these interconnections. Without attempting to make any precise geographic limits of such wholesale power sources, Justice has designated them as the "regional power exchange market".

Some of the smaller utilities in the relevant geographic market are sufficiently close to large privately-owned utilities other t an Applicant to permit them to buy wholesale power from such other ut lities. For example, Clinton, Paw Paw, South Haven, Sturgis, Fruit Belt Electric Cooperative, Southeastern Michigan Electric Cooperatives and Thumb Electric Cooperative buy wholesale power from .tilities in the "regional power exchange market". Most of the smaller utilities in the relevant geographic market are too remote from such power sources to make such purchases unless they are able to obtain wheeling services from Applicant. These smaller utilities

have "the make or buy from Applicant" option for wholesale power supplies. They buy from Applicant or generate their own power.

Justice and Intervenors contend that such smaller utilities have a right to insist that Applicant enter the wheeling business so as to give the smaller utilities a wider choice of sources of wholesale power. The contention is that refusal to wheel power to and from the "regional power exchange market" is unfair competition as a result of which there has arisen a situation inconsistent with the antitrust laws, which situation will be maintained by activities under the licenses.

This argument is another instance of assertion of a legal duty to be a good Samaritan. We reject such argument for reasons discussed in the first part of the topic: REFUSAL TO COORDINATE. We reiterate our conclusion of law that the unilateral refusal to assist competitors per se 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.

Under the topic: REFUSAL TO WHEEL, we held that as a matter of law, the bottleneck situation applies only to conspiracies and hence, is inapplicable to unilateral refusal to wheel. We adhere to this conclusion.

In our discussion of Situation 4: PREVENTION OF COORDINATION BY REFUSAL OF APPLICANT TO WHEEL BETWEEN OR AMONG THE SMALLER UTILITIES, we advanced, as an additional reason for inapplicability of the bottleneck theory, the fact that Applicant's transmission system was not a bottleneck. This latter reason is not applicable here. If as a matter of law the smaller utilities have a right to exchange wholesale power with utilities outside the relevant geographic market using the transmission facilities of Applicant (and the transmission facilities of any other utility geographically located between such smaller utilities and a utility geographically removed) even though such right will require Applicant to enter the business of wheeling (a business from which Applicant has heretofore abstained); then we can not excuse Applicant on the plea that the smaller utilities can build their own transmission facilities.

While we are firmly convinced that the smaller utilities have no such right, if, in fact, such right exists, this is the wrong forum for the enforcement thereof.

The alleged right to such wheeling is not within the relevant matter in controversy and, hence, is not within the scope of this proceeding.

Moreover, assuming arguendo that there is, or could be, a situation inconsistent with the antitrust law arising out of Applicant's refusal to wheel in the regional power exchange market, and assuming that some way can be found to bring such situation within the scope of this proceeding, there is no evidence of an anti-competitive scheme or conspiracy, having as a material element and significant factor the misuse of activities under the license, which would maintain or create such situation. We conclude as a matter of law that there is no nexus between the activities under the license and the said assumed situation.

SUMMARY

(1) The record in this proceeding does not disclose substantial evidence of any fact or facts within the relevant matters in controversy which constitute 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.

(2) Applicant's activities under the Midland licenses are not a material element and significant factor in any actual or alleged scheme or conspiracy the purpose or effect of which is to cause the maintenance of a situation inconsistent with the antitrust laws.

(3) No nexus exists between Applicant's activities under the Midland licenses and any actual or alleged situation inconsistent with the antitrust laws.

MISCELLANEOUS TOPICS

I. RELATION OF PUBLIC INTEREST TO THIS OPINION

The Board has been urged to consider the public interest in reaching a decision in this proceeding. The public interest has been the basis for many federal statutes. These statutes cover such diverse areas of public interest as the establishment and maintenance of the armed services, the regulation of interstate commerce, the advancement of agriculture, the regulation of banks and many others too numerous to mention. The antitrust laws have for their purpose the promotion of competition among concerns engaged in interstate commerce by forbidding anticompetitive practices. The antitrust laws are in an area affected by the public interest. We can confidently conclude that conduct inconsistent with the antitrust laws is contrary to the public interest. However, it is readily apparent from the brief list above of areas affected by the public interest that behavior contrary to the public interest is not necessarily conduct inconsistent with antitrust laws. "The antitrust laws were never meant to be a panacea for all wrongs". Pawmelee Transportation Co. v. Keeshim, 292 F. 2d 794, 804 (7th Cir. 1961).

den., 368 US 941, 7 L. Ed. 2d 340, 82 S. Ct. 376 (1961), reh. den., 368 US 972, 7 L. Ed. 2d 401, 82 S. Ct. 289 (1962).

Some regulatory agencies are empowered and required to take into consideration the public interest in carrying out their regulatory function. The general rule is that in determining whether or not the exercise of its regulatory power will promote the public interest, such an agency must consider anticompetitive consequences, Denver & Rio Grande Western Railroad Co. v. U.S., 387 US 485, 87 S. Ct. 1754, 18 L. Ed. 2d (1967). Said case was concerned with § 20a of the Interstate Commerce Act, as amended, 49 USC § 20a.

In considering the meaning of public interest under § 204 of the Federal Power Act, 16 USC § 824c, the United States Court of Appeals for the District of Columbia in City of Lafayette v. Security and Exchange Commission, City of Lafayette v. Federal Power Commission, 147 U.S. App. D.C. 98, 454 F. 2d 941 ruled that the FPC must consider anticompetitive aspects of the matter as part of the public interests. The Supreme Court affirmed, Gulf States Utilities v. FPC, 411 US 747, 93 S. Ct. 1870, 36 L. Ed. 2d 635 (1973), reh den. 412 US 944, 931 S. Ct. 2767, 37 L. Ed. 2d 405.

The Nuclear Regulatory Commission's authority under the Atomic Energy Act § 105c(5) as amended is limited to a determination

as to whether activities under its licensing procedure would create or maintain a situation inconsistent with the antitrust laws specified in § 105(a). If such finding is in the affirmative, then under § 105c(6), the Commission is required also to consider such other factors, including the need for power in the affected area as the Commission in its judgment deems necessary to protect the public interest. The Commission has the authority to issue or continue a license as applied for, to refuse to issue a license or amend it, and to issue a license with such conditions as it deems appropriate. The authority delegated to this Board is, of necessity, no broader than that of the Commission. Thus, under Sec. 105, matters of public interest, other than anticompetitive conduct, cannot be considered by the Board until after an affirmative determination has been made that activities under the license will create or maintain a situation inconsistent with the antitrust laws.

II. INFLUENCE OF MINIMUM PLANT SIZE ON DECISION

One of the arguments for granting access, in the form of joint-venture or unit power purchase, to nuclear power facilities is that it is not economic to build nuclear units below a size too large to be built by smaller utilities, either alone or in a joint-venture. Mr. J. O. Wolfe, a witness for Justice, is an electrical engineer [Tr 1637]. He testified that "Several sources that I have heard from, including consulting engineers who talked on the subject, indicate that approximately 500 megawatts is the smallest size nuclear unit that can economically be built." [Tr 1678A] Mr. William R. Mayben, a witness for Justice, is an electrical engineer [Tr 2538-2540]. Mr. Mayben testified:

> "... I think the experience of the industry now is that nuclear plants' capacity in less than 500,000 kilowatts, the cost per kilowatt rises so sharply as to virtually be infeasible compared to other forms of base load capacity." [Tr 2558]
>
> "I don't want to imply to the Board or to the record that I am a nuclear power expert, by any means." [Tr 2559]
>
> "... I won't pass any judgment with regard to whether or not 500 (megawatt) is an appropriate level or not." [Tr 3700]

Other witnesses just assume, as a matter of course, that nuclear power plants are too big to be built by smaller utilities.

Mr. Helfman, another witness for Justice, is an electrical engineer [Page 1 of prepared statement following Tr 3210]. He conducted studies which included theoretical construction of a 529 Mw nuclear power plant by a selected group of smaller utilities. Apparently, Mr. Helfman also assumed that approximately 500 Mw capacity was the smallest feasible nuclear power facility.

This basic assumption, as to which there is only hearsay evidence, is urged as proving that the refusal to grant access to the Midland units by joint venture or unit power participation is the denial of any meaningful participation in the unique nuclear industry. Such denial seems to be equated conceptually to the creating or maintaining of a situation inconsistent with the antitrust laws.

We have concluded that activities under the license for Midland Plant Units 1 and 2 will not create or maintain a situation inconsistent with the antitrust laws. The Parties having the burden of proof seem to seek a ruling as to whether the alleged size limitation on nuclear power plants justifies an extension of the antitrust laws beyond their previous scope. The evidence in this proceeding makes it inappropriate for us to even consider the matter. The expert testimony is based on hearsay testimony of gossip in the

industry and not on facts of record. We reject this testimony. The facts of record are that the 75 Mw Big Rock Point Plant (which began as an experimental unit) is an efficient facility for the commercial production of electric energy. The evidence is that this small 75 Mw plant outperformed all of the commercial boiling water reactors in the United States in 1973 regardless of size. There is no substantial evidence in the record of this proceeding that the smaller utilities are precluded from building their own nuclear power facilities because of size limitations.

III. WHOLESALE POWER AS ADEQUATE ACCESS TO THE MIDLAND PLANT

In dealing with the contention that refusal to grant access to Midland in the form of unit power or joint-venture, we have met the contention head-on without consideration of whether access to Midland by sale of power by Applicant would be adequate access.

In this case, and in the legislative history of the Sec. 105c, one argument that has been put forth is that Federal funds provided by all citizens of the United States has paid for the development of peaceful uses of atomic energy and therefore direct access to a nuclear power plant is a right of any utility.

First, the simple fact is that in the relevant geographic market, most of the taxpayers are directly receiving benefits of nuclear power because most of the users of electrical energy are direct retail customers of Applicant. Many of the remaining taxpayers are retail customers of Applicant's wholesale customers. By exercising the option to buy wholesale power from Applicant, the remaining smaller utilities could participate directly. In other words, the facts in this case show that most taxpayers in the relevant

geographic market benefit from nuclear power. The others do not benefit at their choice or at the choice of the management of the smaller utilities supplying power to them.

Second, the argument has been made that nuclear power is low-cost and, therefore, the smaller utilities has to have direct access to low-cost power in order to be competitive.

The record shows that the wholesale customers who buy from Applicant are viable, growing, active competitors of Applicant. There is no substantial evidence that any reduction in Applicant's system average-cost will not be passed on to wholesale customers. The record further shows that the smaller utilities which generate their own power are likewise viable, growing, active competitors. There is no substantial evidence that the latter cannot build their own nuclear power plant if they so desire. The record shows that a small 75 Mw plant can operate efficiently and economically.

If access to Midland by unit-power or joint-venture were to result in lower costs to the smaller utilities than access by purchase of wholesale power, these lower costs would have to be made up by charging the remaining customers of Applicant higher rates.

This would be a detriment to most of the citizens in the relevant geographic market. No sound reason is advanced why the many should be penalized to help the few. Accordingly, based on the record in this proceeding, we find that adequate access to nuclear power is provided to both the citizens and the competing utilities by the sale of power by Applicant at its retail and wholesale rates.

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 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.

V. EXCLUSION OF EVIDENCE AS TO APPLICANT'S OIL BUSINESS AND POLITICAL ACTIVITIES

The Board early in the proceeding excluded consideration of Applicant's gas business and political activities (see Order of Board, November 28, 1972). The relevant matters in controversy all relate to coordination. Nothing was alleged to indicate either the gas business or political activity was related to coordination.

Coordination is carried out pursuant to the contractual Parties. The Board at the time of its ruling could find no way in which these private arrangements would be affected by Applicant's oil business or by political activities. None has since been suggested. The areas which the Parties attempted to explore during the proceeding certainly could not have affected findings concerning the relevant matters in controversy.

The Board reiterates the prior ruling that evidence as to the gas business and as to political activities would have been irrelevant and immaterial to the matters in controversy, that such evidence was properly excluded, and that they are matters outside the scope of this proceeding.

VI. LIMITATION OF TIME FOR CROSS-EXAMINATION

During the hearing, Justice complained several times about limitation on time alloted for cross-examination of adverse witnesses. In the judgment of the Board, adequate opportunity for cross-examination was afforded and more extensive cross-examination would have had little, if any, effect on this decision. The regulations of the Commission give ample authority to the Board to limit cross-examination which is "argumentative, repetitious or cumulative" (10 CFR 2.757(c)) and to control the hearing (10 CFR 2.718(e)). In addition, case law supports the right of a Board to limit cross-examination:

> "The right to cross-examine does not extend to the right to cross-examine endlessly, however." Food Store Emp. U. Local 347, AMC 8 B.W. v. N.R.L.B. 422 F. 2d 685, 692 (D.C. Cir. 1969).

See also Northern States Power Co. (Praire Island Units 1 and 2) ALAB 244, RAI-74-11, 857, 868 (November 21, 1974) and Smith v. Illinois, 390 US 129, 132, 19 L. Ed. 2d 956, 959, 88 S. Ct. 748 (1968).

The Board's action was an appropriate exercise of its authority.

DECISION AND ORDER

The broad issue before the Board has two facets; e.g., create and maintain.

In the letter dated June 28, 1971 from Justice to the Commission re licensing of the Midland Units 1 and 2, Justice's recommendation, that an antitrust hearing be held to consider the antitrust aspects of activities under the proposed licenses, was limited to the maintain facet. This limitation was adopted by all Parties in agreeing to the scope of the relevant matters in controversy. Such agreement of the Parties was, in effect, a stipulation that the activities under the licenses will not create a situation inconsistent with the antitrust laws. This agreement or stipulation permitted the Board to resolve the create facet of the broad issue without more ado. In dealing with the record, it was only necessary for the Board to focus upon the maintain facet.

In its consideration of the record, the Board focused upon and made findings and conclusions as to both facets. The holding of the Board on the broad issue as to the maintain facet is based upon the findings and conclusions in this opinion. Its holding on

the broad issue as to the create facet is based upon the aforesaid agreement or stipulation of the Parties, buttressed by the findings and conclusions in this opinion.

The Board has reviewed the entire record of this proceeding, including the proposed findings of fact and conclusions of law submitted by the Parties. The facts of record not specifically mentioned in the opinion have been considered. All of the proposed findings and conclusions submitted by the Parties which are not incorporated directly or inferentially in this Initial Decision are herewith rejected as being contrary to the Board's findings and conclusions or unnecessary to the rendering of the Decision.

As to the broad issue, we hold that activities under the licenses will not create or maintain a situation inconsistent with the antitrust laws as specified in Subsection 105a of the Atomic Energy Act of 1954, as amended.

Based on the Board's holding as to the broad issue, and pursuant to the Atomic Energy Act of 1954, as amended, and the Commission's Regulations, IT IS ORDERED, that the Director of Regulation is authorized to continue, as issued, the permits to the Consumer's Power Company for construction of the Midland Plant, Units 1 and 2

(Construction Permits CPPR-81 and CPPR-82, both dated December 15, 1972), without the imposition of any antitrust conditions.

IT IS FURTHER ORDERED, in accordance with 10 CFR § 2.760, § 2.762, § 2.764, § 2.765 and § 2.786 that this Initial Decision shall become effective immediately and shall constitute with respect to the matters covered therein the final action of the Commission forty-five (45) days after the date of issuance hereof, subject to any review pursuant to the Commission's Rules of Practice. Exceptions to this Initial Decision may be filed by any Party within seven (7) days after service thereof. Within fifteen (15) days thereafter (twenty [20] days in the case of the Staff), any Party filing such exceptions shall file a brief in support thereof. Within fifteen (15) days (twenty [20] days in the case of the Staff) after the filing of the brief in support of exceptions, any other Party may file a brief in support of, or in opposition to, the exceptions.

IT IS SO ORDERED.

ATOMIC SAFETY AND LICENSING
BOARD PANEL

J. Venn Leeds, Member

Hugh K. Clark, Chairman

Issued this 18th day of July,

1975 at Bethesda, Maryland.

Postscriptum: We are unable to leave this Initial Decision without mentioning Jerome Garfinkel, Esq., the Chairman of this Board until his untimely death. As Chairman until after the closing of the record, he contributed in a major way to the course of this proceeding. The legal profession, the Atomic Safety and Licensing Board Panel, and this Board have lost a capable and wise counselor and the remaining members of the Board have lost a fine friend.

APPENDIX A

"SEC. 105. ANTITRUST PROVISIONS.-

"a. Nothing contained in this Act shall relieve any person from the operation of the following Acts, as amended, 'An Act to protect trade and commerce against unlawful restraints and monopolies' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved August twenty-seven, eighteen hundred and ninety-four; 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes' approved October fifteen, nineteen hundred and fourteen; and 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes' approved September twenty-six, nineteen hundred and fourteen. In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the laws cited above, to have violated any of the provisions of such laws in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act.

"b. The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization or special nuclear material or atomic energy which appears to violate or to tend toward the violation of any of the foregoing Acts, or to restrict free competition in private enterprise.

"c. (1) The Commission shall promptly transmit to the Attorney General a copy of any license application provided for in paragraph (2) of this subsection, and a copy of any written request provided for in paragraph (3) of this subsection; and the Attorney General shall, within a reasonable time, but in no event to exceed 180 days after receiving a copy of such application or written request, render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection. Such advice shall include an explanatory statement as to the reasons or basis therefor.

"(2) Paragraph (1) of this subsection shall apply to an application for a license to construct or operate a utilization or production facility under section 103: Provided, however, That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

"(3) With respect to any Commission permit for the construction of a utilization or production facility issued pursuant to subsection 104b. prior to the enactment into law of this subsection, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdiction basis for such determination shall have the right, upon a written request to the Commission, to obtain an antitrust review under this section of the application for an operating license. Such written request shall be made within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license for the facility or the date of enactment into law of this subsection, whichever is later.

"(4) Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate for the advice called for in paragraph (1) of this subsection.

"(5) Promptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register. Where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a.

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

"(7) The Commission, with the approval of the Attorney General, may except from any of the requirements of this subsection such classes or types of licenses as the Commission may determine would not significantly affect the applicant's activities under the antitrust laws as specified in subsection 105a.

"(8) With respect to any application for a construction permit on file at the time of enactment into law of this subsection, which permit would be for issuance under Section 103, and with respect to any application for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3), the Commission, after consultation with the Attorney General, may, upon determination that such action is necessary in the public interest to avoid unnecessary delay, establish by rule or order periods for Commission notification and receipt of advice differing from those set forth above and may issue a construction permit or operating license in advance of consideration of and findings with respect to the matters covered in this subsection: Provided, That any construction permit or operating license so issued shall contain such conditions as the Commission deems appropriate to assure that any subsequent findings and orders of the Commission with respect to such matters will be given full force and effect."

1. Federal Power Act (as amended)

Electric Utility Regulation (16 USC § 824, 825)

§ 824. Declaration of policy; application of subchapter; definitions

(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in inerstate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter.

(f) No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847.

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries - Regional districts; establishment; notice to State commissions

(a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State Commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

Sale or exchange of energy; establishing physical connections

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of

electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

Temporary connection and exchange of facilities during emergency

(c) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

Temporary connection during emergency by persons without jurisdiction of Commission

(d) During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of

electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: Provided, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: Provided further, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

Transmission of electric energy to foreign country

(e) After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

Transmission or sale at wholesale of electric energy; regulation

(f) The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from that State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict

with the exercise of the Commission's powers under or relating to subsection (e) of this section.

June 10, 1920, c. 285, § 202, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 848, and amended Aug. 7, 1953, c. 343, 67 Stat. 461.

§ 824d. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect

without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it could otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 852.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

June 10, 1920, c. 285 § 207, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 853.

ii. Antitrust Statutes

The Sherman Antitrust Act (15 USC § 1, 2) (1970)

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: ... Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

The Clayton Act (15 USC § 18)

Section 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction

of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly. ...

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under Section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

iv. The Federal Trade Commission Act: (15 USC 45 (1970))

Section 5(a)(1) Unfair methods competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

APPENDIX B

1. Index to Department of Justice Exhibits
2. Intervenors Exhibits
3. Applicant's Exhibits
4. Board's Exhibits and Noticed Documents

Staff has no exhibits

INDEX TO DEPARTMENT OF JUSTICE EXHIBITS

In the Matter of:

Consumers Power Company
Midland Plant, Units 1 and 2
AEC Docket Nos. 50-329A and 50-330A

April 2, 1974

CONSUMERS POWER COMPANY
Midland Units Nos. 1 and 2

VOLUME I

Admitted (1973)	Dept. of Justice No. & Exhibit No.	
11/28	DJ 1	(3 pages) Excerpts from the Federal Power Commission Principle Electric Facilities in the United States, 1972 Map, showing generation and transmission in Michigan.
12/4	DJ 2	(4 pages) August 20, 1928, opinion of the Attorney General of the State of Michigan, holding that an exclusive franchise for use of highways is unreasonable restriction under Section 28, Article 8 of the Michigan Constitution, and that a township is without authority to grant such exclusive franchises.
12/4	DJ 3	(2 pages) Public acts of the State of Michigan, Act 69 of 1929. "An act to define and regulate certain public utilities and to require them to secure certificate of convenience of necessity in certain cases."
12/4	DJ 4	(3 pages) Title 22, Michigan statutes annotated Section 22.142. Act 69 of 1929, supra.
12/4	DJ 5	(13 pages) Title 8 Michigan Statutes annotated, Section 8.71 through 8.94. "An Act to authorize any city having a population of 25,000 or more to take for public use the absolute title in fee to any public utility for supplying water, light, heat, power or transportation to the municipality and the inhabitants thereof within or without its corporate limits."
12/4	DJ 6	(2 pages) Act 264 of 1905. (The Foote Act) "An Act to authorize under certain conditions and restrictions the use of public streets, alleys and highways by persons, firms or corporations engaged in the manufacture, transmission and distribution of electricity for lighting, heating and power purposes."

11/29	DJ 7	(2 pages) United States Department of Agriculture Rural Electrification Administration revised Bulletin 20-6.
11/27	DJ 8	(4 pages) Various correspondence relating to the extension of Michigan Public Service Commission jurisdiction over electric cooperatives in the State of Michigan.
		(A) (1 page) A December 22, 1965 letter from Peter B. Spivack, Chairman of the Michigan Public Service Commission to Oceana Electric Cooperative informing the cooperative that the Commission is extending jurisdiction.
		(B) (1 page) A December 17, 1965, letter from Harley Johnston, manager of Oceana Electric Cooperative, to Peter B. Spivack, chairman of the Public Service Commission, regarding Michigan Public Service Commission jurisdiction over REA cooperatives.
		(C) (2 pages) A December 22, 1965 unaddressed letter from F. M. Hoppe, Director of Public Utilities, Michigan Public Service Commission, informing REA cooperatives of the Commission's intention to extend its regulation to cover cooperatives, and requesting certain information from the cooperatives.
11/27	DJ 9	(9 pages) A Rules and Regulation Order of the Michigan Public Service Commission, dated March 24, 1966, adopting rules governing the extension of single phase electric service in area served by two or more electric utilities.
12/4	DJ 10	(2 pages) A March 3, 1966, document prepared by Consumers Power Company entitled "Comments on Proposed Rules for the Extension of Electric Service in Areas Served by Both Privately Owned Electric Utility and Cooperatives."
11/27	DJ 11	(3 pages) Proposed rules governing the extension of single and three-phase electric service in areas served by two or more utilities.

11/27	DJ 12	(1 page) A CP Co. internal document, dated February 26, 1968, prepared by R. L. Paul, entitled "Municipal Electric Systems Purchase or Lease Offers."
12/4	DJ 13	(1 page) An undated CP Co. internal document listing electric utility systems interconnected with Consumers Power Co.
11/27	DJ 14	(3 pages) Reply of Applicant, Consumers Power Co., to Questions 9 and 10 of questionnaire submitted by Department of Justice, which reply lists nonaffiliated electric systems with peak loads smaller than Applicant which serve, either at wholesale or retail, areas adjacent to those served by Applicant. [Handwritten mar made by DJ personnel & should be disregarde
12/4	DJ 15	(9 pages) Rough draft and final draft of a CP Co. internal document entitled "Consumers Power Co. Municipal and Rural Electrification Administration Activities.
12/4 (Marked for ID only) Rejected 12/13	DJ 16	(27 pages) Corporate tree of Consumers Power Co.
12/4 (Marked for ID only) Rejected 12/13	DJ 17	(11 pages) Excerpts from 64th Cong., 1st Sess., Sen. Doc. 316 (1916) Part II, Table 55, regarding electric power development in the U. S. The excerpted portion relates to the State of Michigan.
11/29	DJ 18	A map showing electric transmission lines of Consumers Power Co., the Detroit Edison Company, Rural Electric Cooperatives, and Cities having municipally owned facilities. (Updated version of map submitted by Applicant in its application for license).
11/27	DJ 19	A map showing the franchise service area of privately owned utilities and general service area of rural electric cooperatives and municipals systems in the State of Michigan. (Submitted in the license application by Applicant)
11/28	DJ 20	A map showing the present and proposed transmission systems of Northern Michigan Electric Cooperative and Wolverine Electric Cooperative.

11/29	DJ 21	The 1972 Annual Report of Consumers Power Co.
11/28	DJ 22	(1 page) A July 20, 1971, letter from A. E. Steinbrecher, Manager of Northern Michigan Electric Cooperative, Inc., to Consumers Power Co., attention Mr. R. L. Paul, informing Consumers Power Co. of Northern Michigan's interest in exploring participation in the ownership and output of the Midland Nuclear Units.
11/28	DJ 23	(1 page) A July 22, 1971, letter from R. L. Paul to Mr. A. E. Steinbrecher acknowledging receipt of Mr. Steinbrecher's July 20, 1971, letter.
11/28	DJ 24	(1 page) A May 24, 1971, letter of Mr. J. D. Wolfe, Director of Traverse City Light and Power, indicating an interest on the part of Traverse City in obtaining a share of the generating capacity of the Midland units and in an arrangement for wheeling this energy over Consumers Power transmission system.
11/28	DJ 25	(2 pages) An internal CP Co. memorandum, prepared by E. H. Kaiser, regarding a meeting with Joe Wolfe, Director of Light and Power for Traverse City, on July 7, 1971, to discuss his inquiry regarding possible purchase of a portion of the Midland plant.
12/4	DJ 26	(1 page) A November 4, 1971, letter from J. R. Endicott, Director of the Board of Public Utilities, City of Coldwater, Michigan, to Robert E. Brewster, Marketing Superintendent of Consumers Power Co., requesting information necessary to plan for Coldwater's future electric requirements.
11/29	DJ 27	(1 page) A July 29, 1971, letter from Fred J. Lutz, of Lutz, Daily and Brain, consulting engineers for the City of Grand Haven, Michigan, indicating an interest on the part of Grand Haven in purchasing a direct interest in the Midland nuclear plant.

11/29	DJ 28	(1 page) An August 16, 1971, letter from R. L. Paul to Lutz, Daily and Brain, acknowledging receipt of their July 20, 1971, letter.
12/4	DJ 29	(2 pages) An August 7, 1970, letter from W. R. Chaney, of Black and Veatch, to Mr. A. L. Edwards, Director of the Board of and Power of the City of Grand Haven, discussing the proposed contract to be offered by CP Co. to Wolverine R. E. C. and the other members of the MMCPP.
12/4	DJ 30	(4 pages) An April 16, 1965, letter from B. D. Hilty of Consumers Power Co. to the Mayor and City Commissioners of the City of Traverse City discussing Consumers Power Co.'s offer to lease the city electric system.
12/4	DJ 31	(2 pages) A March 19, 1968, letter from R. L. Paul to B. D. Hilty, reporting a meeting with Joe Wolfe of the City of Traverse City and Bob Daverman of Daverman and Associates in which the general terms and conditions under which CP Co. could make available an interconnection to Traverse City electric system was discussed.
11/28	DJ 32	(6 pages) (A) (4 pages) A November 13, 1963, report prepared by A. J. Hodge of Daverman Associates on "the basis for negotiations with Consumers Power Co." on behalf of Northern Michigan Electric Cooperative with Wolverine Electric Cooperative. (B) (2 pages) A December 27, 1963, letter from R. J. Daverman to B. G. Campbell, Vice President of Consumers Power Co., relating to negotiations for an interconnection between Northern Michigan and CP Co.
11/28	DJ 33	(1 page) A January 17, 1964, letter from B. G. Campbell to R. J. Daverman regarding a proposal by CP Co. to supply the energy requirements for the Wolverine Electric Cooperative and Northern Michigan Electric Cooperative.

11/28	DJ 34	(1 page) A January 31, 1964, letter from B. G. Campbell to R. J. Daverman regarding negotiations between CP Co. and Northern Michigan and Wolverine.
11/28	DJ 35	(2 pages) A January 31, 1964, letter from R. J. Daverman to A. E. Steinbrecher of Northern Michigan REC and John Keen of Wolverine REC, relating to negotiations with CP Co. for an interconnection; with enclosure (memo of meeting of 1/20/64 with Applicant).
11/28	DJ 36	(3 pages) A March 20, 1964, report prepared by A. J. Hodge regarding a contract proposal from CP Co. to Northern Michigan and Wolverine Electric Cooperatives and meeting with CP Co. 3/20/64. (Consumers wanted to obtain all of cooperatives future load growth.)
11/28	DJ 37	(5 pages) An April 21, 1964, letter from B. G. Campbell to R. J. Daverman relating to negotiations for an interconnection with Consumers Power Co. by Northern Michigan and Wolverine Electric Cooperatives.
11/28	DJ 38	(5 pages) (A) A May 5, 1964, letter from A. E. Steinbrecher, Manager of Northern Michigan Electric Cooperative, to R. J. Daverman reflecting Mr. Steinbrecher's reaction to the Consumers Power Co. contract proposal and suggests requests for power pooling proposals. (B) A May 8, 1964, letter from R. J. Daverman to B. G. Campbell commenting on CP Co. proposal, dated April 21, 1964. (G & T's 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.)

11/28	DJ 39	(2 pages) A May 27, 1964, Daverman Associates report, prepared by R. J. Daverman, regarding CP Co. proposal dated April 21, 1964, to Northern Michigan Electric Coop, and Wolverine Electric Coop. The report indicates that Mr. Campbell stated that CP Co. was definitely not interested in entering into some form of pooling or interchange arrangement with either Northern Michigan or Wolverine.
11/28	DJ 40	(2 pages) A June 30, 1964, letter from R. J. Daverman to B. G. Campbell relating to CP Co. power supply proposal to Northern Michigan and Wolverine Electric Cooperatives. The letter states that on several occasions Mr. Campbell was specifically asked to consider some form of interchange agreement similar to that which CP Co. had entered into with Detroit Edison Co.
11/28	DJ 41	(3 pages) A November 16, 1964, letter from B. G. Campbell to R. J. Daverman attaching Mr. Campbell's reply to a letter received from Mr. H. B. Lee, Director of Power Supply Division, Rural Electrification Administration. Mr. Campbel letter indicates that CP Co. was aware of Northern Michigan and Wolverine's strong desire to interconnect and pool with CP Co.
12/4	DJ 42	(2 pages) A February 16, 1965, letter from B. G. Campbell to Richard H. Wood, Assistant Administrator, U. S. Department of Agriculture, Rural Electrification Administration, wherein Mr. Campbell asserts that a loan for additional generation for Wolverine and Northern Michigan Electric Cooperatives would result in higher cost for the distribution cooperatives.
12/4	DJ 43	(2 pages) February 18, 1964, unaddressed letter from B. G. Campbell, which apparently was sent to all REA distribution cooperative managers. The letter alleges that acceptance by Wolverine and Northern Michigan of Consumers' short term and long term power supply proposal would result in a reduction of cost of energy to the distribution coops of from 10% to 15%.

12/4	DJ 44	(1 page) A March 31 letter from Richard H. Wood, Assistant Administrator, U. S. Department of Agriculture, Rural Electrification Administration, to B. G. Campbell, affirming a prior letter of December 5, 1964, and alleging that the costs of power under Consumers' proposal to Wolverine in Northern Michigan exceeds alternate methods available to the cooperatives obtaining such power.
12/4	DJ 45	(2 pages) An April 6, 1965, letter from John Keen, Manager of Wolverine Electric Cooperative to Congressman Raymond F. Clevenger, discussing a letter by Mr. B. G. Campbell which alleged that the cost of power available to Northern Michigan and Wolverine by purchase from Consumers was less than self-generation.
12/4	DJ 46	(1 page) A July 27, 1965, CP Co. internal memorandum discussing the cost of generation for units proposed by Northern Michigan Electric Cooperative and Wolverine Cooperative.
11/28	DJ 47	(1 page) A January 30, 1967, letter from R. J. Daverman to B. G. Campbell regarding the possibility of a new interchange agreement between Northern Michigan and CP Co. which would permit two-way interchange of emergency capacity and other forms of reserves sharing. The letter contains a handwritten note reading "Same old story! We are working on it and will keep you informed."
11/28	DJ 48	(2 pages) A March 2, 1967, letter from R. L. Paul to R. J. Daverman regarding negotiations between Northern Michigan Electric Cooperative and Consumers Power Co. for emergency interchange of power, purchase of spinning reserves and purchase of economy power.
11/28	DJ 49	(A) (1 page) A July 14, 1967, letter from R. L. Paul to R. J. Daverman denying interconnection with Northern Michigan Electric Cooperative as not being mutually beneficial.

(B) (1 page) A December 19, 1967, letter from R. L. Paul to John Keen, Manager of Wolverine Electric Coop., suggesting a meeting to discuss the "mutual benefits" of an interconnection with CP Co. Due to poorness of reproduction the September 19 1967, letter has been reproduced by the Department.

12/4 DJ 50 (7 pages) A series of memoranda.
(A) (2 pages) A December 23, 1966, memorandum entitled "Comments Regarding Georgia Power v. Crisp County Case." Prepared by E. H. Kaiser.

(B) (3 pages) An undated memorandum by E. H. Kaiser entitled "Meeting with New England Electric System."

(C) (1 page) A June 23, 1967, memorandum by R. L. Paul recording a meeting held in Mr. B. G. Campbell's office on June 20, 1967, for the purpose of reviewing CP Co. policy on interchange agreements.

(D) (1 page) An April 1, 1963, memorandum by E. H. Kaiser entitled "Pooling Policies with Municipals and REA's Having Operation and Wishing to Participate in Mutual Support for Emergencies."

12/4 DJ 51 (1 page) A December 7, 1967, memorandum by R. L. Paul regarding a meeting held December 6, 1967, with Northern Michigan Rural Electric Cooperative, CP Co. and Michigan Public Service Commission relative to continuance of the ALBA Interconnection between CP Co. and Michigan and Northern Michigan.

12/4 DJ 52 (3 pages) June 28, 1968, memorandum prepared by R. J. Daverman regarding a meeting between Northern Michigan, Wolverine and participants from the Rural Electrification Administration to discuss a joint power supply study for Northern Michigan and Wolverine Electric Cooperatives.

11/28	DJ 53	(3 pages) A buckslip from R. A. Conden to B. G. Campbell attaching an August 13, 1969, letter from John Keen to B. G. Campbell which requests CP Co. to enter into an interchange or pooling type of arrangement with Wolverine.
11/28	DJ 54	(3 pages) A June 8, 1970, letter from John Keen to R. L. Paul regarding a preliminary proposal for interchange and wholesale power purchase between CP Co. and the Michigan Municipal and Cooperative Power Pool. (MMCPP).
11/28	DJ 55	(6 pages) A July 2, 1970, letter from R. L. Paul to John Keen regarding CP Co.'s preliminary proposal for interchange and wholesale power purchase agreement between CP Co. and the MMCPP.
11/28	DJ 56	(3 pages) January 8, 1971, letter from R. L. Paul to John Keen regarding CP Co. proposed interchange-wholesale power purchase agreement. (including 1 page MMCPP Pool load estimate by Daverman dated December 18, 1970).
11/28	DJ 57	(20 pages) A 2-page February 3, 1971, letter from R. L. Paul to John Keen accompanying an 18-page draft of the proposed agreement for interchange with the wholesale power purchase between CP Co. and the MMCPP.
11/28	DJ 58	(1 page) A September 17, 1971, letter from John Keen to R. L. Paul regarding negotiations for agreement between CP Co. and the MMCPP requesting a meeting to negotiate several types of coordination.
11/28	DJ 59	(1 page) An October 5, 1971, letter from R. L. Paul to John Keen acknowledging receipt of Mr. Keen's September 17, 1971, letter requesting these items be deferred to another time.
11/28	DJ 60	(4 pages) An April 24, 1972, letter from John Keen to R. L. Paul summarizing the position of the MMCPP with respect to its contract negotiations with CP Co. to date.

11/28	DJ 61	(19 pages) A September 20, 1972, draft of the "Agreement for Interchange in Wholesale Power Purchase Between Consumers Power Company and Northern Michigan Electric Cooperative, Inc., Wolverine Electric Cooperative, Inc., City of Grand Haven, Michigan, and City of Traverse City, Michigan." (MMCPP)
11/28	DJ 62	(17 pages) An "outline draft" of an agreement for interconnection and power and energy interchange between CP Co. and the MMCPP dated November 24, 1972.
11/28	DJ 63	(37 pages) A January 29, 1973, draft of an interconnection agreement between CP Co. and the MMCPP (27 pages); and a January 16, 1973 draft (10 pages).
11/28	DJ 64	(5 pages) A December 20, 1967, agreement between CP Co. and Northern Michigan Electric Coop., Inc.

VOLUME II

Admitted (1973)	Dept. of Justice No. & Exhibit No.	
12/4	DJ 65	(4 pages) A May 21, 1962, study entitled "Preliminary Report on Pool Studies."
12/4	DJ 66	(15 pages) An undated report obtained from CP Co. files discussing coordinated planning and development of the Michigan Pool, coordinated planning and development of Michigan Ontario connection and coordinated planning and development of the MIIO pool (Michigan, Indiana, Illinois, Ohio).
12/4	DJ 67	(43 pages) The recently executed electric coordination agreement between Consumers Power Co. and Detroit Edison Company, dated May 1, 1973.
12/4	DJ 68	(4 pages) A January 4, 1963, press release regarding the entry of CP Co. and Detroit Edison Co. into an interconnection or pooling arrangement.
12/4	DJ 69	(10 pages) A 1965 IEEE conference paper entitled "Consumers Power--Detroit Edison Power Pool," prepared by H. C. Reisner, Assistant Manager, Systems Development, The Detroit Edison Co. and W. J. Mosley, Director of Power Pooling Activities, Consumers Power Co.
12/4	DJ 70	(20 pages) (A) (5 pages) A document, dated January 8, 1969, prepared by W. J. Mosley, entitled "Notes on Michigan Electric Power Pooling Agreement." (B) (15 pages) A series of charts, graphs and figures prepared in 1961 indicating the savings in annual costs to Consumers of the Michigan Pool Plan v. Independent Development.

12/4	DJ 71	Electric Power Pooling Agreement between the Detroit Edison Co. and CP Co., dated December 22, 1962, which has been superceded by the contract, which is DJ 67.
12/4	DJ 72	(104 pages) The Luddington Pumped-Storage Hydroelectric Generating Plant ownership agreement between CP Co. and the Detroit Edison Co.
12/4	DJ 73*	(30 pages) Interconnection agreement between CP Co. and Detroit Edison Co. and the Hydroelectric Power Commission of Ontario, dated May 23, 1969.
12/4	DJ 74	(13 pages) Facilities agreement between CP Co. and the Indiana and Michigan Electric Company, dated September 21, 1971.
*12/7	DJ 73A	(13 pages) Various supplements to the Interconnection Agreement between CP Co., Detroit Edison Co., and Hydroelectric Power Commission of Ontario; (a) (4 pages) Supplement A (Revision 1) (b) (2 pages) Supplement C (Revision 1) (c) (4 pages) Supplement O (Revision 1) (d) (3 pages) Supplement S (Revision 1)

VOLUME III

Admitted (1973)	Dept. of Justice No. & Exhibit No.	
12/4	DJ 75	(22 pages) Facilities agreements among CP Co., the Detroit Edison Co., the Toledo Edison Company, Ohio Power Co. and Indiana and Michigan Electric Co., dated September 1, 1967.
12/4	DJ 76	(35 pages) Area Coordination agreement among CP Co., the Detroit Edison Co., Commonwealth Edison Co., Northern Indiana Public Service Co., the Toledo Edison Co., and Indiana and Michigan Electric Co., dated March 1, 1966.
12/4	DJ 77	(24 pages) East Central Area Reliability Coordination Agreements, dated August 1, 1967, and Supplemental Agreements, dated October 20, 1967, and April 7, 1970.
12/4	DJ 78	(28 pages) Operating agreement among CP Co., the Detroit Edison Co., and the Indiana and Michigan Electric Co., dated March 1, 1966; 1967 amendment (3 pages); and Amendment No. 2 (3 pages).
12/4	DJ 79	(18 pages) Contract for electric service between CP Co. and Edison Sault Electric Company, dated October 7, 1963.
12/4	DJ 80	(6 pages) Contract for electric service between CP Co. and Edison Sault Electric Company, dated December 1, 1966; Supplement No. 1 (2 pages); change to supplement (1 page).
12/4	DJ 81	(4 pages) A document dated November 14, 1972, submitted to the Department by the Edison Sault Electric Co., entitled "Proposal for Increase Wholesale Power Purchase Between Consumers Power Co. and Edison Sault Electric Co."
12/4	DJ 82	(2 pages) An Edison Sault Electric Co. internal memorandum from William R. Gregory and R. C. Kline to Russell O. King, regarding a conference with CP Co. on October 3, 1972, where at reserve requirements and cost-to-reserve capacity was discussed.

12/4	DJ 83	(2 pages) An October 16, 1972, internal Edison Sault Electric Co. memorandum regarding CP Co. proposal to Edison Sault. (Edison Sault could chose either to be a wholesale customer or to interconnect under a contract with a severe racthet clause for emergency capacity.)
12/4	DJ 84	(6 pages) A November 13, 1972, internal Edison Sault Electric Co. memorandum regarding CP Co. proposal of either a wholesale contract or interconnection contract. The former would be more expensiv than the interconnection contract, even if Edison Sault were required to purchase reserve from Consumers.
12/4	DJ 85	(4 pages) A memorandum prepared by Robert C. Kline, Jr., regarding a meeting November 14, 1970, between Edison Sault Electric Co. and representatives of CP Co., wherein Edison Sault learned that an interconnection agreement was not available from CP Co.
12/4	DJ 86	(1 page) A November 17, 1972, letter from W. A. Hedgecock, Vice President of CP Co., to Robert C. Kline, Vice Chairman, Board of Directors of Edison Sault Electric Co., officially submitting a proposal for increased wholesale power purchase, dated November 14, 1972. The letter indicates that the only provision in the attached proposal that has been left open is the initial term of the contract.
12/4	DJ 87	(1 page) A November 20, 1972, letter from Robert C. Kline to W. A. Hedgecock acknowledging receipt of Mr. Hedgecock's November 17, 1972, letter.
12/4	DJ 88	(1 page) December 8, 1972, letter from Robert C. Kline to W. A. Hedgecock informing Mr. Hedgecock that the Edison Sault's Board of Directors authorized management to proceed with all steps necessary to culminate negotiations.

12/4	DJ 89	(27 pages) A May 3, 1972, letter from Robert C. Kline to Earl B. Clomparens, Secretary of the Michigan Public Service Commission, transmitting a statement under oath of the Edison Sault Electric Co. regarding the Commission's study of the energy requirements for gas and electricity and the ability of electric and gas utilities to meet such requirements.
12/4	DJ 90	(6 pages) A contract for electric services between Consumers Power Co. and the City of Coldwater, Michigan, dated February 14, 1972.
12/4	DJ 91	(8 pages) Agreement for electric services between CP Co. and the City of Lansing, Michigan, dated May 15, 1964.
12/4	DJ 92	(21 pages) Interconnection agreement between Consumers Power Co. and the City of Lansing, Michigan, dated October 7, 1970.
12/11	DJ 92A	(6 pages) Supplemental Agreement between City of Lansing and CP Co. dated October 23, 1973.
12/4	DJ 93	(7 pages) Contract for electric service between CP Co. and the South Eastern Michigan Rural Electric Cooperative, dated May 21, 1967.
12/4	DJ 94	(6 pages) Contract for electric services between CP Co. and the City of Bay City, Michigan, dated February 13, 1967.
12/4	DJ 95	(11 pages) Contract for electric services between CP Co. and the Alpena Power Co. of Alpena, Michigan, dated June 27, 1966.
12/4	DJ 96	(3 pages) Supplement Agreement No. 1 to contract for electric service between CP Co. and the Alpena Power Co., dated September 27, 1971.
12/4	DJ 97	(13 pages) Various material relating to the application of CP Co. before Michigan Public Service Commission, for approval of a special contract for the sale and purchase of electric energy with Alpena Power Co., dated December 7, 19

12/4	DJ 98	(10 pages) An undated (apparently unexecuted) contract between CP Co. and the Village of Chelsea, Michigan, for electric service for resale.
12/4	DJ 99	(6 pages) Contract for electric service between Consumers Power Co. and the City of Holland, Michigan, dated October 6, 1955.
12/4	DJ 100	(16 pages) Agreement for electric service between CP Co. and the City of Holland, Michigan, including Supplement No. 1. (unsigned)
12/4	DJ 101	(4 pages). Supplemental Agreement No. 2 between CP Co., the City of Holland, Michigan, dated September 3, 1969; and transmittal letter of G. E. Bell.
12/4	DJ 102	(5 pages) Supplemental Agreement No. 3 between CP Co. and the City of Holland, Michigan, dated October 21, 1970; and transmittal memo of E. H. Kaiser.
12/4	DJ 103	(4 pages) Supplemental Agreement No. 4 between Consumers Power Co. and the City of Holland, Michigan, dated October 21, 1971; and transmittal memo of E. H. Kaiser.
11/28	DJ 104	(A) (33 pages) Michigan Municipal and Cooperative Power Pool Agreement ("MMCPP") between Wolverine Electric Coop., Inc., Northern Michigan Electric Coop., Inc., Grand Haven Board of Light and Power and the City of Traverse City, dated August 21, 1968. (B) (33 pages) Letter from W. C. Morris of the Rural Electrification Administration to John Keen, Manager of Wolverine Electric Cooperative.
11/28	DJ 105	(27 pages) Interconnection agreement between CP Co. and Northern Michigan Electric Cooperative, Inc., Wolverine Electric Coop., Inc., City of Grand Haven, Michigan, and City of Traverse City, Michigan, dated September 1, 1973.
11/28	DJ 106	(6 pages) Excerpt from the 1971 Annual Statistical Report of Energy Purchase by REA Borrowers for the Calendar Year Ended December 31, 1971, published by the U. S. Department of Agriculture Rural Electrifica Administration

11/27	DJ 107	Excerpt from the 33rd Annual Report of Energy Purchase by REA Borrowers for the Calendar Year Ended December 31, 1971 published by the U. S. Department of Agriculture Rural Electrification Administration.
11/28	DJ 108	(A) (7 pages) Excerpt from Statistics of Publicly Owned Electric Utilities in the United States, 1971, published by the Federal Power Commission.
		(B) (5 pages) Excerpt from Statistics of Privately Owned Electric Utilities in the United States, 1971, published by the Federal Power Commission.
11/27	DJ 109	(11 pages) Excerpt from the McGraw-Hill Directory of Electric Utilities, 1972.

VOLUME IV

Admitted (1973)	Dept. of Justice No. & Exhibit No.	
11/27	DJ 110	(15 pages) Correspondence and memoranda relating to territorial agreement between CP Co. and Detroit Edison, June, 1966--May, 1968.
12/4	DJ 111	(1 page) A May 13, 1966, letter from B. G. Campbell to A. H. Aymond, relating to purchase of the City of Wyoming Municipal Lighting System, wherein it is stated that "this purchase will eliminate another potential municipal electric system."
12/4	DJ 112	(1 page) A letter, dated September 20, 1960, from R. M. Kopper, Executive Assistant of Indiana and Michigan Electric Co., to B. G. Campbell informing Mr. Campbel that I & M would not supply electric service to Southeastern Michigan REA.
12/4 (Marked for ID only due to illegibility)	DJ 113	(1 page) A September 20, 1960, letter from R. M. Kopper to J. J. Lower, Manager of Southeastern Michigan REC, informing Mr. Lower that I & M will not be able to offer electric service to Southeastern and that neither will Ohio Power be in a position to assume utility responsibility of applying electric service to Southeastern. (Applicant is to provide a legible copy.)
12/4	DJ 114	(4 pages) A March 17, 1965, letter from Mathew L. Bruce of CP Co. to Frank B. Adams, also of CP Co., regarding Southeastern Michigan Rural Electric Cooperative.
12/4	DJ 115	(3 pages) A November 17, 1964, letter from Mathew L. Bruce to Frank B. Adams regarding the "aggressive competition" CP Co. was experiencing with the Southeastern Michigan Rural Electric Cooperative.
12/4	DJ 116	(2 pages) A June 17, 1965, letter from Mathew Bruce to Frank B. Adams regarding competition with Southeastern Michigan REC to serve the National Corn Picking Contest.

12/4	DJ 117	(2 pages) A June 2[illegible], 1965, letter from J. J. Lower, Genera Manager of Southeastern Michigan Rural Electric Coop. to B. G. Campbell, concerning the competitive relationship between CP Co. and Southeastern Michigan REC.
12/4	DJ 118	(6 pages) July 6, 1956, letter from Mathew L. Bruce to Frank B. Adams captioned "Customers Activity-Southeastern Michigan Rural Electric Cooperative versus Consumers Power Company, Adrian Area."
12/4	DJ 119	(2 pages) July 21, 1965, letter from B. G. Campbell to J. J. Lower, stating that service by Southeastern of the National Corn Picking Contest would be considered an "open act of aggression." The letter goes on to state that "perhaps it is desirable to terminate our relationship."
12/4	DJ 120	(1 page) A December 23, 1965, letter from Mathew L. Bruce to Frank B. Adams, transmitting information that Southeastern Michigan had approached the City of Clinton as well as Buckeye Cooperative in Ohio to seek an alternative source of power.
12/4	DJ 121	(6 pages) A January 31, 1966, letter from E. O. George, Senior Vice President of Detroit Edison Co., to B. G. Campbell, enclosing a copy of the electric supply agreement which Detroit Edison had mailed to Southeastern Michigan Rural Electric Cooperative and asked Mr. Campbell to contract Mr. George if he had "any questions regarding this contract or this situation."
12/4	DJ 122	(2 pages) A July 18, 1966, letter from D. G. Ries, President of Southeastern Michigan REC to B. G. Campbell, regarding the intent of CP Co. to terminate its contract with Southeastern Michigan and informing Mr. Campbell of Southeastern's intent to explore the possibility of obtaining some other lower cost of power source.

12/4	DJ 123	(1 page) An April 16, 1969, internal Consumers memorandum by R. L. Paul regarding special meeting of the Board of Directors of Southeastern Michigan REC, which took place April 11, 1969.
12/4	DJ 124	(2 pages) Internal CP Co. Correspondence from M. L. Bruce to R. L. Paul, dated May 14, 1969, regarding Southeastern Michigan Rural Electric Cooperative.
12/4	DJ 125	(2 pages) A June 10, 1969, letter from M. L. Bruce to Richard Stutesman of Southeastern Michigan Rural Electric Cooperative confirming the major points discussed in a meeting June 5, 1969, between CP Co. and the Board of Southeastern REC. Among other items discussed at this meeting, according to the letter, were that Consumers Power Co. would be interested in purchasing the cooperative if it were for sale and that Consumers Power Co. would not be willing to wheel power from Ohio to Southeastern. ("Has no provision for wheeling power.")
12/4	DJ 126	(1 page) A June 29, 1971, memo to files from W. J. Mosley of CP Co. regarding Southeastern Michigan REC's power supply.
12/4	DJ 127	(14 pages) Reply of the Toledo Edison Co. to subpoena duces tecum issued in the matter of Consumers Power Co., Midland Units 1 and 2.
12/4	DJ 128	Various materials obtained from the U. S. Department of Agriculture and certified as a true, correct and compared copy of a document in the official custody of the Department of Agriculture. The certificate lists the documents and is attached hereto as Appendix A.
12/4	DJ 129	(1 page) December 4, 1963, letter from Warren D. Sundstrand, to Consumers Power Company, attention R. L. Paul, transmitting the billings of Michigan Gas & Electric Co. to the City of Paw Paw, Michigan.

12/4	DJ 130	(2 pages) October 13, 1964, letter from Richard J. Dillon, President of the Village of Paw Paw, Michigan, to Joseph H. Guthride, Secretary of the Federal Power Commission, requesting the FPC to investigate the rates the Village was paying to Michigan Gas & Electric Company, which were substantially higher than those obtainable from either CP Co. or Indiana and Michigan Electric Company.
12/4	DJ 131	(10 pages) October 12, 1966, letter from A. H. Lee, Division Manager, CP Co., to President and Council, Village of Paw Paw, Michigan, transmitting estimates of both partial purchase and total purchase requirements for the Village of Paw Paw.
12/4	DJ 132	(A) (4 pages) October 13, 1966, letter from R. W. Sampson, Vice President of Michigan Gas & Electric Co., to Warren D. Sundstrand, attorney for the Village of Paw Paw, relating Michigan Gas & Electric's continued interest in serving the Village of Paw Paw and its desire to compete with CP Co.'s proposal to sell power to the Village of Paw Paw.
		(B) (2 pages) October 17, 1966, letter from Warren D. Sundstrand to R. W. Sampson informing Michigan Gas & Electric Co, that if a competitive rate is not received from them, the Village of Paw Paw will enter into contract with CP Co.
12/4	DJ 133	(2 pages) October 22, 1966, letter from Donald C. Cook, President of American Electric Power Company, to Warren D. Sundstr The letter advises that AEP has applied for authority of the Securities and Exchange Commission to acquire the common stock of Michigan Gas and Electric and if such acquisition is authorized, Michigan Gas and Electric will offer the Village of Paw Paw a contract of supplying the electric power requirements of Paw Paw at rates which will be more favorable than those provided under Consumers Power Company's proposal.

12/4	DJ 134	(2 pages) October 27, 1966, letter from Warren D. Sundstrand to Donald C. Cook advising Mr. Cook that unless the Village of Paw Paw obtains an immediate reduction in rates charged by Michigan Gas and Electric, it will enter a contract with CP Co.
12/4	DJ 135	(15 pages) November 9, 1966, letter from Donald C. Cook to Warren D. Sundstrand advising Mr. Sundstrand that if AEP's acquisition of Michigan Gas & Electric is approved by the SEC, the Village would be offered power for resale distribution under the same filed rate that is incorporated in AEP's agreements, through Indiana and Michigan Electric Company, with both the City of South Haven and the City of Sturges, Michigan.
12/4	DJ 136	(4 pages) January 31, 1967, letter from Warren D. Sundstrand to Joseph H. Gutride, Secretary of the Federal Power Commission, relating the history of the Village of Paw Paw's attempt to get a reduced rate from Michigan Gas & Electric Company.
12/4	DJ 137	(1 page) January 24, 1966, letter from J. B. Falahee, attorney for CP Co., to B. G. Campbell regarding the response to be made by CP Co. to the Village of Paw Paw's request for wholesale electric service and concluding that a final answer cannot be given until sometime after the Federal Power Commission proceedings are concluded.
12/4	DJ 138	(1 page) November 5, 1966, letter from A. H. Lee, Division Manager of CP Co., to the President and Council of the Village of Paw Paw advising them that CP Co. was withdrawing its offer to serve the Village.
12/4	DJ 139	(1 page) December 12, 1966, letter from F. H. Hoppe, Director of Public Utilities, Michigan Public Service Commission, to Michigan Gas & Electric Company advising that CP Co. had withdrawn their offer to supply wholesale energy to the Village of Paw Paw and that in view of this action on the part of CP Co. the Public Service Commission was closing its files in that matter.

12/4	DJ 140	(1 page) November 15, 1966, internal CP Co. memo by R. L. Paul recounting a November 14, 1966, Village of Paw Paw Council meeting.
12/4	DJ 141	(4 pages) October 10, 1966, letter from A. H. Lee to President and Council of the Village of Paw Paw, Michigan, submitting a proposal to supply wholesale electric energy to the Village.
11/29	DJ 142	(2 pages) September 22, 1966, internal CP Co. correspondence from R. L. Paul to M. W. Balfour regarding a request by the Village of Paw Paw for CP Co. to submit a proposal for supplying wholesale electric power to the Village and requesting authority to negotiate with the Village.
11/28	DJ 143	(4 pages) December 3, 1965, internal CP Co. correspondence from B. G. Campbell to executive officers and division managers, attaching a letter to be sent on December 6, 1965, to the presidents, board members, and managers of the seven rural electric cooperatives served by Northern Michigan Electric Cooperative and Wolverine Electric Cooperative. The December 6 letter recounts a September 21, 1965, meeting with Norman Clapp of Rural Electrification Administration regarding loans to Northern Michigan and Wolverine and further asserts that the distribution cooperatives in the period 1950 through 1964 paid substantially higher rates to northern Michigan and Wolverine than they would have if they had bought their electricity from CP Co.
11/28	DJ 144	(2 pages) A CP Co. statement of policy to be followed in providing electric service in franchised areas in which electric service is also rendered by a rural electric cooperative.
11/29	DJ 145	(5 pages) A CP Co. statement, which was to be released December 8, 1965, relating that seven rural electric distribution cooperatives in Michigan have incurred unnecessary expenses over the last 15 years by buying from the generation and transmission cooperatives, instead of buying at wholesale from CP Co.

12/4	DJ 146	(1 page) Excerpt from minutes of the Board of Directors meeting, CP Co., dated April 12, 1966, in which it was concluded that in selling the Union Street Dam to the City of Traverse City there was no need to include a reverter to CP Co. if the property is used for generation of electricity in that the Dam did not have a sufficient head to provide economic generation.
12/4	DJ 147	(2 pages) February 16, 1960, letter from B. D. Hilty to G. J. O'Marra, CP Co., regarding a meeting with Michigan Bell Telephone Company in which a request by the City of Traverse City to Michigan Bell for joint use of poles was discussed.
12/4	DJ 148	(12 pages) August 12, 1960, internal CP Co. letter from D. J. McGowan to B. D. Hilty regarding a competitive action program for CP Co. versus the City of Traverse City.
12/4	DJ 149	(A) (2 pages) November 18, 1966, letter from Eugene J. Yehl to Gordon A. Low, both of CP Co., regarding providing service to Canadian Lake of the Clouds, in which it is recommended that the line necessary to serve this development be built at no cost to the customer in that if Consumers does not build this line, the customer has access to the O & A cooperative. (B) (2 pages) October 27, 1966, letter from Eugene J. Yehl to Ralph Hahn, both of CP Co., regarding building lines to serve Canadian Lake of the Clouds, in which it is urged that by extending CP Co.'s lines in such a way to encircle the Lake area, Consumers would be assured of obtaining the entire resort business in the future.
12/4	DJ 150	(2 pages) August 30, 1966, memo from RAC (R. A. Condon) to BGC (B. G. Campbell) regarding an August 29, 1966, meeting between R. L. Paul, W. J. Mosley, R. A. Condon, and A. H. Aymond in which the existing interconnection contract with the City of Holland was reviewed. It was

		recommended to Mr. Aymond that a new interconnection agreement be negotiated with the City of Holland, "the prime reason being that if Consumers Power Company did not maintain this interconnection, undoubtedly the City and Wolverine Electric Coop will enter into such an agreement."
12/4	DJ 151	(2 pages) September 22, 1966, memo prepared by R. L. Paul recording a September 20, 1966, meeting with representatives of the City of Holland, Michigan.
12/4	DJ 152	(2 pages) An undated, apparently rough draft, memo recording a conversation of Mr. R. L. Paul with the representatives of the City of Holland on November 20.
12/4	DJ 153	(1 page) A December 12, 1968, internal memo from R. L. Paul to W. L. Sherwood regarding the City of Holland competition, wherein it is stated that it appears "The City of Holland no longer intends to honor our so-called 'gentlemen's agreement.'"
12/4	DJ 154	(3 pages) February 15, 1962, internal memo prepared by W. L. Sherwood providing information regarding the municipal utilities of the City of Holland municipal electric utility.
12/4	DJ 155	(4 pages) November 16, 1964, CP Co. report regarding East Bay View. The report states that "with the purchase of the lines in East Bay View area, CP Co. would serve the one mile area between the two municipalities. (Harbor Springs Municipal and the City of Petoskey) If we do not purchase the East Bay View area, and the two municipalities should combine and reinforce their lines, we may have problems holding the present customers we have in this area."
12/4	DJ 156	(1 page) July 28, 1969, internal CP Co. correspondence from R. L. Paul regarding the City of Harbor Springs' interests in selling CP Co. a primary distribution line. The document states, "We, of course, are interested in purchasing this line,

		not only because of the business that will be obtained, but also because this acquisition will help us secure this area from further penetration by Top O'Michigan Rural Electric Cooperative."
12/4	DJ 157	(1 page) March 1, 1960, letter from G. W. Howard To B. G. Campbell regarding the Village of Constatine's interest in either purchasing power or selling their electric system to CP Co. The document states, "We realize, of course, that we do not want to offend the Michigan Gas & Electric Company by serving customers in their area."
12/4	DJ 158	(2 pages) February 20, 1970, internal CP Co. document prepared by R. L. Paul listing the status of CP Co.'s purchase/ acquisition proposals to various electric systems.
12/4	DJ 159	(1 page) September 11, 1962, CP Co.'s document listing municipal systems purchased since 1950.
12/4	DJ 160	(1 page) A September 26, 1967, internal CP Co. correspondence from J. F. Callahan to Eugene J. Yehl recommending that CP Co. absorb the cost of extending lines to the Lennard Crude Oil Company in that the REAs, with distribution lines in the area, will connect this load to their lines at no charge.
12/4	DJ 161	(3 pages) A position responsibilities description of the Director of Power Pooling Activities.
12/4	DJ 162	(3 pages) An unsigned December 9, 1965, letter to William Barrons, City Manager, City of St. Louis, Manager, submitting an analysis on the cost to the city for purchasing wholesale power under CP Co.'s wholesale rate. In addition, the letter states the city would realize greater financial gains if it were to sell its electric utility to CP Co.

12/4	DJ 163	(2 pages) November 22, 1965, letter from R. L. Paul to Fred B. Perry, director of governmental activities for CP Co., listing counties in the lower peninsula which could generally be considered within CP Co.'s service area, and in which REA cooperatives are operating.
12/4	DJ 164	(1 page) September 3, 1971, internal CP Co. correspondence prepared by R. L. Paul stating that the City of Grand Haven appears to be in violation of the Michigan Constitution's 25% restriction, but that CP Co. does not propose to raise this issue as long as Grand Haven does not procede to serve certain customers.
12/4	DJ 165	(4 pages) August 30, 1966, memo prepared apparently by E. M. Kaiser and W. J. Mosley regarding the key points of CP Co.'s presentation of the pump storage project to MIIO on August 23, 1967.
12/4 (Marked for ID only)	DJ 166	(9 pages) February 3, 1966, letter from Edwin Vennard, Managing Director of the Edison Electric Institute, to chief executives of member companies, attaching certain information regarding municipal and REA-financed electric utilities.
11/29 (Marked for ID only) Received 12/4	DJ 167	(39 pages) October, 1966, paper prepared by the Edison Electric Institute on "Principles of a Coordinating Agreement."

VOLUME V

Admitted (1973)	Dept. of Justice No. & Exhibit No.	
12/4	DJ 168	(4 pages) June 2, 1964 CP Co. memo regarding "Economic Analysis and Proposal for Standby Power Purchase for the City of South Haven, Michigan."
12/4	DJ 169	(1 page) March 6, 1970, internal CP Co. correspondence from R. Paul to H. P. Graves regarding the distribution system in Fawn River Township, wherein it is stated that if a City of Sturgis refuses to sell this distribution system, CP Co. could "still go in and duplicate their facilities to serve their customers."
12/4	DJ 170	(A) (6 Pages) August 19, 1968, internal CP Co. correspondence from R. L. Paul to A. M. Nemetz regarding the proposed Supplement E to the power pooling agreement between CP Co. and Detroit Edison Company, wherein it is stated, "I feel that the supplement would not meet our expressed goal to eliminate the possible participation of undesirable third parties." (B) (1 page) July 23, 1968, letter from A. M. Nemetz to H. C. Reasoner, of Detroit Edison, transmitting first draft of the proposed Supplement E to the Consumers-Detroit Electric Power Pool Agreement. (C) (6 pages) August 12, 1968, internal CP Co. correspondence from A. M. Nemetz regarding the proposed Supplement E, Third Party Participation, to the Consumers-Edison Electric Power Pooling Agreement, wherein it is stated, "From simply reading the agreement it may appear to outsiders that we are setting standards for others that we do not apply to ourselves."
12/4	DJ 171	(1 page) September 11, 1968, internal CP Co. correspondence from R. L. Paul to E. H. Kaiser stating that the criteria for third party participation in the Michigan Pool Agreement in Mr. Kaiser's

		September 11 letter to J. B. Falahee "very adequately covers the subject and should help prevent undesirable third parties from becoming a part of our present or any future pooling agreement."
12/4	DJ 172	(A) (1 page) June 9, 1970, internal CP Co. correspondence from H. R. Wall to J. B. Falahee regarding the advisability of filing, with the FPC, the Michigan Pool Agreement with or without a supplement setting forth the principles governing pool arrangements with third parties. (B) (1 page) June 5, 1970, internal CP Co. correspondence from J. B. Falahee to H. R. Wall and B. G. Campbell regarding the advisability of filing with the FPC a supplement governing pool arrangements with third parties.
12/4	DJ 173	(7 pages) June 27, 1962, memo prepared by R. A. Condon on the effect of combined operation of Northern Michigan Electrical Cooperative and Wolverine Electric Cooperative.
12/4	DJ 174	(2 pages) November 27, 1962, memo prepared by R. P. M., entitled "REA Cooperatives in Michigan," which summarizes pertinent data for the period 1956-1960.
12/4	DJ 175	(3 pages) July 9, 1964, letter from B. D. Hilty to B. G. Campbell concerning the effect of CP Co.'s contract provisions with Northern Michigan Electric Cooperative on CP Co.'s competitive relationship with the City of Traverse City. The letter states that if Traverse City had been under CP Co.'s "standard and municipal wholesale rate" rather than interconnected with Northern Michigan, the load required on June 29, 1964, by Traverse City (due to a forced outage) would have created a demand charge which could have affected billing for eleven months under our (CP Co.) contract provisions. This is not true of the Traverse City--Northern Michigan arrangement."

12/4	DJ 176	(2 pages) March 20, 1970, internal CP Co. correspondence from R. L. Paul to B. G. Campbell regarding Northern Michigan and Wolverine Electric Cooperatives The memo advocates the acquisition by CP Co. of all the facilities of Wolverine and Northern Michigan.
12/4	DJ 177	(5 pages) A memo prepared by M. H. G., dated January 3, 1966, revised February 18, 1966, entitled "Facts Affecting Operation of the Allegan Municipal Plant," and advocating the sale of the Allegan Electric System to CP Co.
12/4	DJ 178	(1 page) February 3, 1966, internal CP Co. Correspondence from R. L. Paul to W. M. Balfour regarding an official request by the City of Allegan that Consumers submit a proposal for supplying either standby or supplemental power to its electric generating facilities.
12/4	DJ 179	(2 pages) February 20, 1966, letter from A. H. Lee, Consumers Power Co. Division Manager, to the mayor and the council of the City of Allegan, submitting a proposal for the supply of electric energy to the City of Allegan. The letter also mentions that Consumers is willing to negotiate for the purchase of the City of Allegan's total system.
12/4	DJ 180	(2 pages) February 23, 1966, memo from R. L. P. regarding the Allegan Municipal System.
12/4	DJ 181	(2 pages) August 14, 1970, letter from R. L. Paul to Edward Frye, of Edison Electric Institute, transmitting data pertaining to the municipal electric systems in CP Co.'s service area.
12/4	DJ 182	(3 pages) An August 3, 1970, letter from Edward Frye to A. H. Aymond requesting an up-dating of statistics on municipall owned electric systems in CP Co.'s service area.
12/4	DJ 183	(7 pages) Press release, for use on December 14, 1967, regarding the construction of the Midland Nuclear Plant.

12/4	DJ 184	(1 page) August 11, 1966, letter from L. A. Vaupre to R. E. Kettner, also of CP Co., recording a telephone call from Harold Bosscher, Division Manager of the Dow Chemical Company, in which Mr. Bosscher posed several questions regarding a power supply for Dow.
12/4	DJ 185	(7 pages) March 4, 1966, internal CP Co. correspondence from B. D. Hilty to B. G. Campbell transmitting information on REA franchises in Michigan.
12/4	DJ 186	(1 page) July 8, 1966, internal CP Co. correspondence from R. L. Paul to division managers, marketing superintendents, regional superintendents, and general office communications list stating that the continued expansion of the two generation transmission cooperatives in Michigan (Northern Michigan Electric Cooperative and Wolverine Electric Cooperative) posses a serious threat to CP Co. and that should the cooperatives succeed in getting Congress to establish an REA Bank, Consumers can anticipate even further expansion of the G&T systems here in Michigan, resulting in increased competition.
12/4	DJ 187	(2 pages) March 20, 1970, internal CP Co. correspondence from R. L. Paul to B. G. Campbell regarding Northern Michigan and Wolverine Electric Cooperatives which urges the acquisition of all facilities of Wolverine and Northern Michigan. (This is a duplicate of DJ No. 176.)
12/4	DJ 188	(7 pages) A speech dated May 17, 1966, by R. L. Paul regarding municipal and REA electric systems.
12/4	DJ 189	(3 pages) March 6, 1963, memo entitled "Coop Generating Capacity and Reserves."
12/4	DJ 190	(2 pages) April 9, 1960, internal CP Co. correspondence from L. A. Vaupre to C. A. Mulligan regarding counter measures to be taken by CP Co. to compensate as much as possible for in roads among Consumers' customers by the Bay City Light Department.

12/4	DJ 191	(2 pages) October 5, 1962, internal CP Co. correspondence from L. A. Vaupre to B. G. Campbell regarding competitive activities by CP Co. versus the Bay City Light Department.
12/4	DJ 192	(A) (1 page) January 19, 1966, internal CP Co. correspondence from L. A. Vaupre to W. A. Hedgecock speculating on the outcome if CP Co. "went to the City Hall (presumably Bay City) with offer of $6 or $7 million and dropped it there." ("Front door-back door" memo) (B) (1 page) A document entitled "Brainstorming the Ad Hoc Committee."
12/4	DJ 193	(15 pages) CP Co. report on the Bay City competitive situation, dated April, 1965.
12/4	DJ 194	(A) (2 pages) July 1, 1966, memo prepared by R. L. Paul regarding June 28, 1966, meeting with representatives of the Bay City Light Department to discuss a new wholesale power contract between Bay City and CP Co. (B) (2 pages) August 9, 1967, internal CP Co. correspondence from L. A. Vaupre to W. Hedgecock entitled "Appliance sales and service in competitive areas, Bay City Division."
12/4 (Marked for ID only)	DJ 195	(16 pages) Response of Halsey, Stuart & Company, dated October 15, 1973, to the civil subpoena issued in this proceeding. (A) (2 pages) Minutes of Halsey, Stuart & Company's Executive Committee of November 18, 1971. (B) (3 pages) A December 8, 1971, letter from Wendell J. Kelley of Illinois Power Co. to E. B. Kelley of Halsey, Stuart & Co. enclosing the attendance list of the Fall Board Meeting, November 11 and 12, 1971, of the National Association of Electric Companies.

		(C) (1 page) A November 29, 1971, letter from C. William Maxwell, Vice President of Halsey, Stuart & Company to C. W. McKee, Jr., Vice President of Florida Power Co., acknowledging Mr. McKee's November 19, 1971, letter.
		(D) (2 pages) A November 19, 1971, letter from C. W. McKee to C. William Maxwell indicating concern at Mr. Martin's (employee of Halsey, Stuart & Company) advocacy of joint REA municipal financing "at the expense of the private segment."
		(E) (1 page) December 6, 1971, letter from W. C. McKee to E. B. Kelley of Halsey, Stuart & Company acknowledging Mr. Kelley's letter.
		(F) (5 pages) A December 7, 1971, letter, enclosing two other letters from, E. B. Kelley of Halsey to Kenneth E. Bowen, President of Central Illinois Public Service Co. informing Mr. Bowen that Mr. Martin's activities (advocating joint REA-municipal financing) will be curtailed and asking that this fact be passed around the NAEC meeting.
12/4	DJ 196	(1 page) October 30, 1969, memo from E. H. Kaiser to W. J. Mosley regarding 138 kv tie with City of Lansing.
12/4	DJ 197	(4 pages) October 10, 1973, letter from William J. Mayben, Manager of R. W. Beck & Associates enclosing exhibits pertaining to the retail and wholesale power markets of the prospective service areas of CP Co. [Pages numbered as 1 through 4 for ease of identification.]
12/4 (Marked for ID only)	DJ 198	(15 pages) Publication entitled "Municipal Electric Light and Power Plants in the United States and Canada," by Carl D. Thompson, Charles K. Mohler, and others.
12/4 (Marked for ID only)	DJ 199	(A) (7 pages) A Michigan Municipal League Bulletin R-4, entitled "Municipal Electric Utilities in Michigan," by Donald M. Whitesell.

		(B) (9 pages) A 1925 National Electric Light Association publication entitled "Political Ownership and the Electric Light and Power Industry."
12/4	DJ 200 - 203	Studies of Samuel J. Helfman prepared for this proceeding.
12/4	DJ 204	(2 pages) Color Map showing the service areas of the various electric utility systems in Michigan. (A) Shows the southern portion of Michigan. (B) Shows northern portion including the upper peninsula of Michigan.
12/4 (Marked for ID only)	DJ 205	(15 pages) November 18, 1971, internal CP Co. correspondence from F. B. Perry to W. A. Borris regarding REA financing and forwarding a letter from Joe Farley of Alabama Power Company and testimony by Halsey, Stuart & Co.
12/4	DJ 206	(2 pages) November 28, 1966, internal CP Co. correspondence by E. H. Kaiser to R. L. Paul regarding the proposed City of Holland agreement.
12/4	DJ 207	(1 page) March 10, 1967, memo by W. L. Sherwood to R. L. Paul regarding a call made to the City of Holland to discuss CP Co.'s interconnection proposal.
12/4	DJ 208	(2 pages) August 7, 1967, memo by W. L. Sherwood to R. L. Paul regarding the City of Holland interconnection.
12/4	DJ 209	(Dupplicate) (4 pages) Request from Edison Electric Institute for information on municipal electric systems in CP Co.'s service and response by CP Co., dated August 3, 1970 and August 14, 1970, respectively.
12/4	DJ 210	(5 pages) November 9, 1962, memo by E. H. Kaiser entitled "Major Points of Consumers-Edison Power Pooling Agreement."

12/4	DJ 211	(4 pages) January 16, 1963, meeting notes prepared by W. Jack Mosley entitled "Discussion of Electric Systems Interconnection in Illinois, Indiana, Michigan and Ohio.
12/4	DJ 212	(7 pages) Joint statements of Walker L. Cisler, President, Detroit Edison Company, A. H. Aymond, Chairman of the Board, CP Co., and James H. Campbell, President, CP Co. concerning the electric power pooling program of CP Co. and the Detroit Edison Company, prepared for the Michigan Congressional Delegation.
12/4	DJ 213	(6 pages) An undated study entitled "Typical data and costs used by CP Co. and the Detroit Edison Company for studies of power pooling in Michigan."
12/4	DJ 214	(12 pages) March 27, 1972, internal CP Co. correspondence from E. H. Kaiser forwarding a summary of a March 10, 1972, meeting held with the Michigan Public Service Commission, and Mr. Robert W. Hartwell's letter of transmittal to the Michigan Public Service Commission of this summary.
12/4	DJ 215	(A) (3 pages) May 19, 1967, memo from W. Jack Mosley to J. Kluberg and B. G. Campbell attaching a copy of the letter received from Eldred H. Scott, of Detroit Edison Company, which, inter alia, requests comments on (1) participation by REA's and municipals in new transmission facilities planned by private utilities, and (2) source of power to Southeastern Michigan REC. (B) (1 page) Undated responses to items 1 and 2 on page 2 of Mr. Scott's letter dated May 17, 1967. (C) (1 page) June 22, 1967, letter from W. J. Mosley to Eldred Scott, of Detroit Edison Company, in response to Mr. Scott's May 17 letter.

12/4	DJ 216	(1 page) February 17, 1964, letter from J. H. C. to T. G. Ayres, Excutive Vice President of Commonwealth Edison Company, informing Commonwealth that the Michigan Pool does not wish to purchase the 300 mw excess capacity that Commonwealth expects to have available in the winter season of 1967-68.
12/4	DJ 217	(4 pages) March 10, 1966, petition of Consumers Power, Detroit Edison Company, and Indiana and Michigan Electric Company for approval of proposed agreements for the purpose of establishing certain interconnections and rendering certain interconnection services and transactions.
12/4	DJ 218	(17 pages) July 1, 1963, study on the feasibility of 345 kv interconnection between Michigan, American Electric Power, and Toledo Edison prepared jointly by AEP Service Corporation, Commonwealth Edison Company, CP Co., Detroit Edison Company, Northern Indiana Public Service Company, and the Toledo Edison Company.
12/4	DJ 219	(2 pages) March 21, 1969, memo by A. K. Falk regarding a proposed interconnection agreement between Consumers Power-Edison-Ontario Hydro.
12/4	DJ 220	(16 pages) Various summaries of interconnection contracts. (A) (1 page) June 10, 1969, document entitled "FPC Rate Schedule No. 15" discussing interconnection with the City of Holland. (B) (2 pages) June 1, 1971, document prepared by the Rate Department concerning the interchange agreement--CP Co. and the City of Lansing. (C) (2 pages) June 1, 1971, study prepared by the Rate Department entitled "Consumers Power Company--Detroit Edison Pooling Agreement." (D) (2 pages) April 1, 1968, study entitled "Michigan Pool (CP Co. DE Co.)--Ontario Hydro Pooling Agreement."

		(E) (4 pages) April 1, 1968, study entitled "MIIO Pooling Agreement" including statistical data.
		(F) (4 pages) CP Co. Electric Load Management Plan.
12/4 (Marked for ID only)	DJ 221	(24 pages) November 8, 1971, letter from the National Association of Electric Companies to member companies attaching an address entitled "An Appraisal of Joint Financing for Municipals and Electric Cooperatives, presented by Frank Martin, Vice President of Halsey, Stuart & Co.
12/4	DJ 222	(5 pages) January 28, 1972, letter from A. H. Hodge, of Daverman Associates, to Harold Beard, President of Beard, Ellison & Davis, Inc., enclosing data on the Michigan Municipal and Cooperative Power Pool for the calendar year 1971.
11/27	DJ 223	(8 pages) Excerpts from the Constitution of the State of Michigan.
11/29	DJ 224	(1 page) July 16, 1968, cost comparison for the years 1950-67 of Northern Michigan Electric Cooperative, Wolverine Electric Cooperative, and CP Co.
11/28	DJ 225	(4 pages) March 26, 1968, letter from R. D. Davey to CP Co. Division Managers showing comparisons of typical residential electric service bills for Michigan investor-owned electric utility companies, Michigan municipal electric utilities, and REA cooperatives in CP Co. territority.
12/4	DJ 226	(5 pages) June, 1967, Rate Department study comparing typical monthly bills of CP Co. and Coldwater Board of Public Works.
12/4	DJ 227	(22 pages) June 21, 1971, agreement for sale of a portion of the generating capability of Luddington pump storage plant by CP Co. to Commonwealth Edison Company, by and among CP Co., Commonwealth Edison Company and Indiana and Michigan Electric Company.

12/4	DJ 228	(26 pages) Uniform Statistical Report for the year ended December 31, 1962, for CP Co.
12/4	DJ 229	(6 pages) A March 27, 1972, letter from E. F. Brush, Assistant General Manager, Board of Water and Light, City of Lansing, Michigan, to Wallace Brand regarding the opposition of CP Co. to H.R. 4942, a bill, which, if enacted would permit municipal electric utilities to sell outside of the corporate limits up to 50% of that sold within its corporate limits.
12/4	DJ 230	(11 pages) Modification No. 7 to the Interconnection agreement, dated July 20, 1956, between Commonwealth Edison Company and Indiana and Michigan Electric Company, dated September 1, 1971.
12/4	DJ 231	(7 pages) December 4, 1972, response of Northern Indiana Public Service Commission to the subpoena duces tecum issued in this proceeding, including certificate of compliance of NIPSCO.
12/4	DJ 232	(3 pages) April 13, 1973, letter from Fred C. Brandenburg, of Detroit Edison Company, to H. Dean Miller, of the General Services Administration, attaching an article printed in the Detroit Free Press on April 10, 1973.
12/4	DJ 233	(23 pages) Uniform Statistical Report for the year ended December 31, 1972, for the Detroit Edison Company.
11/29	DJ 234	(23 pages) August, 1965, Edison Electric Institute Report entitled Methods of Owning and Selling Generating Capacity.
12/4	DJ 235	(1 page) December 3, 1963, letter from R. L. Paul to A. H. Lee regarding Warren Sundstrand's request that the CP Co. serve the City of Paw Paw, Michigan.
12/4	DJ 236	Applicant's Supplemental Environmental Report, In the Matter of Consumers Power Company (Midland Units 1 and 2), AEC Docket Nos. 50-329A and 50-330A.
12/4	DJ 237	Large map showing ECAR (East Central Area Reliability) area in tan/yellow.

12/5	DJ 238	(6 pages) Blank FPC Form 18, 1967 Power System Statement to the Federal Power Commission.
12/6	DJ 239	Power System Statement for the year ended December 31, 1964, of Northern Michigan Electric Cooperative, Inc. (FPC Form 12).
12/6	DJ 240	(11 pages) August 30, 1958, Interchange Agreement between Northern Michigan REC and the City of Traverse City.
12/11	DJ 241	(13 pages) Exerpt from the 1965 Glossary of Important Power and Rate Terms, Abbreviations, and Units of Measurement, promulgated by the Federal Power Commission.
12/11	DJ 242	(42 pages) Various material submitted by the City of Lansing Michigan, to the Antitrust Division in response to subpoena duces tecum. The materials relate to negotiations between CP Co. and the Lansing Board of Electric Utilities for interchange of power resulting in an interchange contract dated October 7, 1970.
12/11	DJ 243	(6 pages) (A) (2 pages) A January 5, 1973, letter from E. F. Brush to W. Jack Mosley requesting that certain matters, inter alia, joint construction of base load generation, admission of Lansing to the Michigan Pool be discussed. (B) (1 page) A January 12, 1973, letter from W. Jack Mosley to E. F. Brush establishing a meeting between CP Co. and Lansing. (C) (3 pages) Memorandum prepared by A. F. Waterman of Lansing recording a January 26, 1973, meeting between CP Co. and Lansing.
12/13	DJ 244	(3 pages) Antitrust conditions for Florida Power Corporation, Crystal River Unit No. 3.
12/14	DJ 245	(5 pages) May 22, 1973, document entitled Policy Commitments of Mississippi Power and Light Company to be Appended as Conditions to Grand Gulf Nuclear Units No. 1 and No. 2, AEC License Docket Nos. 50-416A and 50-417A.

12/20	DJ 246	(A) (2 pages) August 30, 1966, document entitled "Suggested Questionnaire, Consumers Power Company (Traverse City, Michigan) 'Population Trend Survey'" [copy also included due to illegibility of original]. (B) (2 pages) A September 8, 1966, memorandum from Romney Wheeler to A. H. Aymond transmitting a preliminary evaluation from Central Surveys' work in Traverse City. [Copy also included due to illegibility of original.] (C) (3 pages) A September 13, 1966, letter from B. D. Hilty to Romney Wheeler listing reasons that will "appeal" to the citizens of Traverse City as to why the City Light and Power Plant should be sold to CP Co. (D) (2 pages) An October 17, 1966, letter by B. D. Hilty, addressed "Dear Neighbor," which was apparently mailed to the citizens of Traverse City. The letter advocates that the Traverse City Light Department be sold to CP Co.
1/9/74	DJ 247-262	The working papers underlying the studies of Samuel J. Helfman.
1/9/74	DJ 263	(1 page) A chart, dated October 28, 1964, apparently prepared by CP Co. and Detroit Edison, entitled Minimum Reserves vs. Size of Generating Units.
1/10/74	DJ 264	Marked for identification only. Not offered, and in effect, withdrawn.
1/31/74	DJ 265	(1 page) A diagram with four blocks with the figures 20, 40, 30, and 30 in the individual blocks. [Prepared by Department to use in cross-examination.]
Rejected 2/14/74	DJ 266	(24 pages) Complaint before the Michigan Public Service Commission, City of Wyoming and City of Grand Rapids (complainants), vs. Consumers Power Company (respondent), filed September 18, 1970.
Rejected 2/14/74	DJ 267	(41 pages) Various pleadings in connection with City of Wyoming vs. Michigan Public Service Commission.

2/20/74	DJ 268	(102 pages) An internal CP Co. memorandum, dated February 28, 1966, entitled "Upper Peninsula Electric Utility Study."
3/1/74	DJ 269	(1 page) Rectangular coordinate system with years on the absicissa, mills on the ordinate, and a declining curve (left to right) marked average cost.
3/6/74 (Marked for ID)	DJ 270	(14 pages) Various materials relating to Bills 104 and 683 before the Michigan House of Representatives which would appear to have extended Michigan Public Service Commission jurisdiction (including a "single-phase" type rule) to municipals and REA's. (A) (1 page) A March 30, 1961, letter from Representative Arnell Engstrom, Chairman of the Ways and Means Committee, to Harry Running informing Mr. Running that Bill 104 will not get out of Committee and states, "I think the big utilities have done a pretty good job of killing it off . . . ." (B) (1 page) A February 22, 1962, letter from Arnell Engstrom to Harry Running, transmitting "several copies of the bill which was introduced on electric suppliers." (C) (1 page) April 3, 1962 letter from Arnell Engstrom to Harry Running informing that House Bill 683 did not get out of Committee. (D) (2 pages) House Bill No. 104. (E) (4 pages) House Bill No. 683. (F) (5 pages) A brief on the need for House Bill No. 104, prepared for Cherryland Rural Electric Cooperative.
3/6/74 (Marked for ID)	DJ 271	(1 page) A December 7, 1962 internal CP Co. memorandum prepared by M. H. Gerhard entitled "Meeting on Lansing Annexed Area and MSU Prospective Electric and Gas Business.

3/6/74 (Marked for ID)	DJ 272	(2 pages) A July 1, 1966, internal CP Co. memorandum prepared by R. L. Paul entitled "City of Bay City, New Wholesale Power Contract."
3/7/74 (Marked for ID)	DJ 273	(4 pages) A March 16, 1962, internal CP Co. memorandum entitled "Consumers Power Company, Municipal and Rural Electrification Administration Activities."
3/7/74 (Rejected 3/7/74)	DJ 274	(1 page) A July 8, 1966, letter from R. L. Paul to Division Managers, Marketing Superintendents, Region Superintendents, and General Office Communications list warning of increased REA competition if Congress establishes a REA Bank.
	DJ 275	(6 pages) A March 15, 1968, letter from Boston Edison Co. to Members of EEI Rate Research Committee summarizing replies to questionnaire pertaining to wholesale rates for resale.

APPENDIX A

Midland Cities
Ex. No.
DJ No. 123

United States of America

DEPARTMENT OF AGRICULTURE

WASHINGTON

I, EARL L. BUTZ, Secretary of Agriculture of the United States, pursuant to Title 28, United States Code, Section 1733, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described:

1. Memorandum dated December 12, 1969, to Mr. R. E. Cole, Power Survey Officer, from Mr. W. C. Morris, Chief, Power Planning Branch, Northeast Area - Electric, providing information concerning the power supply arrangements and facilities for the Michigan portion of Southeastern Michigan Rural Electric Cooperative, Inc. Attached to this memorandum is a memorandum dated December 12, 1969, from Mr. W. R. Dalton, Chief, Engineering Branch, Northeast Area - Electric.
2. Memorandum dated June 2, 1967, from Mr. Morris to Mr. John H. Scoltock, Chief, Engineering Branch, Northeast Area - Electric, on the subject of Southeastern's power cost analysis.
3. Letter dated January 10, 1967, from Mr. Mathew L. Bruce, Marketing Superintendent, Consumers Power Company, to Mr. Ray Nash, Acting Manager of Southeastern.
4. Certified copy of a Resolution adopted by the Board of Trustees of Southeastern at its regular meeting held September 15, 1966. Attached to this certificate is a copy of Southeastern's Wholesale Power Agreement with Ducheye Power, Inc.
5. Field Activities Report to Mr. Scoltock from Mr. Robert Badner, REA Field Engineer, covering the period September 12-14, 1966, on the subject of Southeastern.
6. Memorandum dated July 29, 1966, from Mr. Morris to Mr. Scoltock summarizing studies and analysis made of the power supply for Southeastern Michigan area.
7. Field Activities Report to Mr. Scoltock from Mr. Badner covering the period May 11-12, 1966, on the subject of Southeastern.
8. Field Activities Report to Mr. Scoltock from Mr. Badner covering the period February 14-17, 1966, on the subject of Southeastern.

9. Field Activities Report to Mr. James W. Goodw , Chief, Power Procurement Branch, Power Supply Division, from Mr. Thomas Darling, Jr., Electrical Engineer, Power Supply Division, covering the period February 14-16, 1966, on the subject of Southeastern.

10. Letter dated February 11, 1966, from Mr. Allen L. Johnson, Southern Engineering Company of Georgia, to Mr. J. Joseph Lower, manager of Southeastern. Attached to this letter are two enclosures.

11. Speed memorandum dated February 3, 1966, to Procurement from Mr. Morris on the subject of Southeastern (Detroit Edison). Attached to this memorandum are a letter dated January 24, 1966, on the letterhead of Detroit Edison Company to Mr. J. J. Lower, manager of Southeastern, and a copy of an Electricity Supply Agreement between Detroit Edison and Southeastern.

12. Field Activities Report for December 29, 1965, on the subject of Southeastern from Mr. Badner to Mr. Scoltock.

13. Letter dated December 4, 1965, from Mr. Lower to Mr. William Callaway, Director, Northeast Area-Electric. Attached to this is a letter dated December 2, 1965, from Mr. R. M. Kopper, Assistant to the General Manager, Indiana & Michigan Electric Company, to Mr. Dewey G. Ries, President, Board of Directors of Southeastern.

14. Letter dated November 24,1965, from Mr. Lower to Mr. Callaway. Attached to this letter are a letter dated November 23, 1965, from Mr. John K. Davis, President of the Toledo Edison Company, and a letter dated November 23, 1965, from Mr. Orville E. Meyer, City Manager of the City of Hillsdale, Michigan, to Mr. Ries.

15. Letter dated November 22, 1965, from Mr. Lower to Mr. Callaway. Attached to this letter are copies of letter sent by Mr. Ries to the Municipal Board of Public Works, Hillsdale, Michigan, the Municipal Board of Public Works, Clinton, Michigan, Detroit Edison Company, Indiana & Michigan Electric Power Company and Toledo Edison Company.

16. Letter dated October 28, 1965, to Mr. Morris from Mr. O. Franklin Rogers, Southern Engineering Company of Georgia.

continued.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia,

this ____ day of _____, 19____.

Earl L. Butz

Secretary of Agriculture

By _____

General Counsel

occ.75-2

(Signed pursuant to the authority of 3 F.R. 3077)

17. Rough draft of a memorandum written by Mr. Scoltock, September 16, 1965, on the subject of Consumers Power Company - REA Borrower Relations. The memorandum is addressed to Mr. Wood, Assistant Administrator, REA, from Mr. Callaway.
18. [illegible]r dated September 15, 1965, from Mr. Rogers to Mr. Morris on the subject of Southeastern, also attached is a copy of the above letter.
19. [illegible]adum to Southeastern Michigan file from Mr. Rogers dated September 15, 1965, on the subject of Consumers Power Company's meeting of August 26, 1965.
20. Field Activities Report to Mr. Scoltock from Mr. Badner covering the period August 30-31 and September 1, 1965, on the subject of Southeastern.
21. Letter dated July 29, 1965, from Mr. Lower concerning Consumers Power Company.
22. Letter dated June 28, 1965, from Mr. Lower to Mr. B. G. Campbell, Vice President of Consumers Power Company.
23. Field Activities Report from Mr. Darling to Mr. Goodwin covering the period September 13-14, 1966, on the subject of Southeastern.
24. Drafts of letters to Toledo Edison Company, Detroit Edison Company and the manager of the Municipal Board of Public Works, Hillsdale, Michigan.
25. Contract of Electric Service between Consumers Power Company and Southeastern dated May 4, 1962, with Power Contract Summary dated May 10, 1962, memorandum dated May 11, 1962, from Mr. E. W. Moldenhauer to Mr. H. B. Lee, Director, Power Supply Division, extract from minutes of meeting of the Board of Directors of Consumers Power Company held on January 24, 1952, and Exemption Certificate - Michigan Sales Tax.
26. Agreement of Southeastern Michigan Rural Electric Cooperative, Inc., for Purchase of Electric Service for Resale from the Toledo Edison Company dated May 8, 1952.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this 15th day of August, 1973.

Earl L. Butz
Secretary of Agriculture

By [signature]
General Counsel
Acting Director, Electric and Telephone Division, OGC
(Signed pursuant to the authority of 7 C.F.R. 2.17)

INTERVENOR'S EXHIBITS

CONSUMERS POWER COMPANY
MIDLAND UNITS 1 AND 2
AEC DOCKET NOS. 50-329A, 50-330A

VOLUME I:

Deponent	Number	Pages
Original Exhibits of Janjai Chayavadhanangkur	1001	37
Additional Revenue from 180,000 k.w. unit	1002	1
Alphonse H. Aymond -- Deposition	1004	11-15, 21-28, 44-50, 55-57, 83, 52, 111-112, 124-125, 137-138, 154-155, 166-271
Harry R. Wall -- Entire Deposition	1005	1-111
Robert L. Paul	1006	27-32, 48-67, 187-196.
B. G. Campbell	1007	14-17, 26-27, 94-127, 136, 168-180, 193-201, 221-222, 244-24[illegible] 269-271, 462-463, 502-505, 556
William Jack Mosley.	1008	38, 49-57, 76-79, 91-92, 121-132, 189-191, 198-207, 214-21[illegible] 225-229, 283-285, 29[illegible] 300, 313, 321-322
W. A. Hedgecock	1009	18-20, 37-39, 40-42, 62-63
H. Kaiser	1010	5-6, 10-20, 25-32, 37-42, 56-57, 59-62, 92-100, 146-147, 155 156

VOLUME II	Number	Pages
Robert C. Conden -- Deposition	1016	10, 127-142

DISCOVERY DOCUMENTS

Letter, S. K. Martens to Mayor and Members of the City Council, Grayling, Michigan, dated August 24, 1960	1017	3
Letter, Romney Wheeler to B. G. Campbell et al; re- meeting the competitive challenge, dated October 29, 1965	1018	9
Survey of Electric Companies with competition in certain cities; re- Jackson, Michigan	1019	3
Balfour to file - Memo - re- Discussions on August 9, 1963 about Rogers City Power Company, dated August 13, 1963	1020	2
Letter, Unsigned to A. H. Aymond; re- Acquisition of customer-owned line, Camp Grayling	1021	1
Letter, R. L. Paul to Ralph Hahn; re- Analysis of Wolverine Electric Cooperative proposal to City of St. Louis, dated August 17, 1965	1022	8
Memo, R. L. Paul to A. H. Aymond, et al; re- Purchase offer to City of St. Louis dated July 13, 1965	1023	1

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Memo, R. L. Paul to File; re- Suggested purchase price for Alpena Power Company, dated May 28, 1971	1024	2
Letter, J. B. Falahee to W. R. Boris; re- Agreement to purchase the City of Charlevoix's municipal electric facilities, executed on January 31, 1963, dated February 1, 1963	1025	14
Letter, T. P. Martin to Maurice Gerhard; re- City of Charlevoix Earnings, dated January 31, 1963	1026	4
Letter, B. G. Campbell to Mayor and City Council, Charlevoix, Michigan, dated December 13, 1962	1027	2
Letter, J. W. Kluberg to B. G. Campbell re- City of Charlevoix, dated August 11, 1961	1028	1
Letter, J. W. Kluberg to D. E. Karn, et al; dated June 22, 1961	1029	1
Statistics and Information, City of Charlevoix, prepared August 1961, Consumers Power Company	1030	15
Resolution adopted by Allegan City Council on March 14, 1966	1032	1
Letter, A. H. Lee to Mayor and Council of City of Allegan, dated June 13, 1966	1033	3
Minutes, Allegan City Council Meeting dated July 28, 1966	1034	1

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Resolution adopted by Allegan City Council on August 8, 1966	1035	1
Letter, Signature illegible to B. G. Campbell; re- Benefits to the City of Allegan from the sale of its electrical system to Consumers Power Company, dated May 27, 1966	1036	8
Letter, B. D. Hilty to Judd L. Bacon, dated December 13, 1965	1037	1
Resolution adopted by Petoskey City Council on November 15, 1965, dated December 8, 1965	1038	1
Letter, J. W. Kluberg to B. G. Campbell; re- Kegomic Area Distribution Facilities, dated October 20, 1965	1039	1
Telegram, B. D. Hilty to City Commission Petoskey, Michigan, dated October 29, 1965	1040	1
Letter, R. L. Paul to Ralph Hahn, dated September 22, 1966	1041	3
Letter, R. L. Paul to B. G. Campbell, dated September 19, 1966	1042	9
Letter, R. L. Paul to G. R. Lambke, dated July 29, 1965	1044	1
Letter, R. L. Paul to Ralph Hahn, re- Approved proposal to be submitted to the City of St. Louis for the purchase of its electric system, dated July 29, 1965	1045	7

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Letter, C. E. Waits to W. J. Jefferson, re- Appraisal of City of St. Louis' municipal system, dated July 9, 1965	1046	1
Report and appraisal of electric distribution system of St. Louis, Michigan dated July 6, 1965	1047	28
Report of examination, City of St. Louis electric utility, St. Louis, Michigan dated June 30, 1965	1048	15
Letter, J. L. Bacon to B. D. Hilty; re- Kegonic Line Purchase, dated December 24, 1965	1049	1
Notes, Value of Municipal Electric System, (Allegan, St. Louis), dated 1966	1050	1
Notes, Incremental Expense Factors	1051	1
Notes, Value of Municipal Electric System, (St. Louis)	1052	1
Notes, Value of Municipal Electric System, (Allegan)	1053	1
Letter, unsigned to Mr. Nash, dated April 18, 1967, re- letter of March 23, 1967 on proposed new contract for electric service beyond May 21, 1967	1054	1
Letter, H. F. Small to A. F. Brewer, dated November 21, 1966, re- Michigan Pool Study	1055	3
Letter, Keith B. Norris to Al Southwick dated January 23, 1963, re- Lakewood Public School	1056	2

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Generation Reserve Comparison	1058	1
Memo, Division Managers from R. D. Davey, Jackson, Michigan, dated September 27, 1971	1060	7
Comparison of Estimated Annual Power Costs Platte, River Hatchery, Phase I, II and III	1061	4
Letter, R. L. Paul to State of Michigan Department of Conservation, Attention: Mr. H. C. MacSwain, Lansing, Michigan dated November 12, 1968	1062	1
Letter, Matthew L. Bruce to R. L. Paul, dated January 23, 1966	1063	2
Letter, D. T. Egly, R. R. Pegg to R. L. Paul, dated September 14, 1971	1064	1
File Memo, re- Northern Electric Coopera-tive, dated August 27, 1964	1065	1
Letter, Leonard Lamb, et al., to B. G. Campbell, dated October 15, 1965	1066	1
Letter, M. A. Beach to A. H. Lee, dated October 1, 1969	1067	1
Letter, R. L. Paul to F. M. Hoppe, dated June 22, 1970	1068	2
Letter, G. Elenbaas to R. L. Paul, dated June 17, 1970	1069	2
Letter, B. D. Hilty to H. R. Wall, dated February 12, 1969	1070	1

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Letter, W. C. Allen to R. L. Paul, dated June 27, 1969	1071	3
Annual Report, Top-O-Michigan, REA 1961, dated April 17, 1962	1072	1
Letter, Jensen to Paul, dated February 17, 1970, re- Petoskey State Park	1073	1
Letter, Paul to Campbell, dated July 28, 1969, re- City of Harbor Springs	1074	1
Letter, Bruce to Stutesman, dated June 10, 1969, re- Wholesale power supply to Coop.	1075	2
Memo, Paul to Campbell, dated January 16, 1968, re- purchase of Presque Isle Electric Coop.	1076	1
Letter, Eugene J. Yehl to Glen Phillips re- Brook Hollow Recreational Project Barryton, Michigan, dated April 20, 1965	1077	2
Memo, E. H. Kaiser to A. H. Aymond, etal re- Letter Agreement, dated January 26, 1971(1079)	1078	1
Letter, E. B. Easson to W. J. Mosley, et al; re-Agreement dated January 5, 1971	1079	5
Study MIIO System Performance during extreme emergencies (1970 System)	1080	9
Draft, Direct Testimony of W. J. Mosley	1081	20
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Letter, H. C. Reasoner, et al; re- Consumers Power Co. - Detroit Edison Company, dated January 21, 1969	1082	1

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Letter, H. R. Wall, et al; to Toledo Edison Company, dated October 16, 1968	1083	2
Letter, H. R. Wall, et al; to Toledo Edison Co., dated October 16, 1968	1084	1
Study, Interconnection effects on Michigan reserve requirements, dated September 18, 1963	1085	10
Letter, E. H. Kaiser to G. L. Heins, re- Memo, (017171 - 017172), dated June 23, 1972	1086	1
Memo, E. H. K. to file; dated June 23, 1972	1087	2
Memo, E. H. Kaiser to file; re- MIIO Companies responses to Consumers Power initial offer to lease pumped storage, dated September 27, 1967	1088	3
Letter, G. L. Heins to E. H. Kaiser, et al; re- Lulu-Allen Junction 345 KV line, dated February 25, 1972	1089	2
Letter, G. L. Heins to W. J. Mosley; re- Argenta-Alkhart 345 KV double circuit tower line, dated October 10, 1969	1090	1
Letter, H. R. Wall et al to T. J. Hagel dated October 29, 1969	1091	3
Letter, W. Jack Mosley to J. H. Campbell re- Cost sharing for Argenta-Elkhart line, dated March 4, 1970	1092	2
Study, E. H. K. to file; re- MIIO Group Prototype generation expansions, dated March 1963	1093	2
Memo, Possible solution to Michigan-AEP-CE problem, dated February 10, 1969	1094	1

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Memo, A. H. Lee to H. P. Graves, et al; re- 17595, dated August 18, 1967	1095	1
Letter, Mary A. Simons, Executive Secretary, Allegan Area Chamber of Commerce to Federal Power Commission dated August 17, 1967	1096	1
Letter, R. A. Condon to M. W. Balfour; re- Alpena Power Company, dated July 31, 1964	1097	1
Letter, Ralph G. Fletcher to Louis A. Vaupre, dated July 28, 1964	1098	1
Letter, B. G. Campbell to A. H. Aymond, dated May 19, 1966	1099	2
Letter, R. L. Paul to R. A. Lamley, dated April 22, 1966	2000	1
Study Draft, M.C.R. to File; re- Michigan Pool Data for EEI Task Force on Power Capacity for Pooling, dated July 20, 1959	2001	15
Map/Chart, Michigan Pool Interconnections as of December 1958	2002	1
Letter, Leo W. Hoffman to H. P. Graves, 17858 - 17861, dated November 2, 1967	2003	1
Letter, Leo W. Hoffman to Editor, Allegan News Gazette	2004	3
Letter, William B. Barrons, City Manager, City of St. Louis to Ralph Hahn, dated January 11, 1966	2005	1
Letter, William B. Barrons, City Manager City of St. Louis to Ralph Hahn, dated April 20, 1965	2006	1
Letter, R. L. Paul to Division Managers et al; dated July 8, 1966	2007	1

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Letter, E. H. Kaiser to R. A. Lamley et al; re- Supplement C-4 (18247-18262), dated February 19, 1970	2008	1
Supplement C-4 Consumers Power-Detroit Edison Electric Power Book - Pool Unit No. 4 Capacity and Energy Sharing and Costs, approved as revised on July 4,1969 and August 7, 1969	2009	17
Letter, H. R. Wall to H. C. Reasoner, dated March 21, 1972	2010	2
Letter, E. H. Kaiser to A. K. Falk; re- 18274-18276, dated March 21, 1972	2011	1
Draft, E.H.K. to file; re- New Consumers Edison Agreement, dated March 17, 1972	2012	3
Memo, W. J. Mosely to H.R.W., re- 18310-18322, dated February 3, 1965	2013	1
Study/Presentation Consumers Power Detroit Edison Powr Pool, dated January 15, 1964	2014	13
Letter, H. P. Graves to Hubert H. Nexon, dated February 25, 1966	2015	3
Minutes Regular Meeting of the Board of Directors of the Rogers City Power Company, held on July 25, 1966	2016	2
Minutes, Special Meeting of the Board of Directors of the Rogers City Power Company, held on November 10, 1966	2017	2
Minutes, Special Meeting of the Board of Directors of the Rogers City Power Company, held on November 16, 1966	2018	2
Minutes, Miscellaneous	2019	3
Chart, Rogers City Power Company's Customers Receiving Increases when billed on Consumers Power Company's Rates, 12 months ending November 1966, dated May 23, 1967.	2020	4

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Chart, CE Nuclear Fuel Cycle Cost Estimates, dated June 1, 1966	2021	1
Letter, W. H. Whitley, publisher, Presque Isle County Advance to B. G. Campbell, dated July 15, 1964	2022	1
Letter, A. H. Aymond et al to W. H. Whiteley, President Rogers City Power Company, dated July 8, 1964	2023	3
Study, RLP to File; re- City of Hillsdale Power Supply and Cost Study, dated December 29, 1966	2024	10
Memo/Address RLP to file; re- Municipal, REA, Other Wholesale Power Business and Related Problems, dated May 17, 1966	2025	7
General Memo, RLP to File; re-review of the City of St. Louis Report on Electric Power Survey and Analysis of Total Power Purchase, dated May 4, 1966	2026	4
Letter, M. H. Gerhard to B. G. Campbell; re- City of Grayling, dated May 17, 1961	2027	1
Letter, R. L. Paul to John N. Malone; re- Contract No. 65-05-DR-(5)-20014, dated November 4, 1971	2028	1
Letter, Gerritt Elenbaas to Robert L. Paul; re- Bill of sale for East Bay View Electric distribution system; dated January 18, 1966	2029	1
Memo, R. L. Paul to W. C. Allen; re- Camp Grayling - Purchase of distribution line, dated July 9, 1969	2030	1
Memo, R. L. Paul to B. E. Hagen; re- Bill of Sale, Camp Grayling Line, dated June 5, 1969	2031	1

Study, City of Portland: Wholesale Electric Service Proposal, dated November 9, 1971	2032	6
Study, City of Petoskey, Michigan: Increased Electric Power Supply, dated July 8, 1969	2033	3
Study, Study and Proposal for Increased Wholesale Power Supply to the City of Petoskey, Michigan	2034	2
Letter, A.H.L. to President and Council of the Village of Paw Paw, Michigan; re- Wholesale Contract Rate for Resale Service/Partial Purchase, dated October 10, 1966	2035	5
Letter, A. H. Lee to B. G. Campbell; re- 19798, dated January 5, 1966	2036	1
Letter, N. L. Adamson, Village Clerk, Paw Paw, Michigan to Arthur Lee; re- 19798, dated January 4, 1966	2037	1
Resolution, Village of Paw Paw, Michigan adopted December 27, 1965 and dated January 4, 1966	2038	1
Study, (incomplete) City of Hillsdale: Power Supply and Cost Study, dated December 30, 1966	2039	3
Study, Consumers Power Company Purchase Proposal City of Grand Rapids Street Lighting System	2040	3
Study/Memo/Brochure, Some Questions and Answers on Electric Rates and Service in Bay City	2041	8
Letter, W.E. Sherwood to M.H. Gerhard;re- City of Holland: Information Regarding Municipal Utilities, dated February 15, 1962	2042	1

DISCOVERY DOCUMENTS (cont.)	Numbers	Pages
Charts, H.J. Neal to file; re-Competition Report, dated February 23, 1966	2043	2
Study, Bay City Proposal, etc.	2044	13
Letter, L.A. Vaupre to W.A. Hedgecock; re- City Light Department, Bay City, Michigan (21917-21918), dated September 27, 1965	2045	1
Memo, L. A. Vaupre to file re- Ad Hoc Meeting, dated September 10, 1965	2046	1
Memo, L. A. Vaupre to file; re- Bay City Light: Advertising Program-Competitive, dated September 27, 1965	2047	1
Letter, L. A. Vaupre to W. J. Jefferson re- Ad Hoc Committee Report: Bay City Electric Light Department, dated July 23, 1965	2048	1
Letter, L. A. Vaupre to W. A. Hedgecock dated June 24, 1965	2049	1
Letter, L. A. Vaupre to M. W. Balfour; re- Kiesel Substation, dated June 4, 1965	2050	1
Study, Report on Bay City Competitive Situation, presented by W. J. Jefferson et al; dated April, 1965, Section II (13 pages).	2051	13
Letter, W. J. Jefferson to L. A. Vaupre, dated March 26, 1965	2052	1
Memo, R. D. Davey to Division Managers re- 2054, dated July 26, 1971	2053	1
Chart, typical net monthly bills for residential electric service, dated July 1971	2054	1

DISCOVERY DOCUMENTS	Numbers	Pages
Letter, Unsigned to B. G. Campbell, dated December 6, 1967	2056	1
Study, City of Pontiac Electric Study, 1970	2057	5
Letter, B. D. Hilty to C. A. Mulligan; re- East Bay View or the Kegonic Area, dated December 3, 1964	2058	2
Letter, B. G. Campbell to D. E. Karn; re- Kegonic Line Acquisition: Petoskey dated January 14, 1965	2059	2
Letter, R. J. Van Ess to William Reid; re- Hydroelectric plant abandonment losses, dated April 18, 1966	2060	2
Memo, G.L.H. to file; re- Rural Electrification Association Study, dated January 23, 1964	2061	3
Letter, J. W. Kluberg to B. G. Campbell; re- City of Grayling, dated August 11, 1961	2062	1
Study, City of Grayling: General Information and Physical Inventory	2063	4
Study/Memo, A.M.N. et al; re- Economic Analysis of Southern Interconnections 1969 versus 1970, dated July 17, 1964	2064	3
Memo, Illegible to R. L. Paul et al; re- 2066, dated August 12, 1968	2065	1
Draft, No. 2 Supplement E; Principles Relating to Extension of Pooling Privileges to Third Parties	2066	4
Minutes (extracts) Meeting of Board of Directors of Consumers Power Company, held on April 11, 1972	2067	1
Service Schedule E, Sale of Portion of Generating Capability of Ludington Pumped Storage Plant by Consumers to Commonwealth, under Agreement dated March 1, 1966 among Consumers Power Company, et al.	2068	10

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Memo, B. G. Campbell to Executive Officers et al; re- 23555-23562, dated December 3, 1965.	2069	1
Letter, R. L. Paul to Division Managers; re- 23723-23724, dated March 28, 1966	2071	1
Exhibit A, Case No. U-2291 Rules Governing the Extension of Single-Phase Electric Service in Areas Served by Two or More Utilities	2072	2
Rate Instruction Bulletin No. 13-5; re- Rate Schedule MPSC No. 7-Electric, dated April 14, 1966	2073	6
Letter, H.J. Jensen to R.C. Youngdahl; re- Petoskey State Park, dated February 17, 1970.	2074	1
Service Inquiry No. 189, Village of Paw Paw, dated September 22, 1966	2075	1
Letter, Harry R. Wall to A. H. Aymond et al; re- Pumped hydro discussion with MIIO Representatives (024177 - 024184), dated August 23, 1967	2076	1
Data, Blue Ridge Pumped Storage, dated August 30, 1967	2077	4
Memo, Review of City of St. Louis Report	2078	2
Memo/Study, Northern Michigan Electric Cooperatives, dated February 7, 1963	2079	15
Memo, A.F.G. to H.R.W., et al; re- City of Big Rapids Surplus Power, dated November 21, 1962	2080	1

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Letter, Tom G. Fletcher to A. H. Aymond, dated May 25, 1971	2081	1
Letter, Tom G. Fletcher to A. H. Aymond, dated August 24, 1971	2083	1
Charts, Alpena Power Company, dated July 25, 1969	2082	5
Letter, Tom G. Fletcher to A. H. Aymond, dated June 15, 1971	2084	1
Memo, "Virginia" to A.H. Aymond, dated November 9, 1962	2085	1
Letter, Unsigned to Nolan E. Isom, Onaway News, Onaway, Michigan; re-2087 dated April 5, 1966	2086	2
Charts, Comparison: Consumers Power Comp./ Presque Isle Electric Corporation/Presque Isle Electric Cooperative, dated April 4, 1966	2087	6
Letter, Earl C. Hurley, Manager, O & A Electric Cooperative, dated December 7, 1965	2088	1
Letter, Paul to Hilty, dated March 19, 1968	2089	2
Brainstorming the Ad Hoc Committee; Vaupre Vaughn, Shepart	2092	1
Letter, Mainey to Vaupre, dated August 25, 1967	2093	1

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Letter, Shepart to Bevan, dated April 8, 1968, re-Electric Boundary Lines	2098	1
Statement, Consumers Power Company, re- Bay City Light department	2103	2
Memo, Unsigned to A. Mulligan, dated May 22, 1962	2104	1
Letter, Kluberg to Vaupre, dated October 2, 1964, re- Bay City Report	2105	2
Letter illegible to "whom it may concern", dated May 1, 1962, re- Bay City	2106	1
Letter, Unsigned to A. H. Lee, Kalamazoo, dated August 13, 1968; re- letter from C.C. Burns to F.C. Voss of August 1, 1968 re- requested information on City of Allegan	2108	1
Telegram, dated July 29, 1964, from Louis L. Sappanos to Consumers Power Co., re- South Haven Power Plant	2109	1

ISCOVERY DOCUMENTS (cont.)	Number	Pages
Memo from E. L. Lance, Consumers Power Company, re- Comments on Allegan City Light	2111	1
Letter from A. H. Lee to C. A. Mulligan, dated October 14, 1960, re- News Clip from Kalamazoo Gazette dated October 13, 1960	2112	2
Questions and Answers, re- Bay City Light Department	2113	1
Questions and Answers for Charlevoix Booklet, B. D. Hilty, Consumers Power Company	2114	11
Charlevoix Booklet: Questions and Answers B. D. Hilty, Consumers Power Company	2115	5
Report on Power Supply of South Haven, Michigan, dated November 1963	2116	2
Memo, dated August 24, 1966, re- Consumers Power Company's offer to the City of Allegan for purchase of electric distribution	2117	2
Charts, City of Allegan to Consumers Power Co., Comparisons of water heating rates	2118	2
Letter, B. G. Campbell to A. H. Aymond, dated May 19, 1966, re- Appraisal of Allegan City Electric System by Consumers Power Company	2119	2
Facts pertaining to Electric Department Operations, undated	2120	2
Some Questions and Answers on Electric Rates and Service i Bay City	2122	8
Memo concerning advantages of leasing a city municipal electric system rather than making an outright purchasing offer	2123	1

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Handwritten note, re- Bay City Area	2124	1
Detroit Edison Company - Consumers Power Company- Service in Areas adjoining the two companies	2125	2
Letter to B. D. Hilty to Mayor, City Council of Charlevoix, dated March 17, 1961	2126	1
Letter, City of Charlevoix to Consumers Power Company, dated August 7, 1961, re- survey of the Charlevoix Municipal Electric Utility	2127	1
Memo, R. L. Paul to files, dated June 12, 1970, re- Farm River Township	2128	1
Questionnaire "Population trend survey", Traverse City, Michigan	2129	1
Letter, Willis C. Allen to Omar Garbenson, dated April 9, 1968	2130	1
Memo, W.K. Markus to W.C. Allen, re- Traverse City	2131	2
Letter, Unsigned to B.D. Hilty, dated April 16, 1962; re- Professional Club Subdivision	2132	1
Meeting, Memo Rogers City	2133	2
Letter unsigned to C. A. Mulligan, dated October 16, 1964, re- Traverse City	2134	1
Letter unsigned to George G. Schmid, dated May 25, 196[illegible]	2135	3
Memo, City or Zeeland	2136	1
Letter, G.M. to W.N. McClelland, dated September 28, 1966	2137	1
Letter, R.L. Paul to A.C. Fagerlund, dated July 10, 1967; re- City of Hart	2138	1

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Letter, Philip C. Webb to Board of Trustees, Glen Oaks Community College Centreville, Michigan, dated January 10, 1966	2139	2
Letter, Philip C. Webb to Norman Haas, dated February 6, 1967	2140	2
Letter, P. C. Webb to G. W. Howard, et al; dated December 28, 1966; re- Glen Oaks Community College	2141	2
Letter, Robert E. Brewster to Dr. Eleanor M. Gillespie, dated November 22, 1966	2142	2
Questions & Answers, Power Plant Expansion	2143	1
Biographical Data, Paul H. Todd	2144	1
Memo, E. A. Riedel to C. J. Herron, dated May 12, 1972; re- Traverse City	2145	1
Letter, B. D. Hilty to Lyle E. Beattie, dated March 18, 1968	2146	1
Letter, W. A. Hedgecock to G. W. Howard et al; dated November 1, 1965	2147	1
Memo, B. G. Campbell et al; to R. L.Paul dated August 19, 1968 (?) re- Draft No. 2, Supplement E, Power Pool Agreement	2148	1
Memo, W. J. Mosley et al, to R. C. Paul, et al., dated September 11, 1968, re- Pooling Agreement	2149	1
Letter, R. L. Paul to W. C. Allen, dated March 26, 1970, re- Cherryland Cooperative	2150	2
Memo, R. L. Paul to R. A. Conden, et al., dated February 20, 1970, re- Status of Appraisals	2151	2
Memo, L. L. Novak to H. J. Jensen, et al., dated February 18, 1970; re- Appraisal Review	2152	1

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Minutes, Meetins of Executive Committee of Board of Directors	2153	5
Memo, C.E.M. to file, dated October 31, 1968; re- City of Manton Purchase	2154	1
Memo, R. L. Paul to H. J. Jensen, et al., dated January 6, 1970; re- City of Eaton Rapids	2155	1
Letter, R. A. Conden to B. G. Campbell, dated April 1, 1968; re- Alpena Power Company	2156	1
Letter, B. G. Campbell to Executive Officers et al., dated December 3, 1965	2157	1
Routing slip, unsigned to G. W. Patterson re- South Haven (handwritten notation) dated April 23, 1962	2160	1
Letter, R. E. Doyle, Jr., Indiana and Michigan to V. M. Marquis, dated April 18, 1962	2161	1
Letter, V. M. Marquis to Mr. Cook, re- City of Scuth Haven, Michigan, dated April 19, 1962	2162	2
Deposition, Patterson, by Grossman, re- Justics Department Exhibits 106, 107, 108	2163	4
Memorandum of Understanding, dated August 26, 1969	2164	1
Economic Analysis 1979 Generation Addition Nuclear and Intermediate, dated March 26, 1971	2165	31

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Consumers Power Company EHV Transmission System Development 1972-1982	2166	29
Remarks of James G. Campbell, Press Conference, dated June 19, 1960	2167	7
Memo - E. H. Kaiser to R. C. Youngdahl, dated May 20, 1970, with attachments Subject Delay of Palisades.	2168	7
Memo - C. F. Brown to B.G. Campbell, dated February 25, 1972 - Proposed 50% Hough Bill	2169	1
Memo - C.F. Brown to B.G. Campbell, dated April 6, 1972 - Delhi Township Association.	2170	1
Memo - R.L. Paul to L.L. Booth, H.S. Smith, B.G. Campbell, R.A. Conden, dated 7/10/67 with attached 2 pages. City of Hart.	2171	3
Memo - R.L. Paul to H.P. Graves, A.C. Fagerlund dated October 2, 1969, The City of Seton Rapids.	2172	1
Letter - G.L. Carson to B.G. Campbell dated February 26, 1960 - Lowell	2174	1
Memo - R.L. Paul to A.C. Fagerlund dated March 21, 1969 City of Essexville with attached memo and Service Inquiry.	2175	3
Memo - to. Summers to R.L. Paul, dated July 17, 1969 - Essexville Waste Treatment Plant Standby Electric Service.	2176	1

DISCOVERY DOCUMENTS (cont.)	Number	Pages
Memo - R.L. Paul to T. Summers dated July 31, 1969 City of Essexville Duplicate Service.	2177	2
Kalamazoo State Hospital - Western Michigan University - Steam Plant Operation; Report on Meeting of Consumers Power Company Study Team July 25, 1964, by R.L. Paul 7/29/64.	2178	2
Memo - Meeting of Legislative Interim Study Committee - RLP 9/10/64	2179	2
Memo - Meeting of Legislative Interim Study Committee RLP 1/14/64 with attached Cost Schedule.	2180	3

INDEX TO EXHIBITS OF

CONSUMERS POWER COMPANY

Date Admitted	Exhibit No.	
3/7/74	11,001	(1 page) Comparison of Approximate Rate of Return and Index of Earnings for Major Retail Rate Classes -- Present and Proposed Rates Based on Year Ended December 31, 1972
3/7/74	11,002	(65 pages) Consumers Power Company's Electric Rate Schedules, Retail
3/7/74	11,003	(5 pages) Electric Rate Schedules Wholesale for Resale
3/7/74	11,004	Electric Utilities in Lower Peninsula of Michigan, Bills for Typical Consumptions (8 pages) Residential (12 pages) Commercial (8 pages) Industrial
4/2/74	11,102	(1 page) Consumers Power-Detroit Edison Approximate Total Bulk Power Transmission Investment at End of 1972
4/2/74	11,104	(1 page) Illustrative Example of Reserve Requirements (Large and Small Systems)
4/2/74	11,106	(33 pages) Interconnection Agreement dated May 23, 1969 between Consumers Power Company, The Detroit Edison Company and The Hydro-Electric Power Commission of Ontario, with Supplements
4/2/74	11,108	(27 pages) Operating Agreement among Consumers Power Company, The Detroit Edison Company and The Toledo Edison Company dated March 1, 1966

Date Admitted	Exhibit No.	
4/2/74	11,109	(51 pages) Operating Agreement among Consumers Power Company, The Detroit Edison Company and Indiana & Michigan Electric Company dated March 1, 1966, with Amendments 1 through 6.
4/2/74	11,111	(32 pages) Agreement For Electric Service between Consumers Power Company and the City of Holland dated November 15, 1967, with Supplemental Agreements 1 through 6.
4/2/74	11,112	(34 pages) Interconnection Agreement between Consumers Power Company and The City of Lansing dated October 7, 1970, with letter Agreements dated December 15, 1972 and June 27, 1973
4/2/74	11,114	(36 pages) Ludington Pumped Storage Hydroelectric Generating Plant Project Transmission Facilities Agreement between Consumers Power Company and The Detroit Edison Company dated August 20, 1969
4/2/74	11,115	(36 pages) Transmission Facilities Agreement between Consumers Power Company and The Detroit Edison Company dated August 20, 1969
4/2/74	11,116	(32 pages) Ludington Pumped Storage Hydroelectric Generating Plant Operating Agreement between Consumers Power Company and The Detroit Edison Company dated August 20, 1969
4/2/74	11,118	(20 pages) Agreement for Sale of Portion of Generating Capability of Ludington Pumped Storage Plant by Consumers Power Company to Commonwealth Edison Company dated June 1, 1971
4/2/74	11,119	(17 pages) Facilities Agreement among Consumers Power Company, The Detroit Edison Company and The Toledo Edison Company dated March 1, 1973

Date Admitted	Exhibit No.	
4/2/74	11,120	(60 pages) East Central Area Reliability Coordination Agreements dated August 1, 1967 and Supplemental Agreements dated October 20, 1967 and April 7, 1970, and ECAR Documents 1, 2, 3 and 4
3/5/74	11,302	(1 page) Customers Served by Municipal Systems and Consumers Power Company
3/5/74	11,303	(1 page) Area Development Data Books, Consumers Power Company, as of October 1, 1973
3/5/74	11,304	(52 pages) Data on Hillsdale-Jonesville, Michigan
3/5/74	11,305	(1 page) Customers over 3,000 kw within Three Miles of REA System Located Outside Community of More than 1,500 Population
3/5/74	11,306	(1 page) Consumers Power Company Franchise Data
3/5/74	11,307	(2 pages) Consumers Power Company Wholesale Power Sales to Other Systems
3/5/74	11,308	(1 page) Municipal Electric Systems -- Appraisals, Purchase or Lease Offers by Consumers Power Company
3/5/74	11,309	(7 pages) Contract for Electric Service Between Consumers Power Company and the City of Charlevoix dated July 12, 1973 (Total Purchase)
3/5/74	11,310	(7 pages) Contract for Electric Service between Consumers Power Company and the City of Coldwater dated February 14, 1972 (Partial Purchase)
11/30/73	12,001	(6 pages) 4/21/67 letter from Daverman to Steinbrecher; 4/25/67 letter from Steinbrecher to Daverman; 5/18/67 letter from Daverman to RL Paul

Date Admitted	Exhibit No.	
11/30/73	12,002	(1 page) 5/18/70 letter from RL Paul to Keen
11/30/73	12,003	(7 pages) Consumers Power Company's Preliminary Proposal: Interchange and Wholesale Power Purchase with Wolverine Electric Cooperative
11/30/73	12,004	(1 page) 5/25/70 letter from RL Paul to Keen
11/30/73	12,005	(21 pages) 9/9/70 letter from RL Paul to Keen; 9/8/70 Draft Agreement for Interchange and Wholesale Power Purchase between Consumers Power Company and Northern Michigan, Wolverine, Grand Haven and Traverse City
12/5/73	12,006	(5 pages) 5/5/71 letter from McLaren and Saunders to Thumb Electric Coop; List of companies receiving identical letters
12/6/73	12,007	(1 page) 12/7/67 memo from RL Paul re meeting with Northern Michigan Coop, Consumers Power Company and the MPSC relative to the continuation of the Alba interconnection
12/7/74	12,008	Lansing 8/10/73 Power Supply Study
1/16/74	12,009	(27 pages) Prospectus for Coldwater's 7/24/61 Bond Issue
1/16/74	12,010	(34 pages) 11/28/72 letter from DeBoe to Endicott; 11/27/72 Campbell, Deboe, Giese and Weber Report on Electric Utility
1/29/74	12,011	(41 pages) Data on Coldwater, Michigan, compiled by Board of Public Utilities and Coldwater Area Chamber of Commerce
1/16/74	12,013	(2 pages) 11/12/71 letter from G. Collins to W.G. Milliken re Coldwater State Home
1/16/74	12,013	(2 pages) 5/10/71 letter from E.H. Munn to A.H. Langius re Coldwater State Home

Date Admitted	Exhibit No.	
1/16/74	12,014	(1 page) 11/21/71 letter from R. E. Brewster to R. L. Paul
1/16/74	12,015	(1 page) 2/12/64 letter from F. M. Hoppe to Coldwater Board of Public Utilities
6/4/74	12,016	(20 pages) MPSC order, Case No. U-4346, re revision of Alpena Power Company's rate schedules
4/2/74	12,017	(2 pages) 2/27/74 letter from C. L. Johnson to E. H. Kaiser
6/11/74	12,018	(1 page) Estimated Annual Cost Differences Resulting from 220 mw or 440 mw Sale of Midland 1 and 2 Plant
Rejected 6/11/74	12,019	(1 page) JRL-5 Restated in Terms of MW Reserve
Rejected 6/12/74	12,020	(4 pages) 3/7/74 Analysis o. Senate Bill No. 1065
Rejected 6/12/74	12,021	(3 pages) 5/9/74 Analysis of Substitute Bill No. 1065
See 6/21/74 Order	12,022	(232 pages) Consumers Power Company's 1973 Annual Report to the FPC
Official notice requested	12,023	(9 pages) 8/29/74 letter of intent from J. N. Keen, representing the MMCPP, to Consumers Power Company and attached agreement
Official notice requested	12,024	(29 pages) Interconnection Agreement between Consumers Power Company and City of Holland

Appendix B-4

BOARD EXHIBITS

No. B1 "Mid-Continent Area Power Pool Agreement", dated March 31, 1972.

NOTICED DOCUMENTS

No. 1 Letter from G. L. Ortman, Staff Counsel, Federal Power Commission, dated 27 February 1974, certified copy of NEPOOL and CAPCO interconnection and coordination agreement, received from Staff on 8 March 1974.

No. 2 Applicant's 1970 Annual Report, page 31, column titled 1960. (Per telephone conference call with all Parties 8 July 1975, all Parties were notifed of Board taking notice, and per telephone call of 10 July 1975, Staff informed Board that no Party had objections.)

APPENDIX C

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

CORRECTIONS IN TRANSCRIPT

Page	Line	Correction
828	16	"vionte-the-law" should be "violate-the-law"
829	5	"aftertimes" should be " of three kinds"
830	7-8	"did he say?" should be "do we see?"
830	12	"you present" should be "we present"
830	18	"attempt to monopolize" should be "intent to monopolize"
830	25	"violated anti-trust laws" should be "violate the anti-trust laws"
831	1	"to forward" should be "to go forward"
831	12	"per se" should be "per se"
872	2	"Hood" should "Foote Act"
872	8	"particulars" to "Intervenors"
878	1	"their" should be "those"
879	12	"underway cable" should be "underwater cable"
885	4	"D. G. Campbellton" should be "B. G. Campbell"
885	22	"as well as Duke" should be "as well as in Duke"
900	4	Delete "and Materials"; should read "National Association of Electric Companies"
900	18	"effect and a small system" should be "effect on a small system"
901	9	"but Dr. Leeds had asked" should be "that Dr. Leeds had asked"
905	2	"training organization" should be "lobbying organization"

Page	Line	Correction
905	22	"Judge Kline" should be "Judge Clark"
906	21	"inexplicably" should be "inextricably"
908	15	"industries own power pooling" should be "industries own view of power pooling"
922	5	"Daiber" should be "Daverman"
926	6	"Main" should be "Maine"
979	2	"might be elected, or are elected" should be "might be reluctant, or are reluctant"
1076	6	"step-tight" should be "step-type"
1078	24	"block-tight" should be "block type"
1078	24	"and separate demand" should be "and no separate demand"
1145	9	"deal with" should be "dealing with"
1213	14	"DJ 142" should be "DJ 42"
1219	21	"128,000" should be "138,000"
1221	1	"disputed" should be "distributed"
1241	20, 23, 25	"DJ No. 142" should be "DJ No. 42"
1242	12, 15	"DJ No. 142" should be "DJ No. 42"
1329	10	"advanced steam plant" should be " Advance steam plant"
1338	4	"Mr. Powell" should be "Mr. Paul"
1407	25	"Anderson Electric Institute" should be "Edison Electric Institute"
1409	2	"665-51" should be "65-51"
1428	17	"it has fallen?" should be "it has fallen out?"
1431	19	"confidences" should be "conferences"
1520	24	Should include "DJ 3" as received into evidence on page 1674.

Page	Line	Correction
1520-A	11, 12, 13	Should exclude DJ 47 through DJ 49 as these three exhibits were received into evidence on November 28, 1973.
1520-A	17-25	Should exclude DJ 53 through DJ 61 as these exhibits were received into evidence on November 28, 1973.
1520-B	2-4	Should exclude DJ 62 through DJ 64 as these exhibits were received into evidence on November 28, 1973.
1532	12, 14, 15	"Mr. Sanders" should be "Mr. Saunders"
1575	3	"I considered significant" should be "I mentioned considered significant"
1598	22	"planning in training" should be "training in planning"
1607	12	"transmitter of data" should be "transmittal of data"
1613	11	"those favorable" should be "those unfavorable"
1639	23	"set off to New York" should be "sent off to New York"
1670	18	"author of 71" should be "offer of 71"
1674	8	Should exclude DJ 47 through DJ 49 as these three exhibits were received into evidence on November 28, 1973.
1674	6	Should include DJ 3 as received into evidence.
1674	8	Should exclude DJ 53 through DJ 64 as these exhibits were received into evidence on November 28, 1973.
1700	5, 10, 13, 16	"heating" should be "peaking"
1701	10, 13, 14	"heating" should be "peaking"
1791	10	"has previously" should be "has not previously"
1860	1	"location RR" should be "designation RR"

Page	Line	Correction
1870	1	"It's a damage" should be "Can damage"
1870	19	"a lower loading" should be "a low loading"
2101	7	"Borrow Capacity" should be "Boiler Capacity"
2188	10	"Florida Power Commission" should be "Florida Power Corporation"
2235	12	"Embassy Pool" should be "M-C Pool"
2316	10	"nyoptic" should "myopic"
2395	18	"7070-megawatt" should be "70-megawatt"
2562	20	"outage for availability" should be "outage or availability"
2567	16, 17	"5 percent" and "15 percent" should be "5 megawatts" and "15 megawatts"
2567	20	"33 1/2" should be "33 1/3"
2572	10, 13	".004" should be ".0004"
2573	22	".004" should be ".0004"
2576	18, 19	Question presently reads, "Could you express one day as a percentage of the number of days in 10 years?" Should read, "Could you express a percentage of time as the number of days in 10 years?"
2576	21, 22	Question presently reads, "Could you express one day as a percentage of days in 20 years?" Should read, "Could you express a percentage of time as the number of days in 20 years?"
2581	10	"10" should be "2.5"
2608	21	"DJ 16" should be "DJ 17"
2623	13	"1,381,000.3 megawatts" should be "1,381,300 megawatts"
2624	3	"I would" should be "It would"
2652		[Something seems to be missing from transcript]
2654	24	"froming" should be "forming"

Page	Line	Correction
2669	25	"Ccmmissions" should be "Conditions"
2922	9, 13, 19, 22, 23	"Mr. Hoffman" should be "Mr. Helfman"
2923	6, 10	"Mr. Hoffman" should be "Mr. Helfman"
2997	9	Page number 3126 should be listed under column marked "In Evidence" not listed under "Rejected" (DJ-246-A - D).
3102	9	"Professor Boris' law" should be "Professor Bork's law"
3573	3	"He said it was" should be "He sent us his"
3814	11	"and the Halsey" should be "in the Halsey"
3914	13	"AEC" should be "AEP"
3914	15	"my saying" should be "by saying"
3939	22	"1973" should be "1974"
4031	12	Delete "of Michigan"
4253	21	"Sandra Streigle" should be "Sandra Strebel"
4483	3	"50 to 20 percent" should be "15 to 20 percent"
4952	2, 3	"Uncertainty Risk in Profit" should be "Uncertainty Risk and Profit"
5222	9, 13	"sixteen-minute" should be "60-minute"
5620	18	"PP-1 rate" should be "TP-1 rate"
5621	6	"PP-1 rate" should be "TP-1 rate"
5858	23	"exceptions" should be "assumptions"
5861		Should be Applicant's Exhibit 12,008, not Intervenor's Exhibit.
5901	14	"in the densely populated areas" should be "in the less densely populated areas"

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)	)	
	)	
	)	
	)	
	)	

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
21st day of July 1975.

Peggy A. Downing
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
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	)	50-330A
(Midland Plant, Units 1 and 2)	)	
	)	
	)	
	)	
	)	

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