Central files

11-13-75

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF'S BRIEF IN SUPPORT OF ITS EXCEPTIONS

Joseph Rutberg
Chief Antitrust Counsel
for NRC Staff

Robert J. Verdisco
Counsel for NRC Staff

Andrew F. Popper
Counsel for NRC Staff

November 13, 1975

INDEX

TABLE OF CASES

STATUTES:

(Copies of the AE Act, Clayton Act, FTC Act and Sherman Act can be found on pp. 5-11 of the Staff's "Proposed Findings of Fact and Conclusions of Law" (October 8, 1974).

MISCELLANEOUS:

REFERENCE MATERIAL:

The list of reference material described below are attached as appendices to the Staff's "Prcposed Findings of Fact and Conclusions of Law" (October 8, 1974).

I. QUESTIONS PRESENTED

(1) Whether Section 105(c) of the Atomic Energy Act of 1954, as amended (the Act), requires that in order to determine whether the activities under a license issued pursuant to Section 103 of the Act, will create or maintain a "situation inconsistent with the antitrust laws", a finding is necessary that said activities must be misused so as to constitute a material element and a substantial factor in a "scheme" or "conspiracy" the purpose and effect of which is to cause the creation or maintenance of such a situation.

(2) Whether an Applicant for a license under Section 103 of the Atomic Energy Act of 1954, as amended, creates or maintains a situation inconsistent with the antitrust laws enumerated in Section 105(a) of the Act when it refuses to grant access to unit power or joint venture participation in its nuclear facilities to smaller entities where there are no alternative sources of nuclear power within the relevant geographic market.

(3) Whether an electric utility that dominates and controls high voltage transmission, creates or maintains a situation inconsistent with the antitrust laws enumerated in Section 105(a) of the Act, as amended, when its refusal to grant access to such transmission denies smaller electric utilities access to coordination.

(4) If so, whether the denial of access to coordination through the domination and control of high voltage transmission evidences a sufficient nexus to the activities under the license.

(5) Whether the policies underlying the antitrust laws enumerated in Section 105(a) of the Act require that a dominant utility enter into coordination agreements only if such agreements result in a net benefit to that dominant utility.

(6) Whether a dominant utility can refuse access to coordination, if it determines that such coordination may not be in the best interest of its shareholders but such access is necessary to allow for competition within a relevant geographic market.

(7) Whether the NRC has the authority to grant the relief requested by the Staff in this proceeding.

(8) Whether the ultimate burden of proof in a licensing proceeding is with the Applicant for a license.

II. PRELIMINARY STATEMENT

On July 18, 1975 the Atomic Safety and Licensing Board (Licensing Board) issued an Initial Decision (LBP-75-39, NRCI-75/7, 29 (1975) hereafter referred to as I.D.) ordering the Director of Regulation of the Nuclear Regulatory Commission (NRC) to continue, as issued, the permits to the Consumers Power Company (Consumers or Applicant) for construction of the Midland Plant, Units 1 and 2. 1/

1/ Midland Units 1 and 2 are sized at 482 MW(e) and 818 MW(e), respectively (I.D. p. 89 and Tr. 9244).

On September 8, 1975 the NRC Regulatory Staff (Staff) filed its exceptions to the I.D. The Staff, at that time, indicated that it intended to consolidate the exceptions, where possible, under specific topics in its brief. Accordingly, the Staff hereby submits its brief in support of its exceptions which topically delineates the Staff's objections and arguments to the I.D. 2/

III. PROCEEDINGS BELOW

The proceeding before the Atomic Safety and Licensing Board was held in accordance with the Attorney General's recommendation that a hearing be held pursuant to Section 105(c) of the Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C. 2011-2296 at 2135 as amended by P.L. 91-560, 84 Stat. 1472 (December 19, 1970) (the Act), to determine whether the granting of the Midland licenses "...may maintain a situation inconsistent with the antitrust laws...." (Attorney General's Letter of June 28, 1971 to the Associate General Counsel of the Commission).

The hearing commenced on November 27, 1973 and the record was closed on June 12, 1974. The Board rendered its I.D. on July 18, 1975 and found that the activities under the Midland licenses would not create or maintain a situation inconsistent with the antitrust laws as specified in Subsection 105(a) of the Act (I.D. p. 114). The Board ordered that the permits issued to the Consumers Power Company for the construction of the Midland Plants, Units 1 and 2 be continued without the imposition of any antitrust conditions.

2/ Much of the reference material utilized in the preparation of this brief can be found as appendices to the "Proposed Findings of Fact and Conclusions of Law" filed by the Staff on October 8, 1974.

IV. THE BOARD INCORRECTLY DEFINED TERMS WHICH ARE IMPORTANT TO A CLEAR UNDERSTANDING AND ORDERLY DISPOSITION OF THIS CASE (STAFF EXCEPTIONS NOS. 1 THROUGH 9).

Several definitions of the Board have been excepted to by the Staff. The Staff submits that certain definitions of the Board are incomplete, inaccurate or not based on the record. The definitions proposed by the Staff are supported by the evidentiary record in this proceeding or other material of which the Licensing Board and the Appeal Board can take official notice.

Specifically, the Staff submits that the following proposed definitions are material to the disposition of this case, in accord with industry standards and the evidentiary record in this proceeding and should be adopted by the Appeal Board. The reasons for the exceptions and the correct definitions are as follows:

(1) The Board erred in its definition of "Bulk Power (Staff Exception No. 2). The Board's definition limits "Bulk Power" to power supplied to its own distribution system or to a wholesale customer. This is incorrect. The concept of "Bulk Power" refers to electric power made available to a receiving entity for distribution or further transmission. This includes "wholesale" power as well as emergency power, economy energy, etc. The receiving entity is not limited to a wholesale customer and in fact the receiving entity could be a competitor. The Board's definition is not a

definition but rather indicates two ways in which "bulk power" may be used. The correct definition of "Bulk Power" is:

> "Bulk Power" - The sources of power which are made available from a transmission system for distribution or for further transmission (Tr. 1709 and 2327).

(2) The Board erred in its definition of "wheeling" (Staff Exception No. 3). The definition of wheeling should not be limited to the term "wholesale" power. For example, emergency energy, economy energy, etc. are forms of "bulk power" which are not necessarily considered "wholesale" power transactions. All types of "Bulk Power" can be wheeled. The correct definition of "wheeling" is:

> "Wheeling" - A form of "transmission service" wherein the transfer of electric power is from one utility to another over the facilities of an intermediate utility by direct transmission or displacement. (Otter Tail Power Company v. United States, 410 U.S. 366 (1973)).

(3) The Board erred in its definition of "Coordination" (Staff Exception No. 4). The Board's definition is too vague and limiting. Coordination can result in an agreement covering a multitude of intersystem arrangements or it can be an agreement which is limited to specific intersystem activity. In addition, the Board erred in tying "Coordination" to "beneficial services" which confer on each party a "net benefit" (Staff Exceptions No. 5 and 6).

The "net benefit" standard is extremely vague. A more appropriate standard for a "Coordination" agreement would be "undue burden" as approved by the Supreme Court in the Gainesville [3/] decision (I.D. p. 69). Accordingly, a more appropriate definition of "Coordination" is:

> Coordination - The joint development and/or operation of bulk power facilities by or among two or more electric systems for improved reliability and increased efficiency which would not be attainable if each system acted independently and no undue burden is imposed on either system (See also FPC National Power Survey (NPS) 1970, I-17-1).

(4) The Board erred in its definition of "operational coordination" (Staff Exception No. 8). This term should not be limited to interchange and sharing, nor should it be limited to just those arrangements and joint activities listed by the Board. For example, "wheeling" services are not mentioned even though they are a form of operational coordination. The correct definition of "operational coordination" is:

> Operational Coordination - The operation of bulk power facilities by or among two or more electric systems for improved reliability and increased efficiency, and may include one or more of the following specific activities; (1) Reserve Sharing, (2) Emergency Energy, (3) Maintenance Energy, (4) Economy Energy, and (5) Transmission Service (wheeling) (NPS 1970, I-17-1; Muller P.T. 20-21, Wein P.T. 62, Mayben Tr. 2652, Aymond Tr. 6257).

(5) The Board erred in its definition of "Firm Power" (Staff Exception No. 9). The Board has characterized "Firm Power" as "highly reliable". This definition is vague and meaningless. A more appropriate definition of

---

3/ Gainesville Utilities Department v. Florida Power Corp., 402 U.S. 515 (1971).

"Firm Power" is:

Firm Power - Power intended to be available at all times during the period covered by a commitment, even under adverse conditions (Glossary of Electric Utility Terms, Edison Electric Institute Publication No. 70-40, 1970, p. 63 and Tr. 2548).

(6) The Board erred in its definition of "Unit power" (Staff Exception No. 10). Unit power contracts do not permit or provide for interruptions as are contractually permitted in interruptible power contracts. The correct definition of "unit power" is:

Unit power - Power which is produced by a specifically designated generating unit.

The Staff believes that the following definitions, which were not proposed by the Board, are important to a clear understanding of and orderly disposition of this case.

Base-Load Power - Generation which is normally operated continuously at a constant output (Glossary of Electric Utility Terms, Edison Electrical Institute Publication No. 70-40, 1970).

High Voltage - Levels of voltage which are well above those normally used for distributing electric power, typically 69,000 volts and above (Tr. 2329, 1708, 1710).

V. THE BOARD ERRONEOUSLY FOUND THAT THE STAFF, JUSTICE AND THE INTERVENORS HAVE THE BURDEN OF PROOF (STAFF EXCEPTIONS NO. 12 AND 120)

The Board concluded that the burden of proof in this proceeding rests exclusively on the Staff, Justice, and the Intervenors. 4/ The Commission's Rules of Practice provide that, "...[t]he proponent of an order has the burden of proof..." 5/ Under normal circumstances, the applicant in a licensing proceeding has the burden of proof, 6/ since it is the party requesting the Commission for an order. The question thus arises whether the Board was correct in adopting a different standard in a Section 105(c) proceeding. The Board, in its I.D., fails to set forth the basis of its ruling or the factors which it considered. 7/

Burden of proof is traditionally divided into three areas: (1) the burden of persuasion, (2) the task of initiating the presentation of evidence on a particular issue, or the burden of "going forward with the evidence, and (3) burden of pleading the fact to be proven. 8/ To rule on the question of "burden of proof", without considering its components is error. 9/

4/ I.D. p. 45.

5/ 10 C.F.R. 2.732. See also Appendix A, Part II Rules of Practice d(1).

6/ Id.

7/ The Board does not go beyond stating a Rule which may be consistent with prosecution of certain criminal offenses but is not consistent with the concept of prelicensing antitrust review.

8/ McCormick, Handbook of the Law of Evidence §318 (pp. 672-686 (1964).

9/ Id. at §317, p. 668.

While a misdirection as to burden of proof may not always be assumed to have influenced the ultimate verdict, 10/ it is appropriate to clarify these evidentiary responsibilities so that the issue will be resolved for other cases and an orderly conduct of the hearing will occur. The new Federal Rules of Evidence state:

> Rule 301. Presumptions in General in Civil Actions and Proceedings
>
> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast. 11/

Looking to this provision, the party upon whom the burden rests in this case is the Applicant.

In Storm v. Lumberman 12/ the court held that the burden of pleading and proving the material elements in any case rests upon the party who is asserting the affirmative position, and not on the party defending the negative. 13/ Under the Lumberman rational, the question becomes which of the parties is asserting an affirmative position. Here, Applicant is requesting the Commission to issue a license with no "antitrust" conditions. Accordingly, the Applicant has the ultimate burden of persuasion. The Staff, Justice, and Intervenors are also making an affirmative assertion that the licenses issued to Consumers for the Midland facilities be amended to contain antitrust conditions because to continue the present licenses would maintain a situation inconsistent with the antitrust laws. Therefore, in a

---

10/ Id., at §322, p. 686.

11/ Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1931.

12/ 6 F.R.D. 355 (D.C. Cal. 1947).

13/ Id. at 358.

case as complex as the one at bar, both parties may have a "burden of proof".

In Plumber Local Union 519 v. Construction Industry Stabilization Committee, [14/] a case involving wage increases during a period when an executive order had frozen wages at a set level, the Court found that burdens existed for both parties. The Union was to prove that they were entitled to an order allowing wage increases, based on necessary preconditions, eg. cost advances, or increased productivity. The government's burden of proof was to show that the proposed action was inconsistent with established standards. A similar approach should have been reached by the Board in this matter. It should have concluded that the applicant, in a Section 105(c) proceeding, has the burden of showing that it is entitled to a license without antitrust conditions. The parties claiming that the granting of a license without appropriate conditions would have the burden of going forward with the evidence to establish that the issuance of such a license would maintain a situation inconsistent with the antitrust laws.

The subject of burden of proof was considered by the Atomic Safety and Licensing Appeal Board in Indian Point Station, Unit 2. [15/] In that proceeding, the applicant challenged the allocation of burden of proof and quantum of evidence which had been placed on the applicant by the Licensing Board. The Staff had advanced a position that the applicant had to show not the absence of wrongful conduct, but the presence of proper conduct, designed to comply with various environmental standards. The

14/ 479 F.2d 1052 (Em. App. Ct., 1973).

15/ In the Matter of Consolidated Edison Company of New York, Indian Point Station, Unit No. 2) ALAB-188 7 AEC 323, 356,(1974).

Appeal Board held as follows:

> The ultimate burden of proof on whether a license should be issued remains on an applicant. But where, as here, (see discussion infra at pp. 361-365 on staff's position regarding the contribution of the Hudson River to the Middle Atlantic striped bass fishery), one of the other parties advances a contention, that party has the burden of going forward with evidence to buttress that contention. As a general proposition at least, once that party has introduced sufficient evidence to establish a prima facie case, the burden then shifts to the applicant who, as part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the presiding board that it should reject the contention advanced by the particular party. See Consumers Power Co., ALAB-123, supra RAI-73-5 at 345. See and compare Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-5, RAI-74-1 19, 31-32 (January 24, 1974); Office of Communication of United Church of Christ v. FCC, 425 F.2d 543, 546-550 (D.C. Cir. 1969). 16/

Applying the above principle to the case at bar, once the Staff, Justice and Intervenors sustained their burden of going forward with the evidence by introducing prima facie evidence of a situation inconsistent with the antitrust laws, 17/ the burden of proof, returned to the applicant to rebut the prima facie case as established. The burden was then on the Applicant to prove by a preponderance of the evidence that the issuance of the license would not create or maintain a situation inconsistent with the antitrust laws. 18/

16/ Id. at 7 AEC 356, n. 142.

17/ The Staff, Intervenors, and the Department of Justice did sustain their burden of proof. See infra, Section XI.

18/ Supra, note 15, 7 AEC at 357; see e.g. International Harvester Co. v. Ruckelhaus 478 F.2d 615 (D.C. Cir. 1973).

VI. THE BOARD ERRED IN THAT IT INCORRECTLY LIMITED THE RELEVANT MATTERS IN CONTROVERSY (STAFF EXCEPTIONS NOS. 11, 73, 78 116, 124)

The relevant matters in controversy in this proceeding are as stated by the Board on page 42 of the I.D. That is:

> 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.

However, the Staff takes exception to the limitations placed by the Board on the scope of the relevant matters in controversy. The Board found that "...access to coordination has [is limited to] two facets: (1) coordination between the Applicant and one or more of the smaller utility systems in the relevant geographic market; and (2) coordination between two or more of the smaller utility systems in the relevant geographic market." (I.D. pp. 40-44 and 93).

The Board erred in failing to consider another facet of coordination. That is, whether or not Consumers had the power to grant or deny access to coordination between the smaller electric utilities in the relevant geographic market and other electric utilities whose electric systems are contiguous to and interconnected with Consumers' electric system. The Board categorizes such interconnections as being outside of the relevant matters in controversy because most of the smaller utilities in the relevant

geographic market are too remote from alternative power sources to make purchases "...unless they are able to obtain wheeling services from Applicant" (emphasis added) (I.D. p. 108). In reaching this conclusion the Board has recognized the crux of the problem but has refused to consider it in light of the commercial realities of the situation in this proceeding.

The Board was specifically advised at the beginning of this proceeding that the scope of coordination was indeed intended to be broad. In fact, the Board itself, in outlining the "Relevant Matters in Controversy", speaks in terms of a broad "power to grant or deny access to coordination" with no limitations (I.D. pp. 41, 42, 43, 44, Transcript (Tr.) 59). The Chairman of the Board even recognized that "...we are here to show ... whether the Applicant has the power to prevent or influence coordination and whether they used that power in an anticompetitive fashion..." (Emphasis added, I.D. p. 44, Tr. 3986-3987).

The Staff has been unable to find any support in the record for the specific limitations on the "facets" of coordination as set out by the Board. To the contrary, it is clear from the record that the "power to grant or deny access to coordination" was intended to be broad. The Board was under no limitation as to which electric utilities should be considered as potential partners to coordination arrangements. The only implied limitation on any such arrangement would be the commercial realities in this proceeding.

The Board has clearly ignored the commercial realities and the record in this proceeding and has unduly limited and misconstrued the scope of the relevant matters in controversy thereby creating a substantial and material error which permeates the entire I.D.

VII. IN ANALYZING THE FACTS IN THIS CASE THE APPEAL BOARD SHOULD APPLY THE LAW AS DEVELOPED UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT IN ORDER TO DETERMINE WHETHER THERE IS A SITUATION INCONSISTENT WITH THE ANTITRUST LAWS

Section 105(a) of the Atomic Energy Act of 1954, as amended, refers to several antitrust statutes which must be considered in determining whether or not the granting of a license will create or maintain a situation inconsistent with the antitrust laws.[19/] The Federal Trade Commission Act (FTC Act) is specifically recognized as one of these laws. Accordingly, in the present case, if the Appeal Board applies the unfair method of competition standard set forth in Section 5 of the Federal Trade Commission Act it would be able to consider the cases dealing with the Sherman Act and Clayton Acts, as well as the FTC Act, in determining whether there is a situation inconsistent with the antitrust laws. As set out below, the Courts have held that violations of the Sherman and Clayton Acts also violate Section 5 of the FTC Act. [20/] Therefore, the Staff submits that Section 5 is the most appropriate standard for determining whether a situation is inconsistent with the antitrust laws under Section 105(c) of the Act.

In FTC v. Cement Institute,[21/] the FTC challenged a pricing system as being an instrumentality for price fixing and thus a violation of Section 5.

19/ It appears from the I.D. that the Board, while acknowledging Section 5 of the FTC Act as one of the antitrust laws, did not apply that standard to the facts in this matter.

20/ See Fashion Originator's Guild v. FTC, 312 U.S. 457 (1941); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); and FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953).

21/ 333 U.S. 683 (1947).

The government had previously moved against the same system under Section 1 of the Sherman Act, but had failed to prove a combination or agreement to fix prices. 22/

Referring to the overlap of the two statutes the Court in Cement Institute stated:

> ...[A]lthough all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act, the converse is not necessarily true. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations. 23/

Thus, the Court in Cement Institute held that not only did the Commission have the power to declare unlawful practices which might restrain competition in their incipient stages, it also had the power to declare unlawful practices which violate the Sherman Act. The scope of Section 5 was further expanded in FTC v. Motion Picture Advertising Service Company, Inc. 24/ In that case, the respondent and three similar companies held exclusive agreements with three-fourths of all the theaters in the United States for the showing of their films. No concerted activity was alleged; the complaint challenged only the legality of unilateral action by each respondent.

22/ Cement Manufacturers Protective Association v. United States, 268 U.S. 588 (1925).

23/ 333 U.S. at 694 (1947).

24/ 344 U.S. 392 (1953).

The Court held Section 5 was violated. In discussing the scope of Section 5, the Court stated:

> The 'unfair methods of competition', which are condemned under Sec. 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act .... Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business .... It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipiency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as 'unfair methods of competition' existing violations of them. 25/ (Emphasis added).

The Supreme Court has upheld FTC findings of "unfair" practices where the anticompetitive impact, as determined by the Commission, was characteristic of the anticompetitive impact caused by conduct specifically proscribed under Sherman and Clayton Act standards. In FTC v. Brown Shoe Company 26/ and Atlantic Refining Company v. FTC, 27/ the Court upheld the FTC's proscription of practices which had the same anticompetitive effect--market foreclosure--as exclusive dealing and tying arrangements, but which violated neither the Sherman Act nor the Clayton Act. The Court said in Atlantic Refining, "...all that is necessary in §5 proceedings... is to discover conduct that 'runs counter to the public policy declared in the' Act." 28/

25/ 344 U.S. 392 at 394-395 (1953). This case also held that "...[a] device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition' within the meaning of §5(a) of the Federal Trade Commission Act."

26/ 384 U.S. 316 (1966).

27/ 381 U.S. 357 (1965).

28/ Id. at 369.

A more extensive market analysis was not necessary since, "... [J]ust as the effect of this plan is similar to that of a tie-in, so is it unnecessary to embark upon a full scale economic analysis of competitive effect." 29/

In Brown Shoe, the Court recognized that the Commission's power under Section 5 was a "...broad power...and is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws. 30/

29/ Id. at 371.

30/ Supra, note 26 at pp. 320-321. After finding that Brown's contracts conflicted with the central policies of both Section 1 of the Sherman Act and Section 3 of the Clayton Act, the Court rejected respondent's argument that the Commission was required to prove a substantial lessening of competition or a tendency to create a monopoly, as would be required under Section 3. It acknowledged that such proof would be necessary to establish a violation of Section 3, but felt it inappropriate under Section 5, because the Commission is empowered "to arrest trade restraints in their incipiency without proof that they amount to an outright violation of Section 3 of the Clayton Act or other provisions of the antitrust laws.

The Federal Trade Commission Act does not speak in terms of "monopoly", "contract", "conspiracy" or "agreement"; it speaks in terms of "competition". Section 5 of the FTC Act was designed to prevent in the incipiency anticompetitive acts and practices before they become full-blown violations, not simply to proscribe well-defined anticompetitive behavior. 31/ In FTC v. Sperry and Hutchinson Company, 32/ Section 5 of the Federal Trade Commission Act was determined to have a substantive reach which permits the Commission to challenge practices not enumerated in the Clayton Act nor forbidden by the Sherman Act. Section 5 of the FTC Act gives the FTC broad powers to prevent unfair methods of competition and unfair or deceptive acts or practices other than those which violate the letter or the spirit of the Sherman and Clayton antitrust laws. As stated by the Court:

> [T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter of encompassed in the spirit of the antitrust laws. 33/

31/ Section 5 obviously applies to full blown violations as well as incipient acts and practices.

32/ 405 U.S. 233 (1972).

33/ Id., at 244. It is clear that practices conflicting with public values and fairness under Section 5 are not limited to affirmative misconduct but also include nonconduct which has the effect of exacerbating an unfair method of competition.

It is the Staff's position that the Appeal Board should apply the "FTC Standard" suggested above to the facts in this proceeding. In applying this standard it is the Staff's position that the situation alleged to be inconsistent with the antitrust laws is a situation which amounts to an unfair method of competition under Section 5 of the Federal Trade Commission Act and that will be maintained by an unconditioned license.

VIII. STATEMENT OF THE CASE

A. Consumers Power Company

Consumers Power Company is a fully integrated major investor-owned public utility involved in the generation, transmission, distribution and sale of electric power both at wholesale and retail (I.D. pp. 40, 64, 84-92). Consumers is engaged also in transmitting power to and receiving power from Indiana and Ohio. In addition, Consumers is closely coordinated with the Detroit Edison Company and is involved with the Detroit Edison Company in exchanging power with Ontario-Hydro (I.D. 95-97).

As of the end of 1973, Applicant's electrical retail sales amounted to $475,720,869; total electric revenue amounted to $495,722,560; total electric retail sales expressed as electrical units and total electric sales expressed as electrical units equaled 23,263,781,000 and 24,102,000,000 kilowatt hours respectively; generation capacity was 5,291,900 kilowatts and electric customers served numbered 1,180,846; net electric income was

$87,462,915 (I.D. 86, DJ-Exhibit 21A and Consumers Power Company 1973 Annual Report (CP 1973 AR), pp. 18, 26 and 28). Applicant's retail sales from 1960 through 1972 increased approximately 130 percent (I.D. 86). Applicant had 84% of the combined retail business in 1972 (I.D. 86).

B. The Electric Utility Industry In The State Of Michigan

The electric utility industry in the State of Michigan is divided into two distinct electric regions: Upper Peninsula and Lower Peninsula (I.D. 84). Applicant's operations are carried out over most of the Lower Peninsula. (I.D. 85).

Three types of electric utility systems operate in the Lower Peninsula: (1) investor-owned utilities, (2) municipal systems, and (3) rural electric cooperatives (I.D. 84). There are five investor-owned utilities, twenty-three municipal systems and ten distribution cooperatives and two generation and transmission cooperatives within or directly adjacent to Applicant's service area (I.D. 84 , 85 ; Tr. 7842, 7843 and DJ-Exhibit 19). The service area of the Applicant is contiguous to each of the other five investor-owned utilities (I.D. 84).

C. Applicant's Intersystem Relationships

Applicant has intersystem relationships, including coordination agreements, with Detroit Edison Company, Indiana and Michigan Electric Company, Hydro-Electric Power Commission of Ontario, The Toledo Edison Company, Northern Indiana Public Service Company and the Commonwealth

Edison Co. (I.D. 95). The Applicant also coordinates, to a limited extent, with the M-C Pool, Lansing and Holland (I.D. 95).

IX. THE APPLICANT DOMINATES THE RELEVANT GEOGRAPHIC AND PRODUCT MARKETS

The Staff agrees with the Board that the proper relevant geographic market area in this case is that area in which the Applicant is presently providing service and that area into which the Applicant could reasonably and feasibly extent such service (I.D. 45). The relevant product market encompasses coordination services, [34/] including all services associated with developmental and operational coordination (I.D. 12, 35, 45). [35/]

Within the relevant geographic market Applicant owns and controls an extensive transmission grid to which all of the smaller utility systems in the relevant market are directly or indirectly interconnected (I.D. 97). Consumers owns and controls most of the high voltage transmission lines in the relevant geographic market (I.D. p.40 , Tr. 6651, DJ-Exhibits 1, 18, and 20 and see Staff's Proposed Findings of Fact and Conclusions of Law, pp. 42, 43, and 44). The Applicant as of 1973, owned 1,421.75 miles of 345 kv lines, 3,338.74 kv miles of 138 kv lines, 23.59 miles of 120 kv lines and 4,198.30 miles of 46 kv lines in 1973 (Uniform Statistical Reports, 1973, 1972, 1971).

Northern and Wolverine have approximately 40 miles of 138 kv which they are operating and some additional 138 kv planned (DJ-Exhibit 20 and

34/ Coordination services by definition means services for bulk power transactions.

35/ The smaller utilities are not limited to coordination with only Consumers. Supra, Section VI.

and Tr. 1135). All other cooperatives in the relevant geographic area are distribution cooperatives and do not own any transmission lines. (DJ-Exhibits 1, 20, 109 and Electric World Directory of Electric Utilities, 1972-73 Edition, McGraw-Hill).

The City of Lansing owns and operates 27 miles of 138 kv lines and the Cities of Charlevoix, Hillsdale, Petoskey, Sturgis and Traverse City own 32, 107, 4.5, 19.8 and 1.25 miles of transmission of 69 kv or less, respectively (DJ-Exhibits 1, 108, 109 and Electric World Directory of Electric Utilities, 1972-73 Edition, McGraw-Hill).

For the year 1973, Applicant generated 5,291,000 kilowatts of power or approximately 5 times the total generation of the municipals, cooperatives and other investor-owned utilities in the relevant market (Amendment 19 to Applicant's application for the Midland License, question and answer 9; DJ Exhibits 108, 109 and Uniform Statistical Reports, 1973, 1972, 1971 and CP 1973 Annual Report p. 28).

Six of the municipals and one cooperative do not have any generation (RLP Exhibit - 11307). Ten of the municipal systems having generation had a capacity of 12,000 kw or less (RLP Exhibit 11307). Alpena, the only small investor-owned utility in the relevant market, had four small hydro units with a generating capacity of 6,800 kw (RLP Exhibit 11307, Tr. 4256 and DJ Exhibit 108). The largest generator operated by the municipals, cooperatives and Alpena is Lansing's 160 Mw unit (Tr. 2081). Many of the other generators operated by these entities are very small gas turbines, diesels, and hydros (DJ-Exhibit 108). None of these systems presently owns or has access to nuclear power (DJ-Exhibits 18, 108, 109 and Tr. 6644).

In summary the Applicant dominates the generation, transmission and distribution of power in the relevant geographic market (I.D. p. 40).

X . CHALLENGED ANTICOMPETITIVE SITUATION

The specific situation challenged by the Staff to be inconsistent with the antitrust laws in this proceeding is Consumers Power Company's power to grant or deny access to developmental and operational coordination through its control of high voltage transmission and its use of that power in the following anticompetitive ways:

A. Refusal To Wheel

The Board in its I.D. found that the evidence shows that Applicant's conduct amounted to a general refusal to "wheel". (I.D. p. 99).

B. Refusal To Grant Access To Nuclear Power (Staff Exceptions Nos. 64, 71, 100, 101, 102, 103, 104, 105, 134, 135)

Consumers has refused to grant access to nuclear power from the Midland units to smaller electric systems in the relevant market. 36/

36/ The fact that Consumers, a dominant utility, planned for the use of all of the power from Midland to serve its own customers and that there is no surplus power to be sold is irrelevant to an antitrust proceeding. The fact that the smaller utilities have "planned for none of the power" from Midland is precisely the problem Congress wanted to avoid in enacting legislation to assure that the benefits of nuclear power are as widespread as possible. Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC at 619, 620, (1973)(Waterford II). The small systems, as evidenced below, cannot independently plan for nuclear power because of their small loads. The fact that Consumers planned the Midland Plant in 1967 and the smaller systems did not request access until 1971 is improperly viewed by the Board. First, the antitrust section of the Act was not amended until Dec. 1970. Until the amendment the small systems did not have any procedural processes for establishing a claim to commercial nuclear power since a finding of practical value had not been made. Second, contrary to the Board's findings, the small systems did in fact request participation in the Midland plant but were denied. If the Board's logic is accepted i.e. that a dominant utility could plan all the power from a nuclear plant to be used by its customers to the exclusion of the small systems and not take affirmative action to assure that the smaller systems know of the plans for nuclear at an early stage of planning, then in every

(Tr. 4350, 4141, 4142, 4351, 4352, 2312, 1563, 1564, 2112, 2158, 2293, 2532, 7924, 7925, 7928, DJ-Exhibits - 22, 24 and 27).

C. Refusal To Grant Access To Coordination (Staff Exception No. 83)

(1) Between And Among The Smaller Utilities

The ability of the smaller utilities to interconnect and thus coordinate among themselves is dependent on their ability to get access to Consumers' high voltage transmission system (Tr. 1718, 4339, 4127, 4144, 2831, 2832, 2837, 2334, 2335, 9331, 9334).

(2) Between The Smaller Utilities And Other Utilities Whose Electric Systems Are Interconnected With And Contiguous To Consumers' Electric System

If the smaller utilities had access to Consumers' high voltage transmission system they would be able to deal with utilities other than Consumers whose electric systems are interconnected with and contiguous to Consumers' electric system. (Tr. 1713, 1719, 2351, 4333, 2333, 2342, 4127, 4144, 4330, 4339, 4331, 2334, 2335, 1727, 4123, 2838, 2819, 4121).

Footnote 36/ from page 23.

36/ instance the larger system could effectively prevent a smaller system from participating directly in nuclear power. The Board's conclusion that it would be unfair to the Applicant to allow access to Midland because the Applicant would then be short of power and would have to buy wholesale power to cover the shortage is inappropriate. (Infra, Section XI). As stated by the Appeal Board in In the Matter of Kansas Gas and Electric Company and Kansas City Power and Light Company, (Wolf Creek Generating Station, Unit No. 1) (Wolf Creek) ALAB-279, NRCI-75/6, 559 at 568, 569, "[t]here is, of course, a settled presumption against imputing to Congress an intent to achieve an irrational result."

XI. ARGUMENT

A. Summary

The fundamental errors of the I.D. are the Board's apparent disregard of the Congressional intent under Section 105(c) of the Act and the way that it applied well-settled antitrust principles to the facts in this proceeding. The Board erroneously concluded that the Applicant, even though it dominates the relevant geographic market, does not have the market power to grant or deny access to coordination among the smaller utilities. (I.D. p. 99). The Staff submits that the Applicant has the power to grant or deny access to coordination and has used that power in an anticompetitive manner.

An examination of the relevant geographic market indicates that Consumers has sufficient power to control the transmission, generation and distribution of electrical energy in the market. (Section IX , supra). The Applicant's actions reveal an intent to maintain its market position by refusing to coordinate with or grant access to coordination to the smaller utilities. These factors are more than sufficient to constitute a situation inconsistent with the policies underlying the antitrust laws as enumerated in Section 105(a) of the Act. The Staff contends that the activities under the license will maintain this situation and that appropriate remedial conditions should be attached to the Midland Licenses.

B. The Board's Assessment Of The Congressional Intent Under Section 105 Of The Atomic Energy Act And The Accompanying Legislative History Is Improper

(1) The Atomic Energy Act Requires That The Policies Underlying The Antitrust Laws Enumerated In Section 105(a) Of The Act Be Considered In Determining Whether The Activities Under The License Will Create Or Maintain A Situation Inconsistent With The Antitrust Laws (Staff Exceptions Nos. 22, 45, 108, 109, 110)

Section 105(c) of the Act and the legislative history accompanying it require the Commission to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws or the policies clearly underlying those laws as specified in Subsection 105(a)." 37/

The scope and purpose underlying the antitrust laws specified in Section 105(a) of the Act was set forth by the Supreme Court in Northern Pacific Railroad v. United States, 38/ where the Court held:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination... or conspiracy in restraint of trade or commerce among the several States. 39/

37/ Joint Committee on Atomic Energy, Report, 91st Cong. 2nd Session, No. 91-1247, at p. 14 (1970). As recognized by the Commission, "[i]t was the intent of Congress that the original public control should not be permitted to develop into a private monopoly via the AEC licensing process, and that access to nuclear facilities be as widespread as possible." Waterford II, Supra, note 36 at 620. See also Wolf Creek, supra, note 36 at 565.

38/ 356 U.S. 1 (1958).

39/ Id. at 4 and 5.

This basic principle, set forth in the Northern Pacific case, has subsequently been found by the Supreme Court to encompass all the antitrust laws. Recently, in United States v. Topco Associates [40/] the Court held:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. [41/]

Congress, in enacting the Atomic Energy Act, clearly indicated that one of the primary purposes of the Act was to "...strengthen free competition in private enterprise." [42/] To this end it specifically developed the prelicensing antitrust review procedure in Section 105(c) of the Act as the method to implement the Commission's antitrust review responsibility in the licensing area.

40/ 405 U.S. 596 (1972).

41/ Id. at 610.

42/ Section 1(b) of the Atomic Energy Act.

(2) Contrary To The Initial Decision In This Case, Congress Exempted No Applicant From The Operation Of Section 105(c) (Staff Exceptions Nos. 25, 26, 32, 33, 34, 35 and 36)

Congress, in enacting Section 105(c) of the Act, firmly established that "any person" choosing to participate in and accept the benefits of nuclear power will be subject to antitrust review under the antitrust laws enumerated in Section 105(a) of the Act. 43/ No special exemption was established for the electric utility industry. 44/ This antitrust review was intended to be prelicensing antitrust review as evidenced by the hearings before the Joint Committee on Atomic Energy, which were entitled "Prelicensing Antitrust Review of Nuclear Power Plants". Thus, the legislative history accompanying 105(c), 45/ and the specific recognition of that fact by the Commission make it clear that prelicensing antitrust review was intended by Congress. 46/

43/ In Wolf Creek, supra, note 36, at 568, the Appeals Board, citing Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); California v. F.P.C., 369 U.S. 482 (1962) and City of Pittsburgh v. F.P.C., 237 F.2d 741 (D.C. Cir. 1956), held "...even where regulatory agencies are not expressly required by the statutes they administer to consider the antitrust implications of cases before them, the courts have held them to be nevertheless obliged to take full account of those laws and their underlying policies before acting." The Appeals Board further stated that "...[a]nd where Congress has explicitly mandated the type of conduct to be screened for anticompetitive effects, attempts to limit the scope of that obligation by giving a narrow or artificial meaning to the statutory terms have been rejected."

44/ Section 105(a) of the Act states in part: "[n]othing contained in this Act shall relieve any person from the operation of the following Acts...."

45/ Hearings Before the Joint Committee on Atomic Energy Congress of the United States 91st Congress, First Session on Prelicensing Antitrust Review of Nuclear Power Plants, November, 1969 (Part 1). See also, Supra, note 37 at pp. 13, 14.

46/ The Commission in In the Matter of Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), CLI-73-7, 6 AEC 48,49 (1973) (Waterford I), stated: "[t]he requirement in section 105 of the Atomic Energy Act for prelicensing antitrust review reflects a basic Congressional concern over access to power produced by nuclear facilities."

(3) The Antitrust Laws Are Fully Applicable To The Electric Utility Industry (Staff Exceptions Nos. 15, 39, 44, 108)

Antitrust review is by no means new to regulated industries. 47/ In the past decade, a series of cases has required administrative agencies

---

47/ United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); (Applying antitrust law to regulated railway industry).

United States v. Joint Traffic Association, 171 U.S. 505 (1898); (Antitrust applied to certain aspects of interstate commerce).

Northern Securities Company v. United States, 193 U.S. 197 (1904), (Antitrust applied to regulated securities market).

United States v. Terminal Railroad Association, 224 U.S. 383 (1912); (Antitrust applied to railroads).

Georgia v. Pennsylvania Railroad Company, 324 U.S. 439 (1945); (Antitrust applied to railroads).

United States v. Pacific & Arctic Railway & Navigation Company, 228 U.S. 87 (1913); (Applied to railroads).

United States v. Philadelphia National Bank, 374 U.S. 321 (1963); (Antitrust applied to regulated sector of banking industry).

United States v. First National Bank & Trust Company of Lexington 376 U.S. 665 (1964); (Applied to banking).

United States v. Radio Corporation of America, 358 U.S. 334 (1959); (Antitrust applied to radio-communications).

United States v. El Paso Natural Gas Company, 376 U.S. 651 (1964); (Antitrust applied to natural gas industry).

California v. Federal Power Commission, 369 U.S. 482 (1962); (Antitrust applied to electric utility industry).

to consider antitrust questions in the exercise of their administrative responsibility. [48] Specifically, the Supreme Court, In Gulf States Utilities v. FPC, [49] held that electric utilities were subject to the antitrust review of the Federal Power Commission, since that agency had a statutory directive to consider the anticompetitive situation. Under Section 105(c) of the Atomic Energy Act the NRC is required specifically to consider the antitrust implications of an applicant's activities vis-a-vis the activity to be licensed. Accordingly, in complying with this Congressional mandate, the NRC must, in its analysis of anticompetitive "situations", consider criteria developed as a result of over eighty years of extensive application of the antitrust laws.

48/ California v. Federal Power Commission, supra, at 485 (1962); (Antitrust applied to electric utility industry).

Otter Tail Power Company v. United States, 410 U.S. 366 (1973); (Antitrust applied to electric utilities).

This principle was enunciated in several cases prior to Otter Tail. See United States v. Philadelphia National Bank, supra; Silver v. New York Stock Exchange, 373 U.S. 341 (1963); and United States v. Radio Corporation of America, supra, these cases applied antitrust law to banking, securities, electric power and communications.

49/ 411 U.S. 747 (1973).

C. The Findings Of The Board In Its Initial Decision Are Contrary To The Intent Of Congress

(1) The Board's "Basic Legal Concepts" Are Erroneous (Staff Exceptions Nos. 13, 14, 15, 16, 17, 19, 20, 21, 22, 25, 26, 27, 31, 37, 38, 45, 56, 65, 67, 73, 79, 87, 88, 108, 109, 110, 111, 112, 113, 114, 117, 129, 139, 140)

The Board sets out legal concepts which are raised by the language of the Act and which it feels are "...especially important aspects of the case". (I.D. p. 46). These concepts are (1) clarification of the term "situation inconsistent with the antitrust laws", (2) "Causal Connection-Nexus", and (3) "Misuse of Activities Under the License". The Staff submits that the Board's conclusions with respect to the basic legal concepts are erroneous and that the application of these standards to the facts in this proceeding has created pervasive error in the I.D.

(a) The Board Erroneously Clarified The Term "Situation Inconsistent With The Antitrust Laws"

The Board on pages 49 and 50 of the I.D., finds that:

> [s]ince the purpose of the antitrust laws is to promote and preserve competition, it follows that a 'situation inconsistent with the antitrust laws' must mean anti-competitive 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, 503 F.2d 321 (9th Cir. 1974).

The Board, in reaching this conclusion, assumed that (a) the legislative history does not provide guidance as to the appropriate construction of the specific language of the Act (I.D. p. 47), (b) an analysis of the FTC Act indicates that the emphasis is on the protection of "competitors" and "consumers" regardless of whether or not the forbidden activities affect competition (I.D. p. 48), (c) the cases dealing with violations of the Sherman Act and Clayton Act provide little guidance in the selection of appropriate criteria for determining anticompetitive conduct which does not amount to a violation of the antitrust laws (I.D. p. 49), and (d) the term "violations of the antitrust laws" means practices which have been determined to be violations of the antitrust laws in authoritative Federal Court opinions (I.D. p. 50).

Contrary to the Board's findings Congress has very specifically and deliberately provided guidance as to the appropriate construction of the specific language of the Act. Congress, in the legislative history accompanying Section 105c of the Act stated:

> The committee is recommending the enactment of prelicensing review provisions which--as in the proposed Atomic Energy Act of 1954 that the Joint Committee originally reported out, and as in the version of subsection 105c, that the Senate passed on

> July 27, 1970--do not stop at the point of the Attorney General's advice, but go on to describe the role of the Commission with respect to potential antitrust situations.
>
> The legislation proposed by the committee provides for a finding by the Commission "as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." The concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard; nor is mere possibility of inconsistency. It is intended that the finding be based on reasonable probability of contravention of the antitrust laws or the policies clearly underlying these laws. It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.
>
> It is important to note that the antitrust laws within the ambit of subsection 105c of the bill are all the laws specified in subsection 105a. These include the statutory provisions pertaining to the Federal Trade Commission, which normally are not identified as antitrust law. Accordingly, the focus for the Commission's finding will, for example, include consideration of the admonition in section 5 of the Federal Trade Commission Act, as amended, that "Unfair methods of competition in commerce, and unfair and deceptive acts in commerce, are declared unlawful."
>
> The committee is well aware of the phrases "may be" and "tend to" in the Clayton Act, and of the meaning they have been given by virtue of decisions of the Supreme Court and the will of Congress - namely, reasonable probability. The committee has--very deliberately--also chosen the touchstone of reasonable probability for the standard to be considered by the Commission under the revised subsection 105c of the bill.[50/]

Congress very specifically established that the standard "situation inconsistent with the antitrust laws" is to be based on the "reasonable

---

50/ Supra, note 37, at pp. 14, 15.

probability" of present or future contravention of any of the antitrust laws or the policies clearly underlying those laws as specified in Subsection 105(a) of the Act. Congress directed that "reasonable probability" be considered in light of the meaning that that term has been given by virtue of decisions of the Supreme Court in Clayton Act cases.[51]

In Brown Shoe[52] the Supreme Court emphasized that Congress, in enacting the Clayton Act, intended to check a tendency towards concentration in its incipiency, and, to this end, it rejected "...as inappropriate to the problem it sought to remedy, the application to § 7 cases of the standards for judging the legality of business combinations adopted by the Courts in dealing with cases arising under the Sherman Act, and which may have been applied to some early cases arising under original § 7."[53] The court stated that Congress did not provide for any "definite qualitative or quantitative tests"[54] for determining whether a given merger may substantially lessen competition or tend toward monopoly and that by using the words "may be substantially to lessen competition", Congress indicated its "concern was with probabilities, not certainties."[55]

51/ Id.

52/ Brown Shoe v. United States, 370 U.S. 294 (1962).

53/ Id., at 318.

54/ Id., at 321.

55/ Id., at 323.

In analyzing merger cases brought under Section 7 of the Clayton Act, the Supreme Court has relied upon market share statistics, concentration ratios, industry concentration trends, and future competitive conditions in addition to anticompetitive conduct in determining whether or not there is a "reasonable probability" that activities will substantially lessen competition. Consideration has been given also to other elements of market structure and performance, such as ease of entry, the strength of the remaining firms, the character of supply and demand in the market, the vigor of competition, and the scarcity of resources and facilities.[56/]

Similarly, the determination of whether a "situation" is inconsistent with the antitrust laws enumerated in Section 105(a) of the Act should be based on whether there is a reasonable probability, not certainty, that a "situation" would be created or maintained. The Board's conclusion that "situation" must mean anticompetitive conduct is overly restrictive, in error and inconsistent with the clear Congressional directive.

The Board, in limiting a "situation inconsistent with the antitrust laws" to anticompetitive conduct states that:

56/ See United States v. Philadelphia National Bank, 374 U.S. 321 (1963) at 363; Brown Shoe Co. v. United States, supra; United States v. Continental Can, 378 U.S. 441 (1964); United States v. Aluminum Company of America, 377 U.S. 271 (1964); FTC v. Proctor & Gamble Co., 386 U.S. 868 (1967); FTC v. Consolidated Food, 380 U.S. 592 (1965); United States v. Von's Grocery Co, 384 U.S. 270 (1966); United States v. Pabst Brewing Company, 384 U.S. 546 (1966); A.D. Neal, The Antitrust Laws of the U.S.A.,(Cambridge Press, 1960) p. 442.

> [t]he 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. (I.D. 49).

The Board need only read the numerous cases decided under the Sherman and Clayton Acts to recognize that those cases provide helpful and appropriate criteria for determining whether there is a "reasonable probability" that any of the antitrust laws specified in Section 105a of the Act will be contravened. Section 7 of the Clayton Act was intended to arrest anticompetitive tendencies in their incipiency. See Brown Shoe Co., supra, 370 U.S., at 317, 322 and United States v. Philadelphia National Bank, supra. The economic evaluations considered under Section 7 cases are therefore relevant as appropriate criteria in determining the types of things to be considered in assessing an inconsistency under Section 105(c) of the Atomic Energy Act. Similarly, those cases where the Supreme Court through economic evaluations found that a company had the power to control prices or the ability to exclude competition under a Section 2 Sherman Act proceeding are relevant and appropriate as criteria to be used in assessing a "situation" inconsistent with 105c of the Act. See United States v. E. I. duPont de Nemours, 351 U.S. 377 (1956); United States v. Grinnell, 384 U.S. 563 (1966); American Tobacco Company v. United States, 328 U.S. 781 (1946); International Boxing Club v. United

States, 358 U.S. 242 (1959). While a finding of inconsistency is not limited to a previous finding of violations of the Sherman and Clayton Acts, the criteria used in evaluating violations of those laws and the reasoning of the courts is certainly helpful in determining those types of practices which would, if allowed to continue, contravene the antitrust laws specified under Section 105(a) of the Act and the policies underlying those laws. It is axiomatic that every violation of the antitrust laws would be inconsistent with the policies underlying those laws.

In addition, the Board has inappropriately restricted the application of Section 5 of the FTC Act to conduct heretofore determined to be unfair by the FTC. Section 5 of the FTC Act was intended to supplement and bolster the Sherman and Clayton Acts and to stop in their incipiency acts and practices which, when full blown, would violate those Acts as well as to condemn existing violations.[57/] The Application of Section 5 of the FTC Act was intended to be broad, and contrary to the Board's finding, the "antitrust" part of Section 5 speaks in terms of "competition" not "monopoly", "contract", "conspiracy", "scheme", "agreement", "competitors", or "consumers".[58/] In fulfilling

---

57/ FTC v. Motion Picture Advertising Service Company, Inc., 344 U.S. 392 (1953).

58/ FTC v. Cement Institute, 333 U.S. 683 (1947); FTC v. Motion Picture Advertising Service Company, Inc. 344 U.S. 392 (1953); FTC v. Brown Shoe Company, 384 U.S. 316 (1966); Atlantic Refining Company v. FTC, 381 U.S. 357 (1965); FTC v. Sperry and Hutchinson Company, 405 U.S. 233 (1972).

its responsibilities the Federal Trade Commission has considered market structure in addition to conduct in determining whether an "unfair method of competition" exists.[59/]

Therefore, to restrict the application of Section 5 of the FTC Act to practices heretofore designed to be unfair methods of competition by the FTC is not in accordance with Section 105(a) of the Act and completely restricts the "reasonable probability" standard established by the Congress.[60/] A more appropriate application of Section 5 would be to utilize decisions by the FTC as guidelines for determining whether the activities under a license would maintain the situation alleged.

59/ Section 5 of the FTC Act was intended to stop in their incipiency acts and practices which, when full blown, would violate Section 2 of the Sherman Act and Section 7 of the Clayton Act. Section 2 of the Sherman Act and Section 7 of the Clayton Act deal with market structure as well as conduct. It is apparent that since Section 5 is intended to deal with incipient Section 2 and Section 7 situations market structure considerations are appropriate under Section 5. As examples of cases where the Commission has utilized a market structure analysis under Section 5 of the FTC Act see: L. G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971) and Golden Grain Macaroni Co. v. FTC, 492 F.2d 882, (9th Cir. 1971) (cert. denied 412 U.S. 918, 1973); Cf. FTC v. U.S. Pipe and Foundry Co., 304 F. Supp. 1254 (D.C.C. 1969).

60/ The limitation on the application of Section 5 to a finding under Section 105(c) to practices heretofore designed to be unfair by the FTC is inconsistent with the Board's finding that "Similarly, it would not have been a difficult feat of draftsmanship to have restricted the operation of Section 105c of the Atomic Energy Act to violations of the antitrust laws including Section 5 of the FTC Act including 'unfair methods of competition' as determined by the FTC. However, Congress did not". I.D. p. 50 .

In sum, the Board erred in limiting a finding of a "situation inconsistent with the antitrust laws" to violations of the antitrust laws [61/] found in authoritative Federal Court opinions and practices heretofore determined to be unfair by the FTC pursuant to Section 5 of the FTC Act. [62/]

Accordingly, the standard proposed by the Staff is whether there exists a "reasonable probability" that the activities under the license will create or maintain a situation inconsistent with any of the antitrust laws or the policies underlying those laws, as enumerated in 105(a) of the Act.

(b) Causal Connection - Nexus (Staff Exceptions Nos. 18, 23, 24, 25, 26, 28, 34, 35, 36, 63, 99, 115, 119, 127)

The Board, on page 50, of the initial decision, states that once it finds a "situation inconsistent with the antitrust laws" it must consider whether such situation will be created or maintained by activities under the license. The Board further finds that the activities must have a "causal connection" with the creation or maintenance of said situation (I.D. pp. 50-51). The Board then concludes that:

> 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 (I.D. p. 55).

61/ The Board apparently ignored that part of the legislative history concerning the "policies clearly underlying these laws." Supra, note 37.

62/ The Board, on page 50 of the I.D., finds that "violations of the antitrust laws ... means practices which have been determined to be violations of the antitrust laws in authoritative Federal court opinions". This is an erroneous finding because the Board completely ignores authoritative decisions under the FTC Act which have not been appealed to the Courts.

As one of the bases for determining nexus the Board sets out the proposition that:

> 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. (I.D. pp. 52).

In explaining its standard of nexus, the Board (a) summarily dismisses the Gulf States and LP&L cases as precedent for defining nexus and (b) relies on Prosser on Torts, dictionary definitions, inappropriate case law and (c) fails to apply the principles set forth in Wolf Creek, supra, note 36 (I.D. pp. 51, 52-55).

First, it is firmly established that Congress intended and the Commission has recognized that Section 105 of the Act deals with pre-licensing antitrust review.[63/] An applicant is not given a specific

63/ Supra, note 37; supra, note 46; supra, note 36; supra, Section XIB(2).

right to have a license. Section 105(c)(6) [64] of the Act specifically states that the authority to issue or to refuse to issue a license under Section 103 of the Act is with the Commission. The Board, in setting its standard of "nexus" has granted immunity to licensed activities prior to the existence of activities in question. The determination by the Commission is made in the context of prelicensing review thus there can be no licensed activities to which immunity can attach.

Second, a standard for evaluating "nexus" in terms of Section 105(c) exists. The Commission in Waterford I, supra, stated:

> A meaningful nexus must be established between the situation and the 'activities' under the license. In this connection, the relationship of the specific nuclear facility to the applicant's total system or power pool, e.g. size, type of ownership, physical interconnection, may need to be evaluated. CLI-73-7, 6 AEC 49.

Similarly, in Waterford II, supra, the Commission stated:

> In our view, the proper scope of antitrust review turns upon the circumstances of each case. The relationship of the specific nuclear facility to the applicant's total system or power pool should be evaluated in every case... While the propriety of pooling arrangements and physical interconnections could certainly be considered in appropriate cases, such matters in most circumstances could not be dealt

---

64/ Section 105(c)(6) states in part: "...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."

> with by this Commission where no meaningful tie exists with nuclear facilities... In short, an intervenor must plead and prove a meaningful nexus between the activities under the nuclear license and the "situations" alleged to be inconsistent with the antitrust laws. CLI-73-25, 6 AEC 621.

It is clear that the Commission was looking for a connection between the allegedly inconsistent "situation" and the activities in which the licensee would engage under the license. The Board on the other hand is in effect saying that the licensed activities must be inconsistent with the antitrust laws in order to establish "nexus". If the Board is correct in its analysis then "nexus" can only be present if there is a "misuse" of licensed activities. The Staff does not agree with the Board's analysis since it premised on an improper foundation. The Commission in Waterford II directs that the focus of investigation not be on the licensed activities but rather upon the relationship between those activities and the situation alleged to be inconsistent with the antitrust laws. To put it quite simply, the Board is trying to find "nexus" by requiring a substantive finding of "misuse"[65/] and not by making a finding which concerns the connection between the activities and the situation alleged. It has failed to consider the relationship between the alleged situation (denial of access to coordination) and the proposed activities under the license.

65/ For a detailed discussion of "misuse" of activities see Section XI C(1)(c), infra.

The test set forth by the Board clearly negates the legislative intent behind Section 105(c). The purpose of that section is prelicensing antitrust review - a determination that once a license is issued it will not create or maintain a situation inconsistent with the antitrust laws. Under the Board's logic, such a finding cannot be made since the Board is looking only to potential "misuse" of a granted license.[66/] The Board did not look at the present situation and attempt to determine whether that situation will be maintained by the grant of a license. The Staff submits that if such a finding is made, then "nexus" has been established. The test then becomes whether the "nexus" is the "meaningful connection" which the Commission has mandated in its Waterford II decision and not the standard of "misuse" set forth by the Board.

The Commission's jurisdiction and requirement of a nexus was discussed in the Appeal Board's decision in Wolf Creek - there that Board held:

> "...we conclude that the legislative history of Section 105c does not support the applicant's argument that the Commission must consider the operations of each nuclear plant in isolation when making its prelicensing antitrust review. On the contrary, the Commission's statutory obligation is to weigh the anticompetitive "situation" - which to us means that operations in an 'air-

66/ As the Appeal Board in Wolf Creek pointed out "...the applicant's argument suggests that the Commission's cognizance under Section 105c is limited to anticompetitive consequences directly attributable to applicant's use of the nuclear plant and its output, it makes no sense... for activities under a license to 'maintain' a pre-existing situation inconsistent with the antitrust laws, some conduct of the applicant apart from its license activities must have been the 'cause' for bringing about those anticompetitive conditions." ALAB-279, NRCI-75/6, 559 at 568.

> tight chamber' were not intended...the Commission has never considered itself limited under section 105c to evaluating the anticompetitive aspect of any nuclear facility in vacuo. ALAB-279 NRCI-75/6, 559 at 572 and 573.

Third, there are several cases which have a direct bearing on the "nexus" question which were not considered by the Board. The Board relies on decisions dealing with the law of torts in establishing "causal connection" as the standard for determining "nexus" under a Section 105(c) proceeding. This standard is particularly inappropriate since there are several antitrust cases which can be utilized in the present situation. The tort cases relied on by the Board deal with tests for damages after an illegal act is found. These cases generally speak in terms of "injury" and whether or not, for the purpose of establishing damages, the alleged activities are a "material element" or "substantial factor" which caused the injury.[67/]

The requirement that "nexus" be found if and only if there is a misuse of activities which is a material element and a substantial factor in a scheme or conspiracy goes beyond the design and intent of the antitrust laws and the policies underlying them. A misuse of activities which is connected to a scheme or conspiracy is not a prerequisite to finding a meaningful relationship between the activities and the "situation" alleged.

67/ I.D. p. 54. Zenith Vinyl Fabrics Corp. v. Ford Motor Company, 357 F. Supp. 133 (E.D. Michigan 1973); Karseal Corp. v. Richfield Oil Corp., 221 F. 2d 358 (9th Cir. 1965).

In Municipal Electric Association of Massachusetts v. S.E.C., 413 F. 2d 1052 (D. C. Cir. 1969) the Association asserted that an increase in concentration of control over low cost electric power would result if the S.E.C. approved the acquisition of two nuclear powered electric generating companies by certain New England electric utility companies. The association further alleged that this increase was the result of an intentional course of conduct designed to increase control of sponsors of nuclear power over the industry in the area and to foreclose opportunities to the Association. The Court in assessing the allegations of the Association to determine which were sufficiently related to the nuclear units to provide the required nexus prerequisites to antitrust review, considered: (1) the fact that the plant will be interconnected with the New England Power Grid, (2) the fact that the municipals were being denied access to low cost power on reasonable terms (3) the ability of the sponsors to absorb power generated from the units and the regional problems of power distribution and (4) the alleged increase in concentration in Massachusetts by control over low cost electric power through nuclear generation.[68/] No reference is made by the court to a "misuse" requirement or that the Association must establish that the participating utilities intended to "misuse" nuclear facilities.

68/ See also City of Lafayette, Louisiana v. Federal Power Commission, 454 F.2d 941 (D.C. Cir. 1971), aff'd sub nom. Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747 (1973), where the Court held appropriate "... the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application" (emphasis added) 454 F.2d at 953.

The general requirement of "reasonable nexus" is well developed in the jurisprudence. The requirement of "reasonable connection" is not, as the Board determined, tied to a "misuse" of activities which are a material element and substantial factor in a scheme or conspiracy the purpose or effect of which is to cause the creation or maintenance of said situation. Rather, a finding of "nexus" should be based on the "situation" alleged.

In sum, the Board's standard for "nexus" goes far beyond the standard envisioned by Congress, the Commission and the Courts. It is a requirement which is without purpose or basis in a Section 105(c) review. The standard proposed by the Staff is that there is a "nexus" when there is a reasonable relationship between the activities or proposed activities under the license and the "situation" alleged. 69/

(c) Misuse of Activities Under The License (Staff Exceptions Nos. 25, 26, 29, 31, 32, 33, 34, 35, 36, 37, 63)

The Board, after establishing that "nexus" means "misuse" of activities, attempts to distinguish between "use" and "misuse" of activities under the license. (I.D. p.55). The Board concludes that the best analogy is found in the patent and labor law areas. (I.D. pp. 56, 58). More specifically, the Board borrows the "Doctrine of Misuse" from patent law and uses it as a basis upon which it defines "situation inconsistent with the antitrust laws" and "nexus". 70/

The analogy between an NRC license and patent law is incorrect.

69/ The Staff has applied this legal standard to the facts in this proceeding, infra, at p. 74 .

70/ By this discussion, the staff does not intend to suggest that the phrase "misuse of activities" is appropriate in a prelicensing antitrust review pursuant to Section 105 of the Act. No such finding is required, or even impliedly necessary under the Atomic Energy Act or the legislative history thereunder.

Patent law is inappropriate in providing guidance as to the meaning of "situation inconsistent with the antitrust laws" and "nexus" since the patent law process creates a limited monopoly while prelicensing antitrust review is designed to protect anticompetitive situations from being maintained.[71/] A patent is issued after a prospective patentee files an application with the Patent Office. A patent examiner then thoroughly reviews the application to determine if the statutory requirements of novelty, utility and nonobvicusness are satisfied (35 U.S.C. §§101-103). The claims, which describe the subject matter which the applicant regards as his invention, may be cancelled, amended or rewritten. Eventually, a patent may be issued.

The patent which ultimately issues covers only the claims approved by the Commissioner of Patents and grants to the patentee "...for the term of seventeen years... the right to exclude others from making, using, or selling the invention throughout the United States" (35 U.S.C. §154). Once the patent issues, however, the patentee is by no means free to use his patent in any way he pleases. There has developed a body of case law which prevents the patentee from using his patent right in ways considered adverse to the public interest. The holdings of these cases are referred to as the "misuse" doctrine (Motion Picture Patents Co. v. Universal Film, Mfg. Co., 243 U.S. 502 (1916)) and include such activities as cross-licensing to fix prices, tying, and grant-backs.

Thus subsequent to the issuance of a valid patent, the "misuse doctrine" operates to limit the power which the patentee can exercise by virtue of a

71/ Indirectly, the patent laws foster competition by encouraging new products and new uses of old technologies.

federal grant. While the patentee is given power under the grant, "misuse" of that power renders him liable for appropriate sanctions.

As indicated in Section XI B (2) of this brief, prelicensing antitrust review is required under Section 105(c) of the Act. The purpose of the antitrust review is to determine whether or not any activity under the proposed license "would create or maintain a situation inconsistent with the antitrust laws" as specified in Section 105(a) of the Act. If so, then it is the Commission's duty to impose conditions which it deems appropriate to eliminate or prevent such a situation or to not issue a license.[72/] In effect, the prelicensing antitrust review culminates with a determination as to exactly what type of license, if any, will be issued.

The license does not grant immunity from the antitrust laws.[73/] Any other activity resulting from the rights associated with the license, if inconsistent with the antitrust laws, renders the licensee liable for appropriate sanctions.

The Board states that the difference between "use" and "misuse" in the patent law is "completely analogous and gives reliable guidance" (I.D. p. 56), in distinguishing between "use and misuse" of activities under a license subject to Section 105(c) review. The Board cites examples of patent misuse and states:

> ...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 activi-

72/ See 105(c)(6) of the Act.

73/ Section 105(a) of the Act, as amended.

ties under the patent grant and the conduct which violated the antitrust laws. (I.D. p. 57).

The Board erred in applying the "misuse" doctrine to the prelicensing antitrust review. This follows from the fact that the analogy used by the Board in justifying the application of the doctrine of "misuse" was incorrectly drawn. If we consider the patent "process" described above, the three distinct items are:

(1) Application review [74/]

(2) Patent Issuance

(3) "Misuse" of patent

Similarly, the license "process" can be described as:

(1) Prelicensing antitrust review

(2) License issuance

(3) "Misuse" of Activities Under the License

The Board applied the "misuse" doctrine of patent law, which does not come into operation until after a patent is issued, to the prelicensing antitrust review process. In short, the Board applied a post issuance doctrine to a pre-issuance review (p. 56, I.D.). Accordingly, the conclusions of the Board are unsupported by law and inconsistent with Section 105(c) of the Act which requires a prelicensing review (p. 61, I.D.).

74/ The review process under the patent laws does not include the question: Whether the granting of the patent will create or maintain a situation inconsistent with the antitrust laws which is the ultimate question under a Section 105(c) licensing proceeding.

Although Consumers received a license issued pursuant to the exemption from prelicensing review under Section 105(c)(8) prior to the antitrust review, the license was conditioned so that it is subject to the outcome of the review and the resulting license conditions (See §105(c)(8) of the Act).

Since there is no analogy between the NRC licensing process and patent law procedures the Board's application of the patent law doctrine of "misuse" to a prelicensing antitrust review is unsupportable.[75/]

Summary And Recommended Standards

Based upon the above discussion the Staff submits that the Board's analysis of its "Basic Legal Concepts" and the standards developed under the analysis are erroneous. The Staff submits further that, based on the above analysis, the following standards are the appropriate guidelines to be applied in this proceeding.

(1) A "situation inconsistent with the antitrust laws" exists if there is a "reasonable probability" that the activities under a license will create or maintain a "situation" inconsistent with any of the antitrust laws or the policies underlying those laws, as specified in Section 105(a) of the Act.

(2) "Nexus" exists where there is a reasonable relationship between the activities under the proposed license and the "situation" alleged.

75/ Although not discussed in detail the labor law analogy proffered by the Board is inapplicable because the purpose of the labor law exemption is specifically designed to exempt labor from being a commodity under the antitrust laws.

(D) Consumers Power Company Unlawfully Suppressed Competition In Order To Preserve Its Dominant Position Thereby Creating A Situation Inconsistent With The Antitrust Laws

(1) Consumers Power Dominates The Relevant Market

The Board found that Applicant is by far the largest utility in the relevant market "...whether measured by generation capacity or by sales of firm power, or any other reasonable yardstick". (I.D. p. 40).

As indicated in Section VII of this brief the Applicant controls approximately 98% of all high voltage transmission and 80% of all generating capacity (100% of all large scale nuclear and non-nuclear generating capacity of 350 Mw and above).

(2) The Dominance and Control Of High Voltage Transmission Has Created A "Bottleneck" Situation Thereby Effectively Limiting The Smaller Utilities' Ability To Compete With Consumers And To Deal With Electric Utilities Other Than Consumers Power Company (Staff Exceptions Nos. 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59, 60, 61, 66, 79, 82, 84, 85, 87, 88, 89, 90, 91, 92, 94, 95, 96, 98, 107, 108, 109, 111, 112, 113, 118, 121, 122, 123, 124, 125, 126, 127, 137, 138, 139, 140)

It is well established that a company that has significant market control cannot refuse to deal (in this case the refusal to grant access to an essential resource) as a method of maintaining or extending its dominant position. 76/

76/ The "good Samaritan" principle espoused by the Board on page 72 of the I.D. is inapplicable to a situation where a dominant utility is exercising its power in an effort to preserve its dominance. The dominance and the refusal to deal are related to the inability of the smaller utilities to compete. The Board's finding that "[t]he reason that a refusal to give aid is not unlawful is that he who refuses to help does not cause injury" is inappropriate in the context of an antitrust proceeding where the refusal to deal does cause competitive injury.

United States v. Colgate and Company, 250 U.S. 300 (1919); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Lorain Journal Co. v. United States, 342 U.S. 143 (1951). In addition, where monopolization has not been achieved, a refusal to deal which is a part of an attempt to monopolize is itself a violation of Section 2 of the Sherman Act. Swift and Company v. United States, 196 U.S. 375, 396 (1905); American Tobacco Company v. United States, 328 U.S. 781, 785, 809, (1945); and United States v. Aluminum Company of America, 148 F. 2d 416, 474-475 (2d Cir. 1945). It is also well established that refusals to deal in one market for the purpose of maintaining a monopoly in another market have long been condemned. Lorain Journal v. United States, supra; United States v. Colgate and Company, supra; Eastman Kodak v. Southern Photo Materials Company, supra; United States v. Klearflax Linen Looms, 63 F. Supp 32 (D. Minn. 1945). Stated another way, those who control access to an essential resource or facility cannot refuse to grant access to such resources or facilities on reasonable and non-discriminatory terms.

The Courts, beginning with United States v. Terminal Railroad Association, 224 U.S. 386 (1912), have consistently adhered to this basic principle.[77/] In the Terminal Railroad case, a jointly owned company controlling the principal terminal facilities in St. Louis, Missouri and East St. Louis, Illinois, was declared to be engaging in an illegal restraint of trade when it refused to allow certain competitors to utilize the terminal. The Court based its decision on the arbitrariness of the

77/ See also United States v. Great Lakes Towing Co., 208 F 733 (D. Ohio, 1913) appeal dismissed 245 U.S. 675 (1917).

contract establishing the joint company in excluding non-members and the physical conditions which compelled the use of the combined system by every railroad which desired to cross the Mississippi River.

The Court stated that:

> The cost of construction and maintenance of railroad bridges over so great a river makes it impossible for every road [railroad] desiring to enter or pass through the city to have its own bridge. 78/

Access to coordination, which can provide access to alternative sources of bulk power supply, is necessary if the smaller utilities in the relevant geographic market are to compete and survive as independent entities (Tr. 2303, 2354, 2798, 2799, 2801, 2802, 2803, 2805, 2809). An essential ingredient of any coordination agreement is access to the use of an existing high voltage transmission system (Tr. 1731, 2293, 2345, 2351, 2819, 2838-2840, 4121, 4143-4147, 4331, 5526). Without access to coordination through the use of a high voltage transmission system access to the benefits of nuclear power is meaningless (Tr. 2303, 2345, 2348, 2838-2845, 4121, 4143-4147, 4332-4354).

In the relevant geographic market it is virtually impossible for municipals, cooperatives or small investor-owned utilities to build nuclear plants or to coordinate in system planning because of their inability to independently construct the necessary transmission. The situation is compounded by the Applicant's refusal to wheel power (I.D. p. 99). 79/ (Tr. 1732, 1733, 1729

78/ 224 U.S. at p. 395.

79/ In addition, the duplication of the Applicant's system, if it were possible, would not be in the public interest (Tr. 2336, 4141, 1732, 1733).

1730, 2336, 2816, 4331, 4141, 4282, 4284, and Gutman PT., p. 29).

The ability of Consumers to control access to high voltage transmission has prevented the smaller utilities in the relevant geographic market from (1) coordinating with utilities other than Consumers (including the inability to obtain alternative sources of bulk power supply) and (2) obtaining meaningful access to nuclear power, thereby resulting in the control of entry of new firms into the bulk power market and severely limiting the growth of competition (Tr. 1713, 1719, 1727, 2333, 2334, 2335, 2342, 2348, 2351, 2819, 2831, 2832, 2837, 2838, 2937, 4123, 4275, 4297, 4331, 4332, 4334, 4350, 4354, 4929).

Subsequent to the Terminal Railroad case, the Supreme Court, in Associated Press v. United States,[80/] reaffirmed the "bottleneck" or "essential resource theory."[81/]

In Associated Press, a news association set up a system of by-laws which prohibited members from selling news to non-members, and granted each member powers to block its non-member competitors from membership. The Supreme Court concluded that the association, by systematically stacking the cards in favor of its established members, seriously limited the opportunity for any newspaper to enter into competition where Associated Press members were already publishing. The fact that Associated Press had not achieved a complete monopoly was not determinative,[82/] as was the fact that the reports of

80/ 326 U.S. 1 (1945).

81/ See also Silver v. New York Stock Exchange, 373 U.S. 341 (1963); and International Boxing Club of New York v. United States, 358 U.S. 242 (1959).

82/ Supra, note 80 at p. 13.

a news association were not "indispensible".[83] The Court in holding that new entrants must still be allowed to share a "facility" on reasonable terms unless it is practicable for them to compete without it, held that:

> Inability to buy news from the largest news agency, or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers, both those presently published and those which, but for these restrictions, might be published in the future. [84]

Consumers Power, by reason of its control of access to high voltage transmission can effectively prevent smaller systems access to alternative bulk power services including nuclear power.

In Gamco, Inc. v. Providence Fruit Produce Building, Inc.,[85] practically all the local trade in fruit and vegetable was centered in a building operated by the defendant. One of the wholesalers experienced financial difficulties and in amalgamating with another wholesaler was denied use of the building based on infringement of a coverant in the lease. In finding that exclusion from the facilities of the market imposed a considerable handicap on Gamco, the Circuit Court of Appeals held that:

> ...a monopolized resource seldom lacks substitutes; alternatives will not excuse monopolization... it is only at the Building itself that the purchasers to whom a competing wholesaler must sell and the rail facilities which constitute the most economical method of bulk transportation are brought together. To impose upon plaintiff the additional expense of developing another site, attracting

---

83/ Id. at p. 18.

84/ Id. at p. 13.

85/ 194 F. 2d 484 (1st Cir. 1952), Cert. denied, 344 U.S. 817.

> buyers, and transhipping his fruit and produce by truck is clearly to extract a monopolist's advantage .... The Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones. 86/

The Court concluded that the possibility of duplicating the facilities cannot:

> ... of itself destroy the illegality of the asserted monopolization. It is clear ... that exclusion from an appropriate market or business opportunity is actionable,notwithstanding substitute opportunities. 87/

In the relevant market, without access to the Applicant's transmission services, the municipal and cooperative systems would have to construct many miles of high voltage transmission lines to alternative bulk power suppliers, a process which is prohibitively expensive, uneconomical and would duplicate Applicant's existing facilities. (Tr. 4282, 4284, 1732, 2816, 1730, 1732, 2336, 4141, 1733, Gutman Pt., p. 29). Accordingly, without access to Applicant's transmission, the construction of a nuclear plant and the ability to deal with utilities other than Consumers is out of the question for the smaller utilities in the relevant geographic market. 88/

The most recent application of the "general access" principle occurred in a case concerning the electric power industry. In Otter Tail Company v. United States, 410 U.S. 366, 377 (1973), the Supreme Court held that:

86/ Id. at p. 487.

87/ Id. at p. 488.

88/ In Gamco, supra, note 85, the Court continued at p. 487-488 that a "latent monopolist must justify the exclusion of a competitor from a market which he controls. The conjunction of power and motive to exclude with an exclusion not immediately and potentially justified by reasonable business requirements established a prima facie case of the purpose to monopolize."

> Otter Tail has 'a strategic dominance in the transmission of power in most of its service area' and that it used this dominace to foreclose potential entrants into the retail arena from obtaining electric power from outside sources of supply.

In recognizing and affirming the District Court's finding,[89] the Supreme Court states that the "[u]se of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' claims of §2 of the Sherman Act."[90] The Court, as a further basis for its conclusion applied the principles established under the "bottleneck" cases to the situation in Otter Tail.[91]

Accordingly, the Staff believes that when a firm has dominant power in a market, it is obliged under the antitrust laws to take the greatest care in not using that power to maintain its market position. This is particularly meaningful where the essence of the dominant position is the control over some

89/ Otter Tail Power Company v. United States, 331 F. Supp. 54, 60 (D. Minn. 1971).

90/ Otter Tail Power Company v. United States, 410 U.S. 366, 377 (1973), citing Lorain Journal, supra, p. 52, and Eastman Kodak, supra, p. 52.

91/ Id. The Supreme Court, by citing the principles established in the Associated Press case and applying them to Otter Tail clearly indicates that the "bottleneck" cases are not limited to conspiracies. Furthermore, it is clearly within the policies underlying the antitrust laws to prohibit the use of monopoly power or dominance which is designed to maintain a market position through the exclusion of access to essential resources.

physical facility like a transmission network.[92/]

The relevant geographical market has one large, fully integrated utility which controls a substantial portion of generation, and transmission of bulk power supply. The remaining utilities in the area are small electric cooperatives and municipal systems. These small systems are not generally integrated and are usually limited to being wholesale customers of Consumers. Generally, these wholesale customers do not have access to alternative sources of bulk power supply without the cooperation of the Applicant. In view of the control over transmission that Consumers Power Company enjoys, it can effectively foreclose other utility systems within the area from coordinating and interconnecting among themselves and with third party systems outside this area.

Without the active cooperation of Consumers, smaller systems, public or private, have neither a way of obtaining a firm bulk power supply from alternative suppliers nor any way of coordinating their systems. Thus, even if the smaller systems could coordinate further among themselves, they would be denied the coordination and interconnection opportunities with

92/ See, e.g., Otter Tail Power Company v. U.S., supra, at note 90. The Board's finding that "[f]orty years of effort failed to result in Congressional enactment of a requirement to wheel" has absolutely no probative value in determining whether wheeling is appropriate under a Section 105 proceeding. Congress' failure to act in no way creates a negative preemption; that is, merely because they consider an area it is not thereafter exempt from other regulation. Under the Board's reasoning if Congress ever considered an area and then failed to take any action in it, the area would be exempt from regulation or the antitrust laws under the preemption doctrine. See Wolf Creek where the Appeal Board held that "[w]e therefore see no occasion to read such a proscription [wheeling] into Section 105c." ALAB-279, NRCI-75/6 1559 at 571.

alternative sources of supply that are necessary for planning, financing, and construction of large nuclear units. Accordingly, such actual or potential competitors would be unable to take advantage of the economies of scale enjoyed by Consumers.

By ordinarily declining to provide transmission services separately, to smaller systems on equitable terms (i.e., the same terms as to other systems such as Detroit Edison), Applicant effectively isolates each system thereby substantially reducing the smaller systems' ability to compete by obtaining access to alternative sources of power or by otherwise coordinating with other utilities. In addition, individual systems are denied low cost bulk power by virtue of enforced isolation and are dependent on Consumers.[93] The Appeal Board in Wolf Creek, supra, appropriately concluded that:

> It is far too late in the day to dispute that it runs counter to basic antitrust precepts to exercise monopoly power - however lawfully acquired initially - to foreclose competition or to gain competitive advantage, or to use dominance over a facility controlling market access to exclude competition and preserve a monopoly position. Electric utility companies are no more free than others to engage in those practices; their unjustified refusals to wheel power to or to interconnect with smaller entities in the field have regularly been called to account as violative of antitrust policies. It was a key purpose of the prelicense review to '...nip in the bud any incipient antitrust situation'. We can therefore perceive no valid reason why the Commission should wear blinders when confronted by such matters. 94/

Accordingly, and contrary to the finding of the Board, the dominance and control of high voltage transmission by Consumers has created a "bottleneck" situation thereby effectively limiting the smaller utilities' ability to compete with Consumers and to deal with electric utilities other than Consumers Power Company.

93/ Steven Fletcher, President of Alpena Power Company, testified that if Alpena Power Company had access to Consumers' high voltage transmission system it "... would have the alternative of going in with a group of smaller utilities or ...we could go to Detroit Edison, I&M, anybody and ask them for wholesale power" (Tr. 4333).

94/ ALAB-279, NRCI-75/6, 559 at 572.

E. The Board's Evaluation Of Prior Conduct And Proposed Remedies In Terms Of Net Benefits To The Applicant Is Erroneous (Staff Exceptions Nos. 17, 30, 40, 41, 42, 43, 55, 62, 80, 81, 106)

As stated above, and noted, and in Section 3 (infra) the facts in the record clearly indicate that Consumers' refusal to participate in various aspects of coordinated operation and coordinated development and their refusal to allow the smaller systems within the relevant market to participate in these forms of coordination with other parties has the effect of maintaining the Applicant's dominant position.

The Board has stated that a dominant entity may not be compelled to participate in coordinated operation and coordinated planning and development, or may not be found to be maintaining a situation inconsistent with the antitrust laws if that entity can show that such past, present, or future conduct would not result in a "net benefit" to that entity. (I.D. pp. 64, 65, 66).Such a position is not supportable.

It is well established that where there is evidence of a refusal to deal and such refusal has the effect of maintaining a dominant position, the net benefits to be achieved from the transaction are irrelevant. In 1918 the Court held that only:

> ...in the absence of any purpose to create or maintain a monopoly... [may an entity]...freely exercise his own independent discretion as to parties with whom he will deal." (U.S. v. Colgate and Company, 250 U.S. 300, 307 (1918).

In Duplex Press Co. v. Deering 254 U.S. 450, 468 (1920)

the court held that "...a restraint [of trade] produced by peaceable persuasion... is not to be justified by the fact that the participants ... may have some object beneficial to themselves...." The Supreme Court affirmed this position six years later in Anderson v. Shipowners Association of the Pacific Coast 272 U.S. 360, (1926) when the court held:

> It is not important, therefore, to inquire whether, as contended by respondents, the object of the combination was merely to regulate the employment of men and not to restrain commerce. A restraint of interstate commerce cannot be justified by the fact that the object of the participants in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of such restraint. (272 U.S. at 363).

In that same year the court found that where a trade union participated in conduct which had the "...design of suppressing or narrowing an interstate market, it is no answer to say that the ultimate object to be accomplished was to bring about a change of conduct...[which reflected] an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint." (Bedford Cut Stone Co. v. Journeymens S.C. Assoc., 274 U.S. 41, 48, 71 L. Ed 918, 921 (1926)). No court has ever deviated from this position.

In United States v. Masonite Corporation 316 U.S. 265 (1941) the court specifically held that the presence or absence of a necessary "business reason" did not justify anticompetitive conduct. The court found that since there was conduct inconsistent with the antitrust laws (Price fixing) "...the fact that there were business reasons which made the

arrangements desirable to the appellees, ... or the fact that from other points of view the arrangements might be deemed to have desirable consequences would be no more a legal justification for price-fixing than were the 'competitive evils' in the Socony - Vacuum Oil Co. Case." (316 U.S. at 276). The court goes on to note that it is irrelevant and outside of their competence to assess if the results were beneficent to the defendants or to other parties. (316 U.S. at 281).

It is incorrect to state that a dominant entity may raise the so called "net benefits defense" , when the law is clear that is no defense to allege that the anticompetitive conduct involved will enhance competition in a given market. See United States v. Philadelphia National Bank 374 U.S. 321 (1963), United States v. Topco Associates 405 U.S. 596 (1972) and Fashion Originators Guild v. Federal Trade Commission, 312 U.S. 457 (1941). If the courts and legislators had intended a "benefits" defense, it would have been manifested at the outset in terms of benefits to competition, not benefits to an individual violator of the law. Yet the courts have seen fit not to validate such a defense. In Philadelphia National Bank the court condemned conduct in restraint of trade and declared that such conduct will "... not be saved because, on some ultimate reckoning of social or economic debits or credits, it may be deemed beneficial." (374 U.S. at 371, see Topco, 405 U.S. at 610). It logically follows that no court or legislature ever considered that the benefits to shareholders, or the lack thereof, would constitute a defense in an antitrust case.

Thus, personal or direct benefits to a party, or the absence of such benefits constitute no defense. Likewise, a benefit to competition or even the achievement of greater economies are absolutely no defense. (See Topco, supra, Philadelphia National Bank, supra, Gamco v. Providence Fruit and Produce Building, Inc., 194 F. 2d 484 (1st Cir. 1952), cert. denied 344 U.S. 817 (1952) which allowed proof relating to justification for a refusal to deal only where there is no proven intent; and Federal Trade Commission v. Proctor and Gamble Co. 386 U.S. 568 (1967)). In Proctor and Gamble that courted stated: "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economics, but it struck the balance in favor of protecting competiton." (386 U.S. at 580).

The court recently evaluated the issues raised by the Board in Otter Tail Power Company v. United States 410 U.S. 366 (1973). In that case the court found, inter alia, that the imposition of a remedy would be improper if it "'...would impair [the utility's] ability to render adequate services to its customers."' (410 U.S. at 381). Since that case involved many concepts that are at issue in this proceeding, the statements of the court deserve some discussion. It is apparent that Otter Tail requires that no remedy be imposed which totally debillitates an applicant's capacity to render service. That is, however, the only remedial limitation, and does not apply to assessment of past refusals to deal. Furthermore, in this proceeding, the Applicant did not present any evidence which was designed to show that its prior refusals to coordinate would render the

Applicant unable to provide service to its customers. Likewise, the Applicant presented no evidence which was designed to show that the proposed remedies would result in the Applicant being unable to render services to its customers. Therefore, the limitation of Otter Tail has not been met. 94a/

To conclude, it is apparent that the Board was in error. By viewing both prior conduct and proposed remedies in terms of net benefits, the Board's assessment of the evidence has become tainted and unacceptable. It was inappropriate for the Board to consider net benefit to the applicant and benefit to shareholders as the standard to be applied in this proceeding.

94a/ As indicated on page 6, supra, the appropriate standard for assessing whether a coordination agreement should be entered into is "undue burden". See Gainesville. Supra, note 3.

F. Consumer's Policies Are Indicative Of Anticompetitive Intent
(Staff Exceptions Nos. 45, 74, 75, 76, 77, 79, 86, 96, 114, 137)

The Board found that Consumers' policy was aimed at acquiring all of the smaller utilities in the relevant geographic market (I.D., p. 104). The Board further found that this evidenced intent to monopolize and constituted an anticompetitive scheme. However, the Board concluded that the acquisition program of the Applicant was not within the relevant matters in controversy. (I.D. p. 105).

Consumers' acquisition policy is relevant to the extent that it shows the purpose and intent of Consumer's overall company policies. It places Consumer's refusals to deal in their proper perspectives. That is to say that the refusals are a part of an overall policy on the part of Consumers to suppress competition in order to preserve its domination and control over the bulk power distribution of electricity.

Consumers' anticompetitive policies and intent are evidenced by policy statements of employees of Consumers (DJ-Exhibits - 125, 156, 171, 187, 188, 774, Tr. 8043), actual or attempted acquisitions of smaller systems (CP-11, 307, DJ-Exhibit - 30, 125, 187 Tr. 1585-1589, 1791-1798) attempts to prevent loans to the smaller systems from the REA (DJ-Exhibits-40, 42, 143, 145, 224, Tr. 1233-1242, 1270) lack of defined policies (I.D. pp. 91, 92, Tr. 6046, 6047, 1729, 4275, 4276, 6177, 4329, restrictive contractual provisions (DJ-Exhibit-91, Tr. 2090-2091; 2234-2239) and refusals to deal (DJ-Exhibits, 22, 24, 27, 125, Tr. 4350, 4351, 4352, 4141, 4142, 4143, 2312, 7934, 7936, 1729, 4275, 4276, 4329, 1563, 1564, 2112, 2158, 2293, 7924, 7925, 7928, 156[illegible] and Section VIII, supra.)

In summary, and contrary to the Board's finding, Consumers' dominance in the relevant market in conjunction with company policies designed to eliminate competition constitutes a "situation inconsistent with the anti-trust laws" and the policies underlying them.

G. "Wholesale" Power Purchases From Consumers Do Not Provide Access To The Midland Plant (Staff Exceptions Nos. 30, 68, 107, 128, 134, 135, 136)

Contrary to the Board's finding, "wholesale" power purchases do not provide access to nuclear power to the smaller utilities (I.D. pp. 111, 112).[95] "Wholesale" power purchases may or may not be a viable alternative for smaller utilities. It is not, however, access to nuclear power. A small utility needs to consider all possible alternatives if it is not satisfied with being a "wholesale" customer and receiving service from the Applicant under its standard terms and conditions for such service (Tr. 2818, 8216, 6627, 6628).

Professor Peter Gutman testified that:

> An offer to sell only wholesale power is essentially an offer to sell only a bundle of services, including generating services, transmission services, maintenance power, emergency power, etc., all tied together. Instead of such tie-in sales, these services should be unbundled so that buyers have the right to buy them separately or together in whole or in part, as they wish. Certainly, the Consumers Power monopoly over transmission and large generating units should not be used as a vehicle to extend its control to other services. The offer to sell power at wholesale implies that Consumers Power wants to retain a monopoly position in the wholesale power market relative to the small municipals and cooperatives. It would prevent competition in the market for bulk power, since buyers would have no alternatives. It denies choice. It prevents competition and its benefits (Gutman-PT, p. 28).

95/ The Congressional purpose in enacting Section 105 was to insure that the benefits of nuclear technology will be shared and enjoyed by as many as possible in a non-discriminatory basis. Cong. Rec., 9440, September 30, 1970, pp. 9 and 47. See also Wolf Creek, ALAB-279 NRCI-75/6, 559 at 565.

"Wholesale" power service represents a composite of all system characteristics. For example,"wholesale"power service represents a composite of past management decisions and reflects the costs associated with many different generating sources and transmission facilities. Some of these decisions may have been technically or economically incorrect. Therefore, a small system would be forced to pay a penalty for any erroneous company decisions when purchasing the "bundle" of services offered in a"wholesale"package. (Muller, PT, p. 35).

The Board incorrectly assumes that the Applicant has the right to decide what bulk power supply options are appropriate for other neighboring entities. 96/ Based on this erroneous assumption and the fact that the smaller entities who buy"wholesale"power from the Applicant are viable, growing, active competitors of the Applicant, 97/ the Board concludes that the smaller utilities are directly participating and have adequate access to nuclear power.

In order for the smaller utilities in the relevant geographic market to remain competitive it is vital that they have direct access to nuclear power because of its low costs, its environmental acceptability and the unavailability of fossil fuels (1723, 2^ 2, 2354, 2359, 2497, 2499, 2807, 2824, 2825, 4119, 4120, 6351, 6353, 6413, 6414, 6647, 8203).

96/ The record shows that"wholesale"power purchases from Consumers may not be economical to smaller utilities (Tr. 1714, 2283, 2286).

97/ The fact that the smaller entities are viable and growing is irrelevant and does not justify anticompetitive practices. See Utah Pie v. Continental Baking Co., 386 U.S. 685 (1967),

The availability of nuclear power to Consumers and the unavailability to smaller systems in the relevant market is significant because nuclear power holds out the promise of being lower cost power (Aymond-Tr. 6647, Mayben - Tr. 2825, Wolfe - Tr. 1723). This is extemely important in meeting load growth because of the unavailability of other fuels (Mayben-Tr. 2824, 2825). Earl Brush, General Manager of Lansing's Electric System, testified that:

> "In my judgment the future of the entire electric utility industry is dependent upon nuclear power." (Brush-Tr. 2354).

Accordingly, and contrary to the Board's finding, wholesale power purchases do not grant the smaller systems access to nuclear power as envisioned by Congress.

H. Nuclear Units Sized at Approximately Less Than 500 MW Are Not Economical (Staff Exceptions Nos. 69, 70, 72, 128, 130, 131, 132, 133)

Contrary to the Board's finding on pages 110 through 111 a nuclear power generating unit must be built on a large scale in order to enjoy the economies associated with such power. According to Alphonse Aymond, President and Chairman of the Board of Consumers, the reasons that the only nuclear units in the relevant market are owned by Consumers are:

> One, the investment in a nuclear power plant is quite substantial. It requires a great deal of capital, and the cost per kilowatt of capacity declines as the plant increases, so there is a disincentive economically to building such a plant unless you build a large one. And many entities within the state do not have the need for a large plant. Another reason would be that it requires considerable expertise. You have to have a lot of talent in people in the field of nuclear physics, engineering and other technical skills, and most of the smaller systems do not have that kind of expertise in their employ. (Aymond-Tr. 6645 and DJ-Exhibit 1).

In addition to Mr. Aymond, other witnesses and evidence indicates that nuclear generation must be built on a large scale in order to make such plants economically feasible. One engineering witness testified that:

> ...nuclear power plants sized at anything less than perhaps 500,000 kilowatts of capacity are not feasible for virtually any utility. The cost of construction seems to be so high that these sizes are not being considered, or less than that are not being considered. (Mayben - Tr. 2808, 2558; See also Brush - Tr. 2292).

Because of the costs and large size associated with economical nuclear units, the construction of a nuclear power plant is not a feasible alterna-

tive for a small system or group of small systems trying to meet load growth.

One witness representing Lansing, Michigan, the largest municipal system in the State of Michigan, testified that:

> ...the municipals--we are too small, as an individual municipal system, to build a nuclear plant. Our information is that 500mw and up, or maybe 500mw is the smallest size that is economical to consider. With our load we could not afford to build, or justify building that large a unit. (Brush - Tr. 2292).

Mr. Joseph Wolfe, former Director of the Light and Power Department of Traverse City, testified that the largest unit a system equal to the size of Traverse City could build would be 20 to 30 MW (Wolfe - Tr. 1550, 1726).

Mr. Robert Kline, Jr., Vice Chairman of the Board and Chief Executive Officer of Edison Sault Electric Company was asked:

Q. Mr. Kline, you indicated...that you have not made any studies with regard to nuclear power....

A. Yes, that's correct.

Q. Can you explain...why...?

A. Principally because of the smallness of the company, sir.

Q. ...what does the smallness of the company have to do with the studying of nuclear power...?

A. Well, because the cost of a nuclear plant for a company our size would be prohibitive. (Kline - Tr. 4431).

Mr. E. Harold Munn Jr., President and Member of the Board of Public Utilities of Coldwater testified:

Q. Mr. Munn, has Coldwater--Has the electrical system of

Coldwater considered any other alternatives in planning for load growth or obtaining alternative sources of bulk power supply?

A. Well, yes. I have to say Yes on that. You have to realize that we're locked into our alternatives, either expansion of generation or expansion of purchase from other sources.

We talked with our engineers and have been advised that our own efforts in the direction of a non-fossil fuel plant such as a nuclear plant are just not economically feasible. And I raised the question at the time that the Consumers Power people presented their last new contract to us in Coldwater, concerning the participation in nuclear power because the contract only provided for a basic cost with adjustments for demand, and so forth, and a fuel adjustment cost, which appeared to me to be based upon the cost of coal; no provision for nuclear.

But we have looked at the matter of nuclear power and indeed, when we intervened in this particular case, it was with very serious intent of wanting to have nuclear power available at what appeared to us the only really viable alternative to what had been offered to us.

Q. When you say "nuclear power" being an alternative do you mean purchasing nuclear power or building your own nuclear power plant?

A. Well, it did not appear economically possible for us to build our own nuclear plant, and so we were looking toward--we are looking toward the fact that we need to obtain a supply of power, hopefully from a nuclear source, that will give us a unit of power that we can depend upon at a cost that will not inflict hardship on our customers (Munn - Tr. 4119, 4120; See also Tr. 2808, 4333 and Gutman, PT, p. 20).

Consumers Power Company has recognized that construction of a nuclear power plant is not a viable alternative for the municipals. Mr. Robert L. Paul testified that:

...It was obvious that they, a small municipal system, could not build a nuclear power plant. (Tr. 7988).

The evidence in this proceeding indicates that commercially built or planned nuclear power plants of Consumers or any other large investor-owned utility have not been sized at less then approximately 500 mw. (Tr. 9244, DJ-Exhibits 1 and 18, and The Nuclear Industry 1973, WASH-1174-73 pp. 5-7).

The Board's reliance on its analysis of the experimental 75 MW Big Rock Plant and conclusion that that plant is an efficient facility for the commerical production of electric energy is illusory and ignores the realities of nuclear power plant construction.

First, as indicated by the evidence noted above in this proceeding greater economies are associated with large scale nuclear power plants. No utility has built or would build, except for experimental purposes, a small sized nuclear power plant.

Second, based upon the above, the effect of building, for example, ten 75 MW plants by ten small utilities in the relevant geographic market as opposed to one centrally located plant of 750 MW would be incompatible with environmental goals.

Third, based upon the above evidence, it is clearly indicated that large scale nuclear power plants are the only ones that would be realistically considered.

Finally, there is substantial evidence that a large scale nuclear power plant will have lower operating costs then would a fossil fuel plant going into service at the same time (Tr. 6647, 6148, 6351, 6353, 2825, 1725,

2502). 98/

In sum, the commercial realities and environmental impact make a 75 MW nuclear plant economically infeasible. Large scale nuclear generation must be built in order to enjoy the economies associated with it. The small systems, because of size limitation, costs of construction and environmental consideration realistically cannot construct nuclear power plants.

98/ The benefits associated with nuclear power are not, as the Board has found, limited to savings associated with the low cost potential of nuclear power (I.D. p. 112). The reliability of nuclear power, due to the unavailability of fossil fuels and environmental advantages are also major benefits associated with nuclear power. (Tr. 2825, 2302, 2303, 5140).

I. The Relationship Between The Nuclear Facility And The Situation Inconsistent With The Antitrust Laws ("Nexus") (Staff Exceptions Nos. 62, 85, 99, 115, 119, 127)

As indicated in Section IXC(1) "nexus" under Section 105(c) exists when there is a reasonable relationship between the activities or the proposed activities under the license and the situation alleged to be inconsistent with the antitrust laws. As indicated below, a "nexus" exists between the activities under the license and the situation alleged to be inconsistent with the antitrust laws.

The "activities" to be considered in determining whether the "activities" will maintain a situation inconsistent with the antitrust laws are broadly based. For example, in Waterford I, supra, and Waterford II, supra, the Commission held that in determining whether a "nexus" exists the relationship of the nuclear facility to the Applicant's total system or power pool should be evaluated.[99]

The scope of "activities" under the license, as viewed by the Commission in the Waterford decisions embraced the planning, building, and operation of a nuclear facility as well as the integration of such a facility into an effective bulk power supply system. This view was based on the fact that economically, a nuclear generating facility cannot be installed as an isolated producing unit. It is practical only as a part of an integrated and coordinated bulk power supply system.[100] It appears from the I.D. that the Board did not consider the relationship between the impact of the activities under the license on the Applicant's entire system or consider the competitive impact that these changes will have on the Applicant and those unable to obtain the benefits of coordination.

99/ CLI-73-7, 6 AEC 49, and CLI-73-25, 6 AEC 621. See also Wolf Creek ALAB-279, NRCI-75/6, 559 at 568.

100/ The same reasoning appears to have been utilized by the Appeal Board in Wolf Creek, supra.

Accordingly, in examining the relationship between the "activities" under the license and the "situation", the Appeal Board should consider the impact of the nuclear plant on the Applicant's entire system. This would include (1) system generating capacity, (2) system reserves, (3) system reliability, (4) capacity and energy available for sale to the Applicant's customers, (5) capacity and energy available for sale to other electric utilities. Finally, the Appeal Board should consider the competitive impact that these changes will have on the Applicant and those unable to obtain the benefits of coordination.

Economically, a nuclear generating facility cannot be put in place as an independent producing unit. (Helfman, PT p. 34). It is designed to function as part of an integrated and coordinated bulk power supply system. Invariably, nuclear generating units will be utilized for base load operation (Aymond, Tr. 6353), that is, continuous operation at full capacity, and must be supplemented by intermediate and peaking capacity in order to provide power at the lowest cost. (Chayavadhanangkur, PT p. 6: Mosle, Tr. 8617). The large size of the nuclear unit will usually exceed the utility's annual load growth. (Wein, PT p. 64). Therefore, the utility must sell or otherwise share the excess in order to minimize surplus capacity. Further, the operation of large generating units creates a reserve problem in that substitute capacity must be available whenever the unit is out of service due to emergency or maintenance conditions. Since large units tend to suffer higher forced outage rates than small units, when added to a system composed of relatively small units, they may dramatically increase

the system's reserve requirement. 101/ (Chayavadhanangkur, PT p. 13). However, through coordination a system can increase its size and increase the number of available units diminishing the effect on reserve requirements posed by installation of large units. 102/ (Chayavadhanangkur, PT p. 13; Wolfe, Tr. 1635, Rogers, Tr. 5529). Consumers Power Company, as a member of ECAR is part of an interconnected system of 51,000 MW of generation capacity. 103/ Absent this capacity, the utilization of the 1300 MW Midland Power Plant would have been extremely difficult if at all possible. (Rogers, Tr. 5545; Wein, PT p. 64).

In order to enjoy the economies of scale in the electric utility industry coordination is necessary. In the absence of formal pools, bilateral agreements among large private and public systems are the coordination mechanism. (Muller, PT p. 15, 67, 72, 73, 73A, 74, 75, 76, 77 and 78 DJ-Exhibits). 104/ Without access to coordination on a large scale, the small system cannot gain the benefits of modern technology and the economics of nuclear power. (Mayben, Tr. 2842). Substantial obstacles confront the efforts of a small system, or group of small systems, to enter into nuclear generation on an isolated basis. They will seldom if ever be able to achieve the gigantic level of investment required to place a large, economical, nuclear facility in operation. (Mayben Tr. 2808, Brush Tr. 2292).

101/ 1970 NPS, p. II-1-56.

102/ Id.

103/ 1970 NPS, p. I-17-17.

104/ According to Consumers' President, "Well, it seems self evident that the larger the system, the greater potential for economies of scale (Tr. 6441).

Smaller systems will continue to suffer economic penalties as long as they do not have the opportunity to achieve access to nuclear generating units and ancillary arrangements which makes such access economically meaningful. In Michigan this means, for example, that individual systems will become either partial or full requirements customers of Consumers rather than continue to generate their own power. These choices by individual systems, if based on the presently limited options available, may prove to be the proper ones on economic grounds alone, but the totality of these decisions will have far-reaching consequences on the organizational diversity of the electric systems in Consumers' service area.

With the installation of the Midland Units, Consumers will enjoy considerable economies of scale (Tr. 2558). Based upon the above analysis, the smaller systems, without access to coordination and high voltage transmission services, will continue to build small, very costly fossil units, thus, increasing Consumers' dominant position. The addition of the Midland units will increase Consumers' total generating capacity by approximately 25% and will enable Consumers to maintain its dominant position.

In conclusion, a "nexus" exists between the planning, operating and building of the Midland Units and the dominant position of Consumers in the relevant geographic market contrary to the finding of the Board.

XII. RELIEF

The Supreme Court stated what it believed to be the role of relief in an antitrust case. Antitrust relief should unfetter a market from anticompetitive conduct and "pry open to competition a market that has been closed by defendant's illegal restraints".[105/] In Ford Motor Company v. United States,[106/] the Court held that relief in an antitrust case must be "effective to redress the violation" and "to restore competition".[107/] It also found that the District Court is clothed with "large discretion" to fit the decree to the special needs of the individual case.[108/]

105/ International Salt Company v. United States, 322 U.S. 392, 401 (1947).

106/ 405 U.S. 562 (1972).

107/ Id., at p. 573.

108/ The suggestion that antitrust violators may not be required to do more than return the market place to the status quo is not a correct statement of the law. In United States v. Paramount Pictures, Inc. 334 U.S. 131 (1947), the Court sustained broad injunctions regulating motion picture licenses and clearances which were not related to the status quo ante. Section 4 of the Sherman Act empowers the Attorney General to institute proceedings in equity to prevent and restrain violations of the antitrust laws. The relief which can be afforded under these statutes is not united to the restoration of the status quo ante. The relief must be directed to that which is "necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute," United States v. E.I. duPont de Nemours & Company, 353 U.S. 586, 607-608, or which will "cure the ill effects of the illegal conduct and assure the public freedom from its continuance." United States v. United States Gypsum Company, 340 U.S. 76, 88 (1970).

It is well settled that in Section 5 (FTC Act) cases, the choice of remedial order is committed to the discretion of the Federal Trade Commission, and except where the remedy bears no reasonable relation to the unfair practices found to violate Section 5, the Courts will not reverse or modify the Commission's choice.[109/]

In Federal Trade Commission v. National Lead Company, et al.,[110/] it was held that "in some instances the Court is obliged not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices."

In Jacob Siegal Company v. Federal Trade Commission, [111/] the Court determined that in the application of Section 5 there is wide latitude in determining what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed.

109/ L.G. Balfour Company v. FTC, 442 F.2d 1 (7th Cir. 1971).

110/ 352 U.S. 419 (1957).

111/ 327 U.S. 608 (1946).

In United States v. Topco Associates,[112/] the Court said:

> In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.
>
> Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

Accordingly, while the Board concluded that the construction permits issued should be continued without the imposition of any antitrust conditions, the Staff believes that based upon the record developed in this proceeding and as briefed herein that the following license conditions are necessary.

112/ 405 U.S. 596, 610 (1972).

A. The Following Proposed Relief Will Remedy the Inconsistency

1. Justification for Proposed Relief

The Staff believes that the foregoing discussion leads to several conclusions. First, a situation inconsistent with the antitrust laws is being maintained by the Consumers Power Company by its use of its dominance in the relevant market by denying access to coordinated developments and operations. Second, there is a relationship between the situation and the activities under the license. Third, this situation will be maintained by the granting of unconditioned licenses. Finally, since the activity under the licenses would maintain the situation inconsistent with the antitrust laws, it is appropriate that the licenses be conditioned to alleviate the situation as authorized by section 105(c)(6) of the Atomic Energy Act.

While public regulation at the retail level has sought to avoid wasteful duplication of facilities in order to promote efficiency, regulatory authority at the wholesale level by the Federal Power Commission (FPC) is limited. Essentially, the FPC has the authority to regulate wholesale rates for those electric systems engaged in interstate exchanges of power and services and to compel, under emergency conditions, system interconnection for purposes of reliability.[113/] Generally, the FPC cannot compel system interconnection for purposes of coordinated operation or require systems to engage in coordinated development for purposes of economy and efficiency. That is, the FPC cannot order large and small systems to jointly build plants or engage in power exchanges that reduce power supply costs.[114/]

113/ Federal Power Act, Part II, Section 201(a) and (b), June 1, 1967.

114/ Id.

Thus, FPC regulation is not designed to effectuate the diffusion of modern technology, including nuclear technology, for the benefit of the electric utility systems in the State of Michigan (Wein - Tr. 4205-4037). The Applicant agrees that the FPC's ability to regulate wholesale competition is also limited. (Pace - Tr. 7538-7540). 115/

The remedies effected by these conditions will be directed to the dominance possessed by the Applicant with respect to the other electric systems within the relevant market and the use of this dominant position to deny access to coordinated development and operations and to alternative sources of bulk power supply, including nuclear power. The availability of alternatives will provide an opportunity to improve the performance of existing generation, and to put together an improved lower-cost aggregate of sources and types of supply when additional resources are needed. (Muller - PT, p. 37, Wolfe - Tr. 1717). The ability of all electric systems to participate in the benefits of technological change will thus provide an opportunity for higher levels of performance by all industry members, a goal which the antitrust laws are designed to preserve.

Under similar circumstances where it has been necessary to remedy an antitrust condition, Applicants have agreed to the imposition of similar conditions in their nuclear facility licenses. As of the close of the record in this case, nineteen Applicants have agreed to accept conditions recommended by either the Department of Justice or the Staff of the Atomic

115/ While the Staff does not disagree with the Board's finding with regard to Staff Exception No. 44, it should be noted that the exception was taken to insure that the Board's finding did not leave the impression that the FPC's power was unlimited and pervasive with respect to the ordering of coordination agreements, wheeling, etc.

Energy Commission. 116/

The Staff is of the opinion that such conditions are consistent with the legal theory discussed above and, moreover, as shown, are consistent with industry practice reflected by a large sector of the electric utility industry.

The following five conditions are prefaced by a set of Definitions and a Statement of General Understanding to clarify and complement the conditions.

2. License Conditions for Midland Nuclear Station

a. *Definitions*

"Licensee" means Consumers Power Company or any successor or assignee of this license and includes each present or future wholly-owned subsidiary and any successor to it.

"Applicable area" refers to the "relevant market" as defined in Section IX, supra.

"Bulk power" refers to the sources of power which are made available from a transmission system for distribution or for further transmission.

"Unit power" refers to "bulk power" which is produced by a specific designated generating unit.

116/ See Docket Nos. 50-302; 50-269, 270, 287; 50-361, 362; 50-341; 50-369, 370; 50-367; 50-366; 50-404, 405; 50-400, 401, 402, 403; 50-413, 414; 50-424, 425, 426, 427; 50-416, 417; 50-389; 50-434, 435; 50-445, 446; 50-452, 453; 50-458, 459; 50-460; 50-461, 462; 50-463, 464.

"Bulk power transactions" refers to specific arrangements for the purchase, sale, exchange and/or transmission of "bulk power".

"Entity" means a person, private or public corporation, municipality, rural electric cooperative, joint stock association, business trust, or lawful association of the foregoing, owning, operating or proposing to own or operate equipment or facilities for the generation, transmission or distribution of electricity, provided that, except for municipalities or rural electric cooperatives, "entity" is restricted to those which are or will be public utilities under the laws of the State of Michigan or under the Federal Power Act, and are or will be providing electric service under a contract or rate schedule on file with and subject to the regulation of the state regulatory commission or the Federal Power Commission.

b. *Access to Nuclear Units*

"Licensee" shall offer an opportunity to participate in the Midland Nuclear Units and any other nuclear generating unit(s) which it

may construct, own and operate severally or jointly, during the term of the instant license or any extension or renewal thereof, to any "entity(ies)" in the "applicable area". Such participation shall be by an ownership interest, or by equity participation, or by a contractual right to purchase a portion of the output of such units at the option of the "entity(ies)" or on any other mutually agreeable basis. Such participation shall be in reasonable amounts.

In the event that during the term of the instant license, or any extension or renewal thereof, "Licensee" is afforded an opportunity to participate in the ownership of or rights to a portion of the output of one or more other nuclear generating units which "Licensee" does not construct or operate, "Licensee" shall exert its best efforts to obtain participation in such nuclear units for any "entities" in the "applicable area" requesting such participation on terms no less favorable than the terms of "Licensee's" participation therein.

In order for the municipals, electric cooperatives and small investor-owned electric utilities in the "applicable area" to remain in the competitive

market place with Consumers Power Company, it is vital that they have access to the benefits of low cost nuclear power. (Mayben - Tr.2649, 2825, Aymond - Tr.6353). Because of the small size of the above group of electric systems, taken in the aggregate, it is not economically feasible for them to build a nuclear unit on their own (Brush - Tr.2292, Fletcher - Tr.4333). The smallest economically attractive nuclear unit is approximately 500 Mw (Mayben - Tr.2808, Wolfe - Tr.1679) while the combined peak loads of the above group was less than 500 Mw in 1972.

Nuclear power will be the lowest cost base load power available in the foreseeable future. (Aymond - Tr.6353, Brush - Tr.2354, Wolfe - Tr.1721). It has been shown that coordinated development by the small electric systems in the "applicable area" using nuclear units can result in an approximate 16-17% decrease in bulk power costs when compared to isolated operation. (Helfman - PT, p.31).

The prospect of low cost power is not the only relevant consideration, however. Nuclear power holds out the promise for decreasing environmental impacts, and because of the fuel shortage, regardless of the difference in costs, access to nuclear power is vitally important. (Brush - Tr.2302, 2303). In other words, it is not just a question of the cost of generation,

it is largely a question of the long term supply of alternative sources of fossil fuel (Chayavadhanangkur - Tr.5140, Mayben - Tr.2825).

c. *Interconnection*

"Licensee" shall interconnect with any "entity" in the "applicable area" which owns and operates, or has access rights to, or which has undertaken to negotiate firm contractual obligations thereof, either separately or jointly with others, to provide some or all of its bulk power supply and which requests such interconnection for one or more of the following purposes:

(a) maintenance and coordination of reserves, including, where appropriate, the purchase and sale thereof,

(b) emergency support,

(c) maintenance support,

(d) economy energy exchanges,

(e) purchase and sale of firm and non-firm capacity and energy, and

(f) delivery of "unit power" or other participation power.

The interconnection agreement shall be consistent with the operating requirements of "licensee's" and the participating "entity's" systems.

Without the benefits of interconnection arrangements and the associated coordination, even the largest electric systems would find it difficult to justify the installation of large base load generating units, whether fossil or nuclear fueled. (Rogers - Tr.5545). Indeed, this applies even more strongly to the smaller electric systems such as those existing in Michigan's Lower Peninsula (Mayben - Tr.2842).

> Without the use of the joint generation and transmission system and the interconnections and interchange arrangements that Consumers Power Company has, it is impossible for Intervenors to install generation of the type and size of the Midland Units. (Chayavadhanangkur - PT, p.17).

The installation of economic nuclear generation becomes possible only when each of the small electric systems becomes interconnected with Consumers on a fully coordinated power pooling basis. (Helfman - PT, p.34). It has been said that without access to interconnection and coordination a small system cannot even consider nuclear power as an alternative. (Mayben - Tr.2845, 2842).

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

Reserve coordination is vitally important if an electric system is to operate in the most efficient manner. (Muller - PT, pp.19, 20; Wein - PT, p.62; Helfman - Pt, p.34; Chayavadhanangkur - PT, pp.10, 13; Brush - Tr.2217). The ability to share reserves allows the system the possibility of decreasing investment without sacrificing system reliability. This is accomplished through the reliance on the interconnected neighbors to provide emergency support in lieu of providing the emergency reserves on his own system. The advantages of emergency support are documented in the record. (Mayben - Tr.2569; Chayavadhanangkur - PT, pp.10, 18; Wein - PT, p.62; Muller - PT, p.21; Aymond - Tr.6637, 6257). Maintenance support is related to emergency support in that a small system could effectively maintain their generating units without the fear that simultaneous outages of other generating units would cause an undue burden on its customers. (Muller - PT, p.21; Wein - PT, p.62; Aymond - Tr.6257, 6637). Economy energy exchanges are important because both parties to the transaction receive economic benefits from the transaction through a splitting of the savings. (Wein - PT, p.62; Muller - PT, p.21; Aymond - Tr.6257; Wolfe - Tr.1590). An important aspect of the operation of an electric system is the ability to purchase firm or non-firm capacity on a long or short-term basis. This ability allows the system to cover equipment outages delays in planned construction or greater-than-expected load

growth. (Muller - PT, pp.19, 21; Wein - PT, pp.63, 64; Chayavadhanangkur PT, pp.10, 22). The delivery of any form of access power is required if the access is to be consummated. (Brush - Tr.2293, 2345; Rogers - Tr.5531; Mayben - Tr.2821; Chayavadhanangkur - PT, p.29; Wolfe - Tr.1731).

d. *Reserve Requirement*

"Licensee" and the "entities" to a reserve sharing arrangement shall from time to time jointly establish the minimum reserves to be installed and/or provided under contractual arrangements as necessary to maintain in total a reserve margin sufficient to provide adequate reliability of power to the interconnected systems of the parties. The allocation of the reserve responsibility among the parties of the reserve sharing arrangement shall be on a reasonable basis.

The parties to such a reserve sharing arrangement shall provide such amounts of spinning and operating reserve capacity as may be adequate to avoid the imposition of unreasonable demands on the others in meeting the normal contingencies in operating their systems. However, in no circumstances shall any party's spinning or operating reserve requirement exceed its allocated reserve responsibility.

A primary benefit of interconnected operations is the ability to pool and share the installed reserves (Brush - Tr.2217, Wolfe - Tr.1635). When an electric system is forced to operate in isolation, it is necessary for that system to carry as its reserves an amount equal to or greater than its largest unit. (Chayavadhanangkur - PT, p.13, Mayben - Tr.2563). Under a reserve sharing arrangement, the system would have access to the reserves of the other members of the pool if a generation deficiency should occur. All members to the reserve sharing arrangement should be able to decrease their individual reserve requirements under this type of arrangement. (Wein - PT, p.63, Chayavadhanangkur - PT, p.13).

One way in which a large electric system can negate some of the advantages of interconnection is to impose an inequitable reserve responsibility upon the smaller system. For example, in the interconnection agreement between Consumers Power Company and the City of Holland, Michigan, the City is required to maintain 45-48% reserves while Consumers, as an equal member of the Michigan Pool, maintains 15-20% reserves. (Chayavadhanangkur - PT, p.21). This is in contrast to a trend towards equalized percentage reserves in coordinating agreements. (Rogers - Tr.5520). One of the essential elements of coordination is equalized reserves. (Rogers - Tr.5526). Pooling reserves can directly reduce costs by allowing economies

of scale, an efficient mix of generation and lesser total reserves. (Chayavadhanangkur - PT, p.14; Wolfe - Tr.1635; Brush - Tr.2217).

e. *Transmission Services*

"Licensee" shall transmit "bulk power" over its transmissic facilities to, from, between or among "entities" with which it is interconnected now or in the future; and between any such interconnected "entity(ies)", and any other "entity(ies)" engaging in bulk power supply between whose facilitie "Licensee's" transmission lines and the transmission lines of others would form a continuous electrical path, provided that (1) permission to utilize such other transmission lines has been obtained, and (2) the arrangements reasonably can be accommodated from a technical standpoint. Any "entity(ies requesting such transmission arrangements are obligated to give reasonable advance notice of its (their) schedule and of power to be transmitted over "Licensee's" facilities.

"Licensee" shall include in its planning and construction program sufficient transmission capacity as required for the transmission services requested herein provided that the "entity(ies)" give "licensee" sufficient advance notice as may be necessary to accommodate its (their) requirements from a technical standpoint. "Licensee" shall not be required to construct transmission facilities which will be of no demonstrable present or future benefit to "licensee".

An essential ingredient in any coordination agreement is access to the use of an existing high voltage transmission system. (Rogers - Tr.5526; Fletcher - Tr.4331; Brush - Tr.2293, 2345, 2351; Wolfe - Tr.1731). The availability of transmission is extremely significant in connection with the ability to secure access to regional power exchange market. (Mayben - Tr.2768). However, it would not be economically or technically feasible to construct the kinds of facilities necessary to interconnect the smaller systems. The costs of constructing high voltage transmission lines are prohibitively expensive for most municipals, cooperatives and small investor owned utilities. (Fletcher - Tr.4282, Wolfe - Tr.1729). Therefore, it is essential that the smaller electric systems obtain the rights to utilize the intervening transmission system owned by Consumers Power Company. (Mayben - Tr.2769). Access to Consumers' transmission facilities would avoid an unnecessary duplication of facilities and thus decrease environmental impact and enable use of higher voltage, more efficient, transmission lines. (Chayavadhanangkur - PT, p.26 and generally Sections X and XI, supra).

f. *Power For Resale*

"Licensee" shall sell power for resale to any "entity" in the "applicable area" now engaging or proposing to engage in the retail distribution and sale of electric power for full or partial requirements, at "Licensee's" filed and effective rates.

CONCLUSION

For the reasons set forth in this Brief, the Staff requests the Appeal Board to find that the continuation of the construction permits issued to Consumers Power for the Midland Plant, Units 1 and 2 without antitrust conditions would maintain a situation inconsistent with the antitrust laws. Further, it is requested that the Board order that the construction permits issued for the Midland Plant, Units 1 and 2 be modified to reflect the license conditions proposed herein by the Staff.

Respectfully submitted,

Robert J. Verdisco
Counsel for NRC Staff

Andrew F. Popper
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 13th day of November 1975.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF'S BRIEF IN SUPPORT OF ITS EXCEPTIONS, dated November 13, 1975, in the captioned matter, have been served upon the following by deposit in the United States mail, first class or air mail this 13th day of November 1975:

Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael C. Farrar
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John F. Farmakides
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Hugh K. Clark, Esq.
Atomic Safety and Licensing Board
P. O. Box 127A
Kennedyville, Maryland 21645

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

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

Forrest Bannon, Esq.
P. O. Box 7513
Washington, D.C. 20044

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

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

Joseph J. Saunders, Esq.
David A. Leckie, Esq.
P. O. Box 7513
Washington, D.C. 20044

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert J. Verdisco

Robert J. Verdisco
Counsel for NRC Staff