

Reg. Cont. No.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

Docket No. 50-329A
50-330A

PRETRIAL BRIEF

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Joseph Rutberg
Antitrust Counsel for
AEC Regulatory Staff

Andrew F. Popper
Counsel for AEC
Regulatory Staff

Robert J. Verdisco
Counsel for AEC
Regulatory Staff

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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(Midland Plant, Units 1 and 2)) 50-330A

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PRETRIAL BRIEF

I. Jurisdiction

This proceeding involves the antitrust review of the application of the Consumers Power Company (Applicant) to obtain licenses to construct utilization facilities pursuant to the provisions of Section 103 of the Atomic Energy Act of 1954, as amended (the Act), to be known as Midland Units 1 and 2.

The review is being conducted pursuant to Section 105c of the Act for the purpose of determining whether the activities under licenses would create or maintain a situation inconsistent with any of the antitrust laws enumerated in Section 105a of the Act.

II. Statutes Involved

The following statutory material are pertinent to this proceeding:

A. Atomic Energy Act, §105 (a) and (c); 42 U.S.C.A. 2135 (Dec. 10, 1970).

- a. Nothing contained in this Act shall relieve any person from the operation of the following Acts, as amended, 'An Act to protect trade and commerce against unlawful restraints and monopolies' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved August twenty-seven, eighteen hundred and ninety-four; 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes' approved October fifteen, nineteen hundred

and fourteen; and 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes' approved September twenty-six, nineteen hundred and fourteen. In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the laws cited above, to have violated any of the provisions of such laws in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act.

* * *

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

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

* * *

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

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

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

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

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

- B. The Sherman Antitrust Act,¹ An Act To protect trade against unlawful restraints and monopolies. Fifty-First Congress, approved July 2, 1890 (26 Stat. 209, as amended; 15 U.S.C. 1). (26 Stat. 209; 50 Stat. 693; 15 U.S.C. (1) and (2) (1970)).

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5. as amended and supplemented, of the act entitled, "An act to create a Federal Trade Commission, to define its power and duties, and for other purposes." approved September 26, 1914: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

^{1/} The Sherman Antitrust Act is published above as amended by Public No. 314 (Miller-Tydings Act), 75th Congress, approved August 17, 1937 (50 Stat. 693), which added the two provisos at the end of the first sentence of section 1.

MONOPOLIZING TRADE; PENALTY (26 Stat. 209; 15 U.S.C. 2).

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

- C. The Clayton Act, §7, acquisition by corporation of stock or assets of another corporation (38 Stat. 731; 15 U.S.C. 18), (1970).

Sec. 7. ² That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

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

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

2/ Public No. 899 (Celler-Kefauver Antimerger Act), 81st Congress, approved December 29, 1950, amended Section 7 to read as set forth above (64 Stat. 1125).

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

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

- D. The Federal Trade Commission Act: Unfair methods of competition and unfair or deceptive acts or practices unlawful. Complaints, findings, and orders of Commission. Appeals. Penalties (38 Stat. 719; 52 Stat. 111; 64 Stat. 21; 66 Stat. 631; 72 Stat. 942; 15 U.S.C. 45), (1970).

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

III. Statement of the Case

A. The Parties

1. Applicant

Applicant is a major investor-owned electric utility operating in Michigan's lower peninsula. ^{3/} The lower peninsula comprises approximately 38,300 square miles and had a 1960 population of approximately 7,240,000 people. ^{4/} Within the area are 41 electric systems which include five investor-owned utilities, 25 municipally-owned systems, and 11 electric cooperatives serving more than 2,500,000 customers. In 1972, the area served by the applicant comprised approximately 26,945 square miles, serving approximately 1,000,000 customers with 22,000,000 thousand Kwh. ^{5/} System generating capacity in 1970 was 3,731,000 Kw. and there was a peak load of 4,080,000 Kw. Applicant's plans include proposals to install generating unit sizes of up to 1150 MW. which at the current level of technology represents frontier or near frontier size units. In 1972 the applicant had electric revenues of approximately \$417,000,000. ^{6/}

^{3/} For the purpose of analyzing the bulk power supply, Michigan is divided into three distinct electrical regions: Upper Peninsula, Lower Peninsula, and Southwestern Michigan. Consumers' operations are carried out over most of the lower peninsula except for the eastern section served by Detroit Edison and a small section in Southwestern Michigan served by the Indiana-Michigan Company, and the Michigan Power Company, both subsidiaries of the American Electric Power Company, National Power Survey, Vol. II-2-1 (1972).

^{4/} Report submitted to the Michigan Public Service Commission prepared by the Michigan Electric Power Capacity and Reliability 1966-1970, and entitled, "Michigan Electric Power Capacity and Reliability 1966-1970."

^{5/} According to Consumers Power Company 1972 Annual Report, the applicant served 1,112,607 electric customers in 67 Michigan counties, page 8.

^{6/} Consumer Power Company Annual Report, 1972.

Applicant does not operate as an isolated system. It is interconnected with Detroit Edison through four extra high voltage transmission lines operating at 345 kv and through four HV lines operating at 120 kv and 138 kv. Further, Applicant and Detroit Edison coordinate planning and operations, and are the sole members of the Michigan Pool. ^{7/} Applicant is also interconnected with the American Electric Power System, and through Detroit Edison to Ontario Hydro System and to major utilities in Ohio. ^{8/}

2. The Intervenors

The intervenors in this proceeding are the Wolverine Electric Cooperative (hereafter referred to as Wolverine) and the Cities of Traverse, Holland, Zeeland, and Coldwater, Michigan, the Michigan Municipal Electric Association, and the Michigan Electric Cooperative, Inc. (hereafter referred to as Joint Petitioners).

^{7/} Its pooling with Detroit Edison is described in Part II of the Federal Power Commission's 1970 National Power Survey at page II-2-101.

^{8/} Its coordination with the Michigan-Indiana-Illinois-Ohio group is described in the 1970 Power Survey at page II-2-107 and the Michigan-Ontario coordination is shown at page II-2-104.

a. Wolverine:

Wolverine is a generation and transmission (G & T) system serving four distribution cooperatives ^{9/} adjacent to areas served by the Applicant. Wolverine, along with Northern Michigan Electric Cooperative and the Cities of Traverse City and Grand Haven comprise the Michigan Municipals and Cooperatives Power Pool (MMCPP). In addition, associate members in MMCP include the City of Zeeland and the Power and Light Departments of Lowell and Hart, Michigan, which utilize Wolverine transmission facilities.

In 1969 Wolverine owned and operated approximately 55,000 Kw of generating capacity, 623 miles of transmission lines and sold nearly 236 million kilowatt-hours of energy. ^{10/}

The MCPP presently plans and operates as if isolated from the applicant, although one 20-megawatt interconnection exists between Northern Michigan and the applicant near Alba, Michigan. Under this arrangement Northern Michigan Electric Corp. purchases short term, firm power under contract with the Applicant and is the only MCPP member interconnected with the Applicant. ^{11/}

^{9/} O & A, Tri-County, Oceana and Western Michigan Electric Cooperatives.

^{10/} 1969 Annual Statistical Report, Rural Electrification Borrowers, USDA, REA Bulletin 1-1, p. 249.

^{11/} The existing arrangement precludes reserve sharing and other interchange arrangements. Appendix D, Northern Michigan Contract.

b. Joint Intervenors:

The Michigan Municipal Electric Association (hereinafter referred to as the Association) is an organization comprised of officials of thirty-four (34) municipal electric departments or utility boards in the State of Michigan. The departments and boards are in the business of distributing electricity at retail in or about their respective communities.

Twenty-three members of the association serve approximately 490,000 Kw of loads in areas adjacent to that served by the Applicant. Sixteen Association members own some generating capacity, and five members, including Traverse City, Grand Haven and Zeeland, are interconnected with the Wolverine Electric Cooperative and Northern Michigan. ^{12/}

Two cities, Holland and Coldwater, additionally are customers of the Applicant under emergency and short term firm power contracts. ^{13/}

In addition to Wolverine, Northern Michigan, Traverse City, and Grand Haven are parties to the Michigan Municipals and Cooperatives Power Pool Agreement (MMCPP Agreement) and intervenor Zeeland, and the Power and Light Departments of Lowell and Hart, Michigan, are associates of Wolverine under the MMCPP Agreement.

^{12/} Amendment No. 19, Consumers Power Co. Application Docket Nos. 50-329A, 50-330A, pp. 7, 7-1, 7-2.

^{13/} Appendix A, Holland contract, Applicant's FPC Electric Rate Schedule 15; Appendix B, Coldwater contract, Applicant's FPC Electric Rate Schedule 3.

Northern Michigan is a G & T cooperative serving three distribution cooperatives whose territories, together with the four cooperatives served by Wolverine encompass the north and west portions of Michigan's Lower Peninsula. With 42,639 Kw of generating capacity installed on Northern Michigan's integrated system, it produced net generation of 248 million kwh and received 11 million kwh from MMCPP members and purchased 8.2 million kwh from the Applicant ^{14/} during the calendar year 1970. It delivered 235 million kwh to the distribution cooperatives and the MMCPP pool members. ^{15/} Wolverine and Northern Michigan in the aggregate generated approximately 427 million kwh in 1969 and operated 1059 miles of distribution lines. ^{16/}

Traverse City, for the year ending June 30, 1970 had installed generating capacity of 35,650 Kw, sales of approximately 96.6 million kwh to 5,675 customers including MMCPP pool members. ^{17/}

Grand Haven has installed generating capacity of 33,630 Kw and during the year ending June 1970 sold in excess of 118 million Kw to approximately 7,075 customers including sales for resale to the other MMCPP pool participants. ^{18/} For the same fiscal year Holland had installed

^{14/} Northern Michigan purchases short term, firm power under contract from the Applicant and is the only MMCPP member interconnected with the Applicant.

^{15/} Power System Statement, FPC Form 12, year ended December 31, 1970.

^{16/} 1969 Annual Statistical Report, Rural Electrification Borrowers, USDA, REA Bulletin 101, pp. 149-150.

^{17/} FPC Form 1-M, City of Traverse City, Light and Power Department, Annual Report for year ending June 30, 1970.

^{18/} FPC Form 1-M, City of Grand Haven, Board of Light and Power, Annual Report for ended June 30, 1970.

capacity of 77,250 Kw and made sales to approximately 11,646 customers totaling 177 million kwh, including 6.69 million Kw of sales for resale to the Applicant. 19/

Coldwater for the current year ending June 30, 1971 sold in excess of 66 million kwh to 4,720 customers from its own installed capacity of 16,625 Kw. In contrast to Holland's sales in 1970 to the Applicant, Coldwater supplemented its own energy generated with purchases of 12.7 million kwh from the Applicant. 20/

3. The Department of Justice

The Department of Justice is a party to this proceeding by virtue of Section 105c(5) of the Act which states that:

...where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission...

In June 1971, the Department of Justice recommended to the Commission that the granting of a license to the applicant without appropriate license conditions would maintain a situation inconsistent with the antitrust laws.

19/ FPC Form 1-M, City of Holland, Board of Public Works, Annual Report for year ended June 30, 1970.

20/ FPC Form 1-M, City of Colwater, Board of Public Utilities, Annual Report for year ending June 30, 1971.

4. The Staff

Although the staff is a full party to this proceeding, its planned participation is limited. The staff and the Department of Justice have agreed that the Department would be the lead agency in this proceeding and establish the evidentiary record. However, the staff intends to argue to this Board the application of the facts that are developed to the applicable law and to recommend the type of relief that the facts may warrant.

B. Contentions

1. Intervenors Contentions

a. Wolverine

Wolverine contends that the Applicant owns the only HV or EHV transmission facilities necessary for coordination within economical distances from Wolverine facilities. Over the past two or three years attempts to establish coordination of system operation with the Applicant have been unsuccessful.

An interconnection and pooling coordination agreement with the Applicant would permit Wolverine and other smaller systems to install larger generating units obtaining the economic benefits of large scale generators. ^{21/}

In order to obtain the benefits of nuclear power and also to eliminate the alleged situation inconsistent with the antitrust laws, Wolverine seeks to participate in the Midland units, secure access to applicant's transmission network, and seeks equitable interconnection arrangements to effect an integrated power pool serving to benefit both the Applicant

21/ The MMCPP group has an annual load growth of approximately 12 to 20 MW.

and the cooperative system.

Wolverine submits that opportunity for access to bulk power supply and coordination must be consistent with the policies enumerated in Gainesville Utilities Department v. Florida Power Corp., ^{22/} and United States v. Otter Tail Power Co. ^{23/}

b. The Joint Intervenors

The Joint Intervenors wish to participate in the Midland units and obtain the necessary ancillary arrangements to effectuate access as well as the opportunity to coordinate with the applicant. Further, they contend that the complete dominance of the Michigan Pool (Applicant and Detroit Edison) in bulk power supply matters in the Lower Peninsula of Michigan, ^{24/} coupled with the water barrier of Great Lakes to the west and north leaves small systems in a position of being unable to look elsewhere for bulk power supply coordination. The City of Lansing, Michigan, is the only smaller utility system owing generation which has prospective access (1972) to the high voltage, interconnected transmission system of the Applicant. ^{25/} The Dow Chemical Company and the Wolverine Power Company both have access to the Electric Power Pooling Agreement (Michigan Pool) between the Applicant and Detroit Edison for the purpose of purchasing capacity only. No such arrangements exist for the intervenors to coordinate their operations with the Applicant through participation in the Michigan Pool.

^{22/} 402 U.S. 515 (1971).

^{23/} 410 U.S. 366 (1973).

^{24/} Department of Justice letter dated June 8, 1971, pp. 1-2.

^{25/} See Amendment No. 19, pp. 5-6, 6-1 through 6-5, and Attachment B.

The Joint Intervenors, as has Wolverine, submit that opportunity for access to bulk power supply and coordination must be consistent with the policy enunciated in Gainesville Utilities Dept. v. Florida Power Corp., and United States v. Otter Tail Power Co. ^{26/}

2. The Justice Department

The Department of Justice, in its advice letter, concluded that Applicant's control of bulk power facilities in lower Michigan is a situation inconsistent with the antitrust laws. The Department further concluded that the Applicant's apparent refusal to grant fair and non-discriminatory access to coordination may raise serious antitrust questions for which this hearing is necessary.

3. Applicant

The Applicant denies each and every allegation made by the intervenors and maintains that it has not created or maintained a situation inconsistent with the antitrust laws. The Applicant further contends that the scope of this proceeding should be limited to the activities associated directly with the nuclear power plant and not the Applicant's system.

4. Staff

The staff believes that the record developed in this proceeding will indicate facts sufficient to warrant a conclusion that the issuance of an unconditioned license to the applicant will maintain a situation which is inconsistent with the antitrust laws. The staff contends that

^{26/} Supra, at notes 22 and 23.

the addition of the nuclear facility to the applicant's system will enable the applicant to maintain (1) market position relative to the smaller systems, (2) ability to construct nuclear power plants and, (3) dominance of HV and EHV transmission lines. The fact that applicant coordinates with other electric systems but not with many smaller systems in the same area contributes to the inability of small systems to obtain the benefits of nuclear power and to effectively compete with it.

C. Issues

The substantive issues in this case, as set out by the Board, are as follows:

- (1) Whether the applicant has the power to grant or deny access to coordination;
- (2) Whether applicant has used this power in an anticompetitive fashion against the smaller utility systems;
- (3) Whether applicant's use of said power has brought into existence a situation inconsistent with the antitrust laws, which situation would be maintained by the activities under the licenses that the applicant seeks.

IV. SUMMARY OF ARGUMENT

The Department of Justice in its theory of the case focuses on the proof that certain of Applicant's activities which will be maintained by the proposed license constitutes a violation of §2 of the Sherman Act. If the Department of Justice succeeds in establishing a violation of section 2, a fortiori, an inconsistency with the antitrust law will exist.

The staff takes the position that there may be a sufficient basis for the Commission to conclude that "a situation inconsistent with the antitrust laws" exists even though a violation has not been established. The facts in this case may indeed show a violation of antitrust laws. However, the Staff would urge that the Board adopt as a standard in this proceeding that a situation inconsistent with the antitrust laws, which may not be a violation of any antitrust law, will satisfy the statutory requirements.

In addition, the Staff contends that the aforementioned situation is sufficiently related to the activities under the license. The Staff believes that the record that will be adduced at trial will adequately demonstrate the requisite elements of nexus as propounded in the Louisiana Power and Light Company Memorandum and Order ^{27/} (hereinafter referred to as the Waterford Memo and Order).

An examination of the geographic market indicates that Consumers has sufficient economic power to control the transmission, generation, and distribution of electrical energy and particularly wholesale bulk power.^{27A/} Further, the Applicant's actions reveal an intent to maintain that situation by its refusals to coordinate and grant access to the Midland plant. These factors are more than sufficient to constitute a situation inconsistent with the policies underlying the antitrust laws.

^{27/} Oct. 1, 1973, Docket No. 50-382(A).

^{27A/}The relevant geographic market in this proceeding is the territory in which Consumers is required or has the right to supply or make available electric service to ultimate consumers. See also, note 172, at p. 70.

The staff's position is that the aforementioned inconsistencies need not be evaluated under an approach which leads to extensive §105c proceedings. An example of how extensive discovery can become is the Duke Power case. ^{28/} The main thrust of the parties in that proceeding is that a violation of §2 of the Sherman Act exists. Over 150,000 pages of the applicant's and intervenors' documents have already been discovered in order to develop the case. ^{29/} The staff believes that within the framework of §105c a more expeditious analytical format is available. ^{30/} Even in the present case over 25,000 pages of applicant's documents have been required in order to pursue the Sherman Act theory. The staff believes that an alternative approach is available which will materially reduce the breadth of these matters. This alternative approach consists of analysis under Section 5 of the Federal Trade Commission Act and the standard of reasonable probability under Section 7 of the Clayton Act, as amended. ^{31/}

In upholding the principles underlying the antitrust laws, ^{32/} Congress has sought to insure that the benefits of nuclear technology will be shared and enjoyed by as many as possible. This concern is based on a keen awareness of the unique nature of nuclear power plants, the scarcity of fossil fuels, and a multi-billion dollar investment, ^{33/} by the taxpayers of the United States for research and development of nuclear power. Congress clearly intended that nuclear energy be available to as many as possible on a non-discriminatory basis.

^{28/} Ibid.

^{29/} Duke Power Company, AEC Dkt. No. 50-269(a) et. al., Letter of Oct. 30, 1973 from Ms. Golden to Mr. Brand.

^{30/} Supra, see part II.

^{31/} Ibid.

^{32/} Cong. Rec. H. 9440, Sep. 30, 1970, p. 9447.

^{33/} Federal Funds for Research and Development and Other Activities, F. Y. 1970-72, National Science Foundation, NSF 71-35, Volume XX.

IV. APPLICABILITY OF THE ANTITRUST LAWS TO THE SITUATION MAINTAINED BY CONSUMERS POWER COMPANY BY VIRTUE OF ITS PROPOSED MIDLAND FACILITY.

Under section 105a of the amended Atomic Energy Act ^{34/} the Commission must consider, in its prelicensing antitrust review, ^{35/} three basic antitrust statutes. ^{36/} The Congressional purpose in enacting these statutes was to prevent the acquisition or maintenance of nuclear power which could be used to exclude competition or restrain trade. Accordingly, the Commission must determine whether or not the issuance of a license would create or maintain a situation inconsistent with the antitrust laws. ^{37/}

A. The Atomic Energy Commission's Antitrust Authority.

Congress, in enacting 105 c of the Atomic Energy Act, firmly established that "any person" choosing to participate in and accept the benefits of nuclear power plants will be subject to the antitrust laws enumerated in Section 105a of the Act. No special exemption was established for the electric utility industry.

^{34/} P.L. 91-560 84 Stat. 1472 (Dec. 19, 1970), Section 105c of the Act, as amended.

^{35/} Section 105(c).

^{36/} Sherman Antitrust Act, 15 U.S.C.A. §§1-7 (1970); Federal Trade Commission Act, 15 U.S.C. §§41-58 (1970); Clayton Act, 15 U.S.C. §§12-27 (1970).

^{37/} See Section 105c(5) of the Act. as amended.

^{38/} (not used)

^{39/} (not used)

This Congressional mandate is by no means new to regulated industries. ^{40/}

In the past decade, a series of cases have required administrative agencies to make antitrust determinations. ^{41/}

^{40/} 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 Co. v. United States, 193 U.S. 197 (1904); (Antitrust applied to Regulated Securities market)
United States v. Terminal Railroad Association, 224 U.S. 383; (Antitrust applied to Railroads)
Georgia v. Pennsylvania RR Co. 324 U.S. 439 (1945); (Antitrust applied to Railroads)
United States v. Pacific & Arctic Railway & Navigation Co., 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 Co. of Lexington, 376 U.S. 665 (1964); (Applied to Banking)
United States v. Radio Corp. of America, 358 U.S. 334 (1959); (Antitrust applied to Radio-Communications)
United States v. El Paso Natural Gas Co., 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).

^{41/} California v. Federal Power Commission, *supra*, at 485 (1962); (Antitrust applied to electric utility industry).
Otter Tail Power Co. v. United States, *supra*; (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*, which cases applied antitrust law to Banking, Securities, Electric Power, and Communications.

Specifically, the Supreme Court, in Otter Tail ^{42/} held that electric utilities were subject to the antitrust review of the Federal Power Commission, when that agency had a statutory directive to consider anticompetitive effects in its licensing process.

Although the Commission is required under the Act to consider the antitrust implications of the applicant's conduct vis-à-vis the licensed activity, it is not necessary nor required for the Commission to conclude that certain conduct will constitute a violation of the antitrust laws before affirmative action by the Commission is taken. ^{43/}

B. The Atomic Energy Act Requires In This Proceeding That The Commission Determine Whether There Is A Situation Inconsistent With The Antitrust Laws.

Section 105c of the Atomic Energy Act requires the Commission to determine in this proceeding "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in Subsection 105(a)."

^{42/} 410 U.S. at p. 372 See Philadelphia National Bank, *supra*, at 350-351 and Silver v. NY. S.E., *supra*, at 357-361. See also, United States v. Borden Co., 308 U.S. 188, 198 (1939) (Applying antitrust law to the milk industry), and, Georgia v. Pennsylvania Ry Co., *supra*, 456-457; applying antitrust to rail industry.

^{43/} Report, Joint Committee on Atomic Energy, pp. 14-15, Report No. 91-1247, 91st Congress, 2d Session (1970).

In Northern Pacific Ry. v. United States ^{44/} the Supreme Court set forth the scope and purpose of the Sherman Act:

The Sherman Act was designed to be a competitive 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." ^{45/}

This basic antitrust principle specifically emanates from the Sherman Act in Northern Pacific Ry. applies with equal force to the underlying basis for the Federal Trade Commission Act, Clayton Act and Section 105c of the Atomic Energy Act. ^{46/}

The Staff's fundamental position is that the burden of proof required under section 105(c) does not reach the level of the establishment of a violation of any of the laws enumerated in Section 105(a) of the Act. We conclude that a situation inconsistent with the antitrust laws is quite different from a violation of such laws.

^{44/} 356 U.S. 1 (1958).

^{45/} Id., at p. 4 and 5.

^{46/} In United States v. Topco Associates, 405 U.S. 596 (1972), the Court stated that: "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."

"Inconsistent" is defined by Webster's as: "(a) not in agreement, harmony or accord; incompatible; (b) not uniform, self-contradictory; (c) not always holding to the same principles or practice; changeable."^{47/} The word "violation" is defined to include: "(a) infringement or breach, as of law, rule, right, etc."^{48/} Accordingly, to establish that certain conduct is inconsistent with the laws is quite different from establishing that such conduct violates the law.

In enacting Section 105c of the Atomic Energy Act, the Joint Committee on Atomic Energy considered the potential problems of defining a "situation inconsistent" with the antitrust laws and stated: ^{49/}

The committee is intensely aware that around the subject of prelicensing review and the provisions of Subsection 105(c), there are opinions and emotions ranging from one extreme to the other pole... 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 105(a). 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

^{47/} Webster's New World Dictionary of the American Language, 2nd College ed., p. 712.

^{48/} Id., at 1585.

^{49/} Report, Joint Committee on Atomic Energy, No. 91-1247, 91st Congress, 2d Session p. 4981 (1970).

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 105c of the bill. ^{50/} (emphasis supplied.)

Our analysis with regard to the "reasonable probability" standard of Section 7 of the Clayton Act is our basis for establishing the standard of inconsistency required by Section 105c of the Act.

^{50/} Id., at p. 14 and 15.

C. The Legislative History Accompanying §105c of the Atomic Energy Act Requires that the same Standard of Reasonable Probability Required under Section 7 of the Clayton Act be Applied to Determine Whether or Not a Situation Inconsistent with the Antitrust Laws Exists.

The reasonable probability test selected by the Congress and relied on by the Staff is based on the premise that Section 7 of the Clayton Act sets a standard which the Atomic Energy Commission can utilize in determining the impact of certain situations.^{51/} We are relying on Section 7 of the Clayton Act primarily for the purpose of establishing a standard of reasonable probability. However, Section 7 is also significant for our purposes because it is concerned with the impact upon market structure, which is the basis upon which the Staff analyzes the facts in this case.

In Brown Shoe,^{52/} the Supreme Court emphasized that Congress intended to check a tendency towards concentration in its incipiency and, to this end, it rejected "the standards for judging the legality of business combinations" applied in Sherman Act cases. The Court stated that Congress did not provide any "definite qualitative or quantitative tests" 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."

^{51/} Supra, at note 49, p. 15.

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

In analyzing horizontal merger cases, the Supreme Court has relied upon market share statistics, concentration ratios, and industry concentration trends to establish that there is a "reasonable probability" that the activity will substantially lessen competition. Consideration has also been given to other elements of market structure and performance, such as ease of entry, the strength of remaining firms, the character of supply and demand in the market, the vigor of competition, and the scarcity of resources and facilities. This same criteria which has been used to establish a violation of the antitrust laws we believe can be utilized to indicate that a situation inconsistent with the antitrust laws exists.

The Commission in applying this standard may conclude that, if a market is concentrated to the extent that an applicant dominates the generation and transmission of electric energy to such an extent that other systems in the market are unable to obtain the benefits of nuclear power or the economies of scale there is a "reasonable probability" that there is a situation inconsistent with the antitrust laws.

The Philadelphia National Bank case^{53/} illustrates the position the Court has taken with respect to the need for a broad economic investigation prior to determining that the law has been violated. In that case the court stated:

^{53/} United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

A merger which produces a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.^{54/}

If it is determined in this proceeding that the applicant dominates one or more of the relevant markets to the extent that it approaches monopoly power then there is a basis for concluding that there is a situation inconsistent with the antitrust laws. If an applicant has significant control over either transmission, distribution or generation we take the position that an unconditioned grant to construct a nuclear power plant will have the effect of increasing the already high level of concentration which will add to the applicant's dominant position.^{55/}

^{54/} Id., at 363. See also A.D. Neal, The Antitrust Laws of the U.S.A., Cambridge Press at p. 442, "They [the courts] must deal ultimately with facts, and the fact is that a concern shows itself to be intent on market dominance, this is proof enough of violation of the Sherman Act, whether or not that dominance has resulted in unduly high prices or bankrupt competitors."

See also United States v. Continental Can, 378 U.S. 441 (1964); United States v. Pennzoil, 252 F. Supp 962 (W.D. Pa. 1965).

^{55/} In United States v. Aluminum Company of America, 377 U.S. 271 (1964), "If concentration is already great, the importance of preventing even slight increases [1.3%] in concentration and so preserving the possibility of eventual deconcentration is correspondingly great."

D. It is the Staff's Position that the Criteria of the Federal Trade Commission Act Provides a Sound Framework for Analysis under §105c.

The Atomic Energy Act of 1954, as amended in 1970, 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. The Federal Trade Commission Act is specifically recognized as one of these laws. In the present case an inconsistency with the Federal Trade Commission Act (FTC Act) can be used to establish a situation inconsistent with the antitrust laws.

Within the parameters of Section 5 of the FTC Act is conduct which amounts to violations of the Sherman or Clayton Acts as well as conduct which is unfair or which, if allowed to go unabated, will amount to a violation of these statutes.^{56/}

In FTC v. Cement Institute^{57/} the FTC challenged a pricing system as being an instrumentality for price fixing and thus a violation of Section 5. 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.^{58/}

^{56/} See Fashion Originator's Guild v. FTC, 312 U.S. 457 (1940).

^{57/} 333 U.S. 683 (1947).

^{58/} Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925).

Referring to the overlap of the two statutes in relation to collusive practices, 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 Federal 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.^{59/}

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 Co., Inc.^{60/} 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.

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

^{59/} 333 U.S. at 694 (1948).

^{60/} 344 U.S. 392 (1953).

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 those that were condemned by 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.^{61/} (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 Co.^{62/} and Atlantic Refining Co. v. FTC,^{63/} 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."^{64/}

^{61/} 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 the Federal Trade Commission Act."

^{62/} 384 U.S. 316 (1966).

^{63/} 381 U.S. 357 (1965).

^{64/} Id. at 369 (1965).

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."^{65/}

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."^{66/}

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 prevents in the incipency anticompetitive acts and conditions before they become full-blown violations, not simply to proscribe well-defined anticompetitive behavior. In FTC v. Sperry and Hutchinson Co.,^{67/} Section 5 of the Federal Trade Commission Act

^{65/} Ibid., 384-45 at pp. 320-321.

^{66/} After finding that Brown's contacts 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 agreement 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 incipency without proof that they amount to an outright violation of Section 3 of the Clayton Act or other provisions of the antitrust laws."

^{67/} 405 U.S. 233 (1972).

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.^{68/}

As a guide to the public policy, the Federal Trade Commission may look to the antitrust laws themselves and to the decisions under them.^{69/} In addition, it may act to remedy a situation which involves incipient violations of the antitrust laws.^{70/} To sum up, the antitrust laws were "designed to be comprehensive charter of economic liberty aimed at preserving full and unfettered competition as the rule of trade."^{71/}

It is the Staff's position that the "FTC Standard" suggested above is fully applicable to the facts in this proceeding. A comprehensive analysis of those facts as they relate to this standard are set out in sections V.F., V.G. and VI.C.

^{68/} 405 U.S. at 244 (1972).

^{69/} Northern Pacific Ry. v. U.S., 356 U.S. 1, 4 (1958).

^{70/} FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

^{71/} Supra, note 69.

E. The Staff's Position on the Significance of Section 2 of the Sherman Act in 105c Proceeding

1. Consumers Power Company Dominates its Service Area in Michigan's Lower Peninsula

The courts have on several occasions defined "monopoly power." In United States v. E.I. duPont de Nemours,^{72/} it was defined as the power to control prices or the ability to exclude competition.^{73/} Practically speaking it is clear that the requisite power may be found to exist even without any showing that prices actually have been fixed or that competitors were actually excluded.^{74/} The question is whether the power exists to accomplish such ends.^{75/}

^{72/} 351 U.S. 377 (1956) which also makes clear that the passage of time does not immunize the transaction from attack.

^{73/} This definition was affirmed in United States v. Grinnell, 384 U.S. 563 (1966).

^{74/} 351 U.S. at 389.

^{75/} American Tobacco Co. v. United States, 328 U.S. 781 (1946). In connection with this case consider, Eugene V. Rostow's interpretation in his book, A National Policy for the Oil Industry, Yale University Press (1948), at p.13: "When three companies produce so large a percentage of market supply, that fact alone is almost sufficient evidence that the statute is violated. Ruthless and predatory behavior need not be shown. The actual elimination of small competitors is unnecessary.... Parallel action, price leadership, a reliance on advertising rather than price competition as a means of inducing changes in each seller's share of the market, and above all, size--the market position of a small number of large sellers or buyers--these are now key points to be proved in a case of monopoly, or of combination in restraint of trade. From such evidence inferences of combination will be drawn, if cautious pleaders rely on Section 1 as well as on Section 2. But the content of an antitrust case has been enormously limited and simplified, under Section 1 as well as Section 2. Painstaking search for scraps of evidence with a conspiratorial atmosphere are no longer necessary. There need be no parade of small business men as witnesses, to testify that they have been driven from the trade, and their lives ruined, by the ruthless squeeze of monopolistic pressure. Under the Tobacco case, the economic fact of monopoly is very close to being the legal proof of monopoly. The decisive elements are the power to assert a degree of control over price and output in the market as a whole; and the power to deter or discourage potential competition -- even, as Judge Hand said, by embracing 'each new opportunity as it opened,' and facing 'every new comer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.'" "

It was held in U.S. v. Grinnell^{76/} that the offense of monopoly under Section 2 of the Sherman Act has two elements: (a) the possession of monopoly power in the relevant market, and (b) the willful acquisition of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic incident. The existence of such monopoly power may be inferred from the predominant share of the market.^{77/} The element of willfulness is usually demonstrated by showing that the monopolist has engaged in business practices which have had the effect of creating or maintaining the monopoly.^{78/}

Monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under Section 2.^{79/} For Section 2 of the Act is aimed at the acquisition or retention of effective market control.^{80/}

^{76/} 384 U.S. 563, 570-71 (1966).

^{77/} Id. at 571.

^{78/} Some courts have suggested that once monopoly power has been demonstrated, the defendant should then be required to show that the monopoly had not been unlawfully acquired or maintained. United States v. Grinnel Corp., 236 F. Supp. 244, 248 (D. R.I.) (1964), aff'd on other grounds, 384 U.S. 563 (1960); United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 345 n.2, (D. Mass. 1953) aff'd. per curiam 347 U.S. 521 (1954).

^{79/} U.S. v. Griffith, 334 U.S. 100 (1948). See also Lorain Journal Co. v. United States, 342 U.S. 143, 154 (1951).

^{80/} 334 at p. 107.

Although the amount of market power needed to constitute a monopoly has not been quantified precisely it has been tailored to the factual situation. Clearly, where a party controls more than 80% of a market monopoly power exists.^{81/}

Quantification of what constitutes a predominant share of a market also was considered in Alcoa.^{82/} The Court found that a 90% share of the aluminum market constituted a monopoly. In Philadelphia National Bank,^{83/} the court did not specify the exact percentage that would constitute undue concentration but did cite the writings of economists who had recommended a 20 to 25% combined share and a 7 to 8% increase in concentration as issues of prima facie illegality. In applying this presumptive rule the court held that at least 30% of the commercial banking in the relevant market was unlawful.

Consumers dominates the HV generation in the relevant geographic market. It also has 80% of the gross electric revenues in this market. These figures are well within the percentage range of which has been held presumptive evidence of monopoly power. In American Tobacco^{84/} the Court

^{81/} See: International Boxing Club v. United States, 358 U.S. 242 (1959) (81% of championship fights).

United States v. Grinnel Corp., 384 U.S. 563 (1966) (87% of central station alarm business)

^{82/} United States v. Aluminum Company of America, 148 F. 2nd 416 (2nd Cir., 1945).

^{83/} Supra, at note 40, an antimerger case.

^{84/} See note 70 Supra.

pointed to the "Big three's" 80% share of the market for premium brands and 66% share of the market for all cigarettes as evidence of control over the entire market. In duPont,^{85/} a 75% market share was assumed by the Court to be sufficient to establish monopoly, particularly in view of the fact that cellophane dominated that market and that a firm could not get into the business without access to duPont's technology.

In United States v. Besser Mfg. Co.,^{86/} a 65% market share, with the balance of the market divided among 50 other companies, was held to be a monopoly, particularly where the industry was dominated by the defendant's manufacturing process.^{87/} In United Banana Co. v. United Fruit Co.,^{88/} a market share of 70% was held to be a sufficient demonstration of power.

Proving monopoly power requires a showing that a firm has power to exclude competitors or to control prices. Showing high market shares permits a court to infer existence of monopoly power. However, as the Court pointed out in United States v. Columbia Steel,^{89/} "The relative effect of percentage command of a market varies with the setting in which that factor is placed."

^{85/} 351 U.S. 377 (1956).

^{86/} 96 F. Supp. 304 (E.D. Mich. 1951), aff'd, 343 U.S. 444 (1952).

^{87/} In the case at hand, Consumers accomplishes domination by controlling sources of generation and transmission services necessary for economies in bulk power supply. The integration of nuclear power into Consumers system will result in similar control over the output of the plant (nuclear).

^{88/} 245 F. Supp. 161 (D.C. Conn. 1968); aff'd, 362 F. 2nd 849 (1966).

^{89/} 334 U.S. 495, 528 (1948).

F. Consumers Dominance and Control over Essential Resources Constitutes a Situation Inconsistent with Section 2 of the Sherman Act and a Fortiori Constitutes a Situation Inconsistent with Section 5 of the FTC Act.

The setting referred to in the Columbia Steel^{90/} case which the Staff contends makes the effect of the percentage command of the market pernicious can best be described by analyzing the cases relating to the "bottleneck" or "essential or scarce facility" theory. A. D. Neal, a noted economist, has stated:

The Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.^{91/}

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

^{90/} Id., p. 528.

^{91/} A. D. Neal, The Antitrust Laws of the U.S.A., Cambridge Univ. Press, 1960 at p. 67.

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.^{92/}

* * *

The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company.

* * *

The other companies use the terminal properties because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive.^{93/}

In the relevant geographic market it is impossible in most situations for either municipalities or cooperatives to build nuclear power plants or to coordinate in planning because of the high cost of building the necessary transmission and the inability to utilize the applicant's transmission grid. Any potential for access to nuclear power, alternative sources of bulk power supply and coordinated planning are completely controlled by Consumers Power Company. The ability of Consumers to control access to nuclear power plants and the HV transmission network in effect gives Consumers the right to control the entry of new firms into the bulk power market, to control the growth of competition and the access to nuclear power.

^{92/} 224 U.S. at p. 395.

^{93/} Id., at p. 397.

Subsequent to the Terminal Railroad case, the Supreme Court, in Associated Press v. United States,^{94/} reaffirmed the "bottleneck" or "essential resource theory."^{95/}

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 wholly irrelevant,^{96/} as was the fact that the reports of a news association were not "indispensible."^{97/} 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:

^{94/} 326 U.S. 1 (1945).

^{95/} 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).

^{96/} Supra, at note 94, p. 13.

^{97/} Id. at p. 95.

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.^{98/} It is obviously fallacious to view the By-Laws here in issue as instituting a program to encourage and permit full freedom of sale and disposal of property by its owners. Rather, these publishers have, by concerted arrangements, pooled their power to acquire, to purchase, and to dispose of news reports through the channels of commerce. They have also pooled their economic and news control power and, in exerting into agreements which the District Court found to be plainly designed in the interest of preventing competition.^{99/}

Consumers Power, by reason of its pool membership, nuclear power plant capability, control of the coordination medium, and high voltage transmission, can effectively and with intent prevent the development and growth of competition.

In Gamco, Inc. v. Providence Fruit Produce Building Inc.,^{100/} 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 covenant 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:

^{98/} Id. at p. 96.

^{99/} Id. at p. 97.

^{100/} 194 F. 2d 484 (1st Cir. 1952), Cert. denied 344 U.S. 817.

... 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 buyers, and transshipping his fruit and produce by truck is clearly to extract a monopolists' advantage... The Act does not merely guarantee the right to create markets; it also insures the right to old ones.^{101/}

The Court concluded that the possibility of duplicating the facilities:

... can not 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.^{102/}

In the lower Michigan area 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 and uneconomical. Accordingly, without access to applicant's transmission the construction of a nuclear plant is out of the question.^{103/}

^{101/} Id., at p. 487.

^{102/} Id., at 488.

^{103/} In Gamco, the Court continued at p. 489 that "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."

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 abusing that power. This is particularly meaningful where the essence of the dominant position is the control over some physical facility like a transmission network. A "dominant firm" must share that facility with competitors unless there is some reasonable alternative to the competitor.^{104/}

G. A Dominant Firm Cannot in the Circumstances of this Proceeding Refuse to Grant Access to the Nuclear Facility or Associated Transmission.

It is well established that a monopolist cannot refuse to deal or discriminate in its dealings with its customers for the purpose of preserving or extending its monopoly.^{105/}

In Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927), one of the questions posed to the Supreme Court was whether the refusal by a monopolist to sell to a certain class of customers at a dealers' discount was in furtherance of a purpose to monopolize.

The Court held that:

...Although there was no direct evidence -- as there could not well be -- that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. "Clearly," as was said by the Court of Appeals, "it could not be held as a matter of law that the defendant was actuated by innocent motives of law rather than by an intention and desire to perpetuate a monopoly."^{106/}

^{104/} See e.g. Otter Tail Power Co. v. U.S., *supra*, at note 23.

^{105/} U.S. v. Colgate, 306 U.S. 68 (1938).

^{106/} 273 U.S. at p. 375.

In this proceeding the refusals to grant access to transmission services, coordinated planning in connection with the output from the nuclear power plant ("unique") constitutes a purposeful attempt by Consumers to maintain its dominant position and stifle competition, thereby maintaining a situation inconsistent with the antitrust laws and the policies underlying them.

In Lorain Journal v. United States, 342 U.S. 143 (1951), the publisher of the only daily local newspaper enjoyed a substantial local monopoly of the mass dissemination of news and advertising. A radio station was licensed, and derived most of its income from local and national advertising in direct competition with Lorain Journal. The Court held that its effort to regain its monopoly by refusing to accept local advertising from customers who also advertised through the radio station was a violation of Section 2 of the Sherman Act. The Court reasoned that:

It is consistent...to hold here that a single newspaper, already enjoying a substantial monopoly in its area, violates the "attempt to monopolize" clause of §2 when it uses its monopoly to destroy threatened competition.^{107/}

The Applicant, the single dominant electric utility in the relevant geographical area enjoys a substantial power over HV transmission in Michigan's lower peninsula and has the power to prevent competition.^{108/}

^{107/} 342 U.S. at p. 154.

^{108/} For a discussion on unilateral refusals to deal see United States v. Colgate & Co., 250 U.S. 300 (1919).

In fact, the record in this matter may establish that this power has been used. Since 1960, the Applicant has made offers or proposals to purchase five members of the Michigan Municipal Electric Association and has acquired two of them, Grayling (1961) and Allengan (1968).

In addition to prohibiting a refusal to deal for the purpose of preserving or extending a monopoly, 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.^{109/} Similarly, it is well established that refusals to deal in one market for the purpose of maintaining a monopoly in another market have long been condemned.^{110/}

The relevant geographic market has one large, fully integrated utility which controls a substantial portion of generation, and transmission of economical bulk power supply. The remaining utilities in the area are small electric cooperatives and municipal systems. These small systems are not integrated and are usually limited to being wholesale customers of Consumers. Generally, these wholesale customers do not have access to

^{109/} See Swift and Company v. United States, 196 U.S. 375, 396 (1905); American Tobacco Co. v. United States, 328 U.S. 781, 785, 809 (1945); and United States v. Aluminum Company of America, 148 F. 2d 416, 474-475 (2nd Cir., 1945).

^{110/} See Lorain Journal v. United States, *supra*; United States v. Colgate & Co., *supra*; and Eastman Kodak v. Southern Photo Materials Co., *supra*. United States v. Pacific & Arctic Railway & Navigation Co., *supra*; and United States v. Klearflax Linen Looms, *supra*.

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 no 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 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 its ability to compete by obtaining access to alternative sources of power or by otherwise coordinating with other utilities. Individual systems are accordingly denied low cost bulk power by virtue of enforced isolation and are dependent on Consumers.

The structure of the electric utility industry is such that a system must assure integrity and reliability. Through its dominance Consumers has the power to influence the integrity and reliability of small systems operating in the relevant geographic market.

This power includes the ability to (1) exclude smaller systems from access to transmission services, (2) refuse to coordinate with smaller systems, and (3) force smaller systems to maintain larger reserves thereby reducing advantages of generation and creating possible planning disruption.

H. Conclusion of Substantive Anticompetitive Analysis

The Staff believes that the Board, based on the above legal and factual analysis, has a sufficient basis to conclude that a situation inconsistent with both Section 2 of the Sherman Act and Section 5 of the FTC Act exists.

However, the Staff urges the Board to apply the "Federal Trade Commission Standard" (set out in Section V.D. of this brief) to the facts in this proceeding. It is particularly important in view of the facts that: (1) every violation of the Sherman and Clayton Acts is a violation of the FTC Act; (2) every violation of the FTC Act is not necessarily a violation of the Sherman and Clayton

Acts; (3) these premises apply also to "inconsistencies"; (4) section 105a of the Atomic Energy Act refers to inconsistencies with "any" of the antitrust laws enumerated therein; (5) if the FTC Standard is used when applying section 105c the other antitrust laws are automatically taken into consideration, and (6) the burden of proof required under the FTC Standard is significantly less than that which is required under the Sherman and Clayton Acts thereby creating an atmosphere conducive to expeditious hearings.

Essential to the delineation of the nexus between "activities under the license" and the situation inconsistent with the antitrust laws" is an examination of the economic situation in which electric systems conduct their operations. The following section examines the historical trend of fewer and larger firms and attempts to assess the impact of technological change on this trend. It is a major conclusion of this section that access to modern technology, including nuclear power, is essential for the continued existence of competition within the electric utility industry.

VI. RELATIONSHIP BETWEEN THE SITUATION INCONSISTENT WITH THE ANTITRUST LAWS AND THE ACTIVITIES UNDER THE PROPOSED MIDLAND LICENSE BY MEANS OF AN ECONOMIC AND LEGAL ANALYSIS

A. Industry Setting

1. Concentration and Diversity in the Electric Utility Industry Have Resulted in Economic Dominance by the Larger Utilities and Limited Opportunities for Smaller Electrical Systems

There are nearly 3500 firms that constitute the electric power industry in the United States which perform one or more of the three industry functions. These functions are generation, transmission, and distribution of electricity.^{111/} Approximately 70 percent of the firms engage solely in the retail distribution of power, and over two hundred are fully intergrated (i.e., perform all three functions). These two hundred firms in some instances supply power at wholesale to retail distributors. At least seventy-five firms confine their activities to generation or transmission and may serve as wholesale suppliers for distributors. About seven hundred firms, lacking transmission, restrict themselves to the generation and retail distribution of power within relatively small, well-defined geographic areas.

Public and cooperative firms make up about 90 percent of industry ownership.^{112/} Most of these firms engage in distribution only and thus own no generation or transmission capacity.^{113/} In contrast,

^{111/} The 1970 National Power Survey, Federal Power Commission, p. I-2-1, hereafter cited as 1970 NPS.

^{112/} Ibid., p. I-2-2.

^{113/} Ibid., P. I-2-3.

the two hundred largest investor-owned utilities (less than 20 percent of all firms with generation) account for 75 percent of total generating capacity and serve 80 percent of all customers.^{114/} The remainder of the industry is comprised of five large federal systems, other public systems, small private utilities, and cooperatives. However, "the [large] investor-owned systems clearly constitute the dominant segment of the industry."^{115/}

This ownership pattern has not always prevailed. It appears to represent the latest point in a process of change. At least two significant changes occurred over the period 1962-1968. First, the total number of electric systems declined 4 percent.^{116/} Privately-owned firms decreased by 2 percent. Second, the proportion of firms engaged solely in distribution increased from 64 percent to 70 percent.^{117/} This increase was the result of the disappearance of seventy-five private generation utilities and one hundred non-federal public firms. Industry trends thus suggest a growing concentration of resources in the control of larger and fewer firms.

While the previous data indicates a high level of concentration and the trend towards increased concentration, it nonetheless does not fully reflect the consolidation of decision-making that has occurred

^{114/} 1970 NPS, p. I-2-4.

^{115/} Ibid.

^{116/} Ibid., p. I-2-7.

^{117/} Ibid., p. I-2-8.

within the industry. Such consolidation has been achieved in some instances through the formation of holding companies. Corporate combinations of adjoining large utilities is one method by which sufficient load size can be achieved in order to justify the installation of large, economical, generator units.^{118/} In 1968, thirty-two holding companies consisting of eighty of the two hundred largest private utilities were responsible for 39 percent of the industry's output.^{119/}

Centralization of decision-making has also occurred through the formation of "power pools". Pools allow firms to physically and economically join together and obtain the economies of large generator units and extra-high-voltage transmission.^{120/} Large investor-owned systems dominate the membership of most power pools. In 1970 there were twenty-two power pools which accounted for 60 percent of industry capacity compared with just 23 percent in 1970.^{121/}

Large utilities dominate the generation, transmission, and distribution of electric power. Industry trends indicate that control of decision-making will increasingly rest with large utilities. However, there still exists a significant number of smaller firms engaged in generation and distribution.

^{118/} National Power Survey, Federal Power Commission, 1964, p.II-357.

^{119/} 1970 NPS, p. I-2-4.

^{120/} 1964 NPS, p. II-358.

^{121/} 1970 NPS, p. I-17-2.

2. Centralizing Pressures of Technological Change Have Been Responsible for a Trend Toward Increased Concentration at the Expense of Organizational Diversity.

Developments in the technology of electric power supply have been responsible for a trend toward increased concentration. Most indicative of this modern technology are large-scale nuclear and fossil-fuel generation facilities and very large capacity transmission systems. Developments in nuclear generation represent the most recent and primary technical change. However, the utilization of such nuclear technology depends greatly on the availability of other technological developments.

a. The Frontiers of Modern Technology Have Advanced the Efficiency of the Larger Utilities.

Advances in fossil-fueled generation technology has been responsible for the increase in the size of generator units. From 1960 to 1973, the maximum size of fossil-fired units has increased from 500 MW to 1200 MW.^{122/} The motivation of utilities to install larger units of this type is due to economies of scale which reflect reductions in capital, operating expense, and maintenance costs per unit of capacity as size increases.^{123/} Larger unit sizes are expected to accompany technological advance.^{124/}

^{122/} 1970 NPS, p. IV-1-3.

^{123/} Ibid., p. IV-1-1.

^{124/} Ibid.

Substantial advances have also occurred in transmission technology. At the turn of the century, the maximum size of transmission lines was about 60 kilovolts (KV), and 138 KV lines were introduced in 1920, 230 KV lines in 1930, and 345 KV lines were operational by 1960.^{125/} A further increase to 500 KV lines occurred in 1964 and 765 KV lines were first used in 1969.^{126/} The 1964 and 1970 National Power Surveys indicate that the use of higher voltages results in lower transmission costs per unit of capacity.^{127/} The factors of competing land uses, limited availability of rights of way, esthetics and environmental pressures, have intensified the need for larger capacity transmission systems. A 765 KV line, for example, possesses the capacity of five 345 KV lines, yet requires less than one-third the size of right of way necessary for the latter.^{128/}

The gains in generation and transmission technology have, for the most part, occurred simultaneously.^{129/} The technical feasibility and economic attractiveness of concentrating large blocks of capacity in single units and plants have created requirements for similar concentration of transmission capacity on a single transmission corridor.^{130/} Since 1950, the capability of the highest voltage line in use has equalled or

^{125/} Ibid., p. I-13-5.

^{126/} Ibid.

^{127/} 1964 NPS, p. I-151; 1970 NPS, P. I-13-7.

^{128/} 1970 NPS, p. IV-2-5.

^{129/} Ibid.

^{130/} Ibid., p. IV-2-4.

exceeded the size of the largest generator unit available.^{131/} At present, the 765 KV line can transmit 4000 megawatts, far in excess of the size of the largest unit in existence.^{132/}

b. Intersystem Coordination Has Resulted in Significant Economic and Technological Benefits to Consumers Power Company.

The benefits of the modern technology of both large-scale generation and transmission have been sought through coordination. Coordination has been defined as the "...joint planning and operation of bulk power facilities by two or more electric systems for improved reliability and increased efficiency which would not be obtainable if each system acted independently.^{133/} Coordination thus deals with the use of existing resources and the planning of additions to generation and transmission.

The most common type of coordination activity involving existing resources is reserve-sharing. Reserve-sharing acts to reduce the amount of reserve capacity required by each party to provide for emergency situations, maintenance needs, and unforeseen load growth.^{134/} Reserve-sharing

^{131/} 1970 NPS, p. II-1-47.

^{132/} Ibid., p. I-17-1.

^{133/} It is clear from the industry structure that these gains have inured solely to the benefit of the larger utilities. Ibid. p. I-17-1.

^{134/} Ibid.

between two previously isolated systems would also be expected to free marketable capacity. Other arrangements possible under coordinated operation include diversity capacity exchanges, economy energy exchanges, and central economic dispatch of existing generation.

The purpose of coordinated planning is to assist utility systems in dealing with two factors which tend to limit the installation of large, economical generator units by single utilities. The combined load growth of two or more firms justifies the addition of units larger than that of any single utility. This type of coordination requires that the utilities engage in either joint ownership units, staggered construction, or short-term or unit power sales to each other. The other limiting factor is that larger units tend to experience higher emergency and maintenance outage rates than smaller units.^{135/} Consequently, as unit sizes increase, reserve-sharing increases in importance.^{136/}

The physical interconnection of transmission facilities is essential for coordination of electric utilities. Adequate interconnections "provide the key to large-scale, low cost generating units, to major savings in capacity due to load diversity, to the sharing of reserve capacity, and to the most efficient utilization of existing capacity."^{137/}

^{135/} 1970 NPS, p. I-18-9.

^{136/} Ibid., p. IV-1-9.

^{137/} 1964 NPS, p. I-27.

Reliability as well as "economy is achieved when extensive transmission systems operate as integral parts of a strong, interconnected network."^{138/}

Thus, there is considerable interaction among generation, transmission, and intersystem coordination. The economics of large units and extra-high-voltage transmission have prompted the development of interconnections.^{139/} The decision to install extra-high-voltage transmission depends on the economics of generating capacity and interconnected operation.^{140/} Further, it is imperative that system conditions such as capacity reserve requirements and transmission needs be included in an analysis of adding large units to a system or a group of coordinated systems.^{141/}

c. Large Scale Nuclear Generation Has Led to Lower Costs and Greater Efficiencies.

The development of the large-scale nuclear generators has followed technological advance in transmission and fossil-fueled generation. The use of nuclear-fueled power is "probably the most important single change in the electric power industry during the past fifty years."^{142/} Economic and environmental considerations have dictated the industry's trend away from fossil-fired plants toward nuclear plants. In recent years nuclear

^{138/} 1970 NPS, p. I-13-1.

^{139/} Ibid., p. IV-2-xiii.

^{140/} Ibid., IV-2-8.

^{141/} Ibid., p. IV-1-9.

^{142/} Ibid., p. I-6-1.

fuel cost has not changed significantly, while fossil-fuel prices have significantly increased.^{143/} This advantage of nuclear plants offsets the capital cost advantage of fossil-fueled plants such that the overall economies of scale are greater for nuclear plants.^{144/} In addition to lower fuel costs, nuclear plants offer better solutions to the industry's environmental problems.^{145/} In view of the prospect for future increases in fossil fuel prices, "there does not appear to be any reason to expect that the nuclear advantage will not be maintained or even increased as time goes on."^{146/} Accordingly, nuclear power plants are expected to represent 44 percent of all future additions to capacity during the 1970's, and 81 percent of total additions during the 1990's.^{147/}

d. Intersystem Coordination and Nuclear Generation

The introduction of large, nuclear units will maintain and likely increase the need for intersystem coordination. Economically, a nuclear generating facility cannot be put in place as an independent producing unit. It is designed to function as part of an intergrated and coordinated bulk power supply system. Invariably, nuclear generators will be utilized for base load operation: that is, continuous operation at

^{143/} Ibid., p. II-1-31.

^{144/} Ibid., p.

^{145/} Ibid., p. I-6-1.

^{146/} Ibid., p. II-1-59.

^{147/} Office of Planning and Analysis, U.S. Atomic Energy Commission, Nuc. Pow., 1973-2000, p. 4.

full capacity, and must be supplemented by intermediate and peaking capacity in order to provide power at the lowest cost. The large size of the nuclear unit will usually exceed the utility's annual load growth. Therefore the utility must sell or otherwise share the excess in order to minimize surplus capacity. Further, the operation of large generators creates a reserve problem in that substitute capacity must be available whenever the unit is out of service due to emergency or maintenance conditions. Large units tend to suffer higher forced outage rates than small units and when added to a system composed of relatively small units, may dramatically increase the reserve requirement.^{148/} An 800 mw unit, for example, would be expected to have four times the effect of a 400 mw unit on reliability calculations.^{149/} However, as both system size and the number of available units increase, the effect on reserve requirements posed by installation of large units diminishes.^{150/} Interconnections, which effectively increase total system size and make more units available, reduce percent reserve requirements.^{151/} Consumers Power Company as a member of ECAR is part of an interconnected system of 35,000 mw of generation capacity.^{152/} Absent this capacity, the planning of 1300 mw Midland Power Plant would have been extremely difficult.

^{148/} 1970 NPS, p. II-1-56.

^{149/} Ibid.

^{150/} Ibid.

^{151/} Ibid.

^{152/} Ibid., p. II-1-47, See Section V 6(C) 4 for full analysis of ECAR.

Physically, the unit is an integral part of an interconnected interdependent generation and transmission system. Due to its large size, the nuclear plant often requires bulk power facilities of interconnected systems to be modified throughout, in order to accommodate increased power flows. Organizationally and economically, the unit frequently reflects the planning of a multisystem group. Consequently the capacity and output rights to the unit will be shared in bulk power markets.

e. Utilization of Modern Technology Associated with Nuclear Power Plants Cannot Be Enjoyed Without Access to Coordination

On an individual basis few very large electric systems appear able to utilize large-scale generation and transmission. Most systems must be able to join a coordinating group large enough to take full advantage of the efficient generating units and extra-high-voltage transmission.^{153/}

As previously indicated, large utilities have engaged in extensive coordination. Large private utilities dominate the membership of most power pools. In the absence of formal pools, bilateral agreements among large private and public systems are the coordination mechanism.

^{153/} 1970 NPS, pp. I-17-1, 27.

Specifically with regard to utilization of nuclear technology, nuclear power plant applicants are prime examples of such large systems. To date, all applicants, with the exception of four members of joint ventures, rank among the largest fifty electric utilities in the country. Not even the largest applicants thus far subject to review have undertaken to develop nuclear capacity without being involved in sophisticated coordination arrangements with neighboring systems. Each is either a member of a formal power pool or a partner in a series of bilateral arrangements which enable cooperative support to gain maximum benefits from the proposed new generating facilities.

Small systems operate in isolation and thus are precluded from installing large nuclear units.^{154/} In 1968 approximately 30 percent of all systems having less than 25 megawatts of peak-hour demand were electrically isolated from major transmission networks.^{155/} Only about 10 percent of the systems with annual peak demands of 500 MW or less participated in coordination agreements with other firms.^{156/} Thirty-one firms with generation capacity of 500 MW or less were members of formal power pools.^{157/}

^{154/} 1970 NPS, p. I-17-29.

^{155/} *Ibid.*, p. I-17-27.

^{156/} *Ibid.*, p. I-17-29.

^{157/} *Ibid.*, p. I-17-27.

Without access to coordination on a large scale the small system cannot gain the benefits of modern technology and the economies of nuclear power. Substantial obstacles confront the efforts of a small system, or group of small systems to enter into nuclear generation on an isolated basis. The typical small firm will seldom be able to achieve the gigantic level of investment required to place a large, economic, nuclear facility in operation. Cost projections for nuclear stations are larger than \$1 billion per station, which exceeds the total electric plant investment of all but the top 30 systems in the nation. If a group of small systems attempt to overcome this capital entry barrier by combining their financial resources and engaging in coordinated development, they still must either obtain the use of extra-high-voltage transmission lines in their area or construct their own transmission.

The owner of existing transmission, typically a dominant large private utility, may refuse to provide transmission service. Attempts to construct large-capacity transmission will likely be foreclosed by environmental and esthetic considerations, if not by additional high capital requirements. Even if the group surmounts these obstacles the relatively small scale of the pooling group will seldom economically justify the installation of the large nuclear units. That is, the group may be forced to carry substantial reserve capacity and may lack a market for all of the unit's output.

f. Structural Implications of Modern Technology

The advantages of intersystem coordination and efficiencies associated with the installation of large scale generation and transmission equipment will intensify existing trends toward consolidation of industry ownership. Earlier note was taken that between 1962 and 1968 a substantial number of firms disappeared from the industry and a large number exited from generation and became solely distributors. The Federal Power Commission concluded that "...these trends can be expected to continue as the growing scale of generation and transmission facilities requires increasingly large capital investments".^{158/}

Because technological improvements have progressively widened the cost gap between small scale and large scale generation and transmission "most of the smaller electric systems which generate the bulk of their electric requirements are at a relatively greater economic disadvantage than they were during the 1950's and the early 1960's".^{159/} This disadvantage will likely continue to grow in view of the prospects of higher fossil-fuel prices. Without coordination opportunities systems with generation capacity will experience higher bulk power costs and inferior reliability.^{160/}

^{158/} 1970 NPS, p. I-2-8.

^{159/} Ibid., p. I-17-27.

^{160/} Ibid., p. I-17-28.

Additionally, the lack of coordination opportunities affect the economic alternatives that an unintegrated electric energy distributor may consider when planning for future bulk power supply needs. Just as technical change has made it more difficult for smaller generating entities to continue on an integrated basis, these same changes have made it more difficult for wholesale customers to seriously consider backward integration into generation as a viable alternative to wholesale purchase. Without an opportunity for intersystem coordination entry into bulk power supply is economically inefficient.

The impact of modern technology fosters greater pressures for increased concentration and reduced diversity in the electric utility industry. Small generating firms, will find it less economical to continue on that basis in the absence of coordination; retail distributors will similarly be foreclosed by lack of coordination opportunities from constructing their own power supply system. Consequently, control of industry generation and transmission resources will be in the hands of the large interconnected utilities. The competitive effects of an increase in concentration and a reduction of diversity are discussed in the following section.

B. ISSUES OF COMPETITION AS THEY SPECIFICALLY RELATE TO THE ELECTRIC POWER INDUSTRY

1. Organizational Diversity and Yardstick Competition

Although utilities do engage in direct wholesale and retail competition, analysts also focus on competition that is indirect in nature. It rests in the rivalry of organizations which permit a varied testing of marketing, management, and technological concepts. The actions of diverse organizations provide a basis for comparisons of relative performance. Through diversity, benchmark or yardstick comparisons can be made.

One commentator on antitrust issues in the electric power industry, has concluded that prospective benefits of yardstick comparisons flowing from organizational diversity provide the most persuasive justification for the application of antitrust policy in the electric utility industry.

Companies are perhaps most fearful of this kind of competition because it may have the greatest impact upon regulatory control. Today, with the growing interdependence of systems and with many of them purchasing their power needs, the yardstick concept may have lost much of its usefulness unless the utility has access to economically-priced power, either by membership in a power pool or as a result of competition in the sale of wholesale power.

To illustrate, assume that a municipal system is buying all or most of its power from a neighboring private system. There exists between the two an indirect, but very real competition to serve their

respective areas since the state commission or the voting public might well decide to allow the system that furnished the cheapest power to serve both areas. Unless the municipality has access to alternative sources of economical power, either by joining a pool to build large, efficient generating plants or by having access to alternative wholesale sources, the neighboring system can virtually control the performance of the municipal system through its control over the wholesale price of power. Of course, the Federal Power Commission can regulate the wholesale rate to eliminate this control, but to say that such regulation is sufficient is either to reject the yardstick concept or to argue in a circle since a regulated price cannot be used as a yardstick to measure the effectiveness of regulation. Such control by selling systems is probably very common and very effective, primarily because of the almost universal control over transmission by the dominant selling system in an area. This kind of 'unfair' competition is usually directed at municipals and cooperatives but also occasionally at small private systems, particularly when the seller is seeking to absorb the smaller system by merger. 161/

Yardstick competition has received explicit consideration in antitrust proceedings involving electric utilities. In Municipal Electric Ass'n. v. S.E.C.^{162/} yardstick competition was discussed as an important issue. Yardstick competition was also viewed as significant in the American Electric Power case. ^{163/}

^{161/} James E. Meeks, "Concentration in the Electric Power Industry: The impact of Antitrust Policy." Columbia Law Review, Vol. 72, pp. 77-8.

^{162/} 413 F. 2d 1052 (D.C. Cir. 1969).

^{163/} In the Matter of American Electric Power, Inc., Initial Decision dated July 20, 1973, p. 117 (hereafter cited as AEP).

The initial decision, which denied the proposed merger noted that "...for yardstick comparisons to be meaningful and effective as a competitive tool it is essential that a sufficient number of utilities be available for comparison purposes."^{164/} However, yardstick comparisons between an integrated utility and its wholesale customers have little validity when the wholesale customers do not have access to alternative power sources. Only if utilities have access to power supplies on equal terms are yardstick comparisons meaningful.

In addition to impairing yardstick competition, lack of access to the use of large-scale nuclear generation and HV transmission restricts wholesale and retail competition in the traditional sense. Several examples of wholesale competition among suppliers to serve municipal distribution systems were discussed in the AEP proceeding.^{165/} In U.S. v. Florida Power Corp.,^{166/} the Department of Justice and two Florida utilities entered into a consent decree which terminated a division of markets agreement which restricted wholesale competition. In addition to wholesale competition, there exists retail competition for industrial and fringe area loads. The Otter Tail case represents a situation in which a dominant electric utility attempted to restrict municipal competition from developing in an area which was formerly served by the dominant system.^{167/}

^{164/} AEP, p. 117.

^{165/} Ibid., pp. 105-106.

^{166/} U.S. v. Florida Power Corp. and Tampa Elec. Co., 1971 Trade Cases, 73, 637. (N.D. Fla. 1971).

^{167/} Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973).

Thus within a relevant market we have the potential for real competition as well as yardstick competition.

2. Competition Can be Maintained Through the Availability of Access to Nuclear Facilities and Related Modern Technologies

The technological forces at work in the electric utility industry threaten to bring about a restructuring of the industry which will result in economic concentration and reduced competition. As a result, competition that exists will be significantly diminished.

However, technological pressures can be accommodated without substantive changes in the structure of the industry. The 1964 National Power Survey, recognized that economy and reliability were compatible with independent and pluralistic ownership, and urged that this mix be sustained:

The industry's pluralistic institutional structure, while perhaps inhibiting coordinated operations, has proven a powerful competitive stimulus to management improvement and cost reduction. The Nation's 3,600 separate electric power enterprises are operated by a great diversity of agencies, some investor-owned, others owned by cities, States, counties, public utility districts and cooperatives, as well as by the Federal Government. Together, they provide this country with a system of power supply which at the retail level is generally responsive to local needs and local control. However, the large number of separate systems coupled with rivalries and controversies between segments of the industry has frequently resulted in economically meaningless boundaries for utility system planning and operation which undoubtedly cost the power consumers of this country millions of dollars every year in wasted opportunities for cost reduction. These boundaries can be transcended without losing the benefits of the existing pluralistic institutional structure if all segments of the industry, and

all the individual systems within each segment, would realize that their ideological differences are no bar to working together in establishing stronger regional and interregional power pools. To do so would strengthen all and diminish none.... 168/

The compatibility of pluralistic ownership or organizational diversity with the attainment of economies of scale was reiterated in the 1970 National Power Survey:

The electric utility industry can achieve full coordination, without altering its pluralistic character, by coordinating the planning, construction, and operating activities of all utility groups in areas with loads of sufficient size to realize all the potential benefits of modern technology, and by strengthening generation and transmission facilities as necessary for assuring adequacy and reliability of power supply. Certainly, from both the resource conservation and economy of service view points, coordination among all of the utilities within the respective regions should be a major objective. 169/

Technical change has fostered pressures for increased consolidation in the electric utility industry. Efficient bulk power supply dictates that generation and transmission capacity be concentrated in large units. However, utilities may obtain the benefits of technical change (including nuclear power) through coordination of operations and additions to generation and transmission resources. In this manner, the opportunity

168/ 1964 NPS, p. I-4,5.

169/ 1970 NPS, p. I-17-29.

for organizational diversity and the maintenance of viable competition will remain.

Similarly, to overcome the consolidation pressures of nuclear technology, the opportunities for intersystem coordinating arrangements, such as those available to Consumers Power Company, must become accessible to all electric utilities if the benefits of nuclear power are to be more widely dispersed.

The next section analyzes the competitive situation in Consumers' service area, focusing on the role intersystem coordinating arrangements play in providing the Applicant with a competitive advantage over its neighboring systems.

C. THE APPLICANT - CONSUMERS POWER COMPANY

Consumers Power Company is a combination utility producing and selling both gas and electric service.^{170/} As an electric utility it ranks among the top 25 electric systems in the nation measured in KWH sales. In 1972 Consumers provided over 22,000,000 MWH to over one million customers located in the lower peninsula of the State of Michigan. Consumers' electric system is completely integrated and is represented by a mixture of generation, transmission and distribution facilities designed to provide economical and reliable electric power. The company's generation facilities total 4286 MW and

includes 2974 MW in fossil fuel generation; 656 MW generated by nuclear fuel; 522 MW generated by gas turbines and diesel; and 134 MW derived from hydro and pump storage generation. These generation plants are interconnected by an extensive transmission system consisting of approximately 8,000 circuit miles ranging from 23,000 to 345,000 volts. Approximately half of the company's transmission consists of high voltage transmission of 138 KV and above, and it is the only system in its service area which owns extra high voltage transmission of 345 KV. Moreover, the company is presently planning to construct several miles of 765 KV transmission. In 1972 Consumers served a peak load of approximately 4000 MW and earned over \$400 million in electric revenues.^{171/}

^{170/} See also description in Part III A.1.

^{171/} Consumers Power Co., 1972 Annual Report; Electric World Directory of Electric Utilities, 81st Edition; ECAR Rept. to F.P.C., April 1973, Vol. I, "Load Projections and Resource Planning". FPC Map, "Principle Electric Facilities in the U.S." 1972.

1. Electric Systems in Competition with the Applicant

There are 25 other electric systems located within Consumers' service area ^{172/} including 21 municipal systems, two cooperatively owned systems, and two privately-owned systems. Compared to Consumers these systems are relatively small. The largest among them, the City of Lansing, with generation of 458 MW and a peak load of 325 MW is less than 10 percent the size of Consumers. Even when combined, these systems account for less than 20 percent of both the generation capability and the KWH sales in the applicant's service area. Moreover, many of the systems own no transmission lines and all of the extra high voltage transmission is owned by Consumers. ^{173/} However, under the present circumstances these systems are severely limited in their opportunities to benefit from what modern technology offers systems such as Consumers.

^{172/} As defined by the Federal Power Commission, a utility's service area is the "territory in which a utility system is required or has the right to supply or make available electric service to ultimate consumers." (Glossary of Important Power and Rate Terms, Abbreviations, and Units of Measurement, 1963 prepared under direction of Inter-Agency Committee on Water Resources, promulgated by the FPC). Consumers, for example, plans its future generation and transmission requirements on the projected load growth in its service area. See, Coordinated Planning and Development--Michigan Pools, p. G-4; Coordinated Planning and Development, "MIIO" Pool, (Michigan, Indiana, Illinois, Ohio) p. I-3; Summary of a meeting of the Michigan Pool and the Michigan Public Service Commission, Lansing, Michigan, March 10, 1972, See also N.P.S., at II-2-104 and II-2-107.

^{173/} Describing the objectives of the Michigan Pool, Consumers explained that the agreement "... does not in any sense represent a merging of the two companies. Each company will continue to be responsible for the service and service policies in the area it serves." Memorandum concerning the Electric Power Pooling Program of Consumers Power Company and The Detroit Edison Company, prepared for the Michigan Congressional Delegation.

These smaller systems have limited opportunities because of: (1) their relatively small sizes and (2) their inability to gain access to the necessary transmission facilities which would allow coordinating arrangements either among themselves or with systems already enjoying the benefits of modern technology. To overcome the disadvantage of small size several small systems have joined together to form the Michigan Municipals and Cooperatives Power Pool (MMCPP). But even by combining their non-coincident peaks, these systems account for a load of less than 300 MW, far below the minimum efficient size of a nuclear unit. Thus, their prospects of attaining direct benefits from nuclear power in the near future are remote. However, even when their loads reach a point where it is feasible for MMCPP to plan and operate their own nuclear facility they will still need to coordinate with Consumers because of the need to utilize its transmission lines. It would be neither economical nor in the public interest to otherwise duplicate transmission lines.

2. Consumers' Interconnections with other Major Systems

Consumers early in its development noted the need to interconnect with other systems. Since its first interconnection with Detroit Edison in 1928, Consumers has continually sought arrangements which would allow the company to take advantage of the latest available technology. At first these arrangements consisted of single line interconnections which increased reliability by providing for emergency and surplus energy transactions. But as developments in transmission technology increased the capabilities of the lines it was clear that in addition to emergency and

economy energy transactions, arrangements which provided for reserve sharing, maintenance, and short-term power would lessen the amount of additional generating capability that was needed. Coordination increases reliability while at the same time reduces costs. Utilities have found it necessary to expand their coordinating efforts to fully exploit the savings promised by modern technology. As technology continues to provide opportunities for increasing reliability and reducing cost, these latest developments "... will not preclude the continued interchange of emergency short term, diversity and economy power between systems."^{174/} These ancillary arrangements are more important than ever in providing utilities access to the promised benefits of modern technology.

3. The Michigan Pool

Consumers' first inter-system interconnection with Detroit Edison was a 138 KV tie for the purpose of exchanging emergency and surplus power. Other interconnections were added in 1949 and again in 1952, but coordination developed to the point where the companies agreed to share reserves, and operate in parallel. In 1962 the two companies signed an Electric Power Pooling Agreement which provided for pooled operations, coordination of planning, and the joint construction of electric generating and transmitting facilities. The formal agreement served to emphasize that in the long run interconnections were vital for efficient operations:

^{174/} NPS - II-2-23.

"The plan is simply the extension of a long-standing endeavor on the part of both Detroit Edison and Consumers Power to achieve the lowest possible operating and capital costs..... Broadly, purposes of the plan are:

- . To perpetuate economy and dependability in production and transmission of electric power
- . To facilitate supplying emergency power as needed in cases of storm damage or other disruption
- . To advance the art and science of interconnection through further integration of the existing Michigan state-wide electric transmission network." 175/

In 1966 Consumers became a party to two separate agreements which provided increased opportunities for assuring the delivery of reliable and low-cost power. Joining Detroit Edison, which has had an interconnection with the Hydro-Electric Power Commission of Ontario since 1953, Consumers agreed to provide emergency assistance, exchange surplus energy, and also to coordinate reserves, maintenance, and development.

In that same year Consumers and Detroit Edison representing the Michigan Pool signed an interconnection agreement with its neighboring utilities including American Electric Power, Commonwealth Edison Company, Northern Indiana Public Service Company, and the Toledo Edison Company. 176/ A three-year study concluded that two extra high voltage lines of 345 KV would be necessary to achieve the maximum benefits to all participants. The benefits expected by Consumers as a result of this agreement was summarized

175/ Memorandum concerning the Electric Power Pooling Program of Consumers Power Company and the Detroit Edison Company, prepared for the Michigan Congressional Delegation.

176/ "MII0" Pool Agreement, Supra, at note 172 .

in a petition to the Michigan Public Service Commission as follows:

- "(a) The proposed agreements will permit a saving on the part of the petitioners of substantial amounts of invested capital in fixed assets;
- (b) They will assure a supply of electric energy during periods of emergency on the systems of the petitioners;
- (c) They will permit the interchange of economy energy to the mutual benefit of the interconnected utilities;
- (d) They will provide a source of reliable bulk power supply when needed by the petitioners;
- (e) They will permit the saving on the part of the petitioners of substantial operating costs annually;
- (f) They will permit coordination of the scheduled maintenance of large generating units of the petitioners; and
- (g) They will permit the utilization of time-zone and seasonal diversity." 177/

4. ECAR

In pursuit of further coordination Consumers became a party to the East Central Reliability Coordination Agreement (ECAR) in 1967. Formed to further augment the bulk power supply reliability in the East Central Region, ECAR is one of the 9 major regional electric utility organizations which on June 1, 1968 established the National Electric Reliability Council (NERC).^{178/} One of the primary purposes of NERC is to encourage and assist the development of interregional reliability arrangements among the regional organizations or their members. ECAR members have entered into inter-area

177/In the Matter of the Petition of Consumers Power Company, the Detroit Edison Company and Indiana and Michigan Electric Company, for approval of proposed agreements for the purpose of establishing certain inter-connecting services and transactions, Before the Michigan Public Service Commission, March 10, 1966.

178/"National Electric Reliability Council Agreement, Dated as of June 1, 1968 as amended on January 21, 1970, August 5, 1970, and July 19, 1972..

reliability coordination agreements with the four regional organizations contiguous to ECAR, namely, Mid-Atlantic Area Coordination Group (MAAC); Southeastern Electric Reliability Council (SERC); Mid-America Interpool Network (MAIN); and Northeast Power Coordinating Council (NPCC). In addition the Michigan Companies (Consumers Power Co. and Detroit Edison Co.) are interconnected with Ontario Hydro, which in turn is a member of NPCC. ^{179/}

While neither ECAR nor NERC are responsible for the day-to-day operation of power systems, they do develop policies, procedures, and criteria that allow a review of the bulk power supply plans of their members, simulate systems' performance, coordinate maintenance, provide spinning reserve requirements for each system, and improve communication facilities between and among the systems. ^{180/}

In addition to the technological improvements in generation and transmission electric utilities have explored new methods of inter-system operation to enhance coordination. An example is the Michigan Pool's \$3.6 million control center, one of the most advanced facilities of its kind in the world.

^{179/} East Central Area Reliability Coordination Agreements, dated August 1, 1967 and Supplemental Agreements, dated October 20, 1967 and April 7, 1970.

^{180/} NPS II-2-51.

D. The Relationship Between the Nuclear Facility and the Situation Inconsistent with the Antitrust Laws ("NEXUS")

The improvements in coordination and the sharing of facilities mentioned in the preceding Section were the result of voluntary negotiation between ECAR and NERC members. However, in appropriate case such operational structures and agreements may be required to avoid the erosion of competition. Such arrangements and planning functions are sufficiently connected and related to the activities under the license, that the nexus is established.

In the Louisiana Power and Light Memo and Order^{181/} the Commission required that a "meaningful nexus" must be shown between the situation alleged to be inconsistent with the antitrust laws and the "activities" under the proposed license. Since this proceeding is a case of first impression, the staff intends to give close attention to the nexus requirement. ^{182/}

It is the staff's opinion that unless the alleged antitrust situation is obviously unrelated to the activities under the license

^{181/} Supra, at note 25.

^{182/} The term "nexus" refers to a "connection, tie, or link..." (Webster's New World Dictionary, Supra, at note 47). In a legal sense, nexus problems invariably refer to the degree or extent of a connection, rather than the existence of a relationship. Within the last 50 years, courts have turned away from the concept of physical connection and physical presence, looking rather to the impact or effect of a connection. CF Hanson v. Denkla 351 U.S. 235 (1958); International Shoe Comp. v. Washington 326 U.S. 310 (1945), compare Pennoyer v. Neff 195 U.S. 417 (1877); for "nexus", as a general term which is satisfied by even indirect effect, see American Refrigerator Transit Comp. v. State Tax Comm., 238 Ore. 340, 395 P. 2d. 127 (1964).

there must be an evaluation of the allegations to determine whether or not there is a situation inconsistent with the antitrust laws. Each event should be evaluated to determine whether or not it is sufficiently related to the licensed activity.

In the past, courts have addressed themselves to the issue of whether or not an alleged anticompetitive practice is related to a facility by a sufficient degree to require administrative antitrust review. In Municipal Electric Association of Massachusetts v. S.E.C. ^{183/} the court was called on to evaluate an S.E.C. order approving the acquisition of stock in two nuclear power plants. The complainants were a group of municipals who asserted that this acquisition would lead to an increase in the concentration of low cost power. They alleged that such concentration was in contravention to the antitrust laws, and that the S.E.C. was in error for not considering this alleged anticompetitive effect. In addition to increased concentration, the municipals brought to the attention of the court the fact that this facility, were it to be owned and operated by the large utilities in the region, would become a vehicle for foreclosing a number of development possibilities which the municipals were entitled to.

The holding indicates that the court found a nexus between this conduct and the proposed facility. It was concerned with the allegation that the sponsors of nuclear facilities "... are obtaining

^{183/} 413 F. 2d. 1052 (D.C. Cir. 1969).

a monopoly in New England over electric generation through systematic exclusion of municipals and other small electric distributors from 'participating in or purchase of power from' nuclear generators in New England...." 184/

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

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

184/ 413 F. 2d. at page 1059.

between said situation and the activities under the license.

The Federal Power Commission has also had the opportunity to review allegations of anticompetitive practices made by the same Massachusetts Municipals. In Municipal Electric Association of Mass. v. Federal Power Commission, ^{185/} the court affirmed action taken by the FPC in connection with an antitrust allegation made during a licensing proceeding for a hydroelectric project. The municipals alleged that the licensed facility, if constructed, would result in severe anticompetitive consequences. The FPC considered relevant to the licensing process, allegations as to whether the municipals would be discriminated against in the sale of power generated during the period before the licensees can absorb the full output of the project, whether the facility was a link in a general boycott, conducted by private power interests in New England, denying municipal power companies access to sources of bulk power and transmission facilities, and whether the municipals had been wrongfully excluded from the New England Electric Coordinating Council.

The consideration given exclusion from the Coordinating Council indicates that participation in one dominant planning group is among those events related to the facility so as to trigger antitrust review. The courts have further found a nexus exists between facilities and

^{185/} 414 F. 2d. 1206 (D.C. Cir. 1969).

conduct, regarding discriminatory interchange agreements and inter-connection agreements, ^{186/} and wheeling and coordination as a general policy in the electric utility industry. ^{187/}

Those factors that the court should consider in this case as being reasonably related to the proposed facility are then not unlike the factors that courts in the past have considered. "...[T]he requirement of reasonable nexus ... is fairly implied in the jurisprudence. Development of the requirement must await consideration in the first instance by the agency involved, and an analysis of the factual context." ^{188/} Consequently, a technical analysis of the impact of nuclear power in the Consumers System is the next factor for consideration.

E. The Impact of Nuclear Power On Consumers' System

Several of the coordinating arrangements discussed in Section C were essential prerequisites to the introduction of the Midland units into Consumers' system. The addition of a 1,000 MW nuclear unit can have a significant effect on the reserve requirement of a system ^{189/} and accordingly involves an analysis of the system.

^{186/} Gainsville v. Florida Power Corporation, 402 U.S. 515 (1971); Gulf States Utilities v. F.P.C. 411 U.S. 747 (1973).

^{187/} Other Tail, supra, at note 22.

^{188/} City of Lafayette, La. va. F.P.C. 454 F. 2d 941, 953, (D.C. Cir, 1971). aff'd sub nom. Gulf States Utilities v. F.P.C., 411 U.S. 747 (1973).

^{189/} See p. 55 above for a discussion of the relationship between unit size, outage rate, and reserve requirement.

Long before the Midland plant will be put into service, its integration into Consumers' system had already influenced the location and use of the company's 345 KV lines which will eventually be connected with the Midland Plant. Approximately 85 percent of the nearly three hundred mile network will have been in operation by the time the Midland plant is completed. Most of these transmission lines which were designed around the Palisades plant, Consumers' second nuclear plant has been in operation since the end of 1971. The majority of the additions to the transmission network will be used to integrate the Ludington Pumped Storage plant ^{190/} and the Midland plants. ^{191/} This example of system planning which involved three new technologies, extra-high-voltage transmission, pumped storage and nuclear generation, clearly demonstrates the integrated role nuclear power plays in Consumers' system. ^{192/} It is furthermore a delineation of the nexus which exists between the system and the nuclear facility.

Consumers has substantial investments in nuclear power. It first introduced nuclear energy into its system when its Big Rock

^{190/} The Ludington Facility shows further relationship between the nuclear plant and Consumers' system. It is the largest facility of its kind in the world. Consumers' Annual Report, 1972, p. 6.

^{191/} Derived from Consumers' Federal Power Commission Form 12 for the year ending December 31, 1971; and "System Performance and Transmission Planning," Vol. II, A Report by ECAR to the Federal Power Commission, April 1972.

^{192/} According to Consumers president the company operates an "integrated system" and would not consider operating Midland in isolation from the rest of the company's system. In the Matter of Consumers Pwr. Co., Docket 50-329A, 50-330A, Deposition of Alphonse H. Aymond, May 15, 1973, Tr. 164-65, 1970.

Point plant went into service in 1965. While this first nuclear venture was only 70 MW in size, Consumers was planning for the integration of its 700 MW Palisades plant and its 1300 MW Midland plant. Further, by the time that Palisades was put into operation at the end of 1971, plans for the 1300 MW Quanicassee plant were announced. Accordingly, Consumers is relying extensively on nuclear power to meet its growing requirements. It is expected that by 1980, 25 percent of the company's generating capacity will be in nuclear power. ^{193/}

There are several reasons why nuclear power is preferred as an energy source by Consumers. These include the assured availability of nuclear support, its environmental qualities, and its low cost of operation. For example, there are no hydroelectric sites available to Consumers which are capable of developing 1300 MW of generation, gas is not available, and it is doubtful that large quantities of oil would be available to fuel large base load plants such as Midland. Coal is available, but the costs of controlling its environmental impact do not make it an attractive alternative:

The ash collected from a coal fired plant would amount to about one-half million tons per year. The problems of disposing of this quantity of ash in an environmental acceptable way are naturally formidable Sulfur dioxide would also be emitted in large quantities from a coal-fired installation.... There would also be emissions of other contaminants such as

^{193/} Load Projection and Resource Planning, ECAR Vol. 1, April, 1973.

nitrogen oxides and trace elements that ... represent atmospheric contamination that would not exist with a nuclear plant With the impact of environmental considerations and new Federal, state and local standards for industry emissions, coal faces further market uncertainty. 194/

According to Consumers, nuclear power is the only practical large-scale energy source among the several new developing technologies. "Pumped storage plants can operate for only a portion of a day and rely on base load units for pumping power during off-peak hours..."; "coal liquefaction ... is at least a decade away and cannot be seriously considered for production of synthetic petroleum in significant quantities in the short term..."; and "oil shale may provide substantial quantities of oil in the long term, but certainly not in the next decade." 195/

Thus, access to nuclear power presents the most promising source of low-cost and reliable energy currently available. In the words of its chairman, Consumers "will receive some much needed energy for [its] integrated system at a price that ... will be as favorable as any alternative that would be available to [it]...." 196/

F. Interface Between Nuclear Power and Coordinating Arrangements

Implicit in the goals expressed in the various coordinating

194/ Moreover, "although fossil units have a better heat rate than nuclear units, the higher fuel cost results in higher overall costs." Consumers Power Company, Supplemental Environmental Report, pp. 5.2-1, -8.

195/ Ibid.

196/ In the Matter of Consumers Power Company, Dkt. 50-329A, 50-330A, Deposition of Alphonse H. Aymond, May 15, 1973, Tr. 164-65.

agreements discussed previously is that economies and increased reliability in the production of electric power can be achieved by installing the largest available generating units and coordinating their operation with the existing system. ^{197/} As noted above, only large systems can absorb the output of even the minimum efficient size nuclear unit. Thus, these interconnected arrangements permit the most economical utilization of such a unit's output. In addition to the inherent economies of a large scale unit, interconnected systems may also lower their costs by reducing the required amount of generating and spinning reserves while increasing reliability. Thus, Consumers need only carry 17 percent of its generating capacity in reserves compared to the 39 percent reserves Lansing carries, or the 100 percent reserves of Traverse City.

These latter systems will continue to suffer economic penalties as long as they do not have the opportunity to achieve access to nuclear

^{197/} This is specifically expressed in a Consumers memorandum prepared for the Michigan congressional delegation: "The program will require substantial construction of new extra-high-voltage transmission lines as the demand for electric energy continues to increase.... The agreement [between Consumers Power and Detroit Edison] also calls for coordinated planning in the location and construction of new electric generating facilities..... It is important that new generators installed to serve the entire coordinated system can be large in size - and hence most highly efficient." Supra, at note 175.

generating units and ancillary arrangements which makes such access economically meaningful. As a result, individual systems will become either partial or full requirements customers of Consumers rather than continue to generate their own power. While these choices by individual systems, based on the limited options available, may prove to be the proper ones on economic grounds alone, the totality of these decisions will have far-reaching consequences on the organizational diversity of the electric systems in Consumers' service area. The loss of such diversity would severely limit the competition among Consumers and its neighboring systems.

As discussed above the introduction of nuclear power has increased the pressures toward centralization in the electric utility industry. Thus, if nuclear power is to benefit as many electric systems as possible, nuclear power applicants will have to accommodate their systems operations. How some accommodations have taken place between large and small electric systems in various parts of the country is analyzed in the following pages.

G. INTERSYSTEM COORDINATING ARRANGEMENTS INCORPORATING SMALLER ELECTRIC SYSTEM IN OTHER AREAS OF THE U.S.

The intersystem coordinating arrangements and power supply options denied to the smaller electric systems in Consumers' service area are made available to some smaller systems in other parts of the country through a variety of coordinating organizations. These organizations vary from informal planning groups such as the Western Energy Supply and Transmission Associates (WEST) consisting of 23 utilities in nine southwestern states to a tightly coordinated operating group such as the New England Power Pool Agreement (NEPOOL) which is opened to all electric systems in that section of the country.

The degree of intersystem coordinating arrangements among other groups of utilities range somewhere between the WEST group and the more formal NEPOOL group and include such groups as the Northwest Power Pool (NWPP) and the Pennsylvania, New Jersey, Maryland Interconnection (PJM).

While the actual method by which these coordinating organizations implement their intersystem arrangements differ, they all offer a wide degree of latitude regarding the ability of smaller systems to benefit from intersystem coordinating arrangements through direct or indirect membership.

Typical of the organizational diversity of the members of such coordinating organization are the members of WEST^{198/} who consist of 12 privately owned companies; five municipal systems; three generation

^{198/} NPS III-3-193.

and transmission cooperatives; two irrigation districts and one state authority. Also typical is the range in the sizes of the various systems which make up these coordinating groups. For example, the largest system in WEST, Southern California Edison Company, owns generation of 11211 MW and 8600 miles of transmission. In contrast, Plains Electric Generation & Transmission Cooperative, Inc. owns generation of 50 MW and less than 500 miles of transmission. Various members of WEST have installed jointly two 750 MW coal fired units at Four Corners, New Mexico and plan to construct jointly two 750 MW coal fired units at Mohave on Colorado River plus hundreds of miles of high voltage transmission.

Several members of WEST are also undertaking a nuclear generation program in which joint ownership of nuclear units is anticipated. Application for the program's first nuclear station, Arizona Nuclear Power Project, is expected by May 1974. As of this time, the joint owners of the plant will include four large, private utilities in Arizona and New Mexico and the Salt River Project, a state agency located in Arizona, but ownership participation in this plant has also been offered to smaller utilities in Arizona and New Mexico.

The Northwest Power Pool^{199/} (NWPP) was one of the earliest interconnected groups formed. Organized in the early 1940s by six systems located in Utah, Montana, Idaho, Washington, Oregon and Canada,

^{199/} NPS-1970-III-3-189, 190.

it has expanded to include 18 systems, two of which are in Canada. As in WEST membership it consists of both privately run and publicly owned systems, including municipal, Federal, and Provincial. As an outgrowth of these pool operations other coordinating groups have been formed, such as the Pacific Northwest Coordination Agreement (PNCA). This group coordinates the electric power needs for over 15 systems including the City of Seattle which owns generation of 1500 MW and over 600 miles of transmission, and the Bonneville Power Administration (BPA) which owns no generation, but serves as the marketing agency for over 100 electric systems.

Still another coordination group in the northwest is Washington Public Power Supply System (WPPSS) which consists of 18 public utilities districts and three municipal utilities. WPPSS has undertaken to rely heavily on nuclear generation to solve its future power needs and it has permitted numerous utilities in the region participation in its planned nuclear units. In conjunction with BPA, Nuclear Project No. 1 will involve 104 publicly and cooperatively-owned firms and five private ^{200/} utilities. Though the output of Nuclear Project No. 3 will be shared only by WPPSS members and four private firms, Nuclear Project No. 2 ^{201/} will have 95 publicly and consumer-owned participants. ^{202/}

^{200/} See prospectus dated Feb. 8, 1973 of WPPSS for issuance of \$25,000,000 of 4.25% notes to finance Nuclear Project No. 1.

^{201/} See question 12 of Information Requested by the Attorney General for Antitrust review furnished with the WPPSS Application for Nuclear Project No. 1.

^{202/} See Application of Washington Public Power Supply System for a 103 Utilization Permit Docket No. 50-397 for Nuclear Project No. 1 at Hanford, Washington.

While only a few of the several coordinating groups in the West region have been mentioned, it is apparent that much consideration has been given to the problem of how to allow small systems to participate in economies inherent in large-scale power developments. In addition to the example of the WPPSS projects, it has been suggested by utilities of that area that "[s]mall systems may also be able to act in concert to install large units...and may find it desirable to participate in wheeling arrangements to deliver power from such jointly sponsored plants without themselves constructing transmission lines."^{203/} This type of wheeling arrangement is presently being implemented by members of the Rocky Mountain Power Pool, and avoids the duplication of facilities and land use. According to these electric systems "Coordinated Planning and development among large and small systems on an area-wide basis provides the best assurance of optimum resource development."^{204/}

Another group which is heavily dedicated to nuclear power is the PJM group, consisting of six systems with operations in Maryland, Pennsylvania, New Jersey, Delaware, District of Columbia, and part of Virginia. Presently PJM members are operating two nuclear plants and are planning to operate an additional ten plants in the near future. In addition the group is constructing 600 miles of 500 KV transmission which will interconnect these generating plants.^{205/}

^{203/} NPS III-3-196.

^{204/} Ibid.

^{205/} NPS II-1-77 through 81.

The PJM agreement is flexible in that it permits member companies to include other systems which it operates in parallel with as part of the power pool. Thus, three privately owned companies have access to the pool through separate agreements with two of the signatories, and have become satellite members. Two publicly owned systems are also satellite members. One is the City of Dover, Delaware which is interconnected with Delmarva Power and Light, which in turn has an agreement with Philadelphia Electric Co., a PJM signatory. The other is the City of Vineland, New Jersey, which is interconnected with Atlantic City Electric Co. which is interconnected with Philadelphia Electric Co., a PJM member. These municipal systems benefit from coordinated planning and operation of the PJM Pool, by accepting requirements for pool participation similar to the requirements imposed on other pool members.^{206/}

Another group of utility systems, far removed from the group in the northwest, has organized a highly formalized power pool open to all utilities, just as is the WPPSS-Bonneville arrangement. The New England Power Pool Agreement (NEPOOL) permits membership to any electric system located in the six-state New England area, regardless of size, type of ownership, or function.^{207/} As a result the approximately 40 members of NEPOOL greatly vary by type. Some members own no generation, others have less than 100 MW, while still other systems are completely integrated controlling 2000 MW of generation and hundreds of miles of high voltage transmission.

^{206/} Ibid.

^{207/} NPS II-1-73-75.

Despite the organizational diversity of NEPOOL members, the planning of pool facilities is completely coordinated. Thus, all members are cognizant of existing generation and transmission capacities within their area and can plan to meet their loads more efficiently. Many modern base-load generating units, are jointly owned including seven nuclear projects. Additionally, if any member has excess capacity it must be offered on a unit basis to members with capacity deficiencies. Operations are also coordinated so that power is provided to any member system during periods of emergency and maintenance.

H. INTERSYSTEM COORDINATION IS LACKING AMONG SYSTEMS IN CONSUMERS' SERVICE AREA

Organizationally diversified systems benefit from improved power supply reliability and economy by coordinating planning and operations. This is the case whether a system is a member of a tightly knit group such as NEPOOL or a member of PNCA whose members are not bound by contractual agreements. What does bind PNCA members is the cooperation, typical of all the groups examined above. Such cooperation is not found among the electric systems in Consumers' service area, but in fact the opposite appears true, i.e., Consumers has used its dominant position to deny meaningful coordination to systems within its service area.

For example, during the period 1963-64 the Wolverine and Northern Michigan cooperatives, two important members of MMCPP, were unable to negotiate a contract for emergency power with Consumers, the only system owning high voltage transmission with which members of MMCPP can readily

coordinate. Consumers alleged it did not see any benefits it could derive from such an arrangement and instead offered through a supplier-customer relationship to supply all of the load growth requirements of the pool. Negotiations resumed in 1969, but again were not fruitful.^{208/}

Some systems have been successful in negotiating contracts with Consumers for emergency power, but these contracts include restrictive provisions which effectively limit the small systems' alternatives, and are not typical of contracts among the members of other coordinating groups. For example, in its contracts to provide emergency power to the Cities of Lansing and Holland, Consumers does not undertake to obtain power from other interconnected utilities if it does not, by itself, have excess power to meet either city's emergency.

While Lansing's ability to obtain emergency power is severely limited, a grave concern in most circumstances, Lansing has been able to install larger and more efficient units than the other smaller systems in Consumers service area. The City of Holland is not as fortunate. Under the provisions of its contract, the formula which determines the amount of emergency power Holland will receive is designed to provide for a decrease in emergency power as Holland increases the size of its largest unit. In effect, Holland is limited to installing units of approximately the size of its second largest unit,^{209/} presently 22 MW in size, and is prevented from installing larger, more efficient, generating units.

^{208/} Advice Letter from Attorney General, To Bertram H. Schur, from Richard McLaran, June 21, 1971.

^{209/} Staff analysis - See agreement dated 11/15/67 between Consumers and the City of Holland, Supplement A thereto.

In other instances where smaller systems do not have contracts for emergency power with Consumers it appears that they are planning to meet emergencies through the more costly device of a partial requirements rate schedule in lieu of emergency assistance arrangements that are common to intersystem coordination. The partial requirement contracts which Consumers has with its customers contains a demand and energy rate block structure and an adjustment for fuel and taxes. Demand is determined as the maximum use during any 15-minute period of the month and is subject to a 60% eleven-month ratchet but not less than a stated minimum KVA. This demand related ratchet provision has a significant impact on future planning for new generation and in effect discourages the installation of any unit (or a larger unit if generation already exists) since the penalty caused by an outage of a unit must be paid for an eleven-month period.^{210/} This demand related ratchet also forces the smaller system to maintain larger generating reserves than necessary.

VII. REMEDY AND CONCLUSION

The staff believes that the information and materials submitted herein lead to several conclusions. First, a situation inconsistent with the antitrust laws is being maintained by the Consumers Power Company by its overall dominance in the relevant service area. 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

^{210/} See Consumer's wholesale contract rate for resale service: partial purchase (Contract Rate PP-1).

licenses. Finally, since the activity under the license would maintain the situation inconsistent with the antitrust laws, it is appropriate that license conditions be imposed.

Under similar circumstances where it has been necessary to remedy an antitrust situation, applicants have agreed to the imposition of conditions in their nuclear facility construction permits. To date, eight applicants have agreed to accept conditions recommended by either the Department of Justice or the Regulatory Staff. These conditions fall into eleven categories and include remedies which require the applicant to (a) interconnect its system with others; (b) coordinate in the operation and planning of its system with all qualified entities which request such coordination; (c) allow participation in the nuclear facility, and (d) provide for the sale and exchange of various bulk power services. The following table identifies each of the applicants and characterizes the type of conditions which are to be included in the licenses when issued.

CHARACTERIZATION OF LICENSE CONDITIONS

FACILITY

- | | | |
|-----|--|--|
| 1. | Negotiate on an equal basis, the sale and purchase of unit power, deficiency power, emergency power, or economy energy..... | Crystal River, Waterford, Harris, Fermi, North Anna |
| 2. | Interconnect with and coordinate reserves on equalized percent basis rather than largest single-unit, if it is economically and technically feasible | Crystal River, Waterford, Harris, Fermi, North Anna, Grand Gulf |
| 3. | Coordinate planning of new generating and transmission facilities | Crystal River, Waterford, Harris, North Anna, Grand Gulf |
| 4. | Facilitate the exchange of bulk power by transmission over company system between or among two or more entities with which it is interconnected | Crystal River, Harris, North Anna, Grand Gulf |
| 5. | Agree to negotiate the joint ownership of future nuclear or fossil units, provided a timely request is made to the company ... | Bailly, Harris, North Anna, Grand Gulf |
| 6. | Provide credit for customer construction, ownership and maintenance of subtransmission, or generation facilities | Bailly, LaSalle |
| 7. | Sell bulk power at voltages and delivery points mutually agreeable, if economically and technically feasible | Waterford, North Anna, Grand Gulf |
| 8. | Eliminate restrictive policy provisions in wholesale bulk power sale and resale contracts with other entities | Crystal River, Waterford, Harris, Fermi, LaSalle |
| 9. | Agree to sponsor municipal and coop membership in power pool(s) in which the company is a member | Waterford, Fermi |
| 10. | Arbitrate terms of sale of bulk power | Waterford, Grand Gulf |
| 11. | Implement conditions in a manner consistent with Federal Power Commission and all other agencies which have jurisdiction over such matters | Crystal River, Bailly, Waterford, Harris, North Anna, Grand Gulf |

APPLICANTS:	CRYSTAL RIVER: Florida Power Corp.	BAILLY: Northern Indiana Public Service Co.
	WATERFORD: Louisiana Power & Light Co.	HARRIS: Carolina Power & Light Co.
	FERMI: Detroit Edison Co.	NORTH ANNA: Virginia Electric Power Co.
	LA SALLE: Commonwealth Edison Co.	GRAND GULF: Mississippi Power & Light Co.

If a situation inconsistent with the antitrust laws is found as a result of this proceeding and it is related to the activities under the license, section 105c(6) of the Atomic Energy Act authorizes the Commission to refuse a license or to condition a license so as to effect appropriate relief within the provisions of section 105c. The staff will propose in its closing brief specific recommendations as to the appropriate relief. At this time, however, the staff would like to offer the Board its views on the general nature of the remedies which the staff seeks.

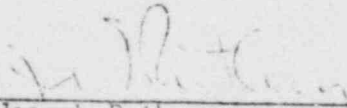
These remedies will be directed to the dominance possessed by the applicant with respect to other electric systems within the applicant's service area and the use of this dominant position to deny access to modern technology, including nuclear power, with the resulting economies of scale. Consequently, remedies will be aimed at neutralizing the applicant's dominance through appropriate license conditions.

Accordingly, the Regulatory Staff will propose license conditions designed to accomplish the following types of relief: first, access to the applicant's nuclear generation; second, access to intersystem coordinating arrangements with respect to reserve sharing, power supply during emergency and maintenance periods, and transmission service; third, access to intersystem arrangements for coordinated planning and operation, and other appropriate relief which will offer other electric systems within the area access to alternative bulk power supply arrangements. The availability of alternatives will provide an opportunity

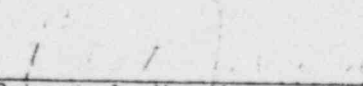
to improve the performance of existing generation, and to put together an improved lower-cost aggregate of sources and types of supply when additional resources are needed. The ability for all electric systems to participate in the benefits of technological change will thus provide an opportunity for higher levels of performance by all industry members, a goal which the antitrust laws were designed to preserve.

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

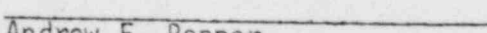
Respectfully submitted,



Joseph Rutberg
Antitrust Counsel for
AEC Regulatory Staff



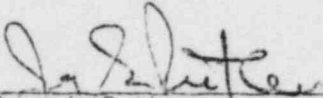
Robert J. Verdisco
Counsel for AEC
Regulatory Staff



Andrew F. Popper
Counsel for AEC
Regulatory Staff

Dated at Bethesda, Maryland
this 20th day of November 1973.

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



Joseph Rutberg
Antitrust Counsel for
AEC Regulatory Staff