UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-329A
Consumers Power Company	)	50-330A
Midland Plant (Units 1 and 2)	)	

REPLY BRIEF OF MICHIGAN CITIES AND COOPERATIVES

November 25, 1974

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INTRODUCTION AND SUMMARY OF ARGUMENT

As is set forth in their Initial Brief, the intervening Cities and Cooperatives*/ have requested three main items of relief: (1) direct access to Midland; (2) non-discriminatory access to transmission services and (3) non-discriminatory access to coordination. Interveners further request the right to purchase wholesale power on a full requirements or partial requirements basis from Consumers Power Company ("Consumers Power" or "Applicant") on non-discriminatory terms and conditions. Implicit is that Consumers Power not frustrate interveners' obtaining access to the above entitlements. Consumers Power Company does not appear to seriously

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*/ The intervening municipalities and cooperatives are as follows: the Cities of Coldwater, Grand Haven, Holland, Traverse City and Zeeland, the Northern Michigan Electric Cooperative, the Wolverine Electric Cooperative, and the Michigan Municipal Electric Association. Hereinafter, they are referred to collectively as "Munis-Coops" or "Interveners". For convenience parties' Initial Briefs filed October 8, 1974, are referred to as such.

contest its obligation to sell wholesale power. */

In pressing their entitlements to non-discriminatory access to the Midland [illegible]s, transmission facilities and coordination, interveners desire to be treated as utilities--not merely as customers. The types of transactions interveners request (e.g., access to large base load nuclear facilities, transmission and coordination) are available to dominant utilities and are consistent with industry practice.

The key word is "non-discrimination." Interveners request no power service for "free" unless such service is provided without cost to others; they ask for no special advantage. They do maintain that Consumers Power Company's policies applied to them should be consistent with its policies to larger companies, such as Detroit Edison Company.

The market structure of the power industry is such that wholesale power transactions take place within coordination or pooling agreements. The interveners did not create this market structure. They should not be excluded from it. Lafayette, L.A.

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*/ To the extent the Department of Justice contends that Consumers Power Company does not have such obligation, interveners disagree. Apart from the antitrust laws, utilities have inherent obligations to provide service. Department of Justice Initial Brief, p. 174, 189-190. The Company would appear to agree. Finding of fact, 4.02 Initial Brief, p. 215. In any event, it the question is in issue, it is only tangential and is not necessary to decision.

v. AEC, 454 F2d 941, 952 (CADC, 1971), affirmed sub. nom. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973).

In one sense, Consumers Power Company's Initial Brief is encouraging to interveners. Unlike at the beginning of this case, Consumers Power Company appears to recognize other utilities' general rights of access to nuclear generation, transmission, and coordination. While attempting to preserve its legal position, in essence the Company asks the Board to adopt its "Policy Statement." (8106-8109). However, that statement is so qualified that it leaves the Company with almost complete control of whether it will enter into particular transactions. Stripped of its verbiage, Consumers Power Company argues that the Atomic Energy Commission has no authority to limit its activities because it is a regulated utility. Its corollary proposition is that the antitrust laws have limited impact on regulated entities. */

In its brief, the Company attributes to the Federal Power Commission, the Michigan Public Service Commission, or the Courts all authority over its activities related to the relief sought by the Department of Justice, the Atomic Energy Commission Regulatory

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*/ This position is notably contary to Justice Department policy. Appendix A. The fact of grants of monopoly privilege should make a firm more subject to antitrust structures -- not less.

Staff and Munis-Coops. According to the Company, since each action it has taken to deny Munis-Coops' rights would have been directly or tacitly approved by one or the other agencies, the Company further argues that in any event, relief should properly come from one of those other forums. Compare, International Tele. & Tel. Corp. v. General Tele. & Electronics Corp., 351 F. Supp. 1153, 1178-1183, 1198, 1203 (D. Haw 1972), appeal docketed Ca 9, 73-1513, cited by Applicant on pp. 85, 96.

Second, the Company argues that there is no requirement that the AEC grant relief, since Munis-Coops can obtain wholesale power through self-generation or wholesale power purchases.

Finally, it argues that, since any violations of the antitrust laws it may have committed would have occurred regardless of its planned operations of Midland, there is no basis for granting relief as a condition to building or operating the units.

We shall discuss these arguments herein. To avoid undue repetition of the initial briefs, interveners do not respond to all of the various sub-arguments and defenses the Company makes. However, at the outset we think it important to focus that despite its many and varied claims, the Company is saying not much more than that other agencies should regulate Consumers Power Company and that this Board has no substantial role.

The Atomic Energy Commission has clear authority to cor-

rect "situations inconsistent" with the antitrust laws that may be "maintained" through the use of Midland Power, even though the source of the original actions deemed to be inconsistent with the antitrust laws was not the building of the units to be licensed. The clear language of the statute states that, if a "situation inconsistent" will be maintained by the construction or operations of the plant, the Commission has the authority to order relief. The statutory use of the word "maintain" in addition to the word "create" recognizes that an anti-competitive situation may pre-exist the building of units to be licensed. It ill-behooves Consumers Power Company to claim that this Board can ignore an anti-competitive market structure because such a market structure would exist without reference to nuclear power. What the Company is asking the Board, an agency of the United States Government, to do is to ignore violations of the law, even in the face of a specific statute requiring the Board to exercise an antitrust review. Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942). */

The attempt to avoid corrections of wrongs by the Atomic Energy Commission because some other agency may also have the power

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*/ The unstated thesis that nuclear generation is unimportant or incidental must be rejected. This is especially so considering that Consumers Power Co. thinks it sufficiently important to apply for a license and to make heavy nuclear investments.

of correction ignores the responsibilities given the AEC by Congress and, we submit, also the public interest. Any action any agency may take with regard to Consumers Power Company may conflict with an action another agency may take, but absent a showing of clear likelihood of conflict and of public harm from a participating agency's action, a regulated entity should not be able to defeat legitimate control over admitted public utility functions because some other agency could also correct the wrong. Compare Colorado Antidiscrimination Commission v. Continental Airlines Co., 372 U.S. 714 (1963). In arguing potential jurisdictional conflicts where no specific existing conflicts have been shown, Consumers Power Company merely attempts to put forward a ghost of interagency conflict to its tangible advantage. Panhandle Eastern Pipeline v. Indiana Public Service Commission, 332 U.S. 507 (1947).

The interveners agree that the Board might properly move cautiously before upsetting an industry market structure. However, here neither the interveners, the Department of Justice or the Atomic Energy Commission Regulatory Staff request fundamental changes in the means by which wholesale or retail power is bought, sold or exchanged. They do not seek a "breaking-up" of Consumers Power Company or a termination of existing pooling arrangements. What they request is that the same arrangements that already take place between Consumers Power Company and other

larger entities be made available to smaller ones.

Nor do interveners, the Department of Justice or the Atomic Energy Commission regulatory staff request the establishment of specific rates, terms and conditions as a result of this proceeding. We propose no interchange contracts for the Board's approval. What is proposed is that standards be established to assure that contracts that may be entered into or rates that may be applied for do not violate the basic premises of the Nation's antitrust laws.

To conclude, Consumers Power Company asserts the lack of authority of this Commission. The Atomic Energy Commission has the authority to license the construction of major facilities whose existence will affect contracts, costs and operating relationships far into the future. The technological fact of increased scale associated with nuclear plants cannot fail to have an effect on the way the electric power industry operates. At the same time the Commission has the direct responsibility to examine competitive impacts. Thus, the Commission combines a focus on both technology and economics.

This hearing demonstrates the ability of the Commission to investigate major problems. Consumers Power Company's narrow reading of the Commission's authority asks the Commission to avoid its responsibility. Compare Calvert Cliffs' Coordinating Committee v. AEC, 449 F2d 1109 (CADC, 1971). Indeed, acceptance of the Com-

pany's thesis that other agencies should resolve antitrust problems would leave the Commission with hardly any antitrust review function, making the passage of the antitrust review section of the Atomic Energy Act a practical nullity and these hearings an exercise in futility. */

In the above context, we are pleased by the suggestion that after the Board's decision establishing basic principles, the parties again attempt to specifically resolve problems relating to the license, if they have not been resolved before-hand. As they stated in their Initial Brief, the interveners have always believed and hoped that this case could be resolved through negotiations. Since the rights claimed by interveners largely involve access to non-discriminatory coordination, which the industry and regulatory agencies have found to be generally mutually beneficial, interveners believe that agreement on technical matters is probable, providing that the Board confirms the existence of the rights of access and coordination for the smaller systems.

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*/ Cf. Carolina Power & Light Co. v. South Carolina Public Service Authority, 20 F. Supp. 854, 860-861 (E.D.S.C., 1937), affirmed, 94 F. 2d 520 (CA 4, 1938), cert. denied, 304 U.S. 578.

> ". . . The trial took eight solid weeks and it is common sense that in such a long, expensive, and extended trial every necessary issue should be raised and disposed of".

I. RELIEF SHOULD NOT BE DENIED MERELY BECAUSE SOME OTHER AGENCY COULD CONCEIVABLY GRANT SIMILAR RELIEF.

A. The Plain Language of Section 205 of the Atomic Energy Act Gives the Commission a Responsibility to Assure that the Licensing of Nuclear Power Facilities Does Not Aid Consumer Power Company in Creating or Maintaining a Situation Inconsistent with the Antitrust Laws

Consumers Power Company argues that each agency has an exclusive jurisdiction over problems entrusted to it and that no other agency should even potentially encroach. The Company's partially stated premises appear to be (1) that it is more proper in the scheme of things for other agencies to deal with the antitrust problems that have been discussed in this case; (2) that other agencies have more expertise than the Commission in the matters at hand; (3) that possible conflicts between agencies may result unless the Commission stays its hand.

Consumers Power Company contends that the regulatory structure of the electric power industry requires that other agencies exclusively deal with antitrust problems. But see California v. FPC, 369 U.S. 482 (1962); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). To be sure, the Company does not make this argument as explicitly as is set forth here. However, the Company attempts to establish that any relief they may be granted involves subject matters with which other agencies, principally the FPC, are concerned. It then contends that these other

agencies--and not the AEC--should contend with problems concerning such jurisdiction.

Consumers Power Company is of course correct that there are potentially over-lapping jurisdictions between this Commission and the Federal Power Commission as well as between courts and other regulatory authorities, i.e., that there may be areas of concurrent jurisdiction. Considering that Consumers Power Company is a regulated entity, this could hardly fail to be the case. Since to a large extent the Federal Power Commission (or the Michigan Public Service Commission) reviews the rates and/or contractual arrangements between Consumers Power Company and other utilities or customers, obviously any significant action this agency takes may have some impact on actions which other agencies might also take. */

What Consumers Power Company fails to consider is that the Atomic Energy Act, including its 1970 amendments, gives the Atomic Energy Commission an extremely broad statutory responsibility

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*/ Note, for example, the Mobile-Sierra doctrine, under which the FPC is limited by private contracts in raising rates otherwise subject to its jurisdiction. United Gas Improvement Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). The fact that FPC jurisdiction may be limited by actions external to itself, such as private contracts, is consistent with the fact that a company might be limited by a court injunction or an AEC license condition from making an anticompetitive filing.

to assure that the licensing of nuclear plants neither creates or maintains an anti-competitive situation in the electric power industry. This fact remains despite the Company's selective and often misleading reliance on legislative history. Certainly, in passing the Atomic Energy Act and its 1970 amendments, Congress was not unaware that Consumers Power Company and other utilities similarly situated were regulated. The Company should not be able to use the fact that it is regulated as an excuse to avoid further Congressionally required regulation.

At the risk of some repetition of their Initial Brief, Munis-Coops again stress the language of the Atomic Energy Act, which provides the Commission's mandate. The Act requires the Commission to investigate whether activites under the license will create or maintain a situation inconsistent with the anti-trust law. It further grants a broad, uncircumscribed power to deny a license or condition it to avoid that situation. As we point out in our Initial Brief, similar conditioning power has been held to give agencies a broad authority and responsibility to assure that licensed or certified activities do not violate public interest standards. Initial Brief, Section III.B., pp. 86-91.

Congress focused in the Commission the power of scrutiny over two broad aspects of the electric power industry. First, is the impact of nuclear power itself and the second is the resultant

application of the antitrust laws. Since, as Consumers Power Company readily concedes, nuclear generation is anticipated to provide a chief means of providing for base load capacity and energy, the construction and operation of nuclear plants will have a pervasive impact on the Company's operations. In this situation, the Board can hardly avoid scrutinizing the contractual relationships which underlie the generation and sale of electric power and energy. To do less would allow nuclear energy to provide the means under which existing anti-competitive market structures could be maintained despite the specific Congressional requirement to the contrary.

Consumers Power Company attempts to argue that because the alleged anti-competitive market structure existed independently of the nuclear facilities to be licensed, the Commission's authority to order relief is limited. However, as we discuss in Section III, infra, the Atomic Energy Act specifically provides a conditioning power, if the activities under the license will maintain a situation inconsistent with the antitrust laws. Thus, the situation need not be "created" by the nuclear facilities to be licensed. If these facilities are the means whereby the status quo will be maintained or aggravated, Consumers Power Company is not granted a license to continue antitrust violations because such violations might also be continued by different means. Thus, the Atomic

Energy Act negates the premise that remedies for anti-competitive impacts resulting from nuclear licensing shall be the exclusive domain of other agencies.

Consumers Power Company argues that the regulatory authority of the Federal Power Commission forecloses action by the AEC. It further argues that, where the FPC may not have authority, this would be a result of a purposeful Congressional decision. To the contrary, Otter Tail makes clear that despite its jurisdiction over interconnections, application of the anti-trust laws was not to be left to the FPC's exclusive domain and that the Federal Power Act supports applying a policy of strict antitrust application. It further makes clear that whatever authority may not have been given that commission is not to be read as creating an exemption for the electric power industry to application of the antitrust laws:

> "Otter Tail contends that by reason of the Federal Power Act it is not subject to anti-trust regulation with respect to its refusal to deal. We disagree with that position.
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> "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provision. 'United States v. Philadelphia National Bank, 374 U.S. 321, 350-351, 10 L. Ed. 2d 915, 83 S. Ct. 715. See also Silver v. New York Stock Exchange, 373 U.S. 341, 357-361, 10 L. Ed. 2d. 389, 83 S. Ct. 1246'. Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.

"In California v. FPC, 369 U.S. 482, 489, 8 L. Ed. 2d 54, 82 S. Ct. 901, the Court held that approval of an acquisition of the assets of the Natural Gas Company by the Federal Power Commission pursuant to Section 7 of the Natural Gas Act 'would be no bar to [an] antitrust suit'. Under Section 7, the standard for approving such acquisitions is 'public convenience and necessity'. Although the impact on competition is relevant to the Commission determination, the Court noted there was 'no pervasive regulatory scheme' including the antitrust law that had been entrusted to the Commission. id, at 485, 8 L. Ed. 2d 54. Similarly, in United States v. Radio Corp. of America, 358 U.S. 334, 3 L. Ed. 2d. 354, 79 S. Ct. 457, the Court held that an exchange of radio stations that had been approved by the Federal Communications Commission as in the "public interest" was subject to attack in an antitrust proceeding.

"The District Court below determined that Otter Tail's consistent refusal to wholesale wheel power to its municipal customers constituted illegal monopolization. Otter Tail maintains here that its refusals to deal should be immune from antitrust prosecution because the Federal Power Commission has the authority to compel involuntary interconnections of power pursuant to §202(b) of the Federal Power Act. The essential thrust of §202, however, is to encourage voluntary interconnections of power. See S Rep No. 621 74th Cong, 1st Sess, 19-20, 48-49; HR Rep No. 1318, 74th Cong, 1st Sess, 8. Only if a power company refuses to interconnect voluntarily may the Federal Power Commission subject to limitations unrelated to antitrust considerations, order the interconnection. The standard which governs its decision is whether such action is "necessary or appropriate in the public interest". Although antitrust considerations may be relevant, they are not determinative.

"There is nothing in the legislative history which reveals a purpose to insulate electric power com-

panys from the operation of the antitrust laws. To the contrary the history of Part II of the Federal Power Act indicates an over-riding policy of maintaining competition to the maximum extent possible consistent with the public interest. As originally conceived Part II would have included a "common carrier" provision making it the duty of every public utility to . . . transmit energy for any person upon reasonable request . . ." In addition it would have impowered the Federal Power Commission to order wheeling if it found such action to be necessary or desirable in the public interest. HR 5423, 74th Cong, 1st Sess; S 1725, 74th Cong, 1st Sess. These provisions were eliminated to preserve the "voluntary action of the utility". S.Rep. No. 621, 74th Cong. 1st Sess. 19.

"It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and regulatory corrosion, courts must be hesitant that Congress intended to over-ride the fundamental National policies embodied in the antitrust laws. See United States v. Radio Corp. of America, supra, at 351, 3 L Ed 2d 354. This is particularly true in this instance because Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with "restraint of free and independent competition"among public utilities holding companies. See, 15 U.S.C. Section 79(a) (2) [15 U.S.C. S. 79(b) (2)].

"Thus, there is no basis for including the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations." Otter Tail Power Co. v. United States, 410 U.S. 366, 372-374 (1973) (emphasis supplied).

We have quoted at great length from the Supreme Court's recent decision in Otter Tail above -- and have appended Otter Tail's Brief to the Surpeme Court to our Initial Brief to this Board -- because Consumers Power Arguments are those of Otter Tail. These have been foreclosed by the Supreme Court in Otter Tail.

In this proceeding where, similar to a court, much of the Commission's authority stems from antitrust statutes--indeed, where Congress specifically gave the Commission authority referenced to those statutes--Consumers Power Company cannot claim a want of authority based upon Federal Power Commission power--or lack of it. */

A basic difficulty with the Company's position is that it fails to allow for the possibility of concurrent jurisdictions. Compare Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); United States v. Philadelphia National Bank, 374 U.S. 321, 350 (1963). Under the Company's thesis, the Public Utility Holding Company Act, 15 U.S.C. 79 et seq., which would impose far more stringent relief than is here considered, would be a nullity

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*/ Consumers Power Company creates the perfect "Catch 22". Heller, Catch 22. If the Federal Power Commission has jurisdiction to grant a specific remedy, then the Atomic Energy Commission should avoid involvement. If the Federal Power Commission does not have authority, then Congress intended the Company be left alone.

since the FPC would also have jurisdiction over the concerned utilities. Similarly, price control regulations, minimum wage standards, franchise limitations, securities regulations, or any other government restraints could be questioned, since the FPC or MPSC could take actions to remedy wrongs in each of these areas.

As the Court in IT & T Corp. stated, */ with regard to similar primary jurisdiction claims:

> "It may well be that the FCC is given the power to consider and evaluate the relationship between communications, common carriers and suppliers of their equipment against the services rendered. The Court in United States v. RCA, supra, note 31, by dicta has indicated the FCC has such power in a horizontal acquisition situation. 358 U.S. at 351-352, 79 S.Ct. 457, 3 L.Ed.2d 354 [**/]. The FCC may even have all the duty so to act, as it self-servingly maintains, but, in reality, if it be a duty, that obligation has been but niggardly, laggardly, and tardily exercised... ." 351 F Supp at 1181; 1180-1182, 1198-1203.

The Federal Power Commission may be more intimately involved in day to day regulation of terms and conditions of sale of wholesale power than this Commission, although it might be noted that its primary focus has been on natural gas regulation. Regardless, the patterns established at the point of installation of major facilities likely have far greater long-term

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*/ International Tel. & Tel. Corp. v. General Tel. Corp., 351 F Supp 1153, (D. Haw, 1972), appeal docketed, No. 73-1513 (Ca 9, 1973).

**/ 358 U.S. 334 (1959).

consequences than the regulation of specific transactions. California v. FPC, supra; Northern Natural Gas Co. v. FPC, 399 F2d 953 (CADC, 1968). They establish long-term cost consequences, and often the basic framework which agreements will take. Thus, the licensing authority is not to be treated as an ancillary power. The granting of a license to build facilities commits the future course of regulation and the conduct of regulated companies as well.

In any event, the specter of conflict between the Atomic Energy Commission and the Federal Power Commission is largely, if not totally, artificial. Like the Atomic Energy Commission, the Federal Power Commission is under a mandate to consider antitrust policies. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973). Review of Federal Power Commission and Atomic Energy Commission actions is by the same courts. There is no showing why the FPC is likely to make determinations different from those of the AEC.

B. There Is No Showing that the Federal Power Commission Has Greater Expertise to Establish Antitrust Standards than the Atomic Energy Commission

Consumers Power Company argues that any antitrust remedies that may be necessary should be left to the Federal Power Commission (or anybody else besides the AEC), implying that that Commission has greater expertise than does the AEC. E.g., Applicant's Brief, pp 42-43, 113-125. In its arguments Consumers

Power Company overlooks that "expertise" tends to follow jurisdiction and is not the exclusive province of one group of men. Agencies tend to have greater or lesser ability to deal with specific problems depending upon their current staffing, budget considerations, and the way they happen to view particular priorities and particular problems at particular times. It is not profound to note that the effectiveness of individual agencies varies with their administration. Consumers Power Company's arguments concerning Federal Power Commission "expertise" provide Company statements that the AEC should avoid its jurisdiction to regulate Consumers Power Company rather than a detailed analysis of why the Federal Power Commission is in fact better equipped to deal with the problems raised by interveners and others in this proceeding. */ Indeed, if Consumers Power Company is correct, we wonder what the proceeding was about.

Moreover, in considering industry expertise, Consumers Power Company ignores that for practical purposes regulated entities generally come to administrative agencies with already formulated rate proposals or interchange transactions. At that time the industry structure, including the configuration of gener-

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*/ Compare the specific analysis of other agencies' exercise of jurisdiction by the Court in International Tel. & Tel. Corp., supra, 351 F. Supp. at 1178-1183, 1198-1203.

ation, is a given. Thus, when a particular FPC rate filing is made, or contract filed, generation and transmission will usually have already been built pursuant to already existing contractual arrangements. Even in terms of licensing applications or initial interchange transactions, the form of agreements will usually have been entered into. Proposals are initiated within a given industry structure and will generally be approved if not inconsistent on their face with public interest standards.

Granted, there is often the opportunity for intervention and hearing. However, this does not negate that proposals are industry initiated and that the prime focus of the FPC is not upon antitrust matters.

It is in light of considerations such as these, that the law has long distinguished between Commission established rates or terms or conditions of service and Company initiated ones. Arizona Grocery Co. v. Archison, T & SFR Co., 284 U.S. 370 (1932); United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

In a similar vein Consumers Power Company alludes to potential conflicts between this agency's exercise of authority and the Federal Power Commission. What conflicts? The Federal Power Commission has no jurisdiction to ignore the antitrust laws. More-

over, even if there were variations in particular decisional results, compared with the generation capacity and sales of the major utilities, the granting of access and coordination rights to interveners can hardly upset the economic structure or well-being of the industry. */

Finally, Consumers Power Company argues that relief should not be granted here because the same interveners raised questions of antitrust policy before the FPC. **/ However, before the Federal Power Commission, it argues against that Commission's ability to resolve similar antitrust matters as it has before the Atomic Energy Commission.

In their since settled rate case, Consumers Power Company's wholesale customers attempted to argue that the "just and reasonable" rate ***/ had to consider elements of what a competitive rate would be (e.g., the impact of denying interveners

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*/ While Consumers Power Company raises the specter of jurisdictional conflict and of economic harm to itself from the proposals of interveners and others, it should be remembered that the total present requirements of the named interveners are hardly more than 350 mws. Ex. 1001, pp. 10-11. The total sales of purchased power by Consumers Power Co. to non-generating systems are an equivalent amount. Thus, under any circumstances, what is at issue is availability of participation, access to transmission and coordination for relatively small amounts of power, whose impact on Consumers Power Company even if "under-priced" should not be significant.

**/ Actually, for what it is worth, there were different, although somewhat overlapping, parties in the varying proceedings, for example, in the cases before the FPC, Grand Haven, Holland and Zeeland, three of the six named interveners, were not parties.

***/ Federal Power Act, §205, 16 U.S.C. 824(d).

their access to transmission and coordination, thus forcing them to purchase from Consumers Power). Consumers Power Company, supported by Staff, argued that except for the price squeeze issue, */ there was no "nexus" between the issues sought to be raised by interveners and a rate adjudication. Consumers Power Company, FPC Docket No. E-7803, "Consumers' Opposition to Intervenors' 'Application for Subpoena Duces Tecum and Production of Documentary Evidence'," pp. 26-33. The Presiding Law Judge agreed. Consumers Power Company, Docket No. E-7803, Ruling on Application of Intervenor Cities of Bay City, et al, for Subpoena Duces Tecum (August 9, 1973). The interveners appealed the FPC ruling. **/ Consumers Power Company replied:

> "Interveners persist in their failure to establish requisit nexus between the subject matter of the documents sought and the questions at issue here. This is, of course, a rate proceeding under Section 205 of the Federal Power Act...
>
> "Similarly, the interconnection and coordination arrangements of which the Interveners complain largely relate to system reliability and have no

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*/ The FPC has since determined it has no jurisdiction concerning price squeezes, but this issue is subject to court review. See references in Munis-Coops' Initial Brief, pp. 96-97.

**/ Consumers Power Company, Docket No. E-7803, "Emergency Appeal from Presiding Administrative Law Judge's Denial of 'Cities Co-ops' Application for Subpoena Duces Tecum (August 23, 1973).

> reasonable relationship to the rates and conditions under which Consumers serves its wholesale customers. To be sure, under Section 202 of the Federal Power Act, the Commission is charged with encouraging voluntary interconnection, and it may compel interconnection under certain prescribed circumstances. See Gainesville Utilities Department, the Florida Power Corporation, 1227 (1968). But, according to the Act, disputes about interconnection terms are to be heard in proceedings under Section 202 (b), not in Section 205 rate proceedings, as the Interveners suggest."

The Company added:

> "As the Supreme Court recently affirmed, 'although the impact on competition is relevant to the Commission determination...there (is) no pervasive regulatory scheme including the antitrust laws that has been entrusted to the Commission.'" Otter Tail v. United States, 93 S. Ct. 1022, 1027 (1973), "California v. FPC, 369 US 482, 485 (1962)", Consumers Power Company, FPC Docket No. E-7803, "Answer Appeal, pgs. 10-16, 11, 15, 13 (September 12, 1973).

When some parties attempted to raise the issue*/ in the context of a joint Consumers Power Company-Detroit Edison Company application to build interconnection facilities with the Hydro-Electric Power Commission of Ontarioa, Consumers Power Company cited this Commission's September 28, 1973, Waterford decision **/ (incorrectly, we believe) to support lack of "nexus" between the Consumers Power

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*/ Coldwater, Marshall, Niles, Hillsdale and Petosky.

**/ In the Matter of the Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), Docket No. 50-382A (September 28, 1973).

Company-Detroit Edison application and the claims of interveners. Consumers Power Company added:

> "While the Atomic Energy Act, of course, differs from the Federal Power Act, the concept of 'nexus' in the context of antitrust review is similar. There must be some relationship between the agency's statutory area of responsibility and alleged antitrust activity. In this case, the 'activity under the license' so to speak, is the fourth interconnection between applicants and Ontario-Hydro. Cities have not pleaded any relationship between such interconnection and the complained anti-competitive practices. No nexus, therefore, has been shown. In these circumstances, intervention should be denied. The Detroit Edison Company, Consumers Power Company, et al, FPC Docket No. E-7206, et al. "Answer of Consumers Power Company and Detroit Edison Company to Cities Protest Petition to Intervene and Request for Hearing" pp. 9-10 (October 17, 1973).

We do not argue the correctiveness of the Federal Power Commission rulings. The point is, however, that at the same time the Company disputes the Atomic Energy Commission's jurisdiction to condition the Midland license on grounds of FPC authority and lack of requisite "nexus", it argues exactly the same thing before the Federal Power Commission. It ought not to be able to resist antitrust review in both places.

If violations of antitrust policy are shown, there is no reason why an agency having jurisdiction over the matter cannot and should not rectify the matter. Certainly, the claim that another agency might also correct a wrong is not a basis for the agency's denying relief.

C. The Public Interest Supports the Relief Being Sought by Interveners

While Consumers Power Company makes jurisdictional and "nexus" arguments to the effect that other agencies should deal with the antitrust problems raised by interveners, its real claim is, of course, that the relief requested should not be granted anywhere. The Company fails to show the public interest in acceding to its arguments.

To be sure, the Company does make the argument that competition is not always desirable. Brief, pp. 43-50. However, neither interveners--nor to our knowledge any other parties--request a change in existing rules concerning competition over areas where such arguments might be factually supportable. For example, without taking a position on the merits of state law restricting retail competition, Munis-Coops do not ask the Board to make any ruling concerning it. */ And the Company does not establish why the relief sought by interveners cannot be disposed of by the AEC. Moreover, in a fundamental sense, in arguing the lack

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*/ The Courts have clearly affirmed the necessity of wholesale competition. E.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); Richmond Power & Light v. FPC, 481 F2d 490 (CADC, 1973), cert. denied sub nom. Indiana & Michigan Electric Company v. Anderson Power and Light, 414 U.S. 1068 (1974); Municipal Electric Association of Massachusetts v. SEC, 413 F2d 1082 (CADC, 1968).

of desirability of additional competition, Consumers Power Company fails to come to grips with the fact that in passing the 1970 amendments Cpngress opted for competition. */ As Otter Tail determined in considering arguments similar to those made by Consumers Power Company with regards to the Federal Power Act: "To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." 410 U.S. at pp 373-374.

The relief sought by interveners includes access to the Midland Units themselves, access to transmission services and coordination on an equalized reserved basis.

Dealing with the specific relief requested, there is no showing that Munis-Coops' customers, members and citizens are

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*/ Consumers Power Company argues (Brief, pp 48-49) that in restricting the service area of the Tennessee Valley Authority, Congress "has exhibited a recognition that competition between electric suppliers may not be desirable with regard to both power service." The company cites Hardin v. Kentucky Utility Company, 390 U.S. 1 (1938). It ignores that, while there may have been reasons for limiting the service area of TVA, a large government financed project, to protect surrounding investor owned utilities, here Congress specifically determined that AEC focus should be on maintaining competition.

Hardin itself indicates that the primary interest of the statutory restriction related to retail service area. Moreover, even where statutory limitations on competition were indicated, the Supreme Court there determined that TVA could sell wholesale power to the two communities involved.

not entitled to direct access to and participation in nuclear power. They submit that, if granting relief were to have no other public benefits, providing them access to lower cost power and to environmental and conservation benefits which are predicted to result from nuclear power would justify and demand an affirmative Board order.

In addition to the benefits which would naturally flow to the ratepayers of the intervening systems, experience teaches that competition itself creates beneficial impacts. Granting direct access to the nuclear units on the part of interveners will hopefully reduce their power costs and, perhaps more importantly, allow them more certain fuel supply and more environmentally compatible generation sources than fossil fuel alternatives. To the extent that such actions further a competitive environment for wholesale power supply, all ratepayers would benefit.

Interveners also request a correction of the existing market structure to allow them transmission and coordination rights similar to those enjoyed by Consumers Power Company. Both in benefits to their ratepayers and in creating greater industry competition there is no public interest reason why Munis-Coops should not have access to alternative markets for power supply. Moreover, while Consumers Power Company argues <u>its</u> interests in denying interveners transmission access (although it would be paid for such

services), it ignores that, even if it does lose captive business, third parties would gain. There is no purpose consistent with the antitrust laws why Consumers Power Company should be able to retain wholesale business at the expense of other potentially more efficient suppliers. */

Even where interveners might have an ability to duplicate lines (But see Initial Brief, at p. 22), granting access to transmission would serve broader public purposes of avoiding the excessive cost and land use detriments associated with such duplicate transmission facilities.

Coordination is the market in which wholesale power transactions take place. Interveners should have access to that market place where power is bought and sold on equal terms to Consumers Power Company. The argument that competition may not be desirable as a generality does not justify an exclusion from those coordination rights, which represent cooperative efforts

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*/ We again note that any likely loss of wholesale power sales would tend to be minimal. Moreover, since for at least the immediate future, Consumers Power Company claims itself to be limited in its ability to finance capital construction, it is in no position to argue that it would be harmed from losing load. Brief, p. 219. References in Argument IV.C., infra. Of course, in a competitive market structure for wholesale power long range relationships would be expected to be governed by contracts, approved by the Federal Power Commission, which contracts would give it whatever protection against losing loads it may deserve.

to establish a workable wholesale power market. Consumers Power Company participates in and, indeed, helped establish this market. Thus, whatever the claimed limitations may be to competition in monopoly industries in general, Consumers Power Company advances no public interest reasons for specifically limiting the relief requested by interveners.

Not only are interveners' citizens and ratepayers entitled to access to competitive, low-cost power sources, but it should not be overlooked that the purpose of Federal regulation of the power industry, including that by the AEC, is premised upon the need for protection of the smaller utilities. Having broad service areas and hundreds of millions of dollars of existing plant investment the larger utilities have been deemed to have sufficient bargaining strength to take care of themselves. Indeed, regulation has been found warranted precisely in light of such strength. See Statement of Joseph C. Swidler, Hearings Before the Committee on Commerce, United States Senate, on S. 218, 89th Cong. 1st Sess. [Serial No. 89-38], pp. 92-93 (1965), quoted at Initial Brief, pp. 65-66. For the Atomic Energy Commission to fail to provide for the type of access that interveners seek would be to fail to protect the class for which Congress gave it specific responsibility.

Nor on the merits is there any reason why any class of customers should be deprived of direct access to nuclear development, largely developed at government expense, or to access to the broad industry pooling of power resources through coordination agreements and sharing of transmission facilities that allows for the most efficient use of power resources. Similarly, to the extent that wholesale power competition exerts cost reducing pressures, there is no reason why any customers should be deprived of the beneficial aspects of such competition.*/ Nor is there reason why all customers should not advantage from the environmental and fuel conservations aspects of coordination.

Coordination allows for the use of the most efficient source of generation at any particular time regardless of ownership. Since air and water pollution are generally caused by discharges of unburned (or not fully burned) materials, an economically inefficient unit will usually be an environmentally inefficient one for the same reason. Thus, operating efficient units creates fuel conservation and environmental benefits. Similarly, joint use of construction sites, transmission lines, etc., create obvious land use advantage.

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*/ The Company attempts to argue that competition and regulation are substitutes. The Courts and common sense hold that they are complementary--and not mutually exclusive. E.g., Northern Natural Gas Co. v. FPC, 399 F2d 953 (CADC, 1968).

Consumers Power Company does argue that granting the relief sought by interveners will result in giving them a discriminatory advantage as against other customers. E.g., Brief, p. 218. However, in doing so the Company clearly fails to separate the wholesale and retail power markets. The fact that under a competitive wholesale market structure interveners may purchase power at reduced costs compared with a Consumers Power Company retail customer creates discrimination no more than the fact that Consumers Power Company's internal wholesale costs would be less than its price for retail power. Compare United States v. Aluminum Co. of America, 148 F2d 416 (CA2, 1945).

Nuclear power on a direct ownership basis should have the result of reducing interveners' cost of wholesale power supply. However, interveners would provide for the costs relating to their ownership interest. This is all Consumers Power Company is entitled to.

There are further broad public policy arguments for this Commission's not avoiding its jurisdiction to make available the benefits of nuclear power ownership to the smaller systems within the electric power industry. To a greater or lesser extent these are reflected in the passage of the Atomic Energy Act and its 1970 amendments and in Court decisions. In addition to the immediate benefits of competition and coordination, it has

been long felt that there are political, social and economic reasons for having decentralized ownership. Justice Brandeis referred to the "curse of bigness." To the extent that opening up access aids interveners, it protects smaller entities in an industry becoming increasingly dominated by large size. Such diversity allows for more numerous voices in the power industry, diversity of decision making and potential innovation.

For example, the industry has generally maintained, perhaps correctly, that scrubbing devices do not work to eliminate sulphur pollution of the air from coal-fired generation, a proposition that interveners do not dispute. Louisville Gas & Electric Company, an independent investor-owned utility near the coal fields, with a strong interest in furthering the effectiveness of such devices, has argued contrary. The availability of Louisville to test the proposition is of public benefit. Similarly, the manager of Holland, one of the interveners, is pioneering in combining generation and waste disposal. And we would even go so far as to say that the availability of interveners to raise the types of issues raised in this proceeding--or merely to challenge claims of a dominant major utility--is of public benefit. Compare Associated Industries v. Ickes, 134 F2d 694 (CA2, 1943); International Tel. & Tel. Corp., supra, 351 F Supp at 1185-1186.

D. Consumers Power Company's Miscellaneous Limiting Arguments Against the Exercise of the AEC's Jurisdiction Provide No Reason for Failure to Condition the License

1. The approved or natural monopoly argument. Consumers Power Company makes various arguments why in view of Michigan Public Service Commission and Federal Power Commission--or other--regulation, the Company cannot be deemed to have violated the antitrust laws. It argues that the Company cannot be monopolistic in the sense of unlawful because the Michigan Public Service Commission and Federal Power Commission control its rates. Since its rates are controlled, any actions that it may have taken, it claims self-servingly, must have been lawful. It adds that it is a "natural monopoly" so that its economic success could not be contrary to antitrust policy. See generally, Initial Brief, Sections IV-V.

The fact that the Government may approve a Company action does not insulate that action from antitrust scrutiny, as Otter Tail directly held. Otter Tail Power Co. v. United States, 410 U.S. 366, 372-374. Nor to our knowledge did any other agency ever claim the authority to insulate Consumers Power Company from antitrust claims; in any event, it would not have the jurisdiction to do so. */ E.g., California v. FPC, 369 U.S. 462 (1962).

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*/ It is of interest that the Justice Department claims an urgency to prosecute antitrust violations by regulated companies despite such claims of immunization as Consumers Power Company makes here. This is required because there is monopoly power to begin with.

Consumers Power Company relies principally on United States v. Marinebank Corporation */ and Missouri Portland Cement v. Cargill, Inc. **/ to support its thesis that its monopoly has resulted from a combination of legal and economic forces and, therefore, creates no anti-competitive constraints. Brief, pp. 139-141. However, in Otter Tail, the Supreme Court specifically addressed this "natural monopoly" issue. Both Otter Tail and Gulf States, as well as a host of other cases, clearly stand for the proposition that in the wholesale power industry there is room and necessity for competition. Moreover, Marinebank Corporation and Missouri Portland Cement both involve acquisitions, which were held not to violate the Clayton Act. While Consumers Power Company attempts through such acquisition cases to justify use of the dominant power already acquired to restrict coordination and transmission and nuclear access, at most the cases cited merely state that an acquisition which does not restrain competition is not unlawful under the Clayton Act.

More specifically, Marinebank Corporation involved an acquisition by a Seattle banking system of a Spokane banking system where, due to restrictive state and federal law, there was

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*/ 94 S. Ct. 2856 (1974).

**/ 498 F2d 851 (CA2, 1974).

no realistic possibility that the Seattle bank could otherwise compete in the Spokane market. The Supreme Court held that under this legal framework there could be no substantial restraint or competition by the entry of the Seattle bank into the Spokane banking market.

In Missouri Portland Cement, a firm not producing cement and not likely to enter the cement market other than by acquisition sought to acquire the stock of an existing cement manufacturer. Judge Friendly held that under these circumstances the acquisition was lawful.

These cases would appear to be more relevant to the question whether Consumers Power Company should disgorge its past acquisitions, or perhaps to whether it has a right to retain ownership in its dominant facilities, than to the question whether it has to grant access to facilities or deal fairly with others.

Consumers Power Company further relies on United States v. Grinnell Corporation, 384 U.S. 563 (1966), principally for its thesis that since its monopoly power arises from "natural" forces, it is protected. We discuss Grinnell, infra. However, unless Consumers Power Company notices something that we do not, we fail to understand its fondness for the case. */

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*/ The case is cited at pp. 84, 112, 113, 134, 137, 155 and 156 of its Brief.

Like Consumers Power Company, Grinnell acquired monopoly power through a number of means, including restrictive agreements, acquisitions, pricing procedures and territorial agreements. The court ordered stringent relief. */

In addition to Grinnell, Consumers Power Company cites Lamb Enterprises **/ and Union Leader ***/ Corporation. Lamb Enterprises is a case where a defendant was held on the facts not to have violated the antitrust laws.

Union Leader held it a "per se" violation of the antitrust laws to promote a group boycott against a competitor in an area that could support only one newspaper, 284 F2d at 584-585.

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*/ Grinnell viewed the situation in exactly the same manner as interveners do: that relief ordered should be sufficient to remedy the problem created by the anti-competitive situation that exists.

> "We start from the premise that adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of illegal conduct, and it breaks up or renders impotent the monopoly power found to be in violation of the Act. That is the teaching of our cases, notably Schine Theatres v. United States, 334 U.S. 110, 128-129, 92 L.Ed. 1245, 1258, 68 S. Ct. 947." 384 U.S. 577.

**/ Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F2d 506 (CA6, 1972), cert. denied, 409 U.S. 1001.

***/ Union Leader Corp. v. Newspapers of New England, Inc., 284 F2d 582 (CA1, 1960), cert. denied, 365 U.S. 833 (1961).

The Court further held that discriminatory pricing to advertisers constituted "an unfair practice evincing an exclusionary intent." 284 F2d at 585-586. Likewise, Consumers Power's activities in what it terms a "natural monopoly" situation of maintenance of pool agreements that provide for preferential interchange rates and denial of access to basic facilities are equally unlawful. */

2. The tax and financing benefits. Consumers Power Company principally relies on United States v. Columbia Steel Co., 334 U.S. 495 (1948) and United States v. General Dynamics Corp., 415 U.S. 486 (1974) to support its arguments that the Commission may deny otherwise justifiable relief because of tax and financing benefits possessed by municipalities and/or cooperatives. Specifically, it cites Columbia Steel for the proposition that "evaluation of the 'strength' of the other firms in the market place [i]s identified as a necessary consideration engaging whether a company with a high market share has acquired monopoly power." Brief, at p. 126. However, the "strength" in the market place looked to in Columbia Steel was the market shares of the acquiring company in order to measure the extent of market domination and the probable effect on competition that would result from an acquisition. There is no suggestion in Columbia Steel that an otherwise unlaw-

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*/ Similar to Consumers Power Company, when its competitors were weakened, the Union Leader attempted to purchase competing newspapers.

ful merger or other predatory conduct might be approved because some potential competitors had off-setting advantages, let alone that the company could violate antitrust policy to off-set a competitor's economic strength. */

United States v. General Dynamics Corp., 415 U.S. 486 (1974) similarly approved a merger where there could be no tendency to substantially lessen competition, since a firm proposing to acquire another coal producer had virtually no uncommited coal reserves and limited capability of deep reserves mining, a capability which the acquired corporation possessed. Consumers Power Company makes no similar claim of an inability to compete because of lack of resources. Indeed, it controls the basic bulk power resources.

In essence, Consumers Power Company attempts to turn the issues in this case into a factual question of the Board's judgment of the relative future competitive abilities of itself and interveners as justifying its refusals to deal, a continued control of markets, tie-in sales and other unlawful activities. However, the cases it cites merely allow for acquisitions (not

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*/ In Columbia Steel a proposed merger was approved largely on the grounds that the acquiring and acquired companies served different markets and that, in any event, there would be a d minimus impact on competition from the merger. There is also the suggestion of a unique situation arising from government sponsoring of plant construction during World War II to serve wartime needs.

refusals to deal, discriminate, or other anti-competitive activities) in some situations by firms not having market power. In this regard, it is important to call to Consumers Power Company's attention the recent case of United States v. Topco Associates, 405 U.S. 596 (1972), in which the Supreme Court prohibited trade restraints by smaller grocery outlets so that they could successfully compete with larger chains.

Furthering competition (and access to basic facilities to allow for competition) is different from equalizing cost or price. Competition assumes that some firms will be able to sell at lower prices and some at higher prices. Thus, Consumers Power Company cannot deny interveners access to basic generation and transmission facilities or power coordination agreement because this might allow them to compete at a more favorable price. United States v. Topco Associates, Inc., supra.

We must reemphasize two further facts. First, the alleged advantages of smaller systems are vastly overstated. Consumers Power Company is among the largest corporations in the United States. Initial Brief, at p. 116. The corporate form has been found to be so advantageous to organizing production that even governments resort to it when they want to get things done. This is illustrated by New York State's various "authorities" that are currently in the news due to Governor Rockefeller's

Vice-Presidential nomination. The thought of the smaller systems taking over Consumers Power Company is unrealistic in the extreme. The converse is not.

Second, the law flatly prohibits the kind of equalization where a corporation attempts to equalize assumed advantages of a larger company. Under a mandate to apply antitrust policy, the Board should not attempt to do this by indirection. In this regard, in addition to Topco, supra, we call the Board's attention to Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939), which held that the petitioners did not even have a legal right to raise the question of the lawfulness of TVA competition. ". . . [T]he damage consequent on competition, otherwise lawful, is in such circumstances damnum absque injuria, and will not support a cause of action or a right to sue." 306 U.S. at 140. And Carolina Power & Light Co. v. South Carolina Public Service Authority, 20 F Supp 854 (EDSC, 1937), affirmed 74 F2d 520 (CA4, 1938), cert. denied, 304 U.S. 578, found:

> ". . . there is no escape from the conclusion that the competition of the finished [South Carolina Public Service Authority] plant will practically destroy the South Carolina Power Company; will seriously injure the Broad River Power Company; and will affect to a large degree the business of the Carolina Light & Power Company. That the only escape from such damaging effect, if the rates of the new project are appreciably lower than the rates of the present companies, will be a phenomenal increase in the consumption of power in

> the 200-mile area. We must, therefore . . . accept as the more probable course that the plaintiff companies are going to be seriously damaged . . ." 20 F Supp at 859.

The Court held, however:

> "This question of the destruction of business and business values by reason of change in the method of doing business is the question that every individual, firm or corporation must contemplate when he enters upon a given business. . . . Certainly, . . . it is apparent that generation and sale of electricity may be a proper activity to which municipalities may return.
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> "Investors who have in the meantime put large sums of money into privately owned properties may lose, and we may regret the loss, but they were at all times charged with the knowledge that there might come such a change in the general method of operating electric power plants." 20 F Supp at 864.

Considering that more conservative courts held lawful the potential destruction of entire businesses from the competition of Government-owned power, Consumers Power Company cannot maintain a right to off-set hypothetical advantages by limiting Muni-Coops' rights of direct access to nuclear power participation. The Atomic Energy Act clearly intends contrary. */

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*/ We reiterate that the success or lack thereof of a particular municipality, cooperative or investor-owned plant is dependent upon many factors, mainly management and service area. Thus, Consumers Power Company would agree that rural electric cooperatives' costs are about its own. Moreover, given the existence of tax benefits (as a matter of Constitutional and statutory law: See Parker v. Brown, 317 U.S. 341 (1943)). The tax deductions resulting from the investment tax credits, liberalized depreciа-

3. The Federal Trade Commission Act. As it must, Consumers Power Company admits, "One of the statutory provisions to which the AEC may refer in considering whether the activities under its licenses will create or maintain a situation inconsistent with the antitrust laws is Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45." Brief, pp. 50-51. However, it then attempts to narrow such consideration to the point of its being meaningless, arguing that the provision adds nothing to the antitrust laws, that the Commission's power is circumscribed by the Federal Trade Commission Act and, more generally, that the Commission has no independent role. Brief, pp. 50-57.

The Company's proposed limitations are inconsistent with the grant of authority by the Commission in §105(c), 42 U.S.C. §2135(a), to consider Section 5. The report of the Joint Committee on Atomic Energy states:

> "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 com-

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[Footnote continued from p. 42]

tion, etc. from the building of capital, intensive nuclear plants may improve the status of an investor-owned utility compared with a municipally- or cooperatively-owned one. The creation of tax deductions beyond revenues from the plant may affect taxes otherwise owed on other operations. This explains the low investor-owned utility effective tax rates. See Initial Brief, p. 116.

petition in commerce, and unfair and deceptive acts in commerce, are declared unlawful'." Report, Joint Committee on Atomic Energy, No. 91-1247, 91st Cong., 2d Sess., Sept. 29, 1970, p. 15 (Emphasis supplied).

Moreover, the proposed limitations are inconsistent with the Congressional policy on nuclear licensing that "the development, use, and control of atomic energy shall be directed so as to . . . strengthen free competition in private enterprise." 42 U.S.C. §2011. To carry out this and other purposes, the Congress has delegated to this Commission the authority to make policy judgments. In addition, this Commission has a special duty to "report promptly to the Attorney General any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or to tend toward the violation of any of the [antitrust laws], or to restrict free competition in private enterprise." (Emphasis supplied). The very fact that this Commission has direct jurisdiction to consider antitrust violations in connection with atomic energy licensing implies that Congress expected this Commission to acquire the expertise to determine antitrust policy in the context of licensing (or refusing to license) nuclear facilities. There is no basis for Consumers Power Company's contrived assumptions that like any court or administrative agency, the Atomic Energy Commission does not have the right and responsibility to determine the law in the first instance, including where this may

demand a creative function. Interveners' Initial Brief, III.B., pp. 86-99. Compare, cases cited therein and, e.g., Calvert Cliffs' Coordinating Committee v. AEC, 449 F2d 1109 (CADC, 1971); Greene County Planning Board v. FPC, 458 F2d 412 (CA2, 1972), cert. denied, 409 U.S. 849.

In a further attempt to narrow the scope of the Commission's authority, Applicant contends that this Commission should not construe Section 5 to extend to any practices except those explicitly found unlawful by the Federal Trade Commission.

Consumers Power ignores the fundamental purpose of Section 5 in relation to the more detailed prohibitions of the other antitrust acts:

> "Congress recognized, however, that any attempt at an exhaustive catalogue of anti-competitive practices would tempt those bent upon thwarting or circumventing the antitrust laws to adopt new and different artifices to achieve the same ends. The legislature felt, moreover, that there was need for action of an early, preventive nature, to strike down devices and schemes in their incipiency, before they became entrenched in structure and industrial concentration. . . ." Holloway v. Bristol-Myers Corp., 485 F2d 986, 990 (CADC, 1973).

Cases cited by Applicant for narrow relief largely involve notice questions not present here where the unfair methods of competition alleged interfere with exclusively private interests, requiring that private parties be advised

whether their conduct constitutes an unfair trade practice. */ Thus, the courts held that no private right of action was created by §5 since the Federal Trade Commission could establish policies under it. These would become matters of public record. However, in view of the specific statutory power given the Atomic Energy Commission to refer to §5, Applicant shows no reason to negate that power by pretending that the Atomic Energy Commission cannot independently enforce the Act. **/

The Atomic Energy Commission is specifically charged with the duty of considering antitrust laws. But beyond this, the express statutory language indicates that Congress desired that this Commission should have the power to specify practices which violate the policies of the antitrust laws. Thus, the statute uses the words "create or maintain a situation inconsistent with" rather than the word "violate."

The Federal Trade Commission Act by its terms authorizes

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*/ This is especially so after a cease and desist order is issued by the Commission.

**/ Interveners cannot understand the reliance placed upon United States v. St. Regis Paper Co., 355 F2d 688 (CA2, 1966), by Consumers Power. The case held that the Department of Justice is without power to enforce Federal Trade Commission orders without certification from the FTC. An application of the result to this Commission would leave it with no role to play concerning §5. Clearly, this is contrary to the express AEC statutory command.

and demands an exercise of jurisdiction to remedy harms connected with unfair practices. Thus, the FTC has stated that in determining whether a practice is unfair it will consider:

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. 29 Fed Reg 8355 (1964). Cited with approval, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244, n. 5 (1972)(Emphasis supplied).

The Commission should do no less. */

4. The "actual violation" argument. Consumers Power Company further interprets the Atomic Energy Act to grant severely limited Board discretion. These arguments are mainly based upon distortions of legislative history and not upon a reading of the statute. Contrary to common administrative law, the Company

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*/ The inclusion of Section 5 jurisdiction in this Commission mandate is consistent with other delegations of primary jurisdiction to federal agencies other than the FTC to consider anti-competitive practices. See, e.g., Interstate Commerce Act, 49 U.S.C. §5, Bank Merger Act, 12 U.S.C. §1828, Federal Aviation Act, 49 U.S.C. §1378.

argues that for a license condition to be issued there must be proven an "actual violation" of the antitrust laws. The Company ignores the plain language of the statute which says not that there must be a "violation," but merely a situation "inconsistent" with the antitrust laws. It also ignores the body of administrative practice.

5. The "burden of proof" argument. In a complicated fashion the Company argues--as a matter of Constitutional right, no less--that the proponents of license conditions have the burden of proof. The Company confuses the burden of proof and the burden of going forward. If interveners--or other parties--initiate a claim, they should provide a reasonable basis for doing so. However, it is the Company that is applying for a license. This license grants of the public domain the rights to develop nuclear energy for purposes of private profit. The ultimate finding that must be made by this agency is that the granting of the license to Consumers Power Company will not be contrary to the public interest, or in statutory terms that it will not create or maintain a situation inconsistent with the antitrust laws.

6. Parker v. Brown, 317 U.S. 341 (1943) argument. The Company makes a Parker v. Brown argument that state action (and even Federal Power Commission action) insulates it from antitrust scrutiny. Brief, pp. 160-170. However, the cases cited by the

Company concern activities and practices that are commanded by state law, or activities that relate to matters where state regulation is predominant.

In Business Aides, Inc. v. Chesapeake & Potomac Co. of Virginia, 480 F2d 754 (CA4, 1973), the court stated that since the utility was not a state agency, the scope of its tariffs should be "carefully analyzed in order to determine whether it acted pursuant to the direction of the state in refusing to provide the requested services." 480 F2d at 756. Only because the court determined that the utility would be in violation of state law, if it granted the requested services, did the court hold the Parker v. Brown doctrine applicable. Likewise, in Gas Light Co of Columbus v. Georgia Power Co., 440 F2d 1135 (CA5, 1971), the court found that the specific rates being attacked were in accordance with tariffs expressly approved by the appropriate state agency. The court held that because this approval was express, it fell within the confines of Parker v. Brown.

Applicant can only place its reliance upon Washington Gas Light Co. v. Virginia Electric & Power Co. (VEPCO), 438 F2d 248 (CA4, 1971) for the proposition that a comprehensive regulatory scheme by a state affords antitrust immunity to activities which are implicitly approved by the agency's failure to correct

a situation inconsistent with the antitrust laws. But that case has little relevance here because the anti-competitive activities complained of related to promotion of electric power in the retail market, which was the focus of the state statutes. The gravamen of the complaint here lies in anti-competitive activities relating to the wholesale markets (bulk power, transmission services, and power-exchange and coordination). This is primarily a matter of federal concern. Interveners Initial Brief, pp. 121-123. The Atomic Energy Act has created an express obligation of the AEC to license with a view towards antitrust considerations. At the time the Act was passed, the same degree of state regulation of the electric utility industry, similar to the present Michigan statute, was present in most states. And Applicant fails to show how the Michigan regulatory scheme is any different from the usual pattern of state regulation which was present when Congress passed the 1970 amendments. In all of the cases cited by Applicant, the courts did not have to consider an express statutory command which dictated that they review antitrust matter relating to specific industries, as the Atomic Energy Act does here. */

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*/ The VEPCO case was decided before the Supreme Court ruled in Otter Tail that regulatory authority of the FPC did not immunize electric utility company practices from antitrust review. Clearly, it would be anomalous to say that a state's passive acquiescence

Nor does the Michigan regulatory scheme foreclose competition within the electric utility industry. */

[Footnote continued from p. 50]

to the practices of a utility company provides antitrust immunity where passive acquiescence by the FPC does not. The holding of the VEPCO case is grounded in the alternative remedy available to the plaintiff before the State Corporation Commission (SCC). "The antitrust laws are a poor substitute, we think, for plaintiff's failure to promptly protest to the SCC and to seek the administrative remedy ultimately shown to have been available and effective." 438 F2d at 252. However, such reasoning was rejected by the Court in Otter Tail when it held that the availability of an alternative remedy before the FPC is no substitute for antitrust review. 410 U.S. at 372-375.

*/ Under the statutes, the Michigan Public Service Commission may grant a certificate of public convenience and necessity to allow a utility to extend its services into a municipality where similar systems are already operating. M.C.L.A. §460.502. The Commission is directed to consider "the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory." M.C.L.A. §460.505.

Applicant argues that there is a broad statutory scheme in Michigan. However, this is questioned by the Michigan Supreme Court decision in Huron Portland Cement Co. v. Michigan Public Service Commission, 351 Mich. 255, 88 N.W.2d 492, 496-97:

> "At the outset we will observe that the Michigan public service commission has no common law powers. As we stated in Sparta Foundry Co. v. Michigan Public Utilities Commission, 275 Mich. 562, 564, 267 N.W. 736:
>
> > 'The Michigan public utilities commission is an administrative body created by statute and the warrant for the exercise of all its power and authority must be found in statutory enactments.'

[Footnoted continued from p. 51]

"We turn, then, to the statutory enactments. Appellant first cites to us section 6 of Act No. 3 of the Public Acts of 1939 (C.L.S. 1956, § 460.6 [Stat. Ann. 1955 Cum. Supp. § 22.13(6)]), which thus describes the statutory jurisdiction of the commission:

> 'Sec. 6. The Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all public utilities in the state except any municipality owned utility and except as otherwise restricted by law. It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation, or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies, whether private, corporate, or cooperative, gas companies, telephone, telegraph, oil, gas, and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies.
>
> 'The Michigan public service commission shall have the same measure of authority with respect to railroads and railroad companies as is granted and conferred under the various provisions of the statutes creating the Michigan railroad commission and its successor, the Michigan public utilities commission, and defining their powers and duties.'

"The broad language, however, furnishes no grant of specific powers. It is an outline of jurisdiction in the commission and does not purport to be more. If, indeed, the general language quoted had the effect of vesting particular, specific, powers in the commission, not only would a constitutional question be presented arising from an asserted lack of standards (42 Am.Jur. p. 343; Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570; Harrigan & Reid Company v. Burton, 224 Mich. 564, 195 N.W. 60,

We call especial attention to International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 351 F Supp 1153 (D. Hawaii, 1972), supra, where the court held that regulation of a utility by a state regulatory commission did not insulate the regulated company from antitrust review unless the regulating agency considered the anti-competitive impact of the defendant's actions

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[Footnote continued from p. 52]

> 33 A.L.R. 142), but there would have been no need whatever for the many statutes enacted (both before and after the effective date of Act No. 3 P.A. 1939) vesting specific powers in the commission." (Footnote omitted).

The Court went on to hold that there was no statutory authority for the Public Service Commission to order a public utility to supply power in municipalities beyond those through which its transmission lines passed. The Court considered M.C.L.A. §460.556 which provides:

> "The Commission shall have power in its discretion to order electric current for distribution to be delivered at a suitable primary voltage, to any city, village or township through which a transmission line or lines may pass; to order service to be rendered by any such electric utility in any case in which it shall be reasonable for such service to be ordered . . ."

In light of the narrow construction of the Commission's powers by the Michigan Supreme Court, it is at best doubtful what statutory scheme contemplates that the Commission should play a role in the wholesale markets beyond ordering the sale of firm bulk power, in appropriate instances, where the transmission lines owned by the utility pass through the municipality.

Moreover, this Commission has a clear Congressional jurisdiction. Absent a clear showing of conflict and a limitation on its jurisdiction, it is questionable whether it should attempt to interpret local law.

or had determined that the activity was justified by a greater public purpose than competition. In doing so, the court noted that the state statutory scheme under consideration did not contemplate any restraint of trade beyond a monopoly of local telephone service:

> "Antitrust immunity does not automatically follow, however, when the putative state action consists of regulatory rulings by a state agency and the regulated corporation's compliance therewith. This court also rejects the 'facile conclusion that action by any public official [or regulatory agency] automatically confers [antitrust] exemption.' Unless it is inherent in the statutory scheme or program that antitrust restraints flowing from an 'approved' merger were both anticipated and intended by the state to result therefrom and, nevertheless, were intended to be protected from antitrust attack as a necessary concomitant of the implementation of the state's scheme or program, and the state's regulatory policy is consistent with federal national policy, then 'approval' of such a merger, horizontal or vertical or both, by a state regulatory agency does not cloak such merger with Parker immunity. In the telephone industry there might possibly be some acquisitions which might be held to implement some necessary intrastate regulatory objective and which, after in-depth investigation and evaluation of resultant trade restraint by a commission, might upon 'approval' fall within the distinctive walls of Parker. On the record here, however, there is nothing to indicate that even the horizontal aspects of GTE's questioned mergers were so studied and evaluated by any commission. Neither the interstate nor intrastate restraint of trade aspects of the vertical side of the GTE mergers were ever so evaluated or 'approved.'
>
> "As a policy matter a state may conclude that it is an economic necessity that certain public services be supplied to its residents through a privately owned

monopoly. However, there is nothing in the record or the statutes of the several states here considered to indicate that any of the several states intended that their regulations were expected to bring about any restraint of trade other than through a state-given monopoly of local or state telephone service. Nor is there any indication that Congress has ever intended to give them any other immunity power. As the court said in Hecht v. Pro-Football, 444 F2d 931, 935 (D.C. Cir., 1971):

> '[W]e suggest that it may be inaccurate and confusing to speak of "valid governmental action which is immune from application of the antitrust laws." Rather, the proper inquiry would seem to be to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws, or, where state action is concerned . . . the inquiry should be to what extent is the state action permissible as not contravening the federal antitrust laws, which in our federal system constitute overriding legislation under the federal commerce power.'

"GTE's acquisitions are not protected by Parker." (Footnotes omitted).

Also see: George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F2d 25, 30-31 (CA1, 1970) (State regulation of public contracts does not preclude antitrust review); Utah Gas Pipeline Corp. v. El Paso Natural Gas Co., 233 F Supp 955 (Utah 1964) (State regulation of gas distribution cannot preempt review of gas line fields under the antitrust laws).

II. THE FACT THAT CONSUMERS POWER COMPANY MIGHT VIOLATE THE LAW INDEPENDENTLY OF THE CONSTRUCTION AND OPERATION OF MIDLAND DOES NOT ELIMINATE THE AUTHORITY OF THE COMMISSION TO ORDER CORRECTIVE LICENSE CONDITIONS

Consumers Power Company states, "Under the standards set forth in the Commission's Opinion in the Louisiana Power & Light Company Antitrust Proceeding license conditions relating to antitrust matters cannot be imposed unless there is a causal connection between applicant's proposed "activities under the license" and a "situation" allegedly inconsistent with the antitrust laws." Brief, pp. 6-7. From this basic premise, the Company leaps to the conclusion that there is no "causal connection" because the "situation inconsistent" claimed by the Department of Justice and others would exist regardless of the construction and operation of Midland. That is, the company claims its dominant position concerning pooling and interchange arrangements pre-dated its Midland application.

The Company ignores that the statutory language specifically included the "maintenance" of a situation inconsistent with the antitrust laws. No one disputes the importance of Midland power to the Company's operations. The fact that a similar situation inconsistent might arguably be "maintained" with the Company's construction and operation of large fossil fuel plants or otherwise does not negate the fact that Consumers Power Company is using nuclear fueled generation. And that the "situation inconsistent" might be maintained in some other way is irrelevant.

Moreover, to the extent that nuclear power has advantages over other forms of generation and interveners or others are deprived of access, the dominant situation of Consumers Power Company can only be enhanced.

Ignoring the statute, Consumers Power Company makes extensive arguments based upon its selections from "legislative history". Its principle legislative history argument appears to be based upon language to the effect that a licensing proceeding should not be "an appropriate forum for wide ranging scrutiny of general industry affairs essentially unconnected with the plant under review." Brief, page 16, quoting from Senate Antitrust and Monopoly Subcommittee Hearings, Part II, at 365-366. Of course, the degree of relationship between a "situation inconsistent" or relief sought and the construction and operation of the plant is a factual matter. In this proceeding, Consumers Power Company admits that there will be a commingling of power from the Midland Units with "the Company's other generating capacity through its transmission system". Brief, p. 8. California v. LeVaca Pipeline Co., 379 U.S. 365 (1965). Nor will this power be an inconsequential part of the Company's operations. See also Houston E & W Texas Ry. v. U.S., 234 U.S. 342 (1914); FPC v. Florida Power & Light, 404 U.S. 453 (1972); FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972). Rather, the Company clearly intends to rely on nuclear power for most of its base load power sources. It is unlikely in the extreme that the construction and

operations of units the size of Midland could take place without the existence of broad pooling and interchange contracts. The construction and operation of Midland is vital to Consumers Power Company's generation program and is supported by its general transmission network and interchange agreements. Absent such agreements, Midland Power would be far less valuable to it, if it would be feasible at all. For the same reasons, absent equal access to such transmission and pooling arrangements, Midland power would be far less feasible for interveners.

The Company admits the basic facts. Its only argument is based upon an out-of-context sentence from an LP&L initial order that power is generally "commingled" and a premise that the fact of commingling should limit the Commission's authority. However, Congress clearly intended the Commission to scrutinize the facts. Nor would it solve the problem of the situation inconsistent to allow for more limited relief than that which would put interveners on a par with applicant in their resource opportunities.

The Company attempts to imply that by seeking access to the same types of arrangements enjoyed by Consumers Power Company on the same terms and conditions that interveners are recommending a change industry structure contrary to its selected reading of the legislative history. However, neither interveners, the Department of Justice or AEC Regulatory Staff, seek relief changing the basic means whereby power is marketed on either wholesale or retail levels, unless allowing access to bottleneck facilities and

coordination is somehow deemed a basic structural change. Indeed, all that is sought is inclusion in the existing arrangements of interveners on equivalent terms.

Moreover, while the relief sought by interveners would be appropriate even under Consumers Power Company's legislative history selection, the Company itself admits that there is legislative history looking to a far broader interpretation of the statute (Brief, pp. 16, 19), but argues there was opposed opinion. While it attempts to brush off such material contrary to its position as inconsistent, there is no policy reason for favoring its narrowed reading of selected portions of legislative hearings as determining the intent of the statute.*/ Thus, the Waterford licensing and safety board has held allegations, that the construction of an atomic facility would maintain the Applicant's monopoly position and that the construction of the plant would materially assist the applicant in providing for its own coordination without entering into agreements with competitors, alleged the requisite nexus:

> "In sum, the petitioners allege nexi between the situation alleged to be inconsistent with the antitrust laws and the activities under the Waterford 3 license. It is asstered that:
>
> (1) Applicant has or is attempting to acquire a monopoly of large low cost electrical generating units in the relevant geographic market;
>
> (2) Control over the bulk power transmission system in the relevant geographic market is fundamental to the creation or maintenance of such a

*/ We discuss the legislative history of the Act principally in Section III A of our initial Brief, pp. 75-85.

monopoly, and Applicant has a monopoly of facilities for the transmission of bulk power and power for system coordination;

(3) Applicant has or is attempting to acquire a monopoly in coordination reserve power sales;

(4) Applicant alone or in combination with others attempted to hinder or prevent efforts by the petitioners to construct their own transmission systems for bulk power and coordinating power. This conduct of Applicant, whether legal or illegal, was intended to maintain its monopoly positions;

(5) Construction of Waterford 3 would maintain or strengthen Applicant's monopoly position by providing Applicant with the ability to serve the increasing demands of present customers and the demands of new customers while foreclosing petitions from the ability to serve these demands;

(6) Construction of Waterford 3 would materially assist Applicant in providing for its own coordination and reserve sharing needs without entering into agreements with intervenors.

See also "Memorandum of Board with Respect to Appropriate License Conditions Which Should Be attached to a Construction Permit assuming Arguendo a situation Inconsistent with the Antitrust Laws", Louisiana Power & Light Co. (Waterford Steam Generating Unit No. 3), Docket No. 50-382A, pp. 18-19, and 24, deeming nexus part of the assumed situation inconsistent (October 24, 1974).

"The contention of the Cities can be simply stated as: The lack of right of access to Waterford (1) gives Applicant an unfair competitive advantage due to economies (a) related to nuclear facilities and (b) related to large-scale facilities, and (2) gives Applicant an unfair competitive advantage in the ability to generate power even when plagued by shortage of fossil fuel (Tr. 960; Tr. 969-973; Tr. 1779; Tr. 2038-2039; Post-Trial Brief for Cities September 5, 1974, pp. 18-19).

"From the time of the Atomic Energy Act of 1946 to the present, the Congress has been concerned lest small entities be excluded from the economies of large-scale nuclear facilities. During the hearings before the Joint Committee on Atomic Energy, Congress of the United States, Ninety-First Congress, on Prelicensing Review of Nuclear Power Plants (1969-1970) there was concern lest small entities would be at an unfair disadvantage by lack of access to nuclear power facilities due to fossil fuels (Joint Committee Hearings, Part 2, pp. 352, 388, and 404). Thus, the Cities' position is essentially that the fears of Congress have come true, so that the remedies provided by law should be applied."

. . . .

"As a general rule, where the granting of a construction permit for a nuclear facility would create or maintain a situation inconsistent with the antitrust laws or the policy clearly underlying such laws, a condition providing for the right of access to that same nuclear facility is deemed an appropriate remedy, absent cogent reasons to the contrary. In response to the show cause order, under the assumption arguendo, the Cities have demonstrated a need for right of access to Waterford, and a careful study of Applicant's reasons for denying access to Waterford fails to reveal a sound basis for departing from the general rule. Therefore, Applicant's Commitment No. 4 is deemed an inadequate condition." Louisiana Power & Light Co., supra, Slip. Op. at 18-19, 30 (October 24, 1974).

III. THE APPLICANT MAINTAINS A SITUATION INCONSISTENT WITH THE ANTITRUST LAWS

In their initial briefs, the Department of Justice, the AEC Regulatory Staff and Interveners have demonstrated that Consumers Power Company has been using its dominant power to block or limit access on the part of Munis/coops to low-cost power supply. In conclusory terms, the Company has monopolized or attempted to monopolize both facilities and markets.

Varying violations of the antitrust laws and policies are involved, including that by control over the major base load generation, transmission facilities and access to coordination, Consumers Power Company can and does limit the access by the smaller systems to alternative markets for purchased power, to lower cost sources of generation and to non-discriminatory coordination. Apart from technical responses that it has not violated the law, Consumers Power states that it does indeed intend to make access to nuclear generation unavailable and to exclude interveners from transmission and coordination rights when this would be disadvantageous to itself, but claims that this is justified on varying grounds among which are the ability of Munis/coops to compete without access to the "bottleneck" sources.

To be more specific, the Department of Justice and other parties have accused Consumers Power Company of maintaining a classic monopoly. Summarized, the Department of Justice Brief demonstrates that Consumers Power Company dominates -- and limits

access to -- the "power exchange" market and also, more generally, that it dominates the wholesale power supply markets. The interveners agree with and support this position.

The Department of Justice, the AEC Regulatory Staff and the Interveners have further demonstrated that Consumers Power Company has a complete domination over the large scale generation, high voltage transmission and attendant coordination arrangements. Denial of access to these facilities and arrangements deprives interveners of access to low cost nuclear power, joint venture arrangements and the purchase of plant capacity from others. Denial of coordination further deprives the Munis/coops of the most efficient use of their own generation.

The former market analysis theory appears to be more emphasized by the Department of Justice and the latter "bottleneck" theory is emphasized by interveners, but they are mutually supportive. Be it through a monopolization of a market or sub-market or the control of vital facilities, the use of dominant power to prevent competition creates an unlawful monopolization or tendency to monopolize under the Sherman Act.*/

The Atomic Energy Commission Regulatory Staff supports both theories. The AEC Regulatory Staff stresses that Consumers

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*/ Consumers Power Company treats this case as if it were only charged with violation of Section II of the Sherman Act. However, it also violates the Section I. Brief, p. 2. Its pooling and interchange arrangements are clearly actions taken in conjunction with others that limit interveners ability to compete in bulk power markets. Moreover, Midland is a joint venture with Dow from which interveners would be excluded.

Power Company is utilizing its control over markets and vital facilities to engage in unfair competition, which would be equally prohibited under the Federal Trade Commission Act, 38 Stat. 719; 52 Stat. 111; 64 Stat. 21; 66 Stat. 631; 72 Stat. 942, 15 U.S.C. 45, as well as other antitrust laws. Finally, we point out that to the extent Consumers Power Company refuses to sell individual power services separately or conditions the sale of such separate services, it engages in unlawful tie-in sales.

The above listing of basic arguments made by the Department, the AEC Regulatory Staff and Interveners is not meant to be exclusive. Indeed, Consumers Power Company is additionally engaging in a host of antitrust violations ranging from exclusive marketing arrangements to unlawful territorial agreements. What should be stressed is that all the arguments have in common the element that Consumers Power Company is in one way or another using its dominant position to prevent the smaller systems from having an equal access to power supply sources.

Consumers Power Company states that interveners have sufficient alternatives available so that it is not essential for them to have access to nuclear generation, transmission or coordination, although we note that in attempting to distinguish Otter Tail (Brief, p. 152), the Company concedes that under certain factual circumstances there would, in fact, be an obligation on its part to deal. What the Company says here is that, since the alternatives of self-generation and purchased power are available, these are sufficient.

It needs be stressed that, although the Company structures its brief as if it were making separate arguments in answer to the charge of monopolization of the power supply (and wholesale power markets) and the exercise of power over bottleneck facilities, Consumers Power's answer to all charges is the same. The Company's entire case is dependent upon its thesis that its willingness to sell wholesale power and the ability of Munis/coops to self-generate are sufficient to allow Munis/coops to be deprived of access to alternate sources through transmission, to nuclear generation or even to coordination of the generation that they do possess.

A. Applicant Misconstrues the Legal Standards which Are Useful in Determining the Relevant Markets and Sub-Markets

Otter Tail establishes that control of a vital area of commerce, or factor of production, carries an attendant obligation to permit reasonable access, where to do otherwise would extend monopoly control. Thus, Consumers Power's attempts to block smaller systems from alternative wholesale power sources and markets or to use its dominant power to exact a monopoly price for such access are inherently anti-competitive.

Consumers Power Company would blunt the thrust of Otter Tail, however, by citing an intermixture of antitrust cases that use broad markets to analyze monopoly and cases that excluded segments of commerce from the market.

At the same time, the Company argues that the entire wholesale market should be used as a basis for analysis and that the retail market should exclude areas that Consumers Power controls. It further argues that the wholesale market should exclude generation for self-use. But the Company reargues Otter Tail, which determined that control of a factor (e.g., "wheeling") sufficient to limit competition is enough to find monopoly control and a basis for relief. The purpose of antitrust review is to look for restraints on competition -- not to engage in sophisticated market share analyses for its own sake International T & T Corp. v. General Telephone & Electric Corp., supra, 351 F Supp. at 1174-1175.

Before specifically discussing the Company's case analysis, we make one further general comment. A defendent to an antitrust claim will often argue for an all encompassing "market". By so doing, the control of an area of the market is a smaller percentage of the whole. Thus, if a hypothetical manufacturer sold 100% of corn flake sales, it might only sell 50% of cold cereals, 25% of all cereals and 1% of food. A hypothetical case, holding that because other cereals are substitutes for corn flakes, in an acquisition case the court will analyze control of the cold cereal market, does not excuse use of a dominant position in a narrow market -- be it corn flakes or transmission -- to extend control over other markets. Nor, assuming freedom of entry, could an airline defend anticompetitive practices in the airline industry

because of competition from rails or busses. E.g., Fortner Enterprises v. U. S. Steel Corp., 394 U.S. 495 (1969).

Applicant relies upon United States v. E. I. DuPont-Nemours and Co., 351 U.S. 377 (1956), for the proposition that a supplier does not have monopoly power, if there are available substitutes in the market. Thus, at pg. 81 of its Brief, the Company argues that the "power supply" or "coordination" market must be subsumed in the "single bulk" power market due to their "reasonable interchangeability". It similarly argues that DuPont answers Otter Tail (although Otter Tail came later) "because there are other adequate substitutes for these resources available to others in the relevant bulk power market -- self generation, wholesale purchases, and under appropriate circumstances, coordination power." Brief, pgs. 150-151 ff (emphasis supplied).

DuPont stands for the proposition that if there is functional interchangeability among products, the products can be considered as part of the same market. The Company argues the case stands for the proposition that the Board should find a broad market, encompassing all wholesale power supply. Thus, it seeks to avoid examination of its specific control and ability to exclude access to nuclear power, transmission, and coordination.

There are limits to how far courts will expand a product market. Consumers fails to note that in the DuPont case the substitutes available would have substantially served the same

purpose as cellophane, the product which DuPont was alleged to possess monopoly power over. The Supreme Court stated:

> "In considering what is the relevant market for determining the control of price and competition no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purpose make up that part of the trade or commerce, monopolization of which may be illegal". 351 at U.S. 395 (emphasis added).

The Court also stated:

> "When a product is controlled by one interest without substitutes available in the market, there is monopoly power. Because most products have possible substitutes, we cannot, as we said in Times-Picayune Co. v. United States, 345 U.S. 594, 612, give that "infinite range to the definition of substitutes". 351 U.S at 394.

In reaching its conclusion that cellophane was part of the transparent wrapping market, and not a separate relevant market, the Supreme Court noted that for every one of its uses the produce faced competition from a product with different physical characteristics but adapted for the same use.

Consumers' attempt to draw self-generation and bulk power into the same relevant market ignores the fact that each factor of production serves a particular function within the electric power industry. Here several municipal and cooperative utilities seek to supply the needs of their customers. In doing so, they must fill out their demand curves from various sources of base load, intermediate and peaking power. Consumers argues that, these because utilities can generate their own power or buy it from Consumers, they don't need access to the factors of production.

But this is not the teaching of the DuPont case. Nothing in the DuPont line of cases holds that products are part of the same market where the user would have to stop producing his product and buy it somewhere else.

Consumers also relies upon United States v. Charles Pfizer and Co., 246 F. Supp. 464 (E.D.N.Y. 1965). However, that case does not support that products which have different uses may be included within the same market. The product being considered in that case was Citric-acid. Citric acid is used as an acidulant in a number of foods. While no one substitute was interchangeable with Citric acid in all its uses, the Court noted that for each use of Citric acid, the product faced vigorous competition from other acidulants:

> "Despite advantages of Citric acid, other acids were available and functionally interchangeable with it. An examination of the use of acidulants in specific foods and beverages and effervescent alkalizing preparations, will determine whether such assets were in active competition with Citric acid in those markets during the complaint period". 246 F. Supp. at 468.

After noting the availability and use of other acids, which were also useable for each type of food product, the court rejected inclusions of acids in baking powders, baking products and rye sours as part of the relevant market:

> "Acids are used in baking powders, and baking products to release carbon dioxide. They produce a chemical reaction similar to that of effervescent alkalizing powders. It is not used, as in foods and beverages, to add an acid tang and thus to enhance the flavor

> of the products; and its release of carbon dioxide is not as an alkalizer. I have, therefore, declined considering baking powders, baking products or rye sours as part of the relevant market". 246 F. Supp. at 469.

Consumers cites Pfizer for the proposition that "functional interchangeability does not require complete identity of use". However, the Pfizer court uses a two part test to determine the inclusion of other products within the relevant market.

> "Having found one or more products functionally interchangeable with Citric acid in a particular use, the next question to be resolved is one of purchaser reaction -- the willingness or readiness to substitute one for the other.
>
> "In determining (reactive) interchangeability of acids for the use referred, the factors that normally determine the choice or preference of the user must be considered. The difficulty of cost in adapting a method or process of manufacturer to the varying physical characteristics of a substitute, as well as transportation in storage must be examining a determining reasonable interchangeability. The significance of each factor varies with the user and the requirements of each product." 246 F. Supp. at 468.*/

Consumers also misconstrues the holding of United States v. Grinnell Corp., 384 U.S. 563 (1966), discussed earlier

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*/ National Aviation's Trade Assoc. v. CAB, 420 F. 2d 209 (D. C. Cir. 1969), also cited by Consumers, does not justify its proposed rejection of the needs of interveners. While airports incapable of handling high performance aircraft were included within the relevant product market, the Court noted that as the amount of air space available over New York is limited, the airports immediately surrounding New York City would not serve the needs of general aviation enthusiasts anyway. Thus, the CAB could reasonably conclude that there would be market pressure to improve outlying airports to accomodate high performance aircraft.

when it states that the Supreme Court combined in a single market a number of different products and services.*/ The relevant market issue in Grinnell was whether a particular combination of protective services available through central dispatching could be substituted for by various other protective services available in the market place. The Court noted that some buyers of the service required the broad protection and held that the other alternatives were not reasonable substitutes.

The basic misunderstanding underlying Applicant's view of the relevant product market is the confusion between factors of production and the end product. In Union Carbide and Carbon Corp. v. Nisley, 300 F. 2d 561 (10th Cir. 1962) appeal dismissed, 371 U.S. 801, the Court stated that the factors of production should not be confused with the end product in defining the relevant market:

> "There was some evidence that ferrovanadium was sold in the ferro alloy market in competition with other alloys. And, commodities which are "reasonably interchangeable by consumers for the same purposes make up that 'part of trade or commerce', monopolization of which may be illegal". See DuPont, 351 U.S. p. 395, 76 S. Ct. p. 1007, quoted in International Boxing Club. But, Section I of the Sherman Act condemns unreasonable restraints irrespective of the amount of trade or commerce involved; and Section II condemns a monopoly or

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*/ Continued-
The exclusion of consideration of the needs of high performance aircraft owners from the relevant market determination was justified by the determination that there was a strong likelihood of development of strong competition in outlying areas. No such similar consideration is present in this case. There is no similar pressure alternative transmission facilities.

continued-

"attempts to monopolize -- either in concert or individually -- 'any part of the trade or commerce'. See United States v. Paramount Pictures, 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260, also quoted in International Boxing Club. We do not understand the DuPont case to hold that every commodity which is reasonably interchangeable with another commodity cannot be the subject of a Section II illegal monopolization, for, "industrial activities cannot be confined to trim categories. Illegal monopolies under §2 may well exist over limited products in narrow fields where competition is limited". DuPont, 351 U.S. p. 395, 76 S. Ct. p. 1007. In our case, the mining, processing and marketing of the finished products from vanadium ore were undoubtedly an integrated industry forming a definitive part of trade and commerce, and it was undoubtedly the subject of monopolization without relationship to other competitive products. Moreover, the gist of the claim here is not the monopolization of the finished product, ferrovanadium, but rather of the raw materials from which it was made. The mining and marketing of the raw materials were undoubtedly an "appreciable part of interstate commerce" and as such subject to a Section 2 monopolization. United States v. Yellow Cab Co., supra." 300 F. 2d at 585.

Here, interveners seek to use the various factors of production to provide their own bulk power. To state that bulk power is available in the market confuses the factors of production with the end product. It tends to foreclose interveners from competing in the sale and exchange of wholesale power services, as well as retail markets where competition exists. Ultimately, blocking smaller systems from competitive power sources can drive them from business, leading to a takeover of their retail markets. This adverse effect upon competition of high cost power, in relation to a dominant

utility was recognized in a recent Federal Power Commission proceeding where wholesale power rate schedules were rejected as anti-competitive:

> It is reasonable to conclude that unless a more equitable and a more competitive rate structure is afforded the municipalities, the erosion of consumer confidence in the municipal systems will continue, particularly if Edison maintains its practice of pacing its price increases to its S-1 customers at intervals appreciably earlier than its price increases to its own direct customers. As has been stated above, as the erosion of consumer confidence in the municipal systems continues, voter support for such systems decreases, and the continued survival of these systems as independent utilities becomes questionable. Municipal Light Boards v. Boston Edison Co., FPC Docket No. E-7400 (July 19, 1973) Slip. Op. at 183 (Edelstein, A.L.J.)

The second misconception underlying Applicant's substitutability argument lies in the use of the claim that self-generation is a ready substitute for the required services. Consumers Power Company argues that small unit generation is a substitute for nuclear access, transmission, and coordination. However, such availability makes self-generation more feasible. Thus, Consumers Power Company would limit the effectiveness of the "alternative" of self-generation.

Consumers Power Company argues that purchased power is an alternative to the relief requested. However, a city or cooperative may choose to self-generate as more profitable than purchasing power.

Consumers Power Company should not be able to forestall a smaller utility's citizens or ratepayers from making

that choice. Cases which have applied the DuPont-Cellophane tests have always recognized that where one product or service (e.g., self-generation) offers distinct advantages over another, it cannot be considered within the same product market. See, e.g., Marnell v. United Parcel Service of America, 1971 CCH Trade Cases ¶73,761 (D.C. Cal. 1971) (The fact that one package delivery service made at home deliveries on a regular schedule, followed up attempted deliveries where customers were not at home and insured all packages, placed it in a market distinct from regular common carriers.) International Boxing Club of New York v. United States, 358 U.S. 242 (1959) (Championship boxing matches were held to constitute a distinct product market from boxing matches as a whole.)

One can extract from these cases the simple principle that products are not readily substitutable when they serve different purposes in the production process.

B. Applicant Maintains Monopoly Power over the Services to which Interveners Seek Access

Consumers Power Company cites DuPont for the proposition that the Board should find a broad market. However, as we point out in the previous section, it attempts to eliminate the obvious demonstration of its power over that market by the simple device of excluding its generation used to serve their loads. The result is made more marked by the inclusion of Lansing's self-generation. Lansing, which has over 600 mws of generation, is far larger than any other cooperative or municipal system in Michigan, the next largest generating system being less than 100 mws, Ex. 1001,

p. 11. Clearly, any fair market analysis would have to treat self-generation of applicant and interveners in the same manner.

However, after Otter Tail, interveners fail to see how Consumers Power Company can continue to deny access to bottleneck facilities based upon determinations of market shares. As Otter Tail pointed out in its brief to the Supreme Court, and as Consumers Power points out here, to a large extent control of retail markets goes to the successful competitor. Further, for generating systems, absent elimination of barriers to wholesale competition, the amount of self-generation will be limited by the extent of the utilities retail market. The resulting partial monopolization did not give rise to a right of refusal to deal by the dominant Otter Tail Power Company. To the contrary, as the Supreme Court found, the partial monopolization that resulted made more important the necessity to preserve competition where possible by allowing access to bottleneck facilities. The same principles apply here.

The difference between Minis/coops' and Consumers Power's position is that Munis/coops contend that because of the partial monopolization of the electric power industry, where competition is feasible it should be encouraged, whereas Consumers Power contends that the partial monopolization of the industry should be extended to provide it complete protection from any competition. It is precisely that latter contention that Otter Tail rejects. Accord Gulf States, Utilities Co. v. FPC, 411 U.S. 747 (1973); Northern

Natural Gas Co. v. FPC, 399 F2d 953 (CADC, 1968); International Tel. & Tel. Corp. v. General Tel. & Electric Corp., supra, 351 F Supp at 1180-1186.

To be very clear about the matter, there can be little doubt that if Consumers Power Company did not possess the requisite retail franchises and other local permissions, it would not have been able to support its domination of bulk power transmission. The same large markets are necessary to absorb the output of large scale nuclear generation. And finally, the legality of its coordination arrangements themselves are dependent on the public utility status of applicants.*/Thus, there can be no doubt that Consumers Power Company's coordination arrangements would be unlawful, if such arrangements were attempted by non-regulated corporations. E.g. Associated Press v. United States, 326 U.S. 1 (1945). See United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 15 (1940); United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

What Consumers Power Company seeks to do is to use the advantages it possesses in maintaining bottleneck facilities and coordination agreements to further limit the competitive opportunities of the smaller systems and make more secure its existing monopoly power. Having secured the special privileges represented by its franchised areas, facilities and coordination agreements, Consumers Power Company cannot then successfully argue

*/These arguments are factually supported in Part I of Munis/coops initial brief.

that smaller entities can be excluded from such arrangements. It certainly should not be able to do so on the basis that they are a natural extension of those rights already granted. E.g. United States v. Loew, Inc., 371 U.S. 38 (1962).

The construction of major new facilities, such as Midland, especially demands the preventing of anticompetitive consequences from the beginning. United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

By not having access to transmission facilities and power coordination arrangements, Muni-Coops' opportunities for reduced power costs are lessened. Lack of access to transmission facilities reinforces existing territorial arrangements covering wholesale power, whether written or understood. It similarly reduces the opportunity of interveners to build larger plants and sell the excess power to others -- or even to each other. Moreover, as we have explained extensively in our initial brief, as well as being sold as full requirements power, wholesale power is bought and sold through individualized transactions, usually pursuant to pooling agreements. If interveners do not have rights to equal interchange arrangements and to fair access to the facilities that are necessary for efficient generation and interchange they will be less equipped to buy and sell specialized power transactions, such as emergency power, maintenance power, economy exchange, short-term firm power, seasonal power, etc. If Consumers Power Company or Detroit Edison Company, for example, must purchase a block of power for a specific

purpose, the sale is more likely to be made by Detroit Edison Company or another major company rather than by a Munis/coop. Or if because of a discriminatory arrangement, interveners will obtain less financial benefits from the transactions, their revenues will be reduced. Under such discriminatory arrangement, interveners will obtain less financial benefits from the transactions, their revenues will be reduced. Under such discriminatory arrangements, because of their lesser opportunity to obtain and sell "backup" or interchange power on a fair basis, it is less economic for interveners to construct larger more efficient units, limiting them in competing for future wholesale power transactions.

1. Bulk Power Generation

The record clearly supports the inadequacy of self-generation for smaller systems compared with access to larger bulk power generation and, more specifically, to nuclear generation. As the Company itself admits, smaller units are less efficient than large base load units and have both higher capital costs and output costs per unit of generation. This issue has been fully discussed in our initial brief. Eg., pp. 19-21. Moreover, as we have stated, smaller units are apt to create greater environmental problems and less efficient energy utilization.

At issue is the licensing of 1,300 mw of nuclear capacity. As not only this record but the very enabling statute under which this case is being decided recognizes, that nuclear power has unique

characteristics. From an economic standpoint, while its initial capital investment costs are high, it provides far lower energy cost generation per kwh than existing units. Nuclear energy avoids air emission problems associated with fossil fuel generation. Especially considering the uncertainities from both availability and cost standpoints of fossil fuels, the availability of direct access to nuclear powered generation cannot be equated to the ability to self-generate from small units.

In attempting to deny them permanent access to nuclear technology, Applicant would relegate Munis/coops to permanent second class status. We stress that in our view the issue is not whether nuclear powered units are to be preferred to fossil fueled units, although there is ample evidence in the record to support that finding and no evidence to the contrary. Rather, the issue is whether Consumers Power Company is correct in its contention that the possibility of generation by the small systems with fossil fueled units is sufficiently similar to ownership of nuclear generation to make them virtual equivalents. Even before the recent focus on energy shortages and environmental problems, Congress determined otherwise.

A manager of a smaller system may choose that it would be desirable for that system to have an ownership in nuclear capacity. We do not believe that Congress intended -- or this record can support -- that that system should be denied such alternative. This is especially so when it is considered that against the 1,300 mw of nuclear generation planned by Consumers Power Company (in addition to

that which it plans in the future and already possesses), the largest existing unit of any of the interveners is no greater than 30 mw.*/

Consumers Power Company eludes to hearsay discussions that certain of the interveners have considered installation of 350 mw coal-fired units. (Brief, p. 220). Interveners have been studying various alternatives available to them as any prudent system managers would do. No interveners, or any group of them, has found such generation feasible and this record confirms that they could not, absent transmission and coordination under equalized reserves conditions. See text, infra.

Consumers Power Company completely dominates large unit generation and transmission. Excluding interveners from nuclear units can merely increase the tendency towards such monopolization. Nor, can we comprehend the public interest in excluding one segment of the industry from such nuclear access.

In addition to its argument that the small unit self-generation available to interveners suffices to exclude them from access to the more desirable power supply sources, as stated, Consumers Power Company argues that interveners can purchase from it and that the availability of this alternative protects it against both a monopolization charge under the Sherman Act and more specifically against Otter Tail. First, it is important to note that Consumers Power Company never expresses a willingness to coordinate with a utility and sell it wholesale power at the same time.**/ It must be stressed

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*/ Munis/coops Initial Brief, p. 19. Lancing has a 160 mw unit. ed.

**/ While the situation is distinguishable, Consumers Power Company coordinates with Detroit Edison and purchases wholesale power from the Pontiac Division.

that Consumers Power is stating that it is willing to sell wholesale power under certain conditions, defined by it, and not that it is willing to make wholesale power generally available on terms which would allow for the development of alternative self-generation. Since failure to obtain coordination increases the cost of self-generation, the purchased power alternative is really another pressure to limit the practical value of the self-generation alternative. */ At the same time, as we also discuss later, the Company wholesale power rates contain a "demand ratchet," which results in charging power rates over a 12 month period based upon the largest amount of power bought from the Company during any 1/2 hour period. Thus, should a partial requirements customer have an emergency outage, it becomes economic for it to buy up to the ratchet level throughout the year, another discouragement to self-generation--or alternatively, an encouragement to excessive purchased power.

The Company tries to distinguish Otter Tail on the basis that that Company would not sell wholesale power, while Consumers

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*/ Since Consumers Power Company does not hold itself out as willing to provide coordination, for a utility that self-generates to serve part of its load and purchases wholesale power to serve the remainder, self-generation becomes more subject to abandonment. Thus, the Company's argument that the smaller systems can self-generate or purchase from the Company really amounts to the proposition that they may do one or the other, unless they are willing to pay a high penalty.

Power Company is willing to do so. However, Consumers Power Company does not commit itself to sell power to potential wholesale systems. (Brief, at p. 215).

The professed "option" of purchasing power from Consumers Power Company as a power supply alternative is a claim in furtherance of monopolizing wholesale power sales, clearly inconsistent with antitrust policy. */ A system that wishes to enter the power supply business--or stay in it--ought to be able to do so without being told that it can buy from Consumers Power Company.

Consumers Power Company attempts to argue that its "purchased power" alternative is reasonable, since this allows a system to purchase Consumers Power Company's total "mix" of power from all its plants at Consumers Power Company's average cost levels. As we explained in our Initial Brief, this suggesion amounts to nothing more than a tie-in sale forcing interveners to buy Consumers Power Company's total mix of power despite the fact that they may also wish to self-generate. If, for example, Consumers Power Company's managerial judgment, its retail market characteristics, its load curve, its financing availability, its other fuel alternatives or any one of the other factors which may go into such decisions result in its reaching a decision to have 50% of its generation in nuclear capacity,

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*/ Consumers Power Company concedes that such sales would constitute a separate market for purchases of Sherman Act analysis. Initial Brief, p. 152.

an intervener ought to have the right to have access to a different amount of such capacity. Such judgment may of course greatly harm or benefit an intervener, but it is precisely the opportunity to make such alternative choices that are important.

Moreover, Consumers Power Company implies that the purchased power alternative is "fair" because the rates charged, as regulated by the Federal Power Commission, will be based upon the average historic costs of capital which comprise the total investment in the Company's system plus current operating expenses. But the Company ignores that there is no guarantee that this will be the case.*/ There is nothing to guarantee that Consumers Power Company will not file for -- or the Federal Power Commission might not grant**/ -- rates determined upon other than an original cost basis or upon costs assignments or allocations unrelated to wholesale generation and transmission. As anyone sophisticated in rate making knows, costing formulas for rate purposes vary. This is one of the factors which a manager may legitimately take into consideration in determining whether or not to purchase direct access in the Midland Units as opposed to purchased power. (Eg., 5129-5130).

In attempting to avoid Otter Tail, Consumers Power Company argues that its bottleneck facilities are not "unique". This is part of a bootstrapping argument, where the Company first interprets the bottleneck monopoly cases as requiring absolute non-substitutible and

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*/ A license condition forcing such limitation, however, in the rates it files before the FPC might be considered.

**/ We agree that such method of costing would be improper.

totally unique facilities and then argues that interveners have not met its own self-imposed test. Of course, Otter Tail and the related "bottleneck" monopoly cases require no such thing. Thus, the towns served by Otter Tail had the alternative of self-generation to the same extent as the Michigan communities. Similarly, newspapers excluded from the Associated Press had available other news sources and, indeed, other press services. Movie-theater owners in the Griffith case had available other films and we warrant to say that the traveler on the highway in Olde Merry England could no doubt have camped in the woods. */

2. Transmission

Transmission serves a separate purpose within the electric power industry than generation. Both are required for the production of firm power that can be sold to retail customers. While generation makes power available at a given point, a transmission network is required to make that generation capacity available for distribution to retail customers elsewhere and to coordinate that power so that it can be marketed as firm power. Selfgeneration does not make excess power which might be available in Ontario also available in Michigan. Transmission facilities are required for this purpose. Complete reliance upon the resources of one municipality requires that the municipality fore-

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*/ The situation of the ability of interveners to self-generate equally to Consumers Power Company is reminiscent of the presumed equality of French laws that equally prohibited beggar and king from sleeping under the bridges of Paris.

go the economics of scale that might be available elsewhere. Forced reliance upon purchases of bulk power from Consumers means that the municipalities are excluded from entering the bulk power market to fill their own demand curves. It forces complete reliance upon the efficiency and judgments of Consumers Power Company and the efficacy of regulation in the face of statutory policies favoring competition. */

A measure of the economic power afforded the corporation that controls the transmission network is shown by an analogy to the oil pipelines within the petroleum industry:

> "An oil refinery cannot shut down and again start operations at will, as most manufacturing plants can. They are like the steel mills in that respect -- once shut down it takes several days to get them back in operation -- on stream we call. The refinery must operate 24 hours a day 365 days a year. Therefore, they must have an ample and never ending supply of crude oil.
>
> "For this reason the pipelines in the early days were constructed by refining companies from the producing fields to the refineries and were operated as plant facilities. This led to some pretty bad practices by some elements of the industry, particularly by the old Standard Oil group, which as you know, was disolved by court action in 1911. The Standard group gradually acquired most of the pipelines east of the Rocky Mountains and made its own rules. It would transport only oil to which held the title. To obtain transportation for his oil a producer would have to sell it to the pipe-

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*/ One of the clearest holdings of several recent Supreme Court cases is that regulation is no substitute for effective competition. E.g., Otter Tail Power Co. v. United States, 410 U.S. 366-372-73(197

> line at the lease tank. Of course, this placed many producers and refiners outside the Standard Group pretty much at the mercy of Standard. Standard pretty much dictated the prices it would pay for oil in the field and the producer either accepted their price or he could not dispose of his oil. On the other hand, Standard was also in the business of refining the oil and other refiners were at the mercy of Standard for their crude oil supply. Naturally, there was some discrimination between Standard and other refiners in crude supply in these small independent refiners were in no position to challenge the larger group."*/

The availability of transmission allows a large utility such as Consumers to coordinate its generation among its own plants and to further coordinate with other utilities. Consumers had in 1972 main system peak demand of 4,080 mws and name plate capacity of 4,298 mws or reserves of 5.3% of load. Ex. 1001, JC-3, 1972 Annual Report "Form 1" to the Federal Power Commission, p. 431-b. Compare the situation of municipalities without this access to transmission. The largest municipality, Lansing, had 631 mws of generation to serve a 321 mw load. Holland had 77.3 mws of generation to serve a 49.3 mw load. (Chayavadhanangkur, pgs. 20-21:5090).

Because of its ownership of transmission facilities throughout the lower peninsula, Consumers can achieve the internal coor-

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*/ Paul J. Bond, "Oil Pipelines - Their Operation and Regulation," address before the Chicago Chapter of the Association of ICC practioners, February 21, 1958. Printed at ICC Practioners Journal 730, 735 (April, 1958).

dination which munis/coops are denied. Denial of access to these essential transmission facilities places interveners at a severe competitive disadvantage. Just as control of the oil pipelines allowed the Standard Oil group to control the petroleum industry before 1911, so does the availability of the transmission network provide Consumers the same advantages.

3. Coordination

Coordination plays a unique role in the production of firm power that can be sold to customers. It provides an assured availability of reserves which would benefit both the Interveners and the Applicant. The use of such coordination by Consumers Power Company amply illustrates the importance of coordination throughout the industry.

Coordination is used to reduce the reserve each member of a network is required to carry in the form of idle equipment. These reserves are used for emergency power, coordination of maintenance, and economy power exchange. While the utilities might be able to continue to function without coordination, they can only do so at significantly high costs. Absent coordination the small utilities are faced with a Hobson's choice of relying upon small inefficient units or allowing a large amount of capacity from larger units stand idle. See Mayben at 2552-2555.

The illustrations cited by Consumers Power Company in support of the "alternatives" available to interveners stress the unique characteristics of both transmission and coordination. As the record supports, in view of their size it is readily apparent that for interveners, or any combination of them, to build large units to take advantage of minimal economies of scale, they must have available transmission and coordination on reasonable terms. */ Since none of the interveners are anywhere near large enough to utilize a large amount of incremental generation -- or for that matter total generation -- power from such plants must be transmitted for sale to other joint owners or potential purchasers of such power. Obviously, if the transmission rate is too high, the economies from building the

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*/ Especially where nuclear power is concerned, an important technological breakthrough in the industry, Interveners request the Board to correct the situation where they are foreclosed from obtaining initial direct access to the most efficient power supply, which failure must effect their ability to compete far into the future. While it is a dramatic example, the ability of applicant to use nuclear power having low incrimental costs in conjunction with the Luddington Power Pump Storage Project, exemplifies the advantage of internal and external power coordination. Only through its coordination is Midland feasible. Only through being able to sell off a portion of Luddington is Luddington economically feasible. Having access to low cost nuclear power, Consumers Power Company is able to generate from Midland 24 hours a day and in off-peak hours to utilize energy to drive water upstream which, during peak hours, will be released to provide for low-cost "peaking" power. Since it takes approximately 3 kwh of energy to drive water upstream for every 2 kwh that results from its release (5390), Luddington is made feasible by the availability of low energy-cost generation sources such as Midland. (5090: pp. 15-16, 5385-5397, Chayauadhangkur).

Consumers Power Company claims it offered Luddington to Intervenors (Brief, p. 185), which is news to Interveners. (5398-5399, 1901-1904). In conjunction with Midland Power, Interveners would very much like to consider the opportunity to buy Luddington power as well.

larger plant are forfeited. To encourage such transactions within the Michigan Power Pool, Consumers Power Company enters into t.ansmission arrangements at a zero incremental cost basis. Similarly, absent coordination from such units on an equalized reserves basis, the reserve capacity would have to be so high as to negate the economies of the transaction.

Consumers Power Company demands that munis/coops maintain additional reserves to those established for its own system. This is no more than a requirement that they pay an extra price for coordination, which because of its monopoly control over vital areas of the electric power market, it can exact.

Consumers Power Company argues that the smaller systems can survive without access to coordination. Maybe they can. However, it is true that by Consumers Power Company's own admissions the REA Cooperatives have higher costs than Consumers Power Company and that most of the municipalities in Michigan have gone out of the generating business. The rights to access cannot be predicated upon the ability of some of the interveners to survive with substitutes for the major facilities and coordination arrangements developed in the electric industry. Such deprivation is not fair to their customers. Moreover, increasing the costs of their generation to their customers limits competition directly contrary to the entire thrust of the antitrust laws.

The fact that some small utility systems are coordinating with each other where feasible or are self-generating is not evidence that these modes of substitution are really natural substitutes for coordination with Consumers. Rather it is evidence that the excessive reserve requirements of Consumers have driven the smaller systems into fending for themselves. The fact that some of these systems have survived is no measure of the number of systems that have been forstalled from entry into the bulk power market.

C. Contrary to its Claims Applicant has Violated the Antitrust Laws by Using Monopoly Power for Competitive Advantage in Other Markets

Consumers seeks to get out from under the thrust of Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), which we analyzed in our initial brief, by reciting the numerous abuses by Otter Tail Power Co. and claiming that since the abuses may not all be present here, Otter Tail does not apply.*/ Because in Otter Tail it was evident that a large power company was trying to foreclose several municipalities from competing. Consumers argues that a predatory intent must be equally manifest. It seems to argue that the conduct must deprive the municipalities of all access to bulk power. But as the court made clear in Otter Tail, the fact that some of the intended victums of anticompetitive conduct are still

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*/ Brief, pp. 151-152, 158

economically viable is no defense to an antitrust suit. In Otter Tail only one of the four municipalities directly involved was actually foreclosed from building its own power system. The holding of Otter Tail that refusal by a large utility to wheel power is a violation of the antitrust laws does not rest upon the happenstance that it was joined with a refusal to supply wholesale power.*/ Rather, it is based upon the thrust of cases such as Griffith v. United States, 334 U.S. 100 (1948), that a monopolist may not use his monopoly position to extend his monopoly.**/

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*/ Consumers attempt to distinguish Otter Tail also fails because it fails to take into account the fact that the relief ordered was tailored to fit the violations of the antitrust laws which were found. The Supreme Court found that the refusal to provide bulk power and the refusal to wheel bulk power from other sources were violations of the antitrust laws. It upheld injunctive relief that compelled Otter Tail to both wheel and sell power. The fact that Otter Tail was compelled to wheel and sell implies that selling bulk power by itself was not a complete remedy for a situation inconsistent with the antitrust laws.

On the other hand, the Court determined that there might not have been a violation of the antitrust laws based upon the litigation sponsored by Otter Tail. Accordingly, the court remanded the case to the District Court to reconsider the relief that ordered Otter Tail to refrain from litigation against the municipalities, which relief was subsequently reaffirmed by the District Court.

**/ Such a rule extends even to patents, a State granted monopoly. A patent holder may not contract to give a license where the renumeration is based upon goods produced after the patent expires. Brulotte v. Thys Co., 379 U.S. 29 (1964). Nor may a patent holder discriminate in the license terms he offers to potential licensees. LaPeyre v. FTC, 366 F.2d 117 (5th Cir. 1966). The fact that its monopoly control of essential facilities may partially result from public franchises does not justify an extension of that monopoly to other markets. Nor does it justify the use of this monopoly power for competitive advantage in other markets. Eg. Fortner Enterprises v. U.S. Steel, 394 U.S. 495 (1969); United States v. Aluminum Co. of America, 148 F.2d 416 (CA2, 1945).

In Griffith several movie house chains negotiated with film distributors for exclusive first run showings in all of their movie houses. Some of the movie houses were located in towns where there was a single theater; others faced substantial competition. The Court held that the joint negotiation of contracts for movie houses with monopoly power and those without monopoly power violated Section 2 of the Sherman Act. The Court expressly stated that its holding did not rest upon the fact that more than one chain of movie theaters was involved:

> "The consequence of such use of monopoly power is that films are licensed on a non-competitive basis and would otherwise be competitive situations. That is the effect where one exhibitor makes the bargain with the distributor or whether two or more exhibitors lumped together their buying power, as appellees did here. It is in either case a misuse of monopoly power under the Sherman Act." 344 U.S. at 108.

The District Court found that the defendants did not enter into agreements with distributors which gave them unreasonable clearances. The Court also found that the defendants did not compel or attempt to compel distributors to grant them approval which were not granted to their competitors or which gave them any substantial advantage over their competitors. However, the Supreme Court in Griffith held that even where the acquisition of monopoly power is innocent (as where the defendant owns the only movie house in town) such monopoly

power may not be used to foreclose competitors or to gain a competitive advantage in another market.

> "[T]he use of monopoly power, however, lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful". 334 U.S. at 107.

The Supreme Court reversed the lower court decision because it held that the necessary effect of the joint negotiation of movie licenses for theaters that faced competiton and those that did not was to use monopoly power in one market for competitive advantage in another, Compare.

In Banana Distributors v. United Fruit Co., 162 F. Supp. 32, 37 (S.D.N.Y. 1958), reversed on other grounds and remanded, 269 F. 2d 790 (2nd Cir. 1959), the rule of Griffith was applied to a unilateral refusal to deal on reasonable terms: */

> "A single producer in a purely competitive market will ordinarily sell to all comers and is free not to do so if it chooses; but the situation is different when the producer has a substantial degree of monopoly power stemming from comparative size. 'Within the limits of his monopoly position the producer can use refusal to sell as a device to influence prices. Moreover, he has a weapon with which to extend his power over the market'. See 58 Yale Law Journal 1121, 'Refusals to Sell and

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*/ The Court stated:

> "Whether or not the defendants may be considered a 'single trader' is, therefore, not decisive."

However, in any event here the coordination and joint transmission agreements are actions taken "in combination" under Sherman §1. Moreover, whether Consumers Power Company acts alone is irrelevant under Sherman, §2.

> Public Control of Competition'. Refusal to sell on the part of a producer having monopoly control in order to influence prices or to maintain or extend its effective market control is illegal, as is any other device designed to accomplish these ends. See United States v. Griffith, 1948, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236; United States v. Aluminum Co. of America, 2 Cir., 1945, 148 F. 2d 416, 427-428.
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> * * * * *
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> "In the case of bar, there is proof from which a jury might conclude that the defendants engaged in refusals to sell which may have served to perpetuate defendant's market status and to affect the price of bananas ultimately charged to the consuming public. It is clear, therefore, that, at least for the purpose of these motions, the refusals to sell (or partial refusals to sell) with which the defendants are charged, when considered with attendant facts and circumstances here present, may have constituted, per se, both a private wrong to the plaintiff and a public wrong actionable under the treble damages provision of the anti-trust law (Title 15 U.S.C.A. §15). (emphasis added)."

Consumers maintains monopoly power over large base load generation, coordination and transmission. Consumers uses the facilities of bulk power generation and transmission and its major coordination agreements to further its competitive position in the bulk power market. The denial of these facilities to the interveners and the attendant coordination agreements has the inevitable effect of raising barriers of competition "in the bulk power market. United States v. United Shoe Machinery Corp., 110 F Supp 295, 344-345 (D. Mass., 1953) affirmed per curiam, 347 U.S. 521 (1954). While Consumers is happy to sell a smaller utility its total requirements, it will only coordinate or sell transmission if it feels that the transactions are beneficial for itself. The benefit Consumers seeks to gain is the foreclosing of competition.

IV. LICENSE CONDITIONS SHOULD NOT BE READ NARROWLY, AS IS SUGGESTED BY CONSUMERS POWER COMPANY.

Consumers Power Company apparently accepts some obligations (1) to sell firm power at both wholesale and retail, (2) to sell transmission services and (3) to coordinate with other systems. Brief, pp. 213-233. It further expresses some willingness to allow participation in nuclear power, albeit upon an insistence that the purchasing entity resell equivalent capacity to Consumers Power Company. Brief pp. 216-224 However, in most instances its expressed willingness to deal is so limited that, if broadly interpreted, the limitations would negate the concessions.

Consumers Power Company's stated restrictions upon its willingness to deal would generally permit participation and coordination with only large systems; moreover the limitations are so broadly stated that ultimate decision and control remains in Consumers Power Company as to what it will and will not do.

The Board should clearly affirm Consumers Power Company's obligations. Discriminatory or ambiguous qualifications are not justified. Munis/coops have stated previously the interveners are hopeful of working with Consumers Power Company to derive implementing conditions or procedures. However, they reiterate that absent ultimate agreement even at the expense of some flexibility, fairness demands license conditions that be sufficiently clear and self-implementing to allow for practical enforcement.

A. Interveners are Entitled to Direct Ownership of the Midland Facilities on an Ownership and Unit Power Purchase Basis.

We shall not repeat here the reasons why we think it essential from both a legal and policy standpoint that interveners be able to have access to direct ownership of the Midland Units. The Board so found in the LP&L case and numerous utilities have agreed to participation voluntarily.

Clearly, Consumers Power Company prefers that the interveners be given the option of direct ownership rather than unit power purchases, if it is to be allowed to control participation. Brief, p. 221 This is understandable, since Consumers Power Company does not desire to finance plant construction for power to be sold to interveners. By and large, interveners would prefer direct ownership rights also, since they can see no public purpose to the Boards requiring a method of ownership that will involve high financing charges and therefore higher Consumer rates. However, there are instances where due to system financing limitations or other factors unit power purchases would be preferred.*/

Consumers Power Company makes two specific arguments against participation in addition to its more general legal argu-

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*/ See letter to Joseph Rutberg, Esq. from William Ross, Esq., July 5, 1973. Unit power purchases might also involve the necessity for additional FPC or other review to price such unit power.

ments that it is not required to deal. First, it claims that intervener requests "were untimely" (Brief, pp. 219-20) and, second, it claims that the statute would not have contemplated construction delays inherent in granting interveners ownership rights (Brief, pp. 20-22). Interveners acted to assert their rights immediately subsequent to the Department of Justice "advice letter". Moreover, at the early stages of these proceedings they requested settlement discussions and were rebuffed. As was found in Waterford, supra, (pp. 22-26 of slip opinion), having exercised their rights in a manner contemplated by statute before a duly constituted administrative tribunal, it would be contrary to the statutory scheme and intent to say that, following the methods prescribed by statute, interveners' requests were untimely.

In any event, interveners could have had no hope of an affirmative response to requests for participation from Consumers Power Company but through the proceeding. Moreover, if the Company seeks to raise an affirmative "latches" argument, it should have been under an obligation to give at least some form of direct notice to interveners of its plans. Indeed, apart from rumor, there was no way interveners could have had knowledge of applicant's plans before the plant was "sized".

Consumers Power Company makes a statutory argument that Congress could not have intended direct participation or other broader relief because it was concerned to avoid delays in nuclear plant construction. Insofar as the Midland Units are concerned,

interveners are not aware of any delay resulting from this proceeding. Moreover, the dimensions of this proceeding result from the fact that the Company is contesting rights claimed by the Department of Justice, the AEC Regulatory Staff and interveners at least as much as interveners' assertions of their rights. Especially where many other companies have agreed voluntarily to granting rights, a hold-out company cannot place the blame for delay on his adversory.*/ However, the claim raised by Consumers Power Company with regard to delay in licensing resulting from antitrust proceedings does emphasize the need for clear and unambigious statements of rights. As we stated in our initial brief, interveners at least are convinced that once such rights are finally determined, it would become desirable for parties to agree on appropriate license conditions or other agreements necessary for partic pation and coordination.**/

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*/ As the Board is aware, interveners requested summary judgment earlier in this proceeding and made clear throughout that they thought summary disposition appropriate.

**/ The Waterford Trial Board limited access to unit power purchases. This limitation should not be applicable here, where questions of state law are not in issue (although Consumers Power Company should not be able to frustrate a Board order by attempting to prevent local legislation to ease participation) and where minimum pre-trial relief is not being ordered. Louisiana Power & Light Co., Docket No. 50-382A, "Memorandum of Board with Respect to Appropriate License Conditions Which Would be Attached to a Construction Permit Assuming Arguendo a Situation Inconsistent", (October 24, 1974, p. 33 If joint ownership is ordered Consumers Power Company would, of course, operate the plant. We point out that in Midland, Applicant has already agreed to a form of joint ownership with Dow (9260-9261) and has similar arrangements with Detroit Edison and Commonwealth Edison concerning Luddington as well as joint agreements for construction and operation of transmission and interconnection facilities. Eg. D.J. 72, 73, 74, 75.

Consumers Power Company makes the further point that granting participation will be costly in depriving it of Midland capacity. (Brief, pp. 214-221) We rely on the Department of Justice reply brief in analyzing this issue. However, we do point out the following: First, Consumers Power Company assumes the outcome of the proceeding in making its claim. If munis/coops have a legal right to participate in Midland, there is no "loss" to Consumers Power Company from its selling such capacity. Second, the statement by the Company of costs, if correct, merely points out the economic importance of nuclear ownership. The Company fails to consider the extent to which sales of Midland power will offset current power demands and, thereby reduce costs to Consumers for wholesale and interchange power purchases. This is especially important in light of the deferral of building capacity and excess capacity on the system. */ As a practical matter, Consumers Power Company is constantly adding generation and load, which would offset particular capacity sales.

B. Consumers Power Company Proposed Limitations on Selling Transmission Services are Inappropriate.

Consumers Power Company attempts to condition the offer of transmission services on a number of factors, including that it does not lose business as a result of the transaction and that the rates be set by the Federal Power Commission. Brief, 226-227

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*/ Calculations such as these heavily depend upon estimates of demand, output, capital cost, etc., making them highly conjectural, in any event.

(8106-8107) */ The first limitation provides the clearest imaginable example of the use of monopoly power over facilities to limit competition. To the extent the Company is entitled to protection against losing retail markets, the Michigan Public Service Commission or local statutes provide. However, interveners can see no basis for this Board's circumscribing retail competition beyond whatever is provided by state law. And, regardless of how desirable it may appear from the Company's standpoint, beyond the protection given by the Federal Power Act and contracts it may enter into, the Company is not entitled to exclude other systems from wholesale power sources in order to protect its market power.

As they have stated in our initial brief, in the present context of this proceeding munis/coops do not ask the Board to order specific transmission rates. However, we emphasize the obvious fact that if a transmission rate is high enough in comparison rates charged others, utilities subject to such higher rate will be economically excluded from buying and selling transactions. Indeed, at some point a too high transmission rate becomes an absolute barrier. In this context, the record fully establishes the need for and desirability of license conditions which provide that transmission services be provided for on a non-discriminatory basis to munis/coops compared with amounts charged larger utilities and, further, that their charges be limited to the costs allocated for

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*/ Consumers Power Company argues based on pre-Otter Tail FPC cases that it would not impose transmission requirements for hydro-electric cases. Brief, p. 13 We do not profess to know what conditions the FPC would today impose on smaller hydro-electric plants, let alone hypothetical hydroelectric plants the size of Midland, but Otter Tail is determinative that conditions would be appropriate for plants causing the potential impact of Midland. See, FPC v. Idaho Power Co., 344 U.S. 17 (1952); Idaho Power Co. v. FPC, 346 F.2d 956 (CA 9, 1965), certiorari denied, 382 U.S. 957.

the services provided. */

Interveners do not imply that one allocation method as opposed to another should be selected. For example, we would deem "a postage stamp" rate, commonly used in the industry, which allows for a uniform transmission charge averaging in costs of all like facilities generally preferable to a "point-to-point" transmission charge, which is based upon specific lines used for specific transactions. But, we do not ask the Board to select any method of allocation or form of rate so long as it is non-discriminatory. However, to the extent that transmission investment is used to serve multiple purposes, such as providing for generation or transmission line backup, for reserve transmission capacity, or for interstate power transfers, and a specific transaction utilizes only a limited number of functions such as emergency power, which is delivered only when transmission and generation capacity is "available", the assigned charge should make some allocation transmission costs to services not being used. We propose that this allocation be determined by negotiation or by the Federal Power Commission. However, a customer should not be charged for services he is not using.

A specific example of this would be a purchase of power by Coldwater say from Toledo Edison. To the extent that capacity exists or lines are built to "back up" Consumers Power Company's own generation Coldwater would not be purchasing that service, since it is not using on Consumers Power Company's generation. In its firm wholesale purchases from Consumers Power Company, full transmission investment is included and to include it again would be a

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*/ See Interveners' suggested license conditions.

double-count. We make no argument as to the amount of the difference or the nature of allocations here except to say that there should be some restriction to prevent a clearly anticompetitive transmission charge.

In this context it is imparative to note that for year Consumers Power Company has been entering into transmission transactions on an incremental zero cost basis in recognition of the importance and desirability of facilitating power transfers and the fact that much transmission investment really serves reliability purposes. (Eg.; 5432-5433) In the face of the record showing that by and large there are no transmission charges among the interconnection entities, it would be totally inopposite not to recognize the potential for an anticompetitive charge, if there were no standards set or limitations on the transmission rate to avoid an anticompetitive charge.

Consumers has announced during the course of these hearings that while it is willing to wheel power, in certain circumstances, it will not allow its transmission lines to be used for "cream skimming" or where it will suffer an economic loss. Brief, p. 146, n. 103. That is -- Consumers wants to protect its most profitable customers from the deleterious effect of obtaining competitively priced bulk power. Such a policy ignores the rights of municipalities and cooperatives. Concerning retail competition, there are existing protections provided by local law that we do not here challenge. However, Otter Tail establishes that the Company has no right to a guaranteed market for wholesale power. In announcing its transmission policies, Consumers admits its intention to use its control over a bottleneck facility to limit competition.

Consumers Power Company makes much of the fact that it has agreed to transmit 20 mws of power between Detroit Edison Company and the MMCPP, although on terms that are anticompetitive on their face. */ We can only speculate the extent to which the existence of this proceeding led to such a favorable result.

Consumers also makes much of the alleged lack of demands by interveners for transmission service. This issue has been briefed in our initial brief (pp. 126-127) and was determined in LP&L, Memorandum of Board, supra. However, we wish to point out that the law does not require repeated demands for a service where the issue is a refusal to deal. The Supreme Court stated in Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 699-700 (1962):

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*/ The terms of the contract negotiated with the MMCPP to wheel power from Detroit Edison facilities demonstrates the use of monopoly control of the transmission to restrict access to the lower Michigan peninsula to other bulk power suppliers who want to compete with Consumers. The rate is based upon the rate charged by Detroit Edison to MMCPP (15% of energy) in addition to the demand charge. This rate has no cost relationship. As the Supreme Court stated in Gainesville:

> "An Airplane seat may bring greater profit to a passenger flying to California to close a milliondollar business deal than to one flying west for a vacation; as a consequence, the former might be willing to pay more for his seat than the latter. But focus on the willingness or ability of the purchaser to pay for a service is the concern of the monopolist ...."
> 402 U.S. at 528.

> "Furthermore, we do not believe that respondents' liability under the antitrust laws can be measured by any rigid or mechanical formula requiring Continental both to demand materials from respondents and to exhaust all other sources of supply. The Court of Appeals appears to have accorded no weight to Continental's evidence which was offered to show that respondents had interfered with, acquired, or destroyed the several small independent sources of vanadium oxide relied upon by Continental. Under the criteria used by the Court of Appeals, respondents could, with impunity, concertedly refuse to deal with Continental while the latter was able to obtain some oxide from independent sources, then proceed at their leisure to dry up those other sources, and finally insist that Continental make repeated demands for respondents' oxide before incurring antitrust liability. The cases relied upon by the Court of Appeals clearly do not support any such formula and we cannot deem the injury alleged to flow from a monopolist's elimination of one's independent suppliers to be so "remote" as to justify refusint to let the damages issue go to the jury." (emphasis added). */

This Commission must determine if the use of monopoly power is going to continue into the future.

C. Consumers Power Company's Arguments Against Coordination on an Nondiscriminatory Basis Are Insubstantial

Consumers Power Company states two broad qualifications to its willingness to coordinate. First, it states that coordination transactions should have "substantial" net benefits. Second, it

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*/ In any event, even assuming such technical defenses would be relevant to a court, they should not be to an administrated agency entrusted to assuring that nuclear facilities are not the means for continuing or establishing unfair use of economic power by dominant utilities. In this regard, the reference to the Federal Trade Commission Act is especially relevant. Moreover, the very nature of the defenses raised imply that even if they were valid, an unlawful situation would be created by the licensing of the plant once they were removed, a situation the Board could not coutenance. If there is any doubt munis/coops request the license conditions and services set forth in Appendix A to their initial brief.

states that they must avoid what it calls one system "leaning" upon another. It apparently intends to use the above principles to object to coordination with less than fully self-sufficient generating entities.

While its proposed limitations are somewhat interrelated and not overly clear, we shall attempt to deal with them in turn.

Munis/coops do not disagree that coordination transactions should involve benefits to each party, although we are at a loss to know what the word "meaningful" adds. In a dictionary sense we do not object to the concept of "meaningful" net benefits. However, as part of an order or license condition, the concept would appear to be an invitation for refusals to coordinate by the Company with regard to individual transactions, presenting great potential for litigation as to whether a "benefit" is "meaningful".

Coordination is a means whereby two or more systems agree to sell each other backup and other power services. By pooling units, the necessary reserves for each system are reduced. In this context, assuming a utility's equipment is in reasonable order, benefits result.

There is no question that benefits result. Thus, if it were assumed that an individual system by not coordinating would have higher reserves of its own system, so long as as Consumers Power Company is being <u>paid</u> for the energy it sells in an emergency or maintenance or power transaction, it suffers no harm

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True, if Consumers Power Company can make such self-sufficienty expensive enough to allow it to sell wholesale power, it will make more money, but this does not support Consumers Power Company's position. Rather it suggests anticompetitive profits resulting from its failure to coordinate on reasonable terms.

In our society in buying and selling transactions, the normal means of providing benefits is payment. Thus, for coordination -- or for that matter any of the transactions here involved -- including plant participation and transmission, the Board should determine that where there is payment there is deemed to be a net benefit.

While coordination transactions should and do provide for "net benefits", if the Board is to enter the matter, we suggest that negative language is to be preferred, such as that a transaction not provide a "detriment" to Consumers Power Company. The reason is not that we intrinsically disagree with the concept of net benefits, which we believe to be practically synonomous, but rather that it has an obvious potential for litigation where Consumers Power Company might claim absence of a benefit, thus forcing expensive litigation over individual transactions to prove "benefits". If Consumers Power Company cannot claim an affirmative detriment to itself, given the general advantages of coordination, munis/coops should not be forced into litigation. We note that such negative language is found in other license conditions approved by the AEC.

We would hope that the difference would not come up or, in any event, would not be substantial in real world transactions, but given the history of this litigation and the difficulty interveners have had in obtaining equalized reserves coordination this additional assurance to avoid future litigation would be reasonable, even if it does involve some "hemming-in." Otter Tail Power Co. v. United States, supra. Under this net detriment test, Consumers Power Company cannot be affirmatively harmed, since in the event a transaction provided a detriment, it would not be forced to enter into it.

Consumers Power Company stresses a concept of "leaning", which it claims to be consistent with the Gainesville case. Gainesville Utilities Department v. Florida Power Corp., 402 U.S. 515 (1971). If all Consumers Power Company is stating is that for a unit to be a pool unit, it must have demonstrated reliability, we do not disagree. We have never implied, nor do we believe has the Department of Justice or the AEC Regulatory Staff, that systems do not have a responsibility to pool members to have reliable generation. However, Consumers Power Company appears to be arguing more than this. */

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*/ As we state in our initial brief, the record fully supports that it is Consumers Power Company's units, because of their size and not interveners units, which are likely to experience disproportionate forced outages. Eg., Palasaides.

It claims that it should not have to coordinate absent a special charge, where for one reason or another, a smaller system may purchase (for payment) more interchange power than does Consumers Power Company. The argument is nothing more than a variation on the theme that Consumers Power Company does not want to coordinate with smaller systems or that it does not want to do so without exacting a special charge. (Eg., Brief 228-233) Cf. New England Power Co. v. FPC, 349 F.2d 258 (CA 1, 1965).

If the generation of interveners is in working order, in time of Consumers Power Company need, such as an outage of a unit on its system, it can contribute energy to Consumers Power Company. However, it should be pointed out that in any jointly dispatched system, Consumers Power Company engineers are likely to control the dispatch and interveners will have little control over the extent to which they are the "selling" or "buying" entity. Furthermore, by the nature of things, a system with smaller numbers of units might buy more interchange power from outside its system; interchange power; transferred among units on the larger system will be masked because of single legal ownership. However, each unit will contribute its share.

As the Federal Power Commission noted in Gainesville, the attempt to exact higher reserves or other payment for what Consumers Power Company here refers to as "leaning" inhibits smaller systems from building larger units, in order to avoid use of emergency power from other systems (i.e., to avoid use of the interconnection). However, as Consumers Power Company itself recognizes,

it receives benefit from the smaller systems building larger units, which can more readily provide low-cost interchange power to Consumers Power Company when it is required.

Interchange transactions do not provide an exact balancing. A coordination partner is entitled to an availability of reserves capacity on which it can sell when needed and payment for its costs when it is selling power. An attempt to exact an additional charge because of size is merely an attempt to keep the smaller systems small. Moreover, while the "leaning" arguments have an appearance of fairness, the fact is that Consumers Power Company and not interveners have been having reliability difficulties. Despite this, a putting into effect of the conditions requested by Consumers Power Company can well provide excuses to prevent meaningful coordination.*/

Consumers Power Company argues that it should not have to coordinate with systems that are not fully self-sufficient. It does so at a time when its reports to the SEC and newspaper articles indicate that because of disabilities on its generaton, it is purchasing approximately 30% of its total power needs from

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*/ Note that Consumers Power Company and Detroit Edison Co. will dominate any Michigan pool agreements. Thus, if a major Consumers Power Company unit or units are unreliable, the necessary reserves go up. Even though interveners systems may be more reliable, they would be so small in terms of their impact on the pool reserves requirements that they would have to bear the higher reserves responsibility required by the pool. A smaller system inevitability finds itself in the position that, if its unit is claimed to be unreliable, it is requested to pay a higher share or to discount the value of its unit, but if the units of the major pool members are unreliable, its reserves go up.

other systems. Prospectus, $50,000,000 Consumers Power Company First Mortgage Bonds, 11 1/4% Series Due 1982, p. 12 (August 21, 1974); Wall Street Journal, October 8, 1974.*/ Consumers Power Company's argument is a classic barrier to entry. A non-generating system or partially generating system must at once provide generating capacity sufficient to meet its total system need plus reserves or it can get no coordination at all.

Assume a system with a 20 mw load, 11.5 mws of generation and a 15% reserves requirement. This system is the conceptual analog of two separate systems each having a 10 mw load, but one having 11.5 mws of generation. The system with 11.5 mws of generation would meet the tests for coordination, having 15% reserves to serve 10 mws of load. The second 10 mw system would purchase 10 mw of power from Consumers Power Company. (The price for purchased power of course includes reserved capacity.)

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*/ Compare the statement of Mr. W. J. Mosley, Vice President of Consumers Power Company:

> "If the Palisades Nuclear Unit is in operation, Consumers has a reserve of 11.7 percent. This compares with a design reserve of 15.5 percent, which is regarded as necessary to enable the Pool to handle the estimated peak demand during an anticipated outage.
>
> At the design reserve the Pool would, on the basis of probability analysis, be able to handle the anticipated peak demand only once in 20 years."
>
> Then he says:
>
> "If the Palisades plant is unavailable to the Michigan Pool, in July and August 1970 the Pool capacity reserve will fall to 7.3 percent.
>
> This increases the probability that the pool would fail to handle the peak demand, by a factor of 600, to once in every three months." Tr. 5466

"and the fact is that Palisades has not been in service." Id.

The combined systems (i.e., a system having a 20 mw load) should be equally entitled to coordination for the 11.5 mws of generation. However, because of a reserves requirement, that 11.5 mws of generation would be adequate to serve only 10 mws of load. Thus, its total generation plus 10 mw purchased power would total 21.5 mws, providing 1.5 mw of reserves to backup its generation. Or stated differently, it would be paying demand charges to Consumers Power Company, which when added to its generation would be greater than 1.5 mw its load. There is no reason why there should not be coordination for the 10 mws.

Consumers Power Company argues that it would obtain no "benefits" in such situation. However, it ignores that it is selling not 8.5 mws of wholesale power but 10 mws of wholesale power because of the discounting of the system's 11.5 mws to provide for reserves. It further ignores that it would have a right to call upon this reserve capacity.*/ Moreover, while reserves are stated as a percentage of peak load, the reserves in actual operating practice would be higher, because the peak is reached for a very short period of the year.

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*/ If the system were to utilize its full 11.5 mws of generation, it would still be purchasing 10 mws from Consumers Power Company, leaving 1.5 mws of reserves.

CONCLUSION

Consumers Power Company raises varied arguments either concerning the limited Commission jurisdiction, as it reads the statute, and varied technical reasons why it would be unfair for it to enter into the types of arrangements with interveners that it enters into with larger systems.

Munis/Coops hope that the Board will allow for relief sufficient to resolve the problem of Consumers Power Company refusing to deal with them in the manner in which it deals with other major utilities. They further hope that relief will not be so circumscribed as to be practically meaningless. We believe the relief requested by interveners, the Department of Justice and the AEC Regulatory Staff to be in the public interest and hope that this relief will be ordered. We specifically recommend to the Board Munis/Coops proposed licensed conditions submitted with our proposed findings.

Respectfully submitted,

Robert A. Jablon

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Dated: November 25, 1974

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UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-329A
Consumers Power Company	)	50-330A
Midland Plant (Units 1 & 2)	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing document upon the following persons by depositing a copy thereof in the United States mail, with first class or air mail postage affixed, this 25th day of November, 1974:

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APPENDIX A

Washington Star-News
Business, Finance
E-12
FRIDAY, OCTOBER 25, 1974

Regulated Firms Warned Of Stiff Antitrust Penalty

A Justice Department official says the department is going to seek jail for officials in regulated industries who violate federal antitrust laws.

Keith I. Clearwaters, deputy assistant attorney general in the Antitrust Division, told participants at a transportation law seminar here yesterday that in deciding to seek prison sentences the department will not accept arguments that regulated industries are exempt from antitrust laws.

"In criminal cases we will not consider as exculpatory or mitigating, arguments that defendants . . . have received informal encouragement to engage in predatory or anticompetitive conduct from any official of any state or federal regulatory commission," Clearwaters said.

He added that there is an erroneous belief among lawyers and their clients in regulated industries—communications, transportation, natural gas and the like—that "the mere existence of regulation is . . . sufficient to relieve regulated companies and individual from anti-trust prosecution . . . This is notice that we disagree."

Clearwaters' speech was an indication that the department intends to take an even tougher stance against economic regulation than it has in the past. The department, for some years has sought through both legislation and regulatory proceedings to limit regulation and encourage competition.

Clearwaters was particularly perturbed about the recent Civil Aeronautics Board ruling which set for the first time a minimum rate floor for charter air fares across the Atlantic.

"This, in our view, tends to eliminate the last vestige of competition for the consumer," Clearwater said, adding that the department would "continue to oppose charter floors."

APPENDIX B

DATE:
BLUE BOOK COPY

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Consumers Power Company) Docket No. E-7803

RULING ON APPLICATION OF INTERVENOR CITIES OF BAY CITY, ET AL., FOR SUBPENA DUCES TECUM

(August 9, 1973)

The intervenor group referred to as the Cities/Coops 1/ filed, on July 10, 1973, an "application for subpena duces tecum and production of documentary evidence" directing the Chairman of the Board of respondent Consumers Power Company to appear at the offices of the Commission on August 15, 1973, "to testify," and to produce at said time and place all documents "relating" to a number of subjects, for the period since January 1, 1960. 2/

A subpena duces tecum may be directed to a corporation. An ad testificandum clause is not essential to the validity

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1/ Cities of Bay City, Charlevoix, Coldwater, Harbor Springs, Hillsdale, Marshall, Petoskey, St. Louis and Union City; the Village of Chelsea; the Northern Michigan Electric Cooperative, Inc.; the Southeastern Michigan Rural Electric Cooperative, Inc.; and the Wolverine Electric Cooperative, Inc.

2/ On July 27, 1973, respondent Consumers Power Company filed a motion supported by an affidavit to the effect that it had not been served with a copy of the application and had first learned about it from Commission Staff on July 26, 1973; and it accordingly requested that it be permitted to serve a response to the application on or before August 3, 1973. The motion was granted, and the time further extended informally to August 6, 1973, following a conference telephone discussion and agreement among all counsel and the Presiding Judge on August 3, 1973.

of such a subpena; where it is included, it is separable from the duces tecum clause and may be disregarded as surplusage. McGarry v. S.E.C., 147 F. 2d 389, 391; Wilson v. United States, 221 U.S. 361, 374.

The documents sought cover every conceivable form of document or recording, over the period from 1960 to date, "relating" to any of the following subjects: (1) competition with any of the Cities for customers or service area; (2) efforts of Consumers to influence any municipal action, or the election of any agent or employee, of any political subdivision in Consumers' service area; (3) efforts to influence any legislation in the Michigan legislature; (4) action or positions taken by Consumers with respect to publicly-owned transmission within Consumers' service area, or participation by its wholesale customers in Michigan Power Pool arrangements; (5) any refusal by Consumers or any other utility to (a) wheel power for or to Cities/Coops or to certain other entities, (b) coordinate with Cities/Coops or other entities, or (c) sell wholesale power; (6) sales of natural gas as boiler fuel to its wholesale electric customers; (7) competition between Consumers' retail sales of natural gas and electric power sold by other electric utilities; (8) negotiations for the acquisition of electric power facilities of Michigan Gas and Electric Company; (9) acquisition or disposition of hydroelectric power sites; and (10) offers, or failures to offer, to any utility opportunities to participate in the ownership of or to purchase unit power from any hydroelectric plant.

In addition, unlimited demand is made for all of the company's "individual" files, including billing data, pertaining to all of its wholesale electric customers, including but not limited to files identified by specific customer name.

The relevance of these subjects, or any documents relating thereto, to this rate proceeding under Section 205 of the Federal Power Act (the "Act") is not apparent, on the

face of the papers, and no effort is made to show any such relevance. Section 1.23 of the Commission's Rules of Practice and Procedure provides that written applications for subpenas "shall specify as nearly as may be the general relevance, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, specification as nearly as may be, of the documents desired and the facts to be proved by them in sufficient detail to indicate the materiality and relevance of such documents."

This proceeding concerns changes in the wholesale electric rate schedules of Consumers Power Company. In support of the rate increases proposed herein, Consumers alleges, as summarized in the Commission's order of January 5, 1973, that its earnings have become inadequate due to inflation; that its current rates yield only a 4.5% return from wholesale service on a 1971 test year basis; and that it was spending about $379 million on construction in 1972, and expected to spend over two billion dollars in construction by the end of 1976. Its rate filing included cost of service and financial data based upon a rate of return allowance of 8%.

Cities/Coop's application for a subpena does not refer to any of these matters, directly or indirectly. The nearest approach is one conclusory paragraph which alleges:

> The documentary items requested are material and relevant to the matters in controversy and are necessary and vital for an adequate preparation by Intervenors of their defense to the proposed rate increase by Consumers Power Company (emphasis added).

It is well established that this Commission has the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to Sections 202 through 207 of the Act. Gulf States Utilities Co. v. Federal Power Commission, ___U.S.____, May 14, 1973, slip op. p. 4. That is to say, in undertaking any of its authorized regulatory functions under the Act, it must consider the policies of the antitrust laws, which are a part of the public interest, in

determining its own action and the results which may flow from its action. It may have to weigh the conflicting anticompetitive implications, under traditional antitrust concepts, of its duties under the Act--as, pursuant to Section 202, in providing and encouraging interconnection and coordination for the generation, transmission and sale of electric energy within and between regions. Cf. Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 243 (1968). In exercising its duty to authorize the issuance of certain securities under Sec. 204, it must consider possible anticompetitive consequences flowing from the issuance. Gulf States, supra, slip op. 9, 10.

Here the Cities/Coops alleged, early in the proceeding, that the proposed rates will produce a "price squeeze" limiting their ability to compete for large commercial and industrial customers in violation of antitrust laws and policies(Response of Cities/Coops to Motion for Extension of Time and Request for Immediate Hearing on Price Squeeze Issue, filed April 27, 1973). By order of May 22, 1973, the Commission directed that the "anticompetitive issue," referred to earlier in the order as the "issue of anticompetitive rates," be tried first, although it specified that a single initial decision issue upon the entire proceeding.

Cities/Coops filed their evidence purporting to relate to the "price-squeeze issue" on June 5, 1973. That issue, which by its nature may upon its face have some relation to the rate proceeding, thus requires no further discovery, and none is sought in the present subpena application. In a "Motion to Establish Hearing Dates," Cities/Coops repeated that it had filed its direct testimony addressed to that issue, and insisted that the Commission immediately set hearing dates on the "price squeeze."

In serving its "price squeeze" case, however, Cities/Coops included a covering letter stating: "Additional testimony concerning anticompetitive, as well as other rate issues, will be filed with our cost-of-service presentation." The Commission's order of May 22, 1973, which referred to "the anticompetitive issue" and "anticompetitive rates," had been designed to "provide a full and complete hearing on the entire anticompetitive issue." Noting that this had been

its understanding, the Commission by order of July 2, 1973, amended its order of May 22, 1973, to provide for trial of all issues in the proceeding at a single hearing.

The result of all this is that there has been no specification by the Cities/Coops, and hence by the Commission, of any anticompetitive issue to be heard, particularly any issue conceivably relevant to the rate proceeding, other than the alleged "price squeeze" issue involving "anticompetitive rates."

Voluminous papers filed by Cities/Coops in numerous procedural motions and replies to motions have included documents from an Atomic Energy Commission licensing proceeding, which are alleged to indicate general antitrust violations. Apart from the fact that none of these documents is inconsistent with conduct not in violation of the antitrust laws, none of them has any apparent relation to any issue properly before the Commission in the instant rate proceeding, and Cities/Coops make no effort to point out any such relation.

We are told, in the subpena application, that the Commission "has an obligation to ferret out potential mis-conduct felled (sic) upon its jurisdiction." It is simply not the Commission's obligation, nor is it authorized, to enter upon a general antitrust investigation per se. Thus it is not granted any power to adjudicate antitrust issues. California v. F.P.C., 369 U.S. 482, 486 (1962). "To avoid misunderstanding, we think it appropriate to say expressly that an agency is not required to hold hearings in matters where the ultimate decision will not be enhanced or assisted by the receipt of evidence." City of Lafayette v. F.P.C., 454 F. 2d 941, 953 (D.C. Cir. 1971), aff'd Gulf States, supra. The "ultimate decision" referred to in City of Lafayette was the decision upon an application, pursuant to Section 204 of the Act, for the approval of financing; here it is the decision upon the lawfulness of rates.

Thus in the Atomic Energy Commission proceeding referred to above, the Trial Board of the AEC has, according to Cities/Coops, "narrowly limited the issues in that proceeding to

whether 'applicant (a) has the power to grant or deny access to coordination; (b) applicant has used its power in an anticompetitive fashion against smaller utility systems; (c) applicant's said use of its power has brought into existence a situation inconsistent with the antitrust law, which situation would be maintained by activities licensing that applicant seeks.' " (Emphasis added)

Upon the present application, the Presiding Judge is required under Section 1.23 of the Rules to determine whether a proper showing of relevance, materiality, scope and specificity has been made, with respect to a proceeding under Section 205 of the Federal Power Act--not with respect to a pre-complaint antitrust investigation conducted by an official charged with enforcing the antitrust laws, for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation, as the form of subpena suggests. See 15 U.S.C.A. 1311-1313; Gold Bond Stamp Co., 221 F. Supp. 391 (D.Minn., 1963), aff'd 325 F. 2d 1018 (8th Cir. 1964). As far as concerns the subject matter of the application for a subpena, nothing in the application, or elsewhere in the record, is sufficient "to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application" City of Lafayette v. Federal Power Commission, supra.

In Pacific Power & Light Co., Docket No. E-7796, the Commission denied intervention to a group which alleged conduct violative of the antitrust laws and policy, where it found that the group's claim "falls short of establishing a reasonable nexus between the activities challenged and the activities furthered by the application," citing City of Lafayette, supra. The same principle is applicable with respect to an application for a subpena duces tecum where an intervenor, although its intervention may have been permissible on other grounds, fails to show relevance of the activities challenged, by implication, in its demands for documents to the purpose or possible effect of the proceeding.

The scope of a subpena duces tecum in a rate proceeding does not properly extend to a drag-net investigation to

determine whether or not respondent's files contain any evidence that it has, or is now, engaged in any unrelated violation of the antitrust laws. Enforcement of the antitrust laws per se is not delegated to this Commission. A subpena duces tecum cannot properly be issued in a Section 205 proceeding before this Commission in the absence of any relevance or materiality, demonstrated or fairly to be implied, of the documents sought to the action which the respondent seeks through its rate filing and which may be furthered by the action of Commission as a result of its investigation pursuant to Section 205 of the Act.

Consumers has filed a comprehensive memorandum in opposition to the application. It points out that the proposed discovery relates to alleged antitrust issues which have no "nexus" to Consumers' filed rates and tariff. As more fully set forth above, the Presiding Judge finds this circumstance, which may be expressed as a lack of relevance to the relief at issue in this proceeding, determinative of the application.

Consumers further demonstrates, in painstaking detail, that it has other strings to its bow. It reveals that, notwithstanding the limitation in scope of the AEC proceeding as described by Cities/Coops, it has produced to Cities/Coops more than 25,000 pages of documents relating to alleged anticompetitive matters referred to in the present application; that these documents were produced after an eight-month search by 14 people consuming thousands of man-hours; and that the present request, while largely duplicative, would require a new search because of changes in the wording of requests. It argues, and it is found, that a second burdensome search of subject areas recently covered by discovery proceedings pursued by Cities/Coops before the AEC should not be required, since a substantial repetition of this task could be expected to produce few, if any, additional documents and particularly since Cities/Coops allege that the documents already in their possession establish violations of antitrust law and policy contrary to the Act in these areas. Objections of undue burden and expense are especially to be considered where it appears that the research required would be time consuming and expensive and the results relatively minimal; see, e.g., Greene v. Raymond (re interrogatories), 41 F.R.D. 11, 14 (1966).

Consumers further contends that it should not be required to respond to demands already considered and rejected by the AEC Hearing Board, which include those relating to political activities before municipal and state legislative entities (cf. Duke Power Co., Docket No. E-7557, Opinion No. 641, Dec. 18, 1972, p. 11 of slip op., and p. 17 of slip op. of initial decision affirmed by Opinion No. 641), to its complete wholesale customer files, and to its operations as a natural gas utility. These matters, it appears, were discussed and briefed extensively before the Board; and Consumers briefs them at some length upon the instant application. These items are clearly improper for reasons of subject-matter and scope in addition to the over-all infirmity discussed above. In view of the Presiding Judge's disposition of the application, there is no occasion to discuss them here in detail; it should be noted, however, that Consumers has presented facts, arguments and authorities which raise serious questions as to the propriety of the individual items of Cities/Coops' demands and as to the public interest in the burden they would impose, apart from the fatal lack of relevance to the matters to be decided by the Commission in this rate proceeding.

Finally, Consumers states that it is willing to supply appropriate documents fully reflecting its actions and positions taken with respect to publicly-owned transmission within its service area, and concerning hydroelectric power sites and offers to participate in power from hydroelectric plants; subjects which apparently are in addition to those brought up before the AEC. The ruling herein does not prevent any arrangement of the kind among the parties, however immaterial it may be to the matter now before the Commission. This matter, to repeat, is a proceeding under Section 205 of the Act to determine whether Consumers' proposed wholesale rates and charges, and rules and regulations affecting or pertaining thereto, are in all respects just and reasonable and not unduly preferential or discriminatory, within the meaning of that section of the Act as interpreted by the Commission and the courts.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

In the Matter of	)	
	)	Docket No. E-7803
CONSUMERS POWER COMPANY	)	

CONSUMERS' OPPOSITION TO INTERVENORS' "APPLICATION FOR SUBPOENA DUCES TECUM AND PRODUCTION OF DOCUMENTARY EVIDENCE"

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August 6, 1973

discovery against Consumers and these non-parties will substantially delay this proceeding and obfuscate the appropriate antitrust issues which have been raised here.

Consumers therefore requests, pursuant to the dictates of Section 1.23, that any subpoena request issued herein be confined to the Company's relations vis-a-vis the intervening systems herein and that the document requests be confined to material found in the files of certain specifically-identified Company personnel. Absent such specificity, the Application should be denied.

IV. To the extent that no reasonable "nexus" exists between this proceeding and some issues raised by the Intervenors, discovery founded on those issues should be denied

Another, completely separate and independent defect common[22/] to the subpoena requests is that they relate solely to issues which bear no "reasonable nexus" to this wholesale rate case and, as such, are not relevant to this proceeding. Under Section 1.23 of this Commission's Rules of Practice and Procedure, parties

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22/ Except possibly to requests AT-4(a), 8, and 9, to which Consumers has agreed to respond voluntarily, and AT-1 and AT-5(3) which could encompass some "price-squeeze" materials; however, AT-1 and AT-5(3) duplicate AEC discovery. See Section I, supra, and Appendix A, infra.

applying for subpoenas must define documents they desire "in sufficient detail to indicate the materiality and relevance of such documents." Under the Commission's decisions, and under judicial interpretations of comparable provisions of the Federal Rules, subpoenas are not issued as a "matter of right" and those which do not call for relevant and material documents must be denied. Nelson Bunker Hunt Trust Estate, 15 FPC 1187, 1189 (1956). See also Demeulenaere v. Rockwell Mfg Co., 13 FRD 134 (S.D. N.Y. 1952); Novak v. General Electric Co., 10 FR Serv. 45 b.31, Case 2 (S.D. N.Y. 1967); Texas Eastern Transmission Corp., 25 FPC 759 (1961); Champlin Oil and Refining Co. et al., 21 FPC 533 (1959).

In assessing whether the requested documents are material and relevant, the test is whether such documents "would tend to establish a relevant fact." Nelson Bunker Hunt Test Estate, supra, at 1189. Therefore, discovery seeking factual support for issues and allegations which are beyond the scope of this proceeding as a matter of law must be deemed irrelevant to the instant case and therefore improper under Section 1.23. At the very least, before Consume[illegible] is compelled to engage in an extensive file search for documents relating to such issues, it

should be resolved whether these issues are relevant. In our view, they clearly are not.

According to the Intervenors, every conceivable anticompetitive activity which Consumers may have possibly considered or engaged in since 1960 should be litigated in this wholesale rate proceeding because, according to their Application (p. 19), "the Federal Power Commission has an obligation to ferret out potential misconduct felled [sic] upon its jurisdiction". Thus, the Intervenors would have the Federal Power Commission step into the shoes of the Department of Justice and the Federal Trade Commission as the chief prosecutor of the nation's antitrust laws. Such a proposition is clearly contrary to the Commission's statutory mandate under Section 205 of the Federal Power Act which charges the Commission to sanction "just and reasonable" electric rates.

The Commission's responsibilities under the antitrust laws, although important, are limited by the scope of its paramount jurisdiction. As the Supreme Court recently affirmed, "although the impact on competition is relevant to the Commission's determination . . . there [is] 'no 'pervasive regulatory scheme' including the anti-trust laws that has been entrusted to the Commission.'"

Otter Tail Power Co. v. United States, 93 Sup. Ct. 1022, 1027 (1973), quoting California v. FPC, 369 U.S. 482, 485 (1962). Rather, as enunciated in City of Lafayette v. SEC, 454 F.2d 941, 953 (D.C. Cir. 1971) aff'd sub. nom. Gulf States Utilities v. FPC, 93 Sup. Ct. 1870 (1973), there must be a "reasonable nexus" between the anticompetitive allegations and the activities subject to the Commission's scrutiny. In this regard, the Court of Appeals also sanctioned the Commission's resolution of "nexus" issues without an evidentiary hearing. The holding made clear that:

> ...[A]s to interventions raising anti-competitive issues we see no objection in law to a disposition without hearing that is accompanied by an explanation, supported in the record, that the intervenor's contentions are too insubstantial or barren . . to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application. [footnote omitted] [Emphasis supplied] 454 F.2d at 953.

These principles were recently summarized as follows by a hearing examiner in the Duke Power Company case, supra, and subsequently deemed "correct" by the Commission itself:

> [T]he duty of the Commission is to consider the underlying policies of those [antitrust] laws and any anti-

> competitive consequences shown and give them weight, but only to the extent that they may bear a reasonable relationship to, be in harmony with, or be complementary to, the purposes of the provisions of the statute to be effectuated in the particular proceeding . . . [Initial Decision, Duke Power Company, supra, pp. 19-20, (Footnote omitted.) [Emphasis supplied.]

In the instant case, the "statute to be effectuated" is Section 205 of the Federal Power Act, under which the Commission is charged with determining whether filed rates and tariffs are "just and reasonable". Among the issues which the Intervenors have raised in this proceeding is whether "Consumers Power's proposed rates create a direct 'price squeeze' which makes it impossible on either an average or incremental cost basis for municipal or cooperative utilities to purchase from Consumers Power and re-sell to large customers" (p. 10-11). The Intervenors have also alleged that Consumers' wholesale sales contracts contain provisions which "may have the effect of preventing sales to new large customers by municipals or cooperatives without consent of the Company." (p. 12). Although there appears to be sufficient nexus between these issues and the rates and tariffs which the Commission is charged with reviewing under Section 205,

most of[23/] the subpoena requests do not relate to these allegations.

Rather, the proposed discovery relates to alleged antitrust issues which have no "nexus" to Consumers' filed rates and tariffs. These issues, as set forth in the Application, include the following: (1) whether Consumers has granted "fair and non-discriminatory access to bulk power facilities", including sale of "transmission services to Cities/Coops" (pp. 7, 9); (2) whether Consumers has "refused participation by the Cities/Coops in new units" (p. 10); (3) whether Consumers "has refused to coordinate on reasonable terms with Cities/Coops" (p. 11; see also p. 9); and (4) whether Consumers has used "its monopoly power over natural gas" in an anticompetitive fashion (p. 17).

In evaluating the "nexus" of an issue to this proceeding, one test is whether adjustment in wholesale rate levels would serve to ameliorate particular claimed antitrust violations. None of the foregoing issues or the discovery based upon them have any relation to the wholesale rates and tariff provisions which are sub-

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23/ In Appendix A attached hereto, we set forth on an item-by-item basis the relationship between the discovery requested and those issues which have no "nexus" to this proceeding.

ject to this proceeding and none of the Intervenors' allegations in this regard could be ameliorated by adjustments to Consumers' wholesale rates. For example, the Intervenors' complaint about "access" to Consumers transmission system is beyond the jurisdiction of this Commission to remedy, and adequate relief in this regard is available through the Federal courts. See City of Paris v. Kentucky Utilities Co., 41 FPC 45 (1969); Otter Tail Power Co. v. United States, 93 Sup. Ct. 1022 (1973).

Similarly, the interconnection and coordination arrangements about which the Intervenors complain largely relate to system reliability and have no reasonable relationship to the rates and conditions under which Consumers serves its wholesale customers. To be sure, under Section 202 of the Federal Power Act, the Commission is charged with encouraging voluntary interconnection, and it may compel interconnection under certain prescribed circumstances. See Gainesville Utilities Department v. Florida Power Corporation, 40 FPC 1227 (1968). But, according to the Act, disputes about interconnection terms are to be heard in proceedings under Section 202(b), not in Section 205 rate proceedings, as the Intervenors

suggest.

Consumers submits, therefore, that most of the subpoena requests do not relate to issues which bear any "nexus" to this rate proceeding and that such requests should thus be struck from the proposed subpoena as unrelated "to the establishment of any relevant fact." Nelson Bunker Hunt Estate, supra.

V. The Subpoena's Return Date is Unreasonable

The subpoena prepared by the Intervenors calls for the production of documents by Consumers' president on August 15, 1973. That date is clearly unreasonable. However, until Consumers is apprised which, if any, of the subpoena requests are to be issued, it will not be in a position to offer its views as to an appropriate date for compliance.[24/] We, therefore, reserve our rights to present our views in this regard and respectfully urge that no return date be established prior to that time.

24/ The discussion concerning burden in Section II(C), supra, is particularly appropriate in this regard.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of	)	
	)	Docket No. E-7803
CONSUMERS POWER COMPANY	)	

ANSWER OF CONSUMERS POWER COMPANY
TO CITIES/COOPS' EMERGENCY APPEAL

INTRODUCTION

Consumers Power Company (Consumers), the applicant in this rate proceeding, hereby answers the August 28, 1973, "Emergency Appeal" of certain intervenors (Cities/Coops) from a ruling of the Administrative Law Judge denying their application for a subpoena duces tecum.[1/] In their Appeal, Cities/Coops request the Commission to require production by Consumers of documents which the Presiding Judge described as follows:

> "The documents sought cover every conceivable form of document or recording, over the period from 1960 to date, 'relating' to any of the following subjects: (1) competition with any of the Cities for customers or service area; (2) efforts of Consumers to influence any municipal action, or the election of any agent or employee, of any political subdivision in Consumers' service area; (3) efforts to influence any legislation in the

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1/ The Cities/Coops subpoena application was filed on July 9. Consumers was not served with the application, however. Accordingly, Consumers sought and was granted leave to file a response on August 6. The Presiding Judge issued his Ruling denying the subpoena on August 9.

to supplement an already extensive, time-consuming, and burdensome discovery project with one of even greater magnitude, not with an initial attempt to obtain access to basic facts. As discussed more fully in the next sections, the Presiding Judge was fully justified, on a number of grounds, in denying the requested subpoena.

II

CITIES/COOPS HAVE FAILED TO DEMONSTRATE THE "EXTRAORDINARY CIRCUMSTANCES" REQUIRED FOR RELIEF, AND THE COMMISSION SHOULD DISMISS THEIR APPEAL ON THIS BASIS

The Appeal seeks Commission review, on an interlocutory basis, of a ruling by the Presiding Judge on a matter of discovery. This type of evidentiary ruling is normally left to the sound discretion of the Judge. Accordingly, the Rules (§1.28) preclude Commission review absent a showing of "extraordinary circumstances where prompt decision by the Commission is necessary to prevent detriment to the public interest." Cities/Coops' Appeal makes no such showing. Hence, the Commission should dismiss their Appeal on this ground, without reaching the merits.

A. The Basis for the Ruling Below Does Not Give Rise to Extraordinary Circumstances.

The ruling of the Presiding Judge does not give rise to emergency circumstances justifying consideration of this Appeal. In attempting to make the requisite show-

ing, Cities/Coops seize on the grounds relied upon by the Presiding Judge. They argue that his "ruling was based primarily upon his stated belief that antitrust issues raised by Cities/Coops are not relevant to a rate case." (Appeal, p.1; see also pp. 7-9). They then claim that the Commission must hear this Appeal in order to make it clear to the Presiding Judge that antitrust issues are in fact relevant. (Appeal, pp. 7-10).

The flaw in this contention is that it completely mischaracterizes the Presiding Judge's ruling. He clearly did not rule that antitrust issues are irrelevant to a rate case. To the contrary, he recognizes that "this Commission has the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations . . ." (Ruling, p.3). Indeed, the anticompetitive "price squeeze" issue, on which Cities/Coops have already filed their testimony will be tried in this proceeding.

Judge Southworth made the basis for his ruling very clear. It was not the irrelevance of antitrust issues in a rate proceeding but the failure of Cities/Coops to show that the particular subjects covered by the subpoena have a "reasonable nexus" to the relief at issue in this proceeding. The Judge repeatedly made clear that his

ruling was based on this failure to make the necessary showing. Thus, he made the following statements at various points in his Ruling:

> "The relevance of these subjects [i.e., the subjects covered by the subpoena] or any documents relating thereto, . . . is not apparent, on the face of the papers, and no effort is made to show any such relevance." (Ruling, pp. 2-3)

> "...[T]here has been no specification by the Cities/Coops, and hence by the Commission, of any anticompetitive issue to be heard, particularly any issue conceivably relevant to the rate proceeding, other than the alleged 'price squeeze' issue involving 'anticompetitive rates'. (Ruling, p.5)

> "...[N]othing in the application, or elsewhere in the record, is sufficient 'to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application.'" [citing City of Lafayette] (Ruling, p.6)

> "A subpoena duces tecum cannot properly be issued in a Section 205 proceeding before this Commission in the absence of any relevance or materiality, demonstrated or fairly to be implied...." (Ruling, p.7)

Two facts, thus, are clear: first, the Judge's ruling was not based on a conclusion that antitrust issues are irrelevant; second, his ruling was based on a finding that the Cities/Coops had not made the necessary showing of relevance and materiality. This kind of procedural ruling does not create the "extraordinary circumstances" which justify interlocutory Commission review.

basis would open a Pandora's box of objections and appeals. In short, there is nothing "extraordinary" about a Judge's ruling that a subpoena applicant has failed properly (i.e., within Rule 1.23) to specify the documents sought. Certainly, Cities/Coops have failed to make any showing on this point.

In conclusion, on these points, Consumers submits that the Commission can and should deny and dismiss this appeal on the ground that Cities/Coops have utterly failed to demonstrate any "extraordinary circumstances" to justify interlocutory review of the Presiding Judge's Ruling.

III

THE RULING OF THE PRESIDING JUDGE ON RELEVANCE WAS CORRECT

As discussed in the preceding Section, the Commission would be fully justified by procedural considerations in leaving the Presiding Judge's ruling undisturbed. However, should it choose to examine the merits of his ruling, the Commission will find ample grounds for sustaining him.

In his Ruling, the Presiding Judge rejected the position, which lies at the heart of this appeal, that the Commission has an obligation to enter upon a general antitrust investigation whenever requested to do so in connection with any application pending before it. Relying upon the opinion of the court of appeals in City of Lafayette v. FPC, 454 F.2d

941 (D.C. Cir. 1971), sustained by the Supreme Court in Gulf States Utilities Co. v. FPC, ___ U.S. ___, May 14, 1973, the Presiding Judge ruled that the intervenor must show "a reasonable nexus between the activities challenged and the activities furthered by the application" (Ruling, p.6, quoting City of Lafayette, supra.). The Presiding Judge plainly stated that intervenors had neither made, nor tried to make, such a showing. He said:

> "A subpoena duces tecum cannot properly be issued in a Section 205 proceeding before this Commission in the absence of any relevance or materiality, demonstrated or fairly to be implied, of the documents sought to the action which the respondent seeks through its rate filing . . ." (Ruling, p.7) [Emphasis supplied.]

Thus, the Presiding Judge's ruling was clearly based on intervenors' failure to make the requisite showing of relevance. Intervenors' effort to twist this ruling into a pre-judgment by the Presiding Judge that antitrust issues are irrelevant in this proceeding is entirely without justification.

Intervenors persist in their failure to establish the requisite nexus between the subject matter of the documents sought and the questions at issue here. This is, of course, a rate proceeding under Section 205 of the Federal Power Act. The Presiding Judge has ruled that the "price squeeze" allegations raised by intervenors bear on the question whether the rate increase sought should be granted.

However, the subpoena, for the most part, does not deal with the price squeeze. It seeks information on interconnection, coordination, wheeling, unit power sales and similar subjects. 7/ Having been told by the Presiding Judge that they have made no showing of relevance, what do the intervenors now say? They claim that these subject matters are relevant because it is their intention to seek relief in this proceeding dealing with interconnection, coordination, pooling, etc. (Appeal, pp. 8-9). This does no more than beg the question. The central query is whether the intervenors can and should obtain relief of this kind in a Section 205 rate proceeding. Section 202 deals with interconnection and provides a means through which the Commission can explore questions dealing with such matters. Hence, interconnection and pooling do not become relevant in a rate proceeding merely because intervenors say they are. They must demonstrate that there is a reasonable connection between such matters and the rate relief sought by Consumers. They have not done so.

Indeed, reading their Appeal amply confirms the view

7/ Consumers asserted the nexus point with regard to Items 2, 3, 4b, 5(1) and (2), 6 and 7. See Consumers' Opposition, Appendix A and footnote 22, p. 26. It did not choose to assert the point with regard to Items 4(a), 8 and 9, where, in an effort to accommodate, it offered to comply with a suitably modified request. See Consumers' Opposition, pp. 3-5.

of the Presiding Judge that intervenors are resting on the theory that the filing of a rate application provides the occasion for a general antitrust investigation. See, e.g., the discussion at pp. 11-20 of the Appeal, which shows no connection between interconnection and rates but argues that the Commission must consider antitrust questions in any sphere of a company's activities when such questions are raised in a rate proceeding.[8/] This is not the holding of Gulf States. As we pointed out to the Presiding Judge in our Opposition, the Commission's responsibilities under the antitrust laws, although important, are limited by the scope of its paramount jurisdiction. As the Supreme Court recently affirmed, "although the impact on competition is relevant to the Commission's determination . . . there [is] 'no 'pervasive regulatory scheme' including the antitrust laws that has been entrusted to the Commission.'" Otter Tail Power Co. v. United States, 93 Sup. Ct. 1022, 1027 (1973), quoting California v. FPC, 369 U.S. 482, 485 (1962). Rather, as enunciated in City of Lafayette v. SEC, 454 F.2d 941, 953 (D.C. Cir. 1971) aff'd sub. nom. Gulf States Utilities v. FPC, 93 Sup. Ct. 1870 (1973), there

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8/ The argument at pp. 20-27 of the Appeal also begs the question. It shows only that where relevance and materiality are demonstrated, a subpoena should issue. The question here is whether the requisite showing of relevance has been made.

must be a "reasonable nexus" between the anticompetitive allegations and the activities subject to the Commission's scrutiny. In this regard, the Court of Appeals also sanctioned the Commission's resolution of "nexus" issues without an evidentiary hearing. The holding made clear that:

> . . . [A]s to interventions raising anticompetitive issues we see no objection in law to a disposition without hearing that is accompanied by an explanation, supported in the record, that the intervenor's contentions are too insubstantial or barren . . . to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application. [footnote omitted] [Emphasis supplied] 454 F.2d at 953.

In evaluating the "nexus" of an issue to this proceeding, one test is whether adjustment in wholesale rate levels would serve to ameliorate particular claimed antitrust violations. None of the foregoing issues or the discovery based upon them have any relation to the wholesale rates and tariff provisions which are subject to this proceeding and none of the Intervenors' allegations in this regard would be ameliorated by adjustments to Consumers' wholesale rates. For example, the Intervenors' complaint about "access" to Consumers transmission system is beyond the jurisdiction of this Commission to remedy, and adequate relief in this regard is available through the Federal courts. See City of Paris v. Kentucky Utilities, Co., 41 FPC 45 (1969); Otter Tail Power Co. v. United States, 93 Sup. Ct. 1022 (1973).

Similarly, the interconnection and coordination arrangements about which the Intervenors complain largely relate to system reliability and have no reasonable relationship to the rates and conditions under which Consumers serves its wholesale customers. To be sure, under Section 202 of the Federal Power Act, the Commission is charged with encouraging voluntary interconnection, and it may compel interconnection under certain prescribed circumstances. See Gainesville Utilities Department v. Florida Power Corporation, 40 FPC 1227 (1968). But, according to the Act, disputes about interconnection terms are to be heard in proceedings under Section 202(b), not in Section 205 rate proceedings, as the Intervenors suggest.

At pp. 30-34 of their Appeal, intervenors attempt an item-by-item showing of the requisite nexus. Once again, they do no more than assert their intention to seek relief dealing with coordination and interconnection as a grounds for requiring the information sought. At no point do they face up to the question whether a Section 205 rate proceeding is the appropriate vehicle to seek such a result.

Hence, the Presiding Judge was correct in refusing to issue the subpoena as requested. He rightly perceived that intervenors are asserting that the Commission has an obligation to embark upon a general antitrust investigation

in connection with any application filed with it. His reading of Gulf States on this point is precisely correct. The Commission does have an obligation to consider antitrust policy in determining its actions. However, a particular antitrust question is not germane unless it is shown that there is some reasonable connection between that question and the action sought by the application before the Commission. Intervenors have persistently refused or failed to show the requisite connection here.

IV

THE RULING OF THE PRESIDING JUDGE WAS ALSO BASED ON OTHER VALID GROUNDS

The ruling of the Presiding Judge rested primarily on the relevance question just discussed. As pointed out, that ruling is fully justified. However, should the Commission think otherwise, or have any question on the point, its inquiry should not stop there. Consumers asserted a number of other, independent grounds for denial of the subpoena and these were specifically endorsed by the Presiding Judge. His rulings in this regard should also be sustained.

There is, first, the objection on the grounds of burden because of the prior file search in connection with the AEC proceeding.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

The Detroit Edison Company and Consumers Power Company	)	Docket No. E-7206
The Detroit Edison Company	)	Docket No. E-8308

ANSWER OF CONSUMERS POWER COMPANY AND DETROIT EDISON COMPANY TO CITIES PROTEST, PETITION TO INTERVENE, AND REQUEST FOR HEARING

On October 2, 1973, The Cities of Coldwater, Marshall, and Niles (Cities) filed, out of time, a "Protest, Petition to Intervene and Request for A Hearing". Consumers Power Company (Consumers) and Detroit Edison Company (Edison), Applicants herein, hereby answer this pleading pursuant to §1.8(e) of the Commission's rules. For the following reasons, Consumers and Edison oppose the petition for intervention and ask that it, and the protest, be rejected.

INTRODUCTION

The Application in this proceeding was jointly filed by Consumers and Edison on June 14, 1973, pursuant to §202(e) of the Federal Power Act and Executive Order No. 10485, issued September 3, 1958. The Application seeks Commission approval for the construction of an interconnection between Applicants and the Hydro-Electric Power Commission of Ontario, Canada (Ontario-Hydro). On October 10, 1972, the Commission approved

the basic interconnection agreement between Applicants and Ontario-Hydro. This approval included approval of the interchange of power by way of three existing interconnections.[1/] The instant Application merely seeks to add a fourth interconnection.

The amounts of energy for import and export under the basic interconnection agreement were authorized by the Commission in an Order dated October 10, 1972, in Docket No. E-7206. The instant Application involves no change in that authorization. The justification for the fourth interconnection is simply that the respective systems of Consumers and Edison and Ontario Hydro have grown considerably in recent years. A fourth interconnection is needed to insure continued system reliability in the event of multiple forced outages of the larger generation units. In sum, this Application involves only a minor addition to existing facilities to insure the continued reliability of Applicants' and Ontario Hydro's systems.

It is in the context of this limited Application that Cities seeks to intervene solely in order to inject a broad range of totally unrelated antitrust issues.[2/] The Cities of

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1/ The original interconnection was between Edison and Ontario-Hydro.

2/ Consumers and Detroit Edison deny every allegation of anti-competitive activity. The voluminous out-of-context documents

(continued next page)

Coldwater and Marshall are parties to FPC Docket No. E-7803, a Consumers rate proceeding under §205, where they are seeking to raise the same issues. In addition, all Cities are parties to a case before the Atomic Energy Commission, Docket Nos. 50-329A and 50-330A, a proceeding involving the licensing of a Consumers nuclear power plant, where they have also raised these same issues.

The Cities of Coldwater and Marshall are wholesale customers of Consumers. Neither has any relationship with Detroit Edison or Ontario-Hydro. The third City, Niles is a full requirements customer of Indiana and Michigan and has no relationship with either Applicants or Ontario-Hydro. Nowhere in their Protest, Petition to Intervene and Request for A Hearing do Cities explain how or in what way they will be affected by Applicants' proposed interconnection with Ontario-Hydro.

(continued)

appended to Cities' protest and petition are similar to documents filed by Coldwater and Marshall in Docket No. E-7803. Judge Southworth accurately characterized the documents in that case:

> Apart from the fact that none of these documents is inconsistent with conduct not in violation of the antitrust laws, none of them has any apparant relation to any issue properly before the Commission in the instant . . . proceeding, and Cities/Coops make no effort to point out any such relation. (Ruling of August 9, 1973, at p. 5)

I.
THE UNAUTHORIZED FILING OF A LATE PETITION BY CITIES IS IPSO FACTO GROUNDS FOR DENIAL OF THEIR PETITION

In its Notice in this docket, the Commission set August 27 as the date by which protests and petitions were to be filed. On August 24, Cities requested an extension until October 1. They sought no further extensions. In an Order of August 31, the Commission granted the extension to October 1. The Cities, however, despite the lengthy delay they obtained, failed to file their protest and petition on time.

Commission Rule 1.8(d) provides:

> Petitions to intervene . . . may be filed at any time . . ., but in no event later than the date fixed for the filing of petitions to intervene in any order or notice with respect to the proceedings issued by the Commission or its Secretary, unless, in extraordinary circumstances for good cause shown, the Commission authorizes a late filing.

By filing their protest and petition late without first having obtained Commission authorization under Rule 1.8(d), the Cities are in plain violation of the Commission's rules. The fact that Cities do not even mention their lateness, let alone attempt an explanation or justification of it, demonstrates the kind of cavalier attitude which this

Commission should not countenance. Under these circumstances, Cities' failure to file timely constitutes, ipso facto, sufficient grounds for denying their intervention in this case.

II.

PETITIONERS HAVE SHOWN NO NEXUS BETWEEN THE ALLEGED ANTICOMPETITIVE ACTIVITY AND THE RELIEF REQUESTED

Cities request their "admission . . . to the benefits of the related interchange and ancillary agreements . . ." involved in the Application as well as "access to Applicant's transmission lines and full coordination and pooling rights". This relief has no relationship or "nexus" to the relief which can be obtained under Section 202(e) of the Federal Power Act.

The Commission's responsibilities under the antitrust laws, although important, are limited by the scope of its paramount jurisdiction. As the Supreme Court recently affirmed, "[a]lthough the impact on competition is relevant to the Commission's determination . . . there [is] no 'pervasive regulatory scheme' including the antitrust laws that has been entrusted to the Commission.'" Otter Tail Power Co. v. United States, 410 U.S. 366, 373 (1973), quoting California v. FPC, 369 U.S. 482, 485 (1962). Rather, as enunciated in

City of Lafayette v. SEC, 454 F. 2d 941, 953 (D.C. Cir. 1971) aff'd sub. nom. Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973), there must be a "reasonable nexus" between the anti-competitive allegations and the activities subject to the Commission's scrutiny. In this regard, the Court of Appeals also sanctioned the Commission's resolution of "nexus" issues without an evidentiary hearing. The holding made clear that:

> ...[A]s to interventions raising anti-competitive issues we see no objection in law to a disposition without hearing that is accompanied by an explanation, supported in the record, that the intervenor's contentions are too insubstantial or barren . . . to meet the requirement of a reasonable nexus between the activities challenged and the activities furthered by the application. [footnote omitted] [Emphasis supplied] 454 F.2d at 953.

These principles were summarized as follows by a Presiding Administrative Law Judge in the Duke Power Company case, Opinion and Order on Increased Rate Filing, Docket No. E-7557 (December 18, 1972), and subsequently deemed "correct" by the Commission itself:

> [T]he duty of the Commission is to consider the underlying policies of those [antitrust] laws and any anticompetitive consequences shown and give them weight, but only to the extent that they may bear a reasonable relationship to, be in harmony with, or be complementary to, the purposes of the provisions of the statute to be effectuated in the particular proceeding . . . [Initial Decision, Duke Power Company, supra, pp. 19-20, February 2, 1972.][Footnote omitted, emphasis supplied.]

In the instant case, the "statute to be effectuated" is Section 202(e) of the Federal Power Act, under which the Commission "shall" approve an application to transmit electric energy to a foreign country unless, after opportunity for hearing,

> "it finds the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission."

The scope of this proceeding is limited solely to these standards.[3/] Cities have made no claim that the proposed interconnection would "impair the sufficiency of electric supply within the United States". Indeed, no such claim could seriously be made because a fourth interconnection with Ontario-Hydro will clearly improve the sufficiency of electric supply. Similarly, Cities do not allege that the interconnection will impede coordination. Again, a fourth interconnection is specifically designed to facilitate improved coordination. In short, Cities make no allegations which relate to system reliability, which is the primary concern of a Section 202(e) proceeding. Rather than coming to grips with

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3/ The narrow and negative standard contained in Section 202(e) of the Act contrasts with the broad "lawfullness" standard contained in Section 204(a) which was, of course, the section interpreted by the Supreme Court in Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973).

the standards which control the scope of this proceeding, Cities request the Commission to conduct a full scale anti-trust hearing on issues unrelated to Section 202(e) of the Federal Power Act.

In a recent decision, Administrative Law Judge Fribourg dismissed similar contentions in the context of a rate proceeding under Section 205:

> The main advantage to intervenors in their presently chosen course appears to be the greater possibility of settlement arising from prolonging, perhaps for years, the time during which the rate increase remains subject to refund. To tie up a public utility's funds in this way exerts considerable leverage on it. In lengthening the time required before refunds are made, it lessens the likelihood that they will be made to the original payers of the overcharges. It is not fair to the public or to the company. As to matters other than the "price squeeze" (consideration of which is omitted because the Commission has decided it), the detriment would perhaps be worth accepting if it produced the needed substantive relief. It does not do so. Denial of the increase neither satisfies the demands nor compensates for their refusal. None of the other issues sought to be raised by the intervenors could be resolved by an order in this proceeding.
>
> It is not suitable that the proceeds of a rate increase be treated as ransom for relief not related to the increase. [Pacific Gas & Electric Company, Docket No. E-7777, September 28, 1973.]

Although this Section 202(e) proceeding does not involve the problem of refunds, the other points made by Judge Fribourg apply equally to this application. First, denial of the Application herein will not provide substantive relief

to Cities. Secondly, "[d]enial of the [application] neither satisfies the demands nor compensates for their refusal." Thirdly, it would be inappropriate to treat approval of the Application as "ransom for relief not related to" the scope or purpose of Section 202(e). It would seem that petitioner's claims are no more properly before the Commission in this proceeding than in a Section 205 rate case.

Significantly, the Atomic Energy Commission, which is expressly charged with prelicensing antitrust review under the Atomic Energy Act, has recently rejected the notion that such review extends to activities of an Applicant unrelated to the "activities under license":

> If activities relating to a facility have no substantial connection with alleged anticompetitive practices, there is no need for a hearing as to such practices or proposed forms of relief from them. In short, an intervenor must plead and prove a meaningful nexus between the activities under the nuclear license and the "situations" alleged to be inconsistent with the antitrust laws. (footnotes omitted) In the matter of Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), Docket No. 50-382A, September 28, 1973.

While the Atomic Energy Act, of course, differs from the Federal Power Act, the concept of "nexus" in the context of an antitrust review is similar. There must be some relationship between the agency's statutory area of responsibility and the alleged antitrust activity. In this case, the

"activity under license," so to speak, is a fourth interconnection between Applicants and Ontario-Hydro. Cities have not pleaded any relationship between such interconnection and the claimed anticompetitive practices. No nexus, therefcre, has been shown. In these circumstances, intervention should be denied.[4/]

III.

CITIES COULD NOT AVAIL THEMSELVES OF THE REQUESTED RELIEF EVEN IF IT WAS GRANTED

Cities request that they be given full access to the pooling, interconnection, and coordination arrangements between Applicants and Ontario-Hydro. It is apparent, however, from the face of their petition to ir.ervene, that they are physically unable to enter into such arrangements.

In their Petition, the City of Coldwater states that its generation capacity is approximately 16.2 mw and its peak demand is 18.4 mw. Thus, Coldwater has no reserve capacity whatsoever and, therefore, has no energy to exchange. The same is true of the City of Marshall which has a generation capacity of 600 kw and a peak demand of 1050 kw. The City of Niles, being a full requirements customer of the Indiana and Michigan Company, clearly has no generating capacity.

4/ Consumers and Edison believe that, entirely apart from Cities failure to demonstrate a nexus between their anticompetitive claims and the subject of the application, Cities' interest in this application is so remote and tenuous in every respect that they lack the requisite standing for intervention.

The interconnection for which approval is sought by Applicants is part of an energy interchange arrangement whereby, essentially, Applicants and Ontario-Hydro draw on each other's reserves in the event of outages. There is no point to such an arrangement, in principle or otherwise, unless each party has excess reserves. Cities have no excess capacity nor, for that matter, do they have sufficient generation to meet their own needs. Even were they to become a party to Applicants' interchange agreement with Ontario-Hydro, they would be totally unable to participate in the arrangement.

Under these circumstances, where Cities are incapable of availing themselves of the requested relief, their petition to intervene borders on the frivolous. Since granting the requested relief would be an empty gesture, their participation in these proceedings would not assist the Commission or be in the public interest. The Commission, therefore, should deny their petition to intervene.

CONCLUSION

None of the Cities seeking intervention have an interest which would in any way be affected by a Commission order in this proceeding. They are simply too remote from this interconnection and, in any event, could not avail themselves of the broad antitrust relief they seek even

assuming the Commission could grant it here. Therefore, the sole result of the granting of Cities' intervention would be to transform a §202(e) proceeding into a massive, prolonged antitrust case. This, Consumers and Edison submit, could have serious effects upon public and private interests alike. Hence, the protest and petition to intervene of Cities should be rejected. We so request.

Respectfully submitted,
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October 17, 1973

APPENDIX C

Losing Power

How Thriving Utility Became a Sagging One After Its Giant Step

Atomic and Gas Difficulties Afflicting Michigan Firm; Is Management Capable?

Company Sees 'Cruel Hoax'

By John R. Emshwiller
Staff Reporter of The Wall Street Journal

JACKSON, Mich.—The year 1966 was a terrific one for Consumers Power Co., the electric and gas utility that provides energy for much of Michigan. The huge company had record earnings, increased its dividend and was regarded as one of the country's best-run utilities.

Early that year, the thriving company completed plans for its most ambitious project yet: a $90 million Palisades nuclear power plant on Lake Michigan near South Haven. The project was to be the first giant step in a program putting the company in the vanguard of an industrywide move to atomic power.

Despite environmental battles, the plant got built, producing its first electricity on Dec. 31, 1971. It unquestionably was a giant step: Construction-cost overruns more than doubled the final price tag, to $185 million. But over the last year, the plant has produced a mere trickle of electricity, forcing Consumers Power to shell out more than $32 million for replacement power from other utilities and prompting the company to sue five contractors for damages exceeding $100 million.

Only One Factor

As costly and troublesome as that has been, it is only one factor in a dramatic [illegible] of one of the nation's biggest utilities. After steadily increasing its dividend during the 1960s, Consumers Power now is struggling to keep it at $2. For the 12 months ended Aug. 31, the company's earnings shrank to $1.56 a share from $2.74 a year earlier.

Consumers Power's once top credit rating has dropped, and the company has encountered increasing difficulty raising capital. It had to scrap plans for a big common-stock offering last spring and finally managed to raise $143 million by enticing investors with costly 11%-plus bonds and a rare form of convertible preference stock with an unusually high dividend of 12%.

Now earnings are so low that company officials say they are unable to sell more bonds or [illegible] preferred stock. The utility has cut about $450 million from its construction spending plans for the next five years and has cut 500 employes from its 11,500-man work force.

"Our present results are horrible," says A. H. Aymond, Consumers Power's 59-year-old chairman and president, who has been at the helm for 11 years. If they don't improve, he says, "we'll have to cut construction further." That could mean economically crippling power shortages in the future—a notion unthinkable to most utility executives just a year ago.

An Industry In Crisis

Problems aren't unusual for utilities these days, of course. There's a crisis in the entire industry. "I've never seen a more troubled time for utilities, nor one where the future of this indispensable industry was more clouded," says Joseph Swidler, former chairman of the Federal Power Commission.

The depleted condition of many firms has anxious industry and government officials groping for solutions. Already the House Ways and Means Committee has approved an increase in the investment tax credit for utilities, and other tax-break schemes have been advanced. Also proposed are federally guaranteed debt issues and the easing of costly environmental controls. Federal energy and financial officials are also urging states to approve quick rate increases.

But if the plight of Consumers Power is any indication, quick cures are going to be hard to come by. Like many utilities, Consumers Power must cope with a host of adversities beyond its control: fuel scarcities, skyrocketing prices of oil and other supplies, tight money and painfully slow rate increases. On top of that, the company also suffers from serious internal problems in both its electric and gas operations. Some of those problems stem from management's own miscalculations.

Know-How Questioned

Where it once enjoyed a high reputation, Consumers Power now finds critics challenging its management ability. Even some former admirers are uneasy: Kenneth Hollister, vice president of the brokerage firm of Dean Witter & Co., says he used to think Consumers Power had "one of the best engineering managements in the industry, but I look at their results now and have to change that judgment."

Top officials of the company feel that such criticism is unfair. They note that such things as inflation, natural-gas shortages and a lagging stock market aren't their fault, and they point out that even with all its setbacks, the company has continued to meet customer needs for energy.

As far as chairman Aymond and other officers are concerned, the utility probably wouldn't be in its present straits if it had got the rate increases it has asked in recent years from the Michigan Public Service Commission. Opposition to rising utility rates, which has been growing nationally, may be at its fiercest in Michigan, where powerful political forces, including state Attorney General Frank Kelley and the United Automobile Workers union, have successfully fought to scale down utility rate increases. Since 1968, the company has gone to the commission seven times seeking annual rate increases totaling $295 million; it has come away with $174 million. (The company currently has a rate request pending before the commission, seeking a $72 million increase in electricity rates; so far it

Losing Power: How One Utility Sagged After Taking Giant Step

Continued From Page One

has received [illegible] million of that in interim relief.)

Now, company officials say, Consumers Power is earning only about half its [illegible] authorized rate of return on stockholders' equity—which in turn contributes to its problems in raising capital for future construction. Part of the problem, the company says, is that the commission's rate-making procedure is just too slow — often taking a year or more—to keep up with rapid inflation. A more important reason, Mr. Aymond told this year's annual meeting, is that rate hearings in Michigan have become "an adversary proceeding in which political figures have traded on the public's lack of knowledge to perpetuate a cruel hoax: the idea that people somehow can avoid paying the cost of the services they receive."

On the other hand Attorney General Kelley and Assistant Attorney General Hugo Anderson, who handles rate-case interventions before the Public Service Commission, contend that Consumers Power has won adequate, perhaps excessive, rate relief in the [illegible]. Mr. Anderson says the company's earnings problems stem largely from such [illegible] [illegible] cents a share from earnings—and a decline in electric-power sales this year because of the [illegible] economy. Mr. Anderson says the stockholder, not the rate payer, should bear such burdens.

William Rosenberg, chairman of the Public Service Commission, won't comment on many aspects of the company's problems, but he does say, "I think I can assure we aren't going to let Consumers Power follow the fate of Consolidated Edison"—a reference to the troubled New York City utility that shook the industry earlier this year by [illegible]

By [illegible], Consumers Power's troubles [illegible] power are the [illegible] of its problems. The Palisades plant alone has been a huge financial drain. After costing $95 million more than planned, it operated normally for only a little more than a year before breakdowns began. The worst one, which kept the plant closed for more than a year, resulted from leaks in steam-generator tubes and a vibration in the nuclear reactor. After repairs, a test startup this August lasted only part of a day before new troubles were discovered in the steam turbines that generate the electricity. Now the company thinks it has licked those troubles and the plant is operating on a limited, test basis.

Besides paying for replacement power [illegible], Consumers Power has had to lay out some $3 million for repair work.

Another Bad Experience

The company's experience with its second big nuclear plant, now being built at [illegible], Mich., has also been less than happy. The facility has become the subject of an environmental lawsuit seeking to stop construction and of a Justice Department antitrust proceeding aimed at opening the plant—along with the rest of Consumers Power's electric-power network—to freer access by small utilities in the state. The plant, originally supposed to cost $349 million and open this year, now is due to start up in 1979, and its final price tag now is projected at $817 million.

Other problems have grown out of the nuclear difficulties. Not the least of these is that Consumers Power, counting on the two big nuclear plants, hasn't completed any new fossil-fuel power plants in the last seven years. When the nuclear units encountered delays, the utility had no immediate alternative but to [illegible] [illegible] the power it is selling, approximately three times the amount it [illegible].

Also, Consumers Power has encountered stiff criticism from atomic-power regulators. The Atomic Energy Commission recently fined the company $10,000, only the third such penalty ever levied, for violations of operating procedures at Palisades in 1972 and 1973. These violations were also the subject of [illegible] the Department [illegible] [illegible] there weren't grounds for prosecution.

[illegible]

[illegible] were [illegible] because of what the AEC considered inadequate [illegible] procedures for some reactor parts. The commission soon allowed construction to resume under tighter than normal supervision, but the problem [illegible] a [illegible] letter from the AEC appeals board that had previously okayed construction. The letter suggested that the commission [illegible] "more [illegible] action." It [illegible] the utility and Bechtel Corp., its chief engineer and builder, with "[illegible] disregard [illegible] and quality assurance [illegible] of a [illegible] routine [illegible] and [illegible] unnecessary [illegible].

Russell Young, [illegible] Consumers Power's senior vice president for [illegible] operations, says the [illegible] of these difficulties. He says the Palisades problems [illegible] from [illegible] equipment and [illegible] contractors. "Consumers Power has excellent people and it isn't fair to [illegible] them on this," he says. "Our company ranks well up on the scale of competent nuclear utilities."

Mr. Young [illegible] also believes that some of the AEC's actions, such as the fine, were "too severe." He blames changing regulations and says that "because we have honestly differed with the interpretation of some rules, we've gotten a reputation for being unresponsive."

Some actions being taken by the company may eventually offset these problems in its electric-power operations. For one thing, it has filed a [illegible] million suit against Bechtel and the other concerns that had major roles in building the Palisades plant. The suit claims that damages resulted from malfunctioning equipment and other asserted failures to live up to contract terms.

The utility is also working on new fossil-fuel generating plants that are due to start coming on stream this year. And while the company still considers nuclear power attractive, it has scrubbed plans for a third giant, $1.4 billion nuclear station that it had scheduled to start up in the 1980s.

Gas Poses Problems, Too

But the company still faces a [illegible] in its other operating area—natural gas. [illegible] Simpson, senior vice president, [illegible], expects that the utility's [illegible] supplier, Panhandle Eastern Pipeline Co. and its Trunkline Gas Co. subsidiary, will fall 27% short of contracted commitments this year, with bigger curtailments looming in 1975.

Mr. Simpson says Consumers Power is [illegible] [illegible] other sources and hopes to get enough gas to continue to take on new residential customers and small commercial customers. But he says the company won't be able to [illegible]

Another [illegible] [illegible] [illegible] one of only a [illegible] [illegible] in the country. The plant, which was put into operation only last year, produces gas from oil. But some $70 million in cost overruns incurred in getting the plant built, plus soaring oil prices, have turned the plant into a high-priced proposition. The gas it produces [illegible] of Consumers Power's [illegible] Consumers Power between $2.25 and $2.50 per thousand cubic feet, compared with about $1 per thousand cubic feet paid for pipeline gas. Gas coming from this plant is expected to be a key reason why Consumers Power's gas rates may go up an estimated [illegible] to [illegible] this year.

Company officials take pains to counter [illegible]

[illegible]

Not, they say, could they have foreseen the [illegible] during the last year. The [illegible] as it has stirred [illegible] operations in Michigan and elsewhere to build up its own supply of natural gas for the future.

For the Public Service Commission chairman, Mr. Thompson, says an audit of the utility is in progress, partly to determine how it got caught in such a gas-short position in the first place. That, critics say, could prove embarrassing. For neighboring Michigan Consolidated Gas, a unit of American National Gas Co., has so much gas these days that it's even able to sell some to Consumers Power. And, according to William Mack, American Natural chairman, that's because Michigan Consolidated years ago specifically sought out other gas sources than Panhandle Eastern, which had been its sole supplier, too. Mr. Mack says it was decided a single source was "too chancy."

On the other hand, Consumers Power decided to stick with Panhandle and didn't even start serious exploration work of its own until the late 1960s, when natural-gas-supply problems first loomed. On several occasions in the mid-1960s, says Consumers Power's Mr. Simpson, Consumers Power had considered adding suppliers but rejected the idea because Panhandle had lower prices, said it could deliver enough gas and [illegible] to compete with Consumers Power for big industrial customers if the utility went elsewhere, a charge Panhandle denies.

SECURITIES AND EXCHANGE COMMISSION

352

2-51687

RECD = 8/16

AUG 20 1974

PROSPECTUS

$50,000,000

Consumers Power Company

FIRST MORTGAGE BONDS, 11¼% SERIES DUE 1982

Interest payable March 1 and September 1

Not redeemable prior to September 1, 1981; then redeemable at 100% plus accrued interest.

Application will be made to list the New Bonds on the New York Stock Exchange.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

PRICE 100½% AND ACCRUED INTEREST

	Price to Public(1)	Underwriting Discounts and Commissions(2)	Proceeds to Company(1)(3)
Per Bond	100.50%	1.15%	99.35%
Total	$50,250,000	$575,000	$49,675,000

(1) Plus accrued interest, if any, from September 1, 1974.

(2) The Company has agreed to indemnify the Underwriters against certain liabilities, including liabilities under the Securities Act of 1933.

(3) Before deduction of estimated expenses of $175,000 payable by the Company.

The New Bonds are offered by the several Underwriters named herein, subject to prior sale, when, as and if accepted by the Underwriters, and subject to approval of certain legal matters by Simpson Thacher & Bartlett, counsel for the Underwriters. It is expected that delivery of the New Bonds will be made on or about September 5, 1974, at the office of Morgan Stanley & Co. Incorporated, 140 Broadway, New York, N. Y., against payment therefor in New York funds.

MORGAN STANLEY & CO.

Incorporated

August 21, 1974

Consumers Power Company (the "Company") is subject to the informational requirements of the Securities Exchange Act of 1934 and, in accordance therewith, files reports and other information with the Securities and Exchange Commission. Information, as of particular dates, concerning directors and officers, their remuneration, the principal holders of securities of the Company and any material interest of such persons in transactions with the Company, as of particular dates, is disclosed in proxy statements distributed to shareholders of the Company and filed with the Commission. Such reports, proxy statements and other information can be inspected at the office of the Commission at Room 6101, 1200 I. Street, N. W., Washington, D. C., where copies can be obtained from the Commission at prescribed rates. In addition, reports, proxy statements and other information concerning the Company can be inspected at the offices of the New York Stock Exchange, the Detroit Stock Exchange and the Midwest Stock Exchange. The Company's executive offices are located at 212 West Michigan Avenue, Jackson, Michigan 49201 (telephone number: 517—788-1630).

No person is authorized to give any information or to make any representations other than those contained in this Prospectus in connection with the offer contained in this Prospectus and, if given or made, any such information or representation must not be relied upon as having been authorized by the Company or any Underwriter. Neither the delivery of this Prospectus nor any sale made hereunder shall, under any circumstances, create any implication that there has been no change in the affairs of the Company since the date hereof. The First Mortgage Bonds offered hereby are herein sometimes referred to as the "New Bonds".

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IN CONNECTION WITH THIS OFFERING, THE UNDERWRITERS MAY OVER-ALLOT OR EFFECT TRANSACTIONS WHICH STABILIZE OR MAINTAIN THE MARKET PRICES OF THE NEW BONDS AND ANY OTHER BONDS OF THE COMPANY AT LEVELS ABOVE THOSE WHICH MIGHT OTHERWISE PREVAIL IN THE OPEN MARKET. SUCH TRANSACTIONS MAY BE EFFECTED ON THE NEW YORK STOCK EXCHANGE OR IN THE OVER-THE-COUNTER MARKET. SUCH STABILIZING, IF COMMENCED, MAY BE DISCONTINUED AT ANY TIME.

THE COMPANY

Consumers Power Company was incorporated in Michigan in 1968 and is the successor to a corporation of the same name which was organized in Maine in 1910 and which did business in Michigan from 1915 to 1968.

The Company is a public utility engaged in the generation, purchase, distribution and sale of electricity, and in the purchase, production, manufacture, storage, distribution and sale of gas, in the Lower Peninsula of the State of Michigan. The Company also supplies steam service in one community. The population of the territory served is estimated to exceed 5,200,000. The Company's utility operating revenues were derived about 58% from electric service and 42% from gas service for the twelve months ended May 31, 1974.

The industries in the territory served by the Company include automobile and automobile equipment, primary metals, chemicals, fabricated metal products, pharmaceuticals, machinery, oil refining, paper and paper products, food products and a diversified list of other industries.

General Problems of the Industry

The Company has been experiencing problems common to the utility industry in general, such as the difficulty in obtaining an adequate return on invested capital (see "Statement of Income" and "Michigan Public Service Commission" under "Regulation"), the restriction on operations and increased costs and delays attributable to environmental considerations (see "Compliance with Environmental Requirements" and "Atomic Energy Commission" under "Regulation"), the necessity of obtaining substantial amounts of outside capital to finance the Company's construction program (see "Construction Expenditures") and the difficulty in obtaining adequate supplies of fuel at reasonable prices (see "Electric Fuel Supply" under "Business").

USE OF PROCEEDS

The net proceeds from this sale of New Bonds will be used to finance in part the Company's construction program and to repay short-term borrowings made and to be made in connection with interim financing of the construction program. It is estimated that just prior to this sale of New Bonds short-term borrowings will aggregate approximately $85,000,000.

The Company estimates that its construction program for the years 1974 through 1978 will require expenditures of approximately $2.2 billion. In order to finance this program and to meet First Mortgage Bond maturities of $170,334,000 during this period, it will be necessary for the Company to sell substantial additional securities, the amounts and types of which have not yet been determined. The sale of certain securities may be restricted as set forth under "Statement of Income". In August 1974 the Company sold $60,000,000 principal amount of First Mortgage Bonds, 11⅜% Series due 1994, and 600,000 shares of $6.00 Preference Stock (the "New Preference Stock"), and it may issue additional equity securities later in 1974. References herein to $110,000,000 of First Mortgage Bonds include the New Bonds and such First Mortgage Bonds, 11⅜% Series due 1994.

CONSTRUCTION EXPENDITURES

As of June 5, 1974 the Company had made or proposed to make capital expenditures for property additions in 1974 in an estimated amount of $360,318,250, which estimate gives effect to a decision by the Company in June 1974 to effect a retrenchment program involving the elimination of approximately $60,000,000 from its construction budget for 1974. The 1974 program as projected includes $197,552,000 of expenditures towards the construction of three major projects as follows:

Project and Location	Features	Estimated Year of Operation	Estimated Total Cost to Company(a)
Palisades Plant (Van Buren County, Michigan)	Nuclear fueled with initial full capacity of about 700,000 kilowatts and ultimate capacity of about 773,000 kilowatts	(b)	$ 188,600,000

Project and Location	Features	Estimated Year of Operation	Estimated Total Cost to Company(a)
Midland Plant (Near Midland, Michigan)	Two nuclear fueled units with aggregate capacity of about 1,320,000 kilowatts and 4,000,000 pounds per hour of process steam(b)(c)	First unit in 1979, second unit in 1980	$ 940,000,000
D. E. Karn Plant, Units 3 and 4 (Near Essexville, Michigan)	Two oil fired units at existing plant to add approximately 1,307,000 kilowatts of capacity(d)	Unit 3 in early 1975, Unit 4 in late 1975	$ 234,000,000

(a) Expenditures have been made or are scheduled to be made as follows:

	Prior to 1974	1974	After 1974
Palisades Plant	$180,048,000	$ 8,552,000	$ —
Midland Plant	$104,073,000	$101,000,000	$ 734,927,000
D. E. Karn Plant	$ 92,578,000	$ 88,000,000	$ 53,422,000

(b) Reference is made to "Atomic Energy Commission" under "Regulation" and to Note (b) to the Statement of Income herein.

(c) The steam will be furnished to The Dow Chemical Company for industrial processes.

(d) In connection with the construction of the two oil fired units and the conversion of other units to burn oil, the Company has a purchase agreement with a Canadian supplier to import oil from Canada. See "Business—Electric Fuel Supply".

The 1974 construction program includes $162,766,250 for other facilities, including other electric production facilities, power supply projects, electric transmission and distribution facilities, gas supply lines, gas production, transmission and distribution facilities, steam additions and general and miscellaneous additions. Of this amount, it is estimated $112,934,650 will be expended for electric additions, $41,906,000 for gas additions and $7,925,600 for general, miscellaneous and steam additions.

1974 construction expenditures estimated to amount to $360,318,250 as of June 5, 1974 plus sinking fund and other long-term debt retirements in 1974 of $17,309,000 total $377,627,250. This requirement will be financed through the issuance and sale of long-term securities, and the balance from internal sources and short-term borrowings. The long-term 1974 financing consists of $34,700,000 principal amount of Installment Sales Contracts issued in February 1974; $50,000,000 Term Bank Loan made in June 1974; $60,000,000 principal amount of First Mortgage Bonds issued in August 1974; 600,000 shares ($30,000,000) of Preference Stock issued in August 1974; $50,000,000 principal amount of New Bonds in September 1974; $35,000,000 proposed sale and lease back arrangement for nuclear fuel later in 1974; plus $50,000,000 in long-term securities of a type to be determined later in the year. After underwriting commissions and estimated expenses of issuance, the balance of approximately $72,500,000 will be provided from internal sources and from short-term borrowings.

The Company has cancelled plans to construct a two-unit, 2,300 megawatt nuclear power plant near Quanicassee, Michigan for initial use in 1984 and 1986. The decision to cancel the $1.4 billion project was made for the reason that in view of currently prevailing market conditions for utility securities and the Company's presently inadequate earnings, the Company could not be assured of raising sufficient new capital over the lengthy construction period of the project to finance the project in addition to the hundreds of millions of dollars which must be raised for other projects to meet customer demands over the next ten years. Total costs (not including land costs) incurred to date for the plant are approximately $13,500,000 which consist of engineering, license application, environmental impact studies, and other preliminary work. A portion of such costs may be salvageable in the event the Company locates a plant on this site at some time in the future. The Company intends to petition the Michigan Public Service Commission for authority to amortize any remaining costs to operations over a period of years. If such authority is not granted, it may be necessary to make a charge against current operations in 1974 for all or a part of the costs incurred.

Continuation of the Company's construction program depends upon continuing availability of substantial amounts of outside capital from frequent sales of debt and equity securities over the foreseeable future. The balance of funds needed is expected to be provided from internal sources. The Company will need significant and timely rate increases if revenues and income are to be maintained at levels which will result in sufficient internally generated funds and which will permit external financing of its construction program and its operational requirements at reasonable cost. If adequate funds cannot be obtained from outside financing and internal sources, the Company, of necessity, will further curtail its construction program to the extent feasible. The Company is currently studying its revised construction schedules and budgets with a view to additional future cutbacks should the unavailability of funds make this necessary. Any expenditure reductions which might result from the deferral of construction could be significantly offset by cost escalations and by general inflationary price trends.

power supply and the effecting of economies by coordinated development and exchange of power. Two 230,000 volt and one 345,000 volt interconnections have been established under the agreement.

The Company has agreements with several other major electric utilities operating in Michigan, Ohio, Indiana and Illinois providing for interconnection services and other transactions. The Company also maintains interconnections with the Michigan Municipals and Cooperatives Power Pool, the Cities of Lansing and Holland and interchanges power with the Edison Sault Electric Company.

The maximum net demonstrated capability for the summer of 1974 of the Company's interconnected system including supplemental purchases is 5,525,000 kilowatts (including the Palisades Nuclear Plant) to serve a projected maximum demand of 4,330,000 kilowatts. The net maximum demand on the interconnected system through July 31, 1974 was 4,394,295 kilowatts on August 27, 1973.

Electric Fuel Supply

In addition to substantial and continuing increases in fuel costs, the Company is also experiencing limitations and restrictions on the availability of fuel.

For the twelve months ended May 31, 1974, approximately 55% of the Company's kilowatt-hour requirements were obtained from coal-fired generation, 6% from nuclear, 7% from oil, 3% from peaking units (oil and gas), —1% from hydro (including net pumped storage generation) and 30% from purchased and interchanged power.

Approximately 55% of the Company's owned generating capability (excluding pumped storage) is dependent upon coal as a source of fuel and requires approximately 6.5 million tons of coal annually. The Company has long-term coal contracts which provide for the delivery of approximately 90% of its coal requirements in 1974. These long-term contracts provide for deliveries through 1977 and in some instances through 1982. The sulfur content of the contract coal ranges from 0.6% to 4.0% by weight, the majority of which falls between 2.0% and 3.0% sulfur. Approximately 900,000 tons of low-sulfur coal per year is under long-term contract from mines located in eastern Kentucky, and 3.7 million tons of high-sulfur coal per year is under long-term contract from mines located in Ohio. The remaining long-term contract coal supplies are from mines in northern West Virginia, Indiana and western Kentucky. Due to shortages of railroad cars, enforcement of the Federal Coal Mine Health and Safety Act of 1969 in mines serving the Company, equipment breakdowns at mines and breakdowns of coal-handling facilities at the Company's plants, as much as 10% of the long-term contract coal may not be available in 1974. The balance of the Company's coal requirements not under long-term contract and that quantity of coal under long-term contracts which cannot be delivered must be supplied through short-term agreements or spot purchases at prices substantially higher than coal obtained under long-term contracts. At present the price for such spot purchases of coal with less than 1% sulfur ranges from $25 to $37 per ton as compared to long-term contract prices of from $13 to $20 per ton.

As of August 1, 1974 the Company's coal inventory amounted to approximately 78 days' supply. The Company is undertaking a program to maintain or improve coal inventories to a level equal to or above normal seasonal levels because of the expiration in November 1974 of the labor agreement between the United Mine Workers and the mine owners. Future changes in governmental requirements pertaining to the coal industry could adversely affect cost and availability of coal supplies. See "Regulation—Compliance with Environmental Requirements" for matters pertaining to meeting EPA regulations on coal-fired generating units.

The Company is negotiating for supplies of low-sulfur coal from two or more new mines which are to become operational from 1976 to 1978. These new sources are intended to supply low-sulfur coal to supplement existing long-term contracts and to possibly replace the existing fuel supplies at one or more existing generating units. Although there is no assurance that the Company will complete such negotiations, the Company believes that any successful completion of current negotiations for new coal supplies will require the Company's participation in partial or total ownership of the coal mines.

In connection with generating units which burn crude oil and the construction of new oil-burning generating units, the Company expects to import from Canada approximately 2,700,000 barrels in 1974, increasing to an annual rate of approximately 11,000,000 barrels beginning in November 1975. As a result

taxes and other increases in cost, imported low-sulfur crude oil from Canada increased to $12.46 per barrel as of June 1, 1974 as compared to $4.12 per barrel a year earlier. The Company expects to recover substantially all of such additional expense through the operation of fuel adjustment clauses included in its rate schedules for electric service. For additional information see "Gas Service" below.

The Federal Energy Office ("FEO") adopted mandatory fuel allocation regulations, under which volumes of middle distillates, residual and crude oils are to be allocated. Such regulations are now administered by the Federal Energy Administration ("FEA"). The Company is to be allocated 100% of its 1972 volume of middle distillate oil (as reduced by application of an allocation factor), or as otherwise determined by the FEA, but not less than 100% of current requirements for nuclear plants, start-up, testing, and flame stability of coal-fired plants (except for peaking uses). Crude and residual oils used as fuel for electric generation are to be allocated among utilities using such fuel on the basis of the amount available and the recommendations of the Federal Power Commission ("FPC") so that, if necessary, each utility "within appropriate groupings" will absorb an equal percentage cutback of power generation to the maximum extent possible. While the Company is not assured of receiving its required allocations, and the failure to receive the same could have an adverse effect upon its supplies of oil and the Company's generation, to date such supplies have been adequate to meet the Company's requirements.

Under the Energy Supply and Environmental Coordination Act of 1974, the FEA is also authorized to allocate coal to plants switching from gas or petroleum products by reason of FEA order and to other persons to the extent necessary to assist in meeting the nation's fuel requirements in a manner consistent, to the fullest extent possible, with environmental requirements.

The Company's overall average cost of fuel burned has increased substantially, as shown below, and further increases are expected for the foreseeable future.

	Cents per Million Btu Fuel Consumed					Percentage of Total Fuel Consumed				
	1973	1972	1971	1970	1969	1973	1972	1971	1970	1969
	¢	¢	¢	¢	¢	%	%	%	%	%
Coal	48.9	44.0	42.9	36.6	31.2	70.1	75.5	85.0	86.2	92.9
Oil	85.4	77.8	79.9	84.1	82.7	9.7	5.0	2.7	.3	.2
Gas	66.4	54.8	45.4	43.0	41.1	5.3	7.7	10.1	11.3	4.4
Nuclear	24.1	24.3	27.8	36.0	33.9	14.9	11.8	2.2	2.2	2.5
All Fuels	49.6	44.2	43.8	37.4	31.8	100.0	100.0	100.0	100.0	100.0

For the five months ended May 31, 1974, the Company's overall average cost of fuel consumed increased to 69.1¢ per million Btu as a result of higher fossil fuel costs and a lower percentage of nuclear fuel consumed. For this period, the percentage of total fuel consumed and cost per million Btu of fuel consumed for the four fuel classes are, respectively, coal: 81.5% and 59.0¢, oil: 9.2% and 157.6¢, gas: 7.4% and 83.2¢ and nuclear: 1.9% and 20.1¢.

The Company's present nuclear fuel requirements are for the Big Rock Point Plant and the Palisades Nuclear Plant. The Company has contracts for each of these plants providing for the supply of all segments of the nuclear fuel supply chain, including uranium ore concentrates and the conversion to uranium hexafluoride; enrichment of the uranium hexafluoride; fabrication of nuclear fuel assemblies; and transportation, reprocessing and reconversion of the "spent" nuclear fuel assemblies. The contracts cover requirements for a minimum of the next five years. These agreements are with major private industrial suppliers of nuclear fuel and related services and with the United States government.

The Company also has contracts for most but not all segments of the nuclear fuel cycle for the initial cores for the Midland Plant. These include contracts for the supply of uranium ore concentrates, conversion to uranium hexafluoride, enrichment of the uranium hexafluoride, and fabrication of nuclear fuel assemblies for the initial cores for the Midland Plant, together with transportation, reprocessing and reconversion of the initial batches of "spent" nuclear fuel assemblies discharged from each of the two Midland Plant units.

APPENDIX D

Donald Cook vs. E. P. A.

Wide Open ClashOver Coal and Clean Air

By E. W. KENWORTHY

WASHINGTON—"All of a sudden it's their environment and we're monsters," said Donald C. Cook, bitterly, the other day at the end of a three-hour interview.

By "we" Mr. Cook meant the electric utility industry in general and particularly the American Electric Power Company, of which he is chairman and chief executive officer. American Electric, with $5-billion in assets, is the nation's largest privately owned generator of electricity—and 93 per cent of its generating capacity is coal fired.

By "they" Mr. Cook meant what he calls "rabid environmentalists," most especially the Federal Environmental Protection Agency, which in his view is infested with them.

For nearly a year, Mr. Cook, a former chairman of the Securities and Exchange Commission, has been directing from his office at No. 2 Broadway, in New York, a furious—and some think wrong-headed—battle against what he regards as the "ignorant" dogmatists and idealists in charge of the agency's enforcement of the 1970 Clean Air Act.

He is particularly enraged by E.P.A.'s aggressive championing of "scrubbers" to capture pollutants in flue cases from coal-fired steam generating plants. Mr. Cook contends that these "monstrous contraptions" will not work reliably, and are ruinously expensive and unnecessary.

But Mr. Cook's offensive also extends to what he calls the "unreasonable" standards themselves — namely the health-related standards for flyash and sulphur dioxide, which are the two principal pollutants from coal-fired electric power plants. He also contends that emission standards set by state governments are unrealistic."

At 65, Donald Cook does not look or act his age. There are no lines in his face, no pouches beneath the sharp eyes. He speaks—at length—with fervor and some eloquence.

He was recently quoted in Nation's Business magazine as saying he got his greatest pleasure out of work. He also admitted that "I don't mind being abrasive if it will make a contribution."

A colleague said recently, "Don Cook may sometimes be wrong, but he's never in doubt."

Mr. Cook believes that he and the "rabid environmentalists" are met at Armageddon, and that he is battling for the Lord, the nation, the economy, the electric power industry—and American Electric.

His critics grant his sincerity, but some of them—including John R. Quarles, E.P.A. deputy administrator—question whether Mr. Cook's priorities are necessarily in the above order. Mr. Cook has chosen Mr. Quarles as the prime target of his abrasiveness because he regards him as the toughest and smartest of the agency's bureaucrats.

His critics, inside and outside the industry, think Mr. Cook has overstated his case and been unnecessarily harsh. But they give him good marks for fighting in the open rather than trying to work his will behind the scenes in Washington as so many industry officials do.

Seeking to prevail by generating public support for his crusade, Mr. Cook last February launched an advertising campaign built around three points:

¶That the solution of the energy crisis lies in generating more power and not simply conserving it,

¶That the way to do this is to relieve the nation progressively from its dependence on Middle East oil by exploiting its abundant coal reserves,

¶That this sensible solu is being thwarted by the Department of the Interior's moratorium on leasing of Federally-owned low-sulphur coal deposits in the West and by the Clean Air Act and by E.P.A. regulations which restrict the use of Eastern and Midwestern high-sulphur coal.

To date there have been 32 full-page ads, most of them running in the New York Times, the Washington Post, the Wall Street Journal, Time, Newsweek, U.S. News

Continued on page 14

Donald C. Cook

Donald Cook Battles Clean Air Standards

Continued from page 1

and World Report and Business Week.

The ads have also run in the 69 daily and 192 weekly papers in the seven-state area where A.E.P. sells power. Those states are Virginia, West Virginia, Tennessee, Kentucky, Ohio, Indiana and Michigan, served by the operating subsidiaries of the parent company: the Appalachian Power Company, the Indiana and Michigan Electric Companies, the Kentucky Power Company, the Kingsport Power Company, the Michigan Power Company, the Ohio Power Company and the Wheeling Electric Company.

A.E.P.'s interlocking grid is, for most of its length, built atop bituminous coal fields, some mined deeply and others stripped.

Some of the ads have drawn strong protests not only from environmental groups but also from Russell Peterson, chairman of the White House Council on Environmental Quality, and John C. Sawhill, deposed head of the Federal Energy Administration.

For example, in several ads last spring, A.E.P. inveighed against those "who shrill for less energy and no growth," asserting that the government's energy conservation proposals would "generate galloping unemployment, and reduce America to the "bad life."

Government officials immediately protested that Washington does not advocate "no growth" in generating capacity, nor a cut-back, but rather reduction in the annual rate of growth of energy consumption—from about 5 to 2.5 percent.

Mr. Sawhill wrote the company: "I urge you to cease this kind of advertising. It masks the total energy problem and gives the incorrect impression that conservation implies strongly negative impacts."

Mr. Peterson wrote that the "galloping unemployment" ad was not only "nonsense" but "subversive of the public interest."

Mr. Cook was infuriated when Mr. Peterson released the letter to the press and so wrote to then-President Nixon, complaining about the "scurrilous" letter, and asking that "you fully investigate both the official and clandestine activities of Mr. Peterson in the conduct of his office."

In any event, the $3.7-million ad campaign represents small change for A.E.P., which had operating revenues of $967-million, and profits of $183-million in 1973. Its profit margin was 18.9 per cent, much above the industry average. Revenues for 1974 are expected to reach $1.2-billion although earnings may be down somewhat because of high interest payments.

The company's 20 power plants have a generating capacity of more than 15,000 megawatts (exceeded only by the Tennessee Valley Authority system) and it expects to expand to 26,000 megawatts by 1982.

Some years ago it decided to rely on coal and not to go for nuclear power in a big way. Its only nuclear plant will not start up until next month. It also has one oil-fired and two hydroelectric plants, all small.

In 1973, the A.E.P. system consumed 31 million tons of coal—nearly one-tenth of the coal used by the nation's electric utilities and about one-fifteenth of all the coal consumed in the whole country. Its own mines supply about one-fifth of its coal and by 1981 are expected to supply 50 per cent.

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The average sulphur content in what A.E.P. burns is 2.5 per cent, but about one-third is only 1 per cent or less. The rest, particularly that burned by Ohio Power, the biggest company in the system, is high sulphur.

There is no dispute between Mr. Cook and the E.P.A. over the availability of technology to deal with flyash, also called particulates, which give the plume from an unregulated power plant its grey-black color.

Electrostatic precipitators, which act like a magnet, were developed in the nineteen-thirties and have been improved to the point where nearly all flyash can be collected.

"We were environmentalists long before it was popular," says one A.E.P. ad, adding that the company tested its first precipitator in 1941. However, it did not install precipitators in all its plants, and did not keep abreast of the developing technology. As a result, in order to meet the standards under the Clean Air Act by 1977, A.E.P. is investing nearly $500-million to "backfit" 26 boilers, 11 plants with new precipitators.

Mr. Cook's complaint is that the cost of the new equipment is excessive for the small additional control.

"We backfitted [one] plant," he said, "to achieve flyash control of 98.5 per cent, and then when West Virginia issued its implementation plan in January, 1972, it was twice as stringent as the Federal requirement, and we had to rebackfit to achieve 99.7 per cent control. That additional 1.2 per cent cost $56-million."

Sulphur Dioxide is another matter. Here Mr. Cook disagrees vehemently with the E.P.A. not only on how to control emissions of this colorless, toxic gas but also on its hazards to public health.

Coal-fired power plants are also responsible for about 56 per cent of the 30 million tons of sulphur dioxide emitted into the

[illegible] —At a Glance

3 mos. ended Sept. 30	1974	1973
Revenues	$338,300,000	$239,100,000
Net income	45,700,000	45,000,000
Earnings per share	62 c	68 c

12 mos. ended Dec. 31	1973	1972
Revenues	$966,500,000	$860,600,000
Net income	182,600,000	156,300,000
Earning per share	2.85	2.63

Assets, Dec. 31, 1973	$5,071,320,000
Stock price (N.Y.S.E.), Nov. 22, 1974	14 3/4
Stock price, 1974 range	27 1/8 - 13 5/8
Employes	16,303

Major subsidiaries:

Appalachian Power (Va.), Indiana and Michigan Electric, Kentucky Power, Kingsport Power (Tenn.), Michigan Power, Ohio Power, Wheeling Electric (W.Va.)

nation's air each year. The E.P.A. has set an atmosphere standard of 80 micrograms per cubic meter, equivalent to 0.03 parts of the gas to per million parts of air, effective June 1, 1975. Many states have set much tougher standards. The target sought by the E.P.A. and most states is a 90 per cent-plus control of emissions.

Mr. Cook outlined four strategies for attacking the sulphur dioxide problem, three of which he approves, and the one—scrubbers—that he violently opposes.

First, he said, is "conforming fuel," with less than 1 per cent sulphur content. He says that 46 per cent of A.E.P.'s generating capacity is already in compliance with state emission limitations, burning Appalachian and Western low-sulphur coal.

The E.P.A. agrees on this solution, if there is strict control of strip-mining to prevent the ravaging of Western farm and grazing lands. But it asserts that Western low-sulphur coal will not be available in anything like the quantities needed until the mid-nineteen-eighties.

Second, as a long-range solution, Mr. Cook would remove the gas by a "front end" process—such as coal liquefaction or gasification—leaving a clean fuel to be burnt.

Again, the E.P.A. agrees, but Mr. Quarles notes that A.E.P. and Allegheny Power System, [illegible] are [illegible] only $1-million over two years to a $13-million research [illegible]

Mr. Cook's third strategy, is the "intermittent control system"—tall stacks, 800 feet or more, of which A.E.P. already has 11, to disperse the sulphur dioxide high in the air and allow the standard to be met most of the time at ground level. He argues that it is wrong for the E.P.A., and the states, to base regulations on measurements at the top of the stack rather than at ground level "where people live."

A ground monitoring system, of which A.E.P. has several, would warn a plant manager wherever atmospheric conditions create excessive ground-level concentrations of the gas. The manager could then switch to an emergency supply of low-sulphur coal or cut back his production and call on another plant in the system to make up the deficit.

Mr. Cook's advocacy of tall stacks has the backing not only of much of the industry but also of the Federal Power Commission, The Federal Energy Administration and the White House Office of Management and Budget.

But the E.P.A. responds that intermittent control is acceptable as an interim device, but not as a permanent control measure. It argues that neither low-sulphur coal nor an alternate source of power may be available during a pollution alert.

Moreover, the agency contends, the tall stacks simply spew out sulphur dioxide to fall at a distance as acid rain or as particulates. And it takes the position that both hazards of those two very seriously indeed.

But the E.P.A. also admits that the evidence is still "tentative" and it has not set sulphate standards.

Mr. Cook leaps on this admission. "There have been a lot of statements on sulphates, he said, "all cast in terms of suspicion. If We start running a government on suspicion, we are not far from a knock on the door in the night. If they have anything on sulphates, let them promulgate regulations."

The E.P.A., meanwhile, is still holding out for "scrubbers," as the most immediately promising control system for sulphur dioxide. They do as Mr. Cook contends, have "horrendous problems."

The chemistry is simple in theory but tricky in practice: the chemical engineering is complex and difficult. Calcium sulphate and sulphite formed in the process plug up spray nozzles and valves. Every few days, the scale has to be removed by high-pressure hoses, or, in bad cases, with hammers, requiring a shutdown.

Mr. Cook cites the recent findings by hearing examiners for the Ohio Environmental Protection Agency, who said that no scrubbing had yet met the criteria set by the National Academy of Engineering in 1970—that a scrubber should operate for a year with 90 per cent availability on a 100 megawatt or larger unit.

Furthermore, he contends that disposal of the "massive amounts of sludge" produced and possible leaching from disposal sites into the water supply involve environmental and health hazards greater than those posed by dispersal of sulphur dioxide by tall stacks.

E.P.A. officials reply that the problems are being surmounted, that several units are approaching the reliability criteria, and that during the last year the numbers of scrubbers in operation, under construction or planned, has jumped from 41 to 93. This represents hundreds of millions of dollars of capital investment and operating and maintenance costs.

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These officials are particularly angered by what they regard as misleading statements in some A.E.P. ads. For example: "Applied to a 12,000 megawatt, coal-fired system, limestone scrubbers would in only five years produce enough [...] every week to cover, for instance, 10 square miles of Washington, D. C., two feet deep." Another ad, citing an Interior Department figure on sludge produced, found the height to be [...]

Agency officials point out that [...] megawatts is almost as large as the entire seven-state A.E.P. system and that sludge would be dispersed among many, relatively small, remote [...] and at a depth much more than five or 10 feet.

In the light of industry experience with scrubbers so far, the E.P.A. draws two conclusions.

The first is that, because of the amount of sludge, the usual lime and limestone processes are not well adapted to power plants in, or near big cities. If such plants use high-sulphur coal, they will probably have to install a system that produces usable products such as sulphur or sulphuric acid, rather than sludge. (Boston Edison has a 150 megawatt plan using a magnesium oxide scrubber producing sulphuric acid and the Philadelphia Electric Company is planning to invest $68-million in magnesium oxide scrubbers.)

The second conclusion is that a large number of coal-fired plants—from 65 to 100—will not be able to comply with its standards by 1977 by installing scrubbers. The time is too short for design, manufacture and installation. Therefore, these plants must be given variances, or the law must be changed to extend the compliance date, probably to the mid-nineteen-eighties.

Where does A.E.P. fit into these conclusions? Mr. Cook boasts that his company has always been a "pioneering" utility, and cites its development of very high temperature boilers, the nation's largest generating units high voltage transmission and advanced circuit breakers and so on.

When Mr. Dowd, the general counsel, stressed this point at E.P.A. hearings a year ago, however, an agency official observed that "A.E.P. is willing to take the risk [of investing larger sums]when the technology in question happens to be generating technology but is unwilling to take any risk when it comes to pollution control, at least sulphur pollution control."

To which Mr. Cook replies that A.E.P. has invested over $1-billion in environmental controls—precipitators, tall stacks and monitoring, huge towers to cool and recirculate water to prevent thermal pollution of rivers, reclamation and tree-planting of a company-owned strip mine in Ohio, and contracts for low-sulphur coal.

But he stands firm against spending even one dollar for scrubber technology.

The E.P.A.'s John Quarles thinks this attitude irresponsible. He does not see why the giant A.E.P. with a billion dollars a year revenue and an 18.9 per cent profit margin should not invest in this sort of sulphur control when, for example, the Louisville Gas and Electric Company, with revenues of $150 million and a 12.7 per cent margin, is investing $40-million.

But Mr. Cook insists: "We are not going to be the sacrificial lamb of scrubbers."

Three Plants—Three Experiences

WASHINGTON — In one advertisement, the American Electric Power Company stated that stack gas scrubbers to remove sulphur oxide from power plant emissions are "unreliable and impractical."

In a press release two months ago, the Environmental Protection Agency said: "The experience of electric utilities so far with 'scrubbers' in actual operation shows they can be used continuously, reliably and effectively."

Among the plants where lime or limestone scrubbers have been installed are: The Phillips Station of the Duquesne Light Company of Pittsburgh, the Paddy's Run Station of the Louisville Gas and Electric Company and the La Cygne Station in Kansas, jointly owned by the Kansas City Power and Light Company and the Kansas Gas and Electric Company.

The evidence from their experience is mixed.

Phillips has a total capacity of 387 megawatts. Five of its six boilers, representing 220 megawatts, have been hooked into a retroactively fitted, four-module lime scrubbing system.

The first is a dual unit, with one scrubber removing flyash, and the other, sulphur dioxide. The other three are chiefly for flyash removal, with one of them on standby.

Steve L. Pernick in charge of Duquesne's environmental program, has been plagued with problems since the dual scrubber went into operation last March.

There has been much scaling and plugging by calcium sulphate and calcium sulphite solids produced by the reaction of sulphur dioxide and the lime. Two or three times a month it has been down for a day or two at a time.

As for efficiency when operating, the dual unit has been removing 90 per cent of the sulphur dioxide passing through it—which is only 20 per cent of that produced by the plant.

However, by injection of lime into the other units, 50 to 60 per cent of the gas has been removed. Flyash removal is over 97 per cent.

Mr. Pernick is confident that if dioxide scrubbers were added to the three single flyash units, the plant, which burns coal containing 2 per cent sulphur, would be in compliance with the state's emission limitations.

Disposal of sludge—over 500,000 tons a year if all boilers were hooked to dual scrubbers—is a problem because the plant is on the outskirts of the city.

Completed installation at Phillips, and another at the company's Elrama plant, would mean a capital cost of $110-million. Annual operating costs, including sludge disposal, would be $30-million. This might mean a 25 per cent increase in consumer bills, Mr. Pernick estimated.

Paddy's Run is the E.P.A.'s showpiece. Its capacity is 330 megawatts, but only one boiler representing 65 megawatts is attached to the sulphur dioxide scrubbers behind a precipitator removing more than 99 per cent of the flyash.

The scrubbing agent in the slurry is carbide lime, a throwaway product from an acetylene plant nearby. The plant burns 4 per cent sulphur coal.

The scrubber unit was planned by Robert P. Van Ness, manager of the company's environmental affairs and a chemical engineer. It went into operation April, 1973, and Mr. Van Ness says that 90 per cent of the gas is now being removed.

He attributes the system's success to the fact that, by carefully controlling the chemical reaction, he winds up with calcium bisulphite, a soluble salt, meaning no scaling or plugging problems.

From April through December last year, when the boiler was operating full time, availability of the scrubber was 70 per cent, and from August through December, it was 98 per cent.

The capital cost was $7.7-million, or about $57 a kilowatt compared with $91 a kilowatt for Duquesne.

Louisville Gas and Electric is planning to add scrubbers to four other units. Annual operating cost of the five will be $14-million, costing consumers about 15 per cent in rate increases, it is estimated.

The five units will produce 900,000 tons of sludge a year, and Mr. Van Ness thinks that eventually this should be piped into worked-out mines or used for fill in strip-mined areas.

De Cygne, located in the Kansas prairie 50 miles from Kansas City, Mo., began operating June 1, 1973. It's big, with total capacity of 820 megawatts.

However, it is producing only 650 megawatts because of a design miscalculation that has necessitated "stealing" hot air from the boiler to help push flue gases up the stack after passing through the scrubbers. The scrubbers cost $42-million, or $51 a kilowatt.

The plant burns coal, strip-mined about three miles distant, that is 5 to 6 per cent sulphur and 25 per cent flyash, both very high. The scrubbers use limestone, quarried a mile away, the plant burns 2 million tons of coal a year and uses 500,000 tons of limestone.

There is only one boiler; the stack is 700 feet. Of the 90 tons of flyash produced every hour, two-thirds is removed from the bottom of the boiler and the rest, along with 40 tons of sulphur dioxide an hour, goes to seven scrubber modules.

Clifford P. McDaniel, the engineer in charge of the scrubbers, has had rough problems with scaling and plugging.

Each night of the week, in rotation, one module is shut down for cleaning—an operation that takes two or three men ten hours and loses 90 to 110 megawatts of output.

Nevertheless, Mr. McDaniel says, at present 98.4 per cent of flyash and 69 to 83 per cent of sulphur dioxide are being removed. Availability of the system has increased from 37 per cent last January, to 60 per cent in May, to 83 per cent in September.

E.W.K.

How Scrubbers Work

The controversial scrubber of gases in a coal-fired operation—to vastly over-simplify—is a large metal container fitted with nozzles and baffles.

From a plant's boiler, flue gas containing toxic sulphur dioxide is pumped into this container and there churned with a chemical compound—most commonly a slurry of lime or limestone—that reacts with the dioxide to produce calcium sulphate and calcium sulphite. These solids can be drawn off with the water into large tanks where they settle out. Most of the water is then pumped back into the scrubber.

After removal of the sulphur dioxide, the remaining flue gas—mostly water vapor and non-toxic carbon dioxide — is reheated and forced up the stack by large induction fans.

The sludge containing the calcium sulphate and calcium sulphite—truly, as scrubber critics charge, "an oozy gook" — is pumped from the settling tanks to small ponds where it is stabilized by the addition of flyash and lime and partially dried. Finally, it is trucked or sent by pipe to a disposal site to harden.

The principal companies to have designed scrubber systems for major plants, of 100 megawatts or larger, include Combustion Engineering, Inc.; the Babcock & Wilcox Company; the Chemical Construction Corporation, a subsidiary of the General Tire and Rubber Company; the Peabody Galion Corporation, and Research-Cottrell, Inc.

A lime scrubbing unit, center at left, in use at the Louisville Gas and Electric Co.

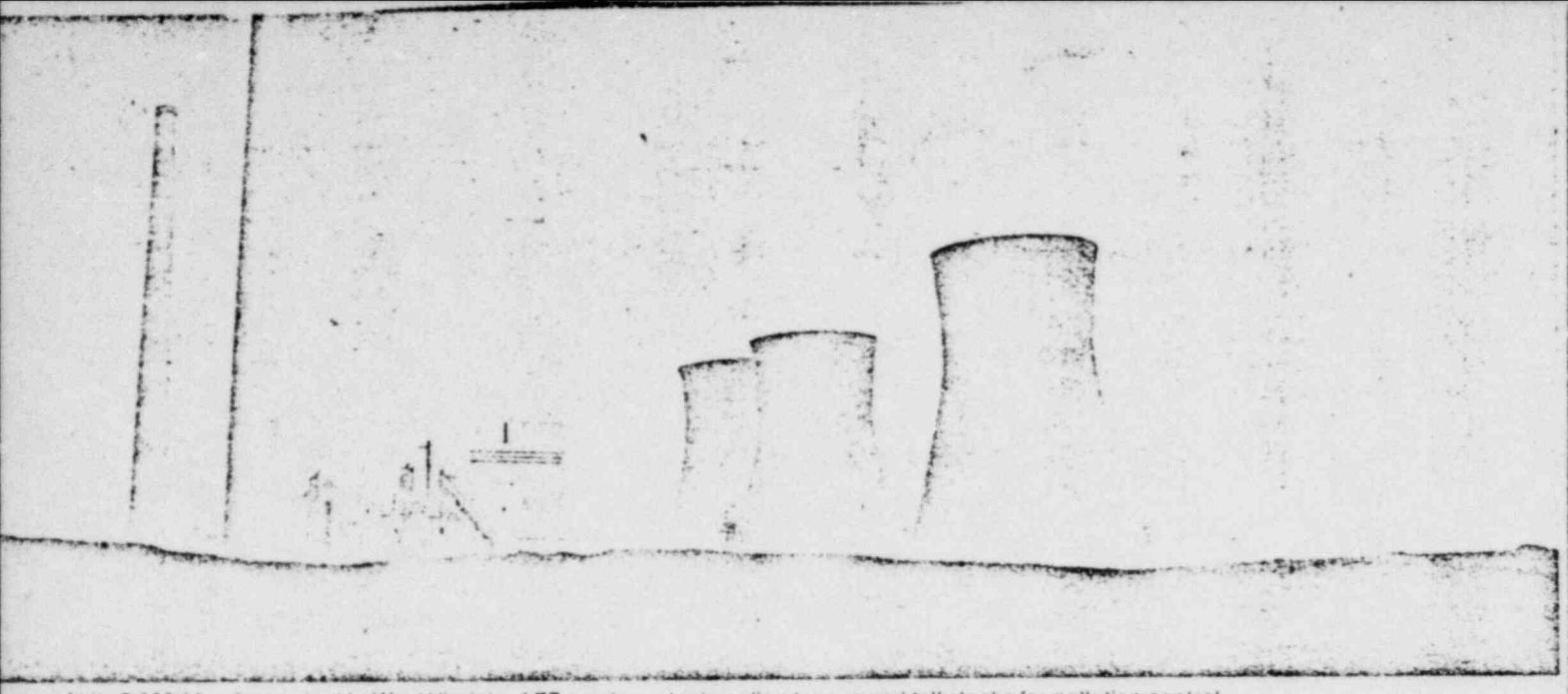
Donald Cook takes on the environmentalists

"I grew up as a New Dealer and was imbued with remaking America. I learned one thing: You get a liberal who has an idea he wants to push, that he believes is in the public interest, and he will stop at nothing, absolutely nothing, in order to push it. He believes the end justifies the means, period. I'm talking about the people at the Environmental Protection Agency."
–Donald C. Cook, chairman, American Electric Power Co.

Obviously, Donald Cook is not a man who pulls his punches. For the last several months, Cook and the $1-billion utility system he tightly controls have been engaged in a blunt, far-reaching crusade against federal environmental policies. In the most hard-hitting attack ever directed against a government agency, Cook personally launched a controversial $3.1-million advertising campaign to mobilize public opinion against EPA policies (page 68). In addition, AEP has filed several lawsuits challenging EPA's enforcement of the Clean Air Act, and it has threatened to close several power plants rather than install scrubbers to purge sulfur oxides from utility smokestacks. Terming the scrubbers "monstrous contraptions," Cook insists that they do not work and are not needed to comply with federal air quality standards.

If getting his message across also means sparring publicly with government officials, Cook seems eager to do battle. He has accused EPA Deputy Administrator John R. Quarles, Jr., of "intimidating" AEP and trying to "muzzle" its right to speak. And earlier this year, when Russell Peterson, chairman of the White House Council on Environmental Quality, wrote to AEP criticizing one of its ads as "irrespon-

Cook's style is to come out fighting rather than work behind the scenes.



At its 2,900-Mw. Amos plant in West Virginia, AEP employs giant cooling towers and tall stacks for pollution control.

sible" and "subversive of the public interest," Cook fired back a letter accusing Peterson of "vituperative and oppressive conduct." Then, irked that Peterson had released his AEP letter to the press before Cook had a chance to reply, Cook took the extraordinary step of writing to President Nixon asking him to "investigate" Peterson's "official and clandestine activities."

To environmentalists, such tactics make Cook the devil incarnate, a know-nothing executive railing at needed environmental laws. But those who know Cook, whether they agree with him or not, insist that he is deeply disturbed by the nation's energy dilemma and by the financial woes facing utilities. And because he is a strong-willed and scrappy man, Cook's style is to come out fighting rather than work quietly behind the scenes, as other utility executives are doing. As a result, AEP, which generates more electricity than any other private utility, is increasingly identified in the public eye as the leading critic of environmental rules.

Cook's case for coal

Behind the rhetoric lie important issues that affect national energy policies as well as environmental quality. The major question, put simply, is whether the U. S. can soon tap more of its abundant supply of high-sulfur coal or whether air pollution rules will restrict its use until utilities install scrubbers. The answer will determine the role of coal over the next 10 years, influence the price of electricity, and affect the quality of the nation's air. Not least, the controversy illustrates the difficulty of applying a vital social law—the 1970 Clean Air Act—to the workaday world of electric utilities.

AEP, of course, wants the U. S. to free itself from high-priced, politically risky foreign oil by tapping domestic coal. Its argument is well summed up by an early ad, drawn by *New Yorker* cartoonist Charles Saxon, showing two defiant-looking Arab sheiks standing in front of a Rolls-Royce. AEP's answer: "We have more coal than they have oil. Let's use it!" Cook is so delighted with the ad ("I like our two Arabs very much") that AEP has turned the slogan into posters, lapel buttons, bumper stickers, and matchbooks.

Subsequent ads took the message much further. We could be free of Arab blackmail, they said, if only the EPA would relax its "unnecessarily restrictive regulations" requiring scrubbers and if only the Interior Dept. would speed the opening of more low-sulfur coal reserves in the West.

In the view of environmentalists and government regulators, however, relaxing emission standards entails substantial risks to public health, particularly among the young, the elderly, and the 5% of the population that suffers from respiratory disease. If utilities want to burn high-sulfur coal, they contend, they must install scrubbers. And many Westerners fear that widespread strip-mining of their low-sulfur reserves will permanently scar their land, rendering it useless for grazing and agriculture.

To AEP, opting for greater coal use makes obvious sense. A New York-based holding company, AEP owns seven major utilities that operate in seven states in Appalachia and the Midwest (map). They are all connected and are run as an integrated system from a computerized control center in a bomb shelter in Canton, Ohio. In all, AEP has a generating capacity of more than 15,000 megawatts, second only to the Tennessee Valley Authority, and 93% of it is coal-fired. While other utilities were mapping ambitious plans to go nuclear in the 1960s, AEP stuck with coal. Even today AEP's first nuclear plant, sited on Lake Michigan, is still two months from startup.

In emphasizing coal, AEP has been able to push the technology further than any utility. Under Philip Sporn, who built the AEP system and retired in 1961 after 41 years with the company, AEP pioneered supercritical boilers, developed the first high-voltage transmission lines, and built the industry's first large cooling towers.

The most efficient utility

Everything about AEP is on a Brobdingnagian scale. It has the tallest smokestacks (some are nearly as high as the Empire State Building), the largest cooling towers (the floor area is as big as the playing field at Shea Stadium), and the largest strip-mining machine (capable of scooping up two Greyhound buses). Its 2,900-Mw. Amos plant in West Virginia is the nation's largest generating station, and its vast distribution system is the major power thoroughfare between East Coast utilities and those west of the Mississippi.

Such economies of scale have enabled AEP to run the nation's most efficient utility system. Its plants, on average, need to burn only 9,256 Btu of fuel to generate one kilowatt-hour of electricity, compared with an industry average of 10,429 Btu. AEP has never had a power shortage, has the highest load factor in the business, and has among the lowest rates of any private utility.

The results show on the bottom line. Operating revenues, which will top $1-billion this year, have more than doubled in 10 years, and earnings have grown 163%. Last year AEP earned $182.6-million on sales of $966.5-million, for a profit margin of 18.9%, well above the industry average.

All this is based on coal, and the company's commitment to coal is deep. When oil supplies are controlled by for-

eign producers and nuclear power is plagued by operating problems, AEP should be sitting pretty. But coal presents serious environmental problems. Over the years, Cook says, AEP has invested $1-billion in environmental controls—one-fifth of the company's total assets. Over the next two years, AEP plans to spend another $375-million on air and water pollution control.

A mixed record

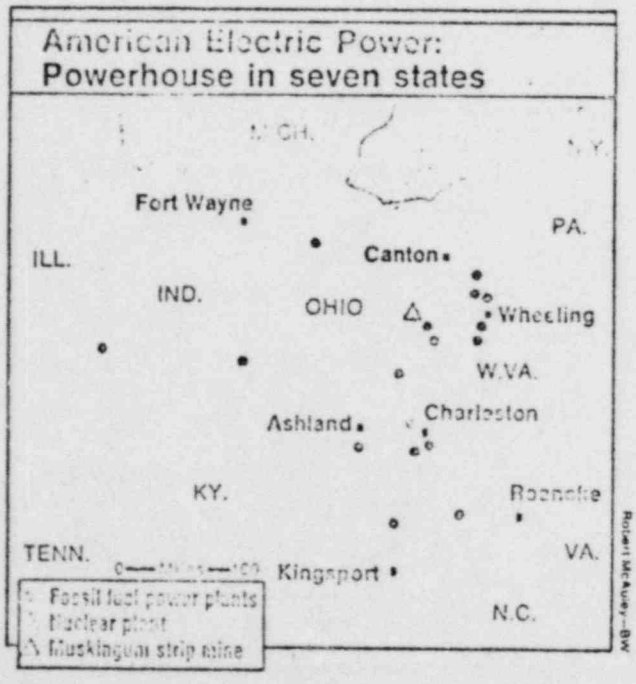
In some areas, AEP has voluntarily applied its technological expertise to environmental problems. Because some of its plants were on small rivers, AEP built cooling towers years ago to avoid thermal pollution. And its successful reclamation work on strip-mined land in Ohio goes back 30 years. There, the company planted 35-million trees on reclaimed land, creating a 35,000-acre recreation area that attracts 250,000 visitors a year. "Hell, I don't think Quarles [of EPA] could spell 'reclamation' 30 years ago," snaps Cook.

In other areas, tough laws were needed to push AEP into action. Coal-fired plants emit tons of fly ash and, as one of the biggest coal users, AEP became one of the biggest polluters. Some of its plants employed inefficient equipment, while others were long uncontrolled even though fly ash collectors were developed decades ago. In part, AEP relied on the fact that its plants were located in rural backwaters, and it used tall stacks to disperse the sooty particles. But the pollution was highly visible and brought frequent complaints. Says E. H. Gloss, manager at the Sporn plant in West Virginia: "Ten years ago we were writing letters to New York saying we had dust problems that should be corrected. New York said no."

Today, AEP is finally upgrading all its major plants with the most advanced electrostatic precipitators available—at a cost of $500-million. The precipitators, which act like giant magnets, trap 99.7% of the fly ash and will bring all AEP plants into compliance with the toughest particulate rules by 1977. One plant, only recently equipped with a precipitator that is 98% efficient, is being refitted with the 99.7% unit. But Cook begrudges the money needed, in some cases, just to achieve the extra 1% or 2% of control. "There is no reasonable relationship between the cost and the benefits," he complains.

High-sulfur coal also produces sulfur oxides, and it is on the SO_2 rules that Cook has decided to fight. The EPA wants utilities that burn high-sulfur coal to install scrubbers, a chemical system that strips the flue gases of about 90% of the SO_2. This requirement would cost AEP another $400-million or so and boost its operating costs at least $110-million a year. Moreover, AEP says that the scrubbers do not yet work well enough under the demanding conditions of a utility to warrant installation. And AEP firmly believes that scrubbers are not needed to comply with federal air quality standards.

As a result, while other utilities are testing and installing 93 scrubbers, AEP has refused to experiment with the system at all. AEP's annual report puts it this way: "We see no purpose served in spending tens of millions of dollars just to confirm the failures of previously tested processes. . . ." Quarles of



the EPA calls this an "intriguing" position for a company that has pioneered so many other technologies. Other critics ask where science would be today if everybody took AEP's "can't do" attitude.

"We *are* innovators," replies John A. Tillinghast, AEP's senior vice-president for engineering. "But we don't have faith and confidence in scrubbers. If you don't believe in something, you don't do it." And Cook, characteristically, puts it more colorfully: "We know enough about scrubbers to know they're no good. We're not going to prostitute our engineering judgments in this company merely because some bureaucrats think scrubbers are the road we ought to go down."

In short, AEP is putting its technological reputation on the line to challenge the EPA's findings that scrubbers are effective and reliable. Other utilities, including TVA, also share AEP's hostility to scrubbers. But no company has gone to the mat quite the way AEP is doing. And the reason, everyone agrees, is Donald Cook.

Cook came to AEP in 1953 from the Securities & Exchange Commission, where he started as a financial analyst in 1935, left in 1945, and returned in 1949 as SEC chairman in the Truman Administration. Along the way, he earned two law degrees from George Washington University (he already had an MBA from Michigan), became a CPA, and developed a close friendship with a young Texas congressman named Lyndon B. Johnson. Cook served as unpaid chief counsel of every Congressional committee that Johnson chaired. And when Johnson became President, he asked Cook to be Secretary of the Treasury. But Cook says that Johnson was a "hard man to work for" and he feared that "service in the Johnson Administration, far from cementing our personal relationship, could destroy it." So Cook stayed at AEP, where he had already become president.

Committed to fighting back

Still, Cook's government experience has left its mark. He frequently refers to his stint as a New Dealer, and, as Lyndon Johnson did, he talks of the needs of poor people with passion and conviction. But at the same time, he deeply resents the fact that EPA regulators and environmentalists (whom he calls "Johnny-come-latelies") are pictured as representing the public inter-

Chairman Cook speaks his mind

Before this interview, a BUSINESS WEEK reporter asked an AEP representative whether using a tape recorder would inhibit Cook from talking freely. His reply: "*Nothing* inhibits Donald Cook." A sample:

On the EPA

"It's better for them politically to take a tough stance on everything that they touch. They're political with respect to auto emissions, with respect to electric utilities. They're political, period."

On students who protested the ads

"We got some letters from some college girls complaining about our ads. They're good earnest young people and shouldn't be discouraged. It's wonderful for them to have ideals and stand up for them. I see myself 40 years ago when I look at them. But there's a big difference between the right to speak out and the formulation of national policy on the basis of ignorance. They know as much about the subject as the hot dog vendor here in front of 2 Broadway."

On corporate responsibility

"Government people think they're the only people who love their country. I don't need some EPA bureaucrat to tell me about the woods, or the land, or the water."

On Western strip-mined land

"I've been through that country. I know what it's like. You're not dealing with the Garden of Eden . . . We believe that with fertilizer and some irrigation to get the grasses started, there should be no difficulty whatsoever in restoring the land to at least the condition it was in before . . . We've never been anti-reclamation. We've been reclaiming strip-mined land for 30 years in Ohio. "Hell, I don't think Quarles [of EPA] could spell reclamation 30 years ago."

On obeying 'unreasonable' rules

"We don't run the country. We only run a utility system. But we're going to tell our story. If somebody then wants us to act like damn fools and they have the power to force us, we're going to do exactly what they tell us to do. You know, it isn't in my job description to go to jail."

On Project Independence

"Even though President Nixon exaggerated how quickly it could be accomplished, Project Independence is a very good concept. We ought to be doing everything we can to get as independent of the Middle East as possible. Can we do it? I say yes."

On using more coal

"We have a very critical situation with oil and gas. But we have a treasure house of coal to produce vast amounts of electric power. That electric power can substitute for many uses of oil and gas. But the government tells us that the high-sulfur coal that we can mine in the East we can't burn, and the low-sulfur coal that we can burn from the West we can't mine. We have the means in our own country to take care of the energy crisis if we only wake up."

On nuclear power

"Nuclear plants have more problems than a hound dog has fleas. I'm talking about operating and engineering problems unrelated to safety."

On coal exports

"We're exporting 55-million tons a year of the finest coal in the world. If we cut back on exports of that low-sulfur coal and made it available for utilities, we would substantially solve the pollution problems of Eastern plants."

On future power shortages

"The utility industry has canceled or delayed 134-million kw. of new capacity. I tell you that in 1978, 1979, and 1980 we're going to have a power shortage in the U.S. . . . Environmental regulation is a major factor. It has forced companies to raise a lot more money at a time when interest rates are high. They can't do it."

On why he did not retire at age 65

"I don't have to work. I'm willing to stay on because of the problems created by the unreasoning attitude of rabid environmentalists who haven't the slightest idea of balancing considerations to get decent results for society as a whole."

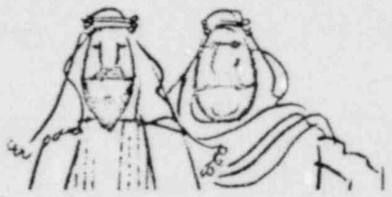
On Lyndon B. Johnson

"I had a close relationship with him. He was an extraordinary figure, a much better man than he's generally given credit for. He got Congress to pass more difficult but needed legislation—civil rights, medicare—than any President since Franklin D. Roosevelt. Of course, he made one very serious mistake, fighting a war we shouldn't have been in . . ."

". . . He was a hard man to work for. He could be understanding, he could be dogmatic. He could be idealistic, he could be cynical. He could be gentle, he could be ruthless. . . ."

est, while businessmen who may sincerely disagree with certain rules are depicted as selfish and greedy. In short, Cook believes that the SO_2 rules are needlessly discouraging coal use and raising electricity rates, and he sees it as his duty to protest. "Someone has to speak out," he says. "What is going on is wrong. It bothers me."

Last April, when Cook turned 65, the board of directors asked him to remain as AEP chairman for two more years. According to Frank Stanton, former head of CBS and an AEP director, the board felt that Cook was needed at a critical time. Moreover, because Vice-Chairman Herbert B. Cohn, 62, and President George V. Patterson, 63, were themselves soon to retire, the board did not want to choose two new



America has more coal than the Middle East has oil. Let's dig it!

AEP has turned a cartoon and slogan into posters, lapel buttons, bumper stickers.

chairmen within three years. And promising younger men, such as Tillinghast and Senior Vice-President W. S. White, Jr., were deemed to need another couple of years of operating experience. (One board member, Courtney C. Brown, former dean of the Columbia Business School, dissented and resigned partly because he felt Cook should step down.)

But the problems of succession were not the only reason Cook was eager to stay at the helm. "I was willing to stay on," he says, "because I believe in countering the unreasoning attitude of rabid environmentalists who haven't the slightest idea of balancing considerations to get decent results for society as a whole."

Though colleagues say Cook likes the power and prestige of the job, staying meant some personal sacrifices. An urbane and cultured man who collects art, travels widely with his wife, and enjoys ballet and opera, Cook now works almost constantly. "Utilities now have so many problems," he says, "that running a major system is a seven-day-a-week job."

Unlike many executives, the voluble AEP chairman does not mind fighting in public. In 1971, Cook and Charles F. Luce, chairman of Consolidated Edison Co., engaged in a feud, partly carried on in the letters column of the *New York Times*. Among other things, Cook

charged that Con Ed's "serious managerial problems" were giving the entire industry a black eye and that Luce had used "devious" methods in hiring away an AEP executive. Later that year, Cook took on General Electric and Westinghouse, suing them for allegedly conspiring to monopolize the turbine-generator business. (In 1972, GE countersued, accusing AEP of illegally boycotting its equipment. Both cases are pending.) Says one high-level

EPA's John Quarles finds it "intriguing" that Cook refuses to help develop workable scrubbers.

insider: "Don likes to fight. For some reason, he always seems to have a chip on his shoulder."

Whatever the reason, Cook is a very dominant chief executive, and what he wants, AEP generally does. The key question, of course, is whether Cook's stand on the SO_2 issue is correct.

Is Cook correct?

Under the Clean Air Act, the AEP set air quality standards for several pollutants, including SO_2, at levels designed to protect public health by July 1, 1975. The act does not specify how to meet the standards and, in theory at least, coal-burning utilities have four different routes open. They can:

- Mine and burn low-sulfur coal.
- Mine high-sulfur coal, then clean it before burning.
- Burn high-sulfur coal, then purge the SO_2 with scrubbers.
- Burn high-sulfur coal, then disperse the SO_2 with tall stacks.

Both AEP and EPA agree that the first strategy is acceptable. Unfortunately, low-sulfur coal is scarce now, and production cannot be increased enough to satisfy utility needs until well into the 1980s, primarily because of shortages of miners, mining equipment, and transportation facilities. Even so, AEP has pushed hard to get low-sulfur coal, spending some $150-million to acquire and ship the fuel from mines in Appalachia and the West. "No company has committed more than AEP to get a clean fuel," Cook claims.

The payoff, according to AEP legal counsel A. Joseph Dowd, is that AEP is already in compliance with SO_2 standards at 46% of its capacity. But AEP plants in Ohio, a state with no low-sulfur coal, are in trouble. Not enough Appalachian low-sulfur coal can be mined to serve Ohio, Dowd says, and it will be the 1980s before the more abundant reserves in the West are sufficiently developed.

Under the second strategy, the nation's vast store of high-sulfur coal would be converted to a clean fuel before combustion. But such technology is not yet available. Even if one were developed at reasonable cost, another decade would elapse before the process produced enough clean fuel for utility needs.

AEP executives express great enthusiasm for such a "front-end" process. But the company is spending surprisingly little on developing one. It has joined with Allegheny Power System, Inc., and Interior's Office of Coal Research in a $13-million research program to liquefy high-sulfur coal into a clean fuel. AEP's share: $1-million over two years, less than one-sixth the cost of its current advertising campaign. By contrast, Commonwealth Edison is contributing $17-million to a $28-million project to gasify high-sulfur coal. Cook's reply: "We can't pour millions into long-term research when compliance dates are on top of us. Our first priority is getting the available low-sulfur coal."

The last two strategies—scrubbers and tall stacks—are at the center of the AEP-EPA fight, and they raise a number of complex questions:

Do the scrubbers work? The National Academy of Engineering has stated that scrubbers should operate for one year on a power plant of at least 100 Mw. before they can be considered commercially reliable. By that definition, scrubbers have not yet been commercially demonstrated. Utilities that installed the first scrubbers two years ago encountered serious plugging and corrosion problems. But more recently a number of utilities have made significant progress. Louisville Gas & Electric installed a limestone scrubber on a 65-Mw. peaking station and found that it removed more than 90% of the SO_2 emissions, experienced no major reliability problems, and was economically feasible (BW—Aug. 31). LG&E executives are so confident that it will work continuously on large plants that they want to spend $108-million to equip all nine of their coal-fired plants with scrubbers. That will enable LG&E to burn abundant high-sulfur coal without violating air standards.

Similarly, Boston Edison Co., which recently ended a two-year test of a magnesium oxide scrubber, overcame early operating difficulties and decided that "this is a viable technology for our particular purpose." It is now studying the costs and weighing them against alternatives. And Philadelphia Electric Co. has agreed to install a scrubber on one unit and, if it works, to equip two more plants with it. "The sulfur removal system we have under development is a good one," reports James Lee Everett, the utility's president. I have great faith we can make anything work if we have to"—a sharp contrast to AEP's "can't do" attitude.

In sum, scrubbers have not yet passed the strict test set by the National Academy of Engineering, but that day seems close at hand. Says Quarles: "Scrubbers are the only technology right before us on the horizon. Alternatives are at least a decade away. When we look at the health effects that exist now and are likely to develop as this country turns increasingly to coal, as it must, then we must move ahead in developing this technology."

Are scrubbers needed? In regions where the SO_2 standards are now exceeded—and that includes parts of most major cities—scrubbers are definitely needed. In Louisville, for instance, the EPA has testified that existing SO_2 levels probably cause 20,000 asthma attacks annually, 4,000 chronic cases of lung disease, and several thousand respiratory ailments in children.

In regions that already satisfy the SO_2 standards, the need is less clear. Most AEP plants are in such regions, and the utility argues that tall stacks are a better solution there. By dispersing the SO_2, the tall stacks can keep concentrations at ground level within the safe limits defined by the federal standards. In addition, AEP is installing a comprehensive monitoring system. Thus, on days when atmospheric conditions trap the SO_2 and ground-level concentrations build up, AEP says it will either switch to an emergency supply of low-sulfur coal "within

hours" or cut power production by switching the load to other plants in the system. Such "intermittent control" is backed by several other utilities, the Federal Power Commission, and the Federal Energy Administration. Says Cook: "We are interested in what takes place at ground level—where the people live, where the animals are, where the vegetation is."

Is intermittent control adequate? Environmentalists raise two objections to intermittent control coupled with tall stacks as a substitute for scrubbers. First, the utility must be counted on to cut production or switch fuel when a pollution alert is sounded. This is not always possible. Last August, for example, the region around Steubenville, Ohio, which includes two AEP plants, experienced a three-day pollution alert. AEP's Tidd plant had agreed to switch to low-sulfur coal within three hours, but BUSINESS WEEK has learned that the Tidd plant did not have any low-sulfur coal available at all. Moreover, the emergency plan, which was written by AEP and approved by the state, calls for power cutbacks only as far as possible. Thus, if power demand is high and cannot be picked up by other plants outside the alert area, the utility is not legally bound to cut production. Pollution levels remain dangerously high, making a mockery of intermittent control. Ohio officials are now working with AEP's Ohio Power Co. to tighten the emergency rules.

Second, tall stacks do not control SO_2 emissions—they only disperse them. The EPA believes that the SO_2 emitted is chemically converted in the atmosphere into tiny sulfate particles, which can be blown hundreds of miles, descend to ground level, and then be inhaled. Such sulfate pollution, the EPA says, endangers health, even where the SO_2 levels satisfy the standards.

How serious is the sulfate problem? Based on epidemiological studies, EPA scientists believe that when sulfate levels exceed 6 to 10 micrograms per cubic meter of air, asthma attacks increase; when the level exceeds 9 micrograms, heart and lung disease worsens in the elderly; and above 25 micrograms, death rates increase. Says an EPA report: "These levels are exceeded in many areas of the country."

The evidence, however, is so tentative and measuring techniques so uncertain that the EPA cannot yet set sulfate standards. The lack of such standards is the weak link in its argument against tall stacks as a substitute for scrubbers in clean air regions—and AEP has protested vigorously. "It's crystal clear that there's no evidence whatsoever on sulfates," Cook charges. "If there were, they'd set standards."

Quarles concedes that the evidence "is not sufficiently complete for us to issue regulations—we're not ready to be cross-examined in court." But he believes that the agency should be prudent and push scrubbers. If, however, the EPA's suspicions about sulfates are wrong, AEP contends, utilities that operate in clean-air regions will be forced to install several billion dollars' worth of scrubbers that are not needed to satisfy the SO_2 standards.

Legally, the EPA can still force utilities anywhere to install scrubbers. The Fifth Circuit Court of Appeals ruled this year that the Clean Air Act requires constant emission controls (scrubbers, for example) and that tall stacks, by themselves, are not sufficient. AEP has joined with the TVA and other utilities to challenge that ruling in a similar case in the Sixth Circuit. "We're trying to precipitate a conflict between circuits," says AEP counsel Dowd. In that event, the matter would probably go to the Supreme Court.

Meanwhile, the EPA's enforcement strategy partly reflects the weakness of the sulfate evidence. At present the agency is forcing scrubbers only on the utilities that operate where SO_2 levels are most hazardous. By 1980 the EPA wants scrubbers on 90,000 Mw. of coal-burning plants—30% of projected coal-fired capacity—at a cost of at least $6-billion. The rest, including many of AEP's plants, may escape without scrubbers for the time being.

Says Quarles: "We're not making utilities install scrubbers just for sulfates at present." But he quickly adds, "I hope by the time we get to those plants in remote areas, we'll know a great deal about sulfates. Possibly some modifications of our requirements will be reasonable. But it's far more likely that we'll conclude our original judgment was correct and they should indeed put in scrubbers."

There the matter rests, complex and incomplete. Thousands of hours of litigation lie ahead, while researchers try to sort out the scientific evidence. Ten years from now, it may well turn out that AEP was right: that the EPA's rules were needlessly tough, forcing rate payers to waste billions of dollars. In that case, Donald Cook will be remembered the way he wants to be: as a forceful, committed defender of the public interest. But the verdict of history is just as likely to go the other way: AEP will have failed to lend its technological prowess to the solution of a serious health problem. Then Donald Cook will be remembered by many as a stubborn man who, on this question, was simply wrong. ■

Commentary

By Stephen B. Shepard

The ad campaign that stirred the ruckus

When Donald Cook decided to go public in his campaign against environmental policies, he envisioned an ad program that would stir people up. "Most institutional advertising is dismal," he says. "It puts more people to sleep than all the somnifics sold in the nation. If we were to accomplish anything, we had to put together advertisements that would provoke interest."

That Cook has done. Where other businessmen might have retained their traditional low profile, Cook has taken a forthright stand on controversial public issues. So far, AEP has run 29 different ads in every newspaper in the utility's service area, plus major national publications, including BUSINESS WEEK. Some of the ads, to be sure, are not controversial at all. One, for instance, states the important truth that the end of the Arab oil boycott did not mean the end of the fuel crisis. Other ads are justifiable corporate image-making, such as the one reporting that AEP is the most efficient user of fuel of any utility in the U. S.

But several others have drawn the ire of environmentalists, government regulators, and ordinary citizens. AEP has received more than 200 letters criticizing the ads. And, of course, some of the ads have been blasted by the government's big environmental guns, including Russell Train and John Quarles, the two top men at the Environmental Protection Agency, and Russell Peterson, head of the Council on Environmental Quality.

The controversy does not seem to bother Cook very much. "I would be disappointed if there weren't a tremendous adverse reaction to these ads," he says. "Since they are directed to deflating a very vocal, very intelligent, very hard-hitting group, believe me, if we didn't get this reaction, I'd say this program was just a dud."

Debatable points. Most of the controversy centers on two issues depicted in the ads at the right. In one ad, aimed at no-growth advocates, AEP warns that generating less energy is sure to generate galloping unemployment. That is undoubtedly true, but to many people, the ad raises a red herring. Just about all the proposals for energy conservation offered by government and private study groups call for reducing the *rate of growth* of energy demand, not cutting present consumption.

The "galloping unemployment" ad so annoyed John C. Sawhill, head of the Federal Energy Administration, that he wrote to AEP: "I urge you to cease this kind of advertising. It masks the total energy problem and gives the incorrect impression that conservation implies strongly negative impacts."

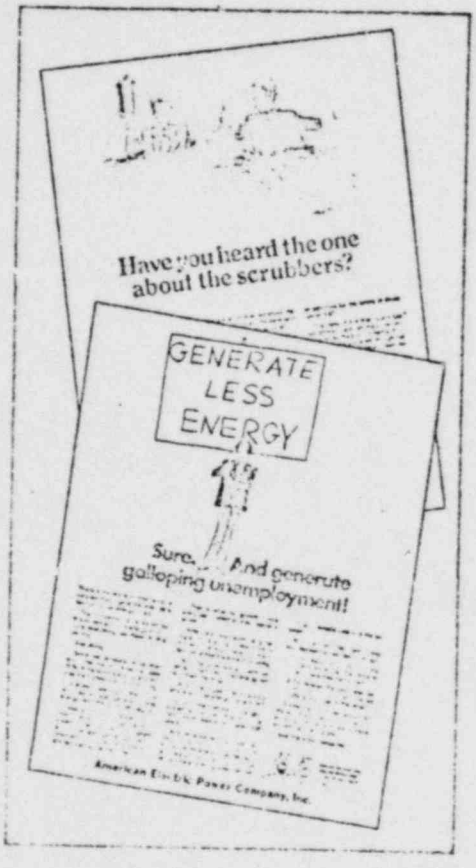
No one knows for sure how much the U.S. energy growth rate, which has been running close to 5% a year, can be cut without economic harm. But most analysts agree that the rate can be halved with no major impact on employment. How? By manufacturing lighter cars, using more home insulation, shifting more freight to the railroads, and designing more efficient buildings, appliances, and industrial machines. Indeed, without such conservation techniques, the U.S. is unlikely ever to achieve self-sufficiency in energy. Nor will such a program hurt the economy, according to a study by Dale Jorgenson, economics professor at Harvard, and Edward Hudson of Data Resources, Inc. (BW – June 1).

The other most controversial ads center on scrubbers to purge sulfur oxide emissions from smokestacks. The ads insist that the scrubbers are "monstrous contraptions" with "horrendous problems." And they claim that the most promising system, the wet limestone scrubber, would leave the nation

with "a disposal nightmare" from waste sludge, which the ads call "oozy gook." Counters Quarles: "Fortunately, they will make very little headway on the scrubber issue. The operating experience being accumulated by other companies is providing pretty convincing answers on our side."

The scrubber issue. Cook defends the scrubber ads by pointing to studies that say scrubbers should operate for one year on a 100-megawatt power plant before they can be considered reliable. By that definition, scrubbers have not yet been commercially demonstrated. But several utilities, including Louisville Gas & Electric, Boston Edison, and Philadelphia Electric, have expressed confidence in the technological performance and promise of the scrubbers they have tested. LG&E, in fact, is ready to spend $103-million to equip all its coal-fired plants with scrubbers. Adds James Lee Everett, president of Philadelphia Electric: "The sulfur removal system we have under development is a good one." In sum, while scrubber technology is still evolving and some bugs remain, some engineers say that calling them "monstrous contraptions" with "horrendous problems" is an overstatement.

AEP's claim that the waste sludge would present a "disposal nightmare" also appears to be exaggeration. For one thing, some scrubbers produce no sludge at all. The system that Philadelphia Electric plans to install will convert the SO_2 in the smokestack to



elemental sulfur, which the utility plans to sell. Similarly, the system found "technologically viable" by Boston Edison produced magnesium sulfite, which the utility processed into sulfuric acid and sold.

Though limestone scrubbers do leave a sludge residue, the disposal problems are hardly insurmountable. LG&E, acknowledged to have the most advanced scrubber in the U.S., will dry the sludge into a stable, inert landfill, then haul it to abandoned strip mines and gravel pits nearby. In some urban areas, such disposal is not possible, but that is not a major problem for AEP plants, which are sited in rural areas, not far from mining operations.

Clearly, AEP's ad campaign raises complex issues that need to be aired. In taking its case to the public, AEP is rightly seeking to widen the debate over matters that are vital to U.S. energy and environmental policies. That, in turn, imposes a responsibility on the company to assure that its ads fairly portray the complexities in both letter and spirit. Some of the ads satisfy this difficult test. But it is hard to avoid the conclusion that some of them seriously overstate the problems that utilities face in developing workable scrubbers. They blemish what is otherwise a legitimate effort to broaden public understanding.

APPENDIX E

LAW OFFICES
WALD, HARKRADER & ROSS

ROBERT L WALD
CARLETON A HARKRADER
WM WARFIELD ROSS
STEPHEN B IVES JR
DONALD H GREEN
SELMA M LEVINE
THOMAS C MATTHEWS JR
JOEL E HOFFMAN
GEORGE A AVERY
ALEXANDER W SIERCK
TERRENCE R MURPHY
WILLIAM R WEISSMAN
STEPHEN M TRUITT
JAMES K WHITE
KEITH S WATSON
TONI K GOLDEN
JAMES DOUGLAS WELCH
ROBERT A SKITOL
THOMAS W BRUNNER*

*NOT ADMITTED IN D.C.

1320 NINETEENTH STREET N.W. WASHINGTON, D.C. 20036
AREA CODE 202
296-2121
CABLE ADDRESS: WALHARK

OF COUNSEL
PHILIP ELMAN
NEAL P RUTLEDGE

July 5, 1973

Joseph Rutberg, Esq.
Office of General Counsel
United States Atomic Energy
Commission
Washington, D. C. 20582

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

Dear Mr. Rutberg:

This is in response to Mr. Jablon's letter to you of June 5, 1973 proposing a basis for settling the Midland antitrust proceedings.

The Applicant has given careful consideration to the statements contained in the letter, and the attached list of proposed license conditions. It has concluded that the proposals are merely a restatement, with some elaboration, of the Intervenors' total demands in these proceedings. This being the case, Applicant cannot view the Jablon letter as a proposal for settling this proceeding, and believes that no useful purpose would be served by discussions based on this document.

Applicant remains prepared to consider any substantial proposal for settling these proceedings. In this regard, Applicant and representatives of the muni/coop pool are currently in process of negotiating an interconnection agreement which could provide mutual benefits to both parties.

In any event, Applicant is appreciative of Staff's effort in initiating this exchange.

Sincerely yours,

Wm. Warfield Ross

WWR:BRM

CC: Service List

APPENDIX F

INTEREST ON GUARANTY DEPOSITS

P.A.1921, No. 347

PUBLIC SERVICE COMMISSION

Transfer of Functions

The public service commission was transferred intact to the department of commerce by section 16.331.

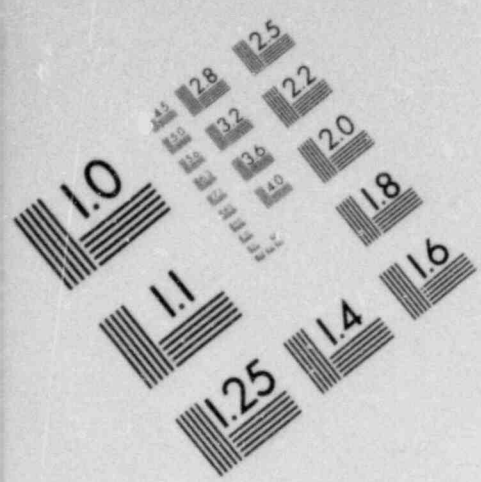
P.A.1939, No. 3, Imd. Eff. Feb. 15

AN ACT to provide for the regulation and control of public utilities and other services affected with a public interest within this state; to create a public service commission and to prescribe and define the powers and duties thereof; to abolish the Michigan public utilities commission, and to confer the powers and duties now vested by law therein, on the public service commission hereby created; to provide for the continuance, transfer and completion of matters and proceedings now pending; to provide for appeals; to provide appropriations therefor; to declare the effect of this act and prescribe penalties for the violations of the provisions thereof; and to repeal all acts contrary to the provisions of this act.

The People of the State of Michigan enact:

460.1 Public service commission, creation; members, appointment, qualifications, terms, vacancies

Sec. 1. A commission to be known and designated as the "Michigan public service commission" is hereby created, which shall consist of 3 members, not more than 2 of whom shall be members of the same political party, appointed by the governor with the advice and consent of the senate. Each member shall be a citizen of the United States, and of the state of Michigan, and no member of said commission shall be pecuniarily interested in any public utility or public service subject to the jurisdiction and control of the commission. During his term no member shall serve as an officer or committee member of any political party organization or hold any office or be employed by any other commission, board, department or institution in this state. No commission member shall be retained or employed by any public utility or public service subject to the jurisdiction and control of the commission during the time he is acting as such commissioner, and for 6 months thereafter, and no member of the commission, who is a mem-



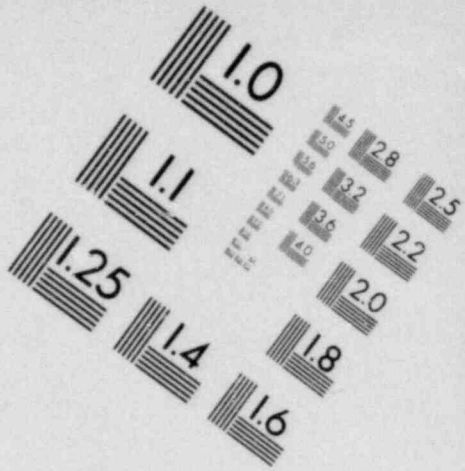
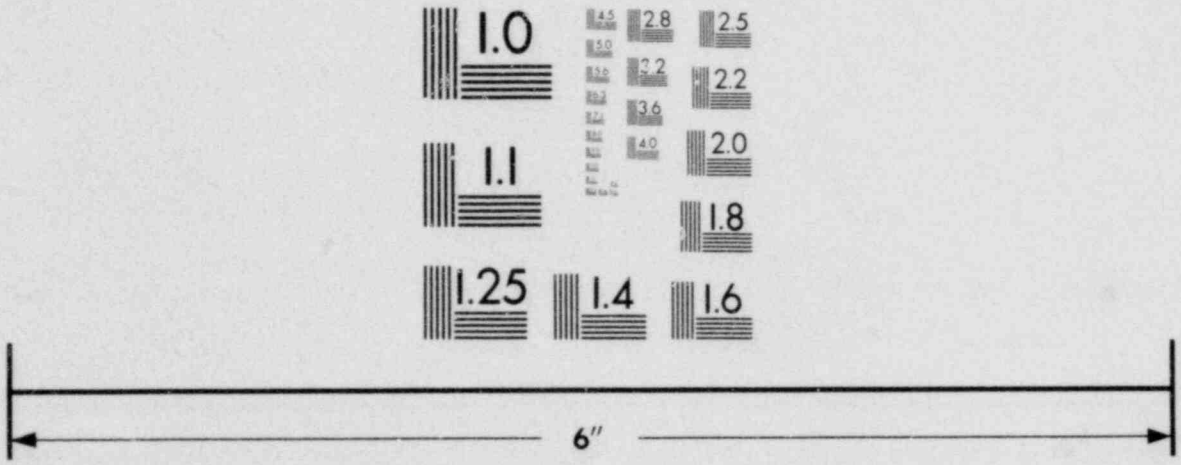
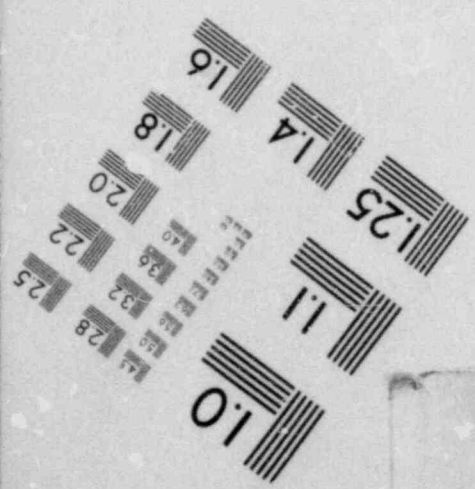
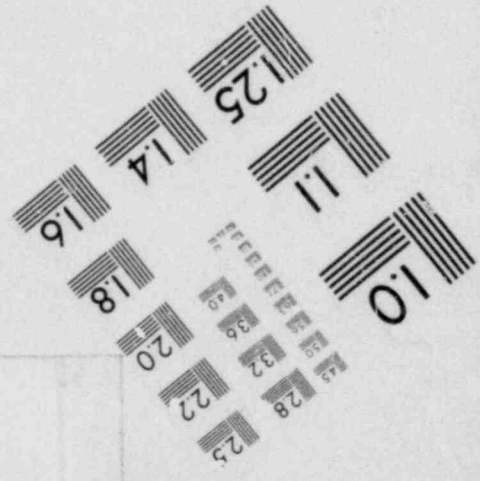


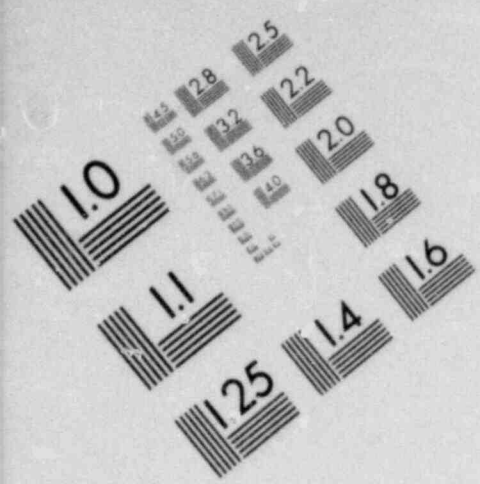
IMAGE EVALUATION
TEST TARGET (MT-3)



MICROCOPY RESOLUTION TEST CHART







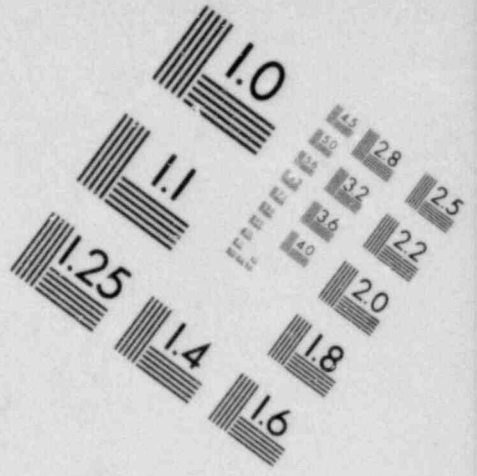
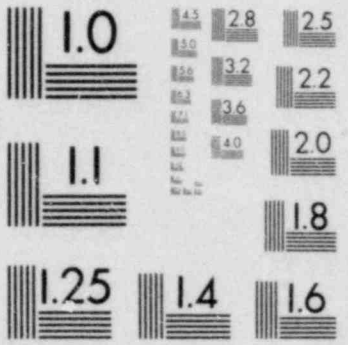
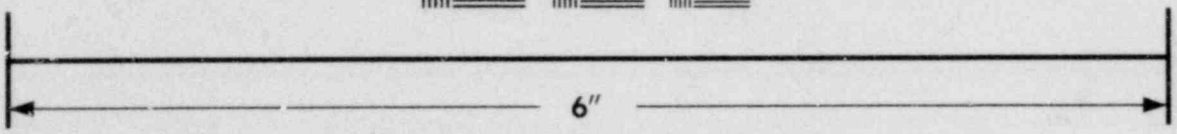


IMAGE EVALUATION
TEST TARGET (MT-3)





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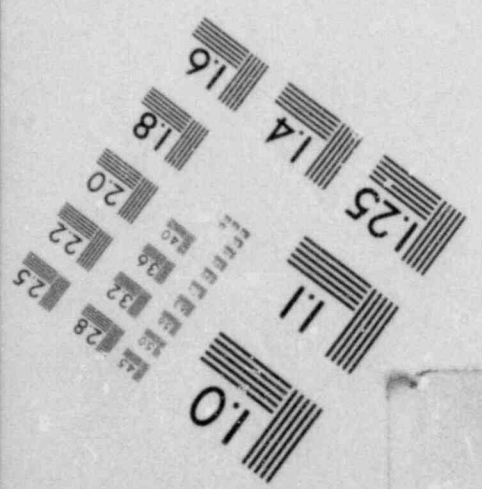

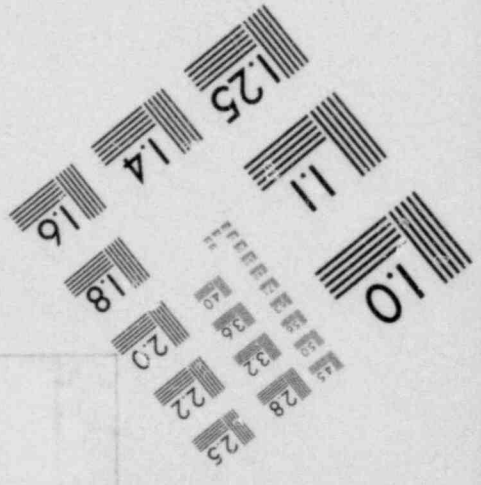

ber of the bar of the state of Michigan, shall practice his profession or act as counselor or attorney in any court of this state during the time he is a member of said commission: Provided, however, This shall not require any commissioner to retire from, or dissolve any partnership, of which he is a member, but said partnership, while he is a member of the commission, shall not engage in public utility practice. Immediately upon the taking effect of this act, the offices of the present members of the Michigan public service commission are hereby abolished, and the members of the Michigan public service commission as herein created shall be appointed by the governor with the advice and consent of the senate, for terms of 6 years each: Provided, That of the members first appointed, 1 shall be appointed for a term of 2 years, 1 for a term of 4 years, and 1 for a term of 6 years. Upon the expiration of said terms successors shall be appointed with like qualifications and in like manner for terms of 6 years each, and until their successors are appointed and qualified. Vacancies shall be filled in the same manner as is provided for appointment in the first instance. As amended P.A.1951, No. 273, § 1, Eff. Sept. 28.

Historical Note

Source:

P.A.1939, No. 3, § 1, Imd. Eff. Feb. 15.
P.A.1947, No. 357, Imd. Eff. July 3.

Opposition party representation was provided for in 1951.

Constitutional Provisions

Art. 5, § 6, provides: "Appointment by and with the advice and consent of the senate when used in this constitution or laws in effect or hereafter enacted means appointment subject to disapproval by a majority vote of the members elected to and serving in the senate if such action is taken within 60 session days after the date of such appointment. Any appointment not disapproved within such period shall stand confirmed."

Art. 5, § 7, provides: "Vacancies in any office, appointment to which requires advice and consent of the senate, shall be filled by the governor by and with the advice and consent of the senate. A person whose appointment has been disapproved by the senate shall not be eligible for an interim appointment to the same office."

Cross References

Interstate Commerce Act, see 49 U.S.C.A. § 1 et seq.
Public utilities commission, see § 460.51.

Law Review Commentaries

Evolution and devolution of public utility law, Edwin C. Goddard, 32 Mich.L.Rev. 577 (1934).

Federal power commission, jurisdiction over sale of developed leasehold interest of [illegible], 64 Mich.L.Rev. 157 (1965).

State utilities and the Supreme Court 1922-1930, Thomas Reed Powell, 29 Mich.L.Rev. 811 (1931).

Transfer of operating rights, 62 Mich.L.Rev. 1016 (1964).

460.2 Same; oath, chairman, removal, quorum, seal, offices

Sec. 2. Members of said commission shall qualify by taking and subscribing to the constitutional oath of office, and shall hold office until the appointment and qualification of their successor. The governor shall designate 1 member to serve as chairman of the commission. Any member of the commission may be removed by the governor for misfeasance, malfeasance or nonfeasance in office after hearing. A vacancy in the commission shall not impair the right of the 2 remaining members to exercise all the powers of the commission. Two members of the commission shall at all times constitute a quorum. The commission shall adopt an official seal, of which all the courts shall take judicial notice and proceedings, orders and decrees may be authenticated thereby. It shall be the duty of the board of state auditors to provide suitable offices, supplies and equipment for said commission in the city of Lansing, the expenses thereof to be audited, allowed and paid in such manner and out of such funds as may be provided by law. As amended P.A.1951, No. 228, § 1, Eff. Sept. 28.

Historical Note

Source:

P.A.1939, No. 3, § 2, Imd. Eff. Feb. 15.

A quorum was reduced from three, to two members in 1951.

Constitutional Provisions

Art. 5, § 10, provides: "The governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive. He may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature."

Art. 11, § 1, provides: "All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust."

Library References

M.L.P. Public Service Commission § 1.

Notes of Decisions

1. Commissioners

Where commissioner of public service commission continued up to and including the day on which the order in question was granted to perform the duties of his office without his right to do so being questioned from any source, he was a "de facto officer" and his action in signing the order was not subject to a collateral attack notwithstanding his alleged change of residence from Michigan to California. Greyhound Corporation v. Michigan Public Serv. Commission (1950) 61 N.W.2d 305, 330 Mich. 578.

Notwithstanding that Commissioner of public service commission changed his residence from Michigan to California, he was at least a de facto officer and as such entitled to take part in the business of the commission so long as he continued to act in that capacity and pending the appointment of his successor. Id.

460.3 Same; compensation, employees, experts, appointment; expenses

Sec. 3. The chairman of the commission and each of the other members shall be paid such annual salary as is established for such offices in the appropriation act most recently effective prior to the effective date of their confirmation by the senate. The commission may appoint a secretary and such deputies, clerks, assistants, inspectors, heads of divisions and employees as shall be necessary for the proper exercise of the powers and duties of the commission. All salaries and other expenses incurred by the commission shall be paid out of such funds as may be appropriated by the legislature therefor, and be paid out of the general fund of the state. All fees and other moneys received by the commission shall be paid over at the end of each month to the state treasurer, taking a receipt therefor. The commission shall have authority to employ engineers and experts in public utilities and public service matters and fix their compensation for such services, to be paid out of the appropriation provided by the legislature therefor. The members of the commission and the engineers, inspectors and employees thereof shall be entitled to their actual and necessary expenses incurred in the performance of the work of the commission. Each such deputy, clerk, assistant, engineer, inspector or expert shall perform such duties as may be required by the commission. Each member of the commission shall devote his entire time to the performance of the duties of his office. As amended P.A.1951, No. 229, § 1, Eff. Sept. 28; P.A.1957, No. 208, § 1, Imd. Eff. June 6; P.A.1959, No. 162, § 1, Imd. Eff. July 16; P.A.1961, No. 74, § 1, Eff. Sept. 8.

Historical Note

Source:

P.A.1939, No. 3, § 3, Imd. Eff. Feb. 15.
P.A.1947, No. 337, Imd. Eff. July 3.

Library References

Public Service Commissions ⇨5. C.J.S. Public Utilities § 36.

Notes of Decisions

I. Inspectors

Inspectors employed by the public service commission had no "vested right" to remain in the classified service of the state. Ramey v. State (1941) 296 N.W. 323, 296 Mich. 449.

Under civil service commission rule providing that vacations with pay be given employees in the classified civil service and that any employee who is separated from state service with leave untaken be compensated for unused portion of his annual leave allowance, inspectors who were employed by the public utilities commission and its successor, the public service commission, during all of 1938 and until about June 1, 1939, when they were discharged, had a "vested right" in compensation for unused leave allowance, on May 15, 1939, when amendment removing the positions from the classified service became effective, so as to entitle them to recover amount thereof. Id.

460.4 Same; powers; pending matters; orders, etc., review

Sec. 4. The Michigan public utilities commission, having failed and refused to properly carry out the legislative mandates with respect to public safety, and having failed and refused to properly enforce the provisions of the several acts conferring jurisdiction upon it with respect to the use of the various highways of the state in a safe and proper manner, is hereby abolished, and immediately upon the taking effect of this act said Michigan public utilities commission shall cease to exist, and the tenure of office of the members thereof and other employment of each employe of said commission shall be thereby terminated. All the rights, powers, and duties vested by law in said Michigan public utilities commission, and in the Michigan railroad commission and transferred to the Michigan public utilities commission, shall be deemed to be transferred to and vested in the Michigan public service commission hereby created, and shall hereafter be exercised and performed by said commission. All hearings, matters and proceedings of whatsoever nature pending before said Michigan public utilities commission or any court shall not be terminated or abated, but shall be considered to have been transferred to the Michigan public service commission hereby created, and shall be continued, carried on and completed in the same manner and subject to the same rights, privileges, immunities and procedure as though the same were carried on and completed by said Michigan public utilities commission, without any requirement of amendment, modification, or change by reason of the transfer hereby made. Said Michigan public service commission shall have and exercise all rights and privileges and the jurisdiction in all respects as has been conferred by law and exercised by the Michigan public utilities commission under the laws of this state; and wherever reference is or has been made in any law to the "commission" or to the "Michigan public utilities commission" or the "Michigan railroad commission" such reference shall be construed to mean the Michigan public service commission hereby provided for, without further amendment or change thereof. Any order or decree of the Michigan public service commission shall be subject to review in the manner now provided by law for reviewing orders and decrees of the Michigan railroad commission or the Michigan public utilities commission. In no case, however, shall any injunction or other order issue suspending or staying any decree or order of the Michigan public service commission except after due notice to the commission and a reasonable opportunity for hearing thereon. All appeals from orders of the Michigan public utilities commission initiated under the provisions of any other act and now pending in any court shall not be dismissed, terminated, or abated but shall be continued, carried on, and completed exactly as though this section had been in effect at the time such appeals were taken and such appeals initiated under the provi-

sions of this section. The Michigan public service commission shall be substituted as defendant in all such causes.

Historical Note

Source:

I.A.1939, No. 3, § 4, Imd. Eff. Feb. 15.

Michigan Administrative Code

For Rules and Regulations under numbered designation corresponding to M.C.L.A. Chapter 460, see Michigan Administrative Code.

Cross References

Public utilities commission, see § 460.51 et seq.

Law Review Commentaries

Federal power commission, jurisdiction over sale of developed leasehold interest of gas in formation. 63 Mich. L.Rev. 155 (1964).

Public utilities: statutory review by the state supreme court of a decision by the commission. 25 Mich.L.Rev. 178 (1926).

Library References

Public Service Commissions ⇐6.
C.J.S. Public Utilities § 38 et seq.
M.L.P. Automobiles § 42.
M.L.P. Carriers § 2.
M.L.P. Public Service Commission § 1.
M.L.P. Railroads § 1.

Notes of Decisions

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1. In general

"Reasonable" with relation to utility rates such as that for sewage service depended upon comprehensive examination of all factors involved, having in mind the objective to be obtained. Land v. City of Grandville (1966) 141 N.W.2d 370, 2 Mich.App. 681.

In fixing telephone rates, the public service commission acted in a legislative capacity, and therefore the commission's order fixing rates was to be construed as a statute of like character would be construed. Michigan Bell Tel. Co. v. Michigan Pub. Serv. Commission (1946) 24 N.W.2d 200, 315 Mich. 533.

All statutes are prospective in their operation except where the contrary clearly appears from the context of the statute itself. Id.

Judgment dismissing complaint in action by members of Michigan public utilities commission, to have the immediate effect provision of statute which abolished the Michigan public utilities commission and created the Michigan public service commission, declared unconstitutional, and for injunction restraining appointees to new commission from assuming duties of their offices, was affirmed by a divided court. Todd v. Hull (1939) 285 N.W. 46, 288 Mich. 521.

2. Powers

The public service commission had only such powers relative to fixing rates or earnings of a telephone company as were by statute expressly or by necessary implication vested in the commission. Michigan Bell Tel. Co. v. Michigan Pub. Serv. Commission (1946) 24 N.W. 2d 200, 315 Mich. 533.

The public service commission had neither express nor implied power under statute to reduce rates or accrued earnings of a telephone company within the state retroactively. Id.

In the case of City of Jackson v. Consumers Power Co. (1945) 20 N.W.2d 265,

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Source:

P.A.1939, No. 3, § 4, Imd. Eff. Feb. 15.

Michigan Administrative Code

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Library References

Public Service Commissions ⊂⇒6.
C.J.S. Public Utilities § 38 et seq.
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M.L.P. Public Service Commission § 1.
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In the case of City of Jackson v. Consumers Power Co. (1945) 20 N.W.2d 265,

312 Mich. 437, the court said: "Act No. 3, Pub.Acts of 1939, vested in the Michigan public service commission powers and jurisdiction of the type here involved which theretofore were vested in the Michigan utilities commission."

Powers of public utilities commission were derived solely from statutes, and authority for its acts was to be found therein. In re Joe Brown & Sons (1936) 263 N.W. 887, 273 Mich. 652.

3. Procedure in general

Notice by public service commission to telephone company that investigation would be held to determine whether company's profits were too high could not be considered as the institution of rate adjustment proceedings, in order to authorize commission to order refund of revenues by company to consumers from date of notice rather than from subsequent date when order for refund was made. Michigan Bell Tel. Co. v. Michigan Pub. Serv. Commission (1946) 24 N.W.2d 200, 315 Mich. 533.

4. Hearing

The railroad commission act and the public service commission act did not specifically require that commission or any of its members themselves hold hearings, but, since final action could only be had by commission, or by one of its members when so directed by commission, any interested party was entitled to a rehearing before full commission upon request, and in absence of such request no complaint could be made of a hearing by an examiner. Detroit & T. S. L. R. Co. v. Michigan Public Service Commission (1949) 36 N.W.2d 896, 324 Mich. 195.

Where public service commission appointed an examiner to hold hearing, and all parties appeared before examiner and no objection was made as to his power in the premises and thereafter testimony was submitted to commission which made an order thereon, party aggrieved by order waived its objection to procedure employed and could not appeal on that ground. Id.

5. Injunction

Although general supervision of telephone companies had been relegated to the railroad commission by P.A.1911, No. 138 (repealed) and P.A.1913, No. 206 (section 484.101 et seq.) a telephone company would be enjoined from violating its franchise contract obligations until action was taken by the Commission. Traverse City v. Citizens' Telephone Co., (1917) 161 N.W. 983, 195 Mich. 373.

6. Review

Where public service commission granted first natural gas company a certificate of public convenience and necessity to make direct sale of natural gas to certain steel company, and second natural gas company appealed to Circuit Court under statutes, and first company intervened as party defendant, and additional and other evidence was adduced in Circuit Court, and such evidence was transmitted to commission by Circuit Court as provided by statute, and commission thereafter rescinded its original order which granted certificate and reported its action to Circuit Court, and Circuit Court dismissed action, first company was aggrieved by commission's order rescinding its original order granting certificate, and first company was entitled to appeal to Circuit Court from order of commission rescinding its original order. Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission (1939) 93 N.W.2d 592, 357 Mich. 282.

Where Supreme Court on appeal by public service commission held that commission had no power under statute to make rates for a telephone company retroactive, Supreme Court would not pass on contention of telephone company, advanced on assumption that Supreme Court might hold statute empowered commission to make rates retroactive, that statute was unconstitutional, since the constitutional question was not essential to the decision. Michigan Bell Tel. Co. v. Michigan Pub. Serv. Commission (1946) 24 N.W.2d 200, 315 Mich. 533.

460.5 Same; books, records, files

Sec. 5. All books, records, files, papers, documents, and other property belonging to the Michigan public utilities commission shall be forthwith turned over to the Michigan public service commission

and shall be continued as a part of the records, files, and other property of said commission. The Michigan public service commission shall in all respects be considered to be the successor in office of the Michigan public utilities commission in respect to all of the powers or duties now vested in or imposed upon said public utilities commission. Any unexpended balance of moneys in the state treasury and any fees or other moneys now owing to said public utilities commission shall be and the same are hereby transferred and assigned over to the Michigan public service commission hereby created, to be used and disposed of as provided by law.

Historical Note

Source:
P.A.1939, No. 3, § 5, Imd. Eff. Feb. 15.

Notes of Decisions

1. In general

Judgment dismissing complaint in action by members of Michigan public utilities commission, to have the immediate effect provision of statute which abolished the Michigan public utilities commission and created the Michigan public service commission, declared unconstitutional, and for injunction restraining appointees to new commission from assuming duties of their offices, was affirmed by a divided court. Todd v. Hull (1939) 285 N.W. 46, 288 Mich. 521.

460.6 Same; powers and jurisdiction; rates, rules, service of public utilities

Sec. 6. **Powers and jurisdiction.** The Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all public utilities in the state except any municipally owned utility and except as otherwise restricted by law. It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted th power and jurisdiction to hear and pass upon all matters pertaining o or necessary or incident to such regulation of all public utilities, incl ding electric light and power companies, whether private, corporate or cooperative, gas companies, water, telephone, telegraph, oil, gas and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies.

Railroads. The Michigan public service commission shall have the same measure of authority with respect to railroads and railroad companies as is granted and conferred under the various provisions of the statutes creating the Michigan railroad commission and its successor, the Michigan public utilities commission, and defining their powers and duties.

Construction and operation of gas service and pipe line facilities. It may make reasonable rules and regulations to provide for the protection of the public in the construction and operation of facilities by public utilities rendering gas service and by companies operating a pipe line or lines for the transportation of gas, or any petroleum products that are gases at normal atmospheric temperatures and pressures: Provided, however, That such power and jurisdiction shall not extend to field gathering lines in either gas producing fields or gas storage fields except as such lines may cross state trunkline highways or railroads. As amended P.A.1952, No. 240, § 1, Eff. Sept. 18; P.A.1960, No. 41, § 1, Imd. Eff. April 19.

Historical Note

Source:

P.A.1939, No. 3, § 6, Imd. Eff. Feb. 15.

The last paragraph was added in 1952.

Water companies were included in 1960.

Michigan Administrative Code

For Rules and Regulations under numbered designation corresponding to M.C.L.A. Chapter 460, see Michigan Administrative Code.

Cross References

Public utilities commission, powers, duties, see § 460.54.

Law Review Commentaries

Certificates of convenience and necessity. Ford P. Hall. 28 Mich.L.Rev. 276 (1930); Ford P. Hall. 28 Mich.L.Rev. 107 (1929).

Commission jurisdiction over utility cooperatives. Israel Packel. 35 Mich.L.Rev. 411 (1937).

Evolution and devolution of public utility law. Edwin C. Goddard, 32 Mich.L.Rev. 577 (1934).

Inconsistencies in public utility depreciation. Robert D. Haun. 38 Mich.L.Rev. 160 (1939).

Deduction of depreciation for rate base purposes. Robert D. Haun. 38 Mich.L.Rev. 479 (1940).

Measures of land value for utility regulation. Irston R. Barnes. 39 Mich.L.Rev. 37 (1940).

Methods of testing the constitutionality of rate statutes involving heavy penalties. 26 Mich.L.Rev. 415 (1928).

Municipality as a unit in rate-making and confiscation cases. Robert D. Armstrong. 32 Mich.L.Rev. 289 (1934).

Pseudo protection of property in rate cases. 24 Mich.L.Rev. 166 (1925).

Public utilities.

Power of commission to change rate paid by private user under special contract with utility. 21 Mich.L.Rev. 392 (1926).

Rate regulation: validity of temporary rate order. 38 Mich.L.Rev. 72 (1939).

Rate regulation: public utilities. 32 Mich.L.Rev. 308 (1934).

Library References

Public Service Commissions ⇔6.7, 7.

C.J.S. Public Utilities §§ 13 et seq., 41, 42.

M.L.P. Carriers §§ 81, 101.

M.L.P. Electricity and Gas §§ 2, 3.

M.L.P. Public Service Commission §§ 1, 2.

M.L.P. Telecommunications §§ 1, 10.

460.6a Gas, telephone or electric utilities; increase in rates, notice, hearing, finding, relief, investigation, report; nondomestic fuel adjustment charges

Sec. 6a. When any finding or order is sought by any gas, telephone or electric utility to increase its rates and charges or to alter, change or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected. When such utility shall have placed in evidence facts relied upon to support its petition or application to so increase its rates and charges, or to so alter, change or amend any rate or rate schedules, the commission, pending the submission of all proofs by any interested parties, may in its discretion and upon written motion by such utility make a finding and enter an order granting partial and immediate relief, after first having given notice to the interested parties within the service area to be affected in the manner ordered by the commission, and after having afforded to such interested parties reasonable opportunity for a full and complete hearing: Provided, That no such finding or order shall be authorized or approved ex parte, nor until the commission's technical staff has made an investigation and report: And provided further, That any alteration or amendment in rates or rate schedules applied for by any public utility which will result in no increase in the cost of service to its customers may be authorized and approved without any notice or hearing. Nothing contained in this section shall be construed to prohibit the commission from permitting the incorporation of fuel adjustment clauses in rate schedules for service other than domestic service pursuant to notice and hearing thereon. P.A.1939, No. 3, § 6a, added by P.A.1952, No. 243, § 1, Eff. Sept. 18, 1952, as amended P.A.1955, No. 172, § 1, Imd. Eff. June 13.

Historical Note

The last sentence, relating to fuel adjustment clauses, was added in 1955.

Michigan Administrative Code

For Rules and Regulations under numerical designation corresponding to M.C.L.A. Chapter 460, see Michigan Administrative Code.

Law Review Commentaries

Commission jurisdiction over utility [illegible]. Lobel Rackel, 35 Mich. L.Rev. 311 (1937).

Evolution and devolution of public utility law. Edwin C. Goddard, 32 Mich.L.Rev. 577 (1934).

Inconsistencies in public utility depreciation. Robert D. Haun, 38 Mich. L.Rev. 169 (1939).

Deduction of depreciation for rate base purposes. Robert D. Haun, 38 Mich.L.Rev. 479 (1940).

Measures of land value for utility regulation. Irston R. Barnes, 39 Mich. L.Rev. 37 (1940).

Municipality as a unit in rate-making and confiscation cases. Robert D. Armstrong, 32 Mich.L.Rev. 289 (1934).

460.6b Gas utility rates, authority of public service commission; rates, etc., on file with federal power commission received in evidence; proceedings; appeal; refund

Sec. 6b. If the rates of any gas utility shall be based, among other considerations, upon the cost of natural gas purchased by said gas utility which is in turn distributed by said gas utility to the public served by it, and the cost for such gas is regulated by the federal power commission, the Michigan public service commission shall have the authority set forth in this section. In any proceeding to increase the rates and charges or to alter, change or amend any rate or rate schedule of a gas utility, the Michigan public service commission shall be permitted to and shall receive in evidence the rates, charges, classifications and schedules on file with the federal power commission whereby the cost of gas purchased or received by such gas utility is fixed and determined. If, while such proceeding is pending before the Michigan public service commission, a proceeding shall be instituted or be pending before said federal power commission, or on appeal therefrom in a court having jurisdiction, with respect to or affecting the cost of gas payable by such gas utility, said Michigan public service commission shall consider as an item of operating expense to said gas utility the cost of gas set forth in said rates, charges, classifications and schedules on file with the federal power commission. If the cost of gas payable by said gas utility shall be reduced by the final order of the federal power commission or the final decree of the court, if appealed thereto, and the Michigan public service commission shall have entered an order approving rates to said gas utility as aforesaid based upon the cost of gas set forth in the rates, charges, classifications and schedules on file with the federal power commission which were later reduced as above set forth, the Michigan public service commission upon its own motion or upon complaint and after notice and hearing may proceed to order refund to the gas utility's customers of any sums refunded to the said gas utility for the period subsequent to the effective date of the Michigan public service commission order approving rates for the gas utility as above set forth. P.A.1939, No. 3, § 6b, added by P.A.1952, No. 272, § 1, Imd. Eff. June 16, 1952.

Michigan Administrative Code

For Rules and Regulations under numbered designation corresponding to M.C.L.A. Chapter 460, see Michigan Administrative Code.

Cross References

Natural gas act, see 15 U.S.C.A. § 717 et seq.

Law Review Commentaries

Changing factors of reasonable rates. Clarence H. Updegraff, 29 Mich.L.Rev. 486 (1931).

Evolution and devolution of public utility law. Edwin C. Goddard, 32 Mich.L.Rev. 577 (1934).

tion of maintenance of way employees. This section shall not apply to motor vehicles used to transport employees distances of less than 5 miles from their regular assembly point nor in cases of extreme emergency. If any dispute arises as to the adequacy of the facilities herein provided for, it may be submitted to and decided by the public service commission. P.A.1919, No. 419, § 3a, added by P.A.1962, No. 39, § 1, Imd. Eff. April 16, 1962.

Library References

Railroads ⇨230. C.J.S. Railroads §§ 400-402.

460.54 Commission, powers and duties respecting rates; franchise rights; municipally owned utility

Sec. 4. In addition to the rights, powers and duties vested in and imposed on said commission by the preceding section, its jurisdiction shall be deemed to extend to and include the control and regulation, including the fixing of rates and charges, of all public utilities within this state, producing, transmitting, delivering or furnishing steam for heating or power, or gas for heating or lighting purposes for the public use. Subject to the provisions of this act the said commission shall have the same measure of authority with reference to such utilities as is granted and conferred with respect to railroads and railroad companies under the various provisions of the statutes creating the Michigan railroad commission and defining its powers and duties. The power and authority granted by this act shall not extend to, or include, any power of regulation or control of any municipally owned utility; and it shall be the duty of said commission on the request of any city or village to give advice and render such assistance as may be reasonable and expedient with respect to the operation of any utility owned and operated by such city or village. In no case shall the commission have power to change or alter the rates or charges fixed in, or regulated by, any franchise or agreement heretofore or hereafter granted or made by any city, village or township. It shall be competent for any municipality and any public utility operating within the limits of said municipality, whether such utility is operating under the terms of a franchise or otherwise, to join in submitting to the commission any question involving the fixing or determination of rates or charges, or the making of rules or conditions of service, and the commission shall thereupon be empowered, and it shall be its duty to make full investigation as to all matters so submitted and to fix and establish such reasonable maximum rates and charges, and prescribe such rules and conditions of service and make such determination and order relative thereto as shall be just and reasonable. Such order when so made shall have like force and effect as other orders made under the provisions of this act. In any case where a franchise under which a utility is, or has been, operated, including street railways, shall have hereto-

fore expired or shall hereafter expire, the municipality shall have the right to petition the commission to fix the rates and charges of said utility in accordance with the provisions of this act, or to make complaint as herein provided with reference to any practice, service or regulation of such utility, and thereupon said commission shall have full jurisdiction in the premises.

Historical Note

Source:

P.A.1919, No. 419, § 4, Imd. Eff. May 15.
C.L.1929, § 11009.
P.A.1931, No. 138, Eff. Sept. 18.

Cross References

Motor carriers, see § 475.1 et seq.
Overcharges, time limitation on recovery, see § 600.5811.
Railroad commission, see §§ 462.2 to 462.50.
Rates,
Generally, see § 462.4 et seq.
Electricity and gas, see § 486.253.
Express charges, see § 462.25.
Freight rates, see §§ 462.5, subd. b, 462.12.
Natural gas, purchase transportation and sale, see § 483.110.
Railroad bridge and tunnel companies, see § 464.9, subd. 9.
Railroad, interurban railway, etc., see §§ 468.1–468.4 and 468.31–468.37.
Street railway companies, see § 472.20.
Surface or elevated railway companies, see § 467.103.
Switching rates, see §§ 462.6 et seq., 468.101.
Telephone companies, see §§ 484.103–484.110.
Transmission of electricity on highways, see §§ 460.552, 460.557.
Union depot companies operating local passenger trains, see § 471.30.
Water, carriers by, see §§ 460.201–460.206.
Sewage or garbage disposal corporations, rates to be determined by public utilities commission, see §§ 123.245 and 123.246.

Law Review Commentaries

Charter contracts and the regulation of rates. Charles G. Fenwick, 9 Mich. L.Rev. 225 (1911).

Commission jurisdiction over utility cooperatives. Israel Packel, 35 Mich. L.Rev. 411 (1937).

Inconsistencies in public utility depreciation. Robert D. Haun, 38 Mich.L. Rev. 160 (1939).

Deduction of depreciation for rate base purposes. Robert D. Haun, 38 Mich.L.Rev. 479 (1940).

Rate regulation: validity of temporary rate order. 38 Mich.L.Rev. 72 (1939).

Telephone rates, hypothetical company technique, consideration of actual expenses. 63 Mich.L.Rev. 406 (1964).

Library References

Public Service Commissions ©=7.
C.J.S. Public Utilities §§ 13 et seq., 41.
M.L.P. Carriers § 81.
M.L.P. Electricity and Gas §§ 2, 8.
M.L.P. Public Service Commission § 2.
M.L.P. Telecommunications § 10.

Notes of Decisions

In general 1
Administrative restraint 17
Binding or contractual effect, ordinances, franchises or other contracts 4
Confiscatory rates 13
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Discrimination 7
Evidence 18

CERTIFICATE OF CONVENIENCE AND NECESSITY

Transfer of Functions

The Michigan public utilities commission was abolished and its functions were transferred to the Michigan public service commission by section 460.4 (P.A.1939, No. 3, § 4). The public service commission, in turn, was transferred intact to the department of commerce by section 16.331 (P.A.1965, No. 380, § 231).

Cross References

Application of this act to electric or gas corporations, see § 486.253.

Library References

Public Service Commissions ⇐6.6. C.J.S. Public Utilities § 42.

P.A.1929, No. 69, Imd. Eff. April 23

AN ACT to define and regulate certain public utilities and to require them to secure a certificate of convenience and necessity in certain cases.

The People of the State of Michigan enact:

460.501 Definitions

Sec. 1. The term "municipality", when used in this act, means a city, village or township.

The term "public utility", when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.

The term "commission", when used in this act, means the Michigan public utilities commission or such other state governmental agency as may exercise the powers now conferred upon said commission.

Historical Note

Source:

P.A.1929, No. 69, § 1, Imd. Eff. April 23.

C.L.'29, § 11087.

Law Review Commentaries

Certificates of convenience and necessity. Waldo O. Williloft. 10 Mich.S.B.J. 17 (1931). Ford P. Hall. 28 Mich.L.Rev. 776 (1930). Ford P. Hall. 28 Mich.L.Rev. 167 (1929).

Transfer of operating rights. 62 Mich.L.Rev. 1016, 1024 (1964).

Library References

M.L.P. Electricity and Gas §§ 2, 3.

460.502
Note 1

460.502 Certificate of convenience; necessity for gas or electric utilities

Sec. 2. No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension.

Historical Note

Source:

P.A.1929, No. 69, § 2, Imd. Eff. April 23.
C.L.1929, § 11088.

Cross References

Natural gas act, see 15 U.S.C.A. § 717 et seq.

Law Review Commentaries

Certificates of convenience and necessity. Ford P. Hall, 28 Mich.L.Rev. 276 (1930); Ford P. Hall, 28 Mich.L.Rev. 107 (1929).

Commission jurisdiction over utility cooperatives. Israel Packel, 35 Mich. L.Rev. 411 (1937).

Competitive operation of municipally and privately owned utilities. Charles M. Kneier, 47 Mich.L.Rev. 639 (1949).

Evolution and devolution of public utility law. Edwin C. Goddard, 32 Mich. L.Rev. 577 (1934).

State utilities and the Supreme Court, 1922–1930. Thomas Reed Powell, 29 Mich.L.Rev. 811, 1061 (1931).

Notes of Decisions

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1. In general

Requiring certificate of convenience and necessity allows public services commission authority to limit territory of utility and to prevent duplication of capital facilities. Huron Portland Cement Co. v. Michigan Public Service Commission (1958) 83 N.W.2d 492, 351 Mich. 255.

A direct order by the Michigan public service commission merely denying right of interstate carrier of gas to deliver its product without first obtaining a certificate of public convenience and necessity, allowed carrier to proceed before commission on hearing to determine whether or not public convenience and necessity required the granting of such a certificate. Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission (1948) 44 N.W.2d 324, 328 Mich. 650, affirmed 71 S.Ct. 777, 341 U.S. 329, 95 L.Ed. 993.

A business affected with public use may be regulated by the state under the

Note 4

in federal district court to restrain the commission from enforcing the interstate commerce act on ground lessor was not a motor carrier, federal district court would deny injunctive relief until commission had formally acted. Id.

If the Michigan public service commission, after a statutory hearing, should deny a certificate of public convenience and necessity to an interstate pipe line carrier of natural gas, pipe line carrier may obtain review in the courts, but if certificate is granted, any interested party would have the same right of review. Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission (1950) 44 N.W.2d 324, 328 Mich. 650, affirmed 71 S.Ct. 777, 341 U.S. 329, 95 L.Ed. 993.

460.503 Petition, contents

Sec. 3. Before any such certificate of convenience and necessity shall issue, the applicant therefor shall file a petition with the commission stating the name of the municipality or municipalities which it desires to serve and the kind of service which it proposes to render, and that the applicant has secured the necessary consent or franchise from such municipality or municipalities authorizing it to transact a local business.

Historical Note

Source:

P.A.1929, No. 69, § 3, Imd. Eff. April 23.

C.L.1929, § 11089.

460.504 Hearing; notices

Sec. 4. Upon filing such application, the commission shall set a day for the hearing thereof in accordance with its rules and practice relating to hearings and notify the applicant thereof. A copy of said application and a notice of the time and place of hearing such application shall also be served upon each and every other utility or agency in the municipality or municipalities proposed to be served by said applicant then rendering similar service therein, and also upon the clerk or other similar officer of each municipality, at least 10 days before such hearing, and said persons so served shall each be permitted to appear and be heard with reference to said application.

Historical Note

Source:

P.A.1929, No. 69, § 4, Imd. Eff. April 23.

C.L.1929, § 11090.

460.505 Same; matters for consideration; certificate, contents

Sec. 5. In determining the question of public convenience and necessity the commission shall take into consideration the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other matters as shall be proper and equitable in de-

termining whether or not public convenience and necessity requires the applying utility to serve the territory. Every certificate of public convenience and necessity issued by the commission, under the authority hereby granted, shall describe in detail the territory in which said applicant shall operate and it shall not operate in or serve any other territory under the authority of said certificate.

Historical Note

Source:

P.A.1929, No. 69, § 5, Imd. Eff. April 23.

C.L.1929, § 11091.

Law Review Commentaries

Certificates of convenience and necessity. Ford P. Hall, 28 Mich.L.Rev. 276 (1930); Ford P. Hall, 28 Mich.L.Rev. 107 (1929).

Competitive operation of municipally and privately owned utilities. Charles M. Kneier, 47 Mich.L.Rev. 639 (1949).

460.506 Review of order

Sec. 6. Any person aggrieved by the order of the commission made upon said application may review such order in the manner now provided by Act No. 419 of the Public Acts of 1919 [1] for reviewing the orders of the Michigan public utilities commission.

[1] Section 460.51 et seq.

Historical Note

Source:

P.A.1929, No. 69, § 6, Imd. Eff. April 23.

C.L.1929, § 11092.

Cross References

Rehearing, see §§ 460.351, 460.352.
Review, see § 460.59.

Notes of Decisions

In general 1
Aggrieved persons 2

1. In general

Right to sell natural gas in Michigan by an interstate pipeline carrier direct to consumers for their own use and not for resale, in a municipality where another public utility was rendering same sort of service, was within jurisdiction of Michigan public service commission. Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission (1950) 41 N.W.2d 324, 328 Mich. 650, affirmed 71 S.Ct. 777, 341 U.S. 329, 95 L.Ed. 993.

2. Aggrieved persons

Where public service commission granted first natural gas company a certificate of public convenience and necessity to make direct sale of natural gas to certain steel company, and second natural gas company appealed to circuit court under statutes, and first company intervened as party defendant, and additional and other evidence was adduced in circuit court, and such evidence was transmitted to commission by circuit court as provided by statute, and commission thereafter rescinded its original order which granted certificate and reported its action to circuit court, and circuit court dismissed action, first company

460.553 Same; discretionary powers; annual report of utilities; audit, expense

Sec. 6. The commission shall have power in its discretion to order electric current for distribution to be delivered at a suitable primary voltage, to any city, village or township through which a transmission line or lines may pass; to order service to be rendered by any such electric utility in any case in which it will be reasonable for such service to be ordered; prescribe uniform methods of keeping accounts to be observed by all persons, firms or corporations engaged in such business of transmitting and supplying electricity, and to keep informed as to the methods employed by all electric utilities in the transaction of their business; and to see that their property is maintained and operated for the security and accommodation of the public and in compliance with the provisions of law. It shall have power to require of such persons, firms or corporations annually a verified report upon such form and giving such information as will enable the commission to better discharge the duties imposed upon it hereby; and shall also have power to require from all electric utilities in the state such information as the commission may need at any time in connection with the performance of the duties imposed upon it by this act. Said commission shall also have power, in connection with any rate or service hearing or investigation, to make such audit and analysis of the books and records of the utility, and such inventory and appraisal of its property as may be necessary in connection with the duties imposed upon the commission by this act; and in any such case the commission shall keep a record of all expenses incurred by it in connection with its investigation of the affairs and property of the said utility and during the progress or at the conclusion of its work, shall state the amount thereof in writing to the said utility and said utility shall pay into the treasury of the state the amount of such expense at such times and in such manner as the commission may by order require. Said moneys when so paid into the state treasury shall go to the credit of the Michigan public utilities commission, and are hereby appropriated to the payment of its expenses.

Historical Note

Source:

P.A.1909, No. 106, § 6, Eff. Sept. 1.
C.L.1915, § 4847.
P.A.1921, No. 274, Eff. Aug. 18.
C.L.1929, § 11098.

Michigan Administrative Code

For Rules and Regulations under numbered designation corresponding to M.C.L.A. Chapter 460, see Michigan Administrative Code.

Law Review Commentaries

Commission jurisdiction over utility cooperatives. Israel Packel, 35 Mich. L.Rev. 411 (1937).

Measures of land value for utility regulation. Irston R. Barnes, 39 Mich. L.Rev. 37 (1940).

> "The facts required to be stated in the declaration, like those found by a special verdict, are deduced from other facts, to be found from the testimony, and must be such as will enable the court to declare the law in the case; so that it will be seen that the facts upon which the rights of the plaintiff are made to depend are in a certain sense conclusions, but are nevertheless the kind of facts required in pleading in stating the plaintiff's cause of action, while the others are the testimony furnishing the evidence of those facts, and not proper to be given in the declaration: * * *"

We think the allegations that the corporations were so organized, controlled and managed that they were the instrumentalities, agents and adjuncts of each other and were, in fact, one unit, coupled with the averments of common ownership, directorship, control, management and operation at one location and that the licensed corporation was uncollectible, while involving expressions of legal conclusions, constitute, at the same time, sufficient pleading of facts to admit of offers of proofs of such agency, particularly when knowledge of the facts relating thereto is peculiarly within the possession of defendants rather than plaintiff. Such was the sense of what we said in Spelman v. Addison, 300 Mich. 690, 2 N.W.2d 883, 884, in which we further observed that:

> "In recent years, at least, this Court has taken a liberal attitude in passing upon sufficiency of pleadings."

The allegations contained in plaintiff's declaration entitle him to an opportunity to prove his case against the defendants.

Reversed, with costs of this appeal to plaintiff.

SMITH, EDWARDS, KELLY, CARR, BLACK and VOELKER, JJ., concur.

KAVANAGH, J., took no part in this decision.

351 Mich. 255

HURON PORTLAND CEMENT COMPANY, Plaintiff-Appellant,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, and Consumers Power Company, Defendants-Appellees.

No. 43.

Supreme Court of Michigan.

March 4, 1958.

The Michigan Public Service Commission denied petition of industrial user for direct electric service from power company. The power company appealed in the nature of certiorari. The Supreme Court, Smith, J., held that where local power company served city and another power company, pursuant to contract approved by Michigan Public Service Commission, served a large industrial user in the area and in connection therewith ran a transmission line to the user's plant and the line did not pass through the city and the other power company did not profess to serve the area and had requested no certificate of public convenience and necessity to the area, the Commission had no authority under the statutes to order the other power company to furnish, from such transmission line, direct electric service to another industrial user in the area.

Order affirmed.

1. Electricity ⇐11(4)

In determining, on certiorari, whether Michigan Public Service Commission, under the circumstances, had statutory authority to order power company to give direct electric service to industrial user, the economic wisdom of the statutes was a matter of legislative concern and would not be considered by the Supreme Court. Comp.Laws 1948 and Comp.Laws Supp.1956, § 460.1 et seq.; Comp.Laws 1948, §§ 460.501, 460.556.

2. Public Service Commissions ⇐6.2

The Michigan Public Service Commission is an administrative body created by

statute, and the warrant for the existence of all its power and authority must be found in the statutes, and the Commission has no common law powers. Comp.Laws 1948 and Comp.Laws Supp.1956, § 460.1 et seq.

3. Public Service Commissions ⇐6.2

The statute outlining the jurisdiction of the Michigan Public Service Commission furnishes no grant of specific powers. Comp.Laws Supp.1956, § 460.6.

4. Electricity ⇐11(4)

In statute giving Michigan Public Service Commission discretionary power to order electric current for distribution to be delivered at suitable primary voltage to any city, village or township through which a transmission line or lines may pass and to order service to be rendered by any such electric utility in any case in which it will be reasonable for such service to be ordered, "such electric utility" means the utility whose transmission lines pass through the municipality involved. Comp.Laws 1948, §§ 460.551 et seq., 460.556.

See publication Words and Phrases, for other judicial constructions and definitions of "Such Electric Utility".

5. Electricity ⇐11(4)

Where local power company served city and another power company, pursuant to contract approved by Michigan Public Service Commission, served a large industrial user in the area and in connection therewith ran a transmission line to the user's plant and the line did not pass through the city and the other power company did not profess to serve the area and had requested no certificate of public convenience and necessity to the area, the Commission had no authority under the statutes to order the other power company to furnish, from such transmission line, direct electric service to another industrial user in the area. Comp.Laws 1948 and Comp.Laws Supp. 1956, § 460.1 et seq.; Comp.Laws 1948, §§ 460.501, 460.502, 460.551 et seq., 460.556; Comp.Laws Supp.1956, § 460.6.

6. Certiorari ⇐68

On certiorari the Supreme Court will not pass upon controverted issues of fact.

Snyder & Loomis, Lansing, for plaintiff and appellant.

Thomas M. Kavanagh, Atty. Gen., Samuel J. Torina, Solicitor General, Lansing, Robert A. Derengoski, John E. Tormey, Asst. Attys. Gen., for appellee Public Service Commission.

A. H. Aymond, Jr., H. P. Graves, Jackson, for defendant and appellee Consumers Power Co.

John R. Watkins, East Tawas, Robert C. Winter, Wilhelmina Boersma, Detroit, of counsel, for Alpena Power Co., amicus curiae.

Before the Entire Bench.

SMITH, Justice.

The problem presented concerns the furnishing of electric service to the appellant. This is an appeal in the nature of certiorari from an order of the Michigan public service commission dated January 4, 1957, "but only insofar as it denies in paragraph 4 of the order section thereof the petition of Huron Portland Cement Company for direct electric service from Consumers Power Company." Paragraph 4, above referred to, states as follows:

> "4. The petition of Huron Portland Cement Company requesting that this Commission order Consumers Power Company to render direct electric service to it from its 140KV transmission line running from Mio, Michigan to the plant of the Presque Isle Corporation, is hereby denied."

It is the position of the commission, in respect of such denial, that "the provisions of P.A.1929, No. 69, are controlling in this matter and under section 2 of said act it is necessary that Consumers Power Company obtain from this commission a certifi-

cate that public convenience and necessity will require the rendering of this service."

It is the claim of appellant, on the other hand, in its application for leave to appeal, that:

"B. The Michigan Public Service Commission erred in determining that it lacked statutory authority to order Consumers Power Company to serve directly from its transmission line the Huron Portland Cement Company under the facts and circumstances contained in the record:

"(1) By giving no consideration to the powers vested in it by the act creating the commission which is Act 3, Public Acts of 1939 (MSA § 22.13[1], 1955 Cum.Supp.), which grants to the Michigan Public Service Commission broad discretionary powers to regulate electric light and power companies;

"(2) By giving no consideration to the powers vested in it by the provisions of Act 106, Public Acts of 1909 (MSA § 22.156) which is commonly referred to as the "Transmission Act" which provides in section 6 that the commission shall have power to order service to be rendered from a transmission line in any case in which *it will be reasonable for such service to be ordered.*

"C. The Michigan Public Service Commission erred in determining that the provisions of Act 69, Public Acts of 1929 (MSA § 22.141) were exclusively controlling in this case."

Upon the above record, in part, and upon the representation to us "that time was of the essence in this case," we granted application for leave to appeal. Appellant raises 2 questions and 2 only:

"(1) Did the Michigan Public Service Commission lack statutory authority to order direct electric service from Consumers Power Company to appellant Huron Portland Cement Company?"

And—

"(2) Was it necessary that Consumers Power Company petition the Michigan Public Service Commission for the granting of a certificate of convenience and necessity to render direct electric service to appellant *before* the Commission could order Consumers Power Company to render direct electric service to appellant?"

We will confine our summation of the facts to the issues thus presented on this appeal. By way of background, however, we should point out that the commission had before it 3 matters involving electric service in and near Alpena, Michigan. These matters were to some degree interrelated and the commission hence issued a single opinion and order thereon. Huron appealed, as above noted, from that part of the opinion and order which denied its petition for direct electric service from Consumers.

The situation presented to the commission was this: Appellant Huron Portland Cement Company (Huron), a Michigan corporation, engaged in the business of manufacturing and selling cement, conducted a portion of its operations in the city of Alpena. It was in need of large additional amounts of electric power. The local electric power company is the Alpena Power Company (Alpena Power), a Michigan corporation with a service area comprising the city of Alpena and certain nearby areas.[1] But Alpena Power was not the only elec-

1. It appears from the appendix of appellee, Michigan Public Service Commission (and that of *Amicus Curiae*, Alpena Power Company) that Consumers and Alpena Power executed, under date of January 21, 1957, an amendment to their service contract of July 18, 1955, whereby Consumers contracted to sell additional electricity to Alpena Power. This amendment, the commission states in its brief, "meets the requirement of the commission order that Alpena Power acquire a greater volume of electricity before inaugurating large industrial service."

tric utility company in the general area. Consumers Power Company (Consumers) furnished large industrial power service within Alpena Power's service area to the Presque Isle Corporation pursuant to a contract therefor which had been approved by commission order. This order also granted Consumers a certificate of convenience and necessity to construct, maintain, and operate a 140KV transmission line from Mio, Michigan to the plant of the Presque Isle Corporation. Such transmission line does not enter or pass through the city of Alpena.

Huron wished to purchase its power requirements directly from Consumers. Accordingly it petitioned the commission to order Consumers to supply the service. This the commission, by order dated January 4, 1957, refused to do. Other necessary facts will appear in our discussion of the issues of law presented.

The appellant asserts (which the commission denies) that the commission has authority to order Consumers to render this service. The question posed is a broad one, going to the very roots of private enterprise. This is not a case where a utility, already servicing a city, arbitrarily refuses to take on a new (or expanded) burden, for Consumers has never supplied electricity to either the city of Alpena or the Alpena area generally. Furthermore, it has stated without ambiguity that it does not profess to service the Alpena area. No other conclusion can be reached from that portion of the record which purports to state the position of Consumers Power Company in this matter:

> "Now, if the Commission please, these applications place Consumers Power Company in a difficult position, because if these industries were located in our service area, we would be pleased to serve these customers with their requirements for electric energy. We well appreciate their desire for electric service on the most advantageous terms to them.
>
> "We are also mindful of the interests of the Presque Isle Corporation, which is a valued customer of Consumers Power Company, and which paid for the cost of the construction of the transmission line which enables Consumers Power Company to bring its electric energy into this area.
>
> "The Presque Isle Corporation is entitled to refunds of such costs of construction on the basis of revenues which we may derive from sales to customers served from that line. We therefore believe that it would be inappropriate for us to take any action which would tend to reduce the refunds which the Presque Isle Corporation might otherwise receive.
>
> "Now, on the other hand, the Alpena Power Company is presently rendering service in the area in which these industries are located. Alpena Power Company also is a valued customer of ours, or soon will be. Moreover, the Alpena Power Company was of great assistance to Consumers Power Company in the acquisition of the necessary rights-of-way for these transmission lines by which we bring our power supply into this area. In fact, the Alpena Power Company actually gave us rights-of-way across their property. Certainly it would be inappropriate for us to attempt to serve any customer in their service area without their consent."

[1] Thus Consumers does not offer the service requested, does not profess to serve the area, has no power lines into the city in which Huron is located, and has requested no certificate of public convenience and necessity to the area in which Huron is located. Hence those cases involving an undertaking of service to an area, particularly where a statute empowers the commission to order reasonable extensions of the mains and service (e. g., People of State of New York ex rel.

Woodhaven Gas Light Company v. Public Service Commission, 269 U.S. 244, 46 S.Ct. 83, 70 L.Ed. 255), are not controlling on the issue before us. If, under the circumstances related as to the position and dedication of Consumers, the commission is empowered to order such service to be rendered to Huron, it will require legislative mandate in the clearest possible terms. Finding such, a constitutional question of serious import would next be presented.[2] It is pertinent to observe, also, with respect to the legislation under consideration, that its economic wisdom, or lack thereof, is not our concern. We do not weigh the relative merits of Alpena Power's possible loss of revenue if this service cannot be rendered by it, loss to stockholders, and ultimate passing of the burden to the customers of Alpena Power, against the effect upon Huron's competitive position if the direct purchase from Consumers' can be made at a lower rate than elsewhere. Those are matters of legislative concern. We have had presented to us, upon certiorari, an issue of law, the statutory authority of the commission in the light of the facts before us to order the service, and upon that, and that only, do we propose to pass.

[2] At the outset we will observe that the Michigan public service commission has no common law powers. As we stated in Sparta Foundry Co. v. Michigan Public Utilities Commission, 275 Mich. 562, 564, 267 N.W. 736:

> "The Michigan public utilities commission is an administrative body created by statute and the warrant for the exercise of all its power and authority must be found in statutory enactments."

[3] We turn, then, to the statutory enactments. Appellant first cites to us section 6 of Act No. 3 of the Public Acts of 1939 (C.L.S.1956, § 460.6 [Stat.Ann.1955 Cum.Supp. § 22.13(6)]), which thus describes the statutory jurisdiction of the commission:

> "Sec. 6. The Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all public utilities in the state except any municipality owned utility and except as otherwise restricted by law. It is hereby vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation, or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies, whether private, corporate, or cooperative, gas companies, telephone, telegraph, oil, gas, and pipeline companies, motor carriers, and all public transportation and communication agencies other than railroads and railroad companies.
>
> "The Michigan public service commission shall have the same measure of authority with respect to railroads and railroad companies as is granted and conferred under the various provisions of the statutes creating the Michigan railroad commission and its successor, the Michigan public utilities commission, and defining their powers and duties."

The broad language, however, furnishes no grant of specific powers. It is an outline of jurisdiction in the commission and does not purport to be more. If, indeed, the general language quoted had the effect

2. E. g., Hollywood Chamber of Commerce v. Railroad Commission, 192 Cal. 767, 219 P. 983, 30 A.L.R. 68 [Syllabus 1]: "Neither the Railroad Commission nor any other governmental agency possesses the power to compel a street railway company to extend its street-car lines at its own expense into a territory which it does not and has never undertaken to serve."

of vesting particular, specific, powers in the commission, not only would a constitutional question be presented arising from an asserted lack of standards (42 Am.Jur. p. 343; Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570; Harrigan & Reid Company v. Burton, 224 Mich. 564, 195 N.W. 60, 33 A.L.R. 142), but there would have been no need whatever for the many statutes enacted (both before and after the effective date of Act. No. 3 P.A.1939) vesting specific powers in the commission.[3]

We agree, on this aspect of the case, with the analysis of Mr. Justice Carr in his opinion (when sitting on the circuit court for the County of Ingham) in the case of Michigan Bell Telephone Co. v. Public Service Commission, 315 Mich. 533, 24 N.W.2d 200, wherein he held:

"In reaching the conclusion that it had the requisite power to require a refund to plaintiff's subscribers, the defendant Commission expressly relied on section 6 of Act 3 of the Public Acts of 1939, and stated that the constitutionality of said section was assumed. Said statute, which was given immediate effect by the legislature, abolished the Michigan Public Utilities Commission and created the defendant for the purpose of taking over the powers and duties that had been vested by law in the former Commission and in the Michigan Railroad Commission. The validity of the immediate effect clause was before the Supreme Court of the State in Todd v. Hull, 288 Mich. 521, 285 N.W. 46. Consideration was given to the changes made by the Act in the existing law. In none of the 3 opinions filed was any reference made to section 6. It may be of some significance, also, that neither the pleadings nor the briefs of counsel contained any claim that the immediate effect clause should be sustained because of the added powers given to the new Commission under section 6. We are justified in assuming, I believe, that careful consideration was given to the entire Act, both by the Court and by counsel, and the conclusion reached that section 6 could not be construed as vesting the Public Service Commission with the broad powers now claimed to have been granted by said section. It may be noted in passing that Justice Bushnell in his opinion used the following significant language:

"'The intent and purpose of the new Act are the same as the old. The new Commission exercises precisely the same powers as the old.'

"Had section 6 been ignored on the theory that it was invalid, some indication to that effect would doubtless have been made by Court or counsel. The conclusion would therefore seem to be justified that at the time of the passage of the Act of 1939 and its consideration by the Court in Todd v. Hull it was not generally considered that section 6 was to be given any such interpretation as is now claimed for it. Rather, it was apparently the accepted view that said section, read in connection with the rest of the act and with prior statutes pertaining to the regulation of public utilities was intended as affirmance of the intent of the legislature to substitute the new Commission for the old, to give it the same powers and duties, and to make the exercise of such powers and duties subject to the same limitations as had been previously established. The fact that the legislature in section

3. E. g., transmission of electricity through highway act, P.A.1909, Act No. 131, C.L.1948, § 460.551 et seq., Stat.Ann. § 22.-151 et seq.; P.A.1952, Act No. 173, amending act to regulate telephone companies, giving commission power (in application for rate increase) "to require the applicant to give such notice as it deems reasonable and necessary under the circumstances."

6 did not incorporate any basic rules, principles, or statements of policy to be observed by the Commission may perhaps be regarded as indicating such intent merely."

[4] Appellant relies, also, upon the provisions of the transmission act, P.A. 1909, No. 106 (C.L.1948, § 460.551 et seq. [Stat.Ann. § 22.151 et seq.]), section 6 of which provides as follows:

"The commission shall have power in its discretion to order electric current for distribution to be delivered at a suitable primary voltage, to any city, village or township through which a transmission line or lines may pass; *to order service to be rendered by any such electric utility in any case in which it will be reasonable for such service* to be ordered; prescribe uniform methods of keeping accounts to be observed by all persons, firms or corporations engaged in such business of transmitting and supplying electricity, and to keep informed as to the methods employed by all electric utilities in the transaction of their business; and to see that their property is maintained and operated for the security and accommodation of the public and in compliance with the provisions of law. * * *." (Emphasis supplied.)

With reference to the above statute, Huron places particular emphasis upon the word "reasonable," arguing that "The language of this statute could not be clearer or more explicit as to the jurisdiction and authority of the commission to order electric service from an existing electric utility in any case in which it is *reasonable* for the commission to order service." (Italics in the original.)

Such a construction, however, does violence to the remainder of the section. The grant to the commission is not unlimited, but restricted. It is given statutory power to order electric current (for distribution) to any community "through which a transmission line or lines may pass." The portion of the statute stressed by appellant, in fact, refers to the rendition of service by any "such" [4] utility and it is clear that the utility referred to is the utility whose transmission lines pass through the municipality involved. This is not the case before us. Consumers' lines do not pass through the city (Alpena) in which Huron seeks the service to be rendered.

Before section 6 may be invoked the statutory requirement of passage of the lines through the municipality must be satisfied.

[5, 6] It is the further assertion of appellant that it was unnecessary that Consumers petition the commission for the granting of a certificate of public convenience and necessity before the commission could properly order Consumers to render direct service to Huron. The statute involved is section 2 of P.A.1929, No. 69 (C.L.1948, § 460.502 [Stat.Ann. § 22.142]), reading as follows:

"No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or

4. See analysis of word "such" in City of Traverse City v. Township of Blair, 190 Mich. 313, 324, 157 N.W. 81.

will require such construction, operation, service, or extension."

The reason for certification was clearly stated in Panhandle Eastern Pipe Line Co. v. Public Service Commission, 328 Mich. 550, 44 N.W.2d 324, 330, affirmed 341 U. S. 329, 71 S.Ct. 777, 95 L.Ed. 993, in the following terms:

"Obviously, Panhandle seeks to skim the cream off the local market for natural gas in the municipality where the intervening defendant now provides such services, by selling gas to Ford Motor Company and other industrial users, without regard to the public convenience and necessity for natural gas by other users in the Detroit area, particularly for domestic use. If Panhandle is free to compete at will for such local markets, and take the cream of the business, any other utility providing the same service in the same area might be forced to obtain higher rates for its services when it must obtain its natural gas from Panhandle, and thus would face a distinct disadvantage. The right to exclude such competition, where the general public convenience and necessities so require, has been delegated by the legislature to the Michigan public service commission. It is within the power of that commission, after a proper hearing and upon a proper showing of the facts and the necessities, to determine whether Panhandle, by selling natural gas direct to industrial users in Detroit, would thus serve the public convenience and the necessities of users of natural gas in that area where Panhandle now claims the absolute right to engage in such service."

See, also, Economics of Public Utility Regulation by Irston R. Barnes, p. 229, wherein it is said:

"* * * The requirement of a certificate of convenience and necessity may enable the commission to prevent the needless multiplication of companies serving the same territory, and at the same time to avoid a wasteful duplication of capital facilities, thus keeping the investment at the lowest figure consonant with satisfactory service. By protecting the utility from unnecessary competition, the risks inherent in utility investments are reduced and the cost of capital is thereby kept as low as the conditions of the investment market permit."

Appellant, however, urges that the statute applies only where a utility seeks to render a new service and that it has no application here since the commission (it asserts) has the statutory authority to order the rendition of the service. This latter argument we have heretofore examined and rejected. The statutory prerequisites for the ordering of such service not obtaining, it follows that in their absence the only means by which Consumers may provide the service is by voluntarily seeking and obtaining a certificate that public convenience and necessity require the rendering of the service. No such request has been made and that disposes of the matter. It is clear that the order of the commission must be sustained. Upon these conclusions there is no need to pass upon additional issues urged, including the constitutional franchise requirement (Const. [1963], art. 8, § 28), nor will we, upon certiorari, pass upon controverted issues of fact.

Order affirmed. Costs to appellee.

DETHMERS, C. J., and EDWARDS, KELLY, CARR, BLACK and VOELKER, JJ., concur.

KAVANAGH, J., took no part in this decision.