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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of

CONSUMERS POWER COMPANY
(Midland Units 1 & 2)

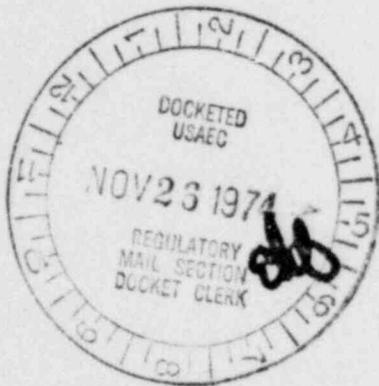
Docket Nos. 50-329A
and 50-330A

To the Atomic Safety and Licensing Board:

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REPLY BRIEF OF
CONSUMERS POWER COMPANY



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I. Introduction

The briefs of the Department of Justice, the Staff, and the Intervenors confirm that the adversaries of Consumers Power Company in this proceeding have failed to prove their case against the Company. Specifically, the Company's adversaries have: (a) failed to demonstrate that any "meaningful tie" or nexus exists between the Midland Units and the antitrust "situation" in Lower Michigan; (b) failed to reconcile their general monopolization theory to the facts of record in this case which contradict the theory; (c) failed to prove that preferential access to the Midland Units and the Company's other bulk power facilities is necessary for the competitive or financial viability of the Company's smaller neighboring systems; and (d) failed to take account of the inequitable, adverse impact which the relief they propose will have upon the Company, its rate-payers, and the investor-owned electric utility industry generally.

A. Nexus

As we demonstrated in our main brief^{1/} and reiterate in Section II of this Reply,^{2/} our adversaries have been

^{1/} Consumers Power Company Brief in Support of its Proposed Findings of Fact and Conclusions of Law (hereinafter "Consumers Power Co. Brief"), pp. 8-14.

^{2/} See pp. 12-26 infra.

unable to demonstrate that the Midland Units will have any substantial impact at all on the antitrust "situation" in Lower Michigan. Rather, by resting their "nexus" theories upon vague references to nuclear power as "the wave of the future,"^{3/} to "the energy crisis"^{4/} or to "truisms applicable to all cases",^{5/} our opponents seek to read the "nexus" prerequisite out of Section 105c and the Commission's LP&L decision.

B. Monopolization Theory

The other parties begin their antitrust argument by urging that this Board adopt a standard which ignores the antitrust laws and affords discriminatory access and preferential coordination arrangements to smaller systems in all cases--a requirement that Congress explicitly declined to enact during the legislative process that led to the adoption of the 1970 amendments to Section 105c.^{6/}

As an alternative to that thesis, the other parties present an antitrust theory that argues that the nation's private, investor-owned utilities have typically acquired their present size and their technical and economic configuration

3/ See pp. 15-17 infra.

4/ See pp. 17-23 infra.

5/ See pp. 23-26 infra.

6/ See pp. 27-39 infra.

by monopolizing activity. Under their theory, these activities include aggressive and often predatory acquisition of competitors, predatory pricing and other predatory practices, and the foreclosure of various types of coordinating activities to those competitors which they are not able to acquire -- thus establishing and enhancing a position from which each utility can control prices and restrict entry in its geographical service area.

Most striking about this theory is that it demonstrably does not apply to Consumers Power Company's policies or practices here under scrutiny. As we demonstrate in this Reply, the briefs of our adversaries must repeatedly strain the record to fit this theory (or ignore it entirely in favor of equally strained interpretations of materials outside of the record which are typically inapplicable to Lower Michigan). Several examples will serve to demonstrate the pervasive gap between our opponents' generalized theory and the facts pertaining to Consumers Power's conduct and market position as they have been developed on the record.

(1) Theory: Private power companies have acquired and maintained monopoly positions through predatory pricing (price squeezes, pricing below cost, etc.) and other predatory marketing practices.^{7/} Fact: As our adversaries concede, there

^{7/} See, e.g., Brief and Proposed Findings of Fact of the United States Department of Justice (hereinafter "Justice Brief"), pp. 178-182; Brief on Proposed Findings of Fact of Michigan Cities and Cooperatives (hereinafter "Intervenors' Brief", pp. 96-97.

is no evidence of Consumers Power ever imposing a price squeeze on a customer, and Consumers Power's retail and wholesale rates during the relevant period have been uniform within all classes and nondiscriminatory for all customers.^{8/}

(2) Theory: Private power companies as monopolizers by definition have the power to control the prices (i.e., rates) of their smaller neighbors.^{9/} Fact: Consumers Power's neighboring systems typically charge rates up to 20% below Consumers Power's own prices which are subject to regulation by two regulatory commissions; and both the theory and practice of this regulation preclude monopoly pricing.^{10/}

(3) Theory: The monopolizing or dominant position of private power companies has resulted in substantial injury to neighboring utilities.^{11/} Fact: With inconsequential exceptions, Consumers Power's neighboring utilities since 1960 have prospered and grown at rates surpassing that of Consumers Power. Many have been able consistently

^{8/} Justice Brief, p. 178; Intervenors' Brief, p. 53.

^{9/} Proposed Findings of Fact and Conclusions of Law of AEC Regulatory Staff (hereinafter "Staff Brief"), pp. 166-70.

^{10/} Consumers Power Co. Brief, pp. 113-20, 126-27. Consumers Power Company Proposed Findings of Fact (hereinafter "Findings of Fact") 2.17-2.18; pp. 62-70.

^{11/} See e.g., Justice Brief, pp. 168, pp. 213-14; Staff Brief pp. 124-26.

to undersell Consumers Power in the marketplace.^{12/} The profitability of such entities compares favorably with those of Consumers Power during the relevant period.^{13/}

In addition, no evidence suggests that the Company engaged in unreasonable conduct that injured its neighbors.^{14/}

(4) Theory: Private power companies have strengthened dominant or monopoly positions in geographical areas, inter alia, through the acquisition of competitors.^{15/} Fact: Consumers Power's growth since 1960 has resulted almost entirely from a growth in its existing service area, and its acquisitions during this period have been inconsequential.^{16/}

(5) Theory: Private power companies, relying on monopoly or dominant positions, have foreclosed neighboring entities from valuable coordinating opportunities.^{17/} Fact: The record demonstrates that Consumers Power has entered into coordination arrangements with every entity in its service area which has requested such arrangements

^{12/} Consumers Power Co. Brief, pp. 126-27; Findings of Fact 2.17-2.18.

^{13/} Finding of Fact 3.29.

^{14/} Consumers Power Co. Brief, pp. 155-213; pp. 99-175 infra.

^{15/} Justice Brief, pp. 87-94.

^{16/} Consumers Power Co. Brief, pp. 205-213; pp. 165-169 infra.

^{17/} Justice Brief, pp. 97-167; Staff Brief, pp. 61-74.

from the Company and which has possessed the ability to meet its own load (including appropriate reserve requirements).^{18/} Our adversaries have not been able to point to a single instance in which Consumers Power has declined to enter into coordination arrangements with any entity which met minimal, accepted industry prerequisites for such arrangements.

In sum, the monopolization theory of our opponents, whatever its general merits, is simply inapplicable to this case. While it is perhaps understandable that, for reasons of efficiency and economy, the Department and the Staff seek to set forth a general theory applicable to an entire major industry, it is no part of the duties of this Hearing Board and the Atomic Energy Commission to espouse such a theory or apply it to a record which is fundamentally at odds with it.

C. "Essential" or "Bottleneck" Facilities.

One of the more glaring defects of our opponents' case is their failure to demonstrate that the smaller systems need preferential access to nuclear generation or the other relief they seek in order to be competitively or financially viable.^{19/} While their briefs devote many pages

^{18/} Consumers Power Co. Brief, pp. 182-202; pp. 99-151, infra.

^{19/} This issue is treated more fully at pp. 15-26 and pp. 86-96, infra.

to showing that having the option of obtaining preferential access may be desirable for a small system, our opponents patently do not establish that such access is "necessary" or "essential" in the legal sense, or that the Company's exclusive ownership and control of its bulk power facilities creates a "bottleneck" situation contrary to the antitrust laws.

It is uncontroverted, of course, that Consumers Power is the largest electric system in its service area and that, as such, the size and number of its generation and transmission facilities are considerably larger than those of its smaller neighbors. Arguably, this permits the Company to take advantage of economies derived from its large scale, unit diversity, and coordination opportunities that may be unavailable to smaller systems. Where the analyses of the other parties break down, however, is in their argument that these advantages create a competitive imbalance; i.e., that they tend toward a situation in which Consumers Power generates and distributes power at lower average cost than its smaller neighbors and, thereby, undersells them in the marketplace.

There are two fatal defects in this argument. First, the Company sells wholesale power at its average costs to all those which seek it at rates regulated by the Fed-

eral Power Commission,^{20/} so that other systems have access to whatever benefits the Company derives from size advantages; secondly, the capital and tax advantages enjoyed by the municipal and cooperative systems permit them to offset whatever advantages the Company derives from its size and to sell power at rates generally below those of the Company.^{21/} Thus, as our main brief demonstrated and as this Reply brief reiterates, the record is devoid of any evidence that direct access to the Company's large-scale facilities is needed to assure the continued viability of these smaller systems or to remedy any alleged anticompetitive imbalance.^{22/}

D. Relief.

There is a fundamental illogic in the license conditions proposed by our opponents.

First, in the name of competition, our adversaries seek to compel a form of cooperation that will promote cartelism rather than competition. For example, if, as our opponents propose,^{23/} the Company includes the bulk power requirements of the smaller systems in its genera-

^{20/} Consumers Power Co. Brief, pp. 117-120; pp. 77-78, infra.

^{21/} Consumers Power Co. Brief, pp. 125-133; pp. 97-98, in ra.

^{22/} Consumers Power Co. Brief, pp. 145-154; pp. 15-96 and 86-96, infra,

^{23/} Justice Brief, p. 251; Staff Brief, pp. 150-51.

tion unit construction programs, all of the neighboring systems will be relying on the same bulk power supply source, and the bulk power supply competition which our adversaries purport to champion will be foreclosed. The antitrust laws clearly should not be utilized to foster such anticompetitive consequences.

Second, the contention that unequal parties must, under the antitrust laws, be treated equally is inherently illogical.^{24/} Such treatment would permit systems which lack the ability or willingness to engage in reciprocal coordination services to receive coordination arrangements for their preferential benefit and to the Company's detriment.^{25/} The remedies sought by our adversaries would result in an increased differential in the costs borne by the Company's customers and by its smaller neighbors' customers.^{26/}

Although the creation of such a disparity is advanced in the name of competition, our opponents do not explain, and we cannot fathom, what public policy is served by discriminating against the Company's customers in this manner. In any event, there is no antitrust law or policy

^{24/} Justice Brief, pp. 147, 164; Staff Brief, pp. 97-101; Intervenor's Brief, pp. 29-31.

^{25/} Consumers Power Co. Brief, pp. 193-94, 216-19, 228-33; pp. 103-128 and 183-188, infra.

^{26/} See e.g., Justice Brief, pp. 49-50.

which permits, much less compels, this Board or the Commission to fashion relief whose purpose is to frustrate the economic and legal barriers to wasteful, duplicative competition inherent in the nature of the electric utility industry or adopted by Congress and the Michigan Legislature.

Finally, our opponents would have the Board and the Commission disregard that their proposed relief seeks to restructure the pluralistic electric utility industry as it has long existed. The nation's electric utility industry is divided into two sectors: one consists of large, investor-owned utilities which obtain their investment financing in the private money market and pay taxes like any other corporate enterprise. The other sector involves so-called publicly-owned utilities, consisting principally of federal projects, municipal systems and REA cooperatives. These systems enjoy substantial, artificial advantages involving subsidized financing and freedom from taxation.^{27/}

In Lower Michigan, the public and private utility sectors are, and have long been, in relative equilibrium -- apparently as a result of the fact that the scale advantages of private systems such as Consumers Power are offset by the

^{27/} Consumers Power Co. Brief, pp. 125-133; pp. 98-99, infra.

tax and financing advantages of the public power systems. This equilibrium has been fostered and maintained by the actions of Congress and regulatory authorities.^{28/} Its existence is acknowledged by the other parties as well.^{29/}

If the municipal and cooperative systems are granted preferential access to the scale advantages of Consumers Power, as our opponents propose in this proceeding, this equilibrium would be upset and the Company's ability to offer competitive services in the marketplace would be undercut. As we set forth in Section VI of this Reply brief,^{30/} the result would be a gross misallocation of economic resources. Congress clearly never intended such consequences in enacting the antitrust laws or Section 105c of the Atomic Energy Act -- vehicles which the Department of Justice and our other adversaries now invoke to promote this fundamental change in Lower Michigan's electric utility structure.^{31/}

28/ See pp. 192-196, infra.

29/ Justice Brief, p. 241, Intervenor's Brief, pp. 114-15.

30/ See pp. 192-196, infra.

31/ Consumers Power Co. Brief, pp. 43-50; pp. 32-40, infra.

II. In construing the "nexus" and other provisions of Section 105c, the briefs of the other parties mis-read or ignore the Commission's LP&L order, the legislative history of Section 105c, and the record of this proceeding.

A. Nexus Theories.

The failure of the other parties to establish the requisite "nexus" between the Company's proposed activities under the Midland licenses and the allegedly inconsistent antitrust situation is strikingly highlighted by their briefs. As the AEC staff observed in its brief, "the requisite elements of nexus [were] propounded in the Louisiana Power and Light Company Memorandum and Order" of the Atomic Energy Commission.^{1/} Yet, despite this acknowledgment of the crucial authority in this area, not one of the parties seeking anti-trust conditions in this proceeding attempts to justify its position in light of the "appropriate benchmarks"^{2/} relating to "nexus" established by the Commission in LP&L.^{3/}

^{1/} Staff Brief, p. 17 referring to Louisiana Power and Light Co. (Waterford Steam Electric Generating Station Unit 3) Dkt. No. 50-382A, Memorandum and Order of the AEC, RAI 73-9, 619 (September 28, 1973) (hereinafter LP&L Order).

^{2/} LP&L Order, RAI 73-9, at p. 620.

^{3/} The degree to which the legal nexus theories of the other parties are removed from the nexus standards put forward by the AEC in LP&L is illustrated by the Staff's position set forth at page 110, footnote 53, of their brief. There, as authority for their view of nexus as a largely ephemeral requirement, they cite a general dictionary defini-

(cont.)

Apparently because their "nexus" position is at odds with the Commission's LP&L decision, the other parties set forth another "nexus" theory for which they provide no legal basis. Although the verbal formulations differ among the other parties, each claims, in essence, that because nuclear generating facilities (such as the Midland Units) will "strengthen" Consumers Power Company's electric system and thereby "maintain" any existing anticompetitive situation, the requisite nexus has been demonstrated. In the words of the AEC staff, the argument is that "[t]he addition of the 1300 mw Midland nuclear plant will help enable Consumers to maintain its dominant position in its service area in Michigan's Lower Peninsula."^{4/} The Interveners would find nexus in the fact that "[t]he building of large nuclear units and attendant new 345 kv transmission will do nothing to diminish this control [of bulk

3/ (cont.)

tion ("connection, tie or link"), three cases (including one from the Oregon Supreme Court) concerning the "nexus" required for a state to be able to tax non-residents, and an 1877 Supreme Court decision (Pennoyer v. Neff, 5 Otto. 714) concerning the ties a non-resident must have with a jurisdiction before service by publication is permissible. Their reliance on such obscure and irrelevant authority underscores, we submit, the inability of the other parties to satisfy the LP&L standards.

4/ Staff Brief, p. 129 (emphasis added).

power facilities and interchange arrangements]."^{5/}

Obviously, virtually nothing Consumers Power Company would do in its corporate interest -- even meeting its payroll or paying its taxes -- could fail to satisfy these meaningless standards. Seeking to add at least an appearance of substance to the same test, the Department of Justice asserts that:

"The only thing necessary [to establish the requisite nexus] is that the license activities be found to contribute in a significant manner to the maintenance of a situation inconsistent with the anti-trust laws or their underlying policies."^{6/}

However baldly or circumspectly they may be stated, these nexus tests asserted by the other parties cannot be reconciled with the more demanding standards established by the Commission in its LP&L Order, and by Congress in enacting Section 105c of the Act. In addition, as we demonstrated in our main brief, the meaningless nexus test propounded by the other parties does violence to the well-established principles of administrative law governing an agency's determination of the scope of its proceedings.^{7/}

^{5/} Intervenors' Brief, p. 7 (emphasis added).

^{6/} Justice Brief, p. 227 (first emphasis added, second emphasis in the original).

^{7/} As to the LP&L Order, see Consumers Power Co. Brief, pp. 5-14. Regarding congressional intent, see pp. 14-24 and for administrative law principles, pp. 24-38.

Yet, even were their legal theory to be credited, the parties propounding it have failed completely to make a showing that the Midland Units will, in fact, "contribute in a significant manner to the maintenance" of any alleged anticompetitive situation, i.e., they have not shown how Consumers Power Company's relative competitive position will be substantially improved by the construction and operation of the Midland Units.

Our opponents make three arguments in seeking to show that the Midland Units will significantly contribute to an alleged antitrust inconsistency. First, they contend that the "fact" that nuclear generation is the "wave of the future" intrinsically establishes that ownership of a nuclear unit bestows a significant advantage. Second, they assert that Midland will result in an unfair advantage to Consumers Power because of the "energy crisis". Third, the parties, particularly the Department of Justice, resurrect the "commingling" theory and other "truisms" of the electric utility industry. We will discuss the deficiencies of each of these nexus arguments in turn.

1. "The Wave of the Future".

The other parties contend flatly that the Midland Units will contribute significantly to the maintenance of an antitrust inconsistency simply because the electric utility industry is increasingly turning to nuclear energy as a source

of fuel for base load units.^{8/} For example, in a paragraph completely devoid of record citations or other documentation, the Staff's brief claims that "[t]he impact of nuclear technology will foster greater pressures for increased concentration and reduced diversity in the electric utility industry."^{9/}

Whether or not nuclear-fueled generation is in fact the "wave of the future",^{10/} any gradual trend toward an increased reliance upon nuclear capacity does not in-

8/ See, e.g., Staff Brief, pp. 124-26, 172; Intervenors' Brief, pp. 8, 14-15, 20.

9/ Staff Brief, p. 125.

10/ The parties rely primarily on the 1970 National Power Survey in support of their argument that nuclear generation is the "wave of the future". See, e.g., Staff Brief, pp. 118-121; see also Justice Brief, p. 221. While the Power Survey, which uses 1968 data throughout, may have been authoritative at the time of its preparation, it is out of date today, and consequently of little probative value. Indeed, in 1970 the AEC projected 150 million kw of nuclear generation would be operational in 1980 but in 1974 projects only 85 to 112 million kw, a reduction of 43 to 25%. "Nuclear Power Growth, 1974-2000" (WASH-1139) (74), p. 17.

Even more dramatic evidence of the other parties' reliance on outmoded projections to show the supposedly general adoption of nuclear generation is found in the Staff's citation of the 1972 edition of that AEC publication, entitled "Nuclear Power Growth, 1973-2000" (WASH-1139) (72), p. 4, Staff Brief, p. 120. The 1974 edition of the very same publication, which the Staff neglects to cite, states at p. 17 that its present forecast is "somewhat lower" than that of the 1972 edition relied upon by the Staff. Indeed, the latest projection shows only 85 to 112 million kw of nuclear generation capacity in 1980 as contrasted to the earlier 132 million kw projection -- a reduction of up to 36%.

trinsically demonstrate that the construction of the Midland Units will "contribute in a significant manner to the maintenance' of an antitrust inconsistency. Without a demonstration of a resultant change in relationships between those who own nuclear generation units and those who do not, a change in fuel usage is irrelevant to the question whether the requisite nexus exists between the Midland Units and any alleged situation inconsistent with the antitrust laws. No such demonstration has been made in this proceeding.^{11/}

2. "The Energy Crisis".

The other parties also engage in a sweeping invocation of the "energy crisis" in an attempt to make the requisite nexus showing. The arguments as set forth in their briefs in this regard appear to be no more than restatements of their "bottleneck" theories. But whatever their context, the factual basis for the "energy crisis-bottleneck" argument is totally lacking.

Regarding fossil fuel availability, the other parties offer no evidence of record to support their assertion that nuclear energy will be the only available fuel for base load generation units in the future.^{12/} Significantly,

^{11/} See also Finding of Fact 1.08.

^{12/} Justice Brief, pp. 219-21; Staff Brief, pp. 116-18; Intervenors' Brief, pp. 35-36.

none of the other parties called fuel supply expert witnesses to support their claims in this regard. Particularly with regard to coal, we are confident that, had the other parties raised this issue on the record in this proceeding, they could not have established that fossil fuels for generation units will be unavailable in the future; obviously, they cannot prevail on this point on the basis of a naked undocumented assertion.

Indeed, the argument that only nuclear-fueled generation units are feasible in the future is inherently unbelievable. Were utilities in Lower Michigan faced with a future unavailability of fossil fuels, neither Consumers Power Company nor its neighbors could operate. The most convincing evidence that fossil fuels are expected to be available is the fact that Consumers Power is constructing 2100 mw of additional coal and oil-fueled base-load capacity^{13/} and several of its smaller neighbors are seriously considering construction of several 350 mw coal-fueled units.^{14/}

In apparent recognition that they have not established the future unavailability of fossil fuel, the other parties next argue that the costs of nuclear generation will

^{13/} Finding of Fact 1.13.

^{14/} Finding of Fact 2.64.

be so much lower than those of fossil-fired generation as to create an advantage which will "contribute in a significant manner to the maintenance" of an anticompetitive situation.^{15/}

Again, the factual record does not support the claim. Instead of presenting expert witnesses, the Department of Justice and the Staff have chosen to rely on off-the-record and out-of-date documents: the 1968 projections of the FPC National Power Survey^{16/} and an equally out-dated 1971 study prepared by Consumers Power Company.^{17/} Had the question of comparative unit cost been reviewed in light of today's circumstances, we anticipate that the increase in fossil fuel prices since the aforementioned data were compiled might well be shown to be exceeded by the extraordinary

^{15/} Justice Brief, pp. 221-23; Staff Brief, pp. 78, 118-20; Intervenor's Brief, pp. 35-36.

^{16/} Justice Brief, p. 221.

^{17/} Applicant's Supplemental Environmental Report (Exhibit 236) cited in Justice Brief at pp. 221-22, and the Staff Brief, pp. 117-18. The Department and the Staff both fail to note that this Report was submitted October 19, 1971.

As an indication of the degree of obsolescence reflected in these 1971 figures, at that time the estimated capital cost of the electrical capacity of the Midland Units was \$430 million, or \$331 per kw (Exhibit 236, p. 5.2-4). On April 2, 1974, witness Mosley testified in this proceeding that Midland's anticipated capital cost will be \$569 per kw, with an energy cost of about 16 mills per kwh or about twice the 1971 estimate upon which the Department relies. (Mosley 8532).

increases in construction and financing costs, both especially crucial to nuclear plants, which are extremely capital intensive.^{18/}

Significantly, the most recent relevant evidence of record is a study made by consultants for the Lansing system using 1972 data which showed that purchasing unit power from a nuclear facility was no more economical than constructing fossil-fired units.^{19/} More recently, the spate of planned nuclear unit cancellations and postponements^{20/} (including cancellation of Consumers Power's next nuclear unit)^{21/} because of the high cost or complete unavailability of capital^{22/} suggests that if the other parties had relied

^{18/} As to the capital intensive character of nuclear generation, see Mayben 2560, 2808.

^{19/} Exhibit 12,008, p. S-4; Finding of Fact 1.11.

^{20/} See Table I, attached to this Reply brief.

^{21/} Answer of Consumers Power Co., Consumers Power Co. (Quanicassee Units 1 and 2), AEC Dkt. Nos. 50-475 and 50-476, August 2, 1974. As this document makes plain, the Department of Justice's characterization, Justice Brief, p. 218, of Quanicassee as "temporarily deferred" is incorrect.

^{22/} An Atomic Safety and Licensing Board recently pointed to "the present difficulty of all utilities in raising capital for construction costs" as a principal reason for a postponement, Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant Units 1, 2, 3 & 4), AEC Dkt. Nos. 50-400, 50-401, 50-402, and 50-403, Preliminary Conference Order, July 11, 1974, p. 2. See also, as other very recent instances in which this factor was crucial, letter of R. L. Mittl, Public Service Electric

(cont.)

on up-to-date data they could not have shown the kind of significant cost advantages from nuclear generation which they claim here as evidence of nexus between the Midland Units and the alleged antitrust inconsistency.^{23/}

Regardless of what the record might have shown, the only cited evidence of record, other than purely conclu-

22/ (cont.)

& Gas Co. to A. Giambusso, AEC, Public Service Electric & Gas Co. (Salem Nuclear Generating Station), AEC Dkt. Nos. 50-272 and 50-311, September 25, 1974, p. 2; Richard E. Raymond, Florida Power Co. to W. G. McDonald, AEC, Florida Power Co. (Florida Units 1 & 2), AEC Dkt. 50-530, September 24, 1974 (attached press release); R. C. Arnold, Metropolitan Edison Co., to W. G. McDonald, AEC, Metropolitan Edison Co. (Three Mile Island, Unit 2), AEC Dkt. No. 50-320, September 13, 1974, p. 1; Ivan R. Finfrock, Jr., Jersey Power & Light Co. to W. R. McDonald, AEC, Jersey Power & Light Co., (Forked River Nuclear Generating Station, Unit 1), AEC Dkt. No. 50-363, September 13, 1974, p. 1; and a memorandum of September 19, 1974 of L. L. Kinter, AEC, in Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), AEC Dkt. No. 50-341, p. 1.

23/ The suggestion of the other parties that the Midland Units represent a sort of economic bonanza for Consumers Power finds no support in the record. Indeed, Company witnesses Aymond, Jefferson and Mosley testified that it was not even certain whether or not Midland power would be more costly than the Company's average system generation costs when Midland comes on line [Aymond 6352-6353; Jefferson 8434; Mosley 8532-8533]. The only caveat to this line of testimony was witness Aymond's observation that Midland would be the "lowest cost facility" of future units because "construction costs keep going up all the time". [Aymond 6352-6353] This observation should not, however, be mischaracterized as support for the view that Midland represents an economic windfall to the Company.

sory assertions, ^{24/} provides no support whatsoever for the "energy crisis" argument of our adversaries. The excerpt from witness Stafford's cross-examination cited ^{25/} by the Department of Justice is misleading since it involves only a comparison of coal-fired and nuclear-fired operating costs which are, ^{26/} of course, only a portion of the total cost of generation. Except for such inaccurate citations, the other parties offer only statements generally extolling nuclear energy ^{27/} or confirming that the Company projected Midland would be somewhat less expensive for its needs than a fossil-fueled alternative which it could construct -- a conclusion inherent in deciding to build the plant. ^{28/} Such evidence fails to refute our show-

^{24/} See for example, Mr. Mayben's progressively more equivocal characterizations:

"nuclear power does hold out [1] a promise of low-cost power supply, [2] at least the lowest or [3] among the lowest expanding into the future ..." Tr. 2825, cited at Staff Brief, p. 152, (brackets added).

^{25/} Justice Brief, pp. 222-23.

^{26/} Capital costs are the other principal component. Nuclear plants tend to have high capital costs and low operating costs while fossil fueled plants have the opposite characteristics. Mayben, 2560, 2808. The quoted passage is also misleading in that the Campbell Units in question were placed in service in 1962 and 1967, more than a decade prior to the Midland Units. (Ex. 12022, p. 436A).

^{27/} Staff Brief, p. 118; Justice Brief, p. 222.

^{28/} Staff Brief, pp. 118-119; Intervenors' Brief, p. 36; Justice Brief, p. 222.

ing that smaller systems have economical bulk power supply alternatives available to them either through wholesale service from Consumers Power and other suppliers^{29/} or by exploitation of their capital and tax advantages through self-generation.^{30/}

In sum, as our main brief explains in discussing the "bottleneck" theory,^{31/} the record in this proceeding will not support a finding that the Midland Units provide the Company with a "unique" source of low cost bulk power that is unavailable to smaller neighboring systems. While the other parties propose that the "nexus" standards of LP&L be replaced by a "nexus" theory founded upon the "energy crisis" and the unique availability and lower cost of nuclear units, the record of this case does not support the theory.

3. "Commingling" and Other "Truisms".

In its effort to show that the Midland Units will make a "substantial contribution" to the maintenance of an antitrust inconsistency, the Department of Justice also seeks to resurrect the discredited "commingling" theory which it

^{29/} Consumers Power Co. Brief, pp. 118-24, 214-16; Section IV-B, infra.

^{30/} Consumers Power Co. Brief, pp. 125-33; Findings of Fact 3.11 and 3.18.

^{31/} Consumers Power Co. Brief, pp. 145-54.

set forth in its pretrial brief.^{32/} In effect, the argument goes that (1) Consumers Power is "dominant" in its service area; (2) Consumers Power will "commingle" Midland power through its transmission system with the generation capacity of its other generation units; and (3) the addition of this power will "strengthen and expand" the Company by enabling it to meet its load growth and contractual obligations to coordination partners.

The argument in support of Justice's position is, of course, unconvincing. As the Commission's LP&L decision recognized, the argument rests upon "truisms applicable to all cases."^{33/} An electric utility has natural monopoly characteristics and, as such, is generally the only or the "dominant" supplier in its service area. Nuclear units are not built in isolation, but rather are invariably commingled or integrated into the constructing company's system. New units are, of course, necessary to permit the electric utility to meet expanding load growth and other public utility obligations. The Department cites these truisms in support of its conclusion that "[i]t is not necessary

^{32/} Compare Prehearing Brief of the United States Department of Justice, pp. 70-72, with Justice Brief, pp. 225-227. The theory remains predicated on the observations: "This power will not and cannot be marketed in isolation...." "Midland power will strengthen and expand Applicant's system...."

^{33/} LP&L Order, RAI 73-9 at 621.

that the license activities themselves be inconsistent with the antitrust laws or their policies".^{34/} But this view is contradicted by a passage from the Joint Committee report explaining the 1970 amendments to Section 105c, H.R. Rep. No. 1470, which instructs the Commission that the applicable standard is whether "the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws".^{35/}

In sum, the inadequacy of the other parties' "nexus" arguments is not confined to the deficiencies of their legal theory reviewed in our main brief.^{36/} Rather, even accepting arguendo the nexus criteria they propose, our opponents have failed to make the requisite factual showing. In addition, by proposing nexus theories which are applicable in all cases, our opponents would delete "nexus" standards from Section 105c and render the Commission's LP&L decision a nullity.^{37/} Thus, our adversaries

^{34/} Justice Brief, p. 227 (emphasis in the original).

^{35/} H.R. Rep. No. 1470, 91st Cong. 2d Sess. (1970), U.S. Code Cong. & Admin News, p. 4994, Staff Brief, p. 19-20 (emphasis supplied).

^{36/} Consumers Power Co. Brief, pp. 5-37.

^{37/} Although the other parties do not address the LP&L requirements, they do make scattered factual assertions that may relate to those standards. These are simply erroneous. For example, they assert that "the location

propose, in effect, that standard preferential unit access, coordination, and wheeling arrangements should be afforded to intervening systems in all cases. As we explained in our main brief and reiterate in the next section of this Reply, Congress explicitly declined to enact such a requirement during the legislative process that led to the adoption of the 1970 amendments to Section 105c.

37/ (cont.)

and use of the company's 345 kv lines" were "influenced" by Midland, citing no authority whatsoever. Staff Brief, p. 114. The statement, "The majority of the additions to the transmission network will be used to integrate ... the Midland plants," is, we are told, "[d]erived from Consumers' Federal Power Commission Form 12 for the year ending December 31, 1971; and [the 200-page] 'System Performance and Transmission Planning', Volume II, a Report by ECAR to the Federal Power Commission, April 1972." The "derivation" is not explained and is not evident from the cited documents. Witnesses Stafford and Lapinski testified that only 28 miles of 345 kv lines are being built in conjunction with, or in contemplation of, the Midland project. See Finding of Fact 1.05.

Similarly, in four separate passages, Justice Brief, pp. 5, 190 and 192, Staff Brief, p. 121, the other parties assert that Consumers Power could not erect Midland were it not for its coordination arrangements with other utilities or could do so only by increasing its reserves to 40%. The only authority cited for this proposition are generalized statements that installation of large units would require increased reserves if a utility operated in complete isolation. Yet witness Mosley testified that there is no causal or other special relationship between the Midland Units and any of the Company's coordination arrangements and that the size of the units was well within the range of the Company's internal requirements. See Finding of Fact 1.07; Mosley 8531.

B. Avoiding Standards of Proof.

The other parties rely on several phrases in Section 105c of the Atomic Energy Act and in the legislative history of that Section in an effort to demonstrate that they can ignore the traditional standards of proof required of those seeking relief under the antitrust laws. We submit that their strained reading of Section 105c and its legislative history should not obscure the actual intent of Congress in enacting this statute.

In the context of the Atomic Energy Act, the Kennedy-Aiken bill of 1967^{38/} would specifically have required, without reference to any antitrust standard, that any utility erecting a nuclear facility must offer joint ownership, unit power sales and wheeling arrangements to all nearby systems. But the Kennedy-Aiken proposal was rejected in committee after extensive hearings.^{39/}

As the Department of Justice acknowledges,^{40/} the

^{38/} S. 2564, H.R. 13828, 90th Cong., 1st Sess. (1967). The relevant portions of the bill are reproduced in Consumers Power Company App. II-52. (See Consumers Power Co. Brief, p. 5n.2. Supplemental legal materials attached to this brief are cited in the following format: "App. S-1.")

^{39/} Hearings on Licensing and Regulation of Nuclear Reactors before the Joint Committee on Atomic Energy, 90th Cong., 1st Sess. (1967); Hearings on Participation by Small Electrical Utilities in Nuclear Power Before the Joint Committee and Atomic Energy, 90th Cong., 2d Sess. (1968).

^{40/} Justice Brief, pp. 215-216.

rejection of Kennedy-Aiker. set the stage for the adoption of the present Section 105c. The present law is, in the words of its Senate floor manager, "a carefully perfected compromise . . . [which] constitutes a balanced, moderate framework for a reasonable licensing review procedure."^{41/} It rejected both extremes -- the Kennedy-Aiken approach and the absence of any competitive review^{42/} -- in favor of a review procedure which required that account be taken of the antitrust laws.^{43/}

Yet, despite this legislative history, which is not open to serious controversy, the other parties argue that the mandatory unit access-coordination-wheeling approach of the rejected Kennedy-Aiken bill was incorporated sub silentio into Section 105c. In part, their argument rests upon a novel reading of two applicable phrases: "inconsistent with the antitrust laws" and "policies under the antitrust laws". This position, we submit, is not only plainly incorrect as a matter of law, but also constitutes no more than a thinly-veiled

^{41/} Remarks of Senator Pastore, 116 Cong. Rec. S. 39619 (December 2, 1970).

^{42/} See Cities of Statesville v. AEC, 441 F.2d 962 (D.C. Cir. 1969), holding antitrust review procedures included in the Atomic Energy Act prior to 1970 to be inoperative.

^{43/} Senator Pastore's remarks are quoted more extensively in Consumers Power Company Brief, p. 20.

attempt to win at the Atomic Energy Commission the same battle which was lost before the Congress during the legislative process which led to enactment of the present Section 105c.

1. "Inconsistent with the Antitrust Laws."

In seeking to avoid the traditional standards of antitrust law, the other parties first attach crucial significance to a distinction between inconsistency with the antitrust laws and violation of those laws. The Staff's brief, for example, asserts that "a situation inconsistent with the antitrust laws is quite different from a violation of such laws,"^{44/} while the Department of Justice asserts that it may prove an inconsistent situation "without proof of intent and anticipated effect" required to demonstrate a violation of the monopolization provision of the Sherman Act.^{45/}

^{44/} Staff Brief, pp. 18-19.

^{45/} Justice Brief, p. 265. See also Intervenors' Brief, pp. 80-81.

As a further example of its unwavering quest to avoid traditional antitrust standards, the Staff Brief at pp. 21-24 excerpts from Section 7 of the Clayton Act the words "may be substantially to lessen competition" as though they stood alone as a general standard for evaluating antitrust inconsistency. Reference to the entire text of Section 7 shows that these words are only directed toward various types of acquisitions or mergers.

These unsupported assertions cannot be reconciled with the legislative history of Section 105c. When the concept of antitrust inconsistency was first introduced into the Atomic Energy Act, the Joint Committee on Atomic Energy stated flatly that the Section "provides for hearings and judicial review in case there is any claim ... that a proposed license ... would violate the antitrust laws."^{46/} The Joint Committee also addressed the question in proposing the 1970 amendments to Section 105c and again stated explicitly that the inconsistency concept "was intended to be the equivalent of actual violation of the antitrust laws."^{47/}

The only support offered by any of the three opposing briefs for their contrary construction of the "inconsistent" language are two passages in the aforementioned 1970 JCAE report (H.R. Rep. No. 1470) that unambiguously rejected their interpretation.^{48/} Those passages instructed the AEC to base its finding "on reasonable probability of contravention". In using that phrase, however, the Committee was not defining inconsistency. As the report explained:

^{46/} S. Rep. No. 1699, 83d Cong., 2d Sess., U.S. Code Cong. & Admin. News 3456, 3476 (1954), also published as H.R. Rep. No. 2181, 83d Cong., 2d Sess. (emphasis added).

^{47/} H.R. Rep. No. 1470, 91st Cong., 2d Sess., U.S. Code Cong. & Admin. News, 4991 (1970) (emphasis added).

^{48/} Justice Brief, p. 183; Intervenors' Brief, p. 81; Staff Brief, pp. 19-20.

"It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws." 49/

Thus, far from explaining the concept of inconsistency, this passage merely elucidated how the AEC is to approach the problems of prediction inherent in anticipating the impact of a not-yet-constructed plant. The passage in no way contradicts the clear statement elsewhere in the Committee's report that a situation "inconsistent" with the antitrust laws is meant to be the equivalent of an anti-trust violation. 50/

2. Antitrust Policies.

The other parties also read the phrase "antitrust policies" in the legislative history of Section 105c as excusing their failure to demonstrate that Consumers Power has violated antitrust laws. Relying upon this language, 51/

49/ H.R. Rep. No. 1470, supra at 4994 (emphasis added). The standard of "reasonable probability" of an anti-competitive effect is, of course, borrowed from cases under §7 of the Clayton Act. See e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 323 n.39 (1962). The Court observed there that "the very working of §7 requires a prognosis of the probable future effort of the merger." 370 U.S. at 332 (emphasis in the original).

50/ For a full treatment of this issue, see our main brief, pp. 38-43.

51/ This phrase is, of course, not found in the Act but only in the JCAE report. H.R. Rep. No. 1470, supra at 4994.

our opponents would transform Section 105c into a requirement that all large systems must assist small ones to compete more vigorously.

In support of this novel thesis, reliance is placed upon two cases, which in our view are wholly inapposite. One of the cases, Northern Pacific Railway v. United States, 356 U.S. 1, 4-5 (1958),^{52/} states only in the broadest dictum that "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition"^{53/} Even assuming that the cartelism proposed in the Kennedy-Aiken approach could be termed the "free and unfettered competition" to which the Court referred, there is nothing in Northern Pacific's general statement that suggests an affirmative duty to share facilities with one's neighbors or enter into joint ventures with them.

^{52/} Quoted in Staff Brief, pp. 17-18, and Justice Brief, pp. 183-184.

^{53/} Obviously, Northern Pacific's introductory dictum must be read in the context of the opinion's holding that the type of tie-ins with which it was dealing were "because of their pernicious effect on competition and lack of any redeeming virtue . . . conclusively presumed to be unreasonable. . . ." By contrast, using the same terminology, the Supreme Court has just held that where "unfettered competition" is limited or barred by regulation, no antitrust issues are raised by resulting market concentration or parallel behavior. United States v. Marine Bancorporation, 94 S. Ct. 2856, 2875 and fn. 34 (1974).

The second case on which our adversaries rely with regard to alleged "antitrust policies," is Northern Securities Co. v. United States, 193 U.S. 197 (1904). This decision is cryptically quoted by the Department of Justice for the proposition that "[t]here is a potency in numbers when combined ..." If this excerpt seeks to suggest an antitrust hostility to larger firms as such, it is misleading since the Supreme Court has repeatedly held to the contrary.^{54/}

In addition to these references to the two phrases from the legislative history of Section 105c, the other parties offer no credible authority in support of their claim that traditional standards of antitrust proof can be ignored in this proceeding. Except for the two inapplicable cases and citations to the out-dated theories of academic commentators,^{55/} the only antitrust analysis offered by the other parties is their attempt to transform antitrust proscription of a "bottle-neck" into an affirmative duty that a large firm must share its exclusively-owned resources with all smaller firms. Thus,

^{54/} See, e.g., Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); United States v. Swift & Co., 286 U.S. 106, 116 (1932).

^{55/} Cited are Professor Rostow's 1948 book, A National Policy for the Oil Industry, and a British scholar's 1960 study, A.D. Neale, The Antitrust Laws of the U.S.A. Neither commentator's ideas have been endorsed by the courts and, we submit, are irrelevant to "the established policies of the antitrust laws."

the Staff's brief argues that the "bottleneck" theory is applicable because "the right to have access to and choose the best alternative for a particular system is paramount to the continuation of the pluralistic industry as it exists today."^{56/} As we will review more fully in our discussion of the "bottleneck approach," the assertion that a system may demand that a competitor provide it with a range of alternative facilities or sources of supply, even to the point of entering into a joint venture with it, is totally foreign to the antitrust laws.^{57/}

Beyond these few attempts to find antitrust support for the relief they seek, the other parties point to various statements of present and former public officials and to the introductory section of the Atomic Energy Act in urging this Board, as a matter of public policy rather than antitrust analysis, to incorporate the rejected Kennedy-Aiken approach into Section 105c. An analysis of the references they cite, however, merely confirms the weakness of their case.

For example, the Department of Justice places great reliance on the testimony of a witness, Leland Olds, at one of the hearings that led to the 1954 Atomic Energy Act. Indeed, the Department contends that "[i]n enacting Section

^{56/} Staff Brief, p. 77.

^{57/} See IV-C, infra.

105c, Congress adopted the Olds-Wein view"^{58/} The Department offers no explanation as to why Mr. Olds, one of the 163 witnesses^{59/} at the 1954 hearings on the Atomic Energy Act, should be deemed to reflect congressional intent in enacting this legislation. In fact, Mr. Olds was urging the Joint Committee on Atomic Energy to undertake a course fundamentally inconsistent with the legislation it actually enacted; he was advocating a set of principles which he termed a "Federal power policy", but which made no reference at all to the antitrust concepts ultimately incorporated in the Act.^{60/}

^{53/} Justice Brief, p. 133. See also the similar assertions of Mr. Olds' allegedly crucial role at Justice Brief, p. 214. Hearings before the Joint Committee on Atomic Energy on Atomic Power Development and Private Enterprise, 83d Cong., 2d Sess., pt. 1 (1954) (hereinafter cited as 1954 Hearings). In 1954 Dr. Wein was an employee of Slick Airways and there is no evidence that he played any role whatsoever concerning the 1954 Act. (Wein 2 after 3979)

^{59/} See, e.g., 1954 Hearings at 524. Key aspects of his proposal included the incorporation in the Atomic Energy Act of provisions paralleling the hydroelectric licensing provisions of the Federal Power Act. One alternative he proposed was "to have an amendment to the Federal Power Act which would bring atomic as well as hydroenergy into the field of the Commission's licensing function." 1954 Hearings at 537.

^{50/} The Department also quotes Mr. Olds' testimony, 1954 Hearings at 530-31 (Justice Brief, pp. 131-33) as the main support for its attack on the adequacy of regulation. Aside from the dubious probative value today of a 1954 description of academic papers delivered in 1937, it is plain that the professors to whom Olds' alluded were describing the analysis of state regulatory deficiencies in the early Thirties that underlay the early New Deal

(cont.)

Equally irrelevant to the legislative history of Section 105c is the testimony of former FPC chairman Joseph C. Swidler, relied upon by the Intervenors.^{61/} Mr. Swidler's quoted testimony was wholly unrelated to antitrust legislation; rather, his testimony concerned a bill which would have deprived the FPC of its broad regulatory authority.^{62/} Mr. Swidler's efforts were successful and the FPC retained its authority to preclude an electric utility from exercising monopoly power in its bulk power operations.^{63/} Thus, Mr. Swidler's testimony is irrelevant to this proceeding -- except perhaps in highlighting the FPC's important regulatory role in the electric utility industry.

The Department of Justice and the Intervenors also place great stress on the remarks of Senator Aiken regarding the purposes of Section 105c.^{64/} However, the statements of

60/ (cont.)

program of subsidizing duplicative public power systems, a policy largely abandoned after the adoption in 1935 of Title II of the Federal Power Act. See R. Hellman, GOVERNMENT COMPETITION IN THE ELECTRIC UTILITY INDUSTRY, 18-37 (1972), a pro-public power source relied upon by Intervenors (Intervenors' Brief, p. 104).

61/ Intervenors' Brief, p. 64.

62/ S. 218, 39th Cong., 1st Sess. (1965).

63/ See Consumers Power Co. Brief, pp. 118-124.

64/ Justice Brief, pp. 215-16.

Senator Aiken, the principal author of the rejected Kennedy-Aiken bill are by no means authoritative in interpreting Section 105c. In the same Senate speech the Department quotes, Senator Aiken conceded that his own expansive views had not influenced his JCAE colleagues.^{65/} Elsewhere, he acknowledged that Section 105c "cut back on the scope of AEC consideration of antitrust issues."^{66/} In fact, the House co-author and the Senate floor manager of the bill which became the present Section 105c also took public issue with Senator Aiken's eleventh hour efforts to rewrite the legislative history of Section 105c.^{67/} Thus, Senator Aiken's position clearly represents the view which the Congress rejected, not that which it incorporated into Section 105c.

Perhaps the most surprising authority cited by the other parties in support of their argument that they

^{65/} Senator Aiken stated in this regard: "I have repeatedly pressed for corrective action, but I have made little progress in the legislative field." Hearings on Pre-licensing Antitrust Review of Nuclear Powerplants, 91st Cong., 2d Sess., part 2, at 556 (1970), reprinting remarks made on the floor of the Senate, March 4, 1970, quoted in Justice Brief, pp. 215-16.

^{66/} "Dissenting Views on H.R. 18679" (Draft dated September 14, 1970), p. 2, attached as Appendix A to "Reply of the Department of Justice on Issues Other Than Disqualification" filed June 9, 1972 in this proceeding.

^{67/} See, e.g., remarks of Senator Pastore and Rep. Hosmer, quoted at Consumers Power Co. Brief, p. 20,

need demonstrate no antitrust violation in this proceeding is Section 1 of the Atomic Energy Act, 42 U.S.C. §2011, which speaks generally of a purpose to "strengthen free competition in private enterprise."^{68/} The legislative history of the 1954 Atomic Energy Act, 68 Stat. 934, makes clear that, far from referring to electric utility competitive practices, this provision referred to the congressional intent to expand the role of private industry as opposed to that of the federal government in developing nuclear technology -- an intent manifested in the obligatory cross-licensing of patents and the expanded access to nuclear information provided for by the Act.^{69/}

^{68/} Justice Brief, p. 228; Intervenors' Brief, p. 76.

^{69/} The emphasis on patent issues was noted at Justice Brief, p. 214. For an example of that concern, see S. Rep. No. 1699, 83d Cong., 2d Sess., U.S. Code Cong. and Admin. News, 3464 (1954) stating:

"This report has already summarized the considerations underlying the stringent prohibition of the Atomic Energy Act of 1946 against private participation in atomic energy. It has also made clear that changing conditions now not only permit but require a relaxation of the prohibitions if atomic energy is to contribute in the fullest possible measure to our national security and progress.

* * * * *

We are mindful of the fact that in the immediate future, relatively few firms may be involved in this effort. We acknowledge that dangers of restrictive patent practices are present, though

(cont.)

Thus, the passage has no bearing whatsoever on Section 105c.

As this review of the authority they cite reveals, the other parties have eschewed reliance upon antitrust laws in interpreting Section 105c and have chosen to utilize Section 105c to raise a purely political question: whether, through the imposition of mandatory unit access, coordination, and wheeling, larger utilities should provide the small systems preferential advantages at the expense of the larger systems.

In its principal brief, Consumers Power Company has set forth the principles which Congress established in amending Section 105c in 1970.^{70/} These stand in sharp contrast to the extended list of preferential forms of treatment for public power entities and other small systems the other parties deem, with no real basis in antitrust analysis, to be compelled by this legislation. The Board's acceptance of this approach, which Congress rejected in the Kennedy-Aiken bill, would, we submit, be inappropriate and plainly contrary to congressional intent.

69/ (cont.)

not inherent, in such a situation. Accordingly, we recommend to the Congress that holders of patents on inventions of primary importance to the peacetime uses of atomic energy be required to license such patents to others in return for fair royalties. This requirement of compulsory licensing will apply to all patents in the field which are sought in the next 5 years."

70/ Consumers Power Company Brief, pp. 43-50.

III. The relevant bulk power and retail market definitions proposed by the Department of Justice ignore legal principles applicable to the factual record of this proceeding.

A. Bulk Power Markets.

The post-trial briefs in this proceeding have substantially narrowed the range of controversy regarding the definition of the bulk power markets relevant to this proceeding. In its main brief, Consumers Power proposed a relevant market definition which encompassed all of the bulk power alternatives of the Company's smaller neighboring systems; i.e., self-generation, wholesale purchase, and coordination exchange. The AEC Staff has substantially adopted Consumers Power Company's market analysis^{1/} while the Intervenor^{2/}s apparently regard market definition as irrelevant.

The Department of Justice, however, still argues that there are two relevant bulk power markets and that power derived from wholesale purchases and self-generation constitutes one relevant product market while coordination transactions (such as unit power and emergency power transactions) belong in a separate market.^{3/} Upon careful analysis, the Department's approach clearly fails.

The other parties appear to concur that

1/ Staff Brief, p. 33, n.40.

2/ Intervenor's Brief, p. 109.

3/ Justice Brief, pp. 62-71.

the appropriate standard to apply in delineating relevant markets is that set forth by the Supreme Court in the duPont case.^{4/} According to duPont, products must be in the same market when they have "reasonable interchangeability" as to price, use and quality.^{5/} In addition, market definitions must consider economic and commercial realities.^{6/} As the district court noted in the leading General Dynamics case:

If competition cuts across product or industry lines, the product market must be drawn broadly enough to include competition as it exists.^{7/}

The Department justifies its separation of the various bulk power transactions into a firm power market and a coordination regional power exchange market with two arguments: (1) that a single source of non-firm power cannot alone substitute for firm wholesale power;^{8/} and (2) that firm power is a "final" product, while the types of

^{4/} United States v. E.I. duPont deNemours & Company, 351 U.S. 377 (1956), see, e.g., Justice Brief, p. 62.

^{5/} These standards are reviewed in Consumers Power Co. Brief, pp. 81-86 and supplied to the bulk power supply arrangements in Lower Michigan in that Brief, pp. 87-92.

^{6/} Brown Shoe Co. v. United States, 370 U.S. 294, 336-37 (1962).

^{7/} United States v. General Dynamics Corp., 341 F. Supp. 534, 555 (N.D. Ill. 1972), aff'd on other grounds, 415 U.S. 486 (1974).

^{8/} Justice Brief, pp. 64-65.

coordination transactions that the Department claims to take place in the regional power exchange market are "factors of production".^{9/}

The Department's first argument is clearly fallacious since it rests on a short-run, myopic view of commercial realities. It is true, of course, that at an instant in time, considering only a single transaction, non-firm power such as emergency power cannot be substituted for firm wholesale purchases. But if this observation provided the basis for market definition, the Department's own regional power exchange market definition would collapse, since the various types of coordination transactions which it includes in this market cannot be substituted in this instantaneous manner.

For example, when viewed as a single transaction in the short-run, it is elementary that emergency power cannot be substituted for unit power, economy energy cannot be substituted for maintenance power, and unit power cannot be substituted for maintenance power. The Department proposes to place power derived from all of these different coordinating transactions in the same relevant product market, but to exclude from this market power derived from firm wholesale purchases and self-generation. But, the Department's brief

^{9/} Id., pp. 66-71.

demonstrates the flaw in its own analysis since it emphasizes all of those various firm and non-firm bulk power alternatives are, in fact, "interchangeable." At one point, its brief states:

"The principal form of actual competition in the wholesale firm power market in the lower peninsula of Michigan arises from the alternative that C.P. Co's wholesale customers have of installing self-generation -- either on an isolated basis or on a partially or fully coordinated basis -- or of purchasing wholesale firm power.

In the period of 1960 to present, the record is replete with examples of such competition. Indeed, there is no disagreement between the parties over the existence of this competition."10/

Elsewhere in the brief the same point is summarized:

"Actual wholesale competition in Applicant's area arises principally from the option that small systems have of installing self-generation as an alternative to purchasing power from Applicant. Applicant regularly solicits the approximately two dozen independent retailers -- municipal electric power utilities, one private electric power company, and one distribution cooperative -- to purchase their wholesale firm power requirements from C.P. Co. rather than to construct, operate or expand their own bulk power supply facilities. Similar competition occurs between Applicant and two generation and transmission (G & T) cooperatives in the western and northern areas of the relevant geographic market."11/

10/ Justice Brief, p. 36. (emphasis added).

11/ Id., pp. 3-4.

In another passage, the Department concedes the competitive interchangeability of coordination arrangements in its "power exchange" market with other bulk power supply arrangements in the course of its characterization of Consumers Power Company's competitive relationship with the MMCPP:

"To the extent the M-C pool provides power exchange services to each of its members (and to four satellite municipals), which lowers the cost of firm bulk power supply to them and makes self-generation more competitive with firm wholesale power from Applicant, the M-C pool's offering of power exchange has also been a source of competition to Applicant, which offered wholesale firm power." 12/

Stripped of its rhetoric, the Department's position represents an abandonment of the "comprehensiveness" argument relied upon by its expert witnesses and a return to a simplistic firm power/non-firm power distinction.^{13/} An electric utility already owning generation capacity can satisfy additional load growth by installing an additional generation unit, by reducing its reserve requirements through coordinating agreements, or by purchasing firm wholesale power. As we documented in our main brief, the Company's smaller

12/ Justice Brief, p. 43 (emphasis added).

13/ Mayben 2706, 2766, 2856-57, 2871-72. See Consumers Power Co. Brief, p. 90-92, and Findings of Fact cited therein.

neighbors utilize each of these alternatives in meeting load growth; and as the Court stressed in Brown Shoe,^{14/} a market analysis which fails to take account of those commercial realities presents a myopic and distorted view for antitrust purposes. For this reason alone, the Department's bulk power market analysis should be rejected.

The Department's second argument for the separation of bulk power transactions into two markets is equally deficient. According to this argument, coordination transactions should be excluded from the bulk power relevant market which the Company proposes because coordination exchange is a "factor of production" while firm bulk power is a final product. This position ignores the fact that numerous products throughout the economy may be viewed simultaneously as factors of production and final products, but that does not provide an a priori basis for separating them into distinct relevant markets. For example, sugar may be consumed directly by ultimate customers or may be utilized by candy manufacturers as a factor of production; the sugar may be marketed in somewhat different form for each purchaser, but it is clearly absurd to suggest that there are necessarily two markets for

^{14/} Brown Shoe Co. v. United States, 370 U.S. 294, 336 (1962).

sugar under these circumstances. We submit that how the consumer uses the product is irrelevant in defining relevant market; rather the appropriate inquiry must focus, according to the case law, on interchangeability -- whether, for example, sugar used as a candy ingredient realistically can be substituted for sugar used as the dining room condiment.^{15/}

In resolving such questions, courts look to the behavior of consumers in the marketplace.^{16/} Here, the applicable bulk power consumers interchangeably utilize wholesale purchases, self-generation, and coordination in meeting their load growth. Thus, these sources must be included in the same relevant market as they have been in our bulk power

^{15/} Cf. American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958), the case in which the "commercial realities" concept adopted by the Supreme Court in Brown Shoe originated.

^{16/} The Justice Brief, p. 65, asserts by simplistic analogy that our contention is equivalent to arguing that nails are in the same market as houses. If analogies are pertinent at all, a far more apt one is as follows: Customers can buy houses for guaranteed delivery on a preset date and houses for delivery some time during a specified building season. Are houses with guaranteed delivery dates in the same market as houses with non-firm delivery dates? We submit that the key to all such questions is customer behavior which is the commercial reality; if customer behavior shows that one product (e.g., houses with guaranteed delivery dates or firm wholesale power) are viewed as highly substitutable for another product (houses with non-firm delivery dates or coordination exchange) by most buyers, then the commercial realities demonstrate that there is one product market. Such is the undisputed factual situation in this case.

market analysis.

The Staff brief agrees that the Company's analysis is correct, i.e., that self-generation, firm wholesale purchase and coordination exchange are highly interchangeable for the buyers who actually are in the relevant market, Consumers Power Company's small neighbors. According to the Staff's brief:

"The important aspect of these various transactions is that the contracted service has one, and only one, function, i.e., to produce firm power. Thus the grouping of these various bulk power services into the same product market is justifiable since these inputs have a unique application." 17/

17/ Staff Brief, p. 33 (footnote omitted). As a final comment at the conclusion of their market definition section, the Staff suggests that there may be three submarkets within the bulk power market, base load generation, nuclear generation and transmission. Staff Brief pp. 33-35. These distinctions make little sense. Obviously, nuclear generation is simply a form of base load generation and cannot be distinguished, in relevant market analysis, from other forms of base load generation such as coal-fired generation. Base load generation has no distinct purchasers who do not also require intermediate peaking generation capacity as well. High voltage transmission transactions, i.e. wheeling, are so rare as to be inconsistent with any notion that they are a distinct market or submarket.

Moreover, under the standards of submarket definition set forth in Brown Shoe Co. v. United States, supra, at 325, a submarket must be established by

(cont.)

Turning to another area in which the Department of Justice disputes our market analysis, we submit that the Department has failed to justify its inclusion of Consumers Power Company's bulk power requirements in the same market as the bulk power requirements of its smaller neighbors.^{18/} The Department concedes that as a matter of law, market definitions look to "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies...."^{19/}

Yet, having explained that purchaser alternatives are controlling, the Department proceeds in the next sentence to ignore Consumers Power Company's position as a "purchaser" of power and to focus solely on its role as a seller. Thus, the Department defines all of its geographic markets as "the area in which it is technically and economically feasible for Applicant to sell at retail and at

17/ (cont.)

"such practical indicia as industry or public recognition of the submarket as a separate entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." None of these standards distinguish any of the Staff's three supposed submarkets from the general bulk power market.

18/ Justice Brief, p. 71 (emphasis in the original).

19/ United States v. Philadelphia National Bank, 374 U.S. 321, 359 (1963), quoted at Justice Brief, p. 71.

wholesale...."^{20/} See the holding in the leading case of United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 592 (S.D.N.Y. 1958), that

"Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." ^{21/}

The other parties do not dispute our contention that, in satisfying its need to obtain power for distribution to its customers, Consumers Power cannot realistically look to its smaller neighboring systems. Although this pattern of trade is explained and reinforced by legal barriers on bulk power sales by the cooperative and municipal systems, the Department chooses to ignore them.^{22/} This is presumably explained by the fact that only through inclusion of Consumers

^{20/} Justice Brief, pp. 71-72 (emphasis added).

^{21/} Among the cases citing this passage is United States v. Philadelphia National Bank, supra, 374 U.S. at 367 n. 43 (1963).

^{22/} The Department's Brief does recognize the importance of these barriers in another context at pp. 44-45. Also, the Department's brief (p. 56 n.) suggests that the 25% limitation on municipal sales was not fully repealed by the recent action of the Michigan legislature which prohibited municipals from expanding their future service areas or from pirating the Company's existing customers. If the Department's position is correct, the continued validity of the 25% rule under some circumstances will further restrict bulk power sales by the municipals to the Company and thus further reinforce the Company's bulk power market definition.

generating capacity of its smaller neighbors or transfers of load to other wholesale suppliers arose under circumstances that are unlikely to recur in precisely the same form.^{26/} This is, of course, a myopic and irrelevant argument since most complex transactions do not recur. The significance of recent market behavior (i.e., market share data) is not in the prediction of the precise nature of future transactions but in gauging the strength of com-

^{26/} Justice Brief, pp. 120-22. Principally, the Department argues that because Edison Sault decreased its wholesale purchases from the Company through the purchase of a hydroelectric generation unit and other hydro facilities will not be available in Michigan, Edison Sault's decreased wholesale purchases should be ignored for purposes of quantifying market shares. The Department also contends, but offers no support for its view, that customers other than the South-eastern cooperative will be unable to change electric suppliers in the future. Witness Pace specifically testified that this "pick and choose" approach was invalid in extrapolating future trends since such predictions would involve "many things" while this particular adjustment was an isolated incident. [Pace 7419-20]. Indeed, witness Paul suggested that, since the end of the period studied by Dr. Pace, many wholesale customers had begun decreasing wholesale purchases in favor of self-generation and coordination [Paul 7884]; thus, there is substantial evidence that in predicting future trends, these "downside" adjustments in the Company's market share would at least balance out the "upside" adjustments urged by the Department.

In any event the record offers no support for the view that the Department can properly ignore Edison Sault's hydro capacity and arbitrarily raise the Company's share of the bulk power supply market from 17% to 24%.

petitors.^{27/} Thus, the Department's attack upon the Company's bulk power market share data must be rejected.

B. Retail Market.

At the retail market level, the Department of Justice, the AEC Staff and Consumers Power Company apparently agree on the definition of the relevant product market. The Department appears to take issue, however, with Consumers Power Company's contention that there are two retail geographic markets (and two sub-markets) delineated by differing barriers to entry which are relevant to the instant case. Relying upon three arguments, the Department seeks to establish the proposition that the entry barriers described in our brief should be ignored in defining the retail market.^{28/} These arguments can be summarized as follows:

1. All legal and economic barriers to entry could be overcome in the future.
2. Any action that lowers the cost to a potential new electric system increases the probability that entry will take place in the future despite the existence of barriers to entry.
3. The relief requested by the Department, if

^{27/} See Brown Shoe Co. v. United States, 370 U.S. 294, 321-22 (1962).

^{28/} Justice Brief, pp. 74-86.

granted by this Hearing Board, would in the future produce opportunities for potential entrants to achieve lower costs.

The Department's "how things might be in the future" approach flies in the face of the fundamental concepts of relevant market definition practiced by antitrust tribunals. As Judge Wyzanski stated, "the problem of defining a market turns on discovering patterns of trade which are followed in practice."^{29/} In adherence to that precept, the Supreme Court recently reversed a trial court's market definition which took account of a prospective trend the presence of which it premised principally on the impact of a recently enacted state banking law.^{30/} Although the Court noted that the law would remove barriers to entry by savings banks, it refused to consider the law's future effect on the relevant market for commercial banking in the State.^{31/}

^{29/} United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 303 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).

^{30/} The state law which permitted savings banks to provide individual checking accounts was to be effective within six months of the time the Court wrote.

^{31/} According to the Court:

"At some stage in the development of savings banks it will be unrealistic to distinguish them from commercial banks for purposes of the Clayton Act. In Connecticut, that point may well be reached when and if savings banks become significant participants in the marketing of bank services to commercial enterprises."

United States v. Connecticut National Bank, 94 S. Ct. 2788 at 2794-95 (1974).

Surely, if the Supreme Court was unprepared to extrapolate even minimally from a definite and imminent change in the law, it would condemn the Department's approach here which departs from present trading patterns on the basis of speculation piled upon conjecture.^{32/}

This conclusion is obviously particularly pertinent where, as here, the very change being speculated about is the relief under consideration on the basis of that market analysis. Under this bootstrap approach, the relief demonstrates the existence of a substantive violation and the substantive violation proves the need for relief.

^{32/} In United States v. Phillipsburg National Bank and Trust Co., 399 U.S. 350 (1970), the Supreme Court rejected a comparable, if far less drastic speculation. Discussing "ease of access to the market," the district court had asserted that "[i]t is not difficult for a small group of businessmen to raise sufficient capital to establish a new small bank when the banking needs of the community are sufficient to warrant approval of the charter," and implied that the proposed merger might actually stimulate other banks to enter the market. United States v. Phillipsburg National Bank and Trust Co., 306 F. Supp. 654, 659 (D.N.J. 1969). The Supreme Court, however, declined to sanction the merger. Referring to the district court's market barriers analysis, the Supreme Court emphasized that no showing had been made "that a group of businessmen would move to start a new bank in Phillipsburg-Easton, should the proposed merger be approved," 399 U.S. at 368 (emphasis added), and noted the substantial though surmountable barriers to entry posed by the banking laws of New Jersey and Pennsylvania. Thus, the Court held the unproven potential for overcoming entry barriers insufficient in the face of existing barriers.

In addition, the Hearing Board should recognize what it is that the Department of Justice contemplates. The Department seeks a situation in which this Hearing Board so drastically adds to the subsidies of municipal power systems and to the costs borne by Consumers Power Company's retail rate-payers, that governments in communities now served by the Company will feel obliged to launch unprecedented duplicative municipal systems to compete with the Company. The extent to which the Department urges this Board to distort existing economic and political circumstances can be gauged by considering how much pressure municipal officials would have to receive from their constituents to be induced to start parallel electric systems in the face of their normal and appropriate concerns with governmental and economic stability and with the environment.^{33/}

33/ As an additional element of its efforts to disregard the existing barriers to entry, the Department also speculates upon the possibility of a successful challenge to the validity of Michigan's single-phase rule upon retail competition (Justice Brief, pp. 51-52). The Michigan Supreme Court gives considerable weight to administrative agencies' interpretation of the statutes they are charged with administering. For example, in Hazel Park v. Municipal Finance Commission, 317 Mich. 582, 605, 27 N.W. 2d 106, 116 (1947), App. S-7, the Michigan Supreme Court stated:

"It is well settled that the construction placed upon statutory provisions by any particular department of government for a long period of time, although not binding upon the courts,

(cont.)

Even on its own terms, the Department's analysis lacks elementary logic. The first two arguments offered by the Department -- that entry barriers can conceivably be overcome and that lower barriers raise the likelihood of entry -- are universally true, but they are hardly relevant. Obviously, some magnitude of comparative advantage to a potential entrant is sufficient to overcome any entry barrier and any increase in such magnitude increases the probability that barriers will be overcome. Since it would make a mockery of antitrust analysis to assume away all entry barriers for the purpose of a market analysis, plainly the Department's position rests on its third argument that this Hearing Board should help destroy these barriers to entry. The Department's reasoning on this critical point is that because this Hearing Board could take action that would contribute to overcoming entry barriers in the

33/ (cont.)

should be given considerable weight.' Aller v. Detroit Police Department Trial Board, 309 Mich. 382, 386."

The Hearing Board is entitled to assume that a rule promulgated by the Michigan Public Service Commission over eight years ago which has not been legally challenged by any of the eight investor-owned and fifteen rural electric cooperatives distributing electric energy at retail in Michigan is a stable factor which must be considered in analyzing the retail market.

future, the massive barriers which presently exist should be ignored. We submit that such reasoning is fallacious in two crucial respects.

First, the Department's position ignores the dimension of time. In cases dealing with the issue of monopolization, the relevance of defining the appropriate geographic market is simply to spotlight the arena within which the alleged offense has transpired and, in so doing, to provide the conceptual framework in which to determine whether a firm willfully acquired or maintained monopoly power. As the Department of Justice itself noted in another portion of its market definition discussion:

"Market definition is intended to produce a framework within which to measure Applicant's power; the determination of whether Applicant has monopoly power in any or all of the market(s) selected and the examination of how that power may have been exercised can only follow this preliminary step in the analysis." 34/

Consequently, an inherent and significant dimension of the market is the dimension of time. More specifically,

34/ Justice Brief, p. 73. (emphasis in original). See duPont, supra, at 380: "Market delineation is necessary ... to determine whether an alleged monopolist violates §2. The ultimate consideration in such a determination is whether the defendants control the price and competition in the market for such a partial trade or commerce as they are charged with monopolizing."

the barriers to entry relevant to market definition are those which existed during the period in which the supposed illegality is to be analyzed. To say that markets and commercial relationships exist over periods of time is not merely to state the obvious. It provides a portion of the context within which to assess whether the activity of monopolization has transpired.

A critical deficiency in the Department's retail market analysis is that it has no relevance to the time period in which its charges of monopolization are to be tested. In that time period, it is plainly necessary to take account of the barriers imposed by the presently existing economic and legal facts-of-life in Lower Michigan.

Second, even if it were assumed that certain compelled changes in Consumers Power's policies or certain increases in the advantages enjoyed by municipal systems or other potential entrants could reduce the impact of some entry barriers (a contention that inevitably must be based on pure speculation), this does not discredit our market analysis. Diminished barriers may nevertheless be formidable. The Department's view would be correct only if the advantages were so significant that entry barriers would play no substantial role whatsoever in municipal utility entry decisions. That entry might become somewhat more conceivable as a result of increased advantage would not

alter the fact that such barriers would nevertheless make entry substantially more difficult in the markets where the Company has Foote Act and 30-year franchises. It is on that fact that our view of the relevant retail markets is based. Our conclusion is seemingly incontestable since the Department has offered no proof for its speculation that the impact of the license conditions it proposes will appreciably reduce the significance of the legal and economic barriers to entry.^{35/}

In sum, even if the Department's "bootstrap" approach to geographic retail market definition is credited, it fails to establish that the indisputable barriers to entry can be disregarded and that all retail power sales can be lumped into a single market in which the charges of monopolization can be considered. Consequently, even by its own terms, this far-fetched analysis is insufficient to justify the market definition the Department proposes.

C. The Yardstick.

The other parties point to "yardstick" notions as being a forum of competition relevant to this proceeding and characterize Consumers Power's position as a denial

^{35/} Indeed, the Department does not address the impact of the relief it proposes at all. See Justice Brief, pp. 251-56.

that those concepts play any role in this industry.^{36/}

Consumers Power has never denied that yardstick concepts -- though skewed by subsidization -- have some impact on the political process and consequently on the actions of electric system managements. We dispute (1) that the yardstick approach plays any role in FPC or MPSC regulation or (2) that what is sometimes loosely termed "yardstick competition" is a comprehensible market in anti-trust terms in which monopoly power can be exercised.

With regard to regulation, there is simply no evidence that yardstick concepts are ever considered by either regulatory commission. Indeed, the application of that approach, particularly in light of the subsidies on one side, would be contrary to the rate-making approaches of both commissions.^{37/}

In antitrust terms, "yardstick competition" has little meaning. There are no transactions in any "yardstick competition" market, no market shares and, in the sense in which the term is normally used, no geographic markets. Neither element of monopolization -- monopoly power nor

^{36/} Justice Brief, pp. 131-34, 14-7; Staff Brief, pp. 126-27; Intervenor's Brief, pp. 14-05. See Appendix A to this brief, regarding the other parties' allegations that regulation does not assure efficiency.

^{37/} See Consumers Power Co. Brief, pp. 113-20.

willfulness -- has any meaning in the yardstick context.

Indeed, to the extent that yardstick concepts have any pertinence to this proceeding at all, they would argue against the forced cartelism sought by the other parties which would obviously preclude the traditional yardstick comparison being made between the subsidized public power entities and the large-scale but unsubsidized utilities.

IV. The monopolization theory of the other parties is fatally defective since it fails to take account of governmental regulation and special characteristics of the electric utility industry.

A. The Barriers to Entry and Competition.

In its principal brief, Consumers Power Company demonstrates how the legal and economic barriers to competition prevailing in Michigan effectively preclude competition in several of the relevant markets and therefore bar any inference that Consumers Power Company has improperly or monopolistically occupied those markets.^{1/} Neither the Staff nor the Intervenors seem to disagree.^{2/}

On the other hand, the Department of Justice insists there is, or should be, a form of competition in which municipal systems would displace Consumers Power in part or all of its service area.^{3/} Our main brief explains why we deem such competition to be infeasible and inconsistent with the public interest in Lower Michigan.^{4/} In contrast to the Company's position, the Department's contrary view does not rely on facts of record, but rather argues that, as a matter

1/ Consumers Power Co. Brief, pp. 103-11, and 136-45.

2/ Their briefs do not explain with any specificity where the competition they purportedly seek to protect is found. Indeed, by speaking in terms of a policy of "pluralism" rather than terms of competition, they in effect bypass the issue.

3/ Justice Brief, pp. 74-85, and pp. 207-217.

4/ Consumers Power Co. Brief, pp. 136-45.

of law, the existence of such competition must be presumed.

The Department's authority for this ingenious approach is Otter Tail Power Co. v. United States, 410 U.S. 366, 377-78 (1973).^{5/} We submit that Otter Tail offers no support to the Department in this regard.

In Otter Tail, a private electric utility was in fact displaced by a municipal system but the decision expresses no opinion as to whether displacements in other circumstances are either feasible or desirable.^{6/} Plainly, since the legal barriers to its displacement by a municipal system cited in our brief^{7/} are all established by Michigan law or regulatory policy, the fact that such displacement was possible in Otter Tail's service area in other states is totally irrelevant to this proceeding. Indeed in its Otter Tail brief to the Supreme Court, the Department of Justice itself pointed out, in the course of its discussion of retail distribution franchises, that utility regulation by the states in which Otter Tail served was minimal.^{8/}

^{5/} Justice Brief, pp. 207-09.

^{6/} In describing the factual underpinning of that case, the Federal Power Commission noted the unusual character of "the present 'Elbow Lake Situation'". Village of Elbow Lake v. Otter Tail Power Company, 40 FPC 1262, 1271 (1968), App. II-44, aff'd sub nom. Otter Tail Power Co. v. FPC, 429 F.2d 232 (8th Cir. 1970), cert. denied, 401 U.S. 947 (1971).

^{7/} Findings of Fact 2.25-2.45

^{8/} Brief for the United States at 62-63 n. 51, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

Regarding competition with rural electric cooperatives, which is precluded by both federal law and state regulatory policies,^{9/} the Supreme Court in Otter Tail followed precisely the approach our main brief proposed and excluded such systems from the relevant market.^{10/} Consequently, Otter Tail not only fails to hold that the possibility of a utility's displacement by another supplier must be presumed, but also specifically recognizes that the force of law may make such displacement impossible.

Beyond Otter Tail, the Justice Department invokes the doctrine of "potential competition" as legal support for its allegations that the potential for displacement is a realistic form of competition. Its treatment of that doctrine is, we submit, illustrative of the Department's misuse of the relevant case law in this proceeding.

The Department cites United States v. Phillips Petroleum Co.^{11/} as "the most recent in a long line of Supreme

9/ Consumers Power Co. Brief, pp. 102-03.

10/ 410 U.S. at 369, n. 1.

11/ 367 F. Supp. 1226 (D. C. Cal. 1973), aff'd per curiam, 94 S. Ct. 3199 (1974). The Supreme Court's order reads, in toto: "July 8, 1974. Appeal from the United States District Court for the Central District of California. Judgment affirmed."

Court cases placing potential competition under the protection of the antitrust laws."^{12/} It is perhaps technically accurate that the Court's summary affirmance, without opinion and in the midst of its summer recess, of the district court in the Phillips Petroleum case is the "most recent in a long line of Supreme Court [potential competition] cases"^{13/} But that characterization, coupled with the citation of the leading pre-1974 cases,^{14/} is plainly misleading because it ignores two full opinions of the Court, decided in June of this year, which are particularly applicable to the question of potential competition raised by the Department in this case.^{15/}

Consideration of the Department's argument on the

^{12/} Justice Brief, p. 209.

^{13/} Even that statement is open to question in light of the Court's July 25, 1974 action, reported at 94 S. Ct. 3210, vacating Justice Douglas' issuance of a stay in Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir.), cert. denied, 95 S. Ct. 150 (1974).

^{14/} Justice Brief, p. 211, cites United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174 (1964); FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967); and United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

^{15/} United States v. Connecticut National Bank, 94 S. Ct. 2788 (1974); United States v. Marine Bancorporation, 94 S. Ct. 2856 (1974). The Department also ignores Judge Friendly's learned opinion in Missouri Portland Cement Co., supra.

merits highlights her important omission is. The Department argues, on the basis of Phillips Petroleum, that many of the benefits of actual competition also result from the presence of a potential competitor, waiting on the edges of a market and capable of entering at a propitious time. These principles may be valid, of course, in a case like Phillips Petroleum involving an unregulated market such as the retail sale of gasoline.^{16/} But in the two cases not cited by the Department, particularly the Marine Bancorporation case, the Court held that the potential competition did not exist when the ability to enter of firms which might otherwise be potential entrants is significantly restricted by force of law. In Marine Bancorporation, the Court stated:

"We . . . hold . . . that the application of the doctrine [of potential competition] to commercial banking must take into account the unique federal and state regulatory restraints on entry into that line of

^{16/} In a very recent case in which "the Government relies heavily upon" Phillips Petroleum, United States v. Falstaff Brewing Corp., 1974-2 Trade Cas. ¶75,315 (D.R.I. October 23, 1974), App. S-6, the court, in rejecting the Government's position, noted that (1) "Phillips had a history of entering markets de novo or unilaterally," (2) "it [was] a leading international company," (3) "Phillips was engaged in [other aspects of the petroleum] business in California [the relevant geographic market]" and (4) the transaction in question was not "a particularly large one for a company of Phillips' size," Falstaff, supra, at p. 98,011.

commerce. Failure to do so would produce misconceptions that go to the heart of the doctrine itself.

The Government's present position has evolved over a series of eight District Court cases, all of them decided unfavorably to its views. The conceptual difficulty with the Government's approach, and an important reason why it has been uniformly unsuccessful in the District Courts, is that it fails to accord full weight to the extensive federal and regulatory barriers to entry into commercial banking. This omission is of great importance, because ease of entry on the part of the acquiring firm is a central premise of the potential competition doctrine." 94 S. Ct. at 2872-73. (footnotes omitted). 17/

In view of the legal barriers to entry (and related economic barriers as well) described in our principal brief, 18/ it is difficult to imagine a more complete or precise rejection of the Department's theory than that voiced by the nation's highest court several months ago in Marine Bancorporation. 19/

Aside from these efforts to presume the existence of potential competition as a supposed matter of law, the

17/ In addition, the Department points to the supposed public policy of affirmatively requiring utilities to enter into joint ventures with their smaller neighbors, relying on the 1954 statements of Leland Olds and the 1970 remarks of Senator Aiken. See pp. 34-37, supra, regarding this assertion.

18/ Consumers Power Co. Brief, pp. 92-111.

19/ For a full development of this point, see Consumers Power Co. Brief, pp. 136-45.

Department of Justice points only to two incidents as factual support for its theory that potential competition exists in the "closed" markets which the Company serves. These concern the creation of the Zeeland municipal system in the 1930's and an exchange of distribution facilities between the City of Lansing and Consumers Power Company in the mid-1960's. The Department's theory is that a municipality will establish a duplicative system and seek to displace the Company if its advantages vis-a-vis the Company are increased to the point where the municipal system is assured that it can significantly undersell the Company. The Department then hypothesizes that the Company would quickly recognize the purported futility of such competition with the lower-cost municipal system and sell out to it.

It is true that during the 1930's Zeeland decided to construct a municipal system to duplicate areas served by the Company.^{20/} But the Department's suggestion that this pattern will recur is incorrect because the Zeeland system was built with substantial assistance from the New Deal's Public Works Administration.^{21/} The PWA lost its authority to

^{20/} Westenbroek 938-939. See Justice Brief, pp. 41 and 76.

^{21/} Pace 7265-7266. There is no record evidence as to the size of that grant. However, R. Hellman, GOVERNMENT COMPETITION IN THE ELECTRIC UTILITY INDUSTRY, 36 (1972), a study relied upon by the Intervenor's Brief, p. 104, reports that such grants averaged 39% of labor and materials cost.

underwrite such programs in 1938, and this "marked the end of the PWA program as a competitive power influence." ^{22/}

Plainly, the peculiarity of the Zeeland situation and the PWA program discontinued 35 years ago, negates any suggestion that municipal systems are likely to follow Zeeland's lead and spring into existence in the Company's service area in the foreseeable future. Moreover, even in the anomolous Zeeland setting, the second step of the Department's hypothesis -- that the Company will ultimately sell out its facilities -- has proven incorrect. The Company did not sell out its facilities but continues even today to serve some customers in Zeeland. ^{23/}

The second purported example of displacement the Department cites concerns the North School District of Lansing. ^{24/} The Lansing system began service in that district as a result of municipal annexation. The Company's decision to sell its facilities there to Lansing was not the capitulation of a defeated competitor but rather a fully compensated mutual effort to eliminate the duplication of facilities in

^{22/} Id. at p. 36.

^{23/} Paul 7814.

^{24/} Justice Brief, pp. 5, 50 and 76.

several locations.^{25/} Consumers Power did not suffer a significant loss of load in the transaction and the high price paid, corresponding to the price that would be payable in the event of condemnation of one of its franchises,^{26/} hardly supports the Department's theory that the Company would abandon its facilities at salvage value if confronted by duplicative competition from a subsidized municipal system. Indeed, the Department ignores the fact that the Company has for years remained and competed on a street-to-street basis with the Traverse City and Bay City municipal systems which duplicate its service area and which underprice it.^{27/}

Thus, the Department's hypothesis that new municipal systems are likely to overcome barriers to entry and displace the Company -- at least without wasteful duplicative competition -- is insubstantial.

^{25/} Aymond 6462-6463. The undesirability of this type of competition has been noted by all observers. [Findings of Fact 2.42 and 2.43.]

^{26/} In exchange for giving up the customers in the annexed area, the Company received not only the value of the property, but also a severance allowance, a separate allowance for loss of profit and a ten-year contract to serve the area at wholesale. Brush 2074. A comparable price would be payable in the event one of its franchises were to be condemned. See Consumer Power Co. Brief, pp. 106-107, especially n. 76.

^{27/} Findings of Fact 2.47, 3.07; Attachment JDP-3, Schedule 1, pp. 1-2, after 7239.

B. Regulation as a Bar to Monopoly Power.

As the Department of Justice acknowledges, "[i]n a regulated industry such as the electric power industry, it is also necessary to consider [in determining whether a firm has monopoly power] whether there is a valid scheme of governmental regulation which restricts the exercise of monopoly power."^{28/} The Department recognizes that, whatever Consumers Power Company's market share, the presence of "regulation which restricts the exercise of monopoly power" would preclude any inference that the Company possesses monopoly power. Thus, the question before this Hearing Board is narrowed to whether or not such regulation exists; as the Department seemingly concedes, if it does, monopoly power cannot be present.

1. Rate Regulation.

In its principal brief, Consumers Power Company outlines in detail how regulation denies it the power to control prices or exclude competition, the elements of monopoly power.^{29/} The other parties do not attempt a comparable survey of the impact of regulation on the Company's

^{28/} Justice Brief, p. 97.

^{29/} Consumers Power Co. Brief, pp. 113-125, 136-145.

market position. Rather they vaguely characterize that regulation as limited and point to various isolated and often irrelevant areas which they allege it does not cover.

Before turning to the other parties' efforts to diminish the scope of regulatory supervision over Consumers Power Company, it is important to note the range of regulation they do not dispute. First, they appear by their silence to concede that regulation bars monopoly power in the retail market. Second, they concede that the Company generally lacks the power to control its own prices, i.e., its rates, in the bulk power market as well.^{30/} The Supreme Court has indicated that without the power to control prices there can be no monopoly power.^{31/} Thus, unless they can demonstrate significant gaps in the structure of rate regulation, the other parties would appear to have conceded that Consumers Power Company lacks monopoly power.

The other parties, principally the Department of Justice, allege three such gaps in rate regulation which

^{30/} Staff Brief, p. 146, Intervenors' Brief, p. 36. The Department of Justice agrees that the Company cannot raise its prices at will. Justice Brief, p. 175.

^{31/} "Monopoly power is the power to control prices or exclude competition....It is inconceivable that price could be controlled without power over competition or vice versa." United States v. E. I. duPont deNemours and Co., 351 U.S. 377, 391-92 (1956).

they claim are germane to this case. The first is that the Federal Power Commission allegedly lacks the authority to require pricing below system average cost. The only case they cite for this proposition, Alabama Electric Cooperative, Inc. v. Alabama Power Co., 38 FPC 962 (1967), fails completely to support it.^{32/}

Moreover, the Department of Justice recognizes that the question of below average pricing is academic in this case, since "the record does not disclose that Applicant had a general policy of pricing below average cost to deter self-generation."^{33/} Consequently, not only

^{32/} In that case, the FPC merely held that a rural electrification cooperative was not entitled to preferential wholesale rates simply because of its status as an REA cooperative. 38 FPC at 968. The Commission did not hold that it could not order incrementally priced wholesale service where doing so would be required to meet the standard of the Act. The Federal Power Act itself, contains no restriction on the form of rate the Commission can impose in enforcing the Act's public interest standard.

^{33/} Justice Brief, p. 176. Surprisingly, the Department points, as its one purported instance of discriminatory below-system average pricing by the Company, to a reference in one document to "special rate proposals." Justice Brief, pp. 176-177, quoting Exhibit 188. The Department there implies that "special" was a euphemism for "unduly preferential." Yet, as the contemporaneous Michigan Public Service Commission regulations make clear, "special services" and "special rates" were simply part of the terminology used in Michigan, prior to the FPC's assertion of jurisdiction over most wholesale transactions, to describe non-municipal wholesale transactions. MPSC Regulations R.460. 2006, (1954 Mich. Admin. Code), App. I-26.

is the Department incorrect in its characterization of the FPC's actions, it raises a topic that it concedes is factually irrelevant to this case.^{34/}

The second purported defect in rate regulation alleged to be relevant to this proceeding concerns the FPC's present unwillingness to consider the competitive effect of the relationship between the wholesale rates it regulates and a utility's retail rates. That question also has no bearing on the facts of this proceeding since the Department of Justice admits that Consumers Power's wholesale customers do not face a so-called "price squeeze."^{35/} Given those undis-

^{34/} The Department also indulges in a rapid shift of position, implying on page 175 of its brief that a gap in FPC regulation is suggested because the FPC permitted incrementally priced transactions where the alternative would be the erection of inefficient plants but arguing two pages later that, under hypothetical circumstances not actually present, the incrementally priced sale of Midland power to avoid the erection of inefficient plants would be in the public interest.

^{35/} Justice Brief, p. 178. Elsewhere in its brief, the Department unconvincingly equivocates in two respects concerning their admission about the lack of any "price squeeze." First, it attempts to find a "price squeeze" in the fact that St. Louis would have lost \$9,000 in 1965 serving an industrial customer. It is, of course, axiomatic that virtually every business, and certainly every utility, occasionally loses money serving a particular customer; that every day fact of business life is hardly a "price squeeze." Then the Department, in a footnote at p. 178, cites United States v. Paramount Pictures,

(cont.)

puted circumstances, the Justice Department's extended price squeeze argument hardly establishes a substantial gap in the rate regulation of Consumers Power Company.^{36/}

Justice's third critique of rate regulation is that regulation does not assure efficiency.^{37/} This argument has nothing to do with monopoly power, i.e., the power to control prices or exclude competition. Even were a regulated utility permitted to be extremely wasteful and unimaginative, it would not thereby acquire any further power over its neighbors. Indeed, to that extent, it would be a less effective competitor.

Stripped of its rhetoric, the Department is really arguing that regulatory authorities are either unwilling or unable to carry out their legislative mandate to regulate electric utilities and, therefore, that this Commission should step in. The irrelevance of this contention to the issue of monopoly power only underscores the undesirability of this

^{35/} (cont.)

334 U.S. 131, 173 (1948), for the proposition that the intent to engage in monopolistic conduct (i.e., placing one's competitors in a "price squeeze") is the equivalent of actually doing so for purposes of demonstrating monopolization. But Justice points to no evidence at all that Consumers Power Company ever intended to impose a price squeeze on its neighbors, so that this case is irrelevant to this proceeding.

^{36/} Justice's analysis also ignores the MPSC's hostility to the retail promotional pricing without which a price squeeze would not be possible. The state Commission recently stressed that "[p]romotional rate structures are out of date." Consumers Power Co., 3 PUR 4th 321, 343 (January 18, 1974) App. S-7.

^{37/} Justice Brief, pp. 127-33.

Commission's passing judgment on the efficacy or competence of public utility regulation. And, in any event, the Department of Justice has failed completely to establish that the regulation of Consumers Power Company is ineffectual in promoting the Company's efficiency.^{38/}

In sum, the Department of Justice has offered only three supposed deficiencies in rate regulation: (1) the unsupported claim that the FPC will not order below system average pricing in appropriate cases or bar it in inappropriate cases; (2) the irrelevant "price squeeze" issue; and (3) the assertion, inapplicable to Michigan and unrelated to the question of monopoly power, that regulation does not seek to promote efficiency. As has been shown, Justice has not, by these charges, refuted our contention that Consumers Power Company is denied control over its prices by rate regulation.

2. Other Regulation.

Our adversaries also attack aspects of public utility regulation other than rate regulation as being deficient or inadequate. In view of the Supreme Court's conclusion in duPont that monopoly power cannot be found with-^{39/}out control over prices, it is a sufficient response that

^{38/} Because of the marginal nature of the Department's argument in this regard, our response has been placed in Appendix A of this Reply.

^{39/} See p. 79, infra.

these inadequacies, assuming their existence, are irrelevant to the presence or absence of monopoly power.

In any event, those attacks are ill-founded. For example, the Department of Justice argues, without any reference to legal authority, that the FPC lacks the power to order a utility to engage in wholesale service.^{40/} Yet, the FPC and the courts of appeals have plainly held to the contrary.^{41/}

Despite the FPC's authority in this regard, and despite the absence of any instance in which the Company has refused to serve at wholesale,^{42/} the Justice Department has called into question the Company's willingness to provide that service in all reasonable future circumstances. To put that unfounded speculation to rest, counsel for Consumers Power Company have been authorized to commit the Company, on the record of this proceeding and for the life of the Midland

^{40/} Justice Brief, p. 127.

^{41/} New England Power Co. v. FPC, 349 F.2d 258 (1st Cir. 1965) (firm wholesale power to non-generating retail distributor); Otter Tail Power Co. v. FPC, 473 F.2d 1253 (8th Cir. 1973) (coordination with small generating system); Florida Power Corp. v. FPC, 425 F.2d 1196, 1201-03 (5th Cir. 1970), rev'd on other grounds sub nom. Gainesville Utilities Dept. v. Florida Power Corp., 402 U.S. 515 (1971) (FPC has identical jurisdiction to order interconnection with generating and non-generating entities).

^{42/} Finding of Fact 4.02.

Units, to provide wholesale service at rates regulated by the Federal Power Commission to any present or future customer with which the Company does not have a coordination agreement, provided that such service is technically and economically feasible and can be furnished without jeopardizing the Company's ability to furnish economical, dependable and satisfactory service to its customers or to satisfy its obligations to other electric systems with which it is interconnected. This explicit commitment is consistent with the Company's past practices and dispels any suggestion that the Company has monopoly power over bulk power supply.

In pointing to another supposed deficiency of regulation, the Staff^{43/} argues that the FPC cannot compel interconnection; this view appears to confuse the FPC's emergency interconnection authority under §202(c) of the Federal Power Act,^{44/} with its general interconnection authority under §202(b).^{45/} It is patently incorrect to contend, as the Staff does without citation of authority other than the Federal Power Act's preamble,^{46/} that "[g]enerally, the FPC cannot compel system

^{43/} Staff Brief, p. 146.

^{44/} 16 U.S.C. §824a(c).

^{45/} 16 U.S.C. §824a(b).

^{46/} §§201(a) and (b), 16 U.S.C. §§824(a) and (b).

interconnection for purposes of coordinated operation" or that "the FPC cannot order large and small systems to ... engage in power exchanges that reduce power supply costs."^{47/}

More generally, the other parties also argue^{48/} that the existence of two areas of utility activity arguably not subject to FPC and MPSC regulation -- the initiation of wheeling and coordinated development programs -- suggests that Consumers Power can possess and exercise monopoly power.^{49/} No showing has been made, however, that these exceptions to the broad authority of the state and

^{47/} Staff Brief, p. 146. The Intervenor's try to find a significant gap in the impact of regulation in the Sierra-Mobile doctrine, which holds that FPC-regulated utilities that enter into contracts which later fail to provide them a reasonable return are nevertheless typically held to their contracts. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). See Borough of Lansdale v. FPC, 494 F.2d 1104 (D.C. Cir. 1974). However, that doctrine does not eliminate FPC authority over those contracts, as the Intervenor's would suggest, but merely shifts the regulatory standard the FPC is to follow in ascertaining what might "adversely affect the public interest." Sierra Pacific, supra, 350 U.S. at 355.

^{48/} Staff Brief, pp. 146-47; Justice Brief, pp. 123-26, 233-36.

^{49/} Of course, it is incontestable that the FPC has full authority to regulate the terms and conditions of coordinated development and wheeling arrangements once they are entered into. City of Huntingburg v. FPC, 498 F.2d 778, 783 (D.C. Cir. 1974); Boston Edison Co., FPC Dkt. Nos. E-8187 and E-8700, Order Granting Hearing on Petition for a Declaratory Order and Consolidating Proceedings (September 25, 1974), App. II-5.

federal commissions permit the exercise of monopoly power to the disadvantage of the smaller systems in Consumers Power's service area. As our adversaries concede, Consumers Power cannot control the price at which it sells wholesale or retail power and energy.^{50/} Neighboring systems may insist upon obtaining wholesale power from the Company and the Staff concedes,^{51/} may engage in a broad range of coordinated development and wheeling transactions with each other or with outside entities under the Company's announced wheeling policies. They may also insist on obtaining wholesale service from the Company.^{52/} The fact that Consumers Power may not be compelled by regulatory authority to engage in the coordinated development of generating facilities with its competitors does not mean that it thereby can acquire monopoly power over their generating capacity; that is, it does not mean they cannot plan and develop their own generation, and, indeed, they are currently in the process of so doing.^{53/}

Finally, the parties claim to find authority for the proposition that utilities must be presumed to possess monopoly power despite the presence of state and federal regulation.

^{50/} See p. 72, supra.

^{51/} Staff Brief, p. 74. The Company's wheeling policies are set forth in Finding of Fact 4.68.

^{52/} See pp. 77-78, supra.

^{53/} Finding of Fact 2.64.

The Staff and the Department of Justice argue that Congress disposed of the question by enacting Section 105 of the Atomic Energy Act.^{54/} Leaving aside the nexus-related issue of whether Congress intended to authorize a sweeping inquiry under Section 2 of the Sherman Act, there is absolutely nothing in the words of the statute or in its legislative history that suggests a congressional intent to raise a presumption that all elective utilities possess monopoly power.

The Intervenors' invocation of Otter Tail Power Company v. United States, 410 U.S. 366 (1973), as somehow dispositive of the role of regulation is even more surprising. Without citing a single passage in either the Supreme Court or the District Court opinion, the Intervenors premise their arguments on an extended quotation from the Otter Tail Power Company's brief which, they say, sets forth a rejected argument.^{55/} In reality, Otter Tail involved attempted monopolization in the retail market principally in states (Minnesota and South Dakota) which have no significant state regulation of electric utilities.^{56/} The Supreme Court expressly

^{54/} Justice Brief, pp. 97-98, 131-34; Staff Brief, p. 25.

^{55/} Intervenors' Brief, pp. 97-100.

^{56/} In its Brief for the United States at 62-63 n. 51, in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), the Justice Department pointed out that

noted that those elements of Otter Tail's activities that involved the bulk power market were thwarted by effective FPC regulatory action.^{57/} Therefore, Otter Tail illustrates rather than refutes the FPC's ability to deny monopoly power in the bulk power market. As such, it is a further example of the principle expressed, most recently in United States v. Marine Bancorporation, 94 S. Ct. 2856 (1974), that regulation may bar an inference as to a firm's market power.^{58/}

3. Primary Jurisdiction and Parker v. Brown.

The presence of extensive regulation in the electric utility industry is relevant to this proceeding in another respect as well. Under the doctrines of primary jurisdiction and of Parker v. Brown, 317 U.S. 341 (1943), independent antitrust review by the Atomic Energy Commis-

56/ (cont.)

Minnesota and South Dakota retail rates are not regulated by the States, and there is no effective municipal regulation except through the franchising process." Indeed, Minnesota does not even have a utility commission. North Dakota, in which Otter Tail also has some facilities, conforms to the more conventional pattern of state regulation. The Intervenor's seek to disparage this crucial distinction by referring to our anticipated reference to it as "much artistry." Intervenor's Brief, p. 100.

57/ 410 S. at 366, 371, citing Village of Elbow Lake v. Otter Tail Power Co., 40 FPC 1262 (1968), App. II-44, aff'd sub nom. Otter Tail Power Co. v. FPC, 429 F.2d 232 (8th Cir. 1970), cert. denied, 401 U.S. 947 (1971); Village of Elbow Lake v. Otter Tail Power Co., 46 FPC 675 (1971), App. II-45; aff'd as modified sub nom. Otter Tail Power Co. v. FPC, 473 F.2d 1253 (8th Cir. 1973).

58/ See Consumers Power Co. Brief, pp. 136-45.

sion should take account of, and avoid interference with, the regulatory authority and actions of other governmental agencies.

The briefs of the other parties never address or take account of these important antitrust principles. Indeed, although the Board asked the parties to address its impact on this case,^{59/} the only reference to Parker v. Brown in any of our adversaries' three briefs is a statement by the Staff that they are relying on the Justice Department position on this issue, a position not contained in the Department's brief.^{60/} Although we are confident Parker v. Brown will be discussed in the other parties' reply briefs, their initial failure to discuss this significant antitrust doctrine demonstrates, we submit, how far the approach of the other parties departs from accepted antitrust principles.

Regarding primary jurisdiction, the Department of Justice also seeks to skirt the heart of the issue.^{61/} It

^{59/} Tr. 9286.

^{60/} Staff Brief, p. 12.

^{61/} Justice Brief, p. 230-37. The Intervenor's deal with the primary jurisdiction doctrine in a footnote at p. 12. There they obliquely refer to the Brief for the Appellant in the Otter Tail case and to a series of totally irrelevant cases (e.g., Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana, 332 U.S. 507 (1947), which dealt with the relationship between the FPC and a state utility commission). From that purported authority, they extract a "thread" which appears to be a blanket denial that the primary jurisdiction doctrine has any force.

totally ignores that extensive body of law^{62/} holding that an antitrust dispute must be initially considered by the appropriate regulatory agency "when conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress."^{63/} Instead, without any citation to authority, the Department offers an intricate three-pronged test which in effect eliminates virtually all applications of the primary jurisdiction doctrine.^{64/}

Most surprising of all is Justice's bald assertion that "a finding by the AEC on the question of the inconsistency with the antitrust laws would obviously be binding on the FPC, as would the AEC's finding as to the basic measure of remedies which should be included in appropriate license conditions."^{65/} Not only does the Department fail to cite

^{62/} The most recent case of which we are aware is Abbott Securities Corp. v. New York Stock Exchange, 1974-2 Trade Cas. ¶75,324 (D.D.C. October 30, 1974), App. S-1. See also Industrial Communications Systems, Inc. v. Pacific Telephone and Telegraph Company, 1974-2 Trade Cas. ¶75,291 (9th Cir. October 4, 1974), App. S-8, in which the appeals court found that the California Public Utilities Commission had primary jurisdiction over an allegation that two telephone companies had conspired to dominate the one-way signalling business, and Monticello Heights, Inc. v. Morgan Drive Away, Inc., 1974-2 Trade Cas. ¶75,282 (S.D.N.Y. September 30, 1974), App. S-10, another case reaching the same conclusion concerning ICC regulation.

^{63/} Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 299-300 (1973).

^{64/} Justice Brief, p. 232.

^{65/} Justice Brief, p. 231.

any authority for this startling position, it silently passes over the Atomic Energy Act's squarely opposite language:

"Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale or transmission of electric power produced through the use of nuclear facilities licensed by the Commission...."^{66/}

In view of their silence concerning Parker v. Brown and their disparate efforts to read the primary jurisdiction doctrine out of antitrust law, we submit that the Company's views in this regard, as set forth in its main brief, are reinforced and confirmed.^{67/}

^{66/} §271, 42 U.S.C. §2018.

^{67/} As to primary jurisdiction, see Consumers Power Co. Brief, pp. 27-38; regarding Parker v. Brown, see id. at pp. 160-71.

C. The So-Called Bottleneck Theory.

The opposing parties argue that small electric suppliers should have preferential access to the bulk power facilities of their larger neighbors as a variation on their "bottleneck" theme. To do this, they attempt both to stretch the facts and to cut down the requirements of the law.

At various points in their briefs, the other parties suggest that the smaller systems require access to three resources in order to eliminate the purported bottleneck effect: nuclear facilities,^{64/} wheeling services^{65/} and coordinated development.^{66/} They present alternate explanations as to why these are "bottlenecked" resources. In some instances, they assert that these resources are essential to those systems. In others, they assert a right to access to all arrangements that might prove to be advantageous to the small systems because "the antitrust laws gives [sic] them the specific right to compete at wholesale on fair terms."^{67/}

^{64/} See e.g. Justice Brief, pp. 169-73, 218-23; Intervenors' Brief, pp. 15, 20-21, and 35-36; Staff Brief, pp. 117-30, 172.

^{65/} Justice Brief, pp. 103-112; Intervenors' Brief, pp. 22-26; Staff Brief, pp. 82-87.

^{66/} Justice Brief, pp. 113-20; Intervenors' Brief, pp. 29-37; Staff Brief, pp. 72-74, 154-56.

^{67/} Intervenors' Brief, p. 124.

First, the other parties totally fail to sustain their contention that these resources are, in fact, essential. In Part II of this brief, and in our principal brief,^{68/} we have reviewed the most extensively argued of these assertions, that pertaining to nuclear generation. Beyond that effort, our adversaries rely principally on bare assertions not supported by citation to the record of this proceeding. For example, the Staff asserts without more that:

"[Because Consumers Power Company owns most nuclear generation and high voltage transmission in its area], there exists in the relevant market area a bottleneck situation. This control over essential resources allows Applicant to determine how other electric systems in the relevant area participate in the bulk power services market." ^{69/}

With regard to wheeling, the only discussion which argues with any specificity that such services are essential to small systems is found in the Staff Brief, pp. 82-83. But that discussion merely speculates about the possible consequences of a utility's unbridled exploitation of physical control of transmission facilities. However, the Staff's brief in this regard is factually irrelevant to this case

^{68/} Consumers Power Co. Brief, pp. 147-50; pp. 15-23, supra.

^{69/} Staff Brief, p. 53.

because it disregards Consumers Power Company's broad policy commitment to provide wheeling service.^{70/} Since the Staff does not address how, under this commitment, some essential service relating to the Company's transmission facilities is being denied to the smaller systems, the Staff discussion about wheeling merely constitutes a sound thrashing of its poorly-constructed straw-man.^{71/}

Most surprising are the assertions by the Department of Justice that the Company may achieve a "bottleneck" effect through its ability to deny other entities access to "power exchange," i.e., coordination. The plain fact is that Consumers Power Company has never refused to engage in a reasonable coordination arrangement,^{72/} has adopted a wheeling policy that facilitates coordination transactions between its smaller neighbors^{73/} and may be required by the FPC to engage in coordinated operation when doing so is in the public interest.^{74/}

^{70/} The Staff concedes that the Company's wheeling policies facilitate coordination between small systems that are not themselves physically interconnected. Staff Brief, p. 74.

^{71/} A similar, although more abbreviated argument is to be found at Justice Brief, p. 187. The argument is defective for the same reasons.

^{72/} See Consumers Power Co. Brief, pp. 182-202, pp. 103-128, infra.

^{73/} See Consumers Power Co. Brief, p. 146, n. 103, pp. 128-136, infra.

^{74/} See Consumers Power Co. Brief, pp. 120-122; pp. 78-79, supra.

The Department's bottleneck analysis of coordination appears no more than an effort to recast its argument regarding the propriety of the terms of the Company's coordination agreements into the more dramatic framework of a denial of an essential resource. However, since the Company has never declined to engage in coordinated arrangements under reasonable terms, and conditions the Department is forced to resort to generalized observations about the difficulty of isolated operations.^{75/} These observations are, of course irrelevant to Lower Michigan where there are no isolated electric systems.^{75a/} In short, no showing of a denial of an essential resource, the obvious first step in a bottleneck analysis, has been made. Instead, the other parties have offered only naked assertions of essentiality and observations about factually non-existent circumstances.

Recognizing the weakness of their position in traditional bottleneck terms, the other parties assert they need not show that the denied resources are essential or unique but merely that they are desired -- or may be desired in the future -- by the smaller systems. For example,

^{75/} See e.g., Justice Brief, pp. 168 and 187.

^{75a/} Finding of Fact 2.05.

the Staff asserts that an electric supplier has a legal right to choose from all technically feasible alternatives:

"While many alternatives may be quite costly the right to have access to and choose the best alternative for a particular system is paramount to the continuation of the pluralistic industry as it exists today." 76/

Similarly, the Intervenors argue:

"The issue is not whether nuclear ownership is preferable to other forms of ownership or purchased power as an objective matter (assuming this can be determined with any degree of certainty), but whether the smaller systems shall have the opportunity to make that decision. The ultimate decision and responsibility for power supply should be that of the individual system and, in making this decision, small systems should not be foreclosed from nuclear access." 77/

In substance the argument is that: (1) Consumers Power Company has the power to foreclose certain alternatives to its neighbors which they would prefer to keep open; and (2) a business enterprise is disadvantaged by not having available the broadest possible range of alternative

76/ Staff Brief, p. 77. See also Justice Brief, pp. 106-112, quoting a number of public power officials and others to the effect that they would prefer to have alternatives open to them which they believe are controlled by Consumers Power Company.

77/ Intervenors' Brief, p. 21 n. (emphasis in the original).

approaches to its problems. This position is but a branch of their argument, which we have reviewed earlier,^{78/} for the imposition of an affirmative duty requiring a large firm to share its exclusively-owned resources with its smaller competitors.

The foregoing position is contrary to law. No such obligation is recognized under the antitrust laws (including Section 5 of the Federal Trade Commission Act).^{79/} The few cases the opposing parties cite in discussing their bottleneck concept do not support this argument. Rather, these cases all recognized that a resource must be functionally necessary to the denied party before bottleneck concepts have any role. In many of these cases, the resource withheld has been a physical necessity: the only bridge over the Mississippi River^{81/} or the only television station in an area.^{82/} In the others, the courts have required that

78/ See pp. 31-39, supra.

79/ See Staff Brief, p. 170. See Consumers Power Co. Brief, pp. 50-57.

80/ As we discuss infra, we submit that several of these cases are, in fact, not "bottleneck" cases at all.

81/ United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912).

82/ Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3d Cir. 1958); Six Twenty-Nine Productions v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966). Both cases involve denials of access to the sole television outlet in a market for local television commercials.

the denied resource be "needed in order to compete effectively".^{83/} For example, in Associated Press v. United States, 326 U.S. 1 (1945), the Court stressed the crucial importance of AP's service:

"AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of great consequence."^{84/}

Even then, the Court indicated its result was dependent on the conclusion that AP's membership provisions were "aimed

^{83/} Silver v. New York Stock Exchange, 373 U.S. 341, 347 (1963).

^{84/} 326 U.S. 1, 18, quoting the district court opinion (emphasis added). Contrary to the suggestion in the Staff Brief, p. 173, the Court did not reject the concept that the wire service must be "indispensable" [sic] to newspapers. What it rejected was the argument that AP service to other papers was not indispensable to newspaper readers because at least one paper in each city had access to it.

To similar effect is Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F.2d 484, 487 (1st Cir. 1952), cert. denied, 344 U.S. 817, where the court stressed that "it is only at the Building [the crucial resource] itself that the purchaser to whom a competing wholesaler must sell and the rail facilities which constitute the most economical method of bulk transport are brought together." (footnote omitted)

at the destruction of competition," a conclusion with no counterpart in this case.^{85/}

Thus, under existing law, an entity such as Consumers Power need not give its neighbors access to each and every resource which it uniquely possesses, but only those unique resources which are essential to those systems. Put in other terms, a possessor of a unique facility or capability is not required to advantage its competitors by joint ventures, forced leasing or other involuntary access, merely because such access would be, or might become, beneficial to the competitors.

In an attempt to refute the principles developed in these cases, the Department of Justice quotes the decision in the preliminary injunction phase of National Screen

^{85/} 326 U.S. at 13-14 and 17-18. To similar effect is Municipal Elec. Ass'n of Mass. v. SEC, 413 F.2d 1052, 1057 (D.C. Cir. 1969), cited by the Intervenor, at p. 63, a case concerned solely with an allegation of a conspiracy with the specific purpose "to prevent Municipals from obtaining any form of low cost bulk power..." Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 702 (1967), another case cited by the Intervenor, at p. 112, equally has no bearing on the issue of what can be a "bottlenecked" resource, holding only that when an antitrust violation is otherwise proven, the fact that the victim has remained prosperous is no defense.

Service Corp. v. Poster Exchange, Inc., 305 F.2d 647, 652 (5th Cir. 1962), to the effect that the "possibility of obtaining substitute facilities is not a sufficient answer if there is in fact a monopoly."^{86/} However, that statement, as the Fifth Circuit stressed in its later opinion on the merits, was directed to a contention that the plaintiff had waived his claim for treble damages by not seeking advantages available to him under a Justice Department consent decree.^{87/} The passage quoted by the Department refers to the waiver allegation; it is plainly not intended as an expansive definition of an "essential resource" under the "bottleneck" theory.

Consequently, the cases the other parties cite provide no support for the notion that a large firm must share a resource with its small neighbors merely because they would prefer to have that alternative available.

^{86/} Justice Brief, p. 119.

^{87/} Poster Exchange, Inc. v. National Screen Service Corp., 362 F.2d 571, 573 (5th Cir. 1966). The quoted language was

"In response to defendant's contention that plaintiff is in no position to complain of defendant's unlawful activity ... because plaintiff, under the protective provisions of a previous consent decree ..., could have applied to motion picture producers for its own non-exclusive licenses to manufacture and distribute motion picture advertising accessories...."

Instead, the cases underscore that a true standard of essentiality is applied in determining whether a bottleneck exists.

While the other parties' inability to demonstrate that any of the purportedly bottlenecked resources are "needed to compete effectively" weighs most decisively against them, their argument is wide of the mark in several other respects. First, in each of the cases upon which they rely an actual denial of the resource had occurred and monopolistic intent was inferred therefrom. Here, we submit, there has been no instance in which the resources in question have been unreasonably withheld.^{88/} Second, all of the cases in which bottleneck theories have been enunciated have involved a combination of two or more entities.^{89/} In its recent

^{88/} See Consumers Power Company Brief, pp. 146-47.

^{89/} id. pp. 152-53. Some of the other parties have cited cases involving only a single firm but that citation, we submit, is inaccurate. Six Twenty Nine Productions and Packaged Programs, supra, involved fully consummated monopolization of a market, the production of local television commercials, not merely the preliminary withholding of a resource. In the Otter Tail case, the Supreme Court failed to adopt the bottleneck concept referred to by the District Court. See Consumers Power Co. Brief, pp. 151-52.

Memorandum, the LP&L Hearing Board points to an important corollary derived from that fact, noting that "neither the Hearings of the Joint Committee on Atomic Energy nor the decided cases support the Cities' position that a sole owner of a facility must enter into a joint venture with competitors or any other entity."^{90/}

Accordingly, the other parties have neither met the accepted tests set forth in the cases adopting the bottleneck approach nor shown that a large firm's affirmative duty to share resources under all circumstances is, or should be, encompassed within the accepted parameters of the bottleneck theory. As we noted earlier, what they have offered in the guise of antitrust analysis is a policy argument promoting further public power subsidization -- a policy that Congress has explicitly declined to adopt.

^{90/} Louisiana Power & Light Co. (Waterford Steam Generating Station, Unit 3), AEC Dkt. No. 50-382A, 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 (October 24, 1974), p. 34.

D. Subsidies.

The other parties misconceive the relevance of the fact that most of Consumers Power's smaller neighbors enjoy significant tax and finance advantages. We do not claim these advantages as a justification for the Company's conduct but rather as an explanation of the impressive financial and competitive strength enjoyed by the municipal and cooperative systems despite their smaller size.^{91/} (See Findings of Fact 2.17-2.20, pp. 125-33 of our brief). This financial and competitive

^{91/} See Consumers Power Co. Brief, pp. 125-133. The citations, Justice Brief pp. 245-246, to American Federation of Tobacco Growers v. Neal, 183 F.2d 869 (4th Cir. 1950), and an oral ruling by the trial judge in United States v. Otter Tail Power Co., 331 F.Supp. 51 (D. Minn 1971), are consequently completely irrelevant. In those cases, the defendants asserted the advantages of their competitors as an excuse for predatory conduct. Consumers Power Company has never asserted that position. We, like the Justice Department, merely view those advantages as part of the market structure in which market power must be gauged.

Even further afield is the Department's reference in this regard, as with market definition, to a "how things might be in the future" approach in contending that the subsidies may be discontinued in the future, Justice Brief, pp. 241-43. All statutes -- including the Sherman Act and the Atomic Energy Act -- are, of course, amendable. As the Supreme Court has made clear, speculative future changes in relevant laws cannot appropriately be considered in antitrust analysis. See pp. 53-54, supra. Plainly, that conclusion, valid even in the face of a trend toward change as in United States v. Connecticut National Bank, 94 S. Ct. 2788 (1974), is inevitable where, as here, there is not the least indication that major changes are likely.

strength of the municipal and cooperative systems is, in turn, relevant to whether an inference of market power can be drawn from the Company's size or market share. United States v. Columbia Steel Co., 334 U.S. 495, 527 (1948).^{92/}

We have thus used these considerations in precisely the same way as has the Department's witness Helfman: as a real feature on the landscape of this industry which must necessarily be considered in any assessment of the industry's structure or of the effect that various arrangements might have -- whether those arrangements arise in the course of the dealings among the various utilities or as a remedy imposed by this Board.^{93/} Therefore, to adopt the course proposed by the Department and to ignore these subsidy advantages simply because they are the product of governmental action would clearly be improper.

^{92/} Staff Brief, p. 170, seemingly acknowledges this principle.

^{93/} See Justice Brief, p. 240.

- V. The briefs of the other parties do not demonstrate that the Company's conduct has been unreasonable or that such conduct is evidence of improper intent.

The proponents of license conditions in this proceeding charge that Consumers Power Company has acted improperly in various of its dealings with smaller neighboring systems. Most of these complaints concern the Company's practices and policies related to coordination and wheeling; other allegations deal with territorial allocation agreements, the acquisition of other systems, and the alleged "tying" of wholesale service.

A. Coordination and Wheeling.

The other parties devote considerable space to allegations that the Company wrongfully refused to coordinate and has imposed coordinating terms that are onerous, discriminatory, anticompetitive in intent and effect, and which amount to the extraction of monopoly profits. In order to make these assertions, the other parties must do considerable violence to the record. Further, they simply ignore such principles of coordination as reciprocity and the need for mutual benefits and treat as irrelevant the undisputed fact that coordination arrangements made without regard to these principles will sometimes have adverse effects on the Company and its customers.

Stripped of their rhetoric, the allegations of the

other parties fall into three categories, none of which supports a finding of improper conduct. First, they charge that Consumers Power Company has not agreed to every request for coordination it has ever received, including those that offered the Company no benefit. Next, they charge that Consumers Power Company has not acceded to every request made by other parties during contract negotiations, including those which would sometimes impose a net detriment on the Company. Finally, they charge that the Company has not agreed to a considerable number of coordinating arrangements for which it had never been asked. Thus our adversaries insist on analyzing the Company's conduct not in terms of whether it was reasonable but rather in terms of whether the Company has granted and affirmatively offered every possible advantage to smaller systems -even at the cost of burdening itself and discriminating against its other customers.

This "maximum advantage" standard goes far beyond anything that is required by existing antitrust law. As we have argued elsewhere, the antitrust laws impose no general and unqualified duty to deal with others.^{1/} Even with regard to collective enterprises from which others may not unreasonably be excluded, and even where denial of entry might result in

^{1/} Consumers Power Co. Brief, pp. 183-84.

serious injury, it is axiomatic that entry may be premised on reasonable conditions.^{2/}

While no universal standard of reasonableness can be extracted, substantial deference has always been shown in the collective enterprise cases to the reasonable business judgment of those granting entry. Thus in Zuckerman v. Yount, 362 F. Supp. 858, 863-64 (N.D. Ill. 1973), a case concerning membership in the Midwest Stock Exchange, the court adopted the Department of Justice position that "as long as an exchange acts in good faith and follows fair procedures antitrust liability would not turn upon whether an exchange had reached what a court subsequently determines to be the 'right' decision." (Emphasis in the original.)

^{2/} Deeson v. Professional Golfers Ass'n, 358 F.2d 165 (9th Cir. 1966), cert. denied, 385 U.S. 846; Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Ass'n, 371 F.2d 263 (7th Cir. 1967), cert. denied, 387 U.S. 909; Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365, 1368-70 (9th Cir. 1970); Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484, 487 (1st Cir. 1952), cert. denied, 344 U.S. 817; Roofire Alarm Co. v. Royal Indemnity Co., 202 F. Supp. 166 (E.D. Tenn. 1962), aff'd per curiam, 313 F.2d 635 (6th Cir. 1963).

Thus, this and other cases^{3/} demonstrate that a considerable sphere is reserved for the subjective business conclusions of those with whom a right to deal is sought.

Under the antitrust laws, a would-be participant in an inter-system coordination arrangement is entitled to insist only that the proposed terms be reasonable, not the most reasonable available option or the option he would most prefer. In an analogous situation, the court in Rogers v. Douglas Tobacco Board of Trade, 244 F.2d 471 (5th Cir. 1957), upheld the authority of a tobacco board to allocate selling time on a basis deemed to be "not unreasonable" although other reasonable alternatives less discriminatory toward a new entrant were available. Similarly in Deeson v. Professional Golfers Ass'n, 358 F.2d 165 (9th Cir. 1966) cert. denied, 385 U.S. 846, the PGA was allowed to favor

3/ In Gamco, *supra*, at 487 the court held that appropriate standards for excluding new tenants from a crucial business facility could include "lack of available space, financial unsoundness, or possibly low business or ethical standards...." In Roofire, Underwriters Laboratories, an insurance industry clearing house, was held justified in applying threshold standards in determining whether equipment is to be tested. In Deeson, the PGA was upheld in relying on the "opinion" of certain officials regarding a player's "ability to play golf and finish in the money ... financial responsibility ... and ... moral character and integrity." (358 F.2d at 167). In Bridge Corp. of America, judgments intended to preclude "a situation where the integrity of the master point system ... would be questioned" (428 F.2d at 1370) were approved.

its own members over other qualified players in choosing tournament participants so long as it asserted a rational basis for its preference.^{4/} Given these principles, the Company's particular policies and practices discussed below cannot be faulted under the antitrust laws.

1. Refusals to coordinate.

Consumers Power Company has entered coordination agreements with all Lower Michigan systems which have requested such an arrangement. These systems include the City of Holland, the Lansing Board of Water and Light, and the MMCPP whose members are Northern Michigan Electric Cooperative, Wolverine Electric Cooperative, the City of Grand Haven and Traverse City.^{5/} The only party which appears to disagree is the Staff, which persists in ignoring the coordination arrangement signed in September 1973 between the Company and the four MMCPP systems.^{6/}

^{4/} 358 F.2d at 170-71.

^{5/} Finding of Fact 4.28.

^{6/} The Staff's discussion of the Company's "Intersystem Relationships" omits all reference to the Company's coordination agreement with the MMCPP. Staff Brief, pp. 46-52. At another point, the Staff flatly asserts, relying not on the record but on the Justice Department's 1971 Advice Letter, that in 1969 the Company engaged in negotiations with the MMCPP but those negotiations "were not fruitful." Staff Brief p. 143. The coordination

(cont.)

More broadly, however, our opponents allege that Consumers Power Company wrongfully refused to coordinate (1) with Northern Michigan and Wolverine cooperatives in 1964, (2) with Northern Michigan in 1967, (3) with Traverse City in 1968, and (4) with the MMCPP in 1969. In our main brief, we discussed the first two of these instances and demonstrated that Northern Michigan and Wolverine were deficient in generation capacity in 1964 and that Northern Michigan was still deficient in 1967. Hence, these proposed arrangements offered no prospect of benefits for the Company.^{7/} The charges involving Traverse City and MMCPP are even more plainly without merit since they simply did not involve refusals to coordinate. Mr. Wolfe testified that in 1968 the Company offered to coordinate with Traverse City but the city chose instead to enter the MMCPP arrangement.^{8/} Finally, contrary

6/ (cont.)

contract between Consumers Power Company and the four members of the MMCPP offered in evidence by the Department of Justice, plus uncontradicted testimony on the record confirm that negotiations between the Company and the MMCPP did, in fact, produce an agreement. Finding of Fact 4.28; Exhibit 105; Steinbrecher 1141, 1492; Keen 4497-4501.

7/ Findings of Fact 4.20-4.23; Consumers Power Co. Brief, pp. 192-93.

8/ Justice Brief, p. 153; Staff Brief, p. 100; Wolfe 1564, 1767. Mr. Paul, who recalls differently, testifies that the Company declined to coordinate when it found that an agreement with Traverse City offered no net benefits. Paul 7924-25.

to the charges made by the Staff, the negotiations with the MMCPP led a coordination agreement.^{9/}

Turning to the scope of the Company's various coordination arrangements, we have previously set out the types of transactions for which each of these contracts provide.^{10/} The other parties appear to dispute our findings both in broad outline and in narrow particulars.^{11/} Their

^{9/} Exhibit 105. It is well established that an organization operating a technically complex enterprise may conduct a thorough and, if necessary, extended review of, and negotiations about, any proposed change in its arrangements without giving rise to any inference that a refusal to deal is intended. See, e.g., Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365, 1368-70 (9th Cir. 1970). This principle is equally applicable when that prolonged review ultimately demonstrates that a refusal to change the existing arrangements would be unreasonable. Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154, 159 (D. Ore. 1966), aff'd, 399 F.2d 155 (9th Cir. 1968), cert. denied, 393 U.S. 1024 (1969).

^{10/} Findings of Fact 2.79-2.85.

^{11/} They charge the Company with refusing to deal with its municipal and cooperative neighbors "on the same basis" as it deals with other systems in matters of wheeling, coordinated development, and access to nuclear power. Staff Brief, p. 87. They also advance the more particular assertions that the Company has "agreed ... to coordinate ... development" with Ontario Hydro [Staff Brief, p. 49], that it is interconnected with Lansing and Holland only "[to] a limited degree" [Staff Brief, p. 52], and that its agreement with Lansing is "limited to the transfer of energy during emergencies" Staff Brief, p. 52.

contentions are wholly without support in the record and are belied by the extensive authority, chiefly the contracts themselves, on which our Findings of Fact rely.

2. Reserve-Sharing Practices.

Perhaps the most persistent indictment advanced by the other parties is that the Company is guilty of a variety of misdeeds related to the terms on which it shares reserves and exchanges emergency capacity and energy with neighboring municipal and cooperative utilities. On the one hand, they contend -- without qualification and citing no support in the record -- that equal percentage reserve formulas are "ordinary" in the industry and invariably represent a fair, equal and non-discriminatory arrangement for emergency power.^{12/} Conversely, they charge that reserve-sharing provisions found in the Company's contracts with its smaller neighbors are discriminatory,^{13/} "onerous"^{14/} and "nothing more than a complicated way of charging a monopolist's price."^{15/}

^{12/} Justice Brief, p. 149; Intervenors' Brief, p. 133.

^{13/} Intervenors' Brief, pp. 38-40.

^{14/} Id., p. 40.

^{15/} Justice Brief, p. 153. Similarly, the Intervenors characterize any departure from equal percentage reserves as an unwarranted "admission fee." Intervenors' Brief, p. 129.

The record of this proceeding offers no authority for these various allegations and often contradicts them. For example, it is not true either that the terms on which Consumers Power Company exchanges emergency capacity and energy with municipal and cooperative systems are "invariably based on some kind of 'largest unit' formula"^{16/} or that "due to the requirements forced upon it by Applicant, Lansing has been forced to operate with almost 100% reserve capacity."^{17/} On the contrary, the Company's coordination agreement with Lansing and the testimony of Lansing's system manager conclusively demonstrate that Lansing's reserve obligation (1) is totally unrelated to unit size and (2) now amounts to less than 20 percent of its annual peak load.^{18/} This represents a lower percentage

^{16/} Intervenors' Brief, p. 40.

^{17/} Intervenors' Brief, p. 20n.

^{18/} According to its coordination contract with Consumers Power Company, Lansing's reserve responsibility is stated in terms of a specified level of spinning reserves, with no reference at all to unit size. Exhibit 11, 112. Its spinning reserve responsibility is 70 mw until 1977 when, pursuant to Lansing's request, it will be reduced further to 35 mw. Finding of Fact 4.39.

Further, Mr. Brush testified that while both parties meant the contract to be silent on the matter of installed reserves, "the spinning actually becomes the installed responsibility." Brush 2140. Mr. Brush, the Board will recall, is the General Manager of the Lansing Board of Water and Light who negotiated the contract here in question. Brush 2067, 2085.

(cont.)

quickly."^{20/} In fact, Mr. Brush was silent on his system's needs and said only that Lansing "could not accept" the offer and "subsequently thereto rejected it in writing."^{21/} Similarly, the Department cites Mr. Brush for the proposition that "the arrangement which Lansing ultimately obtained was still not as favorable to it as the Gainesville formula would have been."^{22/} Mr. Brush, however, said nothing of the kind.^{23/} Rather, his testimony -- when read together with the contract he negotiated -- demonstrates beyond question that the arrangement which Lansing ultimately received was very favorable indeed.^{24/} Moreover, in a document written to his supervisors, Mr. Brush expressed his satisfaction with the new arrangement and lauded the Company for treating Lansing in the same way it treats large, investor-owned systems.^{25/}

20/ Justice Brief, p. 152.

21/ Brush 2111. This transcript page is the sole authority cited by the Department for the contention set out in the preceding sentence of our text.

22/ Justice Brief, p. 152.

23/ We specifically refer the Board to transcript page 2140 on which the Department purportedly relies.

24/ See n. 18, supra.

25/ Exhibit 242.

Still seeking evidence of the Company's discriminatory conduct, the Department again departs from the record with its assertion that the MMCPP accepted its coordination agreement with Consumers Power Company only "reluctantly."^{26/} The Department does not cite to, and the record does not contain, a single shred of evidence to support this characterization of the MMCPP's attitude.

More generally, the Department and the Intervenors claim that compensation for emergency power provided on an "if and when available basis" is "ordinarily the return of the service in kind with each participant maintaining the same percentage of reserves to load."^{27/} They also charge that a reserve requirement which takes account of unit size is a "monopolist's price," provides "more of the form than the substance of genuine reserve sharing," and constitutes an unreasonable "admission fee."^{28/} This argument is wholly without authority in the record.^{29/}

^{26/} Justice Brief, p. 151.

^{27/} Justice Brief, p. 149.

^{28/} Justice Brief, pp. 151-153; Intervenors' Brief, p. 129.

^{29/} On page 149 the Department provides the form but not the substance of authority. After its assertion that "compensation is ordinarily the return of the service in kind with each participant maintaining the same percentage of reserves to load", the Department cites three portions of the record. None support the quoted propo-

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For example, the assertion that Consumers Power has exacted a "monopolist's price" from certain of its coordination partners is crucially deficient since there is no credible claim -- much less, proof -- that the Company has actually received an inequitable or unreasonable share of the benefits of any of its coordination agreements. Furthermore, it ignores the testimony of witnesses Mayben and Slemmer that the benefits which have flowed to Consumers Power Company from these agreements are extremely limited.^{30/}

We believe that our main brief has adequately anticipated the deficiencies in our adversaries' position concerning reserve-sharing and that a detailed review of our position here would serve no useful purpose.^{30a/} Suffice it to say that despite their effort to ignore or obscure the facts, the other parties' argument cannot be reconciled with the following uncontradicted principles of record in this proceeding:

(1) what matters in reserve-sharing is system reliability,

29/ (cont.)

sition. In fact, pages 1212-13 are the introductory "title" and "content and exhibits" pages from the November 29 hearing. Even if what they meant was 5212-13, those pages provide no authority for this central proposition.

30/ Mayben 2690; Slemmer 28-29 after 8838.

30a/ Consumers Power Co. Brief, pp. 197-202.

not unit reliability^{31/} and that a system has lower reliability if it relies on a few very large units than if it relies on a larger number of smaller units;^{31a/} (2) coordination with other systems on the basis of equal percentage reserves will sometimes result in net detriment and inequitable burden to the Company and its customers;^{32/} and (3) if the Company's reserve sharing policies or practices are in any respect improper, the Federal Power Commission can remedy the situation but, to date, it has not seen fit to do so.^{32a/}

31/ The Intervenors particularly seek to confuse this point. On page 40 of their brief they claim that a reserve formula which takes account of the degree in which a system has concentrated its generation capacity in a few large units "results in far greater reserves [sic] requirements by the smaller systems as a proportion of their load, even though there is no showing that such systems' units have lesser reliability." We concede that such a formula may require systems with units disproportionately large in relation to their loads to keep somewhat larger reserves. This, however, simply corresponds to the engineering fact-of-life that the reliability of those systems is lessened by such concentration of generation. Finding of Fact 4.46. It matters little to a coordination partner that another system may have reliable units if its system as a whole is unreliable. The Intervenors' suggestion that unit reliability is all that matters is pure sophistry.

31a/ Finding of Fact 4.45.

32/ Findings of Fact 4.45, 5.09.

32a/ Consumers Power Co. Brief. pp. 120-124.

In sum, the briefs of the other parties -- misleading as they are concerning reserve-sharing -- make no case against the Company.

3. Coordinated Development Policies.

The other parties to this proceeding assert that coordinated development, even between very large and very small systems, is standard in this industry. They then charge that Consumers Power Company has departed from these norms and discriminated against neighboring municipal and cooperative systems by failing to coordinate planning and development and by failing to offer direct and preferential access to the Midland facility. Finally, they characterize these alleged failures as an unlawful refusal to deal. Each of their claims is fundamentally in error.

a. Industry Practice.

The Department announces that it is "standard among neighboring utilities" to engage in coordinated development.^{33/} As proof, it relies on two documents which, it claims, outline "the various forms of coordination taking place throughout the country today between utilities of equal bargaining strength."^{34/}

^{33/} Justice Brief, p. 148, 148n.

^{34/} Justice Brief, p. 148n.

This "proof" fails completely. Neither document purports in any way to assess what is "standard" in this industry.^{35/} Nor do they support the proposition that the arrangements they discuss will necessarily offer the mutual benefits that provide the incentive to agreement or that these are the arrangements or the particular terms that will be agreed upon among systems of "equal bargaining strength." Indeed, to the extremely limited extent these documents speak to topics here in controversy, it is only to confirm the Company's position that wholesale purchases permit small systems to enjoy the benefits of coordination.^{36/}

The Staff similarly argues that the participation of small systems in coordinated development -- including the coordinated development of nuclear capacity -- is "character-

^{35/} One document is intended only "to assist electric utility systems in developing contractual arrangements whereby they may derive the attainable benefits of coordination." Exhibit 167 pp. "39003 and 39001". The other document merely presents "several methods of owning and selling generating capacity ... to be considered should neighboring utilities conclude it is to the mutual benefit to buy or sell generating capacity to each other or to own a plant jointly." Exhibit 234, introductory memo and Forward (emphasis added).

^{36/} According to Exhibit 167: "It is obvious that when systems are approximately the same size, there are fewer problems to resolve in determining an equitable distribution of the benefits and responsibilities.... In many instances, it is advantageous for the small system to buy wholesale energy from a pool. In so doing they share in the benefits of the pool because of their ability to purchase reliable power at a low cost." (pp. 39007-39008).

istic" in other areas of the United States.^{37/} They are able, however, to cite only one intersystem coordination agreement in which coordinated development with small systems is being undertaken: the New England Power Pool Agreement. Even among the other arrangements they discuss, none offers proof for their argument. These include the Washington Public Power Supply System,^{38/} WEST,^{39/} Northwest Power Pool, the Pacific Northwest Coordination Agreement,^{40/} the Rocky

^{37/} Staff Brief, pp. 136-142.

^{38/} While it is apparently involved in coordinated development, the Washington Public Power Supply System is anything but the product of an "intersystem coordination arrangement". Instead, it is "A Municipal Corporation and a Joint Operating Agency of the State of Washington". Staff Brief, Appendix G. According to the source on which the Staff relies, municipals, public utilities, districts or rural cooperatives need only choose to participate. National Power Survey, III-3-197.

^{39/} The Staff offers no evidence that WEST engages in coordinated development. Indeed, all that is alleged is that some, though apparently not all, of its members undertook joint development of a nuclear facility and offered some form of ownership participation to smaller systems. It appears, however, that none of the smaller systems chose to participate. Staff Brief, pp. 137-138.

^{40/} The Staff does not suggest that either the Northwest Power Pool or the Pacific Northwest Coordination Agreement provides for coordinated planning and development. Staff Brief, pp. 138-139.

Mountain Power Pool,^{41/} and PJM.^{42/} Thus, neither the Department nor the Staff offers any substantial evidence that coordinated development, whether among large systems or between large systems and small ones, is standard in, or characteristic of, the market in which Consumers Power Company operates.

41/ The Staff discusses the Rocky Mountain Power Pool (Staff Brief, p. 140) only in the context of the following language in the National Power Survey:

"Small systems may also be able to act in concert to install large units at much lower cost than would be possible if they supplied all their own needs from generating capacity within their system. To accomplish this objective, these systems may find it desirable to participate in wheeling arrangements to deliver power from such jointly sponsored plants without themselves constructing transmission lines. This type of wheeling arrangement ... has received acceptance by utilities in the Rocky Mountain Power Pool..." (p. III-3-1966).

The Board will recall that the Staff itself quotes the testimony of Mr. Aymond to the effect that Consumers Power Company could work out such an arrangement as this for neighboring utilities. Staff Brief, p. 74.

42/ The Staff errs with respect to PJM. It asserts that there are three municipal members. This is incorrect. While the municipals are interconnected with members of PJM they are not members, satellite or otherwise. Indeed, the National Power Survey on which they rely (p. II-1-78) points out that:

"Because these systems are so small, they have no substantive effect on area reliability, capacity planning, or operation. From the pool's viewpoint there is no engineering or financial benefit through inclusion of these very small systems in the power pool, since their scale of operations does not contribute any reduction in overall cost to the area which is not already available within PJM."

Nevertheless, the record does contain substantial evidence as to what coordinated development arrangements are reasonable and consistent with industry practice. For instance, we have previously demonstrated that a prerequisite to coordination is the reasonable prospect that the parties will derive meaningful and reciprocal benefits.^{43/} Although the Department cites the Company's requirement of "mutual benefits" as "nothing more than its insistence upon exacting the advantage of its monopoly position",^{44/} it has found no antitrust inconsistency, and no need for a Section 105 hearing, in the comparable coordination policies of many other systems.^{45/}

^{43/} Findings of Fact 4.13 - 4.15.

^{44/} Justice Brief, p. 7.

^{45/} See, e.g., the following letters of advice released by the Attorney General:

Virginia Electric and Power Company (North Anna Power Units 3 and 4), AEC Dkt. Nos. 504A and 50-405A, 37 Fed. Reg. 16221 (August 11, 1972): "1. Vepco will interconnect with any neighboring utility if it can be shown that benefits accrue to both parties, and the benefits to Vepco exceed the costs to Vepco.

"2. Vepco will interchange electric bulk power with any neighboring utility when net benefits accrue to both parties."

Carolina Power and Light Company (Shearon Harris Power Units 1, 2, 3 and 4), AEC Dkt. Nos. 50-400A, 50-401A, 50-402A and 50-403A, 37 Fed. Reg. 18016 (September 16, 1974): "Bulk power supply arrangements should be such as to provide benefits, on balance, each to Applicant and the other participant(s), respectively. The benefits to participants in such arrangements need not be proportionately greater than those realized by a larger system."

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Furthermore, we have shown that reciprocity is particularly

45/ (cont.)

Virginia Power and Light Company (Surry Power Station Units 3 and 4), AEC Dkt. Nos. 50-434A and 50-435A, 38 Fed. Reg. 32596 (November 27, 1973): "Bulk power supply arrangements should be such as to provide net benefits both to Applicant and to the other participant(s), respectively. The benefits to participants in such arrangements need not necessarily be equal and the benefits realized by a small system may be greater than those realized by a large system."

Duke Power Company (Oconee Units 1,2 and 3, McGuire Nuclear Station Units 1 and 2, Catawba Nuclear Station Units 1 and 2), AEC Dkt. Nos. 50-269A, 50-270A, 50-369A, 50-370A, 50-413A, 50-414A, 39 Fed. Reg. 17461 (May 16, 1974): "Any particular bulk power supply transaction may afford greater benefits to one participant than to another. The benefits realized by a small system may be proportionately greater than those realized by a larger system. The relative benefits to be derived by the parties from a proposed transaction, however, should not be controlling upon a decision with respect to the desirability of participating in the transaction. Accordingly, Applicant will enter into proposed bulk power transactions of the types hereinafter described which, on balance, provide net benefits to Applicant. There are net benefits in a transaction if Applicant recovers the cost of the transaction ... and there is no demonstrable net detriment to Applicant arising from that transaction."

Illinois Power Company (Clinton Power Station Units 1 and 2), AEC Dkt. Nos. 50-461A and 50-462A, 39 Fed. Reg. 15898 (May 6, 1974): " . . . The arrangement should also be reciprocal as nearly as may be although it is recognized that, in any particular arrangement, the benefits may not be equal or identical for each party and that a smaller electric system may realize benefits which are greater than those obligated to enter into an arrangement if it would realize no net benefits from the arrangement, or if the arrangement would result in net burdens to the party."

Emphasis added to each excerpt.

a prerequisite to a coordinated development agreement.^{46/}
Hence, it is neither reasonable nor "standard" in this industry for a system to enter into a coordinated development arrangement without regard either to the availability of mutual benefits or to possible harm to the system and its customers. Nor, indeed, do the antitrust laws require even a collective enterprise to enter transactions without regard to harm which may result.^{47/}

b. Discrimination.

The Staff next charges that the Company has discriminated against neighboring municipal and cooperative systems by failing to coordinate development with those systems and to grant them direct and preferential "access to nuclear power."^{48/} In addition to their claims of what is "standard" in the industry, the other parties support this charge by insisting, for instance, that while the Company has agreed to coordinate development with Ontario Hydro,^{49/} it never offered participation in its Ludington facility to its smaller neighbors.^{50/}

^{46/} Finding of Fact 4.17.

^{47/} See cases cited at 101 n. 2, supra.

^{48/} Staff Brief, p. 87.

^{49/} Staff Brief, p. 49.

^{50/} Intervenors Brief, p. 37n.

First, there is no basis whatsoever for the Staff's general and undocumented complaint that the Company has failed to grant smaller systems access to nuclear power "on the same basis as Consumers treats other privately owned utilities."^{51/} The record establishes that, subject only to the imposition of license conditions to the contrary, the Midland Units will be owned and operated exclusively by Consumers Power Company. There are no arrangements of any kind which will entitle other entities to receive electric power directly from these particular units.^{52/} Furthermore, there is no evidence of record that Consumers Power Company has built or is planning to build any nuclear facility on any other terms. Thus in granting "access to nuclear power" the Company has treated all systems, large and small, in precisely the same manner.

Next, there is no substance to the Staff's charge that the Company has refused to grant municipal and cooperative systems coordinated development "on the same basis as Consumers treats other privately owned utilities."^{53/} The Company engages in coordinated development only in the context of the Michigan Pool^{54/} -- and the Department of Justice has already approved the standards which govern the admission

^{51/} Staff Brief, p. 87.

^{52/} Findings of Fact 1.02 and 1.03.

^{53/} Staff Brief, p. 87.

^{54/} Finding of Fact 4.26.

of additional parties to that arrangement.^{55/} Similarly, the Staff is simply wrong when it asserts that the Company has "agreed ... to coordinate ... development" with Ontario Hydro.^{56/}

Finally, the Intervenors' claim that they were not offered participation in the Company's Ludington Pumped Storage plant totally lacks credibility.^{57/} They cite no authority for this proposition and the record contains uncontradicted evidence to the contrary. In 1967, an officer of Consumers Power Company discussed with representatives of the Northern Michigan Electric Cooperative, the MMCPP's engineering consultants, and the staff of the Michigan Public Service Commission the availability to other systems of unit power from Ludington.^{58/} The Company

^{55/} Except for the Michigan Pool agreement, none of the Company's coordination agreements with either large systems or small ones provide for the parties to engage in coordinated development. At the same time, however, none of those agreements prohibit any party from engaging in coordinated development on mutually acceptable terms and conditions. See Finding of Fact 2.85 for extensive citations of the contracts.

^{56/} Staff Brief, p. 49. See Finding of Fact 2.85.

^{57/} Intervenors' Brief, p. 37n.

^{58/} Finding of Fact 4.56. Specifically, the Department's witness Steinbrecher specifically testified that "Mr. Campbell mentioned the oncoming Ludington facility to us during negotiations, and indicated that there might be peaking capacity available from that facility." Steinbrecher 1897. Mr. Campbell was at that time Vice President in charge of Marketing for Consumers Power Company.

received no response or other expression of interest from the cooperatives, the MM CPP, or any other system.^{59/}

c. Alleged Refusals to Deal.

The record of this proceeding is devoid of proof that neighboring municipal and cooperative systems ever requested coordinated development or participation in nuclear facilities prior to the initiation of this proceeding. Undeterred, the Staff nevertheless charges that the Company's alleged failure to grant non-discriminatory access to nuclear power constitutes an unlawful refusal to deal with municipal and cooperative systems.^{60/} The charge is detailed in two parts. One concerns the Company's failure to accede to certain requests for access to Midland which have been made subsequent to the initiation of this proceeding. we deal with this complaint shortly.

The other part of the Staff's charge is that "Consumers Power has never taken the initiative in offering nuclear power benefits to the small electric utilities systems in the relevant market."^{61/} This, then, is an argument that, standing totally apart from any other conduct, the Company's failure to "take the initiative" in offering

^{59/} Finding of Fact 4.56.

^{60/} Staff Brief, p. 87.

^{61/} Staff Brief, p. 89.

smaller systems direct and preferential access to its nuclear facilities constitutes an unlawful refusal to deal. This novel proposition, urged so tenaciously by the Staff, is completely foreign to this nation's antitrust laws.

"In a successful action for refusal to deal, it is essential that the plaintiff show that he has made a demand or request on the defendant."^{62/} Indeed, the plaintiff's failure to make a demand on the defendant has been held to be fatal even when the plaintiff insists that the making of the demands would have been fruitless.^{63/}

This requirement is neither rigid nor mechanical.^{64/} Nevertheless, exceptions have only been made on those rare occasions when it is proven that the failure is specifically attributable to conduct by the defendant which has the effect of an explicit refusal. Thus, a licensing board of this Commission held the failure to make numerous requests for access not to be fatal in Louisiana Power and Light Co., only where

^{62/} Saunders v. National Basketball Ass'n., 348 F. Supp. 649, 655-656 (N.D. Ill. 1972).

^{63/} Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246 (2d Cir. 1959), cert. denied, 361 U.S. 885; Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561 (7th Cir. 1951), cert. denied, 342 U.S. 909 (1952); Dahl, Inc. v. Roy Cooper Co., Inc., 448 F.2d 17 (9th Cir. 1971); 608 Hamilton Street Corp. v. Columbia Pictures Corp., 244 F. Supp. 193 (E.D. Pa. 1965).

^{64/} Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

"the self-expression of Applicant's representatives is so firm, so resolute, and so unyielding as to cause others to despair of further fruitful discussion or negotiation."^{65/}

The Department takes a tack which is only slightly different from the Staff's. It adds, more by assertion than by proof, the charge that the Company is responsible for this failure on the part of the smaller neighboring systems to make a request. Specifically, it is argued that the Company's "reluctance or outright refusal to join with the smaller systems in the elementary forms of coordination, such as reserve sharing" chilled "any realistic expectation that those systems could have had for the more advanced and sophisticated kinds of coordination."^{66/} However, this claim of "chilling" cannot on its face apply to most of the potential coordinated development partners.

The Department's "chilling" theory cannot account for the failure of such systems as Lansing and Holland to seek participation in the Midland Plant, Consumers Power

^{65/} Louisiana Power and Light Co., (Waterford Steam Generating Station, Unit 3), AEC Dkt. No. 50-382A, 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 (October 24, 1974), p. 21.

^{66/} Justice Brief, pp. 164-65.

Company has long engaged in reserve sharing and other forms of coordination with those systems.^{67/} Similarly, Mr. Wolfe testified that the Company offered to coordinate with the Traverse City system in 1968.^{68/} Thus it cannot be said that the Company's "reluctance or outright refusal" to coordinate operations with these three systems explains their failure to ask for access to Midland until 1971. Similarly, in 1967 the Company discussed with representatives of the MMCP the availability of unit power from the Ludington plant.^{69/} These systems have thus long been on notice that the Company would consider coordinating development.

Even if the Department's theory could be applied to these systems, there remains a hole in its logic. The Department argues that the Company, in agreeing to coordinate only with self-sufficient systems somehow created in the minds of neighboring systems a sufficiently firm conviction that the Company would never coordinate development (e.g. joint venture) even with a self-sufficient system, so that they were released from their normal obligation to inquire.^{71/} However, the

^{67/} Exhibits 91; 11,112; 99; 100-103; 12,024.

^{68/} Wolfe 1564, 1767; Justice Brief, p. 153; Staff Brief, p. 100.

^{69/} See pp. 121-122

^{71/} We have demonstrated in detail that Consumers Power's refusal to coordinate operations and share reserves with non-self-sufficient systems has been reasonable.

Department offers no evidence that the system managers actually held that attitude at the time. Further, there was nothing in the Company's conduct from which a system could have concluded that if it was or became self-sufficient, and if it proposed a joint venture in a nuclear plant, the Company would have refused out of hand. Hence, this Board has been shown no evidence at all of such explicit conduct as "self-expression . . . so firm, so resolute, and so unyielding as to cause others to despair of further fruitful discussion or negotiation."^{72/}

Finally, there is no merit in the Staff's complaint that the Company has acted unlawfully in failing to accede to various requests^{73/} for "access" to Midland which were made

71/ (cont.)

We have further demonstrated that the other side's myriad complaints are without substantial foundation. Consumers Power Co. Brief, pp. 182-202; pp. 99-151 of this Reply. Hence, the neighboring systems could not properly have drawn negative conclusions regarding the Company's attitude on coordinated development from those practices.

72/ Louisiana Power and Light Co., supra, p. 21.

73/ The Department cites MMCP representative Wolfe's testimony to the effect that these requests were simply a part of the scheme of this litigation. Thus he declares that in 1971 "it was felt that these particular requests should be documented and made clear for the record" Justice Brief, p. 166. If it was ever unclear whether the Company acted reasonably in responding to these requests only in the due course of this litigation, the question has now been set to rest.

subsequent to the initiation of this proceeding. It is undisputed that the Company's intention to construct the Midland facility was well publicized as early as 1967^{74/} and that the size of the facility was established in that year.^{75/} For reasons the Staff does not even try to explain in terms of any conduct by the Company, the smaller systems did not request "access" to Midland until four years after the size of these units was fixed.^{76/} Furthermore, there is no evidence that the systems now seeking this access were or are willing or able to participate in a reciprocal coordinated development program. In these circumstances, it is undisputed that the granting of these requests could cost the Company and its customers as much as \$141 million.^{77/} Under these facts, the Company's failure to grant the requested "access" is plainly reasonable^{78/}

74/ Exhibit 183; Supplemental Finding of Fact 1.06A

75/ Finding of Fact 1.08.

76/ Staff Brief, pp. 88-89; Finding of Fact 4.56.

77/ Finding of Fact 4.58.

78/ Indeed, the Department of Justice in a speech by one of its counsel in this proceeding has acknowledged that those seeking unit access must request it "in a timely fashion," i.e. before "a system is designed and built." Address of Donald I. Baker, then Director of Policy Planning and now Deputy Assistant Attorney General, Antitrust Division, Department of Justice, to American Public Power Association, National Conference, May 16, 1973, pp. 12-13.

and therefore cannot constitute an unlawful refusal to deal.^{79/}

4. Wheeling.

The proponents of conditions on the Midland licenses charge the Company with a variety of misdeeds in its conduct and policies concerning transmission services. The Staff attacks the Company for refusing to grant access to transmission services to municipal and cooperative systems "on the same basis" as it grants such access to larger, investor-owned utilities.^{80/} Sounding the same theme, the Interveners declare that the Company's coordination agreements with large utilities "almost uniformly [sic] provide mutual access to transmission capacity" at "no charge", and that the Company's agreement with smaller systems make "no provision for joint use of the transmission capacity or even for the purchase or sale of such capacity."^{81/}

These charges represent the epitome of mischaracterization. The Company and Detroit Edison may only be said to exchange transmission services to the limited extent that certain high voltage facilities, jointly financed by both parties pursuant to the Michigan Pool arrangement, may be used for transactions conducted on behalf of the Pool as a

^{79/} See pp. 101-102, supra.

^{80/} Staff Brief, p. 87.

^{81/} Interveners' Brief, pp. 38-39. The emphasis is in the brief, as is a footnote substantially retracting this unqualified charge.

whole.^{82/} Apart from these jointly owned facilities neither system wheels for the other. The Intervenors' characterization of this arrangement as a general wheeling arrangement at no cost to the Company is thus obviously unfounded.

In fact, the Company has transmission service arrangements with only two systems: Indiana & Michigan Electric Company and the MMCP systems.^{83/} Since the Company is a party to no other wheeling agreements, it is simply false to allege, as have the Intervenors, that the Company's coordination agreements with large utilities "almost invariably provide mutual access to transmission capacity".

It is likewise untrue that "[t]he basic MIO agreements (and for the most part Consumers Power Company's interchange arrangements) provide for no charge by any party^{84/} for the use of the interconnected transmission facilities" or that the Company does not wheel for the smaller systems

^{82/} Article VI, paragraph 2, of the Electric Coordination Agreement between Consumers Power Company and The Detroit Edison Company specifies that "(s)ince such interconnections and all grid lines and switching stations are deemed to be of equal benefit to both parties, annual costs thereof shall be shared by the parties hereto as nearly equally as practicable." The Planning Committee is then given responsibility for determining the applicable "equalization payments." Exhibit 71.

^{83/} Findings of Fact 2.84, 4.71.

^{84/} Intervenors' Brief, p. 38.

"on the same basis" as it wheels for larger systems.^{85/} Quite the contrary, Consumers Power Company charges the MMCPD precisely the same rate that governs its wheeling arrangement with Indiana & Michigan.^{86/}

Having misstated the number and terms of the Company's wheeling arrangements with other systems, the other parties then attempt to explain away the undisputed fact that the Company has never refused to wheel power for a smaller system and that until recently it had never received a specific request for wheeling. The plain fact is that these arguments bear no resemblance to the record.

The other parties argue that Consumers Power Company wrongfully refused to wheel for the Southeastern Michigan Electric Cooperative in 1966.^{87/} This incident, how-

^{85/} Staff Brief, p. 87.

^{86/} Compare (1) Supplemental Agreement No. 2 to Interconnection Agreement between Consumers Power Company and Northern Michigan Electric Cooperative, Inc., Wolverine Electric Cooperative, Inc., City of Grand Haven, Michigan and City of Traverse City, Michigan [Exhibit 12,023], Supplement F, sections 5 and 6 with (2) Operating Agreement among Consumers Power Company, The Detroit Edison Company, and Indiana & Michigan Electric Company [Exhibit 11,109], Amendment 4, Service Schedule D, sections 3.12(b) and 3.13, and Amendment 6, Service Schedule G, sections 3.12(b) and 3.13.

^{87/} Citing no authority, the Department of Justice places these events in 1966. Justice Brief, p. 144. We submit this is plain error. The only evidence bearing on this "request" is Mr. Paul's testimony and Mr. Bruce's letter of June 10, 1969. Paul 7936, Exhibit 125. The meeting they describe took place on June 5, 1969.

ever, cannot accurately be characterized as a denial of a request for wheeling. The only evidence that wheeling was even discussed between the parties is a single document reflecting a June, 1969 meeting between representatives of the Southeastern cooperative and the Company's marketing department.^{88/} In the course of discussing a number of other matters, someone asked whether Consumers Power Company would "wheel power from the Cardinal Plant to Southeastern Michigan." The Company's representative responded simply that it "didn't have a policy or rate on wheeling" and that "such wheeling would involve other systems over^{89/} which we had no control."^{90/}

Our adversaries' argument seeks to transform this isolated, preliminary and generalized verbal inquiry into a formal request to purchase transmission services.^{91/} They

^{88/} Exhibits 275 and 1075.

^{89/} Both the Staff and the Justice Department substitute the word "under" for the "over" that plainly appears on transcript page 7936. Staff Brief, p. 93; Justice Brief, p. 144.

^{90/} Paul 7936; Exhibit 125. The Department describes its Exhibit 125 as an "internal memorandum". It is nevertheless plain on the face of this document that it is a letter from Mr. Bruce of Consumers Power Company to Mr. Richard Stutesman of the Southeastern Cooperative.

^{91/} In a case similar to this, the Ninth Circuit has recently found such evidence insufficient to establish a concerted refusal to deal. "All we have is evidence of preliminary negotiations. A demand and a refusal is a prerequisite to a claim of concerted refusal to deal." Cleary v. National Distillers and Chemical Corp., 1974-2 Trade Cases ¶75,330 (9th Cir. Oct. 29, 1974) App. S-3.

also mischaracterize the Company's response as a refusal to wheel, whereas in fact, its representative merely stated two truths: the Company had no wheeling policy or rate and, in any event, the transmission of power from the Cardinal Plant to the Company was dependent upon other systems which, it appears, could not have made it available.^{92/} We submit that in the light of all the circumstances the response by the Company's marketing representative was truthful and sufficient.

The Department of Justice, however, persists. Having called no witnesses on this matter, and having ignored the documentary evidence it placed in the record, the Department seeks to convert the Company's response into an announced policy never to wheel under any circumstances. It attempts this conversion through its claims -- based entirely on its own speculation -- as to what Southeastern next did that it would not have done but for its purported belief that the Company's response constituted an unqualified refusal.^{93/} We believe that this argument is so devoid of probative value that it can properly be given no weight whatsoever.

^{92/} Under the Buckeye Pact, power from the Cardinal Plant could only be consumed wholly within the state of Ohio. Justice Brief, p. 136 n. 1. Since other systems were contractually prohibited from wheeling power from the plant systems in Michigan, any plan for Consumers Power to obtain Cardinal Plant power was inherently infeasible.

^{93/} Justice Brief, p. 146.

The other "evidence" of the Company's allegedly unqualified refusal to wheel for its municipal and cooperative neighbors is no less fanciful. The other parties admit, except as to Southeastern in 1969, that prior to the initiation of this proceeding none of the smaller systems made a request, in any form whatsoever, for wheeling by Consumers Power Company.^{94/} True to form,^{95/} they seek to convert this deficiency in their case into evidence of wrongdoing by the Company. Their claim this time is that the failure of the smaller systems ever to ask for wheeling is itself evidence of how unqualified and notorious was the Company's policy against wheeling.^{96/} Their only evidence for this startling proposition is the speculation of one witness, and the hearsay speculation of an unnamed person.^{97/} This evidence is fatally deficient because,

^{94/} Justice Brief, pp. 146-47; Staff Brief, pp. 95-96.

^{95/} See pp. 120-22, supra, on refusals to deal alleged without evidence of requests.

^{96/} Staff Brief, p. 93, para. XI-59.

^{97/} The speculating witness was Mr. Wolfe who testified that he "felt it was futile" to ask for wheeling. Wolfe 1729 cited in Staff Brief, pp. 94-95, and in Justice Brief, p. 147. The hearsay speculation came in through Mr. Fletcher who testified that "[w]e have been assured by the Cooperatives with whom we are doing this study that Consumers Power will not wheel the power for us." Fletcher 4275-4276 cited in Staff Brief, pp. 95-96, and in Justice Brief, pp. 146-47.

as numerous courts have held, substantial evidence includes more than uncorroborated hearsay and more than hearsay corroborated by a mere scintilla.^{98/} Even apart from this failure of proof, the charge is as legally insufficient as the claims that an unlawful refusal to deal may be fully established solely by evidence of a failure to tender an unsolicited offer.^{99/}

In the same vein, we are confronted with the claim that "Consumers refusals to grant access to transmission services to smaller electric systems in its service area is evidenced primarily by the complete lack of transmission provisions in the contracts that Consumers has with these small systems."^{100/} This passage is illustrative

98/ Boyle's Famous Corned Beef Co. v. NLRB, 400 F.2d 154 (8th Cir. 1968); NLRB v. Imparato Stevedoring Corp., 250 F.2d 297 (3d Cir. 1957); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 690 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949).

99/ See pp. 122-126, supra.

100/ Staff Brief, p. 93 (emphasis added). Cognate to this claim is the suggestion by the Staff and the Department that the Company's alleged unwillingness to wheel is somehow evidenced by Mr. Fletcher's testimony that he was once told by his staff "that Consumers has never wheeled for small utilities." Fletcher 4329 cited in Justice Brief, p. 147, and in Staff Brief, p. 96.

of the other parties' oft-repeated argument that a failure to initiate discussions and affirmatively offer particular services and terms constitutes a refusal to deal even though a request for those services and terms may never have been made. We submit that, particularly as applied to the facts of record here, this theory does violence to the English language, can claim no basis in law, and contravenes in every way the normal practices and expectations of businessmen.^{101/}

Finally, it is alleged that Consumers Power Company has not adequately responded to inquiries about the Company's wheeling policies which were made by Traverse City, the MMCPP and City of Coldwater after the initiation of this proceeding.^{102/} Since issues relating to the Company's wheeling policies were central to the issues raised in this proceeding, it is hardly surprising that the Company declined to discuss the matter once it was in liti-

^{101/} The Intervenors', reference to Rosa Parks [Intervenors' Brief, p. 127] evidences yet another attempt to go beyond the facts of this case. We are only arguing that the other parties have not here shown a basis for their claim that the Company by its silence was affirmatively denying to other systems advantages that, in fact, those other systems chose not to seek.

^{102/} Staff Brief, pp. 92-93.

gation. In effect, proposals to talk about wheeling at that juncture may be considered settlement overtures. We submit that the Company's unwillingness to engage in such off-the-record discussions of matters of controversy in this proceeding cannot itself give rise to antitrust liability.

In sum, the briefs of our adversaries reveal no credible and substantial evidence that will support a finding that the Company's conduct concerning transmission (wheeling) services has been anticompetitive, discriminatory, or otherwise unreasonable.

5. Alleged "Pre-emptive" Coordination.

Confronted by the fact that the Company has coordinated with all of the self-sufficient smaller systems in its area, the Department also charges the Company with something it chooses to call "pre-emptive coordination". Just as the Department earlier condemned the Company for refusals to coordinate with smaller systems, it now condemns the Company for offering to coordinate with smaller systems for an allegedly improper purpose. The particular instances cited by the Department involve Holland and Allegan.^{103/}

^{103/} Justice Brief, p. 160.

The first basis for the Department's charge of "pre-emptive coordination" involves the Company's 1966 decision to negotiate a renewal of its coordination agreement with the City of Holland -- a decision which according to the Department reveals with "particular clarity" the Company's "monopolistic intent ... to preclude or limit the coordination opportunities of others."^{104/} The only evidence cited for this conclusion is a memorandum written by a middle-level marketing department employee whom the Department deposed at length but did not choose to call as a witness.^{105/} The document states that the "prime reason" for the Company's decision to coordinate with Holland was that if the Company did not act, Holland would interconnect with the Wolverine cooperative system.^{106/}

We submit that this document evidences nothing more than the Company's acknowledgment that, if it did not

^{104/} Justice Brief, p. 92.

^{105/} The Intervenors offered in evidence portions of Mr. Conden's deposition unrelated to this memorandum. Exhibit 1016.

^{106/} Exhibit 150.

proceed promptly to negotiate the new contract with Holland, the Company stood to lose a beneficial coordination relationship.^{107/} Ironically, it is clear that, if Consumers Power had for any reason failed to negotiate this contract renewal with the City of Holland, the Department would now be citing such failure as a wrongful refusal to deal and as evidence of monopolistic intent.^{108/} This demonstrates how thinly stretched is the Department's theory that Consumers Power Company can neither coordinate on reasonable terms nor reasonably refuse to coordinate without being accused of monopolistic conduct. In other words, it is damned if it does coordinate and damned if it doesn't.

The other charge in this regard is that the Company's acquisition of the Allegan system was an act of

^{107/} Holland has been a net seller of emergency power to Consumers Power Company since 1967. Helfman 7 after 3211.

^{108/} See Justice Brief, pp. 149-53.

"pre-emptive coordination" intended to block the growth of the MMCPP. It is also suggested that the acquisition was forced on a city that would have preferred a coordination arrangement, and perhaps would most have preferred to become a member of the MMCPP. The truth of the matter is that on January 21, 1966, Ted Malila, then Mayor of Allegan,^{109/} told Consumers Power Company that the City Council "would be glad to receive" an offer to acquire the system.^{110/} The Company subsequently made such an offer at the same time it offered to sell the standby power about which the City had inquired.^{111/} Subsequently, sale of the system was deemed by the City Council to be the best alternative and its decision was approved by more than 60 percent of the electorate, by the Federal Power Commission and by the United States Court of Appeals. Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125 (D.C. Cir. 1969).

Although the Company's personnel knew that Allegan was also considering interconnecting with the Wolverine cooperative at the time, there is no evidence that this

^{109/} Exhibit 1032.

^{110/} Exhibit 180.

^{111/} In response to questions from the Board, Mr. Paul testified that "standby power" is one variety of wholesale service. Paul 7981, 7912, 7978.

knowledge motivated the Company's decision to purchase the Allegan system. Nor is there any evidence that the Company "blocked" the Wolverine-Allegan interconnection as our adversaries allege. Rather, the record clearly indicates that Allegan exercised its free will and declined to pursue that alternative.

6. Restrictions on Interstate Connections.

Closely related to the charge of pre-emptive coordination are various denunciations of the Company's contractual arrangements with certain small systems which are said to have been unreasonably and unlawfully restricted from dealing with other systems. For its part, the Department charges that the "actual" and "anticipated effect" of this third party contractual provision was "to effect a preemptive coordination and block the future growth of the M-C Pool"^{112/} The Intervenors, for their part, go so far as to claim that "both the Holland and Lansing Agreements contained express provisions, required as a condition of interconnection, that they could not buy power from or sell power to other systems."^{113/}

^{112/} Justice Brief, p. 159.

^{113/} Intervenors' Brief, p. 45.

The facts, however, are these: Prior to becoming subject to FPC jurisdiction in 1969, smaller systems with which the Company dealt agreed to obtain its written consent before interconnecting in such a way that the Company might become engaged in interstate commerce.^{114/} According to uncontradicted testimony on the record, the only purpose of this provision was to prevent the Company from inadvertently becoming subject to FPC jurisdiction.^{115/} No party ever sought such written consent.^{116/}

Undeterred by these facts, the Department charges that, when the MMCPD approached Lansing in 1968 about either joining or interconnecting with the newly organized pool, the discussions collapsed because the existing contract between Consumers Power Company and Lansing "precluded such interconnection."^{117/}

^{114/} Finding of Fact 4.09; see also Justice Brief, pp. 156, 157.

^{115/} Finding of Fact 4.09.

^{116/} The Department erroneously claims that Consumers Power Company refused a specific request by Bay City to interconnect with another system in 1966. Justice Brief, p. 157n. In fact, the testimony on which they rely shows only that the Company refused to entirely remove the clause when the entire contract was being renegotiated.

^{117/} Justice Brief, p. 157.

The facts of record discredit this assertion in a number of respects. First, although the Department never offered the Lansing contract in evidence, the provision it cites as "typical" refers only to "interconnection ... which might result in either party ... becoming engaged, directly or indirectly, in the transmission or sale at wholesale of electric energy in interstate commerce."^{118/}

During the hearing, the Department made much of the fact that the MMCPP is located in the northern part of Michigan's lower peninsula, is bounded by water on three sides, and is therefore isolated from systems outside of Michigan.^{119/} That being the case, there can have been no reasonable apprehension that Lansing's interconnection with the MMCPP would involve either Lansing or Consumers Power Company in "the transmission or sale at wholesale of electric energy in interstate commerce". Furthermore, Consumers Power Company had in 1968 long been interconnected with the MMCPP. Thus Lansing's connection with that pool could not have involved Consumers Power Company in anything in which it was not already involved.^{120/}

^{118/} Justice Brief, note at pp. 156-57.

^{119/} Steinbrecher 1218.

^{120/} Consumers Power Company was connected to the MMCPP through one of its member systems, Northern Michigan. Exhibit 64.

In sum, there is no foundation for the charge that in 1968 Consumers Power Company's contract with Lansing precluded an interconnection between Lansing and the MMCP system.^{121/}

The Department also contends that the Company's assertion that this provision's purpose was to avoid inadvertently becoming subject to FPC jurisdiction is belied by the fact that the Company's "interest in imposing that clause continued well after the time when it decided it was required to file its rate schedules with the FPC."^{122/} This contention falls with the exposure of the underlying facts. The Company has never asserted that the purpose of this provision was to avoid the need "to file its rate schedules" with the FPC. Rather, it sought to avoid inadvertently becoming subject to FPC jurisdiction. The significance of this distinction is demonstrated by a Company memo placed in evidence by the Department which shows that, although it began filing wholesale contracts with the FPC in 1966, the question of the FPC regulatory jurisdiction

^{121/} Nor is there any basis for the Intervenor's charge that the Holland or the Lansing contracts "contained express provisions, required as a condition of interconnection, that they could not buy power from or sell power to other systems." Intervenor's Brief, p. 45. This assertion simply does not survive comparison with the contractual language.

^{122/} Justice Brief, p. 157-58 (emphasis added).

was not resolved until 1970.^{123/}

Thus the Department fails completely in its effort to prove that the Company's "interest in imposing" this clause long outlived the Company's bona fide justification for having it. It has not alleged a single incident subsequent to the resolution of the jurisdictional question in which another system asked that the provision be removed or modified, in which the Company in any way sought to rely on the provision, or in which any other system felt constrained by it.^{124/} Indeed, in the Department's Midland "advice letter" of June 28, 1971, the Department set forth

^{123/} Exhibit 172. According to the memo, "The Federal Power Commission's investigation of the jurisdictional status of the Company and The Detroit Edison Company has been pending since July 1965. In August 1966, the Commission expanded the investigation to include the question of whether or not both companies' wholesale electric contracts are subject to the jurisdiction of the Commission. In view of the Michigan pool's interconnection with electric companies to the south, the question of the jurisdictional status of both companies has been resolved. Accordingly, Mr. Aymond has requested that I obtain the dismissal of the Federal Power Commission's investigation

"Following the expansion of the Commission's investigation to the wholesale electric contracts of both companies in 1966, both companies filed with the Commission all of their wholesale electric contracts In such filings, the companies reserved the question of jurisdiction over the contracts." (emphasis added).

^{124/} The Department argues that the third party provision remained in Lansing's contract until the superseding contract became effective early in 1973. However, the Department neglects to mention that the superseding contract, from which it concedes the restriction was dropped, was signed on October 7, 1970. Exhibit 11,112.

publicly the Company's position that the third party interconnection provisions were inoperative and were being removed from all contracts as they came up for renewal.

If the other parties have mischaracterized the effect of the third-party provision, the Department totally overreaches the record with its summary contention that "[e]ven if the initial or primary purpose of the clause was to avoid FPC jurisdiction, another anticipated effect and the actual effect was to affect a preemptive coordination and block the future growth of the M-C Pool"^{125/} This charge is completely without foundation in the record of this proceeding. Indeed, the Department partially concedes as much by its total failure to cite authority for its convenient discovery of "anticipated effect." Further, in view of the fact that the MMCPP was in no way involved in interstate commerce and that Consumers Power Company was already tied to that pool,^{126/} we further submit that there is no credible evidence that it was the "actual effect" of this provision to block the growth of the MMCPP.

7. Admission standards of the Michigan Pool.

Finally, the complaining parties are broadly critical of Consumers Power Company's conduct concerning

^{125/} Justice Brief, pp. 158-59.

^{126/} See p. 142, supra.

admission to the Michigan Pool. Thus, the Department charges that "[t]he record clearly shows that (the Company) ... has attempted to eliminate the Michigan Pool as a potential avenue by which small systems might attain coordinating advantages."^{127/} In this regard, reliance is placed on a 1967 document relating to Pool admission standards and the admission standards themselves which appear in the 1973 Pool agreement.

The document on which the Department chiefly relies,^{128/} an internal memorandum of a middle-level employee, constitutes evidence of misconduct only if one accepts the dubious proposition that Consumers Power Company was obligated to coordinate fully with any and all systems -- without regard to generation deficiencies, technical unreliability and the potentially adverse effects that such coordination might have on the Company and its customers.^{129/} Furthermore, the Department concedes that the Company took no action on the document in question.^{130/}

^{127/} Justice Brief, p. 160.

^{128/} Exhibit 170.

^{129/} See pp. 100-103, *supra*, on the legitimacy of reasonable standards for admission into a collective enterprise.

^{130/} Justice Brief, p. 163.

The memorandum is an internal document which was written by Robert Paul of the Company's marketing department. It proposes that Pool admission standards should be revised so as to exclude "undesirable third parties" and suggests that one such party could be "the group consisting of Northern Michigan and Wolverine Electric Cooperatives and Traverse City and Grand Haven municipal systems [which] have just entered into a so-called new pooling agreement." Thus, the document concludes, the Company should establish "some definite minimum standards or levels of mutual benefits that must be available before third parties will be considered."^{131/}

The proposal set forth in the document is reasonable. It is undisputed that unreliable systems with insufficient capacity are undesirable coordinating partners since they "lean" on and thus burden the other parties to these arrangements.^{132/} The document's expression of concern about such "leaning" was not at all hypothetical since the two cooperative members of the MMCP had recently sought to coordinate with the Company despite generation deficiencies.^{133/} Thus, this proposal that "minimum standards" for admission be established is hardly evidence of monopolistic purpose.

^{131/} Exhibit 170.

^{132/} Finding of Fact 5.09.

^{133/} Finding of Fact 4.20-422.

The second defect in the Department's analysis is that the Company never took action upon the proposal set forth in the 1967 document. No admission standards were incorporated into the Pool agreement until 1973 and then the change was made at the behest of the Department of Justice.^{134/} Moreover, from 1967 to 1973 neither the MMCPP or any other system requested admission to the Pool.^{135/} The facts therefore simply do not support the contention that it was the policy of the Company to block the growth of the MMCPP by unreasonably and with monopolistic intent denying their admission to the Michigan Pool.

The other basis claimed by the Department for its charge that the Company has wrongfully sought to bar municipal and cooperative systems from participation in the Michigan Pool relates to the admission standards of the Pool agreement which became effective in May, 1973. In its brief the Department concedes that these changes were made at its behest.^{136/} However, the Department's brief then launches

^{134/} Justice Brief, p. 163.

^{135/} Finding of Fact 4.25.

^{136/} We are told that in its consideration of the Detroit Edison "Fermi" application pursuant to Section 105c the Department sought and received a commitment from that system "to exert its best efforts to modify the third-party membership provisions of the pool agreement so that third parties who met reasonable objective criteria would be allowed to participate." Justice Brief, p. 163. Mr. Mosley of Consumers Power Company

into an exposition that is totally at odds with the record:

"Applicant and Detroit Edison promptly cancelled their 1962 power pool agreement and superseded it with a new arrangement. Mr. Wolfe testified the new agreement, dated May 1, 1973, had changed two key provisions of the agreement to make them onerous for small systems seeking to utilize larger units. (Wolfe, direct, Tr. 1684-93).

"The provisions for coordinated development were eliminated, and provisions were substituted changing the pricing method for capacity exchanges. Where the result of the old agreement was to price such exchanges based on large scale units, the new agreement priced based on the capacity costs of the least efficient units and high cost energy. The reserve sharing provisions were changed from equal percent reserves as a percentage of load, by adding another condition requiring each party to maintain its largest single unit of reserve, also onerous to small systems. The effect of these provisions chilled even further any request by a small system to join the Michigan Pool. While the small systems may have been interested in obtaining the advantages of the Michigan Pool, as a result of the foregoing and as a result of the provision for equal sharing so-called "grid lines" without regard to size, the burdens would apparently more than offset any benefits (Wolfe, direct, Tr. 1684-93)." Justice Brief, pp. 163-64.

136/ (cont.)

testified: "Detroit was eager, thought it was appropriate, that the new [Michigan Pool] contract incorporate the substance of this agreement with the Justice Department, and asked us to consider these points; and we did. And we agreed for it to become a part of the new contract." Mosley 8515.

We point the Board's attention to the similarity between the Department's insistence that the Pool agreement contain "reasonable objective criteria" for admission and Mr. Paul's 1967 proposal, so roundly condemned by the Department, that the Company establish "some definite minimum standards."

We have set out this large extract from the Department of Justice's brief because we believe that it is highly misleading and cannot be accepted at face value. Despite appearances, this material is not drawn from the testimony of Mr. Wolfe or, for that matter, from any other part of the record. Indeed, all that Mr. Wolfe says on this subject is that the addition of a largest unit requirement would tend to be "undesirable" to small systems.^{137/}

This portion of Department's brief is so totally lacking in record authority that it should be given no consideration at all by the Board.^{138/}

^{137/} As to the merits of this assessment, we submit that a requirement that each pool member maintain reserves equal to its largest unit is "undesirable" only to a system which had hoped to "lean" on its coordinating partners.

^{138/} The Department's unsupported conjecture that the execution of a new coordination agreement between Consumers Power and Detroit Edison was causally linked to the addition of specific third party membership criteria is flatly contradicted by the testimony of Mr. Mosley. Mosley 8607-8609. Mr. Mosley testified as to several legitimate business reasons, having no relationship to the admission of third parties, for eliminating the coordinated development (pool unit) provisions of the earlier agreement [8500-8505], and for amending the reserve requirement to add another condition requiring each party to maintain reserves at least equal to its largest unit [8669-8670]. Also, Mr. Mosley stated he began discussing the need for a reserve requirement at least equal to each party's largest unit with Detroit Edison as early as 1962, and certainly no later than 1967 [8671 and 8610-8611], and that dissatisfaction with the pool unit concept was first discussed in 1970 [8611].

In any event, the question is not whether other systems would prefer more liberal admission standards to have been established by the Pool; rather, it is whether the established standards are reasonable.^{139/} It should be noted that the Department was not only responsible for formulating the Pool's admission standards; it also formally reviewed these provisions in March 1974 in light of the new Pool agreement and found no cause for complaint.^{140/} Thus, the Department's charge of improper conduct concerning admission to the Michigan Pool falls of its own weight.

B. Other Conduct.

In addition to charges relating to the Company's coordination and wheeling practices and policies, the other parties complain of other alleged misconduct in the bulk power market. They argue: (1) that the Company has allocated bulk power markets through territorial

^{139/} See pp. 100-103 supra.

¹⁴⁰ Attorney General's advice letter, Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), AEC Dkt. Nos. 50-452A and 50-453A (March 22, 1974), 39 Fed. Reg. 12373.

agreements; (2) that the Company has acted improperly in acquiring other systems; and (3) that the Company has engaged in unlawful tying through its refusal to "unbundle" wholesale electric service. We deal with each of these in turn.

1. Territorial Allocations.

One of the more extreme claims advanced in the briefs of our adversaries is that Consumers Power Company and four other bulk power suppliers have executed and enforced wholesale territorial allocation agreements. The Department claims there is "substantial evidence" of "territorial allocation agreements" between the Company and the Company's investor-owned neighbors.^{141/} Similarly, the Intervenor~~s~~s unqualifiedly charge that "Consumers Power Company has territorial agreements or 'understandings' with dominant surrounding systems who might have had an ability to build duplicate transmission facilities or otherwise to complete [sic] directly with Consumers Power Company...."^{142/}

^{141/} Justice Brief, pp. 45-46.

^{142/} Intervenor~~s~~' Brief, pp. 44, 52.

These allegations rest almost exclusively on unsworn hearsay, on hearsay upon hearsay, and on unadorned speculation. They are repeatedly denied in the sworn testimony of Company spokesmen. Despite massive discovery of the Company's files, they are unsupported by credible documentary evidence. In short, the other parties have failed to offer "substantial evidence" of territorial allocation agreements sufficient to support a finding of fact.

a. AEP System.

The first piece of the Department's alleged "substantial" evidence concerns territorial allocations with the American Electric Power (AEP) system. Particular emphasis is placed on events occurring in the Village of Paw Paw in 1966. As evidence of an allocation agreement between the Company and AEP, the Department alleges only that "in 1966, following a tender offer by American Electric Power to the shareholders of Michigan Gas and Electric, Applicant did make an offer to the Village of Paw Paw ... but promptly withdrew it when it appeared competition had developed between it and AEP"^{143/} We submit that these facts, stripped of the rhetoric unsupported by the record, provide no evidence of an agreement not to compete. Rather, these facts show precisely the opposite:

^{143/} Justice Brief, pp. 142, 46.

the willingness of the Company to engage in bulk power supply competition with its investor-owned neighbors.

The facts involving the Paw Paw incident are not in dispute. In 1966, Paw Paw was served by Michigan Gas and Electric Company (MG&E) at wholesale rates which the Village believed to be too high.^{144/} Hoping to improve its situation, Paw Paw asked Consumers Power Company to provide it with wholesale power.^{145/} Negotiations began in early 1966, and on October 10, 1966, Consumers Power Company formally offered to serve Paw Paw^{146/} at a rate which was "substantially less" than Michigan Gas and Electric's^{147/} and which would have saved Paw Paw \$50,000 per year.^{148/} However, a month after the Company's formal offer, the American Electric Power system (which was soon to purchase MG&E) proposed a new contract which offered "a savings to the Village of Paw Paw substantially in excess of the savings afforded by the contract offered by Consumers Power Company."^{149/} Paw Paw accepted that better offer and following this action, Consumers Power withdrew its offer.^{150/}

^{144/} Sundstrand 3895-96.

^{145/} Sundstrand 3907.

^{146/} Exhibit 141.

^{147/} Exhibit 136, p. 2.

^{148/} Sundstrand 3911.

^{149/} Exhibit 136, p. 3.

^{150/} Exhibit 138.

The Village of Paw Paw has never, even in the context of this proceeding, complained that the Company's withdrawal was in any respect improper.^{151/} Furthermore, the record provides no support whatsoever for the Department's claim that the Company's withdrawal of its offer was somehow related to the possibility of competition with AEP. Rather, these events show that the Company was willing to engage in bulk power supply competition with investor-owned neighbors -- a willingness which belies the existence of territorial allocations.

The complaining parties also claim to find evidence of a territorial allocation scheme between Consumers Power and the AEP system in events related to the Southeastern REA cooperative, the MMCPP systems, and the South Haven municipal system. These charges can quickly be disposed of. As to Southeastern cooperative, all the Department claims is that the Indiana and Michigan Company (an AEP subsidiary) declined to serve the cooperative on September 20, 1960, and again on December 2, 1965, and that on that latter date it informed Consumers Power Company

^{151/} In page 1 of his letter of January 31, 1967, Mr. Sundstrand is plainly not speaking of the Company's 1966 offer. Exhibit 136.

of its decision.^{151a/} We submit that these facts reflect only a unilateral refusal to deal on I&M's part and offer no evidence whatsoever of a territorial agreement. I&M's decision is fully and consistently explained by technical considerations, and it cannot be converted into evidence of an illegal agreement simply by the fact that I&M chose to inform Consumers Power Company of the decision it had reached.

Our adversaries' contentions concerning the MMCPP incident are equally ethereal. Here, the evidence is nothing more than Mr. Steinbrecher's statement that I&M once declined to sell power to the MMCPP and that "it's my understanding that the reason for the refusal was the fact that Indiana-Michigan did not want to supply power which would be distributed in the area where power is supplied by the Applicant."^{152/} Even if this were creditable testimony, it does not in its terms allege the existence of an agreement. In fact, however, this testimony does not even rise to the doubtful dignity of hearsay; rather, it is pure and unadorned speculation. In such an administrative hearing as this, evidence having such negligible probative value is insufficient to support a finding of fact.^{153/}

^{151a/} Justice Brief, p. 140.

^{152/} Quoted in Justice Brief, p. 141.

^{153/} See Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229-230 (1938), in which Chief Justice Hughes em-

(cont.)

The complainants also cite in support of the alleged territorial allocation agreement between Consumers Power Company and AEP certain documents concerning the City of South Haven in the early 1960's. Indeed, this evidence is the only support adduced by the Intervenors to support their charge that Consumers Power Company "has territorial agreements or 'understandings' with dominant surrounding systems" to limit wholesale competition.^{154/} This evidence consists of AEP internal memos and deposition testimony from another proceeding, none of which make any reference at all to a territorial allocation arrangement. We submit that the charges relating to South Haven were put completely to rest by Dr. Gutman, called as an expert by the Intervenors, who assessed all of the South Haven evidence and clarified his own direct testimony in the following way:

153/ (cont.)

phasized that statutory provisions designed to assure "flexibility in administrative procedure [do] not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

154/ Intervenors' Brief, p. 44. The Department contends that this evidence "strongly suggests the existence of a gentleman's agreement" but concedes that the evidence here is less persuasive than it is elsewhere. Justice Brief, p. 143n.

Mr. Clark: I would like to know if you have any evidence of collusion between Consumers Power Company and Indiana and Michigan Electric Company.

The Witness [Dr. Gutman]: No. ^{155/}

Responding one page later to a question from Chairman Garfinkel, Dr. Gutman again said: "I want to make it clear that I do not have any evidence of collusion." ^{156/}

In sum, it is contrary to the record in this case and to basic notions of common sense to propose a finding that the Company and the AEP systems have since 1960 executed and enforced bulk power territorial allocation arrangements.

b. MG&E.

The other parties also charge that Consumers Power Company was a party to a territorial allocation agreement with Michigan Gas and Electric Company. ^{157/}

Both the Department and the Intervenors point to a letter written on March 1, 1960 concerning the Company's efforts to serve the Village of Constantine. ^{158/} Here again,

^{155/} Gutman 4844.

^{156/} Gutman 4845 (emphasis added).

^{157/} Justice Brief, pp. 45-46; Intervenors' Brief, p. 52.

^{158/} Exhibit 157.

however, no mention is made of a territorial agreement. Rather, the document makes clear that its author was merely considering whether the Company could serve a wholesale load then served by another. Here, as elsewhere, our adversaries seek to convert evidence of the Company's willingness to compete for wholesale loads into evidence of an agreement not to compete.

The second cited incident involving the Company and the Michigan Gas and Electric Company occurred in Paw Paw in the early 1960's. At this time, Paw Paw was dissatisfied with its service from MG&E, and Warren Sundstrand, one of its representatives, informally made overtures to the Company.^{159/} Because the service by the Company would have required a significant investment in transmission facilities and because there was some legal doubt as to the Company's right to serve without MPSC approval, the Company did not offer service at that time.^{160/} According to Mr. Sundstrand, the Company's representative referred at the time to "more or less of a gentleman's agreement

159/ Sundstrand 3895, 3900-3901.

160/ Paul 7892.

that so long as one company wanted to serve a municipality that the other company would not compete with it."^{161/} This statement, of course, conflicts with the sworn testimony of Company officials.^{162/} We submit that Mr. Sundstrand's isolated recollection must be discounted since, as we previously discussed in this part, several years thereafter the Company did agree to serve Paw Paw's bulk power needs despite MG&E's presence.

c. Toledo Edison and Detroit Edison.

The last of the complainants' "evidence of territorial allocation agreement" concerns the efforts of the Southeastern REA cooperative to obtain an alternative bulk power supply source in 1965. Here, the facts are not in dispute. The Southeastern cooperative is located in both Michigan and Ohio and, at the time, purchased 75 percent of its needs from Consumers Power.^{163/} The cooperative's service area was located adjacent to Toledo Edison Company (an

^{161/} Sundstrand 3903.

^{162/} Aymond 6071; Paul 7950.

^{163/} Paul 7898; Exhibit 11,307; Attachment JDP-2, Schedule 2, p. 2, after 7239.

Ohio electric utility) and Detroit Edison, and in 1965 ^{164/} it approached each of these systems to request service.

Toledo Edison declined to serve, but Detroit Edison agreed to supply most of Southeastern's needs, so that Consumers Power's share of Southeastern's needs fell to 17 percent. ^{165/}

To explain Toledo Edison's refusal to serve, opposing counsel did not call a single witness. Rather, they rest their case entirely on the unsworn hearsay contained in the memoranda of two REA field agents. These documents constitute the grossest kind of hearsay, and hearsay upon hearsay. ^{166/} Such vague and unsupported

^{164/} Exhibit 128. The Department announces that Southeastern sought a new bulk power supplier because the Company was "terminating its power supply contracts." Justice Brief, p. 46. The fact is that the Company merely proposed to revise its existing contract with Southeastern in order to raise its rates to conformity with the Company's other wholesale contracts. Paul 7900. There is no evidence that Southeastern protested to either the Michigan Public Service Commission or the Federal Power Commission.

^{165/} Paul 7900; Exhibit 11,307; Attachment JDP-2, Schedule 1, p. 2, after 7239.

^{166/} The Badner report, dated February 14-17, 1966, for example, explains Toledo Edison's decision not to sell in Michigan by observing that the company "did not appear to be too concerned" over FPC jurisdiction and conflict with the Buckeye Pact, but that they "seemed disturbed and concerned over the thought of invading" Consumers Power Company's territory. Quoted in Justice Brief, p. 138.

hearsay evidence is not sufficiently substantial to support a finding of fact in a hearing such as this.^{167/}

The Department's brief attempts to strengthen this obviously deficient evidence by intimating that the first two reasons allegedly offered by Toledo Edison were shams intended to disguise its territorial agreement with Consumers Power Company. In fact, the first two reasons explaining the refusal are perfectly valid. Although, as the Department's brief emphasizes, Toledo Edison would become subject to FPC jurisdiction by 1970 because of its pending interstate interconnections, that prospect was three or four years away at that time. In 1966, FPC jurisdiction represented a significant and legitimate concern for Toledo Edison.

The second reason for Toledo Edison's refusal -- that relating to the Buckeye Pact -- was equally valid. As the Department concedes, the Buckeye Pact provided that power from the Cardinal Plant (a joint venture involving

^{167/} See n. 98 on p. 134, supra, and accompanying text, and n. 153 on p. 156, supra.

Ohio investor-owned and cooperative systems) could not be transmitted out of Ohio. Thus the Buckeye Pact proscribed the scheme proposed by Southeastern.^{168/} The Department's suggestion that the contract's explicit provisions could be avoided by transferring the power at the state line is absurd on its face. The Southeastern cooperative sits astraddle the state line and serves loads in both Ohio and Michigan. If power could be sold at the state line, as the Department proposes, Southeastern in Michigan had no need to buy from Toledo Edison; it could simply have bought Buckeye power from Southeastern in Ohio.

Thus, Toledo Edison had valid reasons for unilaterally refusing to serve Southeastern cooperative in Michigan. Under these circumstances, the Department's speculation that these explanations were a sham to cover an unlawful territorial agreement cannot be sustained.

Surprisingly, our opponents also cite the 1966 incident involving the Southeastern cooperative as evidence of a territorial agreement not to compete between Consumers Power Company and its coordination partner, The Detroit Edison Company. It is uncontroverted that when Southeastern cooperative sought alternatives to the wholesale service

^{168/} Rogers 5587, 5624; Exhibit 128.

from Consumers Power, The Detroit Edison Company agreed to provide such service in 1966. This would seem to put to rest any claim that the Company and its pooling partner had a bulk power territorial arrangement. However, according to our opponents' briefs, a contrary conclusion is in order because Detroit Edison allegedly did not offer as low a rate as it should have, ^{169/} and because Detroit Edison advised Consumers Power that it had agreed to take over most of Southeastern's bulk power business. ^{170/} We submit that this indictment, like the other allegations of improper territorial allocations, falls of its own weight. ^{171/}

In sum, the record is devoid of any credible evidence to support a finding that the Company had bulk power territorial arrangements with the AEP systems, Michigan Gas and Electric Company, Toledo Edison Company, The Detroit Edison Company, or any other electric system.

^{169/} Justice Brief, p. 140.

^{170/} Justice Brief, p. 141.

^{171/} Another of the Department's baseless allegations concerning Southeastern's partial switch of bulk power suppliers was that Consumers Power made efforts to deter REA from financing the subtransmission line required to interconnect with Detroit Edison. Justice Brief, pp. 121 and 146. Nothing whatever in the record is cited to support this charge.

2. Acquisitions.

Proponents of license conditions also charge that the Company is guilty of misconduct -- or at least of wrongful purpose -- in its acquisition of smaller neighboring systems.

The only misconduct which appears to be charged in this area relates to the Company's alleged "pre-emptive coordination" with Allegan through the acquisition of that system. We have already responded in full to that charge.^{172/} Apart from this, the Company is not accused of any specific wrongdoing with regard to the acquisition of smaller systems.^{173/}

^{172/} See pp. 138-140 supra.

^{173/} On the subject of the Company's acquisitions, the Department of Justice seeks to relitigate an evidentiary issue resolved at hearing and in substance proposes to reopen the record to add two previously excluded documents.

The Board properly excluded Department of Justice Exhibit Nos. 16 and 17. Those documents, which purported to chronicle some of the history of Consumers Power Company and to detail certain ancient acquisitions, would have been of little or no value in resolving the critical issues of this case. Their introduction into evidence would not have served to fill in gaps in testimony, but would merely have triggered further dispute over collateral issues; it would have expanded an already lengthy proceeding.

In United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940), the Supreme Court approved the trial court's exclusion of evidence concerning market conditions in the oil industry in 1934. In language applicable to the case at bar, Justice Douglas writing for the Court explained:

(cont.)

There remains, however, a sweeping charge of monopolistic intent based on a single document from among the

173/ (cont.)

While the offer was not wholly irrelevant to the issues, it was clearly collateral. The trial court has a wide range for discretion in the exclusion of such evidence Admission of testimony showing the market conditions late in 1934 would have opened an inquiry into causal factors as involved and interrelated as those present during the indictment period... . As once stated by Mr. Justice Holmes, one objection to the introduction of collateral issues is a 'purely practical one, a concession to the shortness of life.' 310 U.S. at 230.

None of the cases cited by the Department of Justice at page 101 of its brief dispute the principle that a trial judge or a hearing board has broad discretion to exclude collateral evidence. In each of those cases the court considered past practices in the industry in question or past conduct of the company in question, because under the particular circumstances of the case such evidence was believed to be relevant and material. In the two district court decisions--United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam 347 U.S. 521 (1954); and Independent Taxicab Operators' Ass'n of San Francisco v. Yellow Cab Co., 278 F. Supp. 979, (N.D. Cal. 1968) -- the trial court elected to discuss past industry practices, but in neither case did the court indicate that it was under any compulsion to do so. In the appellate decisions cited by Justice the reviewing court simply noted that the trial court or administrative agency had not acted improperly by admitting evidence as to distant events. Nowhere is there any indication that the trial judge or hearing board was required or encouraged to hear such evidence or that refusal to hear such evidence would be error.

Taken together, the Socony-Vacuum case and the cases cited by the Department stand for the proposition that the

(cont.)

26,000 pages which were produced from the Company's files. It will be recalled that the document, discussed in our main brief (pp. 210-12), contained notes for a speech made to Company personnel by R. L. Paul, a middle level marketing department employee.^{174/} The notes stated, inter alia, that the Company should acquire its wholesale customers and that

173/ (cont.)

trial court or hearing board has broad discretion to admit or exclude evidence of past practices. As indicated above, we believe that, because of the nature of the inquiry and the dubious value of the documents in question, the Hearing Board properly exercised its discretion by rejecting Department of Justice Exhibit Nos. 16 and 17. However, even if the Board could also properly have admitted the tendered evidence at trial, it would clearly be prejudicial for the Board to consider the disputed documents at this late date. Because the cut-off date for discovery and evidentiary purposes was 1960, Applicant had no opportunity at trial to make its own record of pre-1960 practices and conditions. Consideration of the Justice documents without opportunity for Applicant to respond or question would be highly unfair.

174/ Paul's duties consisted of selling bulk power to large commercial accounts and to wholesale customers. Paul 7805. He did not report to an officer of the company, but instead to a higher middle-management level person, R. L. Conden, who, in turn, reported to the Company's Vice President for Marketing, then Mr. B. G. Campbell. Paul 7950. Campbell and Conden were deposed by the Department but deposition testimony relevant to this subject was not offered and neither individual was called as a witness. Mr. Campbell continued working for the Company until his death on March 26, 1974 -- long after the Department indicated who it intended to call as witnesses (see its letters of July 13 and 30, and September 4, 1973) and three months after the close of the Department's case on January 20, 1974.

"marketing activity" was directed to this end. Mr. Paul testified that the activities to which he referred were carried out essentially on his own, and that the Company, as far as he was aware, had no acquisition policy but proceeded on an ad hoc basis.^{175/} Moreover, there is no evidence that the document was known to Mr. Paul's supervisors, approved by them, or circulated within the Company.^{176/} Finally, there is not an iota of evidence that the Company attempted to carry out a policy of acquiring all of its neighboring

175/ Paul 8043-46. Mr. Paul's testimony on this matter was on the morning of March 6, 1974. Well into the next day's hearing, Judge Clark asked Mr. Paul a series of general questions concerning the witness' role in making and transmitting Company policy. Mr. Paul explained that, though he did not make Company policy, he would not transmit something as Company policy unless he believed it was the policy enunciated and approved by management. Paul 8268. No reference was made by either Judge Clark or Mr. Paul to exhibit 188 in this exchange. Hence, Mr. Paul cannot be taken by this general answer to recant his specific testimony of the previous day that (1) he was not seeking to convey Company policy in exhibit 188, and (2) the Company had no general policy of acquiring its neighbors.

176/ In contradiction of the record, the Department of Justice has sought to convey the impression that the notes for Paul's speech were circulated within the Company and received the approval of management. Justice Brief, p. 89. However, Mr. Paul denied that the speech ever received management approval or that his superiors were even aware of it. Paul 8244-45.

entities.^{177/} Hence, no specific monopolizing intent can be ascribed to the Company from the document.

3. The "tying" of the components of wholesale service.

In this brief, the Intervenors present a new argument neither set forth in their pre-trial brief nor developed on the record: that Consumers Power Company is engaging in an illegal "tie-in" because it is unwilling to provide coordination-type services at wholesale to entities without generation sufficient to engage in electrically reciprocal transactions.^{178/} In substance, the argument is an attempt to recast in legalistic terms the Intervenors' quarrel with the terms of the Company's bulk power arrangements and with the Company's insistence on obtaining some net benefit from the coordination transactions into which it enters. That insistence is what the Intervenors characterize as a refusal to "unbundle" wholesale service.

^{177/} See Consumers Power Co. Brief, pp. 205-212.

^{178/} Intervenors' Brief, pp. 56, 68-74, 109.

In attempting to force their coordination agreements into the tie-in mold, the Intervenor pass over the obvious and central fact that coordination transactions are inherently reciprocal and that this reciprocity, far more than any ultimately offsetting cash payments, is vitally important to the coordinating utilities. As we have set forth in our principal discussion of Consumers Power's coordination policies,^{179/} the reflection of those practices in the Company's policies is consistent with general utility practice, accepted as reasonable by the industry,^{180/} by the FPC^{181/} and, in other contexts, by the Staff^{182/} and the Department of Justice.^{183/}

As the Supreme Court noted in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 506 (1969), the principal case on which the Intervenor rely,^{184/} it is a full defense to a tie-in allegation

^{179/} Consumers Power Co. Brief, pp. 182-202; pp. 99-151 of this Reply.

^{180/} Findings of Fact 4.14-4.17.

^{181/} See Consumers Power Co. Brief, pp. 187-190.

^{182/} Staff Brief, p. 149.

^{183/} See p. 117 n. 45, supra.

^{184/} See Intervenor's Brief, pp. 66, 71-73.

to show that the challenged arrangement "serves legitimate business purposes." Surely, it is not a "pernicious" and "unreasonable" tie-in for a utility to insist on receiving mutual coordination commitments as payment for assuming coordination obligations when that mutuality is vital to its "legitimate business purposes."^{185/}

A tie-in is fundamentally different from a coordination agreement. In a tie-in, a seller having effective control of a desirable product -- as through a patent^{186/} or complete ownership^{187/} -- refuses to sell that product unless another product, also available

^{185/} In the leading case of United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 557 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961), a company introducing a technically sophisticated new product was held to be justified in insisting that it install and service the product because of the drastic impact poor operating experience by the first customers would have had on the overall acceptance of the product. "The crucial question," the court held, "is whether Jerrold could have accomplished the ends it sought without requiring the [tying] contracts." Applied to Consumers Power's coordination policies, the answer to that question is plainly "no." See also Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961), cert. denied, 368 U.S. 931.

^{186/} International Salt Co., Inc. v. United States, 332 U.S. 392 (1947).

^{187/} Northern Pacific Railway v. United States, 356 U.S. 1 (1958).

from others, is purchased as well. Prominent cases have involved pairing a desirable patented salt dispenser with salt,^{188/} desirable real estate with rail shipping,^{189/} and advantageous financing with prefabricated houses.^{190/} In each of those cases, simple sales for cash were involved, no reasons for tying other than exploitation were put forward, and, as the Supreme Court stressed, the arrangements could be "because of their pernicious effect on competition and lack of any redeeming virtue...conclusively presumed to be unreasonable...."^{191/} This analysis is wholly inapplicable to coordination agreements providing for reciprocal dealings in a service, such as electric power.

The attempt to view various types of coordination transactions as distinct products artificially

^{188/} International Salt, supra.

^{189/} Northern Pacific, supra.

^{190/} Fortner Enterprises, supra.

^{191/} Northern Pacific, supra at p. 5.

tied together by Consumers Power as wholesale service cannot be sustained for another reason as well. Obviously, there must be two distinct products in order for there to be a tie-in.^{192/} And, in United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 559 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961), the court noted that, "as a general rule, a manufacturer cannot be forced to deal in the minimum product that could be

^{192/} In American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 280 (2d Cir. 1967), the court noted: "Indeed, it is axiomatic that a tie-in analysis begins with the question of separability -- the requirement that the tying and tied products be different, or, stated simply, that the forced purchase be of a second distinct commodity." The court also quoted Professor Turner, then the head of the Antitrust Division of the Department of Justice, to the effect that "[t]he requirement that they [the tying and tied products] be 'different' obviously cannot be dropped out. Every manufactured item is a combination of various materials and components. There are obvious cases in which we would say either that there is no tie-in because the object of the sale is a single product, or that if there is a tie-in, it should not be deemed illegal per se or even illegal at all." Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 67-68 (1958) (brackets added by the Court).

Earlier, the Supreme Court had rejected the notion that advertising in a morning newspaper could be tied to advertising in an evening paper in the same city. The Court stressed: "The common case of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product..." Times Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953) (emphasis added).

sold or is usually sold." The court then set forth four standards, followed in a number of other cases,^{193/} for determining whether what is being sold is a single product or two tied products: (a) whether other sellers offer only the package or sell components as well; (b) whether the accused seller varies the content of the package; (c) whether the accused seller states prices in terms of the package or of the components; and (d) whether the seller provides all components of the package or receives significant components in finished form from others.

None of these four tests supports the concept that Consumers Power's firm wholesale service is actually a series of tied products. There is no evidence of record or other suggestion that other utilities sell non-firm power at wholesale except in the context of electrically reciprocal coordination arrangements.^{194/} Consumers Power's wholesale power is obviously of unvarying character, priced as a unit, and furnished entirely as a finished product by the Company.

^{193/} American Manufacturers Mutual Insurance Co., supra, 388 F.2d at 282; Baker v. Simmons Company, 307 F.2d 458, 468 (1st Cir. 1962); Dehydrating Process Co., supra, 292 F.2d at 655; N. W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493, 501 (D. Del. 1971); Kugler v. AAMCO Automatic Transmissions Inc., 337 F. Supp. 872, 874 (D. Minn. 1971), aff'd, 460 F.2d 1214 (8th Cir. 1972).

^{194/} Supplemental Finding of Fact 4.19A.

Indeed, in following this approach, the Fourth Circuit has held specifically that electrical service is a single product: "It seems to us that VEPCO sold only one product -- electricity."^{195/} Consequently, there is no basis in the law for separating the components of wholesale electric service, terming each a separate product and then claiming it is a per se violation of the anti-trust laws to insist that these supposedly separate products be purchased together.

In sum, the Intervenors' simplistic tie-in approach inappropriately seeks to treat reciprocal coordination as a type of wholesale service and mischaracterizes coordination-type transactions as "bundled" products within that service. It ignores that, under the law, a transaction with interrelated elements is not a tie-in if it serves "legitimate business purposes" and that tie-ins must involve "distinct commodities." As a result, the invocation of tie-in principles clouds rather than illuminates the issues regarding Consumers Power's coordination policies raised in this proceeding. Furthermore, the Intervenors again fail to demonstrate any improper conduct by the Company.

^{195/} Washington Gas Light Co. v. Virginia Electric and Power Co., 438 F.2d 248, 253 (4th Cir. 1971).

VI. The license conditions proposed by our adversaries are discriminatory, put the company at an unfair disadvantage vis-a-vis public power neighbors, and will increase costs to Consumers Power Company's customers.

The recent LP&L antitrust Hearing Board's memorandum regarding appropriate relief in the event of a finding of antitrust inconsistency sets forth useful guidelines for fashioning relief. The decision emphasizes that the purpose of remedial license conditions is not to punish the applicant for alleged wrong-doing in the past, or in the future to put it at a "competitive disadvantage" vis-a-vis the intervenors or other neighboring systems.^{1/} Rather, the purpose of the license conditions is to remedy an "imbalance in competition" -- a goal which the LP&L Hearing Board recognized could be frustrated by the artificial tax and financing advantages of public power systems.^{la/}

The license conditions proposed in the main briefs of our adversaries fail to recognize these principles; in fact, were the Company compelled to abide by their license conditions, the Company's customers would be substantially

^{1/} Louisiana Power & Light Co. (Waterford Steam Generating Station Unit 3), AEC Dkt. No. 50-382A, 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 (October 24, 1974), p. 35.

^{la/} Id.

and inequitably burdened and the competition which presently exists would be greatly diminished. In the following paragraphs we explain why these consequences will result.^{2/}

A. Proposed License Conditions.

1. Eligible Entities.

The relief proposed by the other parties to this proceeding would require Consumers Power to grant unit access, coordination, and transmission services to electric system "entities" which are not selfsufficient in generation capacity -- indeed in some cases to systems which have no generation facilities at all.^{3/} As we explain in our main brief, the relief sought is contrary to common sense, industry practice, and FPC standards.^{4/} The very term "coordination" imparts give-and-

^{2/} The Staff Brief, pp. 147-48, seeks to elevate to the level of a substantive argument the fact that some other antitrust proceedings have been settled. Plainly, those settlements reflect the licensing pressures faced by AEC applicants, particularly those whose applications are not "grandfathered," Section 105c(8), 42 U.S.C. §2135(c)(8), and particular circumstances existing in other areas. Moreover, those settlements vary substantially in their terms and in many cases are quite different from the relief sought in this proceeding.

^{3/} Intervenors' Brief, App. A, p. 1, ¶1; Staff Brief, p. 149; Justice Brief, pp. 151-52.

^{4/} Consumers Power Co. Brief, pp. 185-92, 228-33.

take, or reciprocal dealings; since coordination arrangements are premised on the assumption that all parties have the ability to offer reciprocal services,^{5/} coordination with a system which is not self-sufficient inequitably burdens the other parties to the arrangement.^{6/}

It is submitted that it would clearly be absurd for the relief here sought to apply to systems such as Bay City which own no generation facilities^{7/} or Alpena Power which, according to the Department's brief, owns only two "ancient hydro units" totalling 7 mw capacity to serve a system whose

5/ Finding of Fact 4.17.

6/ See also the Federal Power Commission's statement in its recent coal-by-wire order:

"Operation of an electric power system, whether on a power pool or on an owner-organization service area basis, normally employs a balanced net planned interchange, i.e., zero net unplanned flows. This concept requires each operating organization to provide adequate generation to carry its own load, including any planned import or export power plus a designated reserve margin."

New England Power Pool Participants, FPC Dkt. No. RM 74-22, Order Permitting Withdrawal of Petition for Emergency Relief (Docket No. E-8589) and Accepting Rate Schedules, Permitting Withdrawal of Rate Schedules, Disposing of Procedural Matters and Terminating Proceedings, at p. 22 (August 26, 1974).

7/ Exhibit 11,307; Attachment JDP-2, Schedule 1, p. 1, after 7239.

peak load is 70 mw.^{8/} Rather, these systems require firm bulk power supply, and therefore should bear the full costs of providing that supply.

Significantly, no party has proposed that unit access, coordination and wheeling arrangements be made available to retail customers. Indeed, one of the spokesmen for the MMCPP Pool, the manager of a cooperative, testified at the hearing that he would not wheel power from another system to serve one of the cooperatives' customers.^{9/} Despite the Board's requests in this regard, the briefs of our opponents^{10/} fail to explain why non-self-sufficient entities like Bay City and Alpena should obtain preferential unit access or wheeled firm power from a third system and at the same time a comparably situated retail customer must take power at average cost-based rates, in most cases from the supplier designated by the Michigan Public Service Commission.

Therefore, any relief relating to unit access, coordination or transmission arrangements should be confined to self-sufficient entities, i.e., electric utilities

^{8/} Justice Brief, p. 45.

^{9/} Finding of Fact 4.70.

^{10/} Justice Brief, pp. 256-57; Staff Brief, p. 12.

which own sufficient generation capacity to meet their peak loads.

2. Unit Access.

In its recent memorandum in the LP&L Waterford antitrust case, the Hearing Board noted that there are three forms of access to nuclear units: unit power purchases, joint ownership, or wholesale power purchases.^{11/} The duty of Hearing Boards in Section 105c cases is, as the LP&L Hearing Board held, to fashion "adequate" relief, not "maximize conceivable possibilities."^{12/} Thus, for example, in the Duke Power Company antitrust case,^{12a/} the Hearing Board approved settlement license conditions providing for wholesale sales, but did not require that the applicant provide unit sales or ownership interest arrangements in any nuclear unit.

In this framework, we submit that a condition requiring unit power sales is particularly inappropriate. As we explained in our main brief, such a condition would require the Company to finance construction of generation capacity that will not serve its customers, without giving it the reciprocal right to purchase unit power from the other

^{11/} LP&L Hearing Board Order, supra at p. 32.

^{12/} Id. at 8 and 12.

^{12a/} Duke Power Company (Oconee Units 1, 2, & 3, McGuire Units 1 & 2) AEC Dkt. Nos. 50-269A, 50-270A, 50-287A, 50-369A, 50-370A, Order on Joint Motion of the Regulatory Staff of the Atomic Energy Commission and the Department of Justice to Place Conditions on Oconee and McGuire Licenses (May 24, 1974).

entity.^{13/} Given the well-documented capital difficulties which currently beset Consumers Power,^{14/} these additional financing burdens could jeopardize the Company's ability to satisfy its public utility responsibilities to its customers and its contractual obligations to other systems.

Further, unit power sales will discriminate in favor of the purchaser against the Company's other, no less worthy customers. As between the unit purchase and wholesale purchase arrangements, we have previously explained why only the latter alternative provides for equitable, non-discriminatory access to nuclear generation. Assuming that the capacity of Midland Units will be equal to approximately 22% of the Company's projected peak load in 1980,^{15/} 22% of the Company's wholesale and retail service will in effect be supplied by the Midland Units. It would clearly discriminate against the Company's retail customers and put the Company at an unfair competitive disadvantage were Bay City to derive more than 22% of its power purchased from Consumers Power from Midland, since under these circumstances Bay City's retail customers would be receiving more Midland power than the Company's retail customers. Thus, access to nuclear units

^{13/} Consumers Power Company Brief, pp. 219-20; Finding of Fact 5.04.

^{14/} Findings of Fact 3.27, 3.28.

^{15/} Stafford and Lapinski 9169, 9244; Mosley 8528-29.

through wholesale sales assures that all parties derive a fair and non-discriminatory share of a given unit, while the unit power sales and joint ownership schemes proposed by our adversaries do not.^{16/}

As we explained in our main brief^{17/} and have reiterated in Section IV-B of this Reply, the Company is required by regulatory action and under its own commitment to provide wholesale service in all circumstances in which it would be proper for it to do so. Therefore, if the Board were to find an antitrust inconsistency which requires nuclear unit access, the Company would not oppose the imposition of a license condition that the Company offer wholesale service to all present or future systems with whom the Company does not have a coordination agreement on the common sense terms outlined in the Company's commitment.^{18/}

^{16/} Pace 25 after 7239; Findings of Fact 2.74, 2.75, 5.03.

^{17/} Consumers Power Co. Brief, pp. 120-23.

^{18/} See pp. 77-78 *supra*. These terms are that such service be technically and economically feasible, and that it can be furnished without jeopardizing the Company's ability to provide economical, dependable and satisfactory service to its customers or to satisfy its obligations to other electric systems with which it is interconnected.

Such wholesale service and license conditions would, we submit, completely remedy any allegedly inconsistent anti-trust situation which may be deemed to exist in the Company's service area.^{19/} In a document, introduced by the Department of Justice, setting forth coordination principles (Exhibit 167), the following passage explains how wholesale service provides access to the benefits of coordination:

"In many instances, it is advantageous for the small system to buy wholesale energy from a pool. In doing so, they share in the benefits of the pool because of their ability to purchase power at low cost." (p. 39008)

Similarly, the antitrust Hearing Board in the LP&L case explained how wholesale service can provide access to nuclear generation facilities:

The price of firm bulk power reflects the average cost of power for the entire system of the seller. The cost of power from a nuclear plant owned by the seller would be included in the average. In the sale of firm bulk power, the seller must supply the power regardless of shutdowns,

^{19/} The Department claims that wholesale power is inadequate access to large-scale generation because smaller systems have no "control" over their bulk power supply. [Justice Brief, p. 170.] However, the unit power purchasers obviously have little control over the costs of the unit in question, while minority owners of a unit are likewise unlikely to have such control. [Slemmer 19 after 8838.] Thus, the Department's control argument appears wholly unfounded.

scheduled or unscheduled. In other words, the cost of backup power and the obligation to supply it is factored into the price. Transmission cost over seller's system is also factored into the price of firm bulk power. One situation in which the sale of firm bulk power might be considered adequate access to nuclear power would be a situation in which all or substantially all of seller's power is generated by nuclear units.^{20/}

In the event that the Board concludes that nuclear unit access through wholesale purchases is not adequate to remedy an inconsistent antitrust situation, direct access should be conditioned upon the opportunity by the Company to participate on a comparable basis in the future units of those systems granted access. According to the well-accepted principles governing electric utility system bulk power arrangements, direct participation in the specific units of another system is premised upon the expectation that the participating system will construct units in which

^{20/} LP&L Hearing Board Order supra, p. 32. Nuclear generation capacity is only used to satisfy base-load requirements which constitute only a part of a utility's bulk power needs. [Mayben 2558] Thus, with present technology, it is inconceivable that all of a utility's generation will be nuclear. When The Midland Units come on line, the Company's nuclear capacity will comprise approximately 40% of its total generation capacity, while approximately 60% of the Company's total capacity is base-loaded. [Mosley 8532, 8617; Exhibit 1005, p. 22] Thus, when the Midland Units come on line, a substantial part of the Company's base load capacity will consist of nuclear units.

the first system may participate on a comparably reciprocal basis.^{21/}

The reciprocity principle of unit participation is particularly important at the present time, given the Company's difficult financial condition^{22/} and the rising costs of financing and constructing generation units.^{23/} Under these circumstances, as we explained in our main brief,^{24/} it would be prohibitively expensive and patently inequitable to compel the Company to engage in non-reciprocal unit access arrangements. Therefore, any license conditions compelling the Company to grant direct unit access should specify that those granted access must agree to construct, within a reasonable time, generation units in which the Company is afforded the opportunity to participate in a comparable amount and on comparable terms and conditions.

^{21/} Findings of Fact 4.17, 4.54, 5.04; Slemmer 18, 25-26 after 8838.

^{22/} Finding of Fact 3.28.

^{23/} See pp. 19-21, especially n. 22, supra.

^{24/} Consumers Power Co. Brief, pp. 216-22.

We have explained in our main brief^{25/} and in Section V-A-3 of this Reply^{26/} why ownership or unit power access to the Midland Units should be denied as untimely. As to future units, our adversaries propose that the Company be compelled to grant access to all nuclear units which it may jointly or severally own in the next fifty or so years. There is no evidence on the record to support the position that such relief is necessary. And, in any event, this proceeding involves only the Midland Units; other nuclear units that may be constructed by the Company will be subject to their own antitrust review under Section 105c. Thus, this Board has no jurisdiction to compel access to units other than Midland.

Finally, if the requisite "nexus" finding is made and the Board concludes that there is an antitrust inconsistency which requires relief, access to the Midland facility is the maximum relief which can and/or should be granted.

^{25/} Consumers Power Co. Brief, p. 219.

^{26/} See pp. 112-27.

As our main brief explained,^{27/} most of the other areas of relief proposed by our adversaries are within the jurisdiction of the Federal Power Commission and the Michigan Public Service Commission and should be resolved by them.

In addition, there is a fundamental contradiction in our adversaries' position that the operation of the Midland Units will have grave antitrust consequences for "nexus" purposes, but that permitting fair and adequate access to these units is insufficient to remedy these alleged antitrust inconsistencies. If the requisite "nexus" exists between the units and an inconsistent antitrust situation, providing fair access to that unit would appear, by definition, to be sufficient relief.

Despite the Atomic Energy Commission's explicit holding that parties seeking the imposition of antitrust conditions must "specify the relationship between the specific relief sought and the 'activities under the license,'"^{28/} the other parties seek to ignore the nexus requirement in arguing for expansive relief. The Justice Department^{29/} and the Staff^{30/} simply assume, without authority

27/ Consumers Power Co. Brief, pp. 31-34, 227-228.

28/ Louisiana Power & Light Co., (Waterford Steam Generating Station, Unit 3), Memorandum and Order of the Commission, February 23, 1973, RAI 73-2, 48, at p. 50.

29/ Justice Brief, p. 232.

30/ Staff Brief, p. 182.

or explanation -- and despite their seemingly irreconcilable position that an inconsistency for licensing purposes is less than a violation -- that the scope of AEC licensing power under Section 105c is at least as expansive as the remedial power of a district court after a determination of an anti-trust violation.

Regarding the same proposition, the Intervenor^{31/}s rely primarily on a number of cases involving the FPC, principally Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153 (D.C. Cir. 1967).^{31/} In that case, a utility had built hydroelectric projects without obtaining FPC licenses. When Niagara Mohawk sought licenses for these projects in 1962, the FPC granted licenses specifying effective dates of 1941 and 1949, thus subjecting the licensee to retroactive annual charges and certain other liabilities. In rejecting the Company's complaint that those provisions could not have been made effective retroactively, the court held that under those facts "the Commission does have statutory authority to assign an effective date earlier than the date of the issuance of the license . . ." 379 F.2d at 157.

^{31/} Intervenor's Brief, pp. 87-88.

The narrow issue to which the passage the Interveners quote was addressed was whether the FPC had authority to impose a specific license condition directly tied to a specific failure to adhere to a statutory licensing requirement. That is far different from the unrestricted Commission power, advocated by Interveners in the present case, to impose license conditions to eliminate alleged antitrust abuses in the Lower Michigan electric power industry. Moreover, in the Niagara Mohawk case only FPC legal authority was at issue; the reasonableness or appropriateness of the order was apparent and was undisputed by the applicant. The other cases cited by the Interveners are even further removed from the question of the character of nexus requirement applicable to license condition proposals in this proceeding.^{32/}

^{32/} The Interveners' Brief, pp. 84-85, relies by analogy upon the language in Gulf States Utilities Co. v. FPC, 411 U.S. 747, 760 (1973), that the FPC "serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings," but that statement has nothing at all to do with the kind of relief the FPC could order and, indeed, implies that a comprehensive remedy for "those competitive practices" might have to await the "antitrust proceedings." Five of the cases they cite -- United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965); FPC v. Sunray DX Oil Company,

(cont.)

Within the context of their district court analogy, the other parties, notably the Staff, cite a number of decisions supposedly in support of the view that a court has unlimited power to order virtually any relief it chooses.^{33/} Thus, they quote International Salt Co. v. United States, 332 U.S. 392, 401 (1947), to the effect that antitrust relief shall "pry open to competition a market that has been closed by defendants' illegal restraints,"^{34/} and United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 607-608 (1957) (duPont - GM), for the conclusion that relief shall include the steps "necessary and appro-

32/ (cont.)

391 U.S. 9 (1968); Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 (1959); FPC v. Hunt, 376 U.S. 515 (1964); and Texaco v. FPC, 290 F.2d 149 (5th Cir. 1961) -- deal with the power of the FPC to prescribe a price as a condition of a certificate of public convenience and necessity granted under Section 7 of the Natural Gas Act. Another of the cases, Admiral-Merchants Motor Freight, Inc. v. United States, 321 F.Supp. 353 (D. Colo, 1971) (three judge court), aff'd, 404 U.S. 802, upheld an ICC order denying a rate increase directing repayment of interim rates as a condition of granting an extension of time. Most puzzling of all is the citation of Russell v. Farley, 15 Otto 433 (1882), in which the Court held that, as a condition of granting an injunction to stay proceedings at law, a court may require the plaintiff to enter an understanding as to damages in the event that the injunction proves to have been wrongfully granted.

33/ See Staff Brief, pp. 182-185.

34/ Id. at 182-83 (emphasis added).

priate in the public interest to eliminate the effects
of the acquisition offensive to the statute."^{35/} These
broad maxims must be viewed in the specific context of the
varying relief objectives confronting a court in each case.

Here, the principal thrust of the other parties' case
is that nuclear generation, in the form of the Midland plant,
is so significant a resource that the antitrust laws should
be extended to impose an affirmative duty on a large utility
to share that resource with its smaller neighbors. As we
have noted in detail elsewhere, we believe that position
to be unsound factually and legally. But assuming arguendo
that the Hearing Board were to accept it, its proper impli-
cations would be far different from those the other parties
would suggest. Under that assumption, any impact of a denial
of Midland access on Consumers Power's nearby neighbors
will, by definition, be prospective since the Company itself
will not enjoy any benefits from the units until they come
on line five years from now.

^{35/} Id. at 183 n. 152 (emphasis added).

That circumstance stands in stark contrast to the situations that confronted the courts in cases like duPont-GM and International Salt. In the duPont case, the Court faced the unusual challenge of undoing the impact of an illegal arrangement that had been in effect for 38 years at the time the Court wrote. In International Salt, the defendant had entered into at least 790 illegal tie-in transactions,^{36/} causing the Court to stress the problems of dealing with widespread consummated antitrust violations.^{37/}

In a more relevant setting, reviewing the action of an administrative agency which had blocked the consummation of a merger, Chief Justice Warren, writing for the unanimous Supreme Court, stressed that:

"Our duty is to give 'complete and efficacious effect to the prohibitions of the statute' with as little injury as possible to the interests of private parties or the general public [T]he choice of remedy is as important a decision as the initial construction of the statute and finding of a violation. The court or agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives just described."

Gilbertville Trucking Co. v. United States, 371 U.S. 115, 130 (1962). In that case, the Supreme Court reversed the

^{36/} 332 U.S. at 394-95.

^{37/} 332 U.S. at 400.

ICC because the Commission had not shown that its choice of a broad remedy was necessary or appropriate.

In another leading administrative agency anti-trust case, the United States Court of Appeals for the District of Columbia Circuit, through then-Circuit Judge Burger, reversed an FTC order to the extent it required the sale of certain facilities used in the operation of a company ordered divested, Reynolds Metals Co. v. FTC, 309 F.2d 223, 230-31 (D.C. Cir. 1962). The present Chief Justice held:

"If ever after-acquired property may be subject to a government order to sell, an even greater necessity, totally absent on the present record, must be shown. Inasmuch as there is a failure on this record to demonstrate (1) any nexus between continued possession of after-acquired property, such as the Torrance plant, and the violation of Section 7 [of the Clayton Act], and (2) that restoration of the competitive status quo compels divestiture of such property that part of the Commission's order. . . cannot be sustained."38/

38/ Id. at 231 (first emphasis in the original, others supplied). To similar effect is Papercraft Corp. v. FTC, 472 F.2d 927 (7th Cir. 1973), striking down an FTC order prohibiting a divesting firm from competing for the customers of the divested company. The court there stressed that questions of propriety are particularly raised when the remedy selected is "an untried and blunt instrument" which is itself anticompetitive in effect. 472 F.2d at 933.

Thus, the case law refutes the blanket claim of our adversaries that there are no parameters to the Board's authority in drafting remedial license conditions. In the context of this proceeding, these parameters, we submit, encompass relief confined to access to the Midland Units to be licensed -- not to the collateral matters raised by our adversaries.

3. Coordinated Operations.

Because we deem unit access to be a fully adequate remedy to any alleged antitrust inconsistency and because we also believe such relief to be the outer boundary of the Commission's jurisdiction under Section 105c, relief relating to coordinated operations (such as emergency support, economy energy and maintenance power) is, in our view, both unnecessary and unlawful. However, in the event that the Board chooses to impose license conditions in any of these areas, the proposals of the Department of Justice and the Intervenors must be rejected for several reasons.

First, the coordinated operation proposals of the Department of Justice and the Intervenors fail to include the provision that such operations should provide the Company with net benefits; i.e., the benefits derived from the proposal should significantly exceed the costs. Notably,

the Staff's proposal^{39/} does recognize this principle which, as we explained in our main brief,^{40/} is fundamental to bulk power arrangements between electric systems. Although the Department of Justice rhetorically terms this position "exacting the advantage of its monopoly position," it has found no antitrust inconsistency, and no need for a Section 105c hearing, in many other utilities' coordination policies containing comparable terms.^{40a/}

Second, the proposed license conditions of all of our adversaries are deficient because they fail to provide the Company with assurance that its coordinating partners possess either the willingness or the capacity to offer reciprocal coordination arrangements. Even if a system is self-sufficient it may not be able to provide reciprocal transactions to the extent that it receives them; for example, its generation or transmission facilities may be inadequate to permit it to provide an equal share of coordinating

^{39/} Staff Brief, p. 149.

^{40/} Consumers Power Co. Brief, pp. 186-92.

^{40a/} See p. 117 n. 45 supra.

services, such as emergency back-up or maintenance power, so as to repay its coordinating partner. Under these circumstances, it "leans" on its coordinating partner and unfairly burdens that partner.^{41/} Therefore, any license condition providing for coordinated operations should provide that the Company may insist that its coordinating partner maintain the ability to offer it comparable, equally reliable coordinating services.

Third, we have previously explained why the so-called "equal percentage" reserve sharing should have no place in license condition formulas.^{42/} None of our opponents' relief proposals appears to press explicitly for equal percentage reserves as such. However, the Department urges that the Board "essentially" follow the specific Gainesville terms (though not, we submit, the FPC's approach in reaching that result).^{43/} The Intervenors propose that the reserve formula not be related to the size of generation units,^{44/} and the Staff proposes that proper reserve levels should be established in AEC enforcement actions.^{45/}

^{41/} Finding of Fact 4.35.

^{42/} Findings of Fact 4.45, 5.09.

^{43/} See Consumers Power Company Brief, pp. 197-99.

^{44/} Intervenors' Brief, pp. 127-34.

^{45/} Staff Brief, pp. 156-57.

All of those proposals should be rejected: as we have explained, the method of determining reserve levels varies with each case;^{46/} the precise relief ordered in the Gainesville decision is applicable only to that case and could inequitably burden the Company if utilized here. Most important, again as our main brief explained, whether a given reserve sharing arrangement is appropriate is within the exclusive jurisdiction of the Federal Power Commission,^{47/} so that license conditions in this regard should provide only that the FPC should establish the appropriate standards if the parties are unable to agree about reserve arrangements.

^{46/} Findings of Fact 4.43, 5.08, 5.09, Consumers Power Company Brief, pp. 197-202.

^{47/} Consumers Power Co. Brief, pp. 27-35, 119-24. The Department of Justice's treatment of the FPC's role in this area demonstrates its utter disregard for that agency's responsibilities and authority. The Department acknowledges that the FPC has authority to order coordinated operation and that no effort has been made to obtain this relief through the FPC. Justice Brief, pp. 234-35. But, the Department argues that there is no conflict because the FPC's policy is expressed in the Gainesville case and other FPC proceedings. It is, of course, the FPC's on-going development and implementation of policy that is protected by the doctrine of primary jurisdiction, not its position in a particular case. Justice's position is comparable to an assertion that the AEC should require a licensee to pay a sum of money into the Treasury on the basis of an IRS Revenue Ruling cited to it. Obviously, the absurdity of Justice's position is underscored by the highly general terms in which Gainesville is couched. See LP&L Hearing Board Order, supra, pp. 43-44.

Finally, the rates at which coordinated services are arranged should not, as the Intervenor^s propose,^{48/} be established by the AEC. Not only is such rate-making beyond the jurisdiction of the AEC,^{49/} but also no record exists which would permit the establishment of such rates. It would also be inappropriate for this Board or the AEC to dictate rate guidelines--e.g., rates "no higher than those charged to any other utility"--to other regulatory authorities. It is self evident that charging different rate levels to different systems often may be justified or required by particular circumstances or by an evaluation of the entire coordination arrangement as a package.^{50/}

Therefore, any reserve-sharing license conditions imposed by this Board should provide only that, if the parties are unable to agree upon fair reserve-sharing or other arrangements for coordinated operations, the terms should be resolved by the Federal Power Commission.

^{48/} Intervenor^s' Brief, App. A, pp. 6-7.

^{49/} LP&L Hearing Board Order, pp. 42-43 ("supervision over rates is the particular province of the Federal Power Commission.")

^{50/} Slemmer 9 after 8838; Findings of Fact 4.43, 5.08.

4. Transmission Service.

As with coordinated operations, our main brief explained why relief providing for transmission services is both unnecessary and beyond the jurisdiction of the Commission's authority under Section 105c.^{51/} Even in the event that the Board disagrees, the license condition proposals of our adversaries relating to transmission (other than the self-evident obligation to deliver Midland power) should be rejected.

The other parties to this proceeding have argued that the Company's smaller neighbors need access to the Company's transmission system in order to engage in coordinated development.^{51a/} Yet, at least the Staff acknowledges^{52/} that coordinated development by smaller systems can be conducted under the Company's present wheeling policies.

The wheeling license conditions which the other parties propose, however, would permit access to the Company's transmission system under all circumstances -- not simply to deliver power from the Midland Units or assist other systems in constructing nuclear capacity and coordinating development. Most significantly the open-ended proposals of our adversaries would allow another

^{51/} Consumers Power Co. Brief, pp. 225-28.

^{51a/} See e.g. Justice Brief, pp. 103-112.

^{52/} Staff Brief, p. 74.

system to "pirate" or "cream skim" the Company's non-generating wholesale customers, which the Company has made a considerable investment to serve.^{53/} Such actions were condemned by nearly all of the system managers and expert witnesses who testified in this proceeding and are clearly contrary to the public policy of avoiding wasteful duplication of facilities.^{54/} The license conditions compelled by the Board should clearly not facilitate such activity.

Similarly, the Company should not be compelled to provide transmission services which jeopardize its ability to furnish economical, dependable and satisfactory service to its customers, to satisfy its obligations to other electric systems, or to engage in coordinated transactions with other systems. The proposed license conditions relating to transmission offer the Company no protection in these vital areas.^{55/}

53/ Findings of Fact 4.69, 4.70, 5.10.

54/ Findings of Fact 2.42, 2.43.

55/ That this concern is not illusory is evidenced by the Federal Power Commission's statement in its recent coal-by-wire order:

"Capacity and energy transfers between electric power systems are a function of the system operating condition at a particular time. To attempt any transfer of capacity or energy through other than these dispatch communication channels is an invitation to a system blackout or other major system disturbance. This is true because power system conditions are dynamic

(cont.)

Finally, as the Hearing Board in the LP&L case explicitly recognized, neither this Board nor the AEC has jurisdiction over transmission rates; rather, these are the "particular province" of the Federal Power Commission.^{56/} Thus, the proposal of the Department of Justice that rates for transmission services for less-than-five-year periods be incrementally priced is not only totally without support in the record, but also invades the province of the FPC. Indeed, the FPC is currently conducting rate-making proceedings to determine whether such transmission rates

55/ (cont.)

and subject to many internal and external forces which could require major system adjustments. These adjustments require detailed knowledge of the involved system and some knowledge of the interconnected systems."

New England Power Pool Participants, FPC Dkt. No. RM74-22, Order Permitting Withdrawal of Petition for Emergency Relief (Docket No. E-8589) and Accepting Rate Schedules Permitting Withdrawal of Rate Schedules, Disposing of Procedural Matters and Terminating Proceedings, at p. 23 (August 26, 1974), App. S-11.

56/ LP&L Hearing Board Order, pp. 42-43 ("supervision over rates is the particular province of the Federal Power Commission.")

should be incrementally priced,^{57/} so that AEC intervention in this area would be particularly inappropriate.

Therefore, any license condition relating to transmission services should: (1) provide for services necessary to deliver power from Midland should the Board impose this form of direct access; (2) be otherwise limited to transmission necessary for interconnected systems to engage in coordinated development to facilitate the construction of nuclear units; (3) provide that such transmission services should not jeopardize the Company's service reliability, obligations to other systems, or coordinating opportunities; (4) provide that such services not facilitate "pirating", "cream skimming" or other resource waste and misallocation; and (5) be provided under terms approved by the Federal Power Commission.

B. The Impact of License Conditions.

Perhaps the most striking deficiency in the briefs of our adversaries is their failure to assess the overall impact of their proposed license conditions. Conditions which provide for coordination with unreliable or non-self-sufficient

^{57/} Amendment of Regulations Under the Federal Power Act, FPC Dkt. No. RM75-3, Notice of Proposed Rulemaking to Amend Regulations Under the Federal Power Act Covering Emergency Actions Pursuant to Section 202(c) of the Federal Power Act, at p. 7 (August 26, 1974).

systems, transmission services which permit "pirating" of existing loads or service areas, and unit access without reciprocal opportunities will increase the costs of electric service to the Company's customers. The Board must ask itself whether the principles of the antitrust laws are served by the license conditions which have the primary impact of increasing the cost of power to Consumers Power's customers, so as to decrease the cost to the customers of its smaller neighbors -- most of whom already enjoy lower rates.

The Department of Justice explicitly, and presumably the other parties as well, propose to put the Company at a grave competitive disadvantage, in order to restructure the electric utility industry and thus, in their view, to promote competition.^{58/} We agree that the license conditions proposed by our adversaries could well restructure the electric utility industry in Michigan, but the result will eliminate rather than promote competition.

Although Consumers Power Company is the largest electric supplier in its area, in accordance with well-accepted economic factors and governmental policies, Lower Michigan's electric industry is presently highly pluralistic. Within and adjacent to the Company's service area, numerous smaller systems --

^{58/} Justice Brief, pp. 74-86.

all but two of them publicly-owned municipal systems or REA cooperatives -- operate and thrive.

During the period under scrutiny since 1960, the Company and its public power neighbors have operated in relative equilibrium -- indeed, the public power systems have generally enjoyed lower rates and higher growth rates than the Company.^{59/} This equilibrium is to a large extent the result of the public power systems' artificial tax and financing advantages which have offset whatever economies of scale a large company such as Consumers Power possesses.^{60/} The license conditions proposed in this proceeding -- even if the deficiencies noted in Subsection A were corrected -- would upset this equilibrium without saving natural resources or maximizing resource allocation.^{61/}

Certainly, at the very least, the license conditions proposed by our adversaries would result in both Consumers Power and its public power neighbors obtaining their bulk power from the same source -- nuclear units constructed

^{59/} Findings of Fact 2.17-2.19.

^{60/} Finding of Fact 2.20; Stelzer 7 after 7224. The Department of Justice recognizes the existence of this equilibrium as well. See Justice Brief, p. 241 et seq.

^{61/} Stelzer 18 after 7224.

by Consumers Power Company. This, of course, hardly serves to promote bulk power supply competition since all systems will share whatever benefits or burdens result from the shared units. Thus, whether or not the result is a bulk power cartel in Lower Michigan, or the misallocation of resources, the license conditions proposed in the name of competition will be contrary to the public interest.

It is, of course, in the self-interest of the Intervenors and other proponents of public power to press for the type of license conditions which have been proposed here. But we ask the Board to look beyond such provincial concerns to the adverse consequences of destroying the equilibrium which presently exists. One consequence is that, because the rates charged for power produced by subsidized facilities will not reflect the true resource cost of such power, customers will be encouraged to wastefully over-utilize these facilities.^{62/} Another adverse result is that this over-utilization will, in turn, encourage the construction of inherently uneconomic facilities -- the excess costs of

62/ Stelzer 17-18 after 7224.

63/

which are ultimately borne by the taxpayer.

As the LP&L Hearing Board recognized, bulk power arrangements which permit public power systems to exploit their subsidies offer such systems a competitive advantage but do not promote "resource" savings.^{64/} Certainly there is nothing in the antitrust laws, Section 105c of the Act, or any other expressions of national policy to substantiate the view that these public power systems should be permitted to utilize their artificial advantages at the expense of customers of private utilities such as Consumers Power Company or at the expense of the type of pluralistic competitive equilibrium which presently exists in Lower Michigan. In the event that the Board were to find there exists an anti-trust inconsistency requiring the imposition of license conditions, we would urge the Board not to create a "competitive imbalance" by adopting our opponents' license proposals, but rather to provide for the maintenance of such balance by requiring only that the Company make wholesale service available to all present or future systems under the equitable terms and conditions previously discussed.

63/ Stelzer 7017, 7125-7126.

64/ LP&L Hearing Board, supra, p. 35.

Appendix A - The Role of Regulation in
Assuring Efficiency

As we note in Section IV-B of this reply brief, the question of whether rate regulation is effective in assuring Consumers Power Company's efficiency is, we submit, unrelated to any relevant issue in this proceeding. However, since the Department of Justice addresses the point at length and draws broad conclusions which we believe to be unsupportable at least with regard to Lower Michigan, we review their allegations in this brief appendix.

The only evidence to which the Department points is extremely general and conclusory, referring indiscriminately to regulation nationally. Indeed, three pages of the Justice Brief are devoted to a quotation from Leland Olds' 1954 testimony about two 1937 papers describing state utility regulation in the early Thirties.^{1/}

Examination of the actual conduct of regulation in Michigan flatly contradicts the Department's broad con-

^{1/} Justice Brief, pp. 131-33. The Department also relies on the generalized characterization of utility regulation on a national basis by Professor Wein, who nowhere claims a specific familiarity with regulation by the Michigan Public Service Commission.

tention. First, it has been clear since 1917 that the Michigan utility commission^{2/} could directly assure the efficient operation of a regulated utility as well as supervise its finances.^{3/} More recently, in carrying out its responsibility to regulate all "matters pertaining to the formation, operation or direction of ... public utilities,"^{4/} the Michigan Public Service Commission has instructed the Company and its own staff "to establish mutually acceptable performance goals, particularly in the areas of construction planning and management, full utilization of plant capacity and other critical items of general operations."^{5/}

In appropriate instances, the MPSC has engaged in very detailed supervision of the Company's operations. For example, the Commission has recently required that Consumers Power and The Detroit Edison Company submit daily

^{2/} Then termed the Railroad Commission and now known as the Public Service Commission.

^{3/} See Village of Williamston v. Williamston Illuminating Co., 1917C PUR 121 (Mich. Railroad Comm'n, 1917), App. S-2.

^{4/} MSA 22.13(6), App. I-24.

^{5/} Consumers Power Co., 3 PUR 4th 321, 341 (MPSC 1974), App. I-12.

reports of projected and actual generation capacity, and available and anticipated fuel supplies.^{6/}

In fact, the very report of the General Accounting Office that the Justice Department cites in its blanket attack on the adequacy of regulation^{7/} points to the Michigan Public Service Commission, as one of three among the 41 state commissions responding to its survey that sought to assure adequate consideration of alternative equipment manufacturers and other suppliers by the utilities under its supervision. As the Comptroller-General told a Senate subcommittee, in singling out the MPSC's effect in this regard:

"The Michigan commission 'is much concerned in this area and its latest Detroit Edison Order has ordered the company and the Commission staff "to establish ... performance goals ... in the area of construction planning." In addition, the Commission is in the process of staffing a newly established Performance Evaluation Unit which will have as some of its major functions the development of standards for review of accomplishments in the area of construction planning and execution and in the purchasing of equipment."^{8/}

^{6/} Consumers Power Co. and Detroit Edison Co., MPSC Case U-4128, Order to Show Cause Why Emergency Procedures Should Not Be Implemented Granting Interim Effect, Requiring Publication and Setting Public Hearing, p. 2, (January 28, 1974) App. S-5.

^{7/} U.S. General Accounting Office, Report to the Subcommittee on Budgeting, Management and Expenditures, Committee on Government Operations, United States Senate, Survey of Federal and Electric Utility Procurements of Power Equipment (B-174317, August 1, 1974) cited at Justice Brief, pp. 128-29.

^{8/} U.S. General Accounting Office, supra at p. 34. GAO found no comparable effort on the part of any other state.

Thus, whatever may be the situation in other states or whatever it may have been in other eras, it is plainly incorrect to contend that regulation in Michigan is not today directed toward improving utility efficiency.

Moreover, regulation is not the only factor assuring the maximum efficiency of Consumers Power Company operations. The Company has not been able to attain the rate of return permitted it by the MPSC for some years.^{9/} Consequently, the Company has as much incentive to operate efficiently to increase earnings as any business firm. In addition, yardstick notions, admittedly imprecise and skewed, inevitably serve as a goad to the Company's managers.

9/ Findings of Fact 3.27, 3.28.

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Respectfully submitted,

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November 25, 1974

Table 1

Recent Nuclear Plant Cancellations or Deferrals

Company	Plant & Unit	Cancelled or Deferred	Time	AEC Dkt. No.
Alabama Power Co.	Alan Barton 1, 2,3,4	Deferred	2 yrs.	50-524, 50-525, 50-526, 50-527
Baltimore Gas & Electric Co.	Calvert Cliffs 2	Deferred	1 yr.	50-318
Boston Edison Company	Pilgrim 3	Deferred	indefinitely	50-472
Carolina Power & Light Company	Shearon Harris 1,2,3	Deferred	1.5 yrs	50-400, 50-401 50-402
Carolina Power & Light Company	Shearon Harris 4	Deferred	2 yrs.	50-403
The Detroit Edison Company	Greenwood 2,3	Deferred	1 yr.	50-452, 50-453
The Detroit Edison Company	Fermi 2	Deferred	1 yr	50-341
The Detroit Edison Company	Fermi 3	Deferred	indefi- nitely	Project #478
Duke Power Company	Perkins 1	Deferred	2 yrs.	50-488
Duke Power Company	Perkins 2	Deferred	3 yrs.	50-489
Duke Power Company	Perkins 3	Deferred	4 yrs.	50-490
Duke Power Company	Cherokee 1	Deferred	2 yrs.	50-491
Duke Power Company	Cherokee 2	Deferred	3 yrs.	50-492
Duke Power Company	Cherokee 3	Deferred	4 yrs.	50-493
Dusquesne Light Company	Beaver Valley 2	Deferred	2 yrs.	50-412
Florida Power Corp.	Florida Power 1,2	Postponed	indefi- nitely	Project #530

Company	Plant & Unit	Cancelled or Deferred	Time	AEC Dkt. No.
Georgia Power Company	Alvin W. Vogtle 1,2	Deferred or Cancelled	Indefinitely	50-424, 50-425
Georgia Power Company	Alvin W. Vogtle 3,4	Cancelled	Sept. 1974	50-426, 50-427
Gulf States Utilities Company	Blue Hills 1,2	Deferred	2 yrs.	50-510, 50-511
Jersey Central Power and Light Company	Forked River 1	Deferred	1 yr.	50-363
Kansas Gas & Electric Company	Wolf Creek	Deferred	1 yr.	50-482
Metropolitan Edison Company	Three Mile Island 2	Deferred	1 yr.	50-320
Metropolitan Edison Company	Portland 5	Deferred	1 yr	Project #473
New York State Electric and Gas Corporation	Somerset 1,2	Deferred	2 yrs.	Project #507
Northeast Utilities	Montague 1,2	Deferred	1 yr.	50-496, 50-497
Northern States Power Company	Tyrone 1	Deferred	3 yrs.	50-484
Northern States Power Company	Tyrone 2	Deferred	indefi- nitely	50-487
Ohio Edison Company	Erie 1,2	Deferred	1 yr.	Project #512
Pennsylvania Power & Light Company	Susquehanna 1,2	Deferred	1 yr.	50-387, 50-388
Potomac Electric Power Company	Douglas Point 1,2	Deferred	2 yrs.	50-448, 50-449
Public Service Electric & Gas Company	Atlantic 1	Deferred	5 yrs.	50-477
Public Service Electric & Gas Company	Atlantic 2	Deferred	65 mos.	50-478

Company	Plant & Unit	Cancelled or Deferred	Time	AEC Dkt. No.
Public Service Electric & Gas Company	Hope Creek 1	Deferred	7 mos.	50-354
Public Service Electric & Gas Company	Hope Creek 2	Deferred	1 yr.	50-355
Public Service Electric & Gas Company	Salem 2	Deferred	32 mos.	50-311
Toledo Edison Company	Davis Besse 2,3	Deferred	1 yr.	50-500, 50-501
Virginia Electric & Power Company	North Anna 3,4	Deferred	9 mos.	50-404, 50-405
Virginia Electric & Power Company	Surry 3,4	Deferred	9 mos.	50-434, 50-435

CONSUMERS POWER COMPANY

Supplemental Proposed Findings of Fact

1.06A Consumers Power Company's intention to construct the Midland facility was publicized as early as 1967. [Exhibit 183]

4.02A Consumers Power Company has, for the life of the Midland Units, committed itself to provide wholesale service to any present or future customer with which the Company does not have a coordination agreement, provided that such service is technically and economically feasible and can be furnished without jeopardizing the Company's ability to furnish economical, dependable and satisfactory service to its customers or to satisfy its obligations to other electric systems with which it is interconnected. [Consumers Power Co. Reply Brief, pp. 77-78]

4.12A There is no substantial evidence that Consumers Power Company has engaged in wholesale territorial allocation agreements or arrangements with other electric systems.

4.12B There is no factual basis for concluding that Consumers Power Company's wholesale service unreasonably ties together a group of products or services.

4.19A There is no substantial evidence that utilities depart from these principles by offering coordination-type

services without assurance of reciprocity.

4.27A There is no substantial evidence that Consumers Power Company has unreasonably refused to deal with other systems in matters involving coordinated operations, coordinated development (including the development of nuclear facilities) or wheeling.

4.31A There is no substantial evidence that Consumers Power Company has engaged in "pre-emptive coordination" for the purpose of blocking coordination among municipal and cooperative systems.

4.71A There is no substantial evidence that Consumers Power Company has unreasonably discriminated against any other systems in matters involving coordinated operations, coordinated development (including the development of nuclear facilities) or wheeling.

I N D E X

Supplementary Legal Materials

1. Abbott Securities Corp. v. New York Stock Exchange, 1974-2 Trade Cas. ¶75,324 (D. D.C. October 30, 1974).
2. Village of Williamston v. Williamston Illuminating Co., 1917 C. P.U.R. 121 (1917).
3. Cleary v. National Distillers and Chemical Corp., 1974-2 Trade Cas. ¶75,330 (9th Cir. October 29, 1974).
4. Consumers Power Co., 3 P.U.R. 4th 321 (MPSC January 18, 1974).
5. Consumers Power Co. and Detroit Edison Co., MPSC Case U-4128, Order to Show Cause Why Emergency Procedures Should Not Be Implemented Granting Interim Effect, Requiring Publication and Setting Public Hearing (January 28, 1974).
6. United States v. Falstaff Brewing Corp., 1974-2 Trade Cas. ¶75,314 (D. R.I. October 23, 1974).
7. City of Hazel Park v. Municipal Finance Comm'n, 317 Mich. 582, 27 N.W.2d 106 (1947).
8. Industrial Communications Systems, Inc. v. Pacific Telephone & Telegraph Co., 1974-2 Trade Cas. ¶75,291 (9th Cir. October 4, 1974).
9. Jack Winter, Inc. v. Koratron Co., 1974-2 Trade Cas. ¶75,270 (N.D. Cal. March 6, 1974).
10. Monticello Heights, Inc. v. Morgan Drive Away, Inc., 1974-2 Trade Cas. ¶75,282 (S.D. N.Y. September 30, 1974).
11. Amendment of Regulations Under the Federal Power Act, FPC Dkt. No. RM75-3, Notice of Proposed Rulemaking to Amend Regulations Under the Federal Power Act Covering Emergency Actions Pursuant to Section 202(c) of the Federal Power Act (August 26, 1974).
12. New England Power Pool Participants, FPC Dkt. No. RM74-22, Order Permitting Withdrawal of Rates Schedules, Disposing of Procedural Matters and Terminating Proceedings (August 26, 1974).

Abbott Securities Corp. v. New York Stock Exchange

[¶ 75,324] *Abbott Securities Corp., et al. v. New York Stock Exchange.*

U. S. District Court, District of Columbia. Civil Action No. 1778-72. Filed October 30, 1974.

Sherman Act

Exemptions—Primary and Exclusive Jurisdiction—Securities Exchange Practices—“Totality of Restraints” on Independent Brokers.—There was no jurisdiction for an anti-trust court to determine the reasonableness of the totality of competitive restraints allegedly imposed upon independent broker-dealers alleging that they were excluded from economic access to the NYSE, since the SEC had the power to review the Exchange's conduct. Since it was a fact that the issue of economic access for non-members was inextricably intertwined with the practice of fixing commission rates, and that the SEC had review jurisdiction of the conduct, the exchange was immune from the operation of the antitrust laws for the alleged conduct. (The alleged restraints included a non-member minimum commission schedule and rules prohibiting rebates to non-members, commission splitting with non-members, and customer directed give-ups.) See ¶ 1392.

Exemptions—Primary and Exclusive Jurisdiction—Securities Exchange Practices—Monopolization—Retention of Institutional Business Commissions—Intent—Nonreviewability by SEC.—An allegation by independent brokers that the stock exchange and its members intended and conspired to retain 100% of the brokerage commissions earned on institutional and investment company portfolio transaction brokerage orders by monopolizing the market was conduct not reviewable by the SEC and would, if proved, subject the exchange to antitrust liability. Plaintiffs had sought judicial review of an SEC direction that the exchange promulgate a rule prohibiting customer directed give-ups, and took the position here that, at the time the rule was promulgated, defendant considered giving them, and could have given, plaintiffs direct access to the floor, as was eventually done, but chose not to do so in an exercise of discretion “tainted by anticompetitive purpose and impact.” The exchange's intent at the time the choice was made is a question of fact to be determined by trial. See ¶ 1392.

For plaintiffs: Carl L. Shipley and John Barry Donohue, Jr., Washington, D. C.
For defendant: William E. Jackson, Washington, D. C.

Memorandum Opinion

WADDY, D. J.: Plaintiffs, forty-seven independent broker-dealers in the securities industry, all members of the National Association of Securities Dealers and all non-members of the defendant New York Stock Exchange (Exchange), allege in their complaint that during the period from December 5, 1968 to April 2, 1972, defendant and its members conspired to deny and did deny to plaintiffs economic access to the floor of the exchange, by participating in a group boycott, in an attempt to monopolize the portfolio brokerage commission business. These actions, plaintiffs assert, are in violation of the provisions of the Sherman Antitrust Act, 15 U. S. C. §§ 1-7. Plaintiffs demand treble damages. Jurisdiction of this Court is based on the Clayton Act, 15 U. S. C. § 15 and 28 U. S. C. § 1337.

Prior to December 5, 1968, plaintiffs had economic access to the New York Stock Exchange securities market, even though they were not members. This access was made possible through a practice known as the “give-up”. This practice enabled plaintiffs and other non-member securities dealers to earn substantial income through

reciprocal business arrangements permitted by the Exchange and customer directions such as where a securities broker surrendered a portion of his commission on a transaction to another broker at the direction of the customer placing the order. The recipient broker was usually not connected with the particular transaction but was being compensated by an investment company customer for other services such as sales of mutual fund shares or research performed by the broker for the investment company. This practice was discontinued by the Exchange on December 5, 1969. On September 24, 1971, the Exchange adopted a new policy by agreeing to allow limited economic access to the Exchange market through a 40% member discount. This policy became effective April 2, 1972.

This case is presently before the Court on plaintiffs' motion for summary judgment on the issue of liability, their memoranda of points and authorities in support thereof, the opposition of defendant thereto, and defendant's cross-motion for summary judgment, and its memoranda of points and authorities in support thereof. Defendant has filed the affidavit of Donald L. Calvin,

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vice president in charge of defendant's government relations, and thirty-three exhibits thereto, in support of its motion and in opposition to plaintiffs' motion. The Court has heard oral arguments on these motions.

[Claims]

From a reading of the complaint and the other documents filed in the case it appears to the Court that plaintiffs seek to hold defendant liable under the antitrust laws on two grounds. First, plaintiffs allege that the totality of competitive restraints¹ imposed upon them during the period from December 5, 1968, the effective date of the Exchange's rule prohibiting customer-directed give-ups, until April 2, 1972, the date when the 40% non-member broker-dealer discount became effective, were unreasonable. Second, plaintiffs allege that it was the intention of defendant securities Exchange and its members to retain 100% of the brokerage commissions earned on institutional and investment company portfolio transaction brokerage orders by monopolizing the market, and that defendant and its members conspired to do so by participating in a group boycott and denying plaintiffs economic access to the Exchange floor during this period of time. Plaintiffs claim that defendants are liable as a matter of law.

[Defenses]

Defendant bases its opposition and motion on three defenses. First, defendant contends that the rules which plaintiffs challenge, which rules had the cumulative effect of foreclosing economic access to the Exchange floor to non-member broker-dealers, constituted government mandated action to which the antitrust laws are inapplicable; second, that the Securities and Exchange Commission had review jurisdiction over the self-regulatory conduct being challenged, thereby immunizing the Exchange from antitrust liability; and third, that the conduct of the Exchange was reasonable and justified in response to an antitrust claim.²

[Totality of Restraints—Jurisdiction]

It is the opinion of this Court that it lacks jurisdiction, sitting as an antitrust

court, to determine the reasonableness of the totality of competitive restraints imposed upon plaintiffs during the time alleged, insofar as the Securities and Exchange Commission had the power to review such Exchange conduct. *Gordon v. New York Stock Exchange* [1974-2 TRADE CASES ¶75,148], 498 F. 2d 1303 (CA2 1974); *Silver v. New York Stock Exchange* [1963 TRADE CASES ¶70,787], 373 U. S. 341, 358-361 (1963). Since it is a fact that the issue of economic access for non-member broker-dealers is inextricably intertwined with the practice of fixing commission rates, see para. 8 of the first amended complaint; and see *Gordon, supra*, 498 F. 2d at 1310, and further that the SEC had review jurisdiction of this conduct pursuant to §19(b) of the 1934 Securities Exchange Act, we find, as a matter of law, that defendant is immune from the operation of the antitrust laws for this alleged conduct and that it is entitled to judgment as a matter of law in this regard.

[Retention of Brokerage]

However, we find that plaintiffs' second allegation of conduct on the part of the Exchange and its members, i.e., that defendants and its members intended and conspired to retain 100% of the brokerage commissions earned on institutional and investment company portfolio transaction brokerage orders by monopolizing the market, is alleged conduct not reviewable by the SEC, and will, if proven, subject defendant to antitrust liability. Our Court of Appeals referred to the possibility of this type of liability attaching to an exchange in the case of *Independent Broker-Dealers' Trade Association v. Securities and Exchange Commission*, 497 F. 2d 132 (CA2 1971).³ In discussing the possibilities of an antitrust action based on exchange self-regulatory, anti-competitive conduct, the Court said:

"It is conceivable that an antitrust action could be grounded on the consideration that in a particular case, notwithstanding a formal request by the SEC, the Exchange and its members had a choice and exercised discretion that were [sic] tainted by anti-competitive purpose and impact which could not be justified by

¹ These restraints included a non-member minimum commission schedule, which treated non-member broker-dealers and individual investors alike, and rules prohibiting rebates to non-members, commission-splitting with non-members, and customer-directed give-ups.

² The Exchange asserts that it had a legitimate concern regarding the effect of §3(a)(3)

of the 1934 Act on a non-member broker-dealer discount, and that since the SEC was holding hearings on the matter, and exercising its jurisdiction, its delay in granting access was in deference to the regulatory approach.

³ *Independent Broker-Dealers' Trade Association* is the trade association of plaintiffs herein.

Fairfield County Beverage Distributors v. Narragansett Brewing Co.

the regulatory approach." 442 F. 2d at 140 n.11.*

In *Independent Broker-Dealers' Trade Association*, plaintiffs sought judicial review of SEC action, i.e., the action of the Commission in directing the New York Stock Exchange to promulgate a rule prohibiting customer-directed give-ups. Plaintiffs herein take the position that at the time the rule prohibiting customer-directed give-ups was promulgated, defendant considered giving them, and could have given them, direct access to the floor of the Exchange as was

eventually done in April of 1972, but chose not to do so in an exercise of discretion "tainted by anti-competitive purpose and impact," i.e., to retain 100% of the brokerage commissions. Defendant denies this allegation and asserts that its conduct was reasonable and "justified by the regulatory approach." Defendant's intent at the time the choice was made is a question of fact to be determined by a trier of fact. Therefore we find that there exist genuine issues of material fact that preclude judgment as a matter of law for either party.

[¶ 75,325] *Fairfield County Beverage Distributors, Inc. v. Narragansett Brewing Co.*

U. S. District Court, District of Connecticut, Bridgeport. Civil No. B-87. Filed July 19, 1974.

Sherman Act

Territories—Beer Distribution—State Liquor Controls—Constitutional Antitrust Immunity.—A brewer's imposition and enforcement of territorial restrictions in the distribution of its products, although clearly within the type of restrictions prohibited by *Schwinn* per se rules, did not violate Sec. 1 of the Sherman Act, since the state's regulation of liquor, reserved to it under the Twenty-first Amendment of the U. S. Constitution, made the brewer's actions immune from the prohibitions of the Sherman Act. Although the state liquor control law did not require that the brewer set up limited territories within the state, it permitted and apparently encouraged the establishment of restricted territories. See ¶ 620, 3050.

For plaintiff: Thomas E. Minogue, Jr. and Joel E. Kanter, Bridgeport, Conn.

For defendant: David M. Reilly, Jr., of Reilly, Peck, Raffile & Lasala, New Haven, Conn.

[Opinion]

LUMBARD, Cir. J.: * This is a private action for treble damages under the antitrust laws. Plaintiff Fairfield County Beverages Distributors, Inc. (Fairfield) is a wholesale distributor of soft drinks and beer to retail outlets in Connecticut. From June 1966 to December 1968 Fairfield was the wholesale distributor in certain parts of Fairfield County of the beer products manufactured by defendant Narragansett Brewing Company (Narragansett). Narragansett is a brewer of several brands of beer and is located in Cranston, Rhode Island.

Fairfield claims that territorial restrictions placed on its distribution of Narragansett products during the period in which it was

a distributor of them violated Section 1 of the Sherman Act, 15 U. S. C. §1. By agreement of the parties a bench trial concerned solely with the question of defendant's liability under the Sherman Act was held on May 8, 1974.

[State Liquor Regulations]

Fairfield has been in the wholesale distribution of soft drinks and beer since 1953. In the spring of 1966 Fairfield was distributing soft drinks throughout the Fairfield County area and was distributing certain private label beers to chain stores throughout Connecticut. Under the applicable Connecticut liquor laws and regulations Narragansett was an out-of-state shipper which could

* The majority in *Silver* recognized this type of liability. 373 U. S. at 358-361, and Justice Stewart, dissenting as to the result reached by the majority, thought that this type of exchange conduct was a violation separate and distinct from the ordinary concerted action of an exchange. He said:

"For example, an exchange would be liable under the antitrust laws if it conspired with outsiders, or if it attempted to use its power to monopolize. [citations omitted] Further-

more, individual members of an exchange would be liable if it were shown that they had conspired to use the exchange's machinery for the purpose of suppressing competition. [citations omitted] Application of the antitrust laws to such conduct would rest on the presence of an independent violation, not, as the present case does, simply upon concerted activity by the exchange and its members." 373 U. S. at 371 n. 5.

* Sitting by designation.

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to continue discovery in order to determine the factual premises underlying the claimed exemptions or to determine the Federal Trade Commission's procedures in promulgating the rule would be a means of circumventing the protection afforded by Exemption 5. See *Washington Research Project, Inc. v. H. E. W.*, Civil Action No. 74-1027 (D. C. Cir., Sept. 12, 1974) (slip at 16).¹

The District of Columbia Circuit has recognized that a party arguing that a claim of exemption should be disallowed in a particular case is faced with considerable difficulty.

[I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.

Vaughn v. Rosen, 484 F. 2d 820, 823 (D. C. Cir. 1973), cert. denied, 94 S. Ct. 1564 (1974). Accordingly, the Court of Appeals set forth rules regarding agency indexing of documents so that the arguments by the requesting side might be more effective.² In addition, there is the possibility that *in camera* review might be undertaken. The court feels that these procedures, if carefully followed by all sides, should allow the court to resolve correctly the claimed exemptions in this case, notwithstanding plaintiffs' list of disputed "factual presumptions." See Supplemental Memorandum, *supra* at 4-7.

Accordingly, it is by the court this 3rd day of October, 1974,

Ordered that defendants' motion to quash plaintiffs' subpoena of Roger J. Fitzpatrick and for a protective order be, and the same hereby is, granted; and it is further

Ordered that there shall be no further discovery in this case; and it is further

Ordered that plaintiffs respond to defendants' motion to dismiss or in the alternative for summary judgment on or before November 18th, 1974.

[¶ 75,330] *Peter L. Cleary v. National Distillers and Chemical Corp. and McMinnville Sunshine Dairy Inc.*

U. S. Court of Appeals, Ninth Circuit, No. 72-2460. Dated October 29, 1974. Appeal from U. S. District Court, District of Oregon.

Sherman Act

Boycotts—Agreements to Refuse to Sell—Dairy Equipment—Lack of Firm Offer to Buy—Hearsay Evidence of Conspiracy.—A dairy operator charging that a dairy equipment distributor and a competing dairy conspired to prevent him from purchasing a hydrocarbon detection device (a "snifter") did not offer sufficient evidence to present the case to the jury. Evidence that the operator contacted the distributor and expressed a desire and need for the device, that he was given the "run around" by the distributor, that the distributor sold sniffers to other dairies in the area, that the competitor's snifter was installed on the same day it entered into a lease contract with the distributor, and that after the plaintiff operator sold his dairy to another party the plaintiff received an offer from the distributor to lease a snifter, was wholly inadequate to sustain the charges. There was no evidence that the plaintiff had made a firm demand or offer to buy a snifter, and the only evidence of conspiracy was properly rejected by the trial court as hearsay. See ¶ 720, 2460.

For appellant: George M. Joseph (argued), of Bemis, Breathouwer & Joseph, Portland, Ore. **For appellees:** Cleveland C. Cory (argued), of Davies, Biggs, Strayer, Steel & Boley, Portland, Ore., for National Distillers; Harry W. Devlin (argued), McMinnville, Ore., for McMinnville Sunshine Dairy.

¹ Nothing stated herein should be taken to indicate that the court has determined that the Federal Trade Commission's claim of privilege in the instant case has been properly raised. That decision must await proper briefing and argument by both sides.

² The court has had no occasion at this juncture to consider whether the Index provided by the agency in this case is adequate. However, from the face of the Index it appears that all items in the Memoranda which refer to environ-

mental considerations concern facts in the public record or facts which, on payment of fees, the Commission will deliver to plaintiffs. Thus, it appears unlikely that the memoranda formed the sole basis for the Commission's decision. Compare *American Mail Line Ltd. v. Gulick*, 411 F. 2d 696 (D. C. Cir. 1969). See also *Washington Research Project, Inc. v. H. E. W.*, *supra* at 17; *Pacific Architects & Engineers, Inc. v. Renegotiation Bd.*, Civil Action No. 73-2093 (D. C. Cir., Oct. 8, 1974) (slip at 5-6).

Before: KILKENNY and SNEED, Circuit Judges, and JAMESON,* District Judge.

Opinion

PER CURIAM: Cleary appeals from a directed verdict in favor of appellees in a treble damage suit under the Sherman Act, 15 U. S. C. §§ 1, *et seq.* Appellant alleges that appellees, National Distillers and Chemical Corporation (National) and McMinnville Sunshine Dairy, Inc. (Sunshine), combined to restrain trade by preventing him from purchasing from National, a hydrocarbon detection device known in the dairy business as a "snifter."

The sole issue on appeal is the sufficiency of the evidence supporting appellant's claim that appellees engaged in a concerted refusal to deal. We find appellant's evidence, taken as a whole, is insufficient and, therefore, affirm.

In considering a motion for a directed verdict, the court must give the party against whom the motion is made the benefit of all reasonable evidentiary inferences. *Continental Ore Co. v. Union Carbide & Carbon Corp.* [1962 TRADE CASES ¶ 70,361], 370 U. S. 690, 699 (1962); *Independent Iron Works, Inc. v. United States Steel Corp.* [1963 TRADE CASES ¶ 70,848], 322 F. 2d 656, 661 (CA 9 1963), cert. denied 375 U. S. 922. This is no less true in an antitrust case. However, if there is no substantial evidence to support the claim, the court must direct a verdict. *Chisholm Bros. Farm Equip. Co. v. Int'l Harvester Co.* [1974-1 TRADE CASES ¶ 75,096], 498 F. 2d 1137 (CA 9 1974). Such a result is dictated by the facts in this case.

Appellant's proof consisted of: (1) that he contacted National and expressed a desire and a need for a snifter; (2) that he was given the "run around" by National; (3) that National sold sniffers to other dairies, including Sunshine, in appellant's area; (4) that Sunshine's snifter was installed on the same day it entered into a lease contract with National; and (5) that after appellant sold his dairy to another party, appellant received an offer from National to lease a snifter. This evidence is wholly inadequate to sustain appellant's claim.

First of all, appellant presented no evidence that he made a firm demand or offer to buy a snifter. All we have is evidence of preliminary negotiations. A demand and refusal is a prerequisite to a claim of concerted refusal to deal. *Royster Drive-In Theatres v. American Broadcast, Etc.* [1959 TRADE CASES ¶ 69,377], 268 F. 2d 246 (CA 2 1959), cert. denied 361 U. S. 885 (1959); *Milwaukee Towne Corp. v. Loew's Inc.* [1950-1951 TRADE CASES ¶ 62,891], 190 F. 2d 561 (CA 7 1951); cert. denied 342 U. S. 909 (1952). A plaintiff can have no relief when his failure to obtain a desired product is attributable to his own failure to make a request. *Dahl, Inc. v. Roy Cooper* [1971 TRADE CASES ¶ 73,704], 448 F. 2d 17, 19 (CA 9 1971).

Furthermore, a claim of concerted refusal to deal obviously cannot stand unless there is evidence of concert. An individual distributor acting alone has the right to deal with whomsoever he pleases. *Ricchetti v. Meister Brau, Inc.* [1970 TRADE CASES ¶ 73,326], 431 F. 2d 1211 (CA 9 1970), cert. denied 401 U. S. 939 (1971). Unless there is evidence of an agreement or other concerted action by appellees, appellant's claim is baseless. *Klor's, Inc. v. Broadway-Hale Stores* [1959 TRADE CASES ¶ 69,316], 359 U. S. 207 (1959); *Dahl, Inc. v. Roy Cooper, supra*, at 19.

The only evidence presented by appellant which might establish an agreement or conspiracy between appellees is hearsay, which was properly rejected by the district court. The proponent of a conspiracy must lay a proper foundation of independent evidence before hearsay evidence can be admitted. *Flintkote Co. v. Lysfjord* [1957 TRADE CASES ¶ 68,674], 246 F. 2d 368 (CA 9 1957), cert. denied 355 U. S. 835. Here, there was no such independent evidence presented. In these circumstances, appellant's allegations of concerted action must fail.

Our study of the record and the law convinces us that the district court did not err in granting appellees' motion for a directed verdict.

Judgment Affirmed.

* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

MICHIGAN RAILROAD COMMISSION.

VILLAGE OF WILLIAMSTON

v.

WILLIAMSTON ILLUMINATING COMPANY.

[D-1023.]

Rates — Jurisdiction of Commission — Municipal franchise.

1. An electric utility cannot, after the expiration of ten years from the granting of its franchise, claim immunity from rate regulation by the state through a Commission by virtue of a twenty-five year municipal franchise fixing maximum rates, where the power of the municipality to contract for an electric supply was limited to ten years, though the municipality had power to authorize the mere occupancy of its streets for a period of twenty-five years.

Service — Electricity — Adequacy.

2. Electric service is inadequate where there is insufficient current to meet the demands during the early evening when street, commercial, and residential lighting is being furnished — it appearing that the lights are dim and unsteady, — since adequate service involves both quantity and quality regardless of the revenue.

Rates — Franchises — Maximum rate — Metered or flat rates.

3. A municipal franchise naming a maximum amount per year for each electric street lamp and a maximum amount per candle power per week for incandescent lights does not prevent the parties from adopting an equitable plan placing street lighting upon a metered rate basis, nor prevent the utility from supplying residential or commercial lighting upon a flat or metered rate basis.

Rates — Classes — Flat and metered — Optional.

4. A utility should not furnish the same character of service upon both a flat and a metered rate basis regardless of the fact that both charges might be equal and equitable.

Service — Electricity — Reserve equipment to assure continuous service.

5. An electric utility having a demand for current for lighting and power purposes that requires a constant use of its equipment should install reserve equipment to assure continuous service in case of accident to the machinery.

Rates — Franchise naming maximum rates — Sliding scale.

6. A municipal franchise naming a maximum rate does not prevent the utility from basing its rates upon a sliding scale.

Rates — Electricity — Sliding scale — Minimum charge — Advantages.

7. Electric rates should be based upon a sliding scale with a proper minimum charge, as this method, in connection with a metered current, insures uniformity, removes discrimination, and assures the utility remuneration for all service rendered.

ice is poor, or that the operation of the plant has resulted in a net profit as claimed, but on the contrary that the net earnings are not sufficient to care for reasonable per cent of depreciation, let alone a return upon the investment, and as to giving power service defendant is willing to do this whenever contracts for such service can be secured that will show an earning of \$60 per month.

It appears that the following were the chief factors to be determined:

- (1) Has the Commission jurisdiction?
- (2) Is the service furnished by the defendant adequate?
- (3) Are the demands of the petitioner reasonable?
- (4) Are rates charged remunerative?

Answering these in order:

[1] First. The jurisdictional question would appear to be most important, for if the Commission has no power to issue an enforceable order, consideration of the other questions involved would be useless. The Commission, however, with full knowledge of its powers under Act 106, and after a careful study of the franchise granted by complainant, is convinced it has jurisdiction and will so hold.

The legislature of 1895 passed an act entitled "An Act to Provide for the Incorporation of Villages within the State of Michigan, and Defining Their Powers and Duties." Section 8 of chapter 12 of said act, under the caption "Lighting," reads as follows: "The council may contract from year to year or for a period of time not exceeding ten years, with any person or persons or with any duly authorized corporation for the supplying of such village or the inhabitants thereof, or both, with gas, electric or other light, upon such terms or conditions as may be agreed; and may grant to such person, persons or corporation the right to the use of the streets, alleys, wharves and public grounds, as shall be necessary to enable such person, persons or corporation to construct and operate proper works for the supplying of such light upon such terms and conditions as shall be specified in such contract."

It appears from the record and exhibits filed that on April 21, 1896, or the year following the passage and approval of above act, complainant's counsel passed an ordinance known and re-
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takes to contract for the *purchase* of current, in which case a ten-year term appears to be the limit of time for which such contracts may be made.

The Commission cannot concur in the opinion of the defendant, nor do we believe such construction of the statute permissible, for the language employed is not ambiguous, but states plainly that "any such village is authorized to contract with any person, persons, or duly organized corporation for the supplying of such village or the inhabitants thereof," etc., and for this purpose authority is granted for the occupancy of the streets, alleys, places, etc., for the purpose of constructing a pole line and all the necessary apparatus to enable said person, persons, or corporation to furnish such service. If the defendant was *selling* current, and not distributing it, there would be no necessity for authority to occupy the streets, alleys, etc., of complainant; or if the village were *buying*, it would require no permission to occupy its own streets, alleys, etc. If defendant's construction of the act be accepted, and it be assumed that the village does buy and itself distribute for street-lighting purposes, it would be practically impossible for each resident to do the same; and if the term "village" is taken to mean all the citizens and the village should distribute thereto, then the words, "or the inhabitants thereof or both," are superfluous. We think a fair and reasonable construction to be put upon the language employed is that the term "village" means for street or public lighting, and the term "inhabitants thereof" means residential and commercial lighting, and that the act contemplates the construction and operation of a municipal plant, or the granting of a franchise to some person, persons, or corporation to furnish such service entire, and as evidence of this construction accepted by defendant's predecessors (and which we believe settles this question), defendant as assignee is now actually occupying with its poles, wires, etc., the streets, alleys, and places of complainant, and furnishing current and distributing the same.

[2] Second. "Is the service furnished by defendant adequate?" Relying upon the record and accepting the statements of the officers of said village and other residents testifying for the complainant, it appears, first, that the lights are not steady; second, that they are not bright enough (one witness testifying

that with the light from a three-bulb chandelier it is difficult to read a newspaper); third, that for some two hours during the evening when street, commercial, and residential lighting is being furnished, there was not current enough to meet the demands, and that this was due to a lack of boiler capacity, defendant operating but one boiler, and this being secondhand and too small. From the record we gather that defendant does operate one boiler and one engine for lighting purposes, and that for early evening lighting defendant has contracted for power from a mill operated by water wheel, and after said mill has closed for the day the power from the wheel operates a generator supplying current for lighting. When more current is demanded than this wheel power produces, then defendant operates the steam engine and shuts off the water wheel. It is assumed that this change is what causes the lights to flicker for a moment, but little attention was given to this phase of the complaint, as the length of time such conditions obtain are so short as not to be material.

Testimony was offered by complainant to show that the wires beyond the series of transformers farthest from the power house were small and lacking in capacity, and, having come in contact with limbs of trees, the insulation was worn through, and in case of wind and rain much current was lost by reason of this condition; that the plant was not able to develop enough current to overcome this loss and give good service, and Mr. Thomas, general manager of the Michigan Power Company, after an examination of the plant, testified that the plant is lacking in capacity.

Defendant's witness, while admitting some of complainant's allegations, still contends that the service is regular and good. However, it develops that such witnesses reside or do business within a short distance of the power plant, and not far from the line of transformers nearest said plant, and the burden of complaint appears to be as to residential and commercial rather than street lighting, and this may be understood when reference is had to the new street lighting system installed by the defendant.

Relying upon the request made and the statements of the complainant, the service is not adequate, and if reference is had to the following language found in the last paragraph of § 6 of the P.U.R. 1917C.

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franchise,—“Provided, further, that the lights furnished shall be equal in power, brilliancy, steadiness, and durability to any first-class electric light furnished by reputable companies for the same purpose in any city or village,”—it would appear that the terms thereof had not at all times in the past, and were not on the date of the filing of this complaint, being complied with, and as the question of adequacy involves both quantity and quality regardless of the revenue produced, it would appear that the claim of inadequacy had been sustained.

[3, 4] Third. “Are the demands of petitioner reasonable?” Referring to the prayer we find complainant asks: (a) That defendant cease discrimination; (b) that defendant furnish twenty-four hour service; (c) that defendant furnish adequate current for both power and lighting; (d) that the charge for current used shall be based upon a sliding scale, and that such charges be reasonable.

(a) Counsel for complainant contends that all current furnished by defendant, both for public and private use, should be metered. We find, however, that § 6 of the franchise and the several contracts made with complainant's council since April 21, 1896, and which it would appear expressed the public wish, demands a flat rate for street lighting and a given amount per lamp per year which should not be exceeded; and of the incandescent lights not to exceed a given amount per candle power per week.

The general custom appears to be to base the charge for street lighting upon a flat rate per lamp per year, and there does not appear to have been sufficient evidence produced to convince the Commission that complainant will suffer from a continuance of the present custom, although no objection would be offered by the Commission to the adoption of any equitable plan agreeable to the parties in interest whereby the future charges for street lighting should be upon a metered basis. Neither do we think such system of measurement prohibited by the franchise, which names simply a maximum per lamp per year which should not be exceeded; neither would there appear to be any question as to the right of defendant to supply residential or commercial lighting upon a flat or metered rate basis. However, the advisability of having in effect at the same time different methods of measur-

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ing current as a basis for the charge to be made would appear to be decidedly questionable, regardless of the fact that both such charges might be equal and equitable. In the absence of an application of some uniform and generally accepted method of measurement, there is ground for suspicion that discrimination is being practised, and this condition has always been considered provocative of trouble; for the customer whose current is measured and all used charged for never believes that he uses as much current or uses it as long as his neighbor who enjoys the flat rate, and the result is a growing impatience and an ever-increasing dissatisfaction among customers, which same is not conducive to the best interest of either customer or utility, and, therefore, should not be continued; and if, as claimed by complainant, this system in vogue in the present case results in some customers paying 5 and 6 cents per kw. hr. and others 10 cents or any higher rate per kw. hr. for a like service, it would result in discrimination forbidden by the statute, and should be discontinued at once. The mere fact that some customers believe it to be to their advantage to be on a flat rate is not sufficient excuse for continuing different rates under like conditions, thus violating the law, but rather suggests that the flat rate is lower and less expensive.

(b) As to the twenty-four hour service. It would appear that this is a question that would adjust itself; for if the rate charged would produce a revenue justifying continuous service, it should be given, if there is demand for it. On the other hand, if twenty-four hour service is demanded by complainant and the rate originally agreed upon or now charged was for a less service, and not now remunerative for twenty-four hour service, then if a larger service is given the rate should be increased correspondingly. The contract executed between the defendant and the village of Williamston on June 30, 1916, so far as the street lighting is concerned, called for lights from dusk on each and every evening until 12 o'clock midnight, standard time, on all nights that lights are needed, and this need is to be determined by the common council of the complainant. The rate originally charged was based upon what is known as the "moonlight schedule." It is therefore evident, if *continuous* service is given, that there will be an increase in expense, and naturally an increased charge. P.U.R.1917C.

However, we believe the public know about how much and what quality of service it needs, and the proper thing for any public utility to do is to place itself in a position to comply with the public demands and then charge a reasonable rate therefor.

[5] (c) In this connection, complainant also asks that defendant furnish current for power use. There appears from the record to have been considerable controversy as to the actual demand, defendant contending that numerous efforts had been made to secure contracts for power but without success, while complainant contends that with only a secondhand boiler and one engine, defendant was not in a position to furnish such power and guarantee continuous or uninterrupted service, having made no provision to care for customers while unable to operate due to accident, repairs, or other causes, and that customers could not afford to go to the expense of equipping their respective plants to use electric power without some assurance that defendant would be fully able to care for their needs; otherwise contracts could have been secured easily.

Defendant states that it will give current for power whenever contracts for the use of such power can be secured whose revenue per month would be \$60, notwithstanding the fact that said amount would not meet the additional expense incurred.

If defendant was in a position to assure the customers first-class service, this proposition would appear upon its face to be reasonable. The fact, however, that such service, together with the lighting service demanded by the terms of the franchise, would require the constant use of the single unit plant operated by defendant, suggests the necessity of additional boiler and engine capacity to assure a continuous service in case of accident to the machinery either at night or during the day.

[6, 7] (d) "Basing the charge upon a sliding scale." Under a previous heading we have called attention to the section of the franchise relative to the manner of determining the charge; we still are of the opinion that the language of the section cited naming only the maximum charge which may not be exceeded does not attempt to state what charge less than the maximum should be made nor by what method determined.

An examination of the records in this department shows that over 60 per cent of the corporations furnishing electric lighting P.U.R.1917C.

base their charge upon a sliding scale. It would, therefore, appear to be the latest and more approved method, and if adopted by defendant should not prove to its disadvantage, especially under the protection of the application of a proper minimum; and this method, in connection with a metered current, would insure uniformity, remove discrimination, and assure defendant remuneration for all service rendered.

[8] "A reasonable rate." Thus far the discussion has developed that complainants desire, first, a better quality of service; second, a greater quantity. Complying with these demands will necessitate a largely increased investment by defendant, therefore, the question now to be considered is the rate or charge that should be made in order to produce a reasonable return upon the property invested and in use.

From the records we find that defendants purchased the original bond issue of its predecessor amounting to \$10,000, the proceeds from which, it is stated, were expended upon the property. Later an authorization of \$20,000 in bonds was secured by defendant after the purchase of the property and an order permitting the sale of \$12,000 of such amount, \$10,000 to be used to refund the original \$10,000 issue and \$2,000 to be used for the improvement of the property, leaving \$8,000 of such bond issue in the treasury of the company.

Defendant shows that since acquiring the property it has expended approximately \$1,000 for changing the street lighting system and \$6,000 for new machinery, additional distribution system, etc., or a total of \$7,000. Therefore, if we may assume that the proceeds of the original bond issue of \$10,000 were expended upon the property, and in addition thereto the \$7,000 above mentioned, it would show an investment of approximately \$17,000 without taking into account whatever may have been realized from the sale of the stock and expended upon the property in the first instance, or in bills or accounts payable for material used that might properly be charged to capital account if not included in the above item of \$7,000.

It is admitted that the plant has been partially rebuilt and considerably added to by defendant since its purchase in 1909; however, the record contains no information as to the original cost of the plant, or any changes or additions that may have been made

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thereto prior to its sale to defendant, nor of the price defendant paid for the same at such time, nor at what price defendant obtained the original bond issue of \$10,000. Therefore, as to the actual investment this information is of little value.

A study of the report filed by defendant shows particularly two items that would suggest that much of the original investment was not now in use. Particular reference is made to the item of "abandoned property," as shown in a more recent statement as obsolete equipment, amount \$5,078.36, and the item of "other suspense," \$13,589.36. We are inclined to believe, however, after a careful analysis, although the report does not so state, that this latter item covers property of value and in use at the present time.

The records in the office of the State Tax Commission, together with information furnished by defendant, show the property to have been assessed at \$8,000 (personal \$3,000 and real estate \$5,000), but upon just what percentage of cash value the assessment was made this department is not advised, but the best information obtainable leads us to believe upon a basis of 90 per cent, and if this be true it would make the actual cash value of the property \$3,588.88, as per defendant's own figures.

By exhibit 24, filed at the hearing, defendant shows a plant investment as of December 31, 1915, of \$28,947.12, but the same includes the following items: "Abandoned property, \$5,078.36," and "good will, \$10,000." Deducting these amounts there remains \$13,868.76 as representing property actually in use. To this there might be added the items of "tools and implements, \$43.22," "furniture and fixtures, \$13.13," and "power house supplies, \$15," or a total of \$71.35, making a grand total of \$13,940.11. However, this result is obtained by accepting without question the figures submitted, and which defendant admits represent the first cost or value new, being what is known as the book value. Defendant at the same time admits that no amount had ever been charged off for depreciation, and while it must be conceded that the proper amount chargeable to depreciation is conditioned largely upon the per cent of efficiency in which the plant has been maintained, there are, however, certain portions of such a property which continue to depreciate and cease only when replaced by new; and the distribution line and electrical
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apparatus having been in service several years, it would appear that, applying an average depreciation charge of $3\frac{1}{2}$ per cent for four years, or \$1,951.60, would not be unreasonable, thus leaving the net amount of property as actually in use as of a value of \$11,988.51, or approximately \$12,000.

As previously stated, defendant in its annual report filed December 31, 1915, claims \$10,279.40 as the *actual plant* investment; however, there are items, such as "going concern value," "good will," etc., which may very properly be considered in fixing the value of a utility for rate-making purposes, which might not be considered in fixing a value for taxation purposes; therefore, if to such actual value of the plant as reported there be added \$1,720.60, it will bring the value up to \$12,000, as above stated.

It is claimed no additions have been made to the "value of the property" by reason of the increased value of copper or other material. No consideration is being given to the same by the Commission, for the reason that, while material may vary as to cost from time to time, we believe that present values are not based upon normal conditions, and we feel, further, that if a proper depreciation account had been kept, that the amount would more than offset any appreciation that has taken place.

[9] Defendant in reporting to the secretary of state places a value of \$3,500 upon the land used in the business, thus leaving \$4,500 as the balance of the \$8,000 reported to the State Tax Commission to be treated as machinery, distribution system, supplies, etc., without allowing anything for real estate not used in the business. If this value of the land in use be accepted as correct, then upon the basis of the \$12,000 valuation there would be real estate, \$3,500, and machinery, distribution system, etc., \$8,500, the defendant evidently not reporting the power house and the equipment therein as a part of the real estate, but treating it more as personal. Upon this basis the present earnings of defendant after paying operating expenses with the following:

5% interest on the bond issue of \$10,000	\$500.00
6% depreciation on \$8,500	510.00
Or a total of	\$1,010.00
Defendant's report shows as to earnings and operating expenses as follows, for the year 1915:	
Total income	\$6,180.27
Total operating expense including the items of insurance, taxes, etc.	4,204.41
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Leaving a credit difference of	1,075.86
which would be reduced by the item of	
Interest on unfunded debt, as per report	87.93
Leaving	1,987.93
From this deducting the	1,010.00
previously mentioned bond interest and depreciation,	
Leaves net earnings of	877.93

to apply as the return on the investment of \$12,000. This represents approximately 7½ per cent, and this amount would not appear to be greater than should be enjoyed from the operation of such a utility, a large portion of which is subject to rapid depreciation through exposure to the elements and by obsolescence.

Answering the question, "Are defendant's rates reasonable?" we believe for the character of equipment employed and service given the rate as a whole produces a reasonable return, but that, in view of the evidence produced at the hearing, complainants are entitled to a better service, especially in residence lighting, than they now enjoy.

In some cases the commercial rate charged by lighting companies is less than the residence rate, or is the same with a larger cash discount for prompt payment, but in most instances the rate of 10 cents per kw. hr. obtains throughout the state.

As to street lighting, a somewhat lower rate than \$60 per year per arc lamp is made, but this is usually where the current is furnished several towns from a central plant, and not where a local power plant is installed; however, this price seems to represent the average charge.

At the second hearing counsel for complainant summed up complainant's objections, as follows:

(1) Objects as to placing the great burden upon the consumer of compelling him to go to the expense of purchasing transformer and other equipment, and then they may not secure power or current for power.

(2) Objects to the right of the company "to single out mills, pool rooms, etc., and give them a special rate."

Referring to them in the order we find—

(1st) No undue burden would be placed upon the citizens of Williamston from the fact that, before any installation of equipment by such parties for the use of such power had been made, the extra boiler and engine herein referred to will have been placed by defendant.

(2d) Discrimination means different rates to different customers for like kind of service. If all "mills" and all "pool rooms" are charged the same, then there is no discrimination unless it be shown that they are charged a different rate than other consumers when the service rendered and electricity consumed are practically the same, and in such case the rates are always subject to attack.

From the evidence submitted it would appear that defendant should make the following changes:

First, additional steam capacity through the installation of a second boiler, which would also make it possible to furnish current for power during the day and guard against interruption of service, either day or night, caused by accident, necessary repairs, etc.

Second, another engine to carry the day load if twenty-four hour service is given.

Third, additional wire capacity either through the furnishing of larger wire between the outside line of transformers and residences, or the placing of a new-protected wire, and care taken that it should not come in contact with the limbs of trees so as to wear off the insulation.

Fourth, twenty-four hour service, if desired by complainants, with sufficient increase in rates, if shown to be necessary, to meet the additional expense incurred.

Fifth, current for power, with protection against interrupted service which the additional engine and boiler would give when contracts yielding an earning equal to the additional expense involved have been secured, such expense not to exceed \$60 per month.

It is understood that since the hearing an additional boiler and engine have been purchased and are on the premises ready for installation. Further, that defendant has submitted and filed new schedule of rates, providing for twenty-four hour lighting service and for all-day power service.

Some difference of opinion appears to exist as to the new schedule of rates for street lighting. However, no definite information as to results appears obtainable, and it is the opinion of the Commission that they should be given a fair trial when, if not deemed reasonable, the matter may upon application receive further P.U.B. 1917C.

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consideration, and when the changes herein enumerated have
completed, that the Commission are to be notified when the
rate of rates filed shall become effective.

An order in accordance with above will this day issue.

RE CONSUMERS POWER CO.

MICHIGAN PUBLIC SERVICE COMMISSION

Re Consumers Power Company

Interveners: Cities of Grand Rapids, Wyoming, and Kalamazoo, Michigan Industrial Energy Users Group, West Michigan Environmental Action Council, Inc.

Case No. U-4332

January 18, 1974

APPLICATION by electric company for authority to increase rates and charges; granted with modifications.

Rates, § 120.1 — Test year — Electric company.

[MICH.] The calendar year was adopted as the most appropriate test period for an electric company. [1] p. 324.

Valuation, § 25 — Year-end figures — Electric company.

[MICH.] The use of a year-end rate base was found to be fair and reasonable for an electric company. [2] p. 325.

Return, § 26.1 — Capital structure — Electric company.

[MICH.] An appropriate capital structure for an electric company was found to consist of 50.39 per cent long-term debt, 31.57 per cent common stock, 9.48 per cent preferred stock, 7.44 per cent deferred taxes, and 1.12 per cent short-term debt. [3] p. 326.

Return, § 26.4 — Common equity — Electric company.

[MICH.] A 12.12 per cent rate of return on common equity was found to be fair and reasonable for an electric company. [4] p. 327.

Expenses, § 120 — Investment in exploration company — Electric company.

[MICH.] An electric company's investment in an exploration company which could not be ascribed solely to common equity should not be distinguished from any other lawful investment. [5] p. 328.

[21]

Return, § 87 — Electric company.

[MICH.] A 7.53 per cent rate of return was found to be fair and reasonable for an electric company. [6] p. 328.

Expenses, § 114 — Interest expense — Electric company.

[MICH.] An electric company's interest expense resulting from a tax savings should accrue to the ratepayers. [7] p. 330.

Expenses, § 46 — Donations — Electric company.

[MICH.] An electric company's donations were excluded from its operating charges for rate-making purposes. [8] p. 330.

Valuation, § 118 — Reacquired securities — Electric company.

[MICH.] In determining an electric company's profit on reacquired securities the interest cost, the premium amortization, the discount and expense amortization are all recognized for rate-making purposes. [9] p. 331.

Revenues, § 5 — Interest on reacquired securities — Electric company.

[MICH.] In determining operating income, an electric company's profit on reacquired securities was included. [10] p. 331.

Expenses, § 26 — Advertising — Electric company.

[MICH.] An electric company's adver-

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mission will find it exceedingly difficult to continue to allow for earnings erosion as has been done in this rate order.

Second, the commission should find a way of measuring the impact of rising costs per unit of capacity on those fixed costs, especially capital costs which are unavoidable, and build these into the rate relief process so as to eliminate their tendency to accelerate earnings attrition.

Consequently, the commission in this opinion and order is proposing that a procedure for the granting of rate increases be developed by the staff and implemented which responsibility recognizes the higher revenue requirements associated with the higher investment levels per kilowatt of large generating facilities at the time that these facilities become available for service. Recognizing that this is a significant departure from past rate-making procedures, the commission deems it desirable and in the public interest that all concerned parties have the opportunity to present definitive alternative proposals and to present their views in an open public hearing. An order will be issued by this commission in the near future setting forth a proposed definite proposal, prescribing the procedures to be followed in subsequent hearings and setting forth hearing dates.

IX

Rate Structure

"Declining price" rate structures have been prevalent in the electric power industry almost since its inception. This was the natural result of a general downward trend in

the cost of producing and supplying electric energy. The more kilowatt-hours that were sold, the less they cost. Large generating plants cost less per unit of output than did small generating plants. Technology was able to lower costs with each passing year. Transmission and distribution facilities to move the energy from the production plants to the customers were more fully utilized as more customers with greater usage began to use electric energy. Service to large customers did result in economies of scale and did justify the "declining price" rate structure.

This is no longer the situation. Costs of building and operating an electric system have turned around. The incremental cost of producing the next unit is higher than the existing costs. Every additional unit of electric energy that must be provided will increase the overall cost of supplying energy. The underlying reasons behind this very proceeding attest to this point of fact. Costs are rising not only due to increases stemming from labor and materials that are generally recognized but also due to the construction of new facilities to serve rising public demand for electric energy. Construction costs, including facilities to meet emerging environmental standards, are higher. Interest rates to finance this capital expansion are also higher.

Another justification that has been advanced for "declining price" rate structures is that the rate design has not recognized the full cost of serving a minimum use customer in the minimum monthly charge and that it was therefore necessary to recover

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higher charges in the top part of the rate structure. The commission rejects this contention. This reasoning basically resulted from the assumption that the "minimum system" concept or some equivalent concept for the apportionment of distribution facilities was just and reasonable. The commission does not believe this to be the case. Distribution systems are constructed to meet customer demands for energy and should be apportioned accordingly. Future cost studies should recognize this principle.

Therefore, the way in which rate structures are designed must be changed. This commission must be responsive to the changing needs of society in its decision making. Historical costs of utility plant (with appropriate adjustments to meet projected changes) is important for proper consideration of the total revenues to which a utility is entitled. It is, however, a fundamental responsibility of this commission to look beyond the revenue-producing aspects of a rate structure if it also is to meet the requirements of sound public policy. Today, the rate structure must be designed to enhance basic public policy objectives in areas of consumerism, environmental protection, public health and safety and conservation of natural resources.

Promotional rate structures are out of date. Society cannot be served by utility rate designs that act to increase the difficulties already being experienced. To promote ever-increasing usage and waste of electric energy, or any energy for that matter, is self-defeating.

The public interest requires, and the commission intends that utility price structures should reflect the critical needs of the times. It is not intended that arbitrary departures be made from existing rate structures. Rather, rates must be based upon reasonable cost responsibility and be designed to reflect current costs of providing service. This is critical if efficient use of available energy is to be promoted.

As a matter of record in these proceedings, a "flat" rate schedule for the residential class of customers is in the public interest. This means a rate schedule consisting of a monthly service charge and a flat charge per kilowatt-hour. The maximum allowable service charge would be limited to those costs associated directly with supplying service to a customer. Only costs associated with metering, the service drop and customer billing are includable since these are the costs that are directly incurred as the result of a customer's connection to the electric system. Metering would continue to be employed to measure use. The flat charge per kilowatt-hour would cover all of the other costs incurred in the supply of kilowatt-hours. As evidenced by the record in this proceeding, this is reasonable since there is no significant variation in load factor with volume of consumption.

This form of rate structure for residential customers is realistic in terms of the cost to the utility of supplying electric energy. It is also realistic, as a further step, to encourage customers with large usage to take a harder look at their energy needs be-

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cause they will have more of an economic incentive to conserve electricity. Further, by lowering the price in the smaller consumption ranges, the low income and low use consumer, who uses electricity for basic necessities of modern living, will be paying a fairer price for his energy needs.

A "flat" rate schedule for residential consumers has been incorporated in the rate schedules approved by this opinion and order. This represents a further studied move toward a realistic recognition of "current" costs in the design of electric rates. Under these rate schedules, the customer using 200 kwh per month will receive an increase of 6.5 per cent. The customer using 1,000 kwh to 3,000 kwh per month will receive an increase of 7.1 per cent to 8.3 per cent.

The residential space heating customer's rates were increased to bring its relative rate of return up and at the same time changed to correspond with the revision in the residential schedule. The lower price applicable to over 600 kwh use per month on this rate schedule was eliminated for usage during the summer season so as to allow all residential customers with air-conditioning equipment to be treated alike.

The commercial and industrial rates, in total, were adjusted upward by approximately the overall percentage increase in revenues granted applicant. Although some "flattening" of these rates occurred as an inherent result of increasing prices where the relative returns were the lowest, no attempt was made to deviate from past rate design for these customers. Changes in these schedules reflect

only past practices or requests by applicant undisputed on the record.

Before the commission can consider making changes in the structure of the commercial and industrial rate schedules, it must have facts to consider the impact of the changes on the economy of the state. The commission would not like the cost of electrical service to be a disincentive to economic growth of Michigan or to result in the loss of jobs. The commission will conduct special inquiries into this matter over the next year.

Fuel Cost Adjustment Clause

The "revenue requirement" portion of these proceedings considered as one item of expense the cost to applicant of fuel for its electric generation during the test year. It also considered the revenues that would be obtained through the fuel cost adjustment clauses contained in the various rate schedules at the test year fuel cost level. This commission has determined 49.5 cents per million Btu to be the test year cost of fuel and has offset this expense with fuel clause revenues that would automatically be obtained on an annual basis at this level. It is therefore consistent with the final rate schedule levels approved by this commission to include a "mill per kwh" base cost of fuel equivalent to the fuel cost of 49.5 cents per million Btu in the fuel cost adjustment clauses.

The fuel clause approved by this commission in Case No. U-4262 did not recognize the cost of fuel burned as the result of energy lost in the delivery process from generating plant to customer. These losses during the

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year 1972 amounted to 9.1 per cent. Inclusion of this factor from a technical viewpoint is proper. The commission therefore finds that due to the rapidly increasing cost of fuel, it is reasonable to recognize this factor in the development of the fuel cost adjustment factor.

The commission finds that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCLA 460.551; 1919 PA 419, as amended, MCLA 460.51; 1939 PA 3, as amended, MCLA 460.1; 1969 PA 306, as amended, MCLA 24.201; and the Commission's Rules of Practice and Procedure, 1954 Administrative Code, Supplement No. 54, R 460.11.

b. The statutory requirements of § 81 of 1969 Pa 306, as amended, regarding familiarity with the record, have been complied with.

c. A rate base for applicant's electric operations of \$1,557,548,000 is just and reasonable.

d. An overall rate of return of 7.53 per cent, including a return on common equity of 12.12 per cent, is just and reasonable.

e. The adjusted net operating income for the test year in this case should be \$102,434,000.

f. Applicant is experiencing an annual revenue deficiency of \$30,975,773 and an increase in applicant's electric revenue in that amount is reasonable and in accordance with other findings and conclusions contained in this order.

g. The order granting partial and immediate rate relief issued by the commission on November 9, 1973, approving electric rates on an interim

basis pending the issuance of this order, was designed to produce additional annual electric revenues in the amount of approximately \$25 million. The collection of revenues by applicant under the interim electric rates during the period from November 10, 1973, to the date of this order is hereby confirmed and applicant's bond filed with the commission to assure refund is hereby canceled.

h. An increase in applicant's annual revenues in the amount of \$5,975,773 over and above the revenue increase granted to applicant in the order granting partial and immediate rate relief is just and reasonable and in accordance with the findings and conclusions contained in this opinion and order.

i. The electric rate schedules attached hereto as Exhibit A [omitted herein,] will increase applicant's annual electric operating revenues as authorized by this opinion and order and will result in just and reasonable rates and charges for the sale of electricity and should be made effective for service rendered on and after January 19, 1974.

j. All contentions of the parties not herein specifically determined should be rejected, the commission having given full consideration to all evidence of record and arguments made in arriving at the findings and conclusions set forth in this opinion and order.

RALLS, Commissioner, concurring in part, dissenting in part: I concur with my colleagues insofar as they find a revenue deficiency of \$30,191,773, but I do not support the addi-

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tional award attributable to advertising and public relation expenses.

My concurrence in no way includes acceptance of the views expressed by the majority on pages 338-343, *supra*, entitled "earnings erosion." My finding of revenue deficiency for applicant's jurisdictional electric operations was based upon normal accounting and rate-making methods, as applied to a year-end test period. These methods have been applied in many past cases decided by this commission and other such regulatory bodies. The company's electric operations were defined by evidence on the record and measured by accepted standards.

Conservation Rates

My colleagues and I in today's order have unanimously eliminated the quantity discounts for residential customers. This decision marks another step away from a rate design which induces the uneconomic use of electricity, and which I fought to reform since I became a member of the commission.

Under today's conditions, the quantity discounts for residential customers are not cost-justified and:

- discriminate against low-income customers
- waste scarce fuel resources
- subsidize the deterioration of our water and air
- contribute to the erosion of a utility's earnings.

Advertising and Consultant Expenses

The process of analysis, decision making, and explanation of a contested issue in rate making requires

understanding the arguments of the various conflicting parties, careful review of the underlying policy considerations and the applicable law, and precise drafting of the resulting conclusions.

Positions of the Parties

The positions of the company and the other participants concerning allowance of advertising expenses within the cost of service are diametrically opposed. Consumers Power Company stated that it "maintains its advertising expenses are reasonable and legitimate business expenses and should, with one minor exception, all be recognized as a legitimate cost of service." Staff, the intervener attorney general and intervener West Michigan Environmental Action Council, Inc., join in opposition to recognition of such expenditures, the attorney general maintaining that the sums show an absence of concrete assistance to the ratepayer, and WMEAC advancing numerous grounds for objection.

What are the arguments advanced by the parties in support of their conflicting positions? The company is clear and forthright, as evidenced by the testimony of the assistant controller, S. N. Spring, in asking that the customer pay for "communications with the public that are geared primarily toward discussion of the general activities of the utility as opposed to specific energy utilization." In addition to its own employee's characterization, the company sponsored the testimony of Professor John Marston, identified as an expert in the fields of advertising and public

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relations. Applicant's brief describes Professor Marston's testimony as supporting Consumers' advertising, "articulat(ing) the increasing need of the business community to communicate its problems to its customers."

The company quotes with obvious approval Marston's views as to "reasons an electric company should advertise . . . :

"It (the electric industry) is faced with a multitude of complex problems. It is these problems which an electric company advertises. There is no need for advertising its product per se, for one of the problems is providing enough of the product."

The brief of the applicant makes reference to "institutional advertising, such as that carried out by the company," a characterization very carefully enunciated by Mr. Spring in his ample and well-reasoned testimony. The voluminous evidence in the record supports Spring and Marston's view of the overwhelming majority of the company's advertising expenditures. In the absence of any other testimony, it is uncontradicted that the bulk of the company's advertising is indeed "institutional."

All parties to the proceeding accept this characterization of the company's advertising, and the rationale supplied by the company is similarly clear. Additional complementary characterization of the company's institutional advertising content is provided by intervener West Michigan Environmental Action Council, Inc. WMEAC summarizes the "problems" that the company has chosen

to communicate to the public. They include: (1) a continuing increase in electric demand over the next few years, requiring additional generating capacity; (2) the impossibility of building future coal-fired plants, due to environmental requirements; and (3) unreasonable delays in the construction of nuclear plants caused by unenlightened environmentalists. These themes have been carefully documented by the interveners.

What are the expressed views of the majority of this commission in the order in regard to the factual arguments of the parties? "Applicant contends that, save for a \$40,000 exception, all of its advertising expenditures are institutional in nature. Based upon the record before us, and in addition to our belief that illusive definitions are counter-productive, the commission cannot agree with this (company) position." Why?

Policy and Law

What are the underlying policy considerations and the applicable law in regard to advertising? Applicant cites at length portions of the opinion in *New England Teleph. & Teleg. Co. v Massachusetts Dept. of Pub. Utilities* (1971) — Mass —, 92 PUR3d 113, 275 NE2d 493, 517. In that case the Department of Public Utilities spoke to the question of institutional advertising, advertising "designed to improve the image of the company, rather than to inform customers of new service or of other information which might be helpful or economical." The department of public utilities found that the expense was not a proper cost of service, while

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the court held that that disallowance was erroneous. Consumers cites the action of the Massachusetts court and several other jurisdictions as the proper view to be taken in regard to avowed institutional advertising.

The views of the staff and the intervener attorney general can be summarized in terms of requiring advertising to be of measurable benefit to the ratepayer. They jointly assert that institutional advertising cannot, by its very nature, be of benefit to the customer, and therefore it may not be found as a cost of service. The intervener West Michigan Environmental Action Council, Inc., adds additional considerations to this view, maintaining that such advertising is barred by the terms of the agreement incorporated in the immediately prior Consumers rate case, Case No. U-4174, and that it is inequitable for the ratepayer to pay for the advocacy of controversial environmental positions and policies.

Controversy over advertising expenditures is at least four decades old and precedents have been developed going both ways on the issue. However, in my view the California Public Utilities Commission in 1954 adopted a general rule worthy of note. That commission stated that it would approve ratepayer paid advertising that was of real benefit to the customer, and reasonable in cost. The California commission has applied that concept ever since, and in a recent case it approved an expenditure of \$11.5 million for "informative" advertising while rejecting \$1.4 million, stating: "There's serious question that . . . descriptions of in-

3 PUR 4th

stances of employee helpfulness are of significant benefit to customers." Re Southern California Edison Co. (Cal 1971) 90 PUR3d 1, 19.

The order follows neither position generally adopted in other jurisdictions, and is contrary to the accepted context in which the controverted issues were argued by the parties. The order abhors "narrow definitional terms," "illusive definitions," and "specific labels." Instead, contrary to the apparent ease with which the parties used these definitions to make their respective cases, the order of today resolves the conflict by providing classes of permitted expenditures.

This approach is doubly unfortunate, for this order represents not only the findings of the commission in this proceeding, but is advisory as to future conduct. It is my belief that a reading of the description of Class 5, "These criteria include factual data and information which describe any program or activity which will objectively benefit the ratepayer, including demand/supply studies and specific plans or identifiable projects to provide adequate supplies of utility services," encompasses *exactly* the complained of conduct in this case; that is, the company's comprehensive program of institutional advertising. It is certainly the company's view that such construction will "objectively benefit the ratepayer" and its advertising to date has indeed included references to both "demand/supply studies" and "plans to provide adequate supplies of utility services."

Proper Role of Customer Paid Advertising

As noted above, it is my view that

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advertising to be paid for by the customer should be of real benefit to the customer and reasonable in cost. General categories of such advertising have been labeled "informational" and "conservational." It would be beneficial to all concerned if the commission adopted this simple and easily understandable standard, one which has proven acceptable in other jurisdictions for decades.

In support of customer paid advertising the company sponsored expert witness Elmer White, executive secretary of the Michigan Press Association. Mr. White stated that "People served by a utility have a right and a need to know about the services." I wholeheartedly support Mr. White's view, and advocated such utility advertising before the comparable broadcasting group, the Michigan Association of Broadcasters, at their annual conference this past summer. I will continue to advocate such informational advertising, with reference to the entire range of communications media in our state.

Particular emphasis should be placed upon conservation advertising, since conservation can make real inroads upon our need for new and costly generating facilities. Recently, the company has initiated such commendable conservation advertising. I am a member of a task force created by the Michigan Association of School Administrators to prepare curriculum guides for energy education, and I would hope that similar long-range efforts could be made in all the mass media to educate Michigan's adults to the need to reduce

energy consumption. Our regulated utilities can play a key role in such efforts, since their suggestions to conserve the product they are selling have a special ring of authenticity. To be effective, such efforts will have to be of long duration, since not only new patterns of dressing and heating will have to evolve, but new building concepts will have to be adopted. This society-wide effort will have the greatest chance of success if we adopt standards that are understandable, noncontroversial and capable of sustained application in the years ahead.

Conclusion

This commission should not require the ratepayer to pay for expenses which are not of demonstrable benefit to the ratepayer, which were not prudently incurred, or which were not reasonable. I agree with the position of WMEAC that it is inequitable for the ratepayer to pay for the advocacy of controversial environmental policies. I would like to emphasize that this does not limit in any way the expenditures made by the company from their shareholder's funds, funds that come from permitted profits on the shareholder's investment.

I am unable to conclude that the expenses in question were indeed of demonstrable benefit to the ratepayer, and I therefore find that they should not be paid for by the public. I find the documentation of such expenditures provided by staff to be supported in the record, and therefore adopt the recommendation of the staff.

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the joint application of)
CONSUMERS POWER COMPANY and THE DETROIT)
EDISON COMPANY for approval of emergency)
procedures.)
_____)

Case No. U-4128

At a session of the Michigan Public Service Commission held at its offices in the city of Lansing, Michigan, on the 28th day of January, 1974.

PRESENT: Hon. William G. Rosenberg, Chairman
Hon. Lenton G. Sculthorp, Commissioner
Hon. William R. Ralls, Commissioner

ORDER TO SHOW CAUSE WHY EMERGENCY
PROCEDURES SHOULD NOT BE IMPLEMENTED
GRANTING INTERIM EFFECT, REQUIRING PUBLICATION AND
SETTING PUBLIC HEARING

I.

HISTORY OF PROCEEDINGS

On November 21, 1973, The Detroit Edison Company (Edison) and Consumers Power Company (Consumers), collectively referred to as "Applicants," filed a "Petition for Supplement and Amendment of Emergency Procedures Order" which order was approved by the Commission on July 10, 1972 in Case No. U-4128 for the purpose of establishing emergency procedures in the event that a shortage of electrical power occurred within the Edison-Consumers service areas or in the service areas of other interconnected electric utilities. At that time, the major concern of the Commission was directed toward potential electrical power shortages occurring from excessive peak summer

loads resulting from extended periods of high degree days and causing "brownout" or "blackout" conditions within the state.

The application herein, however, concerns the potential existence of electrical power shortages within the State of Michigan caused by a different set of circumstances; namely, the effect of the "energy crisis" upon the ability of Applicants to meet the electric power demands of the customers. In part, the application herein was initiated in response to legitimate concerns that impending curtailments of crude oil, middle distillate fuels and possible shortages of other fossil fuels would shortly impinge upon Applicants' ability to meet customer demand and that existing approved emergency procedures were impractical to meet potential long-range shortages.

II.

COMMISSION STAFF ACTIVITY

Subsequent to the filing of said application, the Commission Staff (Staff) immediately instituted an inquiry into the nature and extent of potential electrical energy shortages and the need for and substance of any appropriate emergency procedures.

Pursuant to said inquiry, the Staff has had several meetings with operational personnel of Applicants, adopted certain procedures currently effective and recommended expanded emergency procedures which the Commission adopts today.

The Staff has implemented, with the full cooperation of Applicants, detailed reporting procedures which apprise the Commission daily of available electrical generation capacity of the Michigan Power Pool, the status of available and anticipated fuel supplies of both Edison and Consumers, projected and actual peak demands of the coordinated system, availability of purchased power, percentage of system operating reserve and the operating status of all system generating units having a rated capacity of at least

200 megawatts. In addition, Applicants have voluntarily agreed to immediately notify the Commission of any major change in these essential factors.

III.

CASUAL EFFECT OF CAPACITY SHORTAGES

The Staff has determined that any shortage in available electrical energy generating capacity necessary to meet the demand of Applicants' customers will, under current circumstances, be occasioned by one or more of the following factors:

- (1) Shortage or interruption of supply of fuels for electrical energy generation; or
- (2) Unavailability of firm or stand-by power from established interconnected electrical networks; or
- (3) Short-term shortages of generating capacity caused by temporary equipment failure, unanticipated excessive peak demand or severe weather occurrences; or
- (4) Long-term outages or reduction in actual operating levels of generating capacity caused by equipment failure; or
- (5) Short-term excessive peak demand caused by extended weather excesses.

It is essential to note that the potential inability to meet customer demand is not due only to the current "energy crisis" but may be occasioned by a variety of events.

The Commission therefore finds that the public interest requires the adoption of emergency operating procedures designed to protect the health, safety and welfare of all Michigan residents in the event of shortages of electrical energy generation capacity caused by any possible identifiable circumstances.

IV.

STATUS OF CURRENT GENERATING CAPACITY

Due to the establishment of the reporting mechanisms hereinbefore mentioned,

[Balance deleted.]

[¶ 75,314] *Matsushita Electric Corp. of America v. Fruchter.*

New York Supreme Court, New York County. Vol. 172 N. Y. L. J. No. 37, p. 15. Dated August 21, 1974.

New York Fair Trade Law

Fair Trade—Contempt—Violation of Preliminary Injunction—Fact Questions—Reference to Special Referee.—A motion to punish a seller for contempt for willful violation of a preliminary injunction raised factual issues that could not be determined by affidavits; hence, the issue of whether defendant sold or offered for sale the products at prices below the fair trade price was referred to a special referee, and decision on the motion was held in abeyance. See ¶ 6362.34.

[Order]

BRUCHHAUSEN, J.: Motion by plaintiff to punish defendant for contempt for willful violation of a preliminary injunction entered in this action on Jan. 30, 1974, raises factual issues which cannot be determined by affidavits. The issue is referred to Special Referee, Hon. Lloyd I. Paperno, to hear and report whether defendant sold or

offered for sale Panasonic products at prices below the minimum retail selling prices established under the New York Fair Trade Law. Decision on the motion is held in abeyance pending receipt of the referee's report, together with his recommendations.

Serve a copy of this order on the office of the referee, Room 308-M, within ten days of publication so that a hearing date may be set.

[¶ 75,315] *United States v. Falstaff Brewing Corp., et al.*

U. S. District Court, District of Rhode Island. Civil Action No. 3523. Dated October 23, 1974.

Case No. 1859, Antitrust Division, Department of Justice.

Clayton Act

Acquisitions—Market Extension—Potential Competition—Competitive Conditions in Relevant Market—Concentration as Evidence of Lack of Competition.—A brewer was not a potential competitor waiting in the wings that could have exerted a beneficial influence on existing competition in the relevant market, since there was no evidence tending to show that competition in the market was other than vigorous. There was no showing that one or another firm had control over prices or other competitive indicia, and prices had remained constant despite rising costs. Therefore, the level of competition could not have been affected by the existence of a potential entrant on the fringe of the market. A contention that market concentration per se was evidence of lack of competition was rejected. See ¶ 4350.

Acquisitions—Market Extension—Evidence of Potential Entry or Effects on the Edge of the Market.—Even if the relevant market for beer could have benefited from the existence of a potential entrant, it was not shown that an acquiring brewer was so positioned on the edge of the market that it exerted a beneficial influence on competitive conditions. There was no testimony of any sellers in the market that the brewer was considered by them to be a potential competitor, and a rational evaluation of the objective facts known generally to firms selling in the market warranted the conclusion that the brewer would probably not have entered the market. Relevant evidence on this issue included the brewer's general interest in the market, the distance of its brewery from the market, the availability of an adequate distributor system, its prior acquisition discussions, its financial capability and incentives to enter, and the objective evidence of vigorous competitive conditions in the market. See ¶ 4350.

Acquisitions—Market Extension—Elimination of Beneficial Effects on the Edge of the Market—Lack of Substantial Lessening of Competition—Post-acquisition Evidence.—Even if an acquiring brewer had been exerting some beneficial influence on competition by its position on the edge of the market, the elimination of this influence would not have been enough to violate Sec. 7 of the Clayton Act. The opinion of the court in *U. S. v. Phillips Petroleum Co.* (1973-2 TRADE CASES ¶ 74,789) was clearly distinguishable on its facts and

¶ 75,314

post-acquisition evidence, although not employable to validate what is otherwise an illegal merger, established that after the acquisition competition remained intense and was not lessened in any manner or form. Beer prices remained stable despite rising costs and the acquired firm's share of the market and profits declined in spite of its best efforts. See ¶ 4350.

Opinion

DAY, D. J.: In this action the Government seeks to set aside the acquisition by the defendant Falstaff Brewing Corporation (hereinafter Falstaff) of the assets of Narragansett Brewing Company (hereinafter Narragansett) on the ground that said acquisition was a violation of Section 7 of the Clayton Act, as amended, 15 U. S. C. § 18 because it eliminated substantial potential competition in the production and sale of beer in the New England beer market.¹

After a trial following extensive and prolonged discovery proceedings by the parties, I found that Falstaff was not a potential entrant into said market by any means or way except by the acquisition of Narragansett. I further found that it is not probable that said acquisition may substantially lessen competition in said New England beer market and entered judgment in favor of the defendant. *United States v. Falstaff Brewing Corporation, et al.* [1971 TRADE CASES ¶ 73,733], 332 F. Supp. 970 (D. C. R. I. 1971). The Government appealed directly to the Supreme Court under the Expediting Act, 32 Stat. 823, 15 U. S. C. § 29. The Supreme Court vacated said judgment and remanded said action to this Court for further proceedings consistent with its opinion. *United States v. Falstaff Brewing Corp. et al.* [1973-1 TRADE CASES ¶ 74,377], 410 U. S. 526 (1973). Its mandate on remand was for "proper assessment of Falstaff as an on-the-fringe potential competitor". *Ibid.* 537.

Following said remand the Government did not seek to present any additional evidence and by stipulation of counsel for the parties and the order of this Court, the evidence in this action has been limited to

that contained in the original record of said trial. The sole issues for determination by this Court are whether the defendant was a potential competitor waiting in the wings, exerting a beneficial influence on existing competition in said New England market, and, if so, whether the acquisition of Narragansett would probably lead to a substantial lessening of competition in said market.

[Concentration Data]

The parties had stipulated as to the concentration figures and the market shares of the firms selling in said market at the time of the acquisition of Narragansett by the defendant. Based upon these stipulations, the Supreme Court found that:

"While beer sales in New England increased approximately 9.5% in the four years preceding the acquisition, the eight largest sellers increased their share of those sales from approximately 74% to 81.2%. In 1960 approximately 50% of the sales were made by the four largest sellers; by 1964, their share of the market was 54% and by 1965, the year of acquisition, their share was 61.3%. The number of brewers operating plants in the geographic market decreased from 32 in 1935 to 11 in 1957, to 6 in 1964.

"Of the Nation's 10 largest brewers in 1964, only Falstaff and two others did not sell beer in New England; Falstaff was the largest of the three and had the closest brewery. In relation to the New England market Falstaff sold its product in western Ohio, to the west, and in Washington, D. C. to the south." 410 U. S. 527, 528.

Upon these facts the Government contends that the defendant's acquisition of Narragansett created a "reasonable likelihood that competition in the New England market would be substantially lessened".

¹ Section 7 reads in pertinent part as follows: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the

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

In this case the Government has also contended that concentration per se is evidence of lack of competition in the market. In my opinion a better approach was that taken by the late Mr. Justice Harlan in his concurring opinion in *F. T. C. v. Procter & Gamble Co.* [1967 TRADE CASES ¶72,061], 386 U. S. 586 (1967) wherein he stated at page 594:

"Just as the total number of sellers in the market is not determinative of its operation, the percentage of sales made by any group of sellers is similarly not conclusive. The determinative issue is, instead, how the sellers interact and establish the pattern of market behavior. The significance of concentration analysis is that it allows measurement of one easily determined variable to serve as an *opening key* to the pattern of market behavior." (Emphasis supplied).

[Competitive Condition of Market]

Beyond evidence of concentration, the Government presented no evidence tending to prove "deviation from competitive norms" in the New England beer market. Dr. Horowitz, an economist, testifying in behalf of the defendant, stated unequivocally that there is no necessary relationship between concentration and the level of competition in said market. On the contrary, he stated a number of factors which should be considered in ascertaining the level of competition, viz, pricing behavior, willingness to innovate and keep up with technological changes, stability of market shares and quality of product.

In his testimony he pointed out that since 1955, while the market shares of the leading sellers in said New England market had increased, it was only as the result of the rapidly increasing shares of Schlitz and Anheuser-Bush. The shares of other leaders in said market had varied which was consistent with competitive conditions. In addition, prices remained constant in spite of rising costs, another indication of strong competitive forces in said market in his opinion. Although counsel for the Government requested and was granted permission to have two economists of his choice sit with him at counsel table to assist him during the trial of this case, neither of said economists was called as a witness to refute the testimony or opinions of Dr. Horowitz.

The evidence further showed that technological innovations were being studied and undertaken by Falstaff before and after said acquisition which are indicative of the ex-

istence of vigorous competition among the sellers in said market.

The Government contends that the decline in the number of brewers operating breweries in said market indicates decreased competition therein. Those brewers who ceased to do business in said market were too inefficient to compete with other firms who in the words of Dr. Horowitz were "fighting for their share of the market".

No evidence was presented by the Government which would tend to show that competition in said market was other than vigorous. Furthermore, there was no showing by the Government that one or another firm in the market had control over prices or other competitive indicia. In the absence of such a showing, the Government has failed to prove that Falstaff was a "potential competitor with any influence on the competitive conditions in said market".

[Edge of the Market Effects]

Even if this Court were to conclude that said New England beer market could have benefited from the existence of a potential entrant therein, the burden rested upon the Government to prove in the words of Mr. Justice White that "Falstaff was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market". 410 U. S. 526, 532-533. Mr. Justice White suggested two alternative methods of proving such effect. The first method would be to present evidence of how Falstaff was in fact perceived by companies then selling beer in said market. The only testimony relating to this issue was that of Carl Haffenreffer, the former Executive Vice-President and Director of Marketing of Narragansett. He testified as follows:

"They [Falstaff] were no threat. We certainly didn't consider them any threat to us. We had much greater threats to concern ourselves with." Haffenreffer, App. 376.

The Government presented no testimony of any sellers in said market in 1965 or previous thereto that Falstaff was considered by them to be a potential competitor in said market.

The second method requires this Court to determine whether a national beer merchant selling in said market could have reasonably concluded that Falstaff might build a new brewery in New England to supply said market. Relevant evidence on

this issue to be evaluated includes Falstaff's general interest in said market, the distance of its brewery from said market, its prior acquisition discussions, its financial capability and incentives to enter said market, and also the objective evidence of competitive conditions in said market, including a lack of price increases despite rising costs and the inability of those then selling in said market to exercise market control.

It is this Court's opinion that a rational evaluation of the objective facts known generally to firms selling in said market prior to and at the time of said acquisition by Falstaff warrants the conclusion that Falstaff would probably not have entered said market and hence its existence on the edge thereof could not have any pro-competitive effect on behavior in said market.

It is clear that the defendant had never concealed the fact that it was interested in becoming a national brewer. That fact cannot be said to warrant the inference that Falstaff's interest was directed primarily or solely to said New England market. The acquisition of Narragansett did not make Falstaff a national brewer. Horowitz, App. 291. Its decision to become a national brewer did not require that it enter the New England market.

[Merger Negotiations]

The evidence establishes that between 1960 and 1964 Dawson, Ballentine, Liebmann and Narragansett initiated negotiations with Falstaff with the objective of being acquired by Falstaff. The evidence establishes that Dawson's offer was rejected summarily by Falstaff and the proposals by Ballentine and Liebmann eventually were non-productive and were terminated. Griesedieck, App. 138, 300-302. To some extent these negotiations were matters of public record. If these negotiations with Ballentine and Liebmann may be deemed to give rise to any inferences as to Falstaff's intent or objective, they reflect an interest in the New York Market, not the New England market. Any beer seller having knowledge of said negotiations would conclude that Falstaff was not interested in building a brewery as a means of entering said New England market. However, although Ballentine and Liebmann sold in the New England market, their primary market was in the New York-Philadelphia metropolitan area. Under the circumstances, these discussions should have indicated to its competitors that Falstaff was not primarily

interested in said New England market and that it did not intend to construct a brewery therein for the purpose of entering that market.

[Production Capability]

An obvious condition precedent to the construction of a brewery was adequate market penetration. Since the statistics relating to Falstaff's sales and capacity were generally available in the beer business, all sellers in said New England market at the time of said acquisition of Narragansett by Falstaff must have known that Falstaff was then operating its brewery at full capacity and therefore could not begin any penetration of said market by shipping to said market any excess production which it did not possess. Horowitz, App. 234.

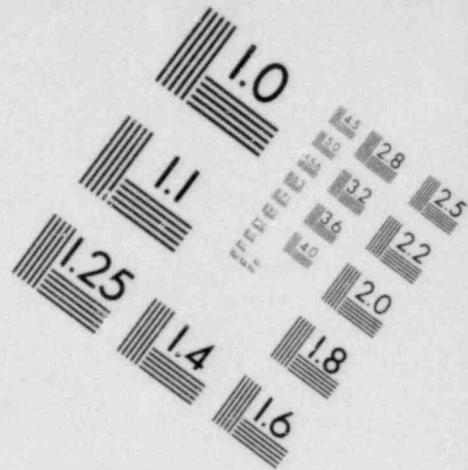
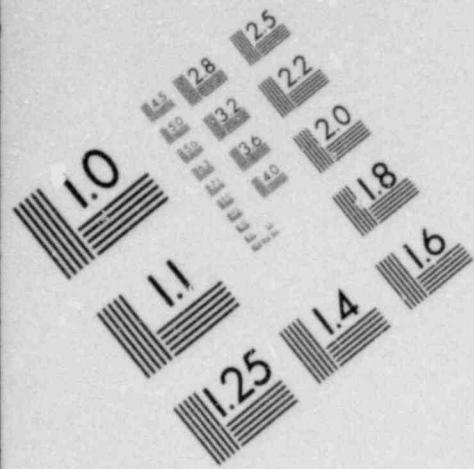
[Distribution System]

Each of the brewers then selling in said market must have known that an adequate distribution system was a condition precedent to entry therein (Horowitz, App. 234) and that such a system was unavailable (Haffenreffer, App. 375). Falstaff had not even made tentative offers to distributors already selling in said market in response to unsolicited inquiries (App. 46, 470-535). In fact, Falstaff had not undertaken the most fundamental steps necessary for an effective entry by it in said market.

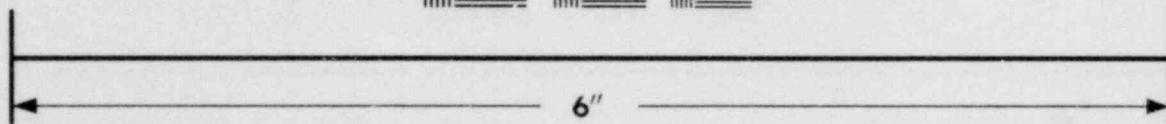
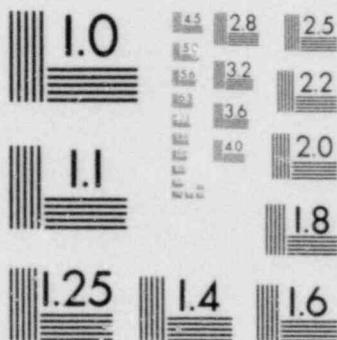
[Financing]

Without an acceptable level of sales in said market, Falstaff could not reasonably anticipate any profit therefrom. Under such circumstances, it is unlikely that Falstaff could have borrowed the money to build a brewery or undertaken to do so. Its President testified:

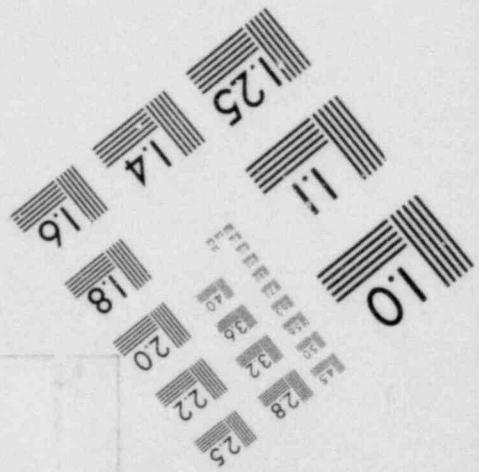
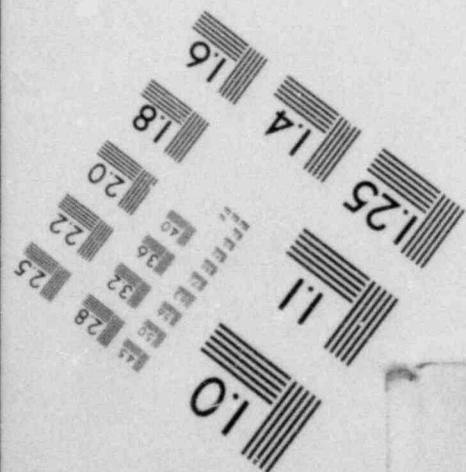
"In the first place, we had no sales in New England, and for us to have attempted to finance a brewery of the size of which we believed necessary, above a million barrels, there was no way that we could estimate to any degree of certainty what kind of sales we would generate after we built the brewery, and therefore it would have been rather a difficult thing for us in my opinion to borrow the money. Certainly we never could have justified it to our stockholders, because we did find it very difficult to open in major metropolitan markets where entrenched rules were already doing business without a decent distributor system. That is, the reason why we did acquire, it was the distributorship purely and simply." Griesedieck, App. 296.

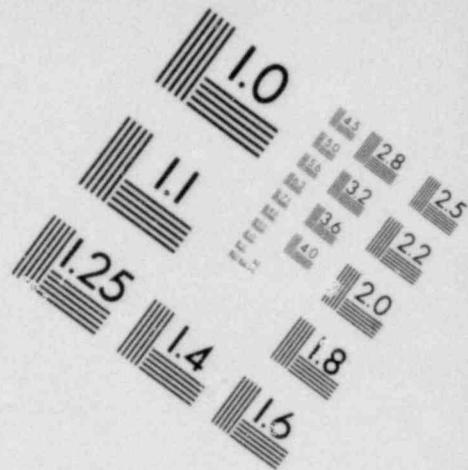
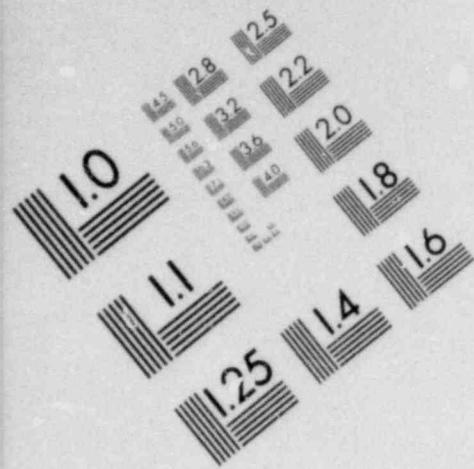


**IMAGE EVALUATION
TEST TARGET (MT-3)**

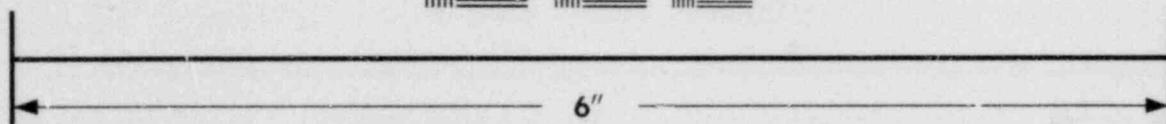
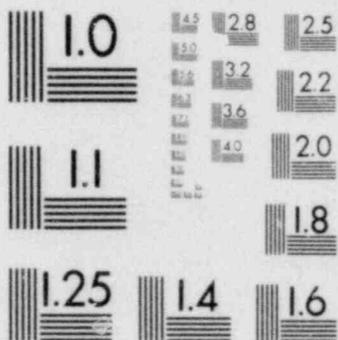


MICROCOPY RESOLUTION TEST CHART

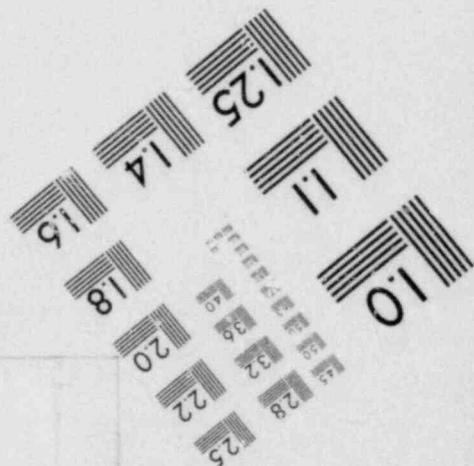
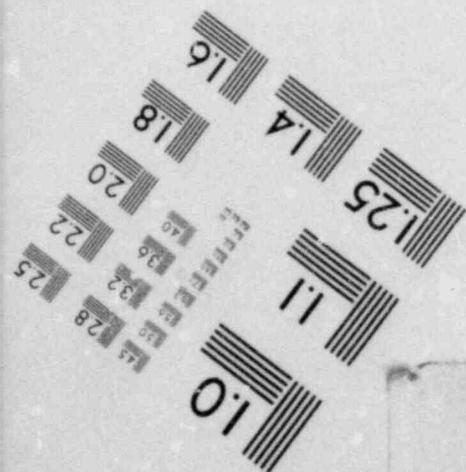




**IMAGE EVALUATION
TEST TARGET (MT-3)**



MICROCOPY RESOLUTION TEST CHART



[*Smaller Acquisition*]

The Government in its brief on remand contends that Falstaff could have acquired some other smaller brewery in said New England market at a significantly smaller cost and expanded it as success in said market permitted. In support of this contention it cites Dawson's Brewery Co., in New Bedford, Massachusetts and Diamond Spring Co. in Lawrence, Massachusetts, both of which were for sale and had made overtures for their acquisition to Falstaff. The evidence establishes that one of them was in bankruptcy at the time of said offer to Falstaff. Additionally, it must have been evident to other brewers in said market that neither of said brewers possessed an adequate distributor organization. It is inconceivable that other brewers in said market could have considered it probable that Falstaff would consider their acquisition as a possible means of entry into said market.

It is this Court's opinion that a review of all the evidence, viewed in the light of the economic situation in said market in 1965, confirms the statement of the said Carl Haffenreffer and the opinion of Dr. Horowitz that Falstaff exerted no influence on the level of prices or on the substantiality of competition in said market. The Government produced no evidence during said trial that any of the brewers selling in said market in 1965 viewed Falstaff as a potential entrant therein.

[*Lessening of Competition*]

If, in fact, Falstaff by its existence was exerting some beneficial influence on competition in said beer market, that in and of itself would be insufficient to prove a violation of said Section 7. As Mr. Justice White said:

"Surely, it could not be said on this record that Falstaff's general interest in the New England market was unknown and if it would appear to rational beer merchants that Falstaff might well build a new brewery to supply the north-eastern market then its entry by merger became suspect under § 7." 410 U. S. 533.

Even if Falstaff's entry into said New England market by merger became suspect, the burden rested upon the Government to prove that the probable result thereof would be to substantially lessen competition in said market. *Brown Shoe Co., Inc. v. United States* [1962 TRADE CASES ¶ 70,366], 370 U. S. 294 (1962).

¶ 75,315

The record of this case shows that Falstaff acquired the assets of Narragansett on July 15, 1965. The instant action was filed on July 13, 1965 and service of process was made on Falstaff on July 21, 1965 at St. Louis, Missouri, where its principal place of business was located. After extensive and prolonged discovery by the parties, the trial of this action began on October 15, 1970.

[*Post Acquisition Evidence*]

It is well settled that post acquisition evidence in a case such as this may properly be considered in determining whether the probable effect of said merger will be a substantial lessening of competition in said New England beer market. *United States v. Pabst Brewing Co.* [1966 TRADE CASES ¶ 71,790], 384 U. S. 546 (1966); *FTC v. Consolidated Foods Corp.* [1965 TRADE CASES ¶ 71,432], 380 U. S. 592 (1965); *United States v. E. I. Du Pont de Nemours & Co.* [1957 TRADE CASES ¶ 68,723], 353 U. S. 586 (1957).

[*Phillips Petroleum Case*]

In its supplemental memorandum filed with this Court, the Government relies heavily upon the opinion of the Court in *United States v. Phillips Petroleum Company* [1973-2 TRADE CASES ¶ 74,789], 367 F. Supp. 1226 (D. C. Cal. 1973). In that case the Court had two issues for decision, viz., (1) whether the defendant was a likely potential entrant into the California market, and (2) whether the defendant therein was waiting in the wings or, in the words of the Court, whether it had any "edge" effect on competition in said market. This Court has already found in favor of Falstaff on the first of these issues and it is not within the scope of said remand.

In *Phillips* the Court held that the criteria to be weighed in ascertaining whether Phillips had a pro-competitive edge effect were (1) was Phillips in the relevant line of Commerce; (2) had it previously indicated its interest in entering the California motor gasoline market; (3) were there objective economic facts indicating Phillips' capability to enter unilaterally; (4) were there objective economic facts indicating Phillips' incentives to enter said market; (5) was Phillips recognized by others selling in said California market as a potential entrant therein, and (6) were there objective economic facts relating to the structure and degree of concentration in said markets and barriers to entry therein. The Court found from the evidence adduced at trial that

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Cited 1974-2 Trade Cases
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98,011

Phillips had a well defined goal of nationwide marketing and had explored every possible means of entering said market, either by a large acquisition, joint venture, a foot-hold acquisition or a unilateral entry. By virtue of its acquisition of the Western Manufacturing and Marketing Division of Tidewater Oil Company for the sum of \$366,000,000, Phillips (1) would have achieved national marketing status, (2) would have entered a market regarded as more profitable than other areas in which it had the strongest representation and where prices had been more stable, and (3) would have gained opportunities for vertical integration, including exploitation of its Alaskan crude oil reserves, product exchanges and potential enlargement of its highly petrochemical business.

The evidence in said case further established that Phillips had a history of entering markets de novo or unilaterally. It had a record of internal growth which made it a leading international company with substantial interests in many parts of the world. The evidence further established that Phillips was engaged in business in California before it acquired said Division from Tidewater. It had exploration and production interests in said state and was engaged there in the manufacture and marketing of many plastic products, and in the packaging and marketing of fertilizers, full lines of rubber carbon, high-purity hydrocarbons and many specialty chemicals. Phillips was the second largest industrial firm located west of the Mississippi—surpassed only by Standard Oil of California.

The underwriters of Phillips in its acquisition of said Division from Tidewater did not consider said acquisition for the sum of \$366,000,000 to be a particularly large one for a company of Phillips' size and concluded that super-imposing said assets acquired from Tidewater on Phillips' balance sheet did not have a great effect.

In the instant case the evidence established that Falstaff's primary method of entry into new markets had been by acquisition. Falstaff was not and is not a nation-wide brewer. It possessed no unique research or managerial talent in comparison with other brewers. It was not active in said New England market prior to its acquisition of Narragansett. Its payment of \$35,000,000 for the assets of Narragansett represented a substantial investment for it which in the absence of its distributor organization could not have been financed

as shown by the evidence presented during said trial.

In *Phillips*, the Court found that the entry by Humble Oil and Refining Company into the California motor gasoline market was evidence of the feasibility of unilateral entry for a company with sufficient capability and motivation. Said Court found there was no uniqueness in said California market. The Court noted that said entry by Humble demonstrated that service stations and other retail outlets could be obtained in sufficient numbers to support substantial entry into said market without resort to a major acquisition. It also found that Phillips could have supplied itself with gasoline in California through four alternative methods until it could complete construction of an oil refinery. At the time of its acquisition of Narragansett, Falstaff's breweries were operating at approximately 100% capacity and could not support its entry into said New England market pending the erection and completion of a new brewery in said market.

In *Phillips*, the Government presented substantial evidence that other companies in the California market regarded Phillips as a potential entrant therein and that Phillips had engaged in several well publicized efforts to gain control of Union Oil Company which was then doing business in said market. In the instant case, no evidence was presented to the effect that other companies then selling beer in the New England market regarded Falstaff as a potential entrant therein.

While it is true that post-acquisition evidence cannot be employed to validate what is otherwise an illegal merger, such evidence may properly be used to confirm trends in the relevant market perceived at the time of the merger. In this case, the post-acquisition evidence establishes that after said acquisition of Narragansett by Falstaff competition remained intense in said New England market and that said acquisition did not lessen competition in said market in any manner or form. On the contrary, said post-acquisition evidence establishes that beer prices remained stable in spite of rising costs, that Narragansett's share of said market declined, and its profits declined despite its best efforts and the competition in said market became more intense. It is this Court's opinion that *United States v. Phillips, supra*, is clearly distinguishable on its facts from this case.

[Established Facts]

The evidence presented in this case and the reasonable inferences to be drawn therefrom establish the following facts, viz:

- (1) The relevant geographic market consists of the New England states, i. e., Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.
- (2) In July, 1965, when Falstaff acquired Narragansett, the sales of Narragansett were almost exclusively in said New England Market.
- (3) At the time of said acquisition Falstaff did not sell any beer in said market and had no brand recognition or acceptance therein. It sold its products no closer to New England than Toledo, Ohio, on the west and Washington, D. C. on the south.
- (4) In 1964, the eight largest sellers of beer in the New England market sold 81.2% of the beer sold in said New England market. In 1960, the eight largest sellers of beer therein sold 74% of the beer sold in said market. In 1965, Narragansett was the largest seller of beer with approximately 20% of the market.
- (5) Since the date of said acquisition, Narragansett's share of said market has fallen and its profits have declined. Competition in said market has remained intense. Said merger has had no adverse effect on the level of competition in said market. Price competition is evidenced by the fact that prices have remained constant in spite of rising costs.
- (6) At the time of said acquisition in 1965, none of the firms selling beer in said market had control over prices or other indicia of competition and therefore the level of competition would not be affected by the existence of a potential entrant on the fringe of said market.

(7) At the time of said acquisition and for the foreseeable future, the defendant could not have entered said New England market by shipping beer from its existing plants which were then operating at near capacity.

(8) Although Falstaff had publicly indicated its desire to become a national brewer, its acquisition of Narragansett did not make it a national brewer.

(9) Firms selling in said market prior to said acquisition were aware that the procurement of an adequate distributor system would have been extremely difficult if the defendant attempted to create one out of the then existing wholesale distributors.

(10) The only evidence presented during said trial establishes that at the time of said acquisition, competitors selling in said market did not view the defendant, Falstaff, as a potential or probable entrant in said market.

(11) Under the conditions then existing in said market, no rational beer seller in said market would have regarded Falstaff as a potential entrant therein at the time of said acquisition.

(12) The acquisition of Narragansett by Falstaff did not result in the elimination of a potential competitor so positioned on the edge of said market that it exerted a beneficial influence on competitive conditions therein.

Since the Government has failed to establish by a fair preponderance of the evidence that said acquisition of Narragansett by the defendant would probably lead to a substantial lessening of competition in the production and sale of beer in said New England market in violation of § 7 of said Clayton Act, judgment must be and will be entered in favor of the defendant, Falstaff Brewing Corporation.

[¶ 75,316] *United States v. Combustion Engineering, Inc. and American Colloid Co.*

U. S. District Court, Eastern District of Pennsylvania. Civil No. 73-2500. Filed, but not entered, November 2, 1974.

Case No. 2349, Antitrust Division, Department of Justice.

Sherman Act

Price Fixing—Customer and Territorial Allocation—Chromite Sand—Consent Decree.—Two importers, processors, and sellers of chromite sand would be prohibited by a consent decree from agreeing to fix prices or allocate customers or territories. See ¶ 1610, 4630.

For plaintiff: Robert H. Bork, Actg. Atty. Gen., Thomas E. Kauper, Asst. Atty. Gen., Baddia J. Rashid, John J. Hughes, Warren Marcus, William A. DeStefano, Stewart J. Miller, Attys., Dept. of Justice, Antitrust Div., Philadelphia, Pa., and Robert E. J. Curran,

¶ 75,317

court on a motion to dismiss plaintiff's declaration. No testimony was taken.

[2] It is a well established rule that the right of an insurance agent to commissions on renewal premiums depends upon the contract existing between the agent and the insurance company, or one of its general agents. See *Masden v. Travelers' Ins. Co.*, 8 Cir., 52 F.2d 75, 79 A.L.R. 469, at page 475.

In *Locher v. New York Life Insurance Co.*, 200 Mo.App. 659, 208 S.W. 862, 866, it is said:

"So that the decided weight of authority leads to the conclusion that, unless it is expressly stipulated or clearly to be gathered by the contract, the agent's right to commissions on renewals is to continue on renewals falling in after the term of his employment, he is not entitled to commissions on renewals received or falling in after the expiration of his agency. The right of the agent to commissions on renewals collected or falling in after the end of his agency, can rest only on express terms in his contract, or be necessarily drawn from an interpretation of that contract as a whole. This must be so, for the right to commissions on renewals rests, in part, on the consideration of the services by the agent to the company in keeping the policies written by him alive."

See, also, *Security Life Ins. Company of America v. McCray*, 124 Ark. 202, 186 S.W. 819.

The right of an agent to collect renewal premiums after his discharge without cause came up in *Kyselka v. Northern Assurance Co. of Michigan*, 194 Mich. 450, 160 N.W. 559, 562. We there said:

"Defendant cannot through a formal discharge for an insufficient reason deprive plaintiff of the just fruits of his labors for upwards of four years."

See, also, *Kyselka v. Northern Assurance Co. of Michigan*, 208 Mich. 47, 175 N.W. 386.

[3] In the case at bar, the agreement provided that it would be in effect as long as the field organizer should exert his best efforts in his employment. The discharge of plaintiff brings into issue the question

of whether he was rightfully or wrongfully discharged. Plaintiff is entitled to a determination of this issue. The trial court was in error in dismissing plaintiff's declaration upon motion and without trial.

The cause is remanded to the circuit court of Wayne county for a trial of the issues raised in the pleadings. Plaintiff may recover costs.

CARR, C. J., and BUTZEL, BUSHNELL, BOYLES, REID, NORTH, and DETHMERS, JJ., concur.



317 Mich. 552

CITY OF HAZEL PARK v. MUNICIPAL FINANCE COMMISSION.

Motion No. 352.

Supreme Court of Michigan.

April 17, 1947.

1. Municipal corporations ⇨79

Where by amendment to home rule city charter tax limit for city purposes was increased to 1.8 per cent. instead of constitutional limit of 1.5 per cent. and if sewer bonds approved by voters were sold, city might not be able to pay principal and interest thereon in addition to necessary municipal expenses unless annual tax rate exceeded 1.8 per cent., Municipal Finance Act providing that no charter limitation should prevent collection of full amount of taxes to pay a bond issue approved by electors, and not the charter provision, would control. *Comp.Laws 1929 and Comp. Laws Supp.1940, § 2228 et seq.; Comp.Laws Supp.1945, § 2689-21 et seq.; Const. art. 10, § 21, as added in 1933.*

2. Statutes ⇨219

An administrative construction of a doubtful provision in the law, though not controlling, is considered and given weight by the courts.

3. Municipal corporations ⇨79

Home rule city, which by electoral vote had adopted an amendment increasing

CITY OF HAZEL PARK v. MUNICIPAL FINANCE COMMISSION Mich. 107
Cite as 27 N.W. 2d 106

its charter tax limit from 15 mills for city purposes to 18 mills, could not insert in notice of sale of sewage bonds, a provision that bonds would be general obligations of city payable from ad valorem taxes within 18 mills charter tax limit but was required to insert provision that bonds were payable without limitation as to rate or amount, since provision of Municipal Finance Act forbidding any limitation was required to be read in to city's charter and controlled the 18 mill limitation. Comp. Laws 1929 and Comp.Laws Supp.1940. §§ 2228 et seq., 2230, 2241, 2694; Comp.Laws Supp.1945, § 2689-21 et seq.; § 2689-91a; Const. art. 8, §§ 20, 21; art. 10, § 21, as added in 1932.

Mandamus proceeding by the City of Hazel Park, a Michigan municipal corporation, against the Municipal Finance Commission, a State of Michigan Commission, to compel defendant to approve a certain form of notice of sale of sewage disposal system bonds in the form submitted to the defendant by the plaintiff.

Writ denied.

Before the Entire Bench.

Carl A. Braun, of Pontiac, for plaintiff.

Eugene F. Black, Atty. Gen., Edmund E. Shepherd, Sol. Gen., of Lansing, and G. Douglas Clapperton, Asst. Atty. Gen., for defendant.

Bodman, Longley, Bogle, Middleton & Armstrong, of Detroit, amici curiæ, for Paul E. Worley, a taxpayer of Hazel Park, Michigan.

Miller, Canfield, Paddock & Stone, of Detroit, amici curiæ.

William E. Dowling, Corporation Counsel of City of Detroit, Paul T. Dwyer, Chief Asst. Corporation Counsel, and John G. Dunn, Asst. Corporation Counsel, all of Detroit, amici curiæ.

BOYLES, Justice.

Plaintiff has filed a petition asking that a writ of mandamus be issued directing the defendant State municipal finance commission to approve a certain form of notice of sale of \$416,000 sewage disposal sys-

tem bonds in the form submitted to it by said city. Order to show cause was issued, defendant's answer and return has been filed, and arguments heard in open court. Briefs have been filed by counsel for both parties, and also, by leave of court, briefs have been filed as amici curiæ by the corporation counsel of Detroit, by counsel for a taxpayer of the plaintiff city, and by counsel engaged in giving opinions to municipalities and purchasers as to the validity of municipal bonds.

The facts are not in dispute. The plaintiff is a municipal corporation in the county of Oakland, State of Michigan, incorporated under the provisions of Act No. 279, Pub.Acts 1909, as amended, city home-rule act, 1 Comp.Laws 1929, § 2228 et seq., as amended, Comp.Laws Supp.1940, § 2228 et seq., Stat. Ann. § 5.2071 et seq., pursuant to electoral vote on September 22, 1941. Its original charter was adopted at an election held on January 5, 1942, and contained a tax limitation of 15 mills for city purposes. On April 1, 1946, section 12.9 of the city charter was amended so as to provide for an extra 3-mill tax levy in addition to the 15 mills above mentioned, where such additional levy may be necessary in order to meet maturing bond principal and interest. At the same election on April 1, 1945, the electors of the city of Hazel Park approved the issuance of said \$416,000 general obligation bonds for additions and extensions to the city sewage disposal system. On November 13, 1946, the city council authorized the issuance of the above-mentioned bonds. Pursuant to the requirements of Act No. 202, Pub.Acts 1943, as amended, Comp.Laws Supp.1945, § 2689-21 et seq., Stat. Ann. 1946 Cum. Supp. § 5.3188 (1) et seq., application was made to the defendant municipal finance commission for permission to issue said bonds, and for approval of the form of the notice of sale thereof. The municipal finance commission granted permission for the issuance of the bonds, but refused to approve the form of the notice of sale as submitted by the city. It did, however, approve a notice of sale identical in form to that adopted by the city except for the deletion of the following sentence: "The bonds will be the general obligations of the city payable from

ad valorem taxes within the 1.8% charter tax limit for city purposes," and the insertion of the following sentence in lieu thereof: "The bonds will be the general obligations of the city payable from ad valorem taxes without limitation as to rate or amount."

The defendant municipal finance commission takes the position that the Michigan Constitution (1903), art. 10, § 21, as added in 1932, does not create a tax limitation for cities and villages but that they are excepted therefrom, and that the provision in Act No. 202, chap. 7, § 1a, Pub. Acts 1943, as added by Act No. 300, Pub. Acts 1945, Comp. Laws Supp. 1945, § 2639-91a, Stat. Ann. 1946 Cum. Supp. § 5.3183 (45a), requiring payment of maturing bond principal and interest from unlimited taxes notwithstanding any charter tax limitation, is not repugnant to the Constitution but is applicable to the city of Hazel Park and other cities and villages.

The plaintiff city of Hazel Park denies this contention and seeks in this action to secure a writ of mandamus requiring the municipal finance commission to approve the form of notice of sale as submitted, which notice provides that the bonds will be payable from ad valorem taxes within the 1.8 per cent charter tax limit for city purposes.

Counsel for the plaintiff phrases the question before us for decision as follows: "Do the provisions of section 21 of article 10 of the Michigan Constitution include city and village taxes within the 15 mill tax limitation but with the right of any such municipality to increase such limitation by a present or future charter provision?"

Section 21 of article 10 of the State Constitution, generally referred to as the 15-mill tax limitation, was adopted at the general election November 8, 1932, effective December 8, 1932. It is as follows: "The total amount of taxes assessed against property for all purposes in any one year shall not exceed one and one-half per cent of the assessed valuation of said property, except taxes levied for the payment of interest and principal on obligations heretofore incurred, which sums shall be separately assessed in all cases: Provided, That this limitation

may be increased for a period of not to exceed five years at any one time, to not more than a total of five per cent of the assessed valuation, by a two-thirds vote of the electors of any assessing district, or when provided for by the charter of a municipal corporation: Provided further, That this limitation shall not apply to taxes levied in the year 1932."

Plaintiff, relying mainly on what was said by this court in *School District of City of Pontiac v. City of Pontiac*, 262 Mich. 338, 247 N.W. 474, 787, contends that the said 15-mill tax limitation amendment as construed by this court places city and village taxes within the 15-mill-tax limitation, but provides that as to such municipalities the limitation may be increased when provided for by the present or future charter of such municipal corporation. Plaintiff relies on that part of the opinion in the *Pontiac* case, supra, wherein it was said, (at page 351 of 262 Mich., at page 479 of 247 N.W.):

"At the expense of repetition, we state again that (disregarding the exception of taxes levied for payment of debts), we think the amendment must be construed as though it read:

"The total amount of taxes assessed against property for all purposes in any one year shall not exceed 1½ per cent. of the assessed valuation of said property: Provided that this limitation may be increased for a period of not to exceed five years at any one time, to not more than a total of 5 per cent of the assessed valuation, by a two-thirds vote of the electors of any assessing district, or (that this limitation may be increased) when provided for by the (present or future) charter of a municipal corporation.

"In the foregoing reference has been made to the so-called home rule cities, but we think the same result would follow as to cities having special charters with like provisions as to the exercise of the power of taxation. The result of the above construction is that the 1932 amendment neither increased nor decreased the charter power of a city to levy taxes for its municipal purposes."

Simonton v. City of Pontiac, 268 Mich. 11, 255 N.W. 608, is not contrary to the

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conclusions reached in School District of City of Pontiac v. City of Pontiac, supra. In the Simonton case it was held that the city of Pontiac was bound to take care of its debt service for 1934, by the provisions of Act No. 273, Pub. Acts 1925; that the 15-mill amendment (Const. [1908], art. 10 § 21) did not apply. The defendant municipal finance commission refers to and relies on the following provision in the Municipal Finance Act, Act No. 202, chap. 7, § 1a, Pub. Acts 1943, as added by Act No. 300, Pub. Acts 1945: "No limitation in any statute or charter shall prevent the levy and collection of the full amount of taxes required by this section for the payment of debts, but nothing herein shall authorize the levy of a tax for any other purpose exceeding the existing statutory or charter tax limitation."

The similar provision in the earlier statute formed the basis for decision in the Simonton case.

The 15-mill amendment was first construed by the court in School District of City of Pontiac v. City of Pontiac, supra [262 Mich. 338, 247 N.W. 476]. The school district sought to enjoin the city from adoption of a proposed budget. After holding that the 15-mill amendment was legally adopted, the court considered the question "What is its proper construction in the particulars hereinafter noted?" Mr. Justice North, writing for the court, discussed and construed three exceptions to the general limitation that the total amount of taxes for all purposes shall not exceed 1½ per cent of the assessed valuation in any one year. The first exception was discussed as follows (at page 348 of 262 Mich., at page 478 of 247 N.W.): "At the outset the framers of the proposed amendment and later the people who considered its adoption were confronted with the legal proposition that contractual obligations could not be impaired and therefore the general exception to the proposed limitation of taxation was made by excepting 'taxes levied for the payment of interest and principal on obligations heretofore incurred.' We are not here concerned with this particular limitation, except to note that in drafting the amendment, as well as in its adoption, the people were mindful of existing conditions

and sought to so frame the amendment as to be in accord with such existing conditions. This led to embodying in the amendment the above quoted provision as the first exception to its general limitation on taxation."

Said opinion then refers to what is considered as the second exception, as follows (at page 348 of 262 Mich., at page 478 of 247 N.W.): "Reading further in the amendment it clearly appears it also occurred to those interested in its framing and adoption that certain conditions might already exist or might thereafter arise in consequence of which the electors of any assessing district might conclude that the 1½ per cent. constitutional limitation was unduly restrictive. * * * Hence the provision in the amendment that the specified limit might be increased for a period not exceeding five years at any one time to the maximum limit of 5 per cent. of the assessed valuation by a two-thirds vote of the electors of the assessing district. * * * and such provision constituted a second exception to the general taxation limitation contained in the amendment."

Having thus eliminated the above two exceptions (which are not essential to a consideration of the precise question before us in the instant case), Mr. Justice North discussed a third exception, as follows (at pages 349-351 of 262 Mich., at page 478 of 247 N.W.):

"This brings us to what a fair reading of the amendment indicates is a third exception to the general limitation of taxation which exception the framers and adopters of this amendment seemingly deemed essential, and which we think gave rise to including in the amendment the words '* * * or when provided for by the charter of a municipal corporation.' At this point consideration was evidently given to the well known fact that in comparatively recent years there had developed in this state the so-called 'home-rule' feature of our government. Provision therefor was embodied in the Constitution of 1908, Article 8, §§ 20, 21. This was followed by the legislative enactment of the Home Rule bill, Act No. 279, Pub. Acts 1909, [1] Comp. Laws 1929, § 2228 et seq. In the

meantime many cities in Michigan have been chartered under the above-cited constitutional provision and legislative enactment. Under the constitutional provision, by the Home Rule Act it was sought fundamentally to place in the hands of the electors of the cities chartered thereunder increased power of local governmental control. To this purpose the Home Rule Act permitted a charter provision authorizing taxation for local municipal needs to the extent of 2 per cent. of the assessed valuation of taxable property (1 Comp. Laws 1929, § 2230). * * * Under constitutional provisions and within the specified limitations this taxing power had already been delegated to various cities in Michigan; and, as noted above, this fact was well known. Surely it would be a strange governmental operation, wholly inconsistent with the ordinary methods of accomplishing that result (if not entirely without precedent), that the charters of the various cities of this state should be summarily amended by a constitutional provision which in spirit, if not in letter, was diametrically opposed to the recently developed policy of Home Rule government in this state. This being true we are fully convinced that the framers and adopters of this constitutional amendment found themselves confronted with a condition which prompted this third exception to the general limitation of the exercise of the taxing power in cities already constitutionally vested with the power to tax in excess of the proposed limitation. To meet this situation, the quoted phrase was embodied and for that reason it should be held to mean that 'this limit may be increased' in the cities whose charters already empower them to levy a tax for municipal purposes in excess of the amount which the city might levy under the terms of the 1932 amendment. * * * At the expense of repetition, we state again that (disregarding the exception of taxes levied for payment of debts) we think the amendment must be construed as though it read:

"The total amount of taxes assessed against property for all purposes in any one year shall not exceed $1\frac{1}{2}$ per cent. of the assessed valuation of said property: Provided that this limitation may be increased

for a period of not to exceed five years at any one time, to not more than a total of 5 per cent. of the assessed valuation, by a two-thirds vote of the electors of any assessing district, or (that this limitation may be increased) when provided for by the (present or future) charter of a municipal corporation.

"In the foregoing reference has been made to the so-called Home Rule cities, but we think the same result would follow as to cities having special charters with like provisions as to the exercise of the power of taxation. The result of the above construction is that the 1932 amendment neither increased or decreased the charter power of a city to levy taxes for its municipal purposes."

In the above case, the charter of the city of Pontiac (a home-rule city) authorized the city to levy annually a tax on real and personal property not to exceed 2 per cent of the assessed valuation, for the sole use of the city. The question presented was whether the 15-mill amendment limited the annual tax for all purposes on property in the city (except debt service) to $1\frac{1}{2}$ per cent of the assessed valuation; or did the city still have the power to tax up to 2 per cent for municipal purposes. The city claimed it was not limited by the 15-mill amendment, but that the city charter limitation of 2 per cent was still in full force and effect. The plaintiff school district contended that (except for debt service already incurred) the amendment limited taxation to $1\frac{1}{2}$ per cent, notwithstanding the charter provisions. As to that, the opinion upheld the position taken by the city.

We have reviewed the above opinions at length, mainly because excerpts from said opinions form the basis for claims now made by both the plaintiff and the defendant, and counsel for amici curiae in the instant case, that each supports their present divergent positions. Furthermore, the above *School District v. City of Pontiac* case gave impetus to a statement in syllabus 7 which reads as follows: "Cities chartered as home-rule cities (Const., art. 8, §§ 20, 21; 1 Comp. Laws 1929, § 2228 et seq.), cities having special charters with

tax limitation provision, and cities of fourth class and villages organized under Constitution, art. 8, § 21; 1 Comp.Laws 1929, § 1465 et seq., having adopted their own tax limitation, are not subject to 15-mill property tax limitation provided for in amendment to Constitution (article 10, § 21), except that if any part of said 15 mills should be allocated to them by legislature, it must be included in total amount assessable for city or village purposes under charter limitation."

Subsequently Mr. Justice Butzel, writing for the court in *Simonton v. City of Pontiac*, supra, said (at page 20 of 268 Mich., at page 611 of 255 N.W.): "Neither does the 15-mill amendment, (§ 21, art. 10, of the Constitution) include home rule cities within its scope, *School District of City of Pontiac v. City of Pontiac*, 262 Mich. 333, 247 N.W. 474, 737."

Counsel for amici curiae now attempt by a literal interpretation of this statement to support their claim that the plaintiff city of Hazel Park in no way comes within the purview of the 15-mill amendment. The above statement in the *Simonton* case thus is read too literally. While it applies to home-rule cities as therein stated, it is more proper to say that the 15-mill limitation in the amendment does not apply to cities which come within the exceptions noted therein. A more conservative statement was written by Mr. Justice North, in *County of Macomb v. City of Mt. Clemens*, 271 Mich. 334, 335, 260 N.W. 885, as follows: "The city of Mount Clemens is under the Home Rule Act * * * and therefore its power of taxation is not limited by the fifteen-mill constitutional amendment, being section 21 of article 10 of the Constitution (1908)."

In *Simonton v. City of Pontiac*, supra, the plaintiff, representing bondholders, sought mandamus to compel the city of Pontiac to levy and collect sufficient taxes to pay the amounts due bondholders. The city had proposed a tax budget for 1934 which would practically eliminate the possibility of making any substantial payments on outstanding debt service. The

defendant city claimed that constitutional provisions and legislative enactments limited "the rights of taxation for city purposes" to 2 per cent for any one year. The city based its contention on sections 20 and 21, article 8, of the Michigan Constitution (1908), and sections 3 and 5 of the home-rule act, Act No. 279, Pub.Acts 1909, 1 Comp.Laws 1929, §§ 2230, 2241,¹ Stat. Ann. §§ 5.2073, 5.2084. Under the constitutional provisions referred to, each city has the power to adopt or amend its charter, and to pass laws and ordinances relating to its municipal concerns, "subject to the Constitution and general laws of this state." The home-rule act referred to provides that no city shall have power to "increase the rate of taxation now fixed by law," except by affirmative vote of a majority of the electors, and that the increase in any case "shall not be such as to cause such rate to exceed two per centum of the assessed value of the real and personal property in such city." The Pontiac city charter provided that the tax for the purpose of defraying the general expenses and liabilities of the city should not exceed 2 per cent of the assessed value of the property in said city in any one year. The plaintiff bondholders claimed that the question of levying and collecting taxes for city purposes and payment of their bonds was controlled by Act No. 273, § 5, Pub. Acts 1925, as amended, 1 Comp.Laws 1929, § 2694, as amended by Act No. 142, Pub. Acts 1931, Comp.Laws Supp.1940, § 2694, Stat. Ann. § 5.3175, since repealed by Act No. 202, Pub.Acts 1943. It provided as follows: "Whenever any money shall be borrowed by any municipality it shall be the duty of every officer or official body charged with any duty in connection with the determination of the amount of taxes to be raised or with the levying of such taxes, to include in the amount of taxes levied each year an amount sufficient to pay the annual interest on all such loans any instalments of the principal thereof, falling due before the time of the following year's tax collection, and all payments required to be made to sinking funds. In any municipality having any debt now

¹ This section was amended by Act No. 239, Pub.Acts 1935, Comp.Laws Supp.1940, § 2241.

outstanding and unpaid, a tax shall in like manner be levied each year, sufficient to pay the interest on such debt falling due before the time of the following year's tax collection, to pay any principal instalment of serial bonds falling due before the time of the following year's tax collection and to deposit into a sinking fund annually an amount which with the increment thereof will be sufficient to pay the principal of such debt at maturity or within the term of refunding bonds authorized to be issued * * *. No limitation in any statute or charter shall prevent the levy and collection of the full amount of taxes required by this section for the payment of debts, but nothing herein shall authorize the levy of a tax for any other purpose exceeding the existing tax limitation."

Referring to the Michigan Constitution (1908), Mr. Justice Butzel, writing for the court in the Simonton case, said (at pages 18-21 of 268 Mich., at page 611 of 255 N.W.):

"The power to limit the rate of taxation and restrict debts was left to the Legislature, where it would be subject to such changes as might be necessary by changing conditions. Volume 2, Proceedings and Debates of the Constitutional Convention, p. 1432.

"Section 21 of Article 8, of the Constitution, hereinbefore quoted, expressly states that the charter that might be adopted by a city was subject to the Constitution and general laws of the state. The Legislature, in the exercise of this power thus reserved, adopted Act No. 273. Pub. Acts of 1925 ([1 Comp. Laws 1929, § 2694, as amended by Act No. 142, Pub. Acts 1931,] hereinbefore quoted), which specifically stated that no limitation in any statute or charter shall prevent the levy and collection of the full amount of taxes required solely for the payment of debts, and made it necessary for the city to include in the amount of the taxes levied each year a sum sufficient to pay the annual interest and the installments of principal on its obligations falling due before the time of the following tax collection. * * * In Harsha v. City of Detroit,

261 Mich. 586, 246 N.W. 849, 90 A.L.R. 853, we held that the Legislature might modify the charters of municipal corporations at will and that the state still retained authority to amend charters and enlarge and diminish their powers. City of Kalamazoo v. Titus, 208 Mich. 252, 175 N.W. 480; Clements v. McCabe, 210 Mich. 207, 177 N.W. 722; Attorney General, [ex rel. Lennane], v. City of Detroit, 225 Mich. 631, 196 N.W. 391. In Doyle v. Election Commission [of City of Detroit], 261 Mich. 546, 246 N.W. 220, we again held that the general law passed by the 1931 session of the Legislature did not infringe upon the right of municipal home rule and was not unconstitutional; that, it being a general law, the home rule charter of the city of Detroit was subject thereto and not infringed thereby. Neither does the 15-mill amendment, (section 21, article 10, of the Constitution) include home rule cities within its scope. School District of City of Pontiac v. City of Pontiac, 262 Mich. 338, 247 N.W. 474, 787. While the case of Hammond v. Place, 116 Mich. 628, 74 N.W. 1002, 1003, 72 Am. St. Rep. 543, was decided before the present Constitution and the legislative acts hereinbefore referred to, nevertheless the general principles therein stated still apply. In that case the plaintiffs obtained a writ of mandamus to compel the assessor to levy upon the tax roll the amount of plaintiff's judgment, which represented the amount due on matured bonds. The defendant contended that such a levy would cause the tax rate to exceed the 3 per cent, provided in the charter of the city. It stressed the fact that owing to the change in conditions and the moving away of large industries, the city was in very great financial distress and unable to meet its obligations. The court said:

"The contention means this: That the municipality may avoid its legal obligations by the reduction of its valuation, and making its running expenses equal to the limit of taxation. This is practical repudiation. Whether the valuation of the property of this city at \$33,000 was reached by the same methods as were severely con-

* This section was last amended by Act No. 2, Pub. Acts 1937, Ex. Sess., and repealed by Act No. 202, Pub. Acts 1943.

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demned by this court, speaking through Justice Cooley, in *Wattles v. City of Lapeer*, 40 Mich. 624, we do not know, since there is no explanation in the record. Whether, however, this singular result would follow from a strict construction of the limitation clause in its charter, we need not determine. Possibly in contemplation of such results, a special statute was enacted, providing for the assessment of judgments rendered against municipalities. 3 How. Ann. St. § 8218. This statute provides that judgments rendered against municipalities shall be assessed by the assessing officers upon its taxable property, and the amount thereof added to the other municipal taxes. It was enforced in *Shippy v. Mason*, 90 Mich. 45, 51 N.W. 353. It clearly provides for the payment of judgments, exclusive of the limitations to taxation established by municipal charters.

* * * * *

"As the city was bound to take care of its debt service for the year by the provisions of Act No. 273, Pub. Acts of 1925, we need not discuss plaintiffs' further contention that section 4 of chapter 10 (Pontiac charter), also imposed this duty upon the city."

The above (Simonton) opinion does not rest decision on the ground that the obligations were incurred prior to the effective date of the 15-mill amendment, and therefore would be within the first exception noted by Mr. Justice North in *School District of City of Pontiac v. City of Pontiac*, supra, namely, that the 15-mill amendment does not apply to taxes levied for the payment of interest and principal on obligations "heretofore incurred," i. e., before December 8, 1932. It is possible that the decision in the *Simonton* case might have been grounded on said exception. However, we feel that the principles there laid down without limiting decision therein to the first exception, apply equally to the situation now before us in the instant case. Apparently these decisions in the *Pontiac* cases were planted on a construction of the third exception referred to by Mr. Justice North in the *School District v. City of Pontiac* case, i. e., "when provided for by the * * * charter of a municipal corporation."

[1] We do not overlook the fact that in the instant case, by an amendment to the charter of the plaintiff city, the maximum of taxes for city purposes in any one year was increased to 1.8 per cent (instead of the constitutional limit of 1.5 per cent) on the assessed valuation of the property in the city. But we also assume that under that limitation, if these bonds be issued and sold, the result will be that the city will not be able to pay the principal and interest thereon and in addition raise sufficient money by taxation to defray the necessary municipal expenses, unless the annual tax rate should exceed 1.8 per cent. Under such circumstances the charter limit of 1.8 per cent does not control, inasmuch as every municipal charter is subject to the Constitution and general laws of this State. The Municipal Finance Act, supra, is a general law of the State, and applies here. It provides that no limitation in any statute or charter shall prevent the levy and collection of the full amount of taxes required to pay the bond issue which has been approved by the electors of Hazel Park and the municipal finance commission.

"The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts." Const. (1908), art. 8, § 20.

"Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state." Const. (1908), art. 8, § 21.

"Municipal corporations are state agencies, and, subject to constitutional restrictions, the Legislature may modify the corporate charters of municipal corporations at will. 12 C.J. [p.] 1031. Powers are granted to them as state agencies to carry on local government. The state still has

authority to amend their charters and enlarge or diminish their powers. [1] Cooley, Const.Lim. (8th Ed.), [p.] 393. * * *

The Legislature may regulate the amount of municipal indebtedness and the rate of taxation of cities. It is expressly authorized by section 20, art. 8, of the Constitution so to do. Its powers are plenary. It may increase or decrease the limit of bonded indebtedness and the rate of taxation for municipal purposes, subject to the prohibition in the Constitutions of this state and of the United States that such legislation shall not operate directly upon contracts so as to impair their obligation by abrogating or lessening the means of their enforcement. *United States ex rel. Wolf v. New Orleans*, 103 U.S. 358, 26 L.Ed. 395. There is no constitutional provision against changing the limit of bonded indebtedness or limiting the rate of taxation for municipal purposes which in cities under the Home Rule Act * * * obtained when plaintiff acquired her bond. * * *

"The power vested by the Constitution of this state in the Legislature to limit the rate of taxation of cities for municipal purposes and restrict their powers of borrowing money and contracting debts is complete in itself and unrestricted." *Harsha v. City of Detroit*, 261 Mich. 586, 591, 592, 594, 246 N.W. 849, 850, 90 A.L.R. 853.

"Article 8 [§ 21.] of the Constitution, hereinbefore quoted, expressly states that the charter that might be adopted by a city was subject to the Constitution and general laws of the state. The Legislature, in the exercise of this power thus reserved, adopted Act No. 273, Pub.Acts 1925 (1 Comp.Laws 1929, § 2694, as amended by Act No. 142, Pub.Acts 1931,³ hereinbefore quoted), which specifically stated that no limitation in any statute or charter shall prevent the levy and collection of the full amount of taxes required solely for the payment of debts, and made it necessary for the city to include in the amount of the taxes levied each year a sum sufficient to pay the annual interest and the installments of principal on its obligations falling due before the time of the following tax col-

lection." *Simonton v. City of Pontiac*, supra, 268 Mich. page 19, 255 N.W. page 611.

"Had the charter provided the bonding limit might be raised or lowered by any different vote than that prescribed by the statute, it obviously would have been of no force. Or had the charter been silent as to the requisite majority, and this controversy had arisen, a construction of the charter would have required us to read into it the legislative provision. This being true, when the Legislature amended the act by requiring a three-fifths vote instead of a two-thirds vote, the amendment was automatically read into the charter, and is now a part of it." *City Commission of the City of Jackson v. Vedder*, 209 Mich. 291, 294, 176 N.W. 557, 558.

"Defendants claim the charter was not amended and, therefore, whether the special assessment bonds should be included in the debt limitation or not is governed by the charter provision. The statutory provision of 1925 did not require any incorporation in the charter for it was a general law and is to be read into the charter. * * *

"It is to be noted that the home rule act⁴ for villages is one of general grant of rights and powers, subject, however, to stated restrictions and thereunder the charter may carry any provisions deemed proper for the municipal government not contrary to the Constitution or any general statute. See *City of Pontiac v. Ducharme*, 278 Mich. 474, 270 N.W. 754; *Toebe v. City of Munising*, 232 Mich. 1, 275 N.W. 744. No election is required for special assessment bonds for general village improvements of public moment and need. Nor is an election necessary for an issue of bonds for the village portion of local improvements, if within the designated percentage, or in the refunding of such bonds. Under the village home rule act the charter as adopted by the electors must conform to the provisions of the Constitution and applicable statutory laws of the State but, under modern legislation the charter adopted is supplemented by specific statutory provisions to supply

³ This section was last amended by Act No. 2, Pub.Acts 1937, Ex.Sess., and repealed by Act No. 202, Pub.Acts 1943.

⁴ See 1 Comp.Laws 1929, § 1763 et seq., Stat.Ann. § 5.1511 et seq.

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the needs for municipal operation." Callahan v. City of Berkley, 307 Mich. 701, 708-710, 12 N.W.2d 431, 433, 14 N.W.2d 87.

"Because of a contention to the contrary in an amicus curiae brief, we also note that our opinion in the instant case neither overrules nor conflicts with Utica State Savings Bank v. [Village of] Oak Park, 279 Mich. 568, 273 N.W. 271, because the subject matter involved in the cited case was purely local (the purchase of a town hall site), but in the instant case the controversy instead of being of local concern only is one of State-wide concern since it pertains to debt limitations in all Michigan Home Rule Cities." Id. (On application for rehearing), 307 Mich. 713, 14 N.W.2d 87.

"In Dawley v. Ingham Circuit Judge, 242 Mich. 247, 218 N.W. 766, we held that the Legislature may pass a general act directly conferring upon legislative bodies of cities, having home-rule charters, powers in addition to those enumerated in the charter. The purpose of the above act was to provide a uniform method throughout the state for the summoning and impaneling of juries in municipal courts of record for the trial of condemnation cases. It follows that sections 23 and 52 of the above act repeal and amend the provisions of § 6, title 8, c. 1, of the charter of the City of Detroit in so far as the provisions of section 6 relate to the summoning and impaneling of a jury." In re Widening Michigan Avenue, Roosevelt to Livernois Aves., 281 Mich. 95, 100, 274 N.W. 723, 725.

"Section 36 of the 'Home Rule Act' provides:

"No provision of any city charter shall conflict with or contravene the provisions of any general law of the state."

"The 'Home Rule Act' is one of the general laws of the state, and charters adopted pursuant to its provisions must square with it." Crary v. Marquette Circuit Judge, 197 Mich. 452, 454, 163 N.W. 905, 906, 166 N.W. 954.

"If the statute controls, then the charter provisions to the contrary effect are void and the decree must be affirmed.

"The Constitution [of 1908] art. 8, § 21, permits adoption of home-rule charters by cities subject, however, to the Constitution

and general laws of the state. The act of 1877, as amended, is a general law of the state. The Home Rule Act of 1909 as amended ([1] Comp.Laws 1929, § 2228 et seq. as amended), requires permissible charter provisions to conform with the Constitution and general laws of the state.

"It was evidently the purpose of the Legislature in authorizing and regulating such libraries by general law to remove the same from politics and factional disturbance.

"The provisions of the statute could not be abrogated by the charter provisions and, therefore, the city commission acted without authority in the premises." Dostedor v. City of Eaton Rapids, 273 Mich. 426, 429, 263 N.W. 416, 417.

"In support of its contention that the Jackson City counsel had the power to fix ex parte gas rate in Jackson, plaintiff to some extent relies upon the fact that in 1914 Jackson adopted a Home Rule city charter, and that charter contained the following provision:

"Section 5. Subject to the limitations of the charter and of the general laws, the City Commission shall have power: * * * To regulate the prices to be charged for gas, heat or electricity, by all persons owning or operating in the streets and public places of the city, wires, pipes and conduits, * * *"

"Plaintiff's contention is not tenable. By the express terms of the charter the quoted provision is 'Subject to the limitations * * * of the general laws' of the State. As hereinbefore noted, in 1939 the legislature passed a general law, Act No. 3, Pub. Acts 1939, by which it is provided:

"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 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,' etc.

"This provision in the general laws of the State, to which Jackson's Home Rule charter was subject, supplanted any contravening charter provision. City Commission of [the City of] Jackson v. Vedder,

209 Mich. 291, 176 N.W. 557; *Harsha v. City of Detroit*, 261 Mich. 586, 246 N.W. 849, 90 A.L.R. 853; and *Simonton v. City of Pontiac*, 268 Mich. 11, 255 N.W. 608, 611. In the latter case it is said:

"In *Harsha v. City of Detroit*, 261 Mich. 586, 246 N.W. 849, 90 A.L.R. 853, we held that the Legislature might modify the charters of municipal corporations at will and that the state still retained authority to amend charters and enlarge and diminish their powers."

"We quote the following from the syllabi in the *Harsha* case:

"Rule that corporate charters in which no power of amendment or repeal is retained, when accepted, constitute contracts between State and corporation, applies to private corporations only.

"Municipal corporations are State agencies, and, subject to constitutional restrictions, legislature may modify corporate charters of municipal corporations at will.

"Powers are granted to municipal corporations as State agencies to carry on local government, and State has authority to amend their charters and enlarge or diminish their powers." *City of Jackson v. Consumers Power Co.*, 312 Mich. 437, 449-450, 20 N.W.2d 265, 268, 62 P.U.R.,N.S. 48.

See, also, *Chemical Bank & Trust Co. v. County of Oakland*, 264 Mich. 673, at pages 686, 687, 251 N.W. 395, at page 400, where the court said: "It is claimed the questions here involved cannot be litigated in this case (mandamus). There is no question raised but what the county of Oakland received and expended plaintiff's money; it issued its tax anticipation notes therefor; it has had the use and benefit of the money; such money remains unpaid. It now says it should not repay it because it violated the law in receiving it. There is no dispute about the amount, the manner in which it was borrowed, the corporate records underlying the loan; the amount is liquidated and due, and the tax should be spread to pay it. The writ will issue, with costs."

[2] While not controlling, administrative construction of a doubtful provision

in the law is considered and given weight by the courts.

"It is well settled that the construction placed upon statutory provisions by any particular department of government for a long period of time, although not binding upon the courts, should be given considerable weight." *Aller v. Detroit Police Department Trial Board*, 369 Mich. 382, 386, 15 N.W.2d 676, 677. See, also, *Board of Education of Union School District of City of Owosso v. Goodrich*, 208 Mich. 646, 175 N.W. 1009 and *Thoman v. City of Lansing*, 315 Mich. 566, 24 N.W.2d 213

[3] The construction given the *Simonton* case, supra, and to the Municipal Finance Act as applied to the instant situation, supports our conclusion herein. The *Simonton* case has been considered as controlling as to bonds issued by municipalities, and has been followed by the municipal finance commission. Under Act No. 273, Pub.Acts 1925, and its successor, Act No. 202, Pub.Acts 1943, the municipal finance commission is charged with the duty to determine whether proposed municipal bonds comply with the provisions of said act. The present ruling of the commission, which plaintiff seeks to avert in this proceeding, conforms to the provisions of the act and the practices of the commission. We agree with the position taken by the commission in this case.

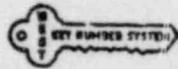
The provision in the Municipal Finance Act, supra, that no limitation in any statute or charter shall prevent the levy and collection of the full amount of taxes to pay the bond issue, must be read into plaintiff's charter, and controls the instant case notwithstanding the 1.8 per cent tax limitation in the charter. If the city of Hazel Park, in accordance with the authorization by its electors, continues its present plan to issue and sell bonds amounting to \$416,000 to finance the proposed public improvement as a general obligation of the city, it must expect to pay the obligation incurred thereby; and such payment does not depend on action taken, or to be taken, by the electors to amend the city charter.

We conclude that the 15-mill constitutional limitation does not apply here, but on the

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contrary the exceptions, as construed herein, control decision. The writ is denied, but without costs as a public question is involved.

CARR, C. J., and BUTZEL, BUSHNELL, SHARPE, REID, NORTH and DETHMERS, J., concur.



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Supreme Court of Michigan.
April 17, 1947.

Judgment ⇐692

Where all assets of estate were disposed of in compromise agreement and by final order of probate court assigning residue of estate, asserted property rights of minor, who was represented in compromise proceeding by guardian, were barred by orders of the probate court, under the doctrine of res judicata, as well as by the settlement agreement.

Appeal from Circuit Court, Wayne County; Lila M. Neuenfelt, Judge.

Ejectment by Pompey Marxhausen Frederick, by John L. King, next friend, against the First Liquidating Corporation, the Massachusetts Mutual Life Insurance Company, Louis H. Schostak, and others, to obtain possession of certain lands and premises. From an order granting motions by the named defendants to dismiss the declaration, plaintiff appeals.

Affirmed.

Before the Entire Bench.

Don Mahone Harlan, for plaintiff-appellant.

Bodman, Longley, Bogle, Middleton & Armstrong, of Detroit (Grant E. Armstrong, of Detroit, of counsel), for defend-

ant and appellee First Liquidating Corporation.

Friedman, Meyers & Keys, of Detroit, (Sylvan Rapaport, of Detroit, of counsel), for defendant and appellee Massachusetts Mut. Life Ins. Co.

Irwin I. Cohn, of Detroit (John Sklar, of Detroit, of counsel), for defendants and appellees Merchants Apparel Bldg., Inc., et al.

BOYLES, Justice.

This is an action in ejectment brought by the plaintiff in the circuit court for Wayne county whereby the plaintiff seeks to obtain possession of certain lands and premises in Detroit. Three separate motions to dismiss the declaration were filed, by the defendant First Liquidating Corporation, the Massachusetts Mutual Life Insurance Company, and by the defendant Louis H. Schostak. All of said motions were substantially on the same grounds. Plaintiff appeals from an order granting the motions and dismissing his suit.

In his declaration plaintiff (by next friend) alleges that he is confined in a school for epileptic and feeble-minded children in Missouri; that upon the death of his mother in 1924 he became vested with ownership in fee simple of an undivided 46 2/3 per cent of an undivided one-half of lot 10, section 9, of Governor and Judges plan, Detroit Wayne county, Michigan. He bases this upon a claim of ownership in his grandfather, August Marxhausen, and a devise in the will of said August Marxhausen.

The record here conclusively establishes that in 1926 and 1927 appropriate proceedings were had in the probate court for Wayne county, in the estate of said August Marxhausen, deceased, whereby the executor of said estate, under license of said court, mortgaged said lands and real estate to pay debts, charges and expenses. Said mortgage was duly confirmed by order of said probate court January 18, 1927, and executed forthwith to the Dime Savings Bank as mortgagee. In February, 1928, the parties interested in said estate petitioned the probate court for authority

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It is clear, therefore, that such a complaint cannot survive a motion for summary judgment unless some evidence of both elements is produced in opposition.

In view of all of the above considerations, It Is Ordered that Defendant Ford's Motion for Summary Judgment be, and hereby is, granted.

[¶ 75,291] *Industrial Communications Systems, Inc., and Intrastate Radio Telephone, Inc., of Los Angeles v. Pacific Telephone & Telegraph Co. and General Telephone Co. of California.*

U. S. Court of Appeals, Ninth Circuit. No. 73-1032. Dated October 4, 1974. Appeal from U. S. District Court, Central District of California.

Sherman Act

Private Suits—Injunction Actions—Threatened Loss or Damage—Injury from Proposed Business Entrant—Lack of Final Regulatory Approval.—A suit charging that telephone companies' proposed entry into the one-way radio signaling business was pursuant to a conspiracy in violation of the antitrust laws and that the venture threatened established industry members with serious and irreparable injury presented a justiciable controversy, despite the lack of final regulatory approval of the proposed enterprise. The existing businesses demonstrated "threatened" loss or damage within the meaning of Sec. 16 of the Clayton Act and stated a claim on which relief could be granted. See ¶ 9028.

Private Suits—Stay Pending State Agency Decision—Primary Jurisdiction—Immunity.—A suit charging that telephone companies' proposed entry into the one-way radio signaling business was pursuant to a conspiracy to violate the antitrust laws was stayed pending final regulatory action on the matter. The doctrine of primary jurisdiction applied, since telephone corporations were comprehensively regulated by the state utilities commission, the possibility of judicial-administrative conflict was to be avoided, the agency's expertise could aid a court's resolution of the dispute, and the agency was to be given the first opportunity to determine if regulatory policy could be reconciled with application of the antitrust laws. The contention that the stay was inappropriate because neither the FCC nor the state utilities commission had the authority to determine whether the challenged activities were in violation of the antitrust laws was rejected. Also rejected was the assertion that the telephone companies were immune from antitrust attack because of their extensive regulation by the federal and state agencies. See ¶ 965, ¶190, ¶214.

For plaintiffs-appellants: James G. Rourke, of Rourke & Holbrook, Santa Ana, Cal.
For defendants-appellees: Anthonie M. Voogd, of Lawler, Felix & Hall, Los Angeles, Cal., Charles W. Bender, of O'Melveny & Myers, Los Angeles, Cal.

Before: CARTER and HUFSTEDLER, Circuit Judges, and SCHNACKE,* District Judge.

Opinion

CARTER, Cir. J.: This is an appeal from the Order of the district court, dismissing the complaint of appellants Industrial Communications Systems, Inc. ("Industrial") and Intrastate Radio Telephone, Inc. of Los Angeles ("Radio") on the ground that it failed to present a justiciable case or controversy. Appellees Pacific Telephone and Telegraph Company ("Pacific") and General Telephone Company of California

("General") seek to sustain the Order of dismissal on three grounds: (1) non-justiciability; (2) the complaint failed to state a claim upon which relief could be granted; and (3) the California Public Utilities Commission ("PUC") has primary jurisdiction of the dispute. Although we conclude that the case was justiciable and the complaint stated a claim upon which relief could be granted, the federal court case should have been stayed pending the outcome of the

* Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

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PUC proceedings under the doctrine of primary jurisdiction. We reverse and remand with instructions that the district court stay this case pending the outcome of the PUC proceedings.

Facts

Industrial and Radio are engaged in the one-way signaling business in the Los Angeles area. One-way signaling is a means for informing a person while he is away from his telephone that someone is attempting to contact him. A subscriber to a signaling service is assigned a number and a small radio receiver that he carries with him. To contact the subscriber, one telephones the signaling utility, waits for a tone, and then dials the subscriber's number. The utility's transmitter emits a radio beam keyed to that subscriber's receiver and the receiver emits a "beep" tone. Thus informed that someone is attempting to contact him, the subscriber telephones a predetermined contact point, such as his office, and obtains the message. The basic technical equipment required to provide one-way radio signaling service is the radio transmitter and the means to connect it with the telephone network.

Industrial and Radio pay to Pacific and General a monthly charge for this dial interconnection under contracts terminable by either party on thirty days' notice. Industrial and Radio compete with each other for one-way signaling service subscribers and are also subject to such competition from other radio common carriers in the Los Angeles area.

On November 1, 1971 the FCC granted construction permits to both Pacific and General to build radio transmitters to be used for providing one-way radio signaling service in the Los Angeles area. These permits authorized the construction by both Pacific and General of facilities to "be operated in coordination" with one another on the same frequency.

On June 1 and June 2, 1972, respectively, General and Pacific each filed an "Advice Letter" with the PUC. These Advice Letters presented revised tariff sheets to the PUC containing information and rates covering the proposed institution of one-way signaling service in Los Angeles. On June 23, 1972, General and Pacific each applied to the FCC for a radio license to operate the transmitters they had built pursuant to the construction permits issued on November 1, 1971.

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On June 21, 1972, Industrial requested the FCC to withhold any action on the radio license applications of General and Pacific, and on June 26, 1972, Industrial Radio filed a complaint with the PUC challenging the tariffs filed with Pacific's and General's Advice Letters. The complaint alleged in pertinent part that the rates and conditions of service General and Pacific sought to establish were unfair, anticompetitive, and constituted an unlawful contract, combination and conspiracy in restraint of trade. It was further alleged that Industrial and Radio would suffer prompt and irreparable injury if the proposed tariffs were permitted to become effective. The following day, the PUC suspended the tariffs proposed by General and Pacific and commenced an investigation to determine the reasonableness and lawfulness of the tariffs.

The complaint proceeding and the PUC investigation were consolidated and, on November 10, 1972, a full PUC hearing was commenced, with one of the issues to be determined stated as follows:

"Would it be in the public interest to permit the proposed tariffs filed by Pacific and General to become effective, public interest being deemed to include but not limited to relevant consideration of alleged anti-competitive impact of such action."

On December 1, 1972, the hearing examiner adjourned the hearings to a future date to set by the Commission.

[Antitrust Suit]

Industrial and Radio also filed their complaint in the district court, alleging that Pacific and General were combining, conspiring, and threatening to commit violations of the antitrust laws by proposing to enter the one-way radio signaling business in Los Angeles. The complaint further alleged that their one-way signaling business would suffer serious and irreparable injury unless General and Pacific were enjoined from entering the market.

Upon motion by Pacific and General, the district court dismissed the complaint on the ground that, since the PUC had not yet approved the defendants' tariffs nor had the FCC granted the defendants the requisite radio licenses, "[t]he dispute as presented is, therefore, hypothetical and abstract. It lacks sufficient immediacy and reality to warrant, at this time, possible disharmony between this Court and the agen-

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cies charged with the primary regulation of this area of competition." This appeal ensued.

I.

The Case Is Justiciable

The United States Constitution limits the jurisdiction of the federal courts to the adjudication of "cases or controversies." U. S. Const., Art. III, § 2. This limitation bars federal courts from giving advisory opinions or from considering hypothetical cases. See *Actna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240-241 (1937). In the usual case, then, acts which merely threaten injury to one or several parties will not support the finding of a case or controversy sufficient to give the courts jurisdiction.

However, the authorizing statute in this case, Section 16 of the Clayton Act, 15 U. S. C. § 26, provides aggrieved parties with a suit for "injunctive relief, in any Court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws." (Emphasis added.) The "relief against threatened conduct that will cause loss or damage" is to be granted "by courts of equity, under the rules governing such proceedings."

The Supreme Court, interpreting Section 16 of the Clayton Act, has specifically held that a party need not prove the fact of injury in order to be entitled to injunctive relief against parties conspiring to violate the antitrust laws. *Zenith Corp. v. Hazeltine* [1969 TRADE CASES ¶72,800], 395 U. S. 100 (1969). Rather, Section 16 "authorizes injunctive relief upon the demonstration of 'threatened' injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury . . . he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws . . ." *Id.* at 130 (citations and footnotes omitted).

Industrial and Radio have properly alleged a combination by Pacific and General to enter the one-way radio signalling business in Los Angeles, in violation of the antitrust laws. They have also alleged that such entry into the market would cause them serious and irreparable harm. Because the dismissal came at the pleading stage of the proceedings, they have had

no opportunity to prove the acts threatening violation of the antitrust laws.¹ We find, and *Zenith Corp. v. Hazeltine*, *supra*, so requires, that the plaintiffs have demonstrated "a significant threat of injury from an impending violation of the antitrust laws." The dispute is therefore justiciable.

Our finding that the plaintiffs have properly alleged an impending violation of the antitrust laws which, if proved, would entitle them to equitable relief, likewise mandates the conclusion that the complaint states a claim upon which relief can be granted. Whether the violation alleged can be proved is not relevant at this stage of the proceedings.

II.

The PUC Has Primary Jurisdiction of the Dispute

Although the district court dismissed the complaint as nonjusticiable, it also noted that determination of the dispute could result in "disharmony between this Court and the agencies charged with the primary regulation of this area of competition." Pacific and General contend on appeal, as they did below, that if the dismissal was erroneous, the district court proceedings should at least have been stayed pending proceedings by the PUC which has primary jurisdiction of this dispute. We agree.

There are in reality two prongs to the contention that the PUC or FCC, not the federal courts, has jurisdiction over this case. First, Pacific and General contend that the extensive regulation of telephone companies by the FCC under the Federal Communications Act, 47 U. S. C. §§ 151 *et seq.*, precludes any antitrust actions against them. We reject this contention, both because our conclusion that the PUC has primary jurisdiction warranting a stay in this case renders a broader holding superfluous, and because the relevant case law would appear to indicate that telephone companies are not unconditionally immune from antitrust actions. See e. g., *Otter Tail Power Co. v. United States* [1973-1 TRADE CASES ¶74,373], 410 U. S. 366, 372 (1973); *United States v. Philadelphia National Bank* [1963 TRADE CASES ¶70,812], 374 U. S. 321, 350-351 (1963) ("Repeals of the antitrust laws by implication from a regulatory stat-

¹ Plaintiffs have indicated that they expect to show, *inter alia*, that Pacific and General have adopted an agreement whereby "Neither company will file for personal signalling system construction permits within their mutual

Southern California Region unless in conformance with the joint plans or defer notifying the other company of its intention to proceed alone." *Appellant's Opening Brief*, at 5 n. 3.

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ute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions"); *International Tel. & Tel. Co. v. General Tel. Co.* [1972 TRADE CASES ¶ 74,094], 351 F. Supp. 1153, 1202-1203 (D. Hawaii 1972). But cf. *United States v. Radio Corporation of America* [1959 TRADE CASES ¶ 69,284], 358 U. S. 334, 349 n. 17 (1959).

In *Radio Corporation of America, supra*, at 349 n. 17, the Court noted that "Congress has provided that certain actions of telephone and telegraph companies may be exempted from the antitrust laws by the Commission, [47 U. S. C.] § 221(a) and § 222(c)(1)." These exemptions, however, have been specifically and narrowly drawn, and pertain solely to consolidations and mergers. They do not authorize or suggest a blanket exemption from the antitrust laws with respect to the regulation of rates, practices, or services.

The second prong of appellees' primary jurisdiction argument is that under that doctrine a court should stay proceedings which are properly within the jurisdiction of, and are in fact presently under consideration by, an agency with extensive regulatory powers over the subject matter and parties involved. We agree and conclude that the reasons for applying the doctrine of primary jurisdiction are applicable to this case.

Whether or not the doctrine of primary jurisdiction applies depends on the extent and amount of regulatory powers vested in the governmental agencies involved. In instances where the companies or activities were fully regulated, the doctrine of primary jurisdiction applied. See *Far East Conference v. United States* [1952-1953 TRADE CASES ¶ 67,241], 342 U. S. 570 (1952); *Radio Corporation of America, supra*, at 346-347; *United States Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, 483-485 (1932). At the other end of the spectrum are those cases concerning the broadcasting industry, where the lack of statutorily mandated control rendered the doctrine inapplicable. See *Radio Corporation of America, supra*, at 348-349 (Radio and television broadcasters "are not included in the definition of common carriers . . . as are telephone and telegraph companies. Thus the extensive controls . . . of the Communications Act . . . do not apply"); *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U. S. 470, 474 (1940).

Because the jurisdiction of the FCC is limited to "interstate and foreign communi-

cation by wire or radio" (47 U. S. C. § 152 (a)), regulation of wire or radio communication between points in the same state is reserved to the appropriate state commission (47 U. S. C. § 153(e)). Under this dual regulatory system, the FCC exercises regulatory authority over the initial issuance of radio licenses but defers questions regarding rates, "economic impact" and "need for service" to the state agency, here the PUC.

[State Regulation]

"Telephone corporations" are comprehensively regulated under the California scheme. No telephone corporation can begin construction of a line, plant, or system in an area unless it has first obtained from the PUC a certificate of public convenience and necessity covering that area. Calif. Pub. Util. Code § 1001. If the PUC finds that any practices, facilities, equipment, or service of a telephone corporation are unreasonable, inadequate, or insufficient, it is empowered to order the company to furnish or construct whatever facilities, equipment or service is needed. Calif. Pub. Util. Code § 761. The PUC's regulatory authority over rates, practices, and services is likewise both pervasive and continuing. Calif. Pub. Util. Code §§ 455, 489, 728, 729. And, in addition to its extensive specifically enumerated powers, the PUC is vested with omnibus authority to do all things necessary to the exercise of its powers and jurisdiction over public utilities. Calif. Pub. Util. Code § 701.

For over a decade, the PUC has pervasively regulated all "elements which affect the relationship between a radio-telephone utility and the public," *Kidd v. Poor*, 64 Cal. PUC 237, 240 (1965), and "a consideration of . . . [antitrust questions] is an essential part of the Commission's function. . . . [T]he Commission must take into account the antitrust aspects of applications before it." *Northern California Power Agency v. PUC*, 5 Cal. 3d 370, 379, 486 P. 2d 1218, 1224, 96 Cal. Rptr. 18, 24 (1971).

[Judicial-Administrative Conflict]

Where, as here, a regulatory agency possesses such extensive authority and control over a particular subject matter, and where consideration of the same subject matter is sought before that agency and the courts, the possibility of a judicial-administrative conflict should be avoided. *Carter v. American Tel. & Tel. Co.* [1966

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TRADE CASES ¶ 71,862], 365 F. 2d 486, 495 (5 Cir. 1966), cert. denied 385 U. S. 1008 (1967) ("the occasion for facing such a possibility ought not to be forced until it is inescapably necessary").

[Agency Expertise]

Another reason for deferring to the PUC is the need to obtain the benefit of that agency's expertise in ascertaining, interpreting and distilling the facts and circumstances underlying the legal issues. Where an agency is charged with responsibility for regulating a complex industry, it is much better equipped than the courts, "by specialization, by insight gained through experience, and by more flexible procedure," to gather the relevant facts that underlie a particular claim involving that industry. See *Far East Conference v. United States* [1952-53 TRADE CASES ¶ 67,241], 342 U. S. 570, 575 (1952). In the present case, the PUC's review of the nature of the market, the quality of present radiotelephone utility service, the competitive impact of defendant's entry into the market, and various other issues would be an invaluable aid to the district court. Cf. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 496 F. 2d 214, 223-224 (3 Cir. 1974).

Finally, adjudication of this case would necessarily require determination of a key threshold issue which is present in most antitrust cases involving regulated industries—whether the regulatory policy in the particular case can be reconciled with application of the antitrust laws, and if not, whether the scope and nature of the regulatory control exercised in the particular case precludes application of the antitrust laws. See *Carter v. American Tel. & Tel.*

Co., *supra*, at 493-494, 497. "[T]he problem is not one of application of the antitrust laws but is one of accommodation of the antitrust policy to the regulatory policy. . . . The courts are obviously well equipped to make initial decisions involving application of the antitrust policy. But, before the particular regulatory agency has defined the particular regulatory policy in the particular case, the courts are not well equipped to make initial decisions involving accommodation of the antitrust policy to the regulatory policy." 3 *Davis, Administrative Law* § 19.05, at 25 (1958 ed.). See *MCI Communications Corp.*, *supra*, at 222.

In a case involving facts virtually identical to the facts in the present case, the district court stayed the federal action pending determination by the FCC,

"after giving due consideration to the likely competitive effects whether granting [defendant's] application will serve the public interest, convenience, and necessity." If the FCC should deny [defendant's] application, the instant Complaint will be dismissed as moot. If the FCC should grant [defendant's] application, in whatever form, then plaintiff can renew its request to this Court for immediate injunctive and/or declaratory relief." *Radio Broadcasting Co. v. Bell Tel. Co. of Pa.*, 325 F. Supp. 168, 170 (E. D. Pa. 1971). See also *Carter v. American Tel. & Tel. Co.*, *supra*.

We endorse this procedure with respect to the present case.³

Therefore, we reverse the order dismissing the complaint in this action and remand with instructions to stay the action pending the final outcome of the PUC proceedings and then to proceed in a manner consistent with this opinion.

³ The contention by Industrial and Radio that because neither the PUC nor the FCC has the authority to determine whether Pacific's and General's activities will violate the antitrust laws, a stay of the federal action is inappropriate, is without merit. In *Carter, supra*, the court stated:

"That the ultimate decision of the FCC may not be an end to the matter is neither unexpected nor decisive. For the doctrine applies even though the facts after they have been

appraised by specialized competence serve as a premise for legal consequences to be judicially defined." [The doctrine applies] even if the court thinks that the arrangement alleged to violate the antitrust laws cannot be legally approved by the agency for the court should still allow the agency first to pass upon the question." 365 F. 2d at 499 (citations omitted). See *Southwestern Sugar & Molasses Co. v. River Terminals Co.*, 360 U. S. 411, 420 (1959).

III.

[*Inspection and Compliance*]

It is further Ordered that for the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege:

(1) Duly authorized representatives of the Texas Attorney General's Office shall upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendant made to its principal office, be permitted (a) access, during the office hours of Defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or in the control of Defendant relating to any of the matters contained in this Final Judgment, and (b) subject to the reasonable convenience of Defendant and without restraint or interference from Defendant, to interview officers, or employees of Defendant, each of whom and the Defendant may have counsel present, regarding any such matters.

(2) Defendant, upon such written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such reports in writing to the Texas Attorney General with respect to matters contained in this Final Judgment, as may from time to time be requested.

No information obtained by the means provided in this paragraph shall be divulged by any representative of the Texas Attorney General's Office to any person other than a duly authorized representative of the plaintiff, except in the course of legal proceedings to which the State of Texas is party for the purpose of determining or securing compliance with this Final Judgment or as otherwise required by law.

IV.

[*Monetary Penalty*]

It is Further Ordered that the Defendant, Associated Milk Producers, Inc., pay to the Plaintiff, State of Texas, the sum of Two Hundred Thirty Thousand Dollars (\$230,000.00) to be due and payable as follows:

A. One Hundred Thousand Dollars (\$100,000.00) cash or check payable to the State of Texas at the office of the Attorney General of the State of Texas, City of Austin, Travis County, Texas, upon execution of this Final Judgment;

B. The remaining One Hundred Thirty Thousand Dollars (\$130,000.00) shall be payable in thirteen (13) equal monthly installments of Ten Thousand Dollars (\$10,000.00), with each such installment due and payable on or before the fifth day of each month beginning November of 1974 and continuing for the next succeeding twelve (12) months until fully paid.

[*Retention of Jurisdiction*]

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for further orders and direction as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions hereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

It is further Ordered that all Writs of Injunction herein granted shall be issued without bond, and it is Agreed that Defendant's Counsel whose names appear hereon shall accept service on behalf of Defendant of all Writs of Injunction herein granted.

[¶ 75,270] *Jack Winter, Inc., Plaintiff v. Koratron Co., Inc., Counterclaimant v. Jack Winter, Inc., Counterclaimant Defendant, and All Cases Consolidated for Trial.*

U. S. District Court, Northern District of California. Civil No. 49,392 and other cases, Nos. 47,273, 49,558, 49,671, 49,913, 50,063, 50,827, 50,854, 51,281, 51,301, 51,653, 51,654, 51,691, C-70-1252, and C-70-1443-CBR. Filed March 6, 1974.

Sherman Act

Patent Practices—Secret Agreement Not to Contest Validity or Sue for Infringement—Sherman Act Liability.—A secret agreement between competing manufacturers of permanent press fabrics under which one manufacturer, who held a patent for its fabric process, agreed not to bring any action against the other manufacturer or users of its fabrics for royalties or infringement under its patent, and the other manufacturer agreed to disclose its process and not to attack the validity of the patent, did not amount to a horizontal division of the product market in violation of Sec. 1 of the Sherman Act. The

Trade Regulation Reports

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B. §2 of the Sherman Act

Adversaries have also raised the claim that Koratron, either individually or in concert with Koracorp, engaged in activities in violation of § 2 of the Sherman Act.²² Two general claims are asserted by Adversaries.

First, Adversaries claim that in procuring both the '432 and the '915 patents, Koratron had perpetrated a fraud on the Patent Office by failing to disclose certain information to that office. By licensing such a fraudulently procured patent, Koratron is charged by Adversaries with attempting to monopolize and actually monopolizing the durable press industry in violation of § 2 of the Sherman Act.

Second, Adversaries claim that Koratron and Koracorp, individually or in concert with one another, monopolized and attempted to monopolize interstate and export trade in the manufacture, processing, and sale of resin-impregnated fabrics, related textile materials, and durable press garments in violation of § 2 of the Sherman Act. This was accomplished, Adversaries claim, by the Dan River agreement and also by implementation of a national and international licensing program of the '432 patented process and related trademarks.

(1) The Claim of Fraud Upon the Patent Office

The Court has already noted the burden upon a patent applicant to make a full and complete disclosure of the facts and circumstances relating to the claimed invention to the Patent Office. *Precision Instrument Mfg. Co. v. Automotive M. Machine Co.*, 324 U. S. 806, 818 (1945). Lacking independent investigative facilities of its own, the Patent Office must rely to a great extent on the candor of the applicant in disclosing those facts and circumstances. See *Beckman Instruments, Inc. v. Chemtronics, Inc.* [1970 TRADE CASES ¶ 73,138], 439 F. 2d 1369, 1378-1380 (5 Cir.), cert. denied, 400 U. S. 956 (1970), rehearing denied, 400 U. S. 1025 (1971). Where such candor has been found lacking, the courts have been empowered to declare the patent at least unenforceable, and in some cases, invalid. *Monsanto Company v. Rohm & Haas Company*, 456 F. 2d 592, 600-601 (3 Cir.), cert. denied, 407 U. S. 934, rehearing denied, 409 U. S. 899 (1972);

²² "Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on

Chromalloy American Corp. v. Alloy Surfaces Co., 339 F. Supp. 859, 874-876 (D. Del. 1972); *SCM v. Radio Corporation of America* [1970 TRADE CASES ¶ 73,343], 318 F. Supp. 433, 446-450 (S. D. N. Y. 1970).

In the instant case, Adversaries have alleged a serious breach of the duty of disclosure by Koratron and its predecessor in connection with both the '432 and '915 patents. Specifically, in the case of the '432 patent, Adversaries alleged (a) that Koratron failed to disclose to the Patent Office the filing of patent application serial No. 149,454, and the use, more than one year before the filing date of the application which issued as the '432 patent, of the process described in that application to make garments sold under the names "Tubinyl" and "Nylura", hereafter referred to as the "Tubinyl process"; (b) that Koratron failed to disclose the Pleetset process, including the commencement of garment manufacture after resin impregnation and before curing; and (c) that Koratron submitted certain fabric samples which, it is claimed, were inaccurately described and which, therefore, exaggerated the importance of oven-curing in achieving the desired result.

In connection with the '915 patent, Adversaries contend that Koratron failed to disclose that the delaying catalyst, magnesium chloride hexahydrate and the technique of pre-setting the resin in the garment seams and crease areas during the pressing operation, the two allegedly novel features of '915, were both publicly known and in commercial use by Koratron and others in connection with the '432 patent.

These omissions or non-disclosures by Koratron are alleged by Adversaries to constitute a fraud upon the Patent Office, thereby giving rise to a § 2 violation of the Sherman Act, in light of the alleged exclusionary market power of Koratron in the relevant market, under *Walker, Inc. v. Food Machinery* [1965 TRADE CASES ¶ 71,625], 382 U. S. 172, 177 (1965), and *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.* [1971 TRADE CASES ¶ 73,750], 450 F. 2d 769, 771-773 (9 Cir. 1971).

In *Walker Process*, the Supreme Court held that allegations that a patent had been obtained by knowingly and willfully mis-

conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U. S. C. § 2. See also 15 U. S. C. § 15.

representing facts to the Patent Office, an attempt by the patentee to enforce the patent, for example, by a licensing system or a similar attempt by an assignee who has knowledge of the facts, constitute a violation of § 2 of the Sherman Act if the other elements of an antitrust violation are present. These additional elements include the possession of monopoly power in the relevant market. Both Mr. Justice Clark for the majority and Mr. Justice Harlan in a concurring opinion were careful to limit the decision to cases involving the procuring of patents by "knowing and willful" misrepresentations to the Patent Office, and to negate specifically its application to cases involving patents invalid for some reason other than actual fraud. In order to find a violation of § 2 in enforcing a patent procured by nondisclosure, it must be shown that there was knowing and willful nondisclosure of material facts, and good faith would furnish a complete defense. *Walker Process, supra*, at 177.

The Court has already found that there was no fraud on the Patent Office in Koratron's procurement of the '432 patent. As indicated above (see pp. 63-69) [Part E] the evidence does not establish that such nondisclosure as did occur, regarding either Tubinyl or Pleetset, was the result of an intentional or willful plan to defraud the Patent Office or that Koratron acted in bad faith before the Patent Office. Moreover, even if there had been any intentional misrepresentations directed toward overcoming the prior art, since the Court has found that the '432 process is legally patentable over the prior art, neither the Tubinyl nor the Pleetset references could have been material to the issuance of the patent. *Corning Glass Works v. Anchor Hocking Glass Corp., supra* [1966 TRADE CASES ¶ 71,834], 253 F. Supp. at 469. The court in *Corning Glass* focused specifically on this materiality requirement in the context of an alleged *Walker Process* violation and concluded that "[i]f one were entitled to a patent under the legal tests of patentability, there is no illegal monopoly resulting from the statements on which to base an anti-trust action." Similarly, the Court has found that Adversaries' proof is insufficient to establish that the fabric samples sent to the Patent Office by Koratron and their descriptions were misrepresentative.

While not in any way wishing to appear to condone the nondisclosure that did occur, this Court is not prepared to find it to have been knowingly and willfully done.

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As the Ninth Circuit noted in *Cataphote Corp. v. DeSoto Chemical Coatings, Inc., supra* [1971 TRADE CASES ¶ 73,750], 450 F. 2d at 772:

" '[K]nowing and willful fraud' as the term is used in *Walker*, can mean no less than clear, convincing proof of intentional fraud involving affirmative dishonesty, 'a deliberately planned and carefully executed scheme to defraud * * * the Patent Office.' *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 245 * * * (1944)."

Adversaries have not met this burden and have not established a § 2 violation based on the procurement of the '432 patent.

With respect to Adversaries' claim that Koratron failed in the '915 application to disclose that the allegedly novel delaying catalyst, magnesium chloride hexahydrate, was both publicly known and in commercial use by Koratron and others, the Court finds that the specific catalyst was never claimed to be an invention and that the patent itself did not so indicate. It was recognized by all that the use of that catalyst was publicly known before the '915 application was filed. The invention which was claimed was the pre-setting step, and the use of the catalyst as an adjunct to that process was never claimed to be an independent invention.

Finally, Adversaries claim that Koratron intentionally failed to disclose to the Patent Office that resin pre-curing of creases and seams during pressing had been used commercially by Koratron and others in connection with the '432 patent long before the '915 patent was conceived. It must be recognized, however, that the application for the '915 patent cited the '432 patent and thus cannot be said to have concealed anything about that patent from the Patent Office. The evidence shows that while some pre-curing undoubtedly occurred when garments were pressed prior to the final cure under the '432 process, early in the life of the '432 patent it was not thought possible to obtain a complete cure of the resins using the hot-head press then in use by Koratron. The innovative feature of the '915 process was the intentional full cure of the resin in the crease and seams by means of a hot-head press prior to the final cure of the completed garment. Adversaries have not established that Koratron actually practiced this full pre-curing of selected areas of the garment under the '432 patent long before the '915 application was conceived and then willfully withheld such a

practice from the Patent Office. As a result, Adversaries have failed to prove a § 2 violation based on the issuance of the '915 patent.

(2) *Licensing Practices and Dan River Agreement*

Adversaries claim that Koratron has violated § 2 of the Sherman Act through its licensing practices and the Dan River agreement by monopolizing or attempting to monopolize the manufacture, processing and sale of resin-impregnated fabrics, related textile materials, and durable press garments.

"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.* [1966 TRADE CASES ¶ 71,789], 384 U. S. 563, 570-571 (1966). "The existence of such power ordinarily may be inferred from the predominate share of the market." 384 U. S. 563 at 571.

[Absence of Monopoly]

In applying this market-share test to this case, the Court does not find monopolization by Koratron. In the pre-trial order, Adversaries defined the relevant market for § 2 purposes as the "manufacture, processing and sale of resin-impregnated fabrics, related textile materials and durable press garments * * *." They presented no evidence at trial, however, of Koratron's share of that market. They did offer evidence of Koratron's market share of a submarket: the market for men's and boys' dress and casual slacks. Even if the Court accepted this evidence as defining a relevant submarket, the only evidence offered which bears on the question of Koratron's percentage share supports an inference that it was at most 42%.²² This figure does not approach

²² This maximum figure is based upon Koratron's estimate that in 1969 durable press garments constituted 75% of the market for men's and boys' dress and casual slacks and that it was receiving royalty payments from 56.4% of the sales of durable-press men's and boys' dress and casual slacks made from the post-cure process. See p. 90 [Part VI E], *supra*. The Court finds that this evidence on market share is very unclear and that it would be insufficient for a finding of monopolization even if the percentage derived from it were higher.

²³ Since the decision in *Lessig* has been affirmed by this Circuit following the decision in *Walker, Inc. v. Food Machinery* [1965 TRADE

the percentage shares which have been held to be monopoly shares. See *United States v. Grinnell Corp.* [1966 TRADE CASES ¶ 71,789], 384 U. S. 563, 571 (1966) (87%); *International Boxing Club v. United States* [1959 TRADE CASES ¶ 69,231], 358 U. S. 242, 249 (1959) (81%); *American Tobacco Co. v. United States* [1946-1947 TRADE CASES ¶ 57,468], 328 U. S. 781, 797 (1945) (over 67%, over 80%); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 429 (2 Cir. 1945) (90%). Cf: *United States v. DuPont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 379, 381, 404 (1956).

Market share is, of course, not the only potential evidence of monopoly or monopolization. Since monopoly power consists of "a power of controlling prices or unreasonably restricting competition," *United States v. DuPont & Co.* [1956 TRADE CASES ¶ 68,369], 351 U. S. 377, 389 (1956), evidence of that power is pertinent. But evidence of knowing and willful acts which were intended to exclude competition is insufficient to show monopolization in the absence of proof of "the exclusionary power" of such acts "in terms of the relevant market for the product involved." *Walker, Inc. v. Food Machinery* [1965 TRADE CASES ¶ 71,625], 382 U. S. 172, 177 (1965). Considering the evidence presented on Koratron's licensing practices and its share of the relevant market, the Court concludes that Adversaries have failed to prove that Koratron possessed such exclusionary power and thus violated § 2 of the Sherman Act by monopolization of that market.

[Attempt to Monopolize]

An attempt to monopolize trade and commerce also violates § 2. In this Circuit, the definition of the relevant market is not required for a finding of an attempt to monopolize. *Lessig v. Tidewater Oil Company* [1964 TRADE CASES ¶ 70,993], 327 F. 2d 459, 474 (9 Cir. 1964), cert. denied, 377 U. S. 993 (1964).²⁴ See also *Industrial Bldg. Ma-*

CASES ¶ 71,625], 382 U. S. 172 (1965), this Court need not address the question whether *Walker Process*, in effect, has overruled *Lessig*, although such an argument finds support in dictum in *Walker Process*. There the Supreme Court stated at 382 U. S. 177:

"To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition."

terials, Inc. v. Interchemical Corp. [1971 TRADE CASES ¶ 73,399], 437 F. 2d 1336, 1344 (9 Cir. 1970). In *Lessig, supra*, the Court also rejected the notion that probability of actual monopolization was a necessary element of an attempt to monopolize. 327 F. 2d 459, at 474. In *Industrial Bldg. Materials, supra*, *Lessig* was interpreted as holding that "[i]n an attempt to monopolize situation, only intent to monopolize is in issue, and no proof as to relevant market is required." 437 F. 2d 1336, at 1344.

Recent decisions by the Ninth Circuit have, however, moved away from that Spartan interpretation of *Lessig*. In *Cornwell Quality Tools Co. v. C. T. S. Company* [1971 TRADE CASES ¶ 73,620], 446 F. 2d 825, 832 (9 Cir. 1971), cert. denied, 404 U. S. 1049 (1972), Judge Hufstедler, writing for the Court, said in dicta that the elements of an attempt to monopolize were specific intent and "sufficient market power to come dangerously close to success." Judge Hufstедler, again writing for the Court, has very recently stated that "an attempt to monopolize under section 2 does not require proof of monopoly power. Proof that there is a 'dangerous probability of success' is certainly enough. [citing *Lessig, supra*] Evidence of market power is relevant, but not indispensable to a *Lessig* claim." *Moore v. Jas. H. Matthews & Co.* [1973-1 TRADE CASES ¶ 74,263, 74,348], 473 F. 2d 328, 332 (9 Cir. 1973). Finally, in *Bushie v. Stenocord Corporation* [1972 TRADE CASES ¶ 73,896], 460 F. 2d 116, 121 (9 Cir. 1972), the Court intimated, in referring to *Lessig* and *Industrial Bldg. Materials*, that something more than mere specific intent was required:

"In both of those cases, the attempted monopolization claim was founded upon a substantial claim of restraint of trade, from which we indicated the specific intent required for a claim of attempt to monopolize could be inferred. No such foundation is present here."

The rule in this Circuit has been clarified by *Hallmark Industry v. Reynolds Metals Co.* [1973-2 TRADE CASES ¶ 74,828], 489 F. 2d 8, 11-13 (9 Cir. 1973). The Court in *Hal-*

mark commented that "[t]he *Cornwell* dictum cannot be read to require proof of any particular degree of market power as an independent and necessary element of attempt to monopolize, for such a requirement would be contrary to the holding in *Lessig*, more recently reaffirmed in *Industrial Building Materials, supra*, and *Moore, supra*," 489 F. 2d at 12, n. 3. On the question of the relevance of market power for a showing of attempt to monopolize, the Court explained at 489 F. 2d 12-13:

"Certainly market power may establish dangerous probability. However, *Lessig, Industrial Building Materials*, and *Moore, supra*, hold that dangerous probability may also be shown through proof of specific intent to set prices or exclude competition in a portion of the market without legitimate business purpose. This specific intent must be accompanied by predatory conduct directed to accomplishing the unlawful purpose. Ordinarily specific intent is difficult to prove and will be inferred from such anticompetitive conduct. Therefore evidence of market power may be relevant, but it is not indispensable where a substantial claim of restraint of trade is made."

The requirement in this Circuit, therefore, is that something more than specific intent is required to establish an attempt to monopolize. Either a dangerous probability of success must be demonstrated, by a showing of market power or other evidence, or the claim of an attempt to monopolize must in turn be based upon a substantial claim of restraint of trade. Cf. *Dobbins v. Kawasaki Motors Corporation, U. S. A.* [1973-2 TRADE CASES ¶ 74,609], 362 F. Supp. 54, 58-60 (D. Ore. 1973).

In this case, the Court's finding that Koratron's licensing practices constituted illegal tying arrangements itself shows that Adversaries' claim of an attempt to monopolize is founded upon a substantial claim of restraint of trade.¹⁰ The great commercial success of the '432 process, combined with these illegal tying arrangements, convinces the Court that there was a dangerous probability of success¹¹ in that attempt to monopolize.

¹⁰ Koratron will be given an opportunity to prove that its tying arrangements were justifiable under the rule of *Jerrold Electronics* and that the customer restrictions imposed upon its licensed textile mills and manufacturers of sundries were not unreasonable restraints of trade. See pp. 92-99 [Part VII A], *supra*. If Koratron can show that these practices, during the entire period in which they were followed, did not constitute illegal restraints of trade, the Court will reconsider its finding of an attempt to monopolize.

¹¹ On this point the Court follows *Hallmark Industry v. Reynolds Metals Co.* [1973-2 TRADE CASES ¶ 74,828], 489 F. 2d 8, 12-13 (9 Cir. 1973), and *Moore v. Jas. H. Matthews & Co.* [1973-1 TRADE CASES ¶ 74,263, 74,348], 473 F. 2d 328, 332 (9 Cir. 1973), in holding that evidence other than market power can establish a dangerous probability of success. Moreover, where, as here, a patent which has achieved great commercial success is used in an attempt to monopolize, dangerous probability of success can almost be presumed.

The Court also finds that the evidence establishes that Koratron had the specific intent to monopolize, "to destroy competition or build monopoly * * *." *Times-Picayune v. United States* [1953 TRADE CASES ¶ 67,494], 345 U. S. 594, 626 (1953). See also *Lessig v. Tidewater Oil Company* [1964 TRADE CASES ¶ 70,993], 327 F. 2d 459, 474 (9 Cir. 1964), cert. denied, 377 U. S. 993 (1964). Specific intent includes "[a]n evil motive to accomplish that which the statute condemns * * *." *Screws v. United States*, 325 U. S. 91, 101 (1945) (plurality opinion of Douglas, J.). Cf. *Walker, Inc. v. Food Machinery* [1965 TRADE CASES ¶ 71,625], 382 U. S. 172, 177 (1965); *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.* [1971 TRADE CASES ¶ 73,735], 452 F. 2d 579, 598-599 (7 Cir. 1971), cert. denied, 405 U. S. 1066 (1972).

The Court finds that the tying arrangements and Koratron's enforcement of them,⁹⁷ the Dan River agreement⁹⁸ and the Swede consent decree⁹⁹ are persuasive and convincing evidence that during the time in question Koratron possessed the specific intent to extend unlawfully, in an attempt to monopolize, the power legally granted to it through the issuance of the '432 patent. These practices and agreements, considered together, render it highly unlikely that Koratron was merely exercising innocent business judgment as to how it could best compete in the market place.

Therefore, the Court concludes that Koratron did violate § 2 of the Sherman Act by attempting to monopolize trade and commerce during the years in question.

VIII. PATENT MISUSE

The rule of patent misuse developed from the traditional equitable principle of "clean hands", that a party may not invoke the equitable jurisdiction of a court unless he has demonstrated in his prior actions conduct beyond reproach. In the patent field, "the doctrine of misuse rests upon the principle that the holder of an exclusive patent privilege granted in furtherance of public policy may not claim protection of his grant by the court when such patent

privilege is being used to subvert that policy." *Lastram Corporation v. King Crab, Inc.* [1965 TRADE CASES ¶ 71,568], 245 F. Supp. 1019, 1020 (D. Alaska 1965). See also *Morton Salt Co. v. Suppiger Co.* [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488, 491-493 (1942). Although an antitrust violation involving a patent comes clearly within the patent misuse doctrine, a showing of such a violation and actual lessening of competition is not required. *Zenith Corp. v. Hazeltine* [1969 TRADE CASES ¶ 72,800], 395 U. S. 100, 140 (1969); *Transwrap Corp. v. Stokes Co.* [1946-1947 TRADE CASES ¶ 57,532], 329 U. S. 637, 641 (1947); *Morton Salt Co. v. Suppiger Co.* [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488, 494 (1942); *Berlenbach v. Anderson and Thompson Ski Co.* [1964 TRADE CASES ¶ 71,057], 329 F. 2d 782, 784 (9 Cir. 1964), cert. denied, 379 U. S. 830 (1964). Generally, patent misuse will consist of efforts to enlarge the scope of a patent beyond its legally defined limits in terms of products or processes covered and to extend the seventeen-year enforcement period.¹⁰⁰

A court of equity can thus deny the enforcement of the patent which has been misused until the abusive practices are terminated and the effects of those practices dissipated. *B. B. Chemical Co. v. Ellis* [1940-1943 TRADE CASES ¶ 56,177], 314 U. S. 495, 498 (1942); *Morton Salt Co. v. Suppiger Co.* [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488, 493 (1942). Once the practices and their effects are purged, the patent once again is enforceable. There is no set time period for purging; the time will vary with the facts of each case. See *Ansul Company v. Uniroyal, Inc.* [1969 TRADE CASES ¶ 72,957], 306 F. Supp. 541, 560 (S. D. N. Y. 1969), modified [1971 TRADE CASES ¶ 73,568, 73,638], 448 F. 2d 872 (2 Cir. 1971), cert. denied, 404 U. S. 1018 (1972). The question of whether a purge has been accomplished is a factual matter and is "largely discretionary with the trial court." *Preformed Line Products Co. v. Fanner Mfg. Co.* [1964 TRADE CASES ¶ 71,026], 328 F. 2d 265, 279 (6 Cir. 1964), cert. denied, 379 U. S. 846 (1964).

Salt Co. v. Suppiger Co. [1940-1943 TRADE CASES ¶ 56,176], 314 U. S. 488, 492 (1942). See also *Brulotte v. Thys Co.* [1964 TRADE CASES ¶ 71,287], 379 U. S. 29, 32 (1964) (use of royalty agreement projecting beyond patent expiration date per se unlawful); *Solex Laboratories, Inc. v. Plastic Contact Lens Co.*, 268 F. 2d 637, 641 (7 Cir. 1959) (use of court's findings and opinion to mislead trade concerning patent rights).

⁹⁷ See pp. 83-90 [Part VI, A-D], *supra*.

⁹⁸ See pp. 69-74 [Part V A], *supra*.

⁹⁹ See pp. 70, 72-73 [In Part V A], *supra*.

¹⁰⁰ "[T]he public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant." *Morton*

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Monticello Heights, Inc. v. Morgan Drive Away, Inc.

[¶ 75,282] *Monticello Heights, Inc. v. Morgan Drive Away, Inc., National Trailer Convoy, Inc., Transit Homes, Inc., Ralph H. Müller, Bill R. Privitt, Victor Demaras, E. Wayne Thompson, Orlando L. Thee, and Jack H. Hobson.*

U. S. District Court, Southern District of New York. No. 73 Civ. 3806. Filed September 30, 1974.

Clayton and Sherman Acts

Exclusive and Primary Jurisdiction—Motor Carrier Rates—Conspiracy—Inability to Prove Damages—Proof of Legal Right to Lower Rate.—A motor home seller's antitrust damage claim that transporters violated the Sherman Act with respect to rate fixing was dismissed, since, in light of the exclusive remedy for rates in the Interstate Commerce Commission, it could not demonstrate any legal right to be charged a rate lower than that set by the carriers absent a challenge before the ICC. Where there is no legal right there can be no legal injury. Even if the firm can show that but for the actions of the defendants other carriers would have entered the industry and would have charged lower rates, it would still not have shown that it had suffered a legal wrong by virtue of the defendants having charged the rates they did. Furthermore, the damages would be speculative, since, even if the right to be charged rates lower than those of defendants were shown, plaintiff would have to show not only the lower rate but also that the lower rate would have conformed to the Interstate Commerce Act. Thus, even if the alleged conduct was far broader than the conspiracy to fix rates, the claim must be dismissed for inability to prove damages, which were tied inescapably to the rates. See ¶ 1381, 9302.

Industry Exemptions—Motor Carriers—Injunctive Relief.—Injunctive relief against carriers' continuing or renewing an alleged combination or conspiracy with regard to rates approved by the Interstate Commerce Commission was subject to two questions: (1) whether the alleged conduct was beyond the regulation, supervision or other jurisdiction of the ICC, so that it falls without the proviso of Sec. 16 of the Clayton Act and (2) whether the conduct goes beyond those actions immunized from the application of the antitrust laws by the Reed-Bulwinkle Act, which allows rate agreements between two or more carriers to be submitted to the ICC for approval and exempts approved agreements from the antitrust laws. See ¶ 1381.

Exclusive and Primary Jurisdiction—Damages—Recovery as Preferential Rebate—Class Action—Keogh Decision.—Even if the reasoning of *Keogh v. Chicago & Northwestern Railway Co.* (U. S. Sup. Ct. 1922), 260 U. S. 156 with regard to preventing a damage action because a recovery might amount to a preferential rebate were overcome by maintaining a class action, the other reasons in the decision (absence of legal right to damages and speculativeness) compelled dismissal of a retailer's damage claim directed at an alleged conspiracy among carriers. See ¶ 1381.

For plaintiff: Sidney B. Silverman, of Silverman & Harnes, New York, N. Y. **For defendants:** John C. Christen, of Cleary, Gottlieb, Steen & Hamilton, New York, N. Y., for Morgan Drive Away, Inc.; John L. Altieri, Jr., of Mudge Rose Guthrie & Alexander, New York, N. Y., for National Trailer Convoy, Inc.; Gasperini, Koch & Savage, New York, N. Y., for Transit Homes, Inc.

Opinion and Order

PIERCE, D. J.: This action is a private antitrust suit in which plaintiff, Monticello Heights, Inc. seeks treble damages and injunctive relief against corporate and individual defendants pursuant to 15 U. S. C. § 1, *et seq.*, the Sherman Act, and in particular Sections 1-3 thereof, and 15 U. S. C. §§ 11 and 12 *et seq.*, the Clayton Act, and particularly Section 4 thereof. The Court's jurisdiction is alleged to be based on Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26.

The defendants have moved, pursuant to Rule 12(b) of the Federal Rules of

Civil Procedure, to dismiss the action on the ground that the complaint fails as a matter of law to state a claim for relief under the antitrust laws and that the Court therefore lacks jurisdiction. For the reasons stated herein, defendants' motion to dismiss is granted as to the claim for damages. Decision is reserved on plaintiff's claim for injunctive relief.

Background

Plaintiff, Monticello Heights, Inc. ("Monticello"), sells mobile homes at retail and operates a mobile home park in Monticello, New York. Defendants Morgan Drive

Away, Inc., National Trailer Convoy, Inc., and Transit Homes, Inc. ("the corporate defendants") are the three largest companies engaged in the business of transporting mobile homes from place of manufacture to retailers. They are members of the Mobile Housing Carriers Conference, Inc. ("MHCC"). Defendants Ralph H. Miller, Bill R. Privitt, E. Wayne Thompson, Victor Demaras, Orlando L. Thee, and Jack H. Hobson ("the individual defendants") were officers and directors of the corporate defendants at all times relevant to this action. When in the course of its business, Monticello purchases mobile homes from manufacturers, it uses the services of the defendants to transport the homes from the manufacturers' plants to its showroom. It has done so since 1964.

Monticello alleges that the defendants have engaged in monopolization, combination, and conspiracy to unreasonably restrain interstate trade and commerce in the sale of for-hire transportation of mobile homes in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1-2. Specifically, defendants are charged with fixing and stabilizing rates for the transportation of mobile homes, inducing and coercing other motor carriers to charge the same rates as defendants and relinquish their right to charge lower rates, excluding potential entrants from the business of for-hire transportation of mobile homes, hindering the growth of other parties engaged in the business, and discouraging and eliminating competition between defendants for the services of drivers and field organization personnel. Monticello claims that because of these actions on the part of the defendants, potential competition has been excluded from the industry. As a result, plaintiff has been forced to pay for defendants' services at unreasonably high and non-competitive rates.

Defendants contend that two Supreme Court cases, *Keogh v. Chicago & N. W. Ry. Co.*, 260 U. S. 156 (1922), and *Georgia v. Pennsylvania R. Co.* [1944-1945 TRADE CASES ¶ 57,344], 324 U. S. 439 (1944), require the conclusion that plaintiff's allegations are insufficient to state a cause of action. In *Keogh*, a manufacturer of excelsior and flax tow claimed that eight railroads and twelve individuals, through membership in the Western Trunkline Committee, had combined and conspired to maintain unreasonably high and non-competitive freight rates for transportation of those products. It was alleged that the rates "were higher than

the rates would have been if competition had not been eliminated." *Keogh v. Chicago & N. W. Ry. Co.*, *supra*, at 160. A unanimous Supreme Court held that even if the challenged rates resulted from an illegal conspiracy the plaintiff had not stated a cause of action under the antitrust laws. The Court affirmed the lower court's dismissal of Keogh's complaint. Noting that the government was not barred from proceeding against the defendants, the Court observed that "[i]t does not, however, follow that Keogh, a private shipper, may recover damages under [the antitrust laws] because he lost the benefit of rates still lower, which but for the conspiracy, he would have enjoyed." *Id.* at 162.

The Court advanced three principal arguments for its conclusion. First, the Court reasoned that "[a] rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce." *Id.* That act allowed for a challenge of rates in proceedings before the Interstate Commerce Commission ("ICC") and provided for recovery of any damages resulting from unreasonably high or discriminatory rates. The Court found that this remedy was intended by Congress to be exclusive. *Id.* Further, the rates challenged by Keogh, reflected in the published tariff of the railroads, had been approved by the Commission. These rates, said the Court, established the legal rights of the shipper as against the carrier. The shipper had no legal right to be charged a lesser rate. *Id.* at 163. Thus, imposition of the existing rate had done the plaintiff no legal injury within the meaning of the antitrust laws.

The Court next noted that if a single shipper were allowed to recover in a private antitrust suit "for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." *Id.* Such an effect would negate the paramount purpose of Congress under the antitrust and commerce acts—to prevent unjust discrimination.

Finally, the Court observed that damages resulting from the injury alleged by Keogh were purely speculative. They rested on the hypothesis that any lower rate which might have been charged would conform to the requirements of the Act to Regulate Commerce. This hypothesis could not be veri-

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fed, even by submission of the question to the Commission.

"The powers conferred upon the Commission are broad. It may investigate and decide whether a rate has been, whether it is, or whether it would be discriminatory. But by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination. And that hypothetical question is one with which plaintiff would necessarily be confronted at trial." *Id., supra*, at 164.

Moreover, a lower rate, even if approved by the Commission, might not have benefited the plaintiff at all because the savings might have been passed on to customers or ultimate consumers. *Id.* at 164-65. Thus, the requirement of the antitrust laws that a private plaintiff be someone "injured in his business or property" had not been satisfied.

The *Keogh* reasoning was specifically affirmed by the Supreme Court in *Georgia v. Pennsylvania R. Co., supra*. There the State of Georgia had moved in the Supreme Court for leave to institute an original action against 20 railroads for violation of the Sherman Act. The State alleged that the defendant railroads had conspired to fix "arbitrary and non-competitive rates and charges" and had "generally dominated and coerced" other railroads in restraint of trade. Georgia sought damages under the antitrust laws on behalf of its citizens. The Court rejected the claim stating,

"We think it clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist.

* * *

"The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier.

* * *

"The reasoning and precedent of that case apply with full force here." *Id.* at 453.

It is against the background of these cases that the Court must consider the present motion.

The Damages Claim

Monticello correctly admits that if its complaint alleged solely an agreement, concerted action and conspiracy to fix rates for services, it should be dismissed on the

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authority of *Keogh* and *Georgia*. Like the railroads there, the motor carriers here are subject to the Interstate Commerce Act ("ICA"), 49 U. S. C. § 1 *et seq.*, and regulation by the Interstate Commerce Commission. There is no dispute that the rates these defendants may charge are determined pursuant to that Act.

Monticello asserts, however, that its damage claims differ from those dismissed in *Keogh* and *Georgia* in important respects, compelling a contrary result here. The Court disagrees.

Monticello points out first that it has brought its suit as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of itself and all other retail dealers of mobile homes who were serviced by the defendants during the period from 1959 to date. Any recovery would benefit plaintiff and its competitors uniformly. Monticello argues, therefore, that the *Keogh* Court's objection that a recovery for the plaintiff would act as a rebate to give him a preference over his trade competitors, see *Keogh v. Chicago & N. W. Ry. Co., supra*, at 163, is overcome in this case.

The Supreme Court has recently spoken favorably of the class action device as a vehicle for consumer antitrust suits. See *Hawaii v. Standard Oil Co.* [1972 TRADE CASES ¶ 73,862], 405 U. S. 251 (1972). However, this device cannot save Monticello's suit, even assuming that it would effectively solve the rebate problem, a question the Court does not decide. It fails to meet the principal grounds for the *Keogh* decision, *i.e.*, that Congress had supplied an exclusive remedy under the commerce act for the challenge of allegedly unreasonable rates and that in the absence of such a challenge the shipper had no legal right to be charged a rate lower than that set by the carriers and approved by the Commission. *Id.* at 162.

Monticello points out that it has alleged conduct far broader than the conspiracy to fix rates charged in *Keogh* and *Georgia*. It has also cited numerous cases to support its contention that coercive action such as that attributed to the defendants here falls outside any exemption from the antitrust laws provided to carriers with respect to rate-making activity under 49 U. S. C. § 5b. See, *e.g.*, *Otter Tail Power Co. v. United States* [1973-1 TRADE CASES ¶ 74,373], 410 U. S. 366 (1973); *California Motor Transport Co. v. Trucking Unlimited* [1972 TRADE CASES ¶ 73,795], 404 U. S. 508 (1972); *Eastern Railroad Presidents Conference v. Noerr*

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Freight, Inc. [1961 TRADE CASES ¶69,927], 365 U. S. 127 (1961). For the purposes of plaintiff's damage claim, however, these cases are beside the point. While it is true that Monticello is challenging more than the rates charged by the defendants and more than the way in which those rates have been determined, it is equally true that the damages Monticello claims to have suffered are inescapably tied to the rates being charged. In order to demonstrate the damage to its business or property necessary for a treble damages action under Section 4 of the Clayton Act, Monticello must depend on the claim that but for the defendants' conspiratorial activity, however broad, it would have been able to obtain mobile home transportation at lower rates. It is because of this dependence on rate determinations that Monticello's damage claim fails.

Monticello has not demonstrated, and indeed cannot demonstrate, any legal right to be charged a rate lower than that set by the MHCC and approved by the ICC. Where there is no legal right there can be no legal injury. Even should Monticello show, as it has offered to do, that but for the actions of the defendants, other carriers would have entered the industry and would have charged lower rates, it would still not have shown that it had suffered a legal wrong by virtue of the defendants having charged the rates they did. As to plaintiff's damage claim, defendants have met the high standard required for dismissal, *i.e.*, they have shown that "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957).

There is a further reason for dismissing Monticello's damage claim. As was the case in *Keogh*, even if plaintiff could demonstrate a right to be charged rates lower than those of the defendants, the damages alleged here are entirely speculative. In order to recover, the plaintiff would have to show not only that a lower rate would have been charged, but also that such lower rate would have conformed to the ICA. As stated by the Court in *Keogh*,

"[U]nless the lower rate was one which the carrier could have maintained legally, the changing of it could not conceivably give a cause of action. To be legal a rate must be non-discriminatory. . . . [I]t is possible that no lower rate from St. Paul on tow and excelsior [the products involved in that case] could have been legally maintained without reconstituting the whole rate structure for many articles moving in an important section of the

country." *Keogh v. Chicago & N. W. Ry. Co.*, *supra*, at 164.

The Court went to state, as indicated at pages 6-7, *supra*, that such a hypothetical determination could not be made by the Court or the Commission. This reasoning applies with equal effect to the instant case.

Injunctive Relief

Monticello has also asked for equitable relief enjoining the defendants from continuing, renewing, or engaging in any other combination or conspiracy having a similar effect on commerce as the acts charged here. *Keogh* and *Georgia* do not dispose of this claim. As the Court noted in *Georgia*, a plaintiff may, without challenging the rates charged by carriers, seek "to dissolve an illegal combination or to confine it to the legitimate area of collaboration." *Georgia v. Pennsylvania R. Co.*, *supra*, at 460. "So long as the collaboration which exists exceeds lawful limits and continues in operation, the only effective remedy lies in dissolving the combination or in confining it within legitimate boundaries." *Id.* at 461-62.

Two questions exist respecting the propriety of injunctive relief in this case. The first is whether the alleged conduct of the defendants is beyond the "regulation, supervision, or other jurisdiction of the Interstate Commerce Commission" so that it falls without the proviso of Section 16 of the Clayton Act, 15 U. S. C. § 26, which limits a private party's right to injunctive relief. The second question is whether the defendants' conduct goes beyond those actions immunized from the application of the antitrust laws by the Reed-Bulwinkle Act, 49 U. S. C. § 50. That Act, passed after the decision in *Georgia*, allows rate agreements between two or more carriers to be submitted to the ICC for approval and exempts approved agreements from the antitrust laws. Thus far, defendants have specifically foresworn reliance on this section as a defense to plaintiff's charges in this action.

Unless defendants' conduct falls without the primary jurisdiction of the ICC and without the exemption of 49 U. S. C. § 5b, Monticello's claim for injunctive relief, like its damage claim, must be dismissed. The parties shall have thirty days from the entry of this order in which to make further submissions, if they wish to do so, directed solely to the question of the propriety of injunctive relief in this action.

Wherefore, this Court enters judgment granting defendants' motion to dismiss the

complaint pursuant to Rule 12(b) Fed. R. Civ. P., as to the damage claim. Decision is reserved on plaintiff's claim for injunctive relief pending receipt of any submissions within thirty days of the entry of this order. So Ordered.

[¶ 75,283] *Supermarket Services, Inc. v. Hartz Mountain Corp.*

U. S. District Court, Southern District of New York. No. 74 Civ. 4267 (HFW). Filed October 8, 1974.

Sherman Act

Private Suits—Preliminary Injunctions—Substantial Probability of Success—Existing Questions of Law and Fact.—A distributor-servicer of pet supplies whose distributorship was cancelled assertedly for initiating a cost-plus wholesaling program with its customers was granted preliminary injunctive relief. The manufacturer who cancelled the distributor alleged that, since the retailer customer, under the terms of the distributor's new program, could do his own servicing of supplies, there was a complete change in the nature of the distributor's business with a decrease in emphasis on services—the key to the manufacturer's success. While the evidence did not establish a clear likelihood of success upon the merits at trial, sufficient serious questions of law and fact were raised relating to (1) the original contract between the parties which contained no specification of territory of primary responsibility that was later altered, (2) the seemingly precipitous termination of the contract, (3) the true nature of the new program initiated by the distributor-servicer and its economic impact on the manufacturer, (4) the manufacturer's informing the distributor's customers of the cancellation, and (5) whether vertical, horizontal, or both types of restraints were employed by the manufacturer. See ¶ 9312.

Private Suits—Preliminary Injunctions—Irreparable Injury—Distributorship Cancellation—Loss of Sales in Other Product Lines—Unascertainable Damages—Loss of Good Will and Reputation.—Although a cancelled distributor-servicer's lost sales to old customers could be calculated, the fact that the distributor (cancelled by a manufacturer for initiating a cost-plus wholesaling program with its retailer-customers) would lose the manufacturer's line of goods could possibly lead to the distributor's termination by retailers in other product lines it distributed. In addition, damages due to lost sales to new customers could not be calculated because it would be impossible to calculate either how many stores would not take the new pricing program because the manufacturer was not available, or the amount of orders that would be placed with the distributor both for the manufacturer's products or other lines. Since some of the distributor's customers were informed by the manufacturer of the cancellation, the possibility existed that the distributor's business reputation and good will were irreparably harmed. Moreover, the distributor's reputation in the industry as a dependable distributor was jeopardized. The distributor was not able to fill orders because its inventories in the manufacturer's products were drastically reduced as a result of the cancellation. See ¶ 9312.

Private Suits—Preliminary Injunctions—Balancing of Equities.—A manufacturer of pet supplies who cancelled a distributor-servicer for initiating a new cost-plus wholesaling price program failed to establish that the equities were in its favor where it claimed that, if it was forced to reinstate the distributor, other distributors would initiate such a program. The manufacturer claimed that the program resulted in improper servicing of its products and subsequent loss of business. However, the cancelled distributor was forced to seek a relationship with a new pet supply manufacturer with perhaps not as complete a line of products. The distributor was also faced with the loss of three major customers as a result of the cancellation. Moreover, the manufacturer had informed the distributor's customers of the cancellation, making the possibility of damage to the distributor's business reputation and good will serious and imminent. The equities were thus tipped in the distributor's favor. Furthermore, it did not become impossible for the manufacturer to have a confident and cooperative relationship with the distributor with whom it had done business for eleven years after only six days of disagreement which led to the action brought. See ¶ 9312.

For plaintiff: Willkie Farr & Gallagher, New York, N. Y. (Louis Craco and David L. Foster, of counsel). **For defendant:** Kaye, Scholer, Fierman, Hays & Handler, New York, N. Y. (David Klingsberg and Robert Fink, of counsel).

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(18 CFR Part 32)



Amendment of Regulations Under the)
Federal Power Act; Part 32 -)
Interconnection of Facilities;) Docket No. RM75-3
Emergencies; Transmission To Foreign)
Country)

NOTICE OF PROPOSED RULEMAKING TO AMEND REGULATIONS
UNDER THE FEDERAL POWER ACT COVERING EMERGENCY
ACTIONS PURSUANT TO SECTION 202(c) OF THE
FEDERAL POWER ACT

(August 26, 1974)

This notice is issued pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq. (1970), and the Federal Power Act, 16 U.S.C. 791(a) et seq. (1970), particularly Sections 202(c) and 309 thereof, 16 U.S.C. 824a(c) and 825h.

(1) It sets forth proposed regulations by which the Commission would administer the emergency electric power transfer authority as set forth in Section 202(c) of the Federal Power Act. Presently, the Commission's Regulations under the Federal Power Act do not set forth specific regulations governing the filing of applications for such emergency relief.

(2) Section 202(c) states as follows:

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an

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

(3) To accomplish this purpose, the accompanying regulations propose to create a new subpart of Part 32 of the Commission's Regulations under the Federal Power Act (18 CFR Part 32), §§ 32.60 - 32.66. The sections set forth application content and procedural filing requirements for requested Commission actions under Section 202(c).

(4) "Emergencies" as employed in the proposed regulations are of two basic types:

- emergencies as determined by the Commission by reason of one or more of the following factors
 - a sudden increase in demand for electric energy
 - a shortage of electric energy
 - a shortage of facilities for the generation or transmission of electric energy

- a shortage of fuel or water for generating facilities
 - a shortage of electric energy or facilities for other, but related, types of causes
- emergencies occasioned during wars in which the United States may be engaged.

(5) Recent events, particularly those of the 1973 Arab oil embargo, underscore the need for regulations of this type to deal with emergency conditions and especially with respect to emergency conditions associated with shortages of petroleum fuel oil, natural gas and coal stocks for electric generation purposes. Operational arrangements linking the various electric utility control dispatching centers are organized, and most major centers are able, electrically, to transfer substantial blocks of power and energy among systems under normal and various types of emergency conditions.

(6) This is not to say that limiting constraints of an operational character are not present. They are, and they must be recognized. Also, fuel stock inventories and the ability of utilities to replace such inventories can not be ignored. The Commission recognizes, as a public service responsibility of each electric system, the duty to secure for itself adequate supplies of fuel. However, when "diligent best efforts" fail, emergency conditions may arise. Under the latter circumstances, it is to be expected that utility systems may seek relief pursuant to Section 202(c) of the Federal Power Act.

(7) The Commission's rate schedule files contain a plethora of arrangements covering intersystem transactions for general or special types of emergencies. Federal Power Commission Order No. 496, issued November 29, 1973, 38 F.R. 33641, requested the Nation's electric utilities to undertake a Nation-wide effort, upon a cooperative voluntary basis and using normal electric utility operating channels, "* * * to maximize the use of coal and nuclear fuel electric generating capacity and hydroelectric generating capacity nationally * * *." (mimeo ed., p. 4). The request is restated in the Commission's order issued concurrently herewith, New England Power Pool Participants, et al., Docket No. RM74-22, et al. We are not here concerned with those day-to-day voluntary operations.

(8) While the proposed regulations would apply to all types of Section 202(c) emergencies, what the Commission is here primarily concerned with is a marshalling of facilities to effect large-scale inter-regional transfers of power and energy which electric utilities in one section of the Nation may request from utilities in another section or sections to assist in offsetting massive coal stock shortfalls, a recurrence of petroleum fuel shortages involving electric utility fuel needs, the continuing shortage of natural gas, or a shortage of water for hydroelectric power generation. Without Commission action, it is possible that concerned utilities and state public service commissions will not find mutually acceptable operational arrangements or pricing bases upon which to conduct needed electric transfers. Initially, such was the case in New England Power Pool Participants, supra.

(9) The Commission recognizes increasing immediate concerns of a number of coal burning electric systems as to coal supply availability. The forthcoming expiration of major coal mine labor employment contracts and the prospective labor negotiations involving coal mining operations, make electric utility fuel stocks a matter of first importance. There is also the forthcoming period in which labor negotiations are to be conducted in the petroleum refinery sector of the economy. The effects of air quality requirements under environmental laws may also be relevant, insofar as they limit the quantities and types of fuel which legally may be used. See Federal Power Commission Bureau of Power staff report on Potential Effects of Air Quality Regulations on the Bulk Electric Power Supply, FPC Press Release No. 20080. Currently, the Commission's Bureau of Power is engaged in a Nation-wide review of electric utility fuel supply matters, including potential orders of magnitude of electric transfers which may become necessary if certain fuel stock and electric utility operational conditions materialize. This work, undertaken at Commission initiative, is being coordinated with the National Electric Reliability Council and the results of Commission analyses will be made available to all concerned governmental authorities -- Federal, state and local, the operating utilities and the general public. This work is to be completed at an early date.

(10) Commission action in this docket will assist in facilitating the resolution of potential operational or economic differences in advance, and thereby to preclude possible delays in the implementation of needed large-scale inter-regional transfers of electric power and energy in fuel or water shortage conditions. Accordingly, the Commission proposes to establish general criteria governing Commission action in fuel or water

supply shortfalls, which systems may be expected to observe and which may justify Commission determination of an emergency, and to articulate ratemaking principles under which this Commission would test the basis of rates and charges therefor. In this manner, the Commission proposes to relate governmental policies to utility operations for the guidance of all concerned. The Commission's experience in New England Power Pool Participants, supra, warrants this initiative through the general rulemaking procedures^{1/}.

(11) With respect to fuel inventory and energy supply inadequacies, the Commission solicits the comments and suggestions of all parties and interests relative to what should be the "normal" fuel inventory practices, as well as the following criteria upon the basis of which the Commission would be expected to act. Under currently foreseeable fuel conditions, these criteria will assist the Commission in assessing the comparable status of various utilities which may be experiencing fuel supply problems for purposes of ascertaining the degree to which a system may, in fact, be said to have an emergency condition with respect to fuel supply. In future periods, they will be of major assistance in assessing the degree to which particular utilities have, in fact, made, or attempted to make, provision for adequate fuel supply when advancing claimed emergency circumstances. Also, such data will be helpful to all governmental economic regulatory authorities in assessing, through cost allocations, the cost incidence of fuel supply acquisition, retention and utilization when prescribing electric utility rates and charges, either at the bulk power supply or the retail power supply levels. The acquisition of fuel supplies involves substantial cost factors impacting upon regulatory authority of this Commission and the regulatory authority of numerous state commissions. The following criteria are proposed.

An inadequate utility system fuel inventory or energy supply may be judged to exist when one or more of the following conditions prevails, and load reduction to ultimate consumers will be necessary unless the utility receives assistance:

^{1/} The Commission regards the expansion of regional fuel stocks and of the interregional energy transmission systems to be important factors directly relevant to the exercise of authority under Section 202(c), emergency energy transfers. Also they bear directly upon the maintenance of an adequate and reliable bulk power supply. Consequently, the Commission is concerned

- (1) system coal stocks are reduced to 30 days (or less) of normal burn days and a continued downward trend in stocks is projected;
- (2) system residual oil stocks are reduced to 15 days (or less) of normal burn days for residual oil and a continued downward trend in stocks is projected;
- (3) system distillate oil stocks are reduced to 15 days (or less) of normal burn days for distillate oil and a continued downward trend in stocks is projected;
- (4) system natural gas deliveries which cannot be replaced by alternate fuels have been or will be reduced 20 percent below normal requirements and no improvement in natural gas requirements is projected within 30 days 2/;

1/ Footnote continued from preceding page

not only with the criteria for invoking Section 202(c) but, in a broader sense, it is dealing with means for encouraging and promoting the increased fuel stocks and transmission capabilities which will make such emergency energy transfers more effective in meeting major regional fuel or water shortages. Comments are solicited from all parties regarding effective means for the accomplishment of this general purpose.

2/ Criteria governing this Commission's statutory duties and responsibilities arising under the Natural Gas Act, 15 U.S.C. 717(a) et seq., must be referred to when considering this Commission's natural gas allocation program, and not the provisions set forth herein with respect to 202(c) of the Federal Power Act.

- (5) water supplies required for power generation have been or will be reduced 20 percent below normal requirements and no improvement in water supplies is projected within 30 days;
- (6) all power and energy which is available for purchase, through diligent best efforts, and which can be transferred to the system is being received; and
- (7) the projected energy deficiency upon applicant's system -- without emergency authorization by this Commission -- will equal or exceed 10 percent of applicant's then normal net energy for load based upon the use of all of its otherwise available resources.

In the administration of this regulation, the Commission contemplates that fuel emergency energy transfers from other systems to an applicant would not require reductions in net energy for load on those systems of more than 10 percent below normal at any time during or subsequent to the transfers and would not result in the dropping of loads of ultimate consumers served by such systems.

The foregoing criteria do not preclude an electric system from seeking to claim a fuel emergency when it has fuel stocks greater than those indicated. The Commission, however, would expect any such claims to be factually supportable. Comments are requested on this point.

(i2) Alternate ratemaking theories are set forth below for comment. They are allocated costing (variable and fixed), incremental costing plus incentive, incremental costing and share-the-savings method. Comments and suggestions on each of these methods is requested, along with any other proposals which interested parties may wish to recommend. The Commission intends to decide, as a part of this rulemaking, whether it should prescribe a single method of pricing for fuel emergency transfers here under consideration or whether it should recognize alternate methods and, if so, which ones.

The Commission is cognizant of work currently being undertaken on inter-regional power transfer pricing by the National Association of Regulatory Utility Commissioners' Subcommittee on Electricity. The comments of state regulatory agencies, their national association and the Federal Energy Administration, will be of major assistance to the Commission in this rulemaking. Certain authority to allocate fuel oil and coal has been conferred upon the Federal Energy Administration. That Administration also has certain statutory authority relative to the conversion of electric generating facilities to coal-fired operation. See Emergency Petroleum Allocation Act of 1973, 87 Stat. 627, and related statutes, and the Energy Supply and Environmental Coordination Act of 1974, 88 Stat. 246. The Natural Gas Act, 15 U.S.C. 717(a), confers authority upon this Commission to allocate the natural gas supplies of an interstate pipeline among its customers. See Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621 (1972).

As shown by the following tabulation of state regulatory authority -- which tabulation was prepared by this Commission's staff based upon a 1973 letter questionnaire survey of state public service commission jurisdiction -- state commissions are directly involved and affected. This tabulation was furnished to each state commission by letter of this Commission's Chairman in September 1973.

[table deleted]

(13) The proposed amendments to Part 32 of the Commission's Regulations under the Federal Power Act, by establishing new §§ 32.60 - 32.66, are as follows:

APPLICATIONS FOR COMMISSION EMERGENCY AUTHORIZATION PURSUANT TO SECTION 202(c) OF THE FEDERAL POWER ACT

32.60 Contents of application; filing fee.

Every application under section 202(c) of the Federal Power Act shall be accompanied by the fee prescribed in Part 36 of this subchapter and shall set forth the following information:

(a) The exact legal name of the applicant and of all persons named as parties in the application.

(b) The name, title, and post office address of the person to whom correspondence in regard to the application shall be addressed.

(c) The person named in the application, whether or not a public utility subject to the act. Section 202(c) includes all entities which own or operate electric generation, transmission or distribution facilities, regardless of whether they are investor owned, publicly owned or cooperatively owned. All are subject to Commission emergency authority conferred by this section.

(d) The State or States in which each entity named in the application operates, together with a brief description of the business of and territory, by counties and States, served by such entity.

(e) Description of the proposed interconnections or operations, showing proposed location, capacity and type of emergency services requested.

(f) Reasons why the proposed interconnection of facilities or operations will be in the public interest.

(g) What steps, if any, have been taken to secure voluntary interconnection and operations under the provisions of the act.

32.61 Definition of emergency.

Emergency as used in this subsection shall be, as defined in section 202(c) of the Federal Power Act.

32.62 Fuel emergency and energy supply inadequacies.

Applications for emergency authorization by the Commission by reason of a claimed fuel emergency shall be accompanied by a detailed statement of the firm amounts of electric power and energy received from and delivered to other systems under existing contracts, a showing that no additional power and energy can be purchased despite diligent best efforts, a listing of proposed sources and amounts of additional energy requested to be made available by Commission action, and an analysis of the additional energy transfer capabilities of existing and proposed temporary interconnections which could be completed within 30 days. Additionally, such applications for emergency authorization shall be accompanied by a showing that without assistance by the Commission under Section 202(c), the applicant will experience reductions in net energy available for its system load of more than 10 percent of normal load, some portion of which will require the applicant to drop loads to ultimate consumers.

An inadequate utility system fuel inventory or energy supply may be judged to exist when one or more of the following conditions prevails, and load reduction to ultimate consumers will be necessary unless the utility receives assistance:

- (1) system coal stocks are reduced to 30 days (or less) of normal burn days and a continued downward trend in stocks is projected;

- (2) system residual oil stocks are reduced to 15 days (or less) of normal burn days for residual oil and a continued downward trend in stocks is projected;
- (3) system distillate oil stocks are reduced to 15 days (or less) of normal burn days for distillate oil and a continued downward trend in stocks is projected;
- (4) system natural gas deliveries which cannot be replaced by alternate fuels have been or will be reduced 20 percent below normal requirements and no improvement in natural gas requirements is projected within 30 days 3/;
- (5) water supplies required for power generation have been or will be reduced 20 percent below normal requirements and no improvement in water supplies is projected within 30 days;
- (6) all power and energy which is available for purchase, through diligent best efforts, and which can be transferred to the system is being received; and
- (7) the projected energy deficiency upon applicant's system -- without emergency authorization by this Commission -- will equal or exceed 10 percent of applicant's then normal net energy for load based upon the use of all of its otherwise available resources.

In the administration of this subsection, the Commission contemplates that fuel emergency energy transfers from other systems to an applicant would not require reductions in net energy for load on those systems of more than 10 percent below normal at any time during or subsequent to the transfers and would not result in the dropping of loads of ultimate consumers served by such systems.

3/ See footnote 2/, supra.

32.63 Rates and charges.

Applications for emergency authorization of the Commission shall be accompanied by a proposal of the applicant to compensate the generating or transmitting systems for the emergency services requested. These proposals shall be specific. Where the applicant proposes to compensate systems for emergency services at rates and charges on file with the Commission pursuant to Part 35 of the Commission's Regulations under the Federal Power Act, the application shall identify such rate schedules by filing electric utility and FPC rate schedule designation. Where the applicant proposes to compensate the generating or transmitting systems at rates and charges not on file with the Commission, the applicant shall propose quantitative unit (kilowatt or kilowatthour) rates and charges, or cost-of-service formula type rates and charges for the emergency services requested. Where the applicant proposes a cost-of-service type rate or charge, the cost allocation methods proposed shall be clearly identified.

Where the applicant posits a fuel emergency as the basis for seeking Commission authorization pursuant to Section 202(c) of the Act, the Commission will prescribe rates and charges upon the following bases:

/Alternate Methods For Comment, See
Paragraph (12), supra _

Allocated Costing Method:

The allocated costing method would permit the generating and transmitting systems to recover the following costs:

(1) an allocable portion of investment costs of production plant, including return on investment, depreciation, income taxes, property and other taxes related to plant investment and insurance.

(Comments should be submitted indicating how the allocable portions would be determined).

(2) an allocable portion of investment costs of transmission plant, including return on investment, depreciation, income taxes, property and other taxes related to plant investment and insurance.

(Comments should be submitted indicating how the allocable portions would be determined).

(3) incremental costs associated with the generation of fuel emergency service. Incremental costs mean such operating and maintenance expenses incurred that would not have been otherwise incurred if such service had not been furnished. Such expenses include the incremental expenses incurred in the production of the energy so furnished, including incremental fuel expense, incremental operating labor and supplies, incremental maintenance labor and supplies, and incremental administrative and general expenses.

(Comments should be submitted to indicate how the generating systems would determine the incremental costs, e.g., the actual weighted average cost of fuel consumed to generate the energy, or the replacement cost of the fuel consumed. If the replacement cost is to be used, the generating system should comment as to how such cost will be determined, and how the interests of the other existing customers will be preserved and the selling utility not unduly enriched).

(4) the incremental costs incurred in the transmission of fuel emergency service, including operating labor and supplies, incremental maintenance labor and supplies, incremental administrative and general expenses, losses, and any other related costs.

(Comments should be submitted to indicate the nature of "any other related costs" and how such costs would be determined).

Incremental Costing Plus Incentive:

(1) incremental costs associated with the furnishing of fuel emergency service. Incremental costs mean such operating and maintenance expenses incurred that would not have been otherwise incurred if such service had not been furnished. Such expenses include the incremental expenses incurred in the production of the energy so furnished, including incremental fuel expense, incremental operating labor and supplies, incremental maintenance labor and supplies, and incremental administrative and general expenses.

(Comments should be submitted to indicate how the generating system would determine the incremental costs, e.g., the actual weighted average cost of fuel consumed to generate the energy, or the replacement cost of the fuel consumed. If the replacement cost is to be used, the generating system should comment as to how such cost will be determined, and how the interests of the other existing customers will be preserved and the selling utility not unduly enriched).

(2) the incremental costs incurred in the transmission of fuel emergency service, including incremental operating labor and supplies, incremental maintenance labor and supplies, incremental administrative and general expenses, losses and any other related costs.

(Comments should be submitted to indicate the nature of "any other related costs" and how such costs would be determined).

(3) as an incentive factor to the generating and transmitting systems to utilize their facilities for the generation and transmission of such energy, these systems would be permitted some reasonable compensation for their investment in production and transmission plant by way of return and associated income taxes but not to the same extent that they are compensated therefor for non-emergency on-peak service.

(Comments should be submitted to indicate how the generating and transmitting systems would determine the return and income tax components).

Incremental Costing:

(1) incremental costs associated with the furnishing of fuel emergency service. Incremental costs mean such operating and maintenance expenses incurred that would not have been otherwise incurred if such service had not been furnished. Such expenses include the incremental expenses incurred in the production of the energy so furnished, including incremental fuel expense, incremental operating labor and supplies, incremental maintenance labor and supplies, and incremental administrative and general expenses.

(Comments should be submitted to indicate how the generating system would determine the incremental costs, e.g., the actual weighted average cost of fuel consumed to generate the energy, or the replacement cost of the fuel consumed. If the replacement cost is to be used, the generating system should comment as to how such cost will be determined, and how the interests of the other existing customers will be preserved and the selling utility not unduly enriched).

(2) the incremental costs incurred in the transmission of fuel emergency service, including incremental operating labor and supplies, incremental maintenance labor and supplies, incremental administrative and general expenses, losses, and any other related costs.

(Comments should be submitted to indicate the nature of "any other related costs" and how such costs would be determined.

Share-the-Savings Method:

The share-the-savings method would take into account the following factors:

(1) incremental costs of generation, including:

- (a) incremental fuel costs
- (b) start-up costs
- (c) incremental operation, maintenance and administrative costs

(2) decremental costs of generation replaced on the receiving system.

The price for fuel emergency service would be equal to the supplier's incremental generation costs, plus one-half of the difference between the costs to the purchaser (the supplier's incremental cost plus the sum of the transmission charges, by intermediate transmitting systems) and the purchaser's decremental costs.

(Comments should be submitted to indicate how the generating system would determine the incremental costs, e.g., the actual weighted average cost of fuel consumed to generate the energy, or the replacement cost of the fuel consumed. If the replacement cost is to be used, the generating system should comment as to how such cost will be determined, and how the interests of the other existing customers will be preserved and the selling utility not unduly enriched).

32.64 Other information.

The Commission may require additional information when it appears to be pertinent in a particular case.

32.65 Form and style; number of copies.

An original and six conformed copies of an application under §§ 32.60 to 32.66 shall be filed and shall conform, in all other respects, to the requirements of §§ 1.15 through 1.17 of this chapter. Persons designated as potential sources of emergency power and energy assistance in an application filed pursuant to this subsection shall, at the time of application, be served with the application. The persons so designated and served shall submit their answers to the Commission within 10 days of the date of filing of the application unless otherwise directed by the Commission's Secretary, and as part thereof, they shall analyze the impact of the required power and energy transfers upon their capabilities to provide for loads on their own systems.

32.66 Required exhibits.

There shall be filed with the application and as a part thereof the following exhibits:

Exhibit A. Statement of the estimated capital cost of all facilities of the applicant, required to establish the interconnection and to perform interconnected system operations so that emergency services might be received by it; and the estimated annualized cost of operating such facilities to receive the type of emergency service requested. To the extent known by applicant, similar data shall be supplied relative to the facilities and operations of each entity from which applicant seeks emergency services.

Exhibit B. A general or key map on a scale not greater than 20 miles to the inch showing, in separate colors, the territory served by each entity named in the application, and the location of the facilities to be used for the generation and transmission of electric power and energy requested, indicating on said map the connection points between systems.

(14) Any interested person may submit to the Federal Power Commission, Washington, D.C. 20426, not later than October 16, 1974, data, views and comments, in writing, concerning the matters herein proposed. Written submittals will be placed in the Commission's public files and will be available for public inspection at the Commission's Office of Public Information, Washington, D.C. 20426, during regular business hours. An original and fourteen (14) conformed copies should be filed with the Commission. Submissions to the Commission should indicate the name and address of the person to whom correspondence in regard to the proposal should be addressed, and whether the person filing them requests a conference at the Federal Power Commission to discuss this proposal. The Commission will consider all submissions before taking action on the matter herein proposed.

(15) The Secretary shall cause prompt publication of this notice to be made in the Federal Register.

By direction of the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION



Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., Rush Moody, Jr.,
William L. Springer, and Don S. Smith.

New England Power Pool Participants,) Docket No. RM74-22
et al.) Docket No. E-8589
Appalachian Power Company, et al.) Docket Nos. E-8550 et al. 1/
) (Coal-by-Wire)

ORDER PERMITTING WITHDRAWAL OF PETITION FOR EMERGENCY
RELIEF (DOCKET NO. E-8589) AND ACCEPTING RATE
SCHEDULES, PERMITTING WITHDRAWAL OF RATE SCHEDULES,
DISPOSING OF PROCEDURAL MATTERS AND TERMINATING
PROCEEDINGS

(Issued August 26, 1974)

New England Power Pool Participants (NEPOOL), on January 10, 1974, filed a petition in Docket No. E-8589, seeking an "emergency" order of the Commission pursuant to Section 202(c) of the Federal Power Act, 16 U.S.C. 824a(c), directing certain electric utilities to provide them with available electric power and energy, pursuant to the petroleum fuel conservation policy expressed in Commission Order No. 496, issued November 29, 1973, 38 F.R. 33641, and Order No. 497, issued December 7, 1973, 38 F.R. 34318.

In furtherance of the Commission's fuel conservation policy expressed in those orders, the Commission's Chief, Bureau of Power, by letter of December 4, 1973, requested the cooperation of the National Electric Reliability Council in a voluntary program under which utilities in each council area would prepare contingency schedules of emergency power transfers. The last mentioned activity was in progress when the NEPOOL petition was filed.

1/ See Appendix A hereto for designations of all rate schedules, the names of all filing utilities and their respective docket numbers.

We agree with the comments of a number of conference participants, filing electric utility systems, state commission personnel, the FPC's conference staff and other conference participants. These proceedings are rate hearings to determine the prices for services already rendered upon a voluntary basis to meet a specific problem -- residual oil shortages along the Atlantic coast occasioned by the Arab oil embargo of 1973.

Legally, the Commission has determined that it lacks the jurisdiction to order wheeling or displacement of energy under its "public utility" regulatory jurisdiction. See for example, Order Denying Rehearing, Southern California Edison Co., issued June 5, 1974, Docket No. E-8570. Interstate electric utilities are not common carriers under the Federal Power Act. See Otter Tail Power Co. v. U.S., 410 U.S. 366, 375-6 (1973).

The spot market concept of Richmond for wholesale electric transactions presupposes legal authority under the Federal Power Act to direct electric systems to operate as power wheeling, displacement common carriers, which they are not. Moreover, even if the Commission possessed the requisite regulatory authority to direct those changes, the operational and electrical dispatch changes which would be required to implement a Nation-wide spot market in bulk power supply, can not be performed by the electrical control and operating equipment which is now in place and operational in the various power pools and electrical control areas. The Commission's emergency authority to direct power and energy transfers -- not exercised in this instance because the Commission did not find the prerequisite emergency -- would necessitate the use of this same in-place equipment.

Any physical restructuring of a power pool or system dispatch organization would necessitate extensive engineering studies of existing facilities and establishing requirements for new control facilities. New detailed operating procedures would be required, as well as the development of many trained system operations personnel. Following these actions, it would be possible to establish new electrical divisions to control the Nation's interconnected electrical networks, however, new hardware and control equipment would have to be procured. A power supply system can not operate reliably without highly technical controls. Unless proper controls and procedures are in use in a power pool, there will be system disturbances or blackouts on a regular basis.

The electric power supply systems in the eastern, southern and midwestern regions of the United States normally operate together in a synchronous manner to form a series of large interconnected electric power grids. Geographically, these interconnected systems extend from Maine to Florida and inland as far as Oklahoma, Nebraska and the Dakotas and include most power facilities in seven of the nine electric reliability councils. The far western states tend to operate as a separate series of power grids with weaker ties to the East. The interconnected systems in most of Texas operate as an electrically isolated power grid. Ownership of components of these systems is divided among investor owned utilities, agencies of the Federal Government and various publicly owned utility organizations and cooperatively owned systems. System reliability is accomplished under this Commission's administratively established adequacy and reliability program pursuant to Section 202(a) of the Federal Power Act, and Order series 383, the latest being Order No. 383-3, 49 FPC 700 (1972). This program is voluntary, but it is the policy of the Commission that all electric systems shall have the opportunity to participate in the adequacy and reliability matters consistent with their needs. See Order series 383.

Development of these power supply systems has been in an orderly manner; load growth, equipment, fuel, sites and economic principles being major factors in determining the type and location of facilities to be constructed. The supply of electrical energy to the consumer is, in general, by a utility operating in a designated service area. Growth of load within such service area requires facility expansion since each utility is normally required to supply all load in its territory. This requirement causes area planning of facility expansion to be a major function of electric utility organizations, not the electric loads of another area or to operate an electric system as a transport or common carrier. Planning involves specifying facilities to supply the maximum expected load on a particular system.

Economic and reliability considerations make it desirable to interconnect these individual service areas. System interconnections are generally of mutual benefit for the interconnecting parties, provided there is required coordination of operations between such systems. Generally, electric utilities throughout the country operate their systems in this manner. Power pools are formed primarily for economic

and reliability reasons and operate within the framework of adequacy and reliability factors. A power pool or a large operating utility employs a considerable amount of highly sophisticated control equipment, which is custom designed for its particular application and is the result of lengthy planning, specification and ordering periods. A major change in power pool dispatching or in system operations requires considerable lead time so that the proper control equipment can be ordered and installed.

Operation of an electric power system, whether on a power pool or on an owner-organization service area basis, normally employs a balanced net planned interchange, i.e., zero net unplanned flows. This concept requires each operating organization to provide adequate generation to carry its own load, including any planned import or export power plus a designated reserve margin.

Control of a multi-unit interconnected electric power system in this manner is accomplished at system operations or dispatch centers. Communications to the power generating centers within the system and to the dispatch centers of adjoining organizations are a vital link in the operation of the power systems 16/.

16/ As a basic indicator of adequate generation, a dispatch center monitors system frequency and seeks to maintain a constant 60 cycles. Over-generation will cause the frequency to increase while under-generation causes the frequency to decline. Controlling system frequency requires detailed coordination with adjoining power dispatch centers, since under-generation on one system causes electrical power flows into that system, to maintain stable system operations. As a part of this coordination, voltage and power flow are monitored at key locations on each system. Results of this monitoring program require technical interpretation by individuals with appropriate training and experience to obtain the exact operating condition of the electric power system. The current total system status exists at no other location. Operating procedures require that changes in total system status be immediately communicated to the system dispatch center via automatic monitoring devices or personal contact means.

Capacity and energy transfers between electric power systems are a function of the system operating condition at a particular time. To attempt any transfer of capacity or energy through other than these dispatch communication channels is an invitation to a system blackout or other major system disturbance. This is true because power system conditions are dynamic and subject to many internal and external forces which could require major system adjustments. These adjustments require detailed knowledge of the involved system and some knowledge of the interconnected systems.

Anticompetitive allegations of Richmond and Congressman Harrington do not alter these physical facts or the legal constraints by enlarging the statutory authority of the Commission to direct public utilities to conduct wheeling, displacement or common carriage operations. Administrative agencies do not gainsay statutory limitations through the procedural means by which objections are framed. The anti-competitive objections which the City and Congressman Harrington urge to the settlement rates and charges incorrectly assume we possess such authority.

As noted supra, Order No. 496, by its terms, is a voluntary program. It was created to meet the supply conditions of the Arab oil embargo and not to equalize fuel costs or to change basic long-term fuel supply arrangements. The Commission, as a part of that program, directed its staff to work with the pools, councils and state commissions on a cooperative procedure basis. The conference staff did so, and that is basically how the 819,930 mwhs were moved to the East Coast this past winter with an associated oil saving of over a million barrels of residual oil 17/.

17/ During the period January 1974-May 26, 1974, an aggregate of 819,930 mwh were generated by the participating systems and transmitted to PJM, NYPP and NEPOOL, largely through the interconnecting transmission lines of the Allegheny Power System, the American Electric Power System, the Carolina-Virginia Systems, the PJM Systems and the NYPP. The approximate split of energy was 50 percent to PJM, 25 percent to New York Pool and 25 percent to NEPOOL.

The Commission has not found an "emergency" within the meaning of § 202(c) of the Federal Power Act as requested by NEPOOL's petition in Docket No. E-8589. The Commission is not acting pursuant to its emergency authority in this order.

The proffered settlement rates and charges have been tendered pursuant to the Commission's normal interstate rate regulatory authority, §§ 205, 206, 16 U.S.C. 824d, e, over public utilities 18/. NEPOOL, the originator of the § 202(c) proceeding in Docket No. E-8589, requests our approval of the settlement rates and seeks to terminate that, and all other litigation in the above dockets, as do the other pools, affected electric utilities and state public service commissions.

The anticompetitive issues raised in these proceedings spring from the aforementioned contractual dispute between Richmond, Indiana, and Indiana & Michigan Electric Company and offers by the City to sell fuel conservation power to the company or others. From that initial dispute, the City, and to some degree Congressman Harrington, presents a series of arguments directed chiefly against the American Electric Power (AEP) and Allegheny Power Systems (APS). The City claims these systems have engaged in illegal conduct in the

17/ Footnote continued from preceding page

Some of the transmission was accomplished through the CAPCO systems and the Ontario Hydro system. (See Appendix C). Upon an aggregate basis, these mwh translate into approximately 1,320,000 bbls. of residual oil. Not all of this transmitted energy will ultimately be classified as "fuel conservation energy" when transmitted. There are some amounts of economy interchange and other classes of service. Other than through scheduling, it is basically impossible to separate fuel conservation energy from other energy going through tieline meters.

18/ The Commission's statutory authority to act in emergency situations pursuant to Section 202(c) of the Federal Power Act is not limited to "public utilities" (i.e., interstate investor owned systems). The companion notice of proposed rulemaking, issued concurrently herewith, would apply to all types of utility systems however owned, investor owned, publicly owned or cooperatively owned, Docket No. RM75-3.

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY BRIEF OF CONSUMERS POWER COMPANY, dated November 25, 1974, in the above captioned matter, have been served on the following by deposit in the United States mail, first class or air mail, this 25th day of November, 1974:

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