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INTRODUCTION

On October 8, 1974, the Department of Justice filed its Brief and Proposed Findings of Fact in this matter (Department's Brief). At the same time, the Atomic Energy Commission Staff, the Michigan Cities and Cooperatives, and Consumers Power Company filed briefs and proposed findings. These will hereinafter be referred to as AEC's Brief, Intervenors' Brief, and Applicant's Brief, respectively.

Since the positions taken by the AEC Staff and the Intervenors in their briefs are consistent in most respects with that of the Department, this reply is confined to a clarification of several matters raised in Applicant's Brief. We do not propose herein to address issue by issue the matters raised by Applicant in its Brief. Rather we have relied on the factual and legal discussion set out in our Brief, and we will merely highlight the major inaccuracies we believe are present in Applicant's Brief. Further, it should be noted that while there are substantial conflicts between the Department's and the Applicant's statements of relevant facts, we shall not undertake a point by point reply. In light of the detailed analysis contained in our Brief, the contradictory factual assertions, as well as the validity

of our contentions, are, we believe, apparent. */ Hence, such a factual presentation would be both repetitive and unnecessary.

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*/ For example, Applicant asserts that "there is no evidence that any terms or conditions contained in the wholesale service contracts are anticompetitive in their effect or intent." (Finding of Fact No. 4.03; emphasis added; see also Finding No. 4.11). Yet Applicant in fact restricted systems with which it was interconnected from interconnecting with third parties, and this contractual provision in fact precluded Lansing from interconnecting with the M-C Pool (Department's Brief, 156-157). Also, Applicant's Finding No. 4.75 states:

> There is no credible evidence that the Company's management articulated or implemented a policy designed to acquire all of the smaller electric systems in the Company's service area. (emphasis added)

This claim is clearly refuted by the evidence (Department's Brief, 87-94), notwithstanding the considerable effort Applicant undertook to disown Mr. R. L. Paul (Applicant's Brief, 210-212).

I

APPLICANT MISCONSTRUES THE SCOPE AND CHARACTER OF SECTION 105c PROCEEDINGS

Throughout this proceeding the Department has contended, pursuant to Section 105c of the Atomic Energy Act, that there exists today in Michigan's lower peninsula a situation inconsistent with the antitrust laws and that the activities under the Midland licenses would affirmatively maintain, indeed exacerbate, that situation. In order to prove this contention, it has been necessary to show first that a situation inconsistent with the antitrust laws exists. This entailed the presentation of evidence concerning the system-wide structure and practices of the Consumers Power Company and other electric systems in Michigan's lower peninsula. Secondly, it was necessary to show the relationship of the activities under the license to that situation--i.e., the meaningful nexus as required by the Statute and by the Commission. We believe we have satisfied this requirement in all respects by demonstrating that the construction and operation of the Midland Units and the marketing of low-cost, base-load nuclear power from these units, through integration into Applicant's system, and the regional power exchange, furthers Applicant's monopolization of the relevant wholesale and retail power markets. */

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*/ Contrary to Applicant's assertion that the Department by participating in this proceeding seeks "to avoid the burden of proving its antitrust claims in a conventional forum" (Applicant's Brief, 6), the Attorney General is required by

[footnote continued on next page]

Despite the clear language of Section 105c, Applicant maintains that the statute does not permit the prelicensing antitrust review process to be used in this manner. Applicant contends that (1) the legislative history of the Atomic Energy Act, (2) the Commission's Waterford Memorandum, **/ and (3) what it calls "fundamental principles of administrative law" limit Section 105c inquiries to "antitrust issues inherent in the terms on which the licensed facility would be owned or its energy output allocated" (Applicant's Brief, 18). While it is not entirely clear what antitrust issues this standard would encompass, we interpret it to include only those situations where an applicant unreasonably excludes third parties from a joint venture project. ***/

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*/ [continued from previous page]
Section 105c(1) to "render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection" --i.e., whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. Section 105c(5) further allows the Department to "participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice." Rather than forum-shopping, as Applicant suggests, the Department is fulfilling its statutory obligation mandated by Congress.

**/ Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit No. 3, AEC Docket No. 50-382A; Memorandum and Order of the Commission, September 24, 1973 (hereinafter "Waterford Memorandum").

***/ While Applicant does not explicitly state that it would limit Section 105c inquiries to joint venture situations, the entire thrust of its argument points in this direction. In fact, joint venturers are the only example Applicant cites as subject to Section 105c.

We believe Applicant has misinterpreted the legislative history of Section 105c, the requirements outlined by the Commission in its Waterford Memorandum, and the principles of comity between administrative agencies.

A. Applicant Distorts the Legislative History of Section 105c

1. Congress' Intent in Enacting Section 105c Was To Insure That Access to Nuclear Facilities Be Widespread

We believe the Atomic Safety and Licensing Board in the proceeding involving Alabama Power Company's Farley Nuclear Plant aptly summarized, in an Order addressed to the question of nexus, Congress' intent in enacting Section 105c:

> Our reading of the legislative history of the antitrust provisions of the Act convinces us that the primary impetus for the injection of antitrust considerations into the nuclear licensing process was the deeply held concern of Congress that the huge public investment in the research and development of nuclear reactor technology should not be utilized by a few leading private firms to entrench themselves in an anticompetitive market position. Competition in the electric power industry, even more than the atomic power industry, was so clearly a basic concern of Congress, and was referred to so often during the legislative history of the 1970 Amendments, that no citations are needed. 14/ It can further be presumed that Congress was familiar with the laws of physics and the benefits flowing from interconnection, pooling, reserve sharing, and other practices of electric utilities which would necessarily involve the output of the proposed nuclear generating facilities in question, and would thus be subject to any provisions or conditions made a part of the license by the Commission.

14/ It is of interest to note, in this connection, the decision of the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, in

Cities of Statesville, et al. v. Atomic Energy Commission, 441 F.2d 962 (D.C. Cir. 1969). That opinion, although dealing with the somewhat narrower, but similar, antitrust provisions of section 105c as they stood before the 1970 Amendments, said that even though it was holding 105c inapplicable to the section 104 licenses there sought, when section 105 became applicable 'the contentions here raised (under section 105c) will certainly be both pertinent and reviewable.' (emphasis supplied). These contentions, as summarized by Judge Leventhal's concurring opinion, were made by municipal electric utilities whose underlying complaint was 'against authority enabling private companies to operate these large facilities, and to take advantage of the Government's gigantic research and development expenditures in the field of nuclear energy, on terms alleged to be repugnant to the policies of the antitrust laws, permitting the private companies to dominate the power markets without any participation by the smaller municipal utilities.' 441 F.2d at 980. This is also a large part of what is being alleged in the instant case, and if it would have been 'pertinent and reviewable' under the old section 105c, it is also pertinent and reviewable under the new and broader section 105c. */

The Commission emphasized this same theme in its Waterford Memorandum when it stated:

> The Commission's antitrust responsibilities represent inter alia a Congressional recognition that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds. It was the intent of Congress that the original public control should not be permitted to develop into a private monopoly via the AEC licensing process, and that access to nuclear facilities be as widespread as possible (Waterford Memorandum, 4).

Congress' concern that a few large firms would utilize the cost advantages available from nuclear technology--technology developed from a huge public investment--to maintain and further

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*/ Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), AEC Docket Nos. 50-348A and 50-364A, Memorandum and Order, February 9, 1973; 14-16.

"entrench" themselves in an anticompetitive market position is applicable whether the nuclear facility is solely owned or jointly owned. Whether a facility is jointly owned or solely owned is an economic-engineering question dependent on whether an electric system is large enough to absorb the entire output of a nuclear facility without assistance from its neighboring electric systems. It is implausible to argue, as Applicant has done, that Congress enacted antitrust legislation aimed only at small and medium-sized electric systems, who must enter joint ventures to take advantage of nuclear technology, and left larger firms immune from antitrust liability.

2. The Department's Role in the Enactment of Section 105c is Consistent with Its Interpretation of the Scope of Section 105c

Applicant, through the selective and distorted use of quotations from the testimony of Department of Justice spokesmen before various Congressional committees, contends that the Department gave assurances to the Congress that Section 105c was aimed only at joint-venture nuclear facilities (Applicant's Brief, 8, 16). While it is true that joint ventures were a matter of considerable controversy at the time of the enactment of Section 105c, the Department's action in proceeding against an applicant who seeks to construct and operate a facility on its own is entirely consistent with statements it made before Committees of Congress while Section 105c was under consideration.

Applicant cites the testimony of the Assistant Attorney General, Antitrust Division, Walker B. Comegys before the Joint Committee on Atomic Energy on November 18, 1970, to support its contention (Applicant's Brief, 17). While Mr. Comegys did tell the committee of the concern of the Department about the unreasonable exclusion of small systems from joint venture facilities, he also expressed, in his testimony of the same day, concern about the exclusion of small systems from participation in solely owned facilities. In response to a question from Chairman Holifield, he said:

> Mr. Comegys: Now that [sic] the doctrine of joint venture that we have discussed is a separate and distinct doctrine from that which would be applied in the case of a [sic] single ownership, absent any duality in pooling arrangements and interconnections and so forth. There you are dealing with a single owner.
>
> I would not say that under no circumstances could a single owner be required to share but this would require a showing, the traditional showing under Section 2, which is one of monopoly plus something else, deliberateness or intent or something of that nature. Mr. Chairman, you have properly highlighted a most important point, I think.
>
> Chairman Holifield: So there would be a completely different factor involved in any antitrust advice or decision that might be made by the Antitrust Division if they were dealing with a single owner of a nuclear plant or of joint ownership of a nuclear plant.
>
> Mr. Comegys: That is correct, and these are traditional theories. They are not something new. This [is] traditional antitrust doctrine. */

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*/ Hearings on Prelicensing Antitrust Review of Nuclear Power Plants before the Joint Committee on Atomic Energy (hereinafter "Hearings"), 91st Cong., 1st Sess., pt. 1 at 113 (November 20, 1969).

Applicant also cites the testimony of Mr. Comegys before the Senate Antitrust and Monopoly Subcommittee on May 6, 1970, to support its position that Department "gave assurances" to the Congress that it would not proceed against an electric system which solely owned a nuclear facility (Applicant's Brief, 16). Once again Applicant has quoted selectively. The entire paragraph from the testimony reads:

> The advice will, of course, be grounded on judicial interpretation and application to particular factual situations of the standards of Section 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. On this basis, antitrust review would consider the contractual arrangements and other factors governing how the proposed plant would be owned and its output used. We would also consider the arrangements under which it would be built and supplied. No broader scope of review is contemplated, cognizant as we are of the need to avoid delays in getting atomic electric plants into operation. We do not consider such a licensing proceeding as an appropriate forum for wide-ranging scrutiny of general industry affairs essentially unconnected with the plant under review (Hearings, pt. 2 at 366).

We do not understand how the Department's position in this case is inconsistent with either of Mr. Comegys' statements. We have not engaged in a wide-ranging scrutiny of general industry affairs, rather we have scrutinized activities which are essentially connected with the plant under review. We have inquired into the specific contractual arrangements and other factors governing how the proposed plant would be owned and its output used. We have attempted to apply to particular fact situations the standard of Section 2, that of monopoly power plus the deliberate exercise of that power, precisely as Mr. Comegys explained.

Applicant also cites Mr. Comegys' comments on power pooling before the JCAE as evidence of a "disclaimer that the proposed provisions would be made the vehicle for inquiry into the general characteristics of a utility's operations" (Applicant's Brief, 13). When Mr. Comegys' testimony is read in its entirety, a significantly different picture of what he intended to convey emerges:

> Chairman Holifield. Mr. England has a question.
>
> Mr. England. You are apparently saying that even if X electric utility with its own funds, acting by itself builds and operates a nuclear powerplant, if it enters into a pooling arrangement with other utilities, a mere pooling arrangement, this then would put it in the category of joint venturer and the principle you say which would apply to the joint venturer situation would apply to a person who hooks up his powerplant with a pool?
>
> Mr. Comegys. The last part of the question I did not understand. You were saying the mere fact that one owned the nuclear generating plant, itself, then it entered in a pooling arrangement and the pooling arrangement was the thing that the small utility wanted to become a part of?
>
> Mr. England. No; I did not say the last phrase, 'if he enters into a pooling arrangement.' As I understood, you are saying that the principles applicable to joint venturers might apply if a smaller utility wanted to get into the pooling arrangement.
>
> Would you go further and say that those same principles would apply insofar as the smaller utility wanting to get part ownership in a plant, itself?
>
> Mr. Comegys. As I understand the question, my answer would be no to that. If what the small utility wanted to do was to get access to [illegible] energy [illegible] and the plant [illegible] utility, then quite apart [illegible] ments the latter entered into, the section [illegible] criteria, that is to say, not the joint venturer criteria, would be applied.

I think if you go to the next step down and say that if the smaller utility wanted to join the pooling arrangement then you would apply joint venturer criteria. That is why it is so important to try to avoid prognosticating what we will or will not do in this field until we examine a concrete case and situation. The general principles are not new principles. They are old principles. I think that there should be no uncertainty as to how these principles will be applied.

Mr. England. One further brief question: If the smaller utility were only looking to share power from the pool but were not looking for ownership participation in the nuclear powerplant, would the AEC have jurisdiction to entertain his petition?

Mr. Comegys. I could not answer that question, sir, until I saw the entire arrangement. I think that you do not license the pool. The license would be the facility but maybe the pool would be an intricate part of the facility or vice versa.

I am sure you know that one type of pooling arrangement is where one of the joint venturers builds a plant this year and it serves all for a time and as demand grows, another aspect of the pooling provision would require another joint venturer to add to a pool a second plant that he did not have to build up to that time. So the various types of pooling arrangements or other arrangements are myriad.

Mr. England. Thank you.

Chairman Holifield. Now if we can find where you were in your statement, we will start from there. I want to thank you for your responsiveness and the clarity of your answers to the committee (Hearings, pt. 1 at 133-134 (November 20, 1969); emphasis added).

We agree with Chairman Holifield that the Department's position when read in its entirety is clear. No "disclaimers" were ever given that the Department would not proceed under a monopolization theory against an Applicant seeking to construct and operate a facility on its own. In fact, the opposite is true:

Congress was explicitly told that the Department would proceed as we have in this case. The consistent tenor of the Department's statements to the JCAE was twofold; (1) where a facility was to be jointly owned, the less rigorous standards applicable to joint ventures under traditional antitrust principles would apply, and (2) where a nuclear facility was to be solely owned by an applicant, the stricter standards of Section 2 of the Sherman Act would apply. Applicant, through selective quotations and unsupported assertions, has seriously misrepresented the position the Department took before the various Congressional committees which considered Section 105c.

Applicant further argues that after the House had passed the bill in reliance on the Department's assurances, the Department "sought to lay the groundwork for a broader interpretation by providing expansively worded letters to some Senators in the course of that body's deliberations" (Applicant's Brief, 17). Applicant does not cite any such letters, so it is difficult to respond to this charge. However, as we have previously stated, the Department's position was clear from the first.

Applicant ends its set of quotations with the comments of Senator Pastore and Congressman Hosmer which it states militate against our interpretation of Section 105c (Applicant's Brief, 20). We disagree. In essence, these two distinguished Members of Congress concluded that the language of the statute and the accompanying committee report are clear and speak for themselves and that the comments of Department of Justice spokesmen should

not be read as an authoritative interpretation of Section 105c. We completely agree and we have not attempted to argue otherwise.

3. Applicant Misinterprets the Aiken Dissent

The intricacies of the legislative history of Section 105c are exhaustively discussed in the Reply of the Department of Justice on Issues Other than Disqualification Rasied by Applicant's Answer of May 9, 1972, filed June 9, 1972, in this proceeding, which was incorporated by reference into the Department's Brief. However, an additional comment is necessitated by a serious misstatement by Applicant. Applicant states: "Senator Aiken, a JCAE member who advocated broad AEC review authority, conceded that the reported bill reflected the Committee's effort 'to cut back on the scope of the AEC considerations of antitrust issues'" (Applicant's Brief, 19). As was made clear in our earlier brief, Senator Aiken's dissenting views were never made part of the JCAE report because of an agreement that changes in the committee report would be made to obviate Senator Aiken's concern that the bill did cut back on the scope of review.

4. Expeditious Licensing of Nuclear Facilities and the Antitrust Review Process are Compatible Goals

Applicant argues that it is "inconceivable" (Applicant's Brief, 22) that Congress intended to adopt the scope of antitrust review proposed by the Department since it is "inherently

inconsistent with the Congressional mandate for an expeditious licensing process" (Applicant's Brief, 21). The Department agrees that the expeditious licensing of nuclear power plants was an important Congressional objective. However, we maintain that an expeditious licensing process is fully compatible with the scope of the antitrust review we have advocated in this case. This case, while excessively protracted, is one of first impression involving numerous complex issues of statutory interpretation. Once meaningful precedents have been set, the time required to try proceedings of this nature will be substantially shortened. It should also be remembered that the Midland Units are grandfathered under Section 105(c), and therefore their construction has not been delayed by antitrust review. Moreover, of the 56 applications on which the Department has rendered antitrust advice, in only one instance, the LP&L Waterford Unit, has antitrust review delayed construction.

5. Congress' Decision Not to Enact Proposed Legislation Relating to the Electric Power Industry has No Bearing on the Interpretation of Section 105(c)

Applicant argues that the failure of Congress to pass the Aiken-Kennedy Bill */ or the various proposed electric power reliability acts **/ is evidence of the intent of Congress

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*/ S. 2564, H.R. 13828, 90th Cong., 1st Sess.

**/ Proposed "Electric Power Reliability Act of 1967." H.R. 12322, 90th Congress, 1st Sess. (1967); S. 1071, H.R. 7016, H.R. 7052, H.R. 7188, H.R. 9557, all 91st Cong., 1st Sess. (1969).

that the scope of Section 105c be limited. This argument is fallacious in several respects. First, Applicant has not relied on legislative history, but has attempted to read the minds of the Members of Congress. Second, the proposed pieces of legislation in question were significantly different from Section 105c: The Aiken-Kennedy Bill did not require a finding of a situation inconsistent with the antitrust laws and the various electric power reliability proposals were grants of authority to the Federal Power Commission to compel various power transactions and had nothing to do with the licensing of nuclear facilities. The legislative context is extensively discussed in the Reply of the Department, filed June 9, 1972, in this proceeding.

B. The Holding and Subsequent Interpretation of the Waterford Memorandum Support the Department's Interpretation of the Scope of Section 105c

In assessing the implications of the Waterford Memorandum, Applicant has concentrated on isolated dicta and ignored the holding of the Memorandum. We believe that nothing in the holding of the Waterford Memorandum, nor in the subsequent Waterford Licensing Board decision interpreting that decision, is inconsistent with the Department's theory of this case. */

*/ Even accepting Applicant's reading of the Waterford Memorandum, the facts supporting its nexus argument are clearly erroneous. For example, Applicant states that "[n]either the size nor the feasibility of the units is dependent upon [the Company's] coordination arrangements" (Applicant's Brief, p.). This statement is in direct conflict with information supplied in Amendment No. 19 to Applicant's Application for Reactor Construction Permit and Operating License, filed March 22, 1971, with the AEC. In that [footnote continued on next page]

In the Waterford Memorandum, the Commission accepted its Licensing Board's recommendations that the petitions to intervene in the proceeding be granted and that an antitrust hearing be ordered to determine the validity of the allegations. The Licensing Board's recommendations were based on findings which included the following:

(1) Petitioners and Intervenors have alleged with sufficient particularity situations that may be inconsistent with the antitrust laws or the policies underlying those laws;

(2) There are nexi between activities under the proposed license and (a) said situation and (b) proposed relief. **/

The nexus and situation alleged in the petitions for intervention was that generation of power from the nuclear unit (an activity under the license) would strengthen the ability of Louisiana Power and Light Co. to maintain an existing antitrust-inconsistent situation. This allegation is similar in content to that alleged in the current proceeding.

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*/ [footnote continued from previous page] document Applicant states that the economic justification for the Midland facility is based upon "the annual load growth for the Michigan Electric Power Pool (Applicant and the Detroit Edison Company) . . ." (p. 3). Applicant further states on page 4 of that document that it plans generation and transmission additions to its system in conjunction with the Detroit Edison Company. (See also DJ No. 183, p. 4.)

**/ Louisiana Power and Light Company, Memorandum and Order of Board with respect to petitions to intervene in antitrust hearing, Docket No. 50-382A, April 24, 1973; 1.

The Waterford Licensing Board further clarified the elements necessary to make a showing of meaningful nexus in a subsequent Memorandum and Order. There the Board stated:

> In sum, the petitioners allege nexi between the situation alleged to be inconsistent with the antitrust laws and the activities under the Waterford 3 license. It is asserted that:
>
> (1) Applicant has or is attempting to acquire a monopoly of large low cost electrical generating units in the relevant geographic market;
>
> (2) Control over the bulk power transmission system in the relevant geographic market is fundamental to the creation or maintenance of such a monopoly, and Applicant has a monopoly of facilities for the transmission of bulk power and power for system coordination;
>
> (3) Applicant has or is attempting to acquire a monopoly in coordination reserve power sales;
>
> (4) Applicant alone or in combination with others attempted to hinder or prevent efforts by the petitioners to construct their own transmission systems for bulk power and coordinating power. This conduct of Applicant, whether legal or illegal, was intended to maintain its monopoly positions;
>
> (5) Construction of Waterford 3 would maintain or strengthen Applicant's monopoly position by providing Applicant with the ability to serve the increasing demands of present customers and the demands of new customers while foreclosing petitioners from the ability to serve these demands.
>
> (6) Construction of Waterford 3 would unlawfully assist Applicant in providing for its own coordination and reserve power needs without entering into agreements with intervenors.

> The Board finds that these allegations, if proved would establish the required nexus. These are, of course, matters to be proven; the Board has not determined whether these allegations are true. */

C. The Principles of Comity Between Administrative Agencies are Consistent with the Department's Interpretation of the Scope of Section 105c

Applicant argues that well-established principles of administrative comity and deference confirm its analysis as to the proper scope of Section 105c proceedings (Applicant's Brief, 24). The absence of jurisdictional conflict between various regulatory bodies with responsibilities in the electric power field is discussed in Section IV A of this brief in connection with the question of the applicability of the doctrine of primary jurisdiction to this proceeding. That discussion is equally applicable in this context.

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*/ Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit 3), AEC Docket No. 50-382A; Memorandum and Order of Board with Respect to Petitions to Intervene of Cajun Electric Power Cooperative, Inc.; Dow Chemical Company; and Louisiana Municipal Association Utilities Group, December 10, 1973; 7-9.

Congress clearly intended to relax the standard of certainty of contravention entailed in proving a violation of the antitrust laws. We believe, given the clear language of Section 105c and the committee report authoritatively interpreting Section 105c, that there is no reason to analyze the inconsistency standard of F.P.A.S.A. However, Applicant seriously misstates the situation when it says that in the administration of F.P.A.S.A. there is no support for the "inconsistency" test being less than a "violation" test.

The legislative history of the F.P.A.S.A., from which the "inconsistency" standard of the Atomic Energy Act was taken, */ makes clear that there too Congress sought to impose a lesser standard of proof than violation. The 1949 version of the F.P.A.S.A., which was in effect when the Atomic Energy Act of 1954 was passed, changed the F.P.A.S.A. test from "will violate" to "situation inconsistent." The House Committee Report states:

> Section 207. Applicability of antitrust laws
>
> This section requires any executive agency in beginning negotiations for the disposal of any plant or other property costing $1,000,000 or more to seek advice of the Attorney General to advise the executive agency whether the proposed disposition of the property would tend to create or maintain a situation inconsistent with the antitrust laws. The executive agency must assist the Attorney General by furnishing him any requisite information it may possess essential to the Attorney General's determination. This section also provides that nothing in the act shall modify or limit the applicability of the antitrust laws to persons who acquire property under the provisions of the act.

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*/ Applicant appears to concur in this proposition (Applicant's Brief, 39).

> In one respect the section is broader than a similar provision in the Surplus Property Act of 1944. It requires a determination by the Attorney General as to whether the proposed disposal would tend to create or maintain a situation inconsistent with the antitrust laws, while under existing law the determination is whether the proposed disposition will violate the antitrust laws. (H. Rpt. No. 670, 81st Cong., 1st Sess. (1949), p. 19; emphasis added).

Ignoring this clear expression by Congress of its intention to relax the standard and the similar expression made in connection with the 1970 amendments to the Atomic Energy Act, Applicant argues that the absence of a definitive statement by any judicial or administrative tribunal or by "one of the many agencies active under the 1949 Act" that inconsistency is less than violation should be interpreted to mean that inconsistency is the same standard as violation.

An argument based entirely on what was not said or not done is, on its face, misconceived. While it is true (to the best of our knowledge) that no court or agency, in interpretating the F.P.A.S.A., has held that inconsistency is less than violation, it is equally true that no court or agency has held that inconsistency is the same as violation.

However, it is clear that the Department of Justice, in performing its statutory role of advising whether a disposal of Federal property would tend to create or maintain a situation inconsistent with the antitrust laws, has not interpreted the standard as requiring a showing of violation. For example, a June 15, 1971, letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to William E. Casselman, II,

General Counsel, General Services Administration, providing the Attorney General's advice, states:

> The two contract provisions mentioned above appear to enhance the ability of Foote and Lithium Corp. to stabilize the market price of lithium over a very substantial future period.
>
> * * *
>
> In our view the oligopolistic positions of Foote and Lithium Corp. would be augmented by the proposed sale under the above-described conditions.
>
> For the foregoing reasons, we conclude that the proposed sale would tend to create or maintain a situation inconsistent with the antitrust laws.

This letter was furnished to Applicant upon its request during the discovery phase of this proceeding.

The Department in the above letter did not allege that either Foote or Lithium Corp. had violated the antitrust laws or that the sale of lithium would enable the buyers to violate the antitrust laws in the future. The letter stated only that the market position of these two firms should not be enhanced by the property disposition. The language of the letter clearly indicates that the Department, in making this determination, proceeded on an assumption that inconsistency has a different, distinct and significantly more expansive meaning than violation.

III

MICHIGAN LAW REGARDING ELECTRIC UTILITIES

Applicant throughout its Brief and its Proposed Findings presents an incomplete and often inaccurate picture of the extent to which Michigan state law prevents competition between electric utilities and of the nature of Michigan Public Service Commission regulation. For example, Applicant consistently cites Mich. Stat. Ann. 22.13(6) to support its contention that the Michigan Public Service Commission has broad, pervasive regulatory authority:

> The authority and responsibilities of the Michigan Public Service Commission in the retail market are even broader [than the FPC's wholesale regulation] . . . . The MPSC is granted broad authority to regulate all 'matters pertaining to the formation, operation or direction of . . . public utilities.' (Mich. Stat. Ann. 22.13(6); Applicant's Brief, 32) */

In fact, Mich. Stat. Ann. 22.13(6) has been construed as granting the MPSC no specific power or authority and is therefore not properly cited as a basis for alleged pervasive regulation. According to the Michigan Supreme Court:

> PA 1939, No. 3 [Mich. Stat. Ann. 22.13(6)] has been before our Court several times, and in each instance has been held to be a mere outline of jurisdiction vesting the Commission with no specific powers . . . . Northville Coach Lines, Inc. v. City of Detroit, 379 Mich. 317, 330; 150 N.W. 772 (1967). (emphasis added)

Since the Department views Michigan law as of only marginal relevance to this proceeding, we will not respond in detail to

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*/ See also Applicant's Brief, 114, 115, 163, and 167.

Applicant's mischaracterizations of that law in this Brief. Rather, we have attached as Appendix A hereto a memorandum outlining the relevant Michigan law. Where pertinent in the remainder of this Brief, we will refer the Board to the appropriate sections of Appendix A.

IV

THE IMPACT OF STATE AND FEDERAL REGULATION

Applicant, while paying lip service to the clear holding of United States v. Otter Tail Power Co., 410 U.S. 366 (1973), suggests that pervasive governmental regulation severely limits application of the antitrust laws, and thus Section 105c of the Atomic Energy Act, to the electric power industry. This pervasive regulation theme, which prevades Applicant's Brief, finds expression in what are essentially four separate propositions.

First, Applicant suggests that the "nexus" requirement under Section 105(c) is somehow analogous to the doctrine of primary jurisdiction. It therefore would exclude consideration of factual issues which allegedly are within the regulatory authority of either the Federal Power Commission (FPC) or the Michigan Public Service Commission (MPSC). Second, it urges that "competition is not always desirable" is an established antitrust principle which should guide and restrain the AEC's application and enforcement of Section 105c. Third, Applicant charges state and Federal regulation with responsibility for existing impediments to competition and concludes that pervasive regulation immunizes its conduct and market share from antitrust scrutiny. */ And fourth, it proposes that pervasive regulation

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*/ As a subpart of this proposition, Applicant postulates erroneously that regulation denies it the power to fix price or exclude competitors and thus it cannot be found to have monopoly power.

limit the relief in this proceeding to access to the Midland Units as "the outer boundary" (Applicant's Brief, 222). */

We believe these propositions are erroneous on their face and were refuted by the Department's Brief. However, to insure that the Board entertains no doubt as to the Department's position in this regard, we will discuss Applicant's propositions briefly herein.

A. The Doctrine of Primary Jurisdiction is Inapplicable to This Proceeding

Applicant appears to contend that the "nexus" issue in this proceeding, i.e., whether the activities under the Midland license will maintain a situation inconsistent with the antitrust laws, must, at least in part, be determined by the doctrine of primary jurisdiction. At one point it seems to argue that "nexus" and primary jurisdiction are indistinguishable. **/ Reduced to essentials, however, Applicant's argument seems to be that the other parties to this proceeding (apparently including the Department and the AEC Staff) should look for a more appropriate forum in which to litigate the antitrust issues raised in this case. ***/

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*/ This issue has been analyzed in detail at pp. 228-238 of the Department's Brief and will not be discussed herein.

**/ "Whether described in terms of 'nexus,' 'primary jurisdiction,' or administrative comity and 'deference,' these principles are applied . . . " (Applicant's Brief, 24-25).

***/ "Antitrust issues would necessarily be considered in such a proceeding [before the Federal Power Commission]. Comparable opportunities to file complaints and raise antitrust issues exist at the MPSC" (Applicant's Brief, 34).

Even assuming arguendo that the FPC and/or the MPSC provide a forum to which a party could address complaints regarding Applicant's market power and anticompetitive conduct, Applicant's attempt to meld two distinct and unrelated legal concepts is misconceived.

In the first place, there is no issue of primary jurisdiction in this proceeding, for no agency except the Atomic Energy Commission has the specific statutory authority to determine whether the activities under the Midland licenses would create or maintain a situation inconsistent with the antitrust laws and to remedy any such situation by attaching appropriate conditions to Applicant's licenses if issued.

Applicant's reliance on Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973), is factually and legally inapplicable. Ricci involved, inter alia, a claim that plaintiff's membership in the Mercantile Exchange had been transferred to a third party in violation of both the rules of the Exchange and the Exchange Act itself. It was this factual issue which the court referred to the Commission, not the issue of whether the transfer was in violation of the Sherman Act nor whether the Exchange Act immunized the conduct complained of from antitrust sanction.

Thus Ricci stands merely for the proposition that courts will stay their hand pending agency adjudication if: (1) the court determines that maintenance of an antitrust action may be incompatible with the regulatory scheme; (2) some facet of the dispute is within the agency's jurisdiction, and (3) agency

adjudication promises to materially assist judicial resolution of the antitrust immunity question (409 U.S. at 302). Conversely, if these three criteria are not present, a regulatory agency may be required to await judicial action. California v. FPC, 369 U.S. 482 (1962). Moreover, the doctrine of primary jurisdiction does not come into play if the transaction has already been considered by the regulatory agency prior to the commencement of the antitrust action. United States v. Philadelphia National Bank, 374 U.S. 321, 353-354.

In the present case, there is no allegation that Applicant has acted in violation of the Federal Power Act, Michigan statutes or regulations of the MPSC. Thus, there is no issue on which the AEC could defer to another regulatory agency.

If Applicant's primary jurisdiction proposition is in reality an argument that, since the FPC or the MPSC has reviewed certain of Applicant's operating practices and contracts, the AEC is precluded from considering these practices and contracts as part of its Section 105c determination, Applicant is clearly in error. City of Lafayette v. S.E.C., 454 F.2d 941 (D.C. Cir. 1971), cited extensively by Applicant, provides no support for its conclusion.

In City of Lafayette, certain cities sought to require both the FPC and the Securities and Exchange Commission to consider antitrust allegations in the course of approving the proposed issuance of securities by Gulf States Utilities Co.

The court held that the particular antitrust allegations had a reasonable relationship to the FPC's exercise of its regulatory authority but no such relationship to the SEC's exercise of its authority, which is primarily concerned with utilities' organizational structure rather than operating practices (454 F.2d at 955-956). Contrary to the impression given by Applicant, the court did not hold that the SEC would be foreclosed from considering such an issue merely because the FPC was required to exercise jurisdiction over it.

> [W]e leave open the resolution appropriate if in a particular case the operations assailed are of such a nature as to be equivalent, in significance and consequence, to structural affiliation, or if the purpose of the utility's sale of securities is otherwise shown to have a reasonable nexus to matters within the SEC's jurisdiction under other provisions. (454 F.2d at 956)

The court's test was affirmative: Is there sufficient nexus between the SEC's regulatory authority and the conduct complained of? The court did not even suggest that FPC exercise of jurisdiction might preclude the SEC from also considering antitrust issues in an appropriate case.

Moreover, the alleged jurisdictional conflict in the present case between the FPC and the AEC presents an entirely different issue. The FPC, while required to consider antitrust issues as elements of its public interest standard (Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973)), has no jurisdiction to enforce the antitrust laws. Northern Natural Gas Co. v. FPC, 399 F.2d 953, 960 (D.C. Cir. 1968). The FPC interprets those

laws only in the course of accommodating antitrust policy into its regulatory scheme (Gulf States, supra); and a decision by it based solely on the application of antitrust principles would be of doubtful validity. FCC v. RCA Communications, Inc., 346 U.S. 88 (1953); see also Otter Tail, supra, at 373.

On the other hand, Section 105c, in requiring a finding whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws, specifically adopts the antitrust standard. It does not require the AEC and the Board to balance the antitrust policy of competition with some other regulatory goal the AEC is charged with attaining under the Atomic Energy Act. */ The Board must review the evidence in this proceeding under the standard of Section 105c, not that of the Federal Power Act, nor that of the Michigan statutes. It cannot escape this duty by deferring to the FPC or MPSC's evaluation of, or acquiscense in, Applicant's conduct under their particular regulatory schemes. **/

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*/ The only balancing contemplated by the Act comes into play only after the Commission has made adverse antitrust findings. If a particular "situation inconsistent with the antitrust laws" were not remediable by license conditions, the Commission might find in a particular case that the need for power outweighs the competitive reasons for denying a license.

**/ It is interesting to note Applicant's varying characterization of the standard which regulatory agencies apply. In an effort to support its asserted "well-established" principle that competition is not always desirable (Applicant's Brief, 43-50; see discussion, infra), Applicant argues that the antitrust policy of competition is not in the public interest. Yet in urging that "administrative law principles" require its adversaries to seek a forum other than the AEC, Applicant attempts to cloak the FPC and the MPSC in the mantle of an antitrust court.

The Supreme Court's recent decision in Otter Tail Power Co., v. United States, 410 U.S. (1973), makes this point crystal clear. After stating a general proposition that "activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws," 410 U.S. at 372, the Court goes on to consider Otter Tail's specific immunity claims. In rejecting Otter Tail's claim that its refusals to deal should be immunized from anti-trust prosecution becasue the FPC has authority to compel interconnections under Section 202(b) of the Federal Power Act, the Court said:

> The standard which governs [the FPC's] decision [to order interconnection] is whether such action is 'necessary or appropriate in the public interest.' Although antitrust considerations may be relevant, they are not determinative.
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> * * *
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> Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations. 410 U.S. at 373-375.

In other words, the mere fact that the FPC has authority to grant similar or identical relief to that sought in an antitrust proceeding (or in this AEC proceeding) neither precludes an antitrust court's (or this Board's) examination of relevant antitrust issues nor denies the court (or the Board) the power to grant the appropriate relief.

B. There is No Antitrust Principle, Established or Otherwise, that Competition is Not Necessarily Desirable in Regulated Industries

Applicant apparently contends that Congress, in enacting the antitrust review provisions of Section 105c, had in mind that the AEC should apply a "well-established antitrust policy" that competition is not necessarily desirable (Applicant's Brief, 43-50). The argument distorts both antitrust policy and the clear Congressional mandate underlying Section 105c. Competition is the fundamental national economic policy and that which clearly underlies the antitrust laws. */ The recognition that antitrust must give way to regulation in some circumstances--i.e., where a direct and irreconcilable conflict between the two schemes exists, Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963) -- is not an antitrust principle; rather it is a sharply limited exception to the application of antitrust principles.

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*/ The underlying policies of the antitrust laws have been variously defined by the Supreme Court. In United States v. Southeastern Underwriters Association, 322 U.S. 533, 439 (1944), the Court said: "The purpose was . . . to make . . . a competitive business economy." Standard Oil Co. v. F.T.C., 340 U.S. 231, 248-249 (1951), noted: "The heart of our national economic policy has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent." Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953), states: "Basic to the faith that a free economy best promotes the public welfare is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the nation's resources and thus direct the course its economic development will take."

A review of the cases Applicant cites as a basis for this alleged "national antitrust objective" */ reveals that the courts were merely directing the Federal Communications Commission, the regulatory agency involved, to reconcile fundamental regulatory purpose with the antitrust laws. The statute involved there -- the part of the Federal Communications Act regulating communications common carriers -- imposes strict controls on entry and exit and requires new applicants to demonstrate that their proposed service is required by the "public convenience and necessity." The courts have held that in deciding whether to create new competition by the issuance of a certificate of public convenience and necessity, the FCC cannot axiomatically equate more competition with the public interest. Rather, it is required to make a regulatory decision after balancing the specific benefits of increased competition against the public benefit, in any, that would result from selection of another alternative providing for less competition. No such balancing is required of this Board because the AEC, in its regulation of the development and use of atomic energy by the electric power industry, has no fundamental regulatory goal which conflicts with the application of the basic national economic policy of competition. On the contrary,

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*/ F. C. C. v. RCA Communications, Inc., 346 U.S. 86 (1953); Hawaiian Telephone Co. v. F. C. C., 498 F.2d 771 (D.C. Cir. 1974).

the AEC's regulatory scheme specifically directs the Board to make an antitrust finding -- nothing more, nothing less. The issue is whether the activities under the Midland licenses would create or maintain a situation inconsistent with the antitrust laws.

Applicant has also contended that its alleged antitrust principle -- that "competition is not necessarily desirable -- has received Congressional recognition. This is supposedly reflected, first, by a quote from Representative Rayburn in the floor debates regarding the Rural Electrification Act (Applicant's Brief, 45-46), and second, by the elimination of the "wheeling" provision from Part II of the Federal Power Act. */

With respect to its first allegation of Congressional recognition, Applicant apparently failed to notice that, subsequent to Mr. Rayburn's statement, a proposed amendment to the Rural Electrification Act, which would have in fact severely limited rural electric cooperatives' ability to compete was rejected by an overwhelming record vote in the Senate. **/ Thus, Rep. Rayburn's statement of intention notwithstanding, the legislative history of the Rural Electrification

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*/ Additionally, Applicant cites the limitations placed on the Tennessee Valley Authority in 1959 (Applicant's Brief, 40-42).

**/ This amendment, introduced by Senator King, would have limited REA loans to serve only those "for whom such service may not be furnished or made available by competing private enterprise." Section 4 of "Amendment in the Nature of a Substitute." Cong. Rec., pp. 3229-3230 (March 4, 1936); rejected, Cong. Rec., p. 3317 (March 5, 1936). See also A Giant Step, Clyde T. Ellis, Random House (1966), p. 50.

Act does not support Congressional recognition of Applicant's "well-established antitrust principle."

Applicant's reference to the deletion of FPC authority to compel wheeling from Part II of the Federal Power Act as Congressional recognition of its asserted well-established antitrust principle" is also erroneous. Modification of the Act to exclude the common carrier provision */ reflects Congress' determination that pervasive regulation of the electric utility industry was not desirable. With respect to the common carrier provision, the Senate Report states:

> While imposition of these duties may ultimately be found to be desirable, the committee does not think they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in the new section 202(a) (formerly section 203(a)), for the first Federal effort in this direction. (S. Rep. No. 621, 74th Cong., 1st Sess.; emphasis added).

This Report indicates further that Section 203(b) of the initial bill (empowering the FPC on its own motion to direct a utility to extend its facilities, to interconnect with others, and to wheel power) had been eliminated so that these matters also would be "left to the voluntary action of the utilities." Id; Otter Tail, 410 U.S. at 375.

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*/ Section 202(a) of the initial bill would have made utilities common carriers by requiring them to sell or wheel electric energy to any person on reasonable request.

Finally in this regard, Congress' treatment of the electric power industry has evidenced a consistent view that the basic economic policy of competition rather than regulation should apply thereto to the extent possible. In 1914, for example, when Congress was considering the legislation which became the Clayton Act, representatives of major privately owned electric utilities urged that their companies be exempted from the new law. See Hearings on Trust Legislation before the House Committee on the Judiciary, 63rd Cong. 2d Sess., p. 1825. No such exemption was adopted. Six years later, Congress provided in Section 10(h) of the Water Power Act of 1920, 41 Stat. 1068 (now Section 10(h) of the Federal Power Act, 16 U.S.C. 803(h)), that all Federal licenses of hydroelectric plants must contain a condition prohibiting agreements and combinations to restrain trade. Congress' repeated concern for the preservation of competition in the electric power industry is also manifested in the legislative history of the Public Utility Act of 1935, 49 Stat. 803 (Public Utility Holding Company Act and Part II of the Federal Power Act). After reviewing two exhaustive studies of the structural and competitive conditions in the electric power industry, */ Congress, in the Holding Company Act, declared that "restraint of free and independent competition" was one of the evils

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*/ Report of the President's National Power Committee, H.Doc. 137, 74th Cong. 1st Sess; and Utility Corporations Report, Federal Trade Commission, S. Doc. No. 92, 70th Cong. 1st Sess.

affecting relationships among public utility companies. 15 U.S.C. 79a(b)(2).

The above discussion indicates that, even if Congress had not enacted Section 105c of the Atomic Energy Act, there would be no basis for asserting any "well-established anti-trust principle" regarding the possible undesirability of competition. In light of Congress' clear procompetitive mandate in enacting Section 105c, Applicant's contention is even less tenable.

Finally, it should be noted that the Department's case here does not rest upon any simplistic notion that there should be unlimited competition in the electric utility industry. We recognize that some kinds of retail competition would be wasteful. Our antitrust case examines the effects of applicant's conduct upon the competition which does exist or could reasonably be expected to exist within the framework of valid state and Federal regulation. The AEC cannot, and is not asked to, overturn any state or Federal regulation; the Department's relief seeks merely to supplement regulation by preventing Applicant's private misuse of monopoly power which regulation does not reach. New competition and new competitors which may result from appropriate AEC license conditions, will, of course, be subject to state and Federal regulation.

C. State and Federal Regulation Neither Immunizes Applicant's Conduct nor Prevents Its Exercise of Monopoly Power

An important contention of Applicant is that FPC and MPSC regulation of its affairs prevents it from controlling prices or excluding competitors; and, therefore, it cannot be held to have monopoly power (Applicant's Brief, 125). Later in its Brief Applicant takes the somewhat inconsistent position that any of its practices which have had the effect of controlling prices or excluding competitors are immunized by the doctrine of Parker v. Brown, 317 U.S. 341 (1943) (Applicant's Brief, 160-171). These two related contentions are merely an oblique attempt to revive the proposition, clearly laid to rest in Otter Tail, */ that pervasive regulation operates to repeal

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*/ There is nothing in the legislative history [of the Federal Power Act] which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible with the public interest.

* * *

It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws (410 U.S. at 374-375).

application of the antitrust laws to the electric power industry.

1. The Power to Control Price and Exclude Competitors

Applicant's claim that state and Federal regulation of its activities negates any possibility of monopoly power is premised on the assumption that, between the jurisdiction of the FPC and MPSC, Applicant exercises no control over the prices at which it sells electricity and no control over the nature of its relationships with the small systems in its area. While the terms and conditions of Applicant's retail and wholesale power transactions are subject to regulatory scrutiny, and certain of its regional power exchange activities are subject to the jurisdiction of the FPC, these facts do not mean that Applicant lacks monopoly power.

First, by focusing on the terms and conditions of its own power sales, Applicant obscures the fact that its relationships with the small systems in its area substantially control the cost of power to these systems. For example, the interconnection agreement between Applicant and the City of Holland requires the city to maintain generating reserves amounting to 45-48% of its peak load, while Applicant, as a member of the Michigan Pool, maintains only 15-20% reserves. If Applicant's agreement with Holland were on an equal-percentage-reserves, or Gainesville basis, Holland's required reserves

would be reduced 21 mw; and it could market 21 mw of additional firm power (Slemmer, cross, Tr. 8983-8984). Thus, Applicant's ability to dictate the terms of its interconnections with small systems gives it significant power to control the cost of electricity to these small systems and, necessarily, the price at which these systems can sell electricity.

The FPC, of course, has authority to order an electric utility to enter into a reserve sharing agreement with another Section 202(b) of the Federal Power Act, 16 U.S.C. 824a(b). It recently approved the policy of reserve sharing on equal-percentage principles by compelling the Florida Power Corporation to interconnect and share reserves on that basis with the City of Gainesville (Gainesville Utilities Department v. Florida Power Corporation, 40 F.P.C. 1227 (1968); and the Supreme Court upheld its jurisdiction to do so. Gainesville Utilities Department v. Florida Power Corporation, 402 U.S. 515 (1971). Notwithstanding the Gainesville precedent, Applicant adheres to its private decision to refuse to enter such arrangements with the small systems in its area. For the municipal and cooperative intervenors in this proceeding, to obtain effective Gainesville reserve-sharing relief from the FPC, would require them to undertake a protracted proceeding before that agency. To require this would be manifestly unjust in view of the AEC's jurisdiction to grant this relief and the substantial time and effort they, as well as the Department, have already expended in this proceeding.

The FPC, then, could mitigate Applicant's monopoly power somewhat by ordering it to share reserves on Gainesville principles with the small systems in its area. Its authority under Section 202(b) of the Federal Power Act, however, is limited in that it cannot order Applicant to enter into coordinating transactions with other utilities which would require Applicant to increase its generating capacity. This provision precludes the FPC from ordering the type of coordination known as "coordinated development" in which the participating utilities pool load growth to justify installation of larger generating units and enhance their ability to sell low-cost power.

Mr. Helfman's studies demonstrate the increased power supply costs to the "coordinated intervenor group" that result from Applicant's refusal to coordinate development with these systems. DJ No. 202 shows a sixteen-year total cost of $856,102,000 to the coordinated intervenors under their present arrangements with Applicant (Case IB) versus a total cost of $761,464,000 assuming their coordinated development with Applicant (Case IIIA Alternative). In other words, if Applicant continues to refuse to coordinate development on reasonable terms, these particular small systems may expect to incur nearly $85 million of unnecessary expense over the next 16 years.

Second, there is little effective regulatory restraint on Applicant's power to exclude competitors. In addition to its ability to exclude competitors that flows from dictating the power supply costs of the small systems and thereby controlling the economics of entry or continued operation just discussed, Applicant may exclude competitors by merely refusing to deal with them. Despite the claims Applicant makes for Section 202(b) of the Federal Power Act (Applicant's Brief, 120-122) and the MPSC authority under Mich. Stat. Ann. 22.156 (Applicant's Brief, 122-123), Applicant may not be required to supply power to a new retail distribution system in all instances.

In the first place, the MPSC has never ordered delivery of power for retail distribution under Mich. Stat. Ann. 22.156; and would probably lack the constitutional authority to do so. (See Appendix A to this Brief, 25-27.)

Second, the authority of the FPC to compel wholesale services to a new or existing utility is limited by the language of Section 202(b) discussed above. Where serving a new wholesale load would require Applicant to increase its generating capacity, Section 202(b) would not permit the FPC to order such service.

Further, under Section 202(b) the entity desiring to interconnect and purchase power at wholesale must be a "person engaged in the transmission or sale of electric energy." Whether the FPC can order Applicant to interconnect

with and supply wholesale power to a new entrant not already so engaged is a matter still in doubt. */

2. The Doctrine of Parker v. Brown

The concept of antitrust immunity for state action was enunciated in Parker v. Brown, 317 U.S. 341 (1943), in which the Supreme Court held that California's Agricultural Prorate Act, which contained restrictions on terms of sale and provided for the setting of a minimum price at which producers could legally sell, did not contravene the antitrust laws. The basis for the Court's holding is that the Sherman Act was directed at private action and was not intended to restrain "a state or its officers or agents from activities directed by its legislature" in the exercise of its police powers. 317 U.S. at 350-351. The Court, however, was careful to find, after lengthy discussion, that the California statute harmonized with and furthered Federal policy on the same subject, as expressed in the Agricultural Adjustment Act. 317 U.S. at 352-368. Absent this Federal statute derogating from antitrust policy, California's action would have been

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*/ In Village of Elbow Lake v. Otter Tail Power Co., 40 FPC 1262, aff'd, Otter Tail Power Co. v. Federal Power Commission, 429 F.2d 232 (8th Cir. 1970), cert. den., 401 U.S. 947 (1970), Otter Tail contended before the Commission that Elbow Lake lacked standing under this criterion. The issue became moot, however, since the village became active in generation, transmission and sale of electric power during the pendency of the proceeding.

constitutionally invalid; its validity depended upon Congress' antitrust immunity. The state action must also be valid, and it cannot be valid when in contravention of Federal law or when Congress has occupied a legislative field. Hecht v. Pro-Football, Inc., 444 F.2d 931, 935 (D.C. Cir. 1971). Moreover, the action immunized must be directed, commanded, or imposed by the state legislature or regulatory agency. United States v. Pacific Southwest Airlines, 358 F. Supp. 1224 (1973). Even Washington Gas & Light Co. v. Virginia Electric and Power Co., 438 F.2d 248 (4th Cir. 1971), and Gas Light Co. of Columbus v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), cert. den., 404 U.S. 1062 (1972), reh. den. 405 U.S. 969 (1972), both of which have been criticized as "an unwarranted hyperextension of Parker," */ involved conduct which the respective state commissions were authorized to compel on their own motion. Therefore, the doctrine of Parker v. Brown, even in its most expansive interpretation, will immunize from antitrust sanction only action which is approved by the state and which the state has the power to compel. **/

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*/ International T & T Corp. v. General Telephone & Electric Corp., 351 F. Supp. 1153, 1203 (D. Hawaii, 1972).

**/ The Department does not concur in this expansive reading of Parker, as explained in Appendix A of the Department's Prehearing Brief. However, given the limited nature of relevant Michigan regulation, the Parker doctrine does not undercut our case, and a restatement of our position on the doctrine in this brief is unnecessary.

In this proceeding, the very activities with which the Department is most concerned -- Applicant's refusals to coordinate with the neighboring small utilities with which it competes -- necessarily involve wholesale sales of electric energy in interstate commerce, and such sales have since 1927 been held a forbidden subject for state regulation because of the Commerce Clause of the Constitution. Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927). It was to fill the jurisdictional gap resulting from Attleboro that Congress passed the Federal Power Act in 1935. As the Supreme Court subsequently stated, "[w]hat Congress did was to adopt the test developed in the Attleboro line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate customers.'" Federal Power Commission v. Southern California Edison Co., 376 U.S. 205, 214 (1964). With no jurisdiction in the states to regulate wholesale interstate sales (and the Department is not aware of any efforts by Michigan to regulate them) there clearly can be no antitrust immunity resulting from such state regulation. Cf. Gas Light Co. of Columbus v. Georgia Power Company, 440 F.2d 1135(5th Cir. 1971); Washington Gas Light Co. v. Virginia Electric and Power Co., 438 F.2d (4th Cir. 1971).

Applicant appears to argue that the Parker v. Brown doctrine applies to immunize conduct subject to Federal regulatory authority from the antitrust laws (Applicant's Brief, 169). A long line of cases dealing with the relationship between Federal regulation and antitrust casts doubt on this assumption. For example, the Supreme Court, in California v. FPC, 369 U.S. 482 (1962), held that FPC approval of the merger of El Paso Natural Gas and Northwest Pipeline Corp. conferred no antitrust immunity and subsequently, in United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964), found the merger violative of Section 7 and ordered divestiture "without delay." Id. at 662. */

Even assuming arguendo that the FPC's regulatory scheme gives it the mantle of a state for Parker v. Brown purposes, only those activities of Applicant which have been directed by the FPC could conceivably be immunized. **/ This, we submit, affords Applicant no greater immunity from antitrust scrutiny than the traditional rules governing the relationship between Federal regulation and antitrust discussed above.

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*/ See also, United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

**/ United States v. Pacific Southwest Airlines, supra.

V

APPLICANT'S ASSERTED RELEVANT MARKETS ARE CONTRARY TO ESTABLISHED LEGAL PRINCIPLES AND HAVE NO BASIS IN FACT

Applicant's proposed definitions of the markets relevant in this proceeding do not reflect legal or economic realities of Michigan's electric power industry, but rather obscure its clear dominance in the relevant markets. Thus, Applicant has sliced a relevant market into irrelevant submarkets ("open," "closed," "perpetually closed" and "long-term"), and where an examination of separate markets would reflect realistically Applicant's monopoly, it has attempted to combine a final-product market (wholesale firm power) and a factor market (regional power exchange services) into a meaningless aggregate.

However, rather than attempt to refute Applicant's market analysis assertions point by point, we rely on our position set forth at pages 61 through 87 of the Department's Brief and will limit ourselves here to a few observations.

A. Retail Market

Applicant itself admits that a new municipal electric system could "theoretically" be formed to replace Applicant in its so-called "closed" markets, but contends, contrary to the clear concern of its chief executive officer, Mr. Aymond, */

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*/ Aymond, cross, Tr. 6060-6061. See Department's Brief, 48-50.

that such potential competition ripening into actual competition is unlikely (Applicant's Brief, 105-111). While the likelihood or unlikelihood of actual competition taking place requires a certain amount of forecasting, to deem Applicant's "closed" markets as not relevant to this proceeding would be to ignore the "edge" or "wings" effect enunciated in United States v. Penn Olin Chemical Co., 375 U.S. 158, 174 (1964), and approved subsequently in United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); (see Department's Brief, 207-212).

Moreover, Applicant's fracturing of the retail market draws no support from United States v. Marine Bancorporation, 42 U.S.L.W. 5210 (Supreme Court; June 25, 1974). In that case, the Government's assertion that the acquisition of a Spokane banking company by National Bank of Commerce (headquartered in Seattle) would reduce potential competition was rejected by the District Court for Western Washington, which held, inter alia, that Washington state law prevented competition between the acquiring and acquired bank. The Washington statutory scheme prohibits absolutely any bank from establishing a branch in any city or town -- other than its principal place of business -- in which another bank is already transacting business. Also, multi-bank holding companies are prohibited since under Washington state law no corporation may own more than 25% of the capital stock of more than one

bank. */ The Supreme Court, although upholding the District Court's determination that Washington state law precluded meaningful entry by National Bank of Commerce into the Spokane, Washington, market, stated: "If regulatory restraints are not determinative, courts should consider the factors that are pertinent to any potential competition case . . . ." (42 U.S.L.W. at 5222)

Michigan law relating to entry by municipal corporations into the electric utility business is clearly distinguishable from the Washington statutory scheme and cannot, therefore, be viewed as "determinative." The authority of the Michigan municipality to acquire an electric utility, while subject to certain procedural prerequisites, is essentially unlimited. If the electors approve, a municipality may enter the electric utility business by refusing to renew the franchise of the serving utility, by duplicating the facilities of the serving utility and entering into competition with it, or by condemning the franchise and facilities of the serving utility (see Appendix A, S-16).

Thus, the argument that Michigan law restricts entry by municipalities into the electric utility business is in reality an argument that it is unlikely that the voters of a particular city will approve entry; it is unlikely that a

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*/ Also, there were statutes restricting the ability of a bank to expand by acquiring a small existing bank and branching from it.

jury will find condemnation necessary, etc. Even were a municipality shown to be unlikely to accomplish the necessary legal steps to enter the electric business, the cause would not be the legal requirements themselves but rather the economics of the proposed entry as perceived by the city council, the electors or the jurors. In this regard, it should be noted that Applicant currently has -- and if its Midland licenses are not appropriately conditioned, will continue to have -- the ability to dictate the economics of municipal entry (see Department's Brief, 98-122). Accepting Applicant's market definitions and the conclusions it draws from them would allow Applicant to interpose its own anticompetitive conduct as a defense for maintenance of its monopoly position.

B. Wholesale Market

Related to Applicant's theory of "closed" and "open" markets is its attempt to relegate its own wholesale generating requirements to the status of a nonmarket. (Applicant's Brief, 92-97) */ This, when taken together with its allegedly irrelevant "closed" retail markets, leads to rather interesting if anomalous results. The net effect of Applicant's analysis, if accepted, is that despite dominating both the

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*/ "[T]he market for Consumers Power's bulk power needs must be excluded from the relevant bulk power market in this proceeding." (Applicant's Brief, 97)

wholesale and retail markets, Applicant has no relevant market power. */

The cases cited by Applicant as precedent for excluding its "in house" requirements from the wholesale market are neither on point nor supportive of Applicant's position. All analyze, for purposes of applying Section 7 of the Clayton Act, the impact of an acquisition or series of acquisitions **/ and involve a determination of submarkets within a more broadly defined relevant market.

It is therefore not surprising that, in determining the competitive impact of Microdot's acquisition of Elco, both of which firms manufactured and sold metal plate connectors exclusively on the open market, "in house" production of other companies was excluded. The in-house producers neither bought

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*/ This reasoning, followed to its logical conclusion, would result in the anomalous situation that if Applicant perfected its monopoly by acquiring every electric utility system in Michigan -- including Detroit Edison, Indiana & Michigan Electric Co., and Michigan Power Co. -- it could not be held to have monopolized because there would no longer be any relevant market in which it could have monopoly power.

**/ See Applicant's Brief, 95-97. U. S. v. International Telephone & Telegraph Corp., 324 F. Supp. 19 (D. Conn. 1970), is somewhat unique and more on point in that the Government sought to demonstrate Grinnell's "dominance" as a part of an "aggregate concentration" theory under Section 7. The analysis was therefore somewhat analogous to that under Section 2. However, even accepting the dicta cited by Applicant (Applicant's Brief, 95-96 n. 42) as a holding that sprinklers manufactured and installed by Grinnell were not in the same market as sales of other sprinklers, this did not mean that Grinnell's sprinkler manufacturing capacity was irrelevant. Rather, the Court looked to the impact in the final market, "the installation of automatic sprinkler systems." 324 F. Supp. at 27.

nor sold conductors and there was no reliable information as to their identity or the amount of their production. The principal impact of the acquisition would occur and could be measured in the submarket consisting of the manufacturers which sold on the open market. Elco Corp. v. Microdot, Inc., 360 F. Supp. 741, 748 n. 3 (D. Del. 1973) (Applicant's Brief, 96 n. 42).

International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 351 F. Supp. 1153 (D. Haw. 1972) (Applicant's Brief, 95), involved a suit by IT&T under Section 7 to determine the legality of various GT&E acquisitions. The court found, inter alia, that, as a result of a 1956 consent decree, Western Electric's (WE) vertical relationship with the AT&T (Bell) system was virtually "impregnable" and had the effect of "sever[ing] Bell's telecommunications equipment business from the broad market and establish[ing] the independent operating companies as a remaining and realistically distinct submarket." 351 F. Supp. at 1177 (emphasis added).

The plaintiff, IT&T, the defendant, GT&E, and the acquired companies were all independent operating companies. The court was not concerned with the market position of the Bell system but rather focused on non-Bell or independent companies. It was within this submarket that the GT&E acquisitions would have an impact and the submarket was thus an appropriate one in which to measure the competitive consequences of the acquisitions.

Applicant's reading of the IT&T-GT&E case would seem to dictate that if AT&T (the Bell system) were to merge with GT&E, the Bell market share must be ignored in evaluating the marger's impact on competition. Applied to market analysis in this proceeding, at most IT&T v. GT&E supports the exclusion of Detroit Edison's self-generation to meet its bulk power requirements from the relevant market. It in no way supports Applicant's contention that its generation to meet its own power requirements should be excluded when measuring its wholesale monopoly power.

Moreover, the rationale for this market-splitting disappears when its factual underpinning is examined. The stated basis for excluding Applicant's self-generation from the relevant market is "that Consumers Power Company plans its system in contemplation of generating almost all of its needs." (Applicant's Brief, 93) This "contemplation," however, is not substantiated by the facts. Applicant does not generate "almost all of its needs." In 1973, for example, of a total power cost of approximately $205 million, purchase power, including net interchange, accounted for over $69 million (DJ 228A, p. E-16). Thus, approximately 34% of Applicant's power needs (in terms of cost) in 1973 came from other than its own generation.

Finally, it must be remembered that Applicant's wholesale power requirements are the power supply for its retail

loads. As pointed out above, Applicant faces substantial potential competition by way of municipal entry into its allegedly "closed" retail areas, and concomitant with this competition is the possibility that Applicant will be replaced as both the wholesale and retail supplier to its present loads. Thus, Applicant's attempted exclusion of its own power requirements from the wholesale market is legally unsound and unsupported by the facts.

C. Regional Power Exchange Market

Applicant, in attempting to combine the regional power exchange market and the wholesale firm power market into one market, sets forth a rather novel legal analysis. It first states the general proposition that a market should consist of all products which are reasonably interchangeable. It then cites (1) a series of cases that have held products to be within one market despite differences in price, (2) another series of cases combining products despite differing physical characteristics, and (3) yet another series of cases holding products to be a single market even though some or all of them may be unsuitable for the needs of a particular buyer, etc. (Applicant's Brief, 82-86). From this Applicant apparently concludes that different products (wholesale firm power and regional power exchange service) can only be analyzed as part of a single product market -- despite

differences in price and physical characteristics, and despite the fact that these products are not reasonably interchangeable over the long term for electric systems.

A legal analysis citing cases where products have been placed in the same market despite a difference between them in price, physical character, or buyer identity and concluding that products with all of these differences comprise a single product market turns the search for a relevant market on its head.

Moreover, if it is germane to cite a series of cases holding products with certain differences as being one relevant market, it is equally germane to list a series of cases holding products with apparent similarities to be distinct markets. This the Department is prepared to do, */ although we believe such an undertaking would serve no useful purpose. The delineation of relevant markets is a factual question requiring a case by case determination. As the court said in Diamond International Corp. v. Walterhoefer, 289 F. Supp. 550,

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*/ For example, International Boxing Club v. United States, 358 U.S. 242 (1959), holding that championship boxing matches were a relevant market distinct from boxing matches in general; United States v. Paramount Pictures, 334 U.S. 131, remanding to the district court for a determination whether there was a monopoly in "first run" movies as opposed to movies in general; United States v. Guerlain, Inc., 155 F. Supp. 77 (S.D.N.Y. 1957), holding that perfume of a single manufacturer had such "unique characteristics" as to distinguish it from all other toilet goods including perfume of another manufacturer; and United States v. E. I. duPont de Nemours & Co., 353 U. S. 586 (1957) holding automotive fabrics and finishes distinct from fabrics and finishes in general.

577 (D. Md. 1968): "[T]he decided cases give no real help for an a priori determination of interchangeability."

For products to be deemed interchangeable, two factual questions must be answered: first, whether the products can be used for the same purpose (functional interchangeability); and, if this is answered affirmatively, second, whether a purchaser is willing to substitute one for the other (reactive interchangeability):

> To determine whether acids are in competition in a particular industry it is first necessary to decide whether they can be used for the same purpose --whether they are functionally interchangeable . . . . Having found one or more products functionally interchangeable with citric acid in a particular use, the next question to be resolved is one of purchaser reaction--the willingness or readiness to substitute one for the other. United States v. Chas. Pfizer & Co., Inc., 246 F. Supp. 464, 468 (E.D.N.Y. 1965).

* * *

> While a finding of functional interchangeability must precede that of reasonable (reactive) interchangeability, it is not determinative. For products to be classified in the same market they must be both functionally and reasonably interchangeable. 246 F. Supp. at 468 n.3.

While we concur in the proposition that wholesale firm power and economical self-generation are functionally and reactively interchangeable and compete with each other (Applicant's Brief, 88; Department's Brief, 36-44), this certainly does not make power exchange services, as factors of producing economical self-generation, functionally and reactively interchangeable with wholesale firm power purchases.

That some small utilities in Michigan meet their retail firm power obligations by a combination of self-generation and wholesale firm power purchases indicates neither functional nor reactive interchangeability between regional power exchange services and wholesale firm power purchases. By and large in all instances where a system with generation has opted to meet part of its requirements with the long-term purchase of wholesale firm power, Applicant had foreclosed it from the opportunity to obtain the regional power exchange services it desired in order to derive maximum economies from self-generation. */ For example, in 1972 Edison Sault Electric Company believed that it could choose between a wholesale contract and an interchange agreement with Applicant (DJ No. 83) and prepared an economic evaluation which concluded that an interconnection agreement would be preferable (DJ No. 84). At a November 14, 1972, meeting, Applicant's Mr. Paul advised Edison Sault that its belief was erroneous (DJ No. 85); and on November 17, 1972, Applicant's Mr. Hedgecock summarized the options open to Edison Sault: "[T]he only provision . . . that has been left open is the initial term of the contract" (DJ No. 86). If one product is unavailable, thereby requiring acceptance of a less desirable product, the two products can hardly be said to compete. Competition implies a choice between alternatives, and acceptance of wholesale firm power offered on a take-it-or-leave-it basis does not reflect such a choice.

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*/ See Department's Brief, 144-167.

VI

PREDATORY PRACTICES OR EXPLICIT MONOPOLISTIC MOTIVATION NEED NOT BE SHOWN TO ESTABLISH THE OFFENSE OF MONOPOLIZATION

Applicant argues that in order to establish the "willfulness" requirement of the offense of monopolization, it is necessary for the Department to show explicitly that Applicant has acted with monopolistic motivation or that Applicant has engaged in predatory practices (Applicant's Brief, 155). While the Department has presented a substantial body of evidence to that effect, we believe it is important that the law of monopolization be stated accurately and that Applicant's misstatements of case holdings be corrected.

Applicant has misstated the Department's position to be that market structure alone is sufficient to establish a violation of Section 2 of the Sherman Act. As we argued in the Department's Brief (188-191), specific intent to monopolize or predatory practices need not be shown to establish a Section 2 violation; willful monopoly may be inferred from the effect of activities which are "honestly industrial." We have not argued that market structure alone is sufficient.

Applicant states that we have cited "no case in support of the proposition that anticompetitive motivation need not be shown" (Applicant's Brief, 155). In fact, we have cited both United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945), and United States v. Griffith, 334 U.S. 100 (1948),

to support the proposition that intent may be inferred and need not specifically be shown. Applicant attempts to distinguish the Alcoa case on rather unique grounds. Despite the holding of Judge Hand that intent may be inferred and the fact that the trial judge found no predatory practices, Applicant contends that the Alcoa case supports its theory of monopolization since evidence as to predatory practices was presented at trial (Applicant's Brief, 155). This logic is clearly specious.

Applicant also cites United States v. United Shoe Machinery Corp., 110 F. Supp. 395 (D. Mass. 1953), to support its proposition that specific intent must be shown, even though the leasing arrangements under which U.S.M. machines were made available were found to be "honestly industrial." As Judge Wyzanski stated:

> So far, nothing in this opinion has been said of defendant's intent in regard to its power and practices in the shoe machinery market. This point can be readily disposed of by reference once more to Aluminum, 148 F.2d at pages 431-432. Defendant intended to engage in the leasing practices and pricing policies which maintained its market power. That is all the intent which the law requies when both the complaint and the judgment rest on a charge of 'monopolizing,' not merely 'attempting to monopolize.' Defendant having willed the means, has willed the end. (110 F. Supp. 295 at 346)

Applicant cites several other Section 2 cases where predatory practices were found, including United States v. Otter Tail Power Co., 410 U.S. 366 (1973). It then argues that since predatory practices were found in those cases, predatory practices must be found in all cases of monopolization. In the Otter Tail case, the district court had found predatory practices, such as

refusals to wheel and refusals to deal; */ and therefore it was unnecessary for the Court to decide whether intent could be inferred. Moreover, the Griffith case, where the intent standard outlined above was first adopted, was cited with approval by Justice Douglas in his opinion for the Court in Otter Tail.

Applicant also argues that "where, as here, an industry under scrutiny is marked by natural monopoly characteristics and extensive governmental regulation, the standard is clear: the other parties to this proceeding must show that the company has acquired or maintained its position through unfair or predatory conduct" (Applicant's Brief, 157). The Department does not agree with Applicant that the electric power markets relevant to this proceeding are natural monopoly markets. The possibilities for competition in these markets were recognized by the U. S. Supreme Court in Otter Tail and found worthy of the protection of the antitrust laws. While in most situations only one electric power company can economically serve at retail at one time, the court recognized that the ability of a town to switch franchises presented important competitive possibilities. Consequently, cases involving natural monopoly fact situations--such as towns which can financially support only one newspaper or one movie theatre--are inapposite.

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*/ We heartily agree with Applicant that Otter Tail's "methods" were "clearly predatory."

VII

THE "BOTTLENECK THEORY" OF MONOPOLIZATION IS APPLICABLE TO THE FACTS OF THIS PROCEEDING

Applicant argues that the "bottleneck theory" of monopolization is inapplicable to this proceeding because: (1) Applicant has never denied and never would unreasonably deny access to its transmission network to any electric system; (2) Applicant's transmission system is not an "essential" or "unique" resource since the unavailability of this facility has not competitively handicapped its small neighboring electric systems, and (3) the Department's statement of the law is incorrect (Applicant's Brief, 145-150). All three of Applicant's contentions are grounded on factual and legal misrepresentations.

First, Applicant has refused to provide transmission services, and its past and present policies concerning such services are in fact unreasonable (Department's Brief, 135-142, 144-147, 199-200). */

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*/ Applicant places great emphasis on its recent agreement to wheel 20 mw of power from Detroit Edison to the M-C Pool (Applicant's post-record "exhibit" 12,023; Applicant's Finding of Fact 4.71) to demonstrate that its wheeling policies are and always have been reasonable. This contract was concluded long after the termination of the evidentiary hearing in this matter and after the record was closed. Hence, the Department has had no opportunity to present evidence or cross examine witnesses regarding this agreement. Nevertheless, we do not believe the wheeling arrangement reflected by this exhibit represents a significant divergence from Applicant's consistently unreasonable position regarding wheeling. First, the charge associated with the utilization of the transmission line is excessive on its face. Second, we believe Applicant currently is deficient in generating capacity (see DJ No. 21, Stelzer, Tr. 1960-61) and would have difficulty supplying the 20 mw of power to the M-C Pool itself. It is not clear what policy Applicant would follow if it did have capacity and energy to sell. Therefore, Applicant's post-record "exhibit" does not prove the point for which Applicant cites it.

Second, the "bottleneck theory" cases do not require that access to a facility be "essential" or "unique," only that an excluded competitor be at a significant competitive disadvantage without access (Department's Brief, 204-205). Also, well-established principles of antitrust law do not allow Applicant to argue successfully that the tax and financing advantages allegedly available to public and cooperative systems justify its anti-competitive conduct (Department's Brief, 238-250; see also Department's Prehearing Brief, 86-88). In any event, access to Applicant's transmission system is necessary for the competitive viability of small electric systems (Department's Brief, 97-122).

Finally, the bottleneck theory, while first promulgated in cases involving "group boycotts," has been extended to cover facilities which are solely owned. Otter Tail clearly stands for this proposition. In that case Chief Judge Devitt of the District of Minnesota applied the "bottleneck theory" to the sole owner of a transmission system who had denied access to that system to its competitors. There he stated:

> Pertinent to an examination of the law is a reference to cases expressive of the 'bottleneck theory' of antitrust law. This theory reflects in essence that it is an illegal restraint of trade for a party to foreclose others from the use of a scarce facility. Here the theory finds application in Otter Tail's use of its subtransmission lines. One authority believes:
>
> 'The Sherman Act requires that where facilities cannot practically be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.'
>
> This statement epitomizes the holdings in federal cases which have established the principle:

United States v. Terminal Railroad Assoc., 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F.2d 484 (1st Cir. 1952); Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3rd Cir. 1958); Six Twenty-Nine Productions, Inc. v. Rollings Telecasting , Inc., 365 F.2d 478 (5th Cir. 1966).

> The bottleneck principle is applicable to Otter Tail. Its control over transmission facilities in much of its service area gives it substantial effective control over potential competition from municipal ownership. By its refusal to sell or wheel power, defendant prevents that competition from surfacing. 331 F. Supp. 54, 61 (D. Minn. 1971), aff'd 410 U.S. 366 (1973).

Moreover, Justice Douglas, in affirming Judge Devitt's District Court opinion, cites with approval Associated Press v. U. S., 326 U.S. 1 (1945), a classic "bottleneck" theory case, to support the Court's decision (410 U.S. 377).

Thus, we submit that the "bottleneck theory" of monopolization enunciated in United States v. Terminal Railroad Ass'n, 227 U.S. 683 (1912), and expanded by Otter Tail is both factually and legally applicable to this proceeding.

VIII

THE BOARD'S OBLIGATION TO IMPOSE APPROPRIATE RELIEF

Applicant's position regarding appropriate relief in this proceeding is a maze of dropback positions, which run from holding out its wholesale rate as appropriate access to the Midland Units (Applicant's Brief, 214) to allowing that access and coordinating transactions based on the policy statement presented in Mr. Aymond's testimony may be appropriate. */ In its tortured path from its first position (no relief is necessary) to its final line of defense, Applicant's arguments suffer from two glaring defects. Applicant first assumes that the "nexus" required under Section 105c(5) is identical to the term "appropriate" as used in Section 105c(6). Second, Applicant contends that relief which does not leave it in an economic position equal to or better than it would be absent relief would be contrary to the public interest. **/

A. Scope of Relief

Applicant's contention as to the narrow scope of relief is in direct conflict with the unambiguous language of the statute,

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*/ The allegedly reasonable conditions of Applicant's policy statement are, we submit, merely a continuation of practices which have been demonstrated to be anticompetitive. See for example Department's Brief, 199-200, for discussion of the unreasonableness of Applicant's "new" wheeling policy.

**/ See, for example, Applicant's Brief, 218, where it seems to insist that even AEC-ordered unit power transactions should provide it with "incentive."

as well as the legislative history of the Act. */ Moreover, the recent memorandum of the Board in the Louisiana Power and Light Co., Waterford Unit No. 3, proceeding **/ makes clear that once a situation inconsistent with the antitrust laws has been found to exist, the AEC has broad authority to impose conditions in order to eliminate such situation.

In that proceeding the Department, the AEC Staff and the Applicant Louisiana Power and Light Co. agreed on a formulation of license conditions and the Applicant agreed to accept those conditions regardless of whatever further action the Board might deem necessary in the matter. ***/ Intervenor municipal systems were dissatisfied with this agreed-upon relief, ****/ and the Board ordered them to show cause by presenting evidence why said relief would not be adequate, assuming arguendo that the activities under the Waterford licenses would create or maintain a situation inconsistent with the antitrust laws. At the conclusion of the

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*/ See Department's Brief, 253-256.

**/ In the Matter of Louisiana Power and Light Company (Waterford Steam Generating Station Unit No. 3) AEC Docket 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 ("Board's Memorandum").

***/ Essentially the agreed-upon conditions obligated the Applicant to: (1) interconnect and share reserves with small systems on an equal-percentage basis; (2) engage in unit power transactions; (3) grant access to future nuclear facilities; (4) wheel power and plan and construct transmission facilities for such wheeling; and (5) sell power and energy at wholesale.

****/ The cities alleged nine deficiencies of the proposed conditions (Id., 12).

show-cause hearing, the Waterford Board issued a memorandum in which it found the agreed-upon relief inadequate and set forth its views with respect to an adequate set of license conditions, which, if accepted by the Applicant, would lead the Board to advise the Commission that antitrust matters no longer precluded issuance of the applied-for construction permit.

The Board, after noting that it "has the responsibility and inherent power to determine what license conditions are appropriate" (Board's Memorandum, 9), found the agreed-upon license conditions "basically adequate except in three respects: (1) access to nuclear facilities; (2) transmission "between" and "among"; (3) reserve sharing" (Id., 12). The Board then formulated license conditions which expanded and clarified the relief available from the Applicant under the license conditions. */ The Board clearly viewed all the relief provided for by its conditions as necessary to provide appropriate relief in the proceeding (assuming that activities under the Waterford licenses would create or maintain a situation inconsistent with the antitrust laws). It refused to grant the Applicant's motion for summary disposition of the proceeding with relief limited to the agreed-upon conditions. **/ By expanding the reserve sharing and

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*/ Except in one regard, which led subsequently to the Department's filing of an exception to the Board's Initial Decision (Docket No. 50-382A), November 14, 1974.

**/ Order Denying Applicant's Motion for Summary Deposition of All Issues and Alternative Motion for Summary Disposition of Certain Issues (AEC Docket 50-382A), October 24, 1974.

wheeling relief in its conditions beyond that originally consented to by the Applicant, the Waterford Board has effectively demolished any argument that the granting of some form of access to the nuclear unit applied for represents the extent of the AEC's jurisdiction to impose license conditions under Section 105c (see Applicant's Brief, 213-214).

The Board's Memorandum represents the first precedent under Section 105c on the appropriateness of license conditions extending beyond mere access to the nuclear unit applied for. The fact that the parties had stipulated to the existence of a situation inconsistent with the antitrust laws and maintenance of that situation by the license activities--and that the Applicant had consented to accept certain relief--in no way vitiates the Memorandum's precedential impact.

B. The Irrelevance of Harm to Applicant in Determining Appropriate Relief

While the purpose of a proceeding under Section 105c is not punishment of past misconduct, the relief provided must be sufficient to remedy the situation inconsistent with the antitrust laws (Section 105c(6); Committee Report, 31). As the Supreme Court held in United States v. United States Gypsum Co., 340 U.S. 76, a district court is obligated upon finding monopolization:

> . . . to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance . . . . The conspirators should, so far as practicable, be denied future benefits from their forbidden conduct (emphasis added).

That this may place the defendant in a worse position that he would be absent the decree is neither surprising nor relevant.

Yet Applicant contends initially that if this Board finds that the license activities would create or maintain a situation inconsistent with the antitrust laws, appropriate relief should be limited to insuring access to the Midland facility through wholesale purchases from Applicant. While such a license condition would further Applicant's demand to be left whole by AEC-ordered relief, and indeed Applicant would benefit therefrom, it certainly would not be adequate to correct the situation. The Board in the Waterford proceeding considered this form of nuclear access and dismissed its adequacy except possibly in some hypothetical situation "in which all or substantially all of seller's power is generated by nuclear units" (Board's Memorandum, 32). */ The Waterford Board's determination of this issue was clearly based upon a recognition that wholesale firm power and direct access to nuclear generation are not substitutable:

> In both of these forms of access, the buyer (unit purchaser or joint owner) only gets power when the nuclear facility is in operation. During scheduled shut-down for maintenance and unscheduled shut-down for other reasons, the buyer gets no power because of access to the nuclear facility. Accordingly, the buyer must make arrangements to obtain back-up power generated by other facilities when the nuclear facility is shut down. Moreover, the cost of transmitting the power from the nuclear facility to the buyer is for the account of the buyer in both types of access.

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*/ The Department would disagree with the proposition that access limited solely to wholesale firm purchases is appropriate even in such a case (see Department's Brief, 173-182).

* * *

> In the sale of firm bulk power, the seller must supply the power regardless of shut-downs, 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 (Id., 31-32).

Perhaps suspecting that its offer to provide access to Midland through wholesale firm power sales will be found inadequate, Applicant attempts to convince this Board that ordering appropriate relief would cause it economic harm, and therefore the Board should ignore its statutory obligation under Section 105c(6).

Initially, Applicant urges that there is no evidence that the joint intervenors need nuclear power from Applicant to remain competitive and thus no relief is necessary. Not only is this an erroneous statement, */ it is irrelevant. The Waterford Board's Memorandum makes this point crystal clear:

> Finally, Applicant relies on testimony of Mr. Burroughs that the City of Lafayette does not need power, nuclear or otherwise, from Applicant in order for the City of Lafayette to compete with Applicant. The City of Lafayette has survived by operating without power from Applicant. The fact that in Mr. Burroughs' opinion Lafayette can continue to so survive, does not answer the question as to whether refusal of access to Waterford would create a situation inconsistent with the antitrust laws by unduly limiting competition. Illegal activities do not become legal merely because they are directed against a successful competitor: Utah Pie Co. v. Continental Baking Co., 386 U.S. 685; 18 LEd 2d 406; 87 S. Ct., 1826 (Board's Memorandum, 29-30; transcript citations omitted).

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*/ See, e.g., Department's Brief, 218-225; Brush, Tr. 2354: "In my judgment the future of the entire electric utility industry is dependent upon nuclear power."

Principally, however, Applicant claims that because requests for access were "untimely" (Applicant's Finding of Fact 4.58; Applicant's Brief, 218-219), and, because the entire electrical output of Midland is required for its own use (Applicant's Finding of Fact 1.06), AEC-ordered relief would be costly to it. To quantify its contention, Applicant presented a study purporting to show that if it were ordered to grant ownership interests in the Midland Units, it would incur substantial increased power costs (Stafford and Lapinski, direct, 9161-9165; Exhibit 12,018).

Several problems with Applicant's claims are apparent. First, the study is of questionable validity as to the amount of increased power costs which may be involved. */ Second, until the amendment of the Atomic Energy Act in December of 1970,

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*/ Among other defects, the study shows that while claiming increased costs due to the requirement to purchase power if required to sell Midland capacity, Applicant voluntarily delayed construction of the Quanicassee and Campbell facilities due to decreased load projections (Stafford and Lapinski, Tr. 9189-9190). Thus, Applicant continues to plan future generation installations with its head in the sand: it refuses to recognize that it may be required to divest a share of Midland power and to act affirmatively to mitigate any "harm" it anticipate from so doing. To the extent the study's figures are correct, they show only that Applicant's own conduct in failing timely to plan and install sufficient generation will exacerbate the "harm" caused by appropriate relief. A further defect with the study is that in all years, except one, Applicant had surplus generating capacity in excess of 220 mw. In aggregating the "harm" to Applicant from Midland sales, it does not consider possible revenue from the sale of this capacity (Stafford and Lapinski, Tr. 9244).

the small utilities had no realistic expectation that Applicant would grant them access to the Midland Units, by AEC compulsion or otherwise (Department's Brief, 164-167). */

Moreover, acceptance of Applicant's claim would conflict directly with the holding of the Waterford Board on this point. In the show-cause hearing on relief, Louisiana Power and Light contended that denial of access to Waterford Unit No. 3 was justified since requests for access were "untimely," the facility was sized to meet the requirements of the Middle South system (Applicant's parent company) and all of the unit's capacity was needed by Middle South. These arguments, substantially identical to those put forward by Applicant in this proceeding, were summarily rejected by the Board:

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*/ Applicant notes that in 1967 it indicated the possibility of making unit power available to the small utilities from its Ludington facility and received no response (Applicant's Finding of Fact 4.56). From this Applicant seems to draw the conclusion that it was receptive to the concept of unit power sales and the small systems should have felt free to ask for Midland power on a similar basis, before such requests become "untimely."

This logic is totally misleading for the simple reason that Ludington is a pumped storage facility and thus valuable principally for peaking power. The small systems were not short peaking power; they needed base-load power, with its low energy cost (Brush, Tr. 2302; Steinbrecher, Tr. 1933-1937). Leaving aside the fact that Ludington power would have been uneconomic for systems in need of base-load power, there is some doubt whether Applicant actually offered Ludington power to the small systems. Mr. Steinbrecher, who attended the meeting at which Applicant's Ludington offer allegedly was made, testified regarding the meeting:

> I have no recollection that at any time were we given any indication that the company was ready to discuss with us any possible interest we might have in Ludington (Steinbrecher, Tr. 1930).

> The position of Applicant is inconsistent with the purpose of Section 105c of the Act which authorizes these proceedings. In all cases where conditions are imposed by courts or administrative bodies to correct antitrust situations, such conditions require behavior contrary to the plans, desires and determination of the party upon whom they are imposed. If access to Waterford is a proper condition to impose in the present proceedings, the facts that Waterford was designed solely for the needs of Middle South and that Applicant and Middle South are unwilling in negotiations with others to relinquish any part thereof should not prevent or deter the imposing of a condition requiring a right of access to Waterford (Board's Memorandum, 25-26).

Finally, Applicant seems to be saying that the Intervenors should wait until Applicant applies to build its next nuclear units and at that point submit timely requests (see particularly Applicant's Brief, 221). This contention clearly is misconceived. In the first place Applicant currently has no application on file with the AEC to construct additional nuclear facilities (Applicant's Finding of Fact 1.13), and thus the Midland proceeding represents the only "day in court" in the foreseeable future for the small systems in Michigan. Second, prior to Applicant's withdrawal of its application for the Quanicassee nuclear facility, */ its next nuclear facility, it had never offered the small utilities direct access to that plant (see AEC Brief, 90-91).

When analyzed in their entirety, Applicant's claims regarding relief must be rejected. Rather, we submit, this Board must be guided by the clear language of Section 105c(6) and order the relief appropriate to cure a situation demonstrated to be inconsistent with the antitrust laws.

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*/ It should be noted that Applicant's withdrawal of Quanicassee does not negate the fact that nuclear generation is both unique and valuable (see Department's Brief, 168-175 and 218-225).

CONCLUSION

In light of the evidence and applicable law set forth above and in the Department's Brief of October 8, 1974, the Department of Justice requests the Board to adopt the Department's proposed findings of fact and conclusions of law (Department's Brief, 258-267) and to issue an order setting forth the parameters of the relief appropriate to remedy the existing situation inconsistent with the antitrust laws, or in the alternative, issue an order conditioning the Midland licenses as we request (Department's Brief, 251-252).

Respectfully submitted,

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November 25, 1974
Washington, D. C.

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

CONSUMER POWER COMPANY Midland Nuclear Units 1 and 2	Docket Nos. 50-329A 50-330A

APPENDIX A TO REPLY BRIEF OF THE UNITED STATES DEPARTMENT OF JUSTICE

* * * * *

MICHIGAN STATE LAW AFFECTING COMPETITION BETWEEN ELECTRIC UTILITIES

November 25, 1974

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MICHIGAN STATE LAW AFFECTING COMPETITION BETWEEN ELECTRIC UTILITIES

I. INTRODUCTION

Essentially there are three types of entities which market retail electric energy in Michigan's lower peninsula: private corporation utilities, utilities formed pursuant to the Rural Electrification Act of 1936 (7 U.S.C. 901.) and municipal electric systems. 1/ To one degree or another, Michigan State law regulates the retail operation of each type system, though as will be discussed below, this regulation is not to such a degree to eliminate substantial actual and potential competition for Michigan retail customers.

The Michigan legislature has vested the Michigan Public Service Commission with jurisdiction and power to regulate the rates, fees, charges, service, rules, conditions of service of public utilities located within the State of Michigan (Mich. Stat. Ann 22.13(6). 2/ The Commission, however, has no common law power but, as an administrative body created by statute, has only such powers as are conferred upon it by statute. Huron Portland Cement Co. v. Public Service Commission, 351 Mich. 255, 88 N.W. 2d 492 (1958). The legislature is establishing the authority of the

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1/ Additionally, Const. 1963, Article VII, Section 28 authorizes counties, townships, cities and villages to enter into agreements with one another, the state or any combination thereof for the joint administration, transfer of, cooperation regarding any responsibility or function. This provision and statutes appears to allow an ad hoc formation of "Metropolitan Districts" (see Const., 1908, Article VIII, Section 31).

2/ This Section merely outlines the general powers of the Michigan Public Service Commission with the detailed grants, inherited from the Michigan Railroad Commission or Public Utility Commission, located elsewhere in the statutes.

MPSC, expressly denied it the power to regulate any municipally owned utility, 3/ but rather codified the procedures and requirements for the acquisition and operation of a municipal public utility elsewhere in the statutes. Thus, for analysis of Michigan state regulation, there are two classes of public utility -- private corporation and rural electric cooperative and municipally owned -- and these classes will be discussed separately.

II. CREATION, OPERATION AND REGULATION OF MUNICIPALLY OWNED ELECTRIC UTILITIES.

A. Michigan Constitution and Statutes Clearly Authorize Municipalities to Acquire, Own or Operate an Electric Utility:

1. Constitutional Provisions:

The authority of a municipal corporation to engage in the distrubution and/or generation of electricity is founded in the Michigan Constitution, Const. 1963, Art. VII, Section 24, which provides:

> Subject to this constitution, any city or village may acquire, own or operate, within or without its corporate limits, public service facilities for supplying water, light, heat, power sewage disposal, and transportation to the municipality and the inhabitants thereof.

To exercise this right a municipality must comply with the constitutional requirement that:

> No city or village shall acquire any public utility furnishing light, heat or power . . . unless the proposal shall first have been approved by three-fifths of the electors voting thereon. [Const. 1963, Art. VII, Section 21]

These constitutional provisions must be read together and have been incorporated by the Michigan legislature in statutes

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3/ The sold apparent MPSC power over municipalities is to prescribe the form of the annual report municipal utilities are required to publish pursuant to Mich. Stat. Ann. §22.131.

authorizing the various forms of municipal corporation 4/ to acquire, own or operate electric facilities within or without their corporate limits. 5/ Since the constitutional provisions are not self-executing, Sebewaing Industries v. Village of Sebewaing, 337 Mich. 530, 60 N.W. 2d 440 (1953); Michigan Public Service Co. v. City of Cheboygan, 324 Mich. 309, 37 N.W. 2d 116 (1949), the legislative enactments rather than the constitutional provision, govern a municipal corporation's acquisition and operation of an electric utility.

A statute enacted in 1891 authorizes cities and incorporated villages to acquire by purchase or to construct, operate and maintain facilities for the purpose of supplying such municipalities or its inhabitants with electric light (Mich. Stat. Ann. 5.2471), or in the alternative to contract for such electricity

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4/ The Michigan Constitution (Const. 1963, Art. VII, Section 21) provides that cities and villages shall be incorporated under general laws enacted by the legislature.

Pursuant to this constitutional directive, the Michigan legislature has provided by the general law for the incorporation of villages (Mich. Stat. Ann. 5.1201), cities of the fifth class (Mich. Stat. Ann. 5.2086), cities of the fourth class (Mich. Stat. Ann. 5.2086, 5.1951), cities of the third class (Mich. Stat. Ann. 5.2012), Home Rule Cities (Mich. Stat. Ann. §5.2071), and Townships (Mich. Stat. Ann. §5.1). The statutes do not appear to provide for first or second class cities.

Provision for incorporation of cities of the fifth class (Mich. Stat. Ann. §5.2086) is contained in the Home Rule Cities Act (Public Act 1909, Act. No. 279, Mich. Stat. Ann. 5.2071-5.2118) while provision for incorporation of cities of the third class (Mich. Stat. Ann. 5.2012) is contained within the act for fourth class cities (Public Acts 1895, Act. No. 215, Mich. Stat. Ann. 5.1591-5.2018). Therefore, with minor exceptions, the powers of fifth class cities are governed by the Home Rule Cities Act, while the powers of the third class cities are governed by the Fourth Class Cities Act, and thus, for purposes of discussing the laws relating to municipal electric systems in Michigan, there are essentially only three relevant statutory schemes.

5/Villages (Mich. Stat. Ann. 5.1420-5.1426, 5.1428, 5.2471-5.2473; Fourth Class Cities (Mich. Stat. Ann. 5.1895-5.1903); and Home Rule Cities (Mich. Stat. Ann. 5.2079).

on such terms and conditions as the governing body of the village or city direct. This general authorization has been supplemented with various legislation pertaining to the different forms of municipal corporations.

2. Statutes Relating to Fourth Class Cities

Cities of the fourth class have the power to purchase, construct, operate and maintain, either within or without the corporate limits, facilities to supply electric light to the cities and its inhabitants. (Mich. Stat. Ann. 5.1895-5.1903). While the statutory language is limited to acquisition by purchasing or construction, a separate code section authorizes the condemnation of private property, within or without the city, for the construction and maintenance or due operation of such electric facilities. (Mich. Stat. Ann. 5.1901) 6/

The power to acquire, own or operate works for supplying electric lights includes the right to sell and furnish electricity to private individuals, to install and maintain a distribution system and to extend the municipal lighting system to furnish electricity to private individuals. Michigan Gas & Electric Co. v. City of Dowagiac, 273 Mich. 159, 262 N.W. 762 (1935).

6/ Despite defeat by the Constitutional Convention of 1907 of a proposal to grant municipalities the power to condemn land outside their corporate limits, the state retained this power and could delegate it to the municipalities. Thus, where authorized by statute -- as all are -- a municipality may condemn property located outside the city limits for the use in a municipal electric system. City of Allegan v. Iosco Land Co., 254 Mich. 560 (1931).

> In pursuance of the power vested in it, the City of Dowagiac owns and operates a municipal electric light plant and has the constitutional and statutory authority to sell and furnish electricity to private individuals in connection with the operation of its plant, to install and maintain a distribution system so to do. This power and authority vested in it by its constitution and charter may not be abdicated by any franchise. (273 Mich. at 155)

While a fourth class city clearly has the constitutional and statutory authority to acquire a municipal electric utility, certain procedural requirements -- e.g., resolution of the city council that it is "expedient" to acquire such facilities (Mich. Stat. Ann. 5.1896), approval of two-thirds (2/3) of the electors voting -- must be undertaken before a city can exercise this right.

3. Statutes Relating to Villages:

Villages likewise are empowered to acquire 7/, own, and operate, within or without the village, a municipal electric light plant for the purpose of supplying electricity to the village and its inhabitants and the village council has the power to fix terms and conditions of such service (Mich. Stat. Ann. 5.1420). 8/

Although it has been held that this section does not authorize a village to sell heat, light, power or water outside its corporate

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7/ Includes condemnation since Mich. Stat. Ann. 5.1426 authorizes villages to condemn private property "for the construction and maintenance, or for the due operation of electrical facilities."

8/ While the statute limits this right to villages with a population in excess of 250 inhabitants, the Constitution of 1908, Art. VIII, Sec. 23 granted such right to "any" village and thus population is irrelevant. Op. Atty. Gen. Mich. 1913, p. 70. Note the 1963 Constitution, Const. 1963, Art. VII, Sec. 24, likewise reads "any city or village."

limits, Op. Atty. Gen. Mich. 1928-30, p. 380, Mich. Stat. Ann. 5.1534 confers such power on a village if it amends its charter to so provide. The procedural prerequisites for a village exercising its right to acquire a municipal electric system are substantially identical to those required for cities of the fourth class. The village council must adopt a resolution that such action is "expedient" (Mich. Stat. Ann. 5.1421), and the proposal must be approved at a general or special election by two-thirds (2/3) of the electors voting on the proposal. (Mich. Stat. Ann. 5.1422).

4. Statutes Relating to Home Rule Cities:

A home rule city may provide in its charter 9/ for the construction, ownership and operation of public utilities, including electric power plants, and to purchase or condemn existing franchises, plants, and equipment or other private property for such purpose (Mich. Stat. Ann. 5.2079). However, even in cases where the city charter authorizes acquisition of a public utility, a proposal to do so must receive an affirmative vote of three-fifths (3/5) of the electors voting at a general or special election.

9/ Rather than enumerate powers, the Home Rule Cities Act (Mich. Stat. Ann. 5.2071) is essentially a series of mandatory and permissible city charter provisions. The statutes dealing with electric operations are all permissible and may be adopted or not by the individual municipality. This requires appropriate amendment of the city charter before the city attempts to exercise its powers. Sault Ste. Marie City Commission v. Sault Ste. Marie City Attorney, 313 Mich. 644 (1946).

5. Summary and Conclusion:

To summarize, all municipal corporations in Michigan may acquire by purchase, construction or condemnation facilities, located within or outside their corporate limits, for the generation and/or distribution of electricity. The sole legal limitation on this power is that the statutory requirements for such action be met and the charter of the particular city or village provide authorization. If the statutes are complied with, the courts are without jurisdiction to interfere. Michigan Gas & Electric v. City of Dowagiac, supra; Muskegon Traction & & Lighting Co. v. City of Muskegon, 167 Mich. 331, 132 N.W. 1060 (1911). In Muskegon Traction, the plaintiff claimed, inter alia, that erection by the city of a municipal electrical plant should be enjoined since such action was economically unwise and would lead to financial loss to both the city and plaintiff. The court noted that the record contained no evidence to support this claim and went on to hold:

> [E]ven if it were conclusively proven that this undertaking would result in loss to the city as well as to the complainant, the courts would be powerless to restrain this city from its proposed course. Its power is complete and undoubted, its electors are dealing with their own money, and, if they choose to invest it in losing enterprises, so long as they comply with the law, it is their own concern. (167 Mich. at 340).

While it may be argued that the procedural requirements for entry de novo by a municipality into the electric distribution and/or generation market is time consuming and technically exacting, Michigan State law clearly does not erect such legal

barriers that entry by a municipality is precluded or even substantially restricted. In fact, the statutes evidence, by their very existence, legislative intent and expectation that Michigan municipal corporations will enter the electric generation and distribution markets. Moreover, the procedural requirements, particularly the necessity of obtaining voter approval, appear to be merely safeguards given the local population to check a local government's ability to expend moneys or incur debts for specified purposes 10/ and no way meant to limit a municipality's right to operate an electric system.

B. The Effect of Existing Service by Another Utility on the Ability of a Municipality to Acquire, Own, or Operate an Electric Utility

1. A Municipality may Enter the Electric Utility Business by Refusing to Renew the Franchise of the Serving Utility:

The Michigan Constitution provides that no person or entity has the right to use the streets, highways, or other public places of any city, village or township for wires or poles without consent of such city, village, or township nor to transact local business without first obtaining a franchise from the township or municipality. (Const. 1963, Art. VII, Section 29). This requirement applies to all entities, including public utilities of another neighboring municipality, Bay City Plumbing

10/ Some other public utility undertaking also require approval of three-fifths (3/5) of the voters. For example, Mich. Stat. Ann. 5.2079 requires a proposal to acquire transportation facilities be approved by three-fifths (3/5) of the electors voting.

& Heating Co. v. Lind, 235 Mich. 455 (1926). And a municipality may maintain an action to compel removal of non-franchised facilities. City of Detroit v. Detroit United Railway, 172 Mich. 136, 137 N.W. 645, aff'd 229 U.S. 39 (1936). Also, no municipality may grant a franchise for a period exceeding thirty years (Const. 1963, Art. VII, Section 30); and the grant of any franchise not revocable at will requires, in the case of villages and cities, approval of three-fifths (3/5) of the electors voting on such proposal (Const. 1963, Art. VII, Section 25) and, in the case of townships, approval by a majority (Const. 1963, Art. VII, Section 19). Renewal of a franchise likewise requires approval by the electors. If not renewed, the franchise expires and continued operation by the former franchise holder may be an actionable trespass. City of Detroit v. Detroit United Railway, supra.

City of Detroit, involved an action brought by the city to compel United to remove its facilities located within the corporate limits, since the franchise granting use of the streets has expired. United defended against the city's suit claiming inter alia, the franchises were extended by city ordinance; the city induced United to expend large sums of money to better rather than repair the railway system and was therefore estopped from insisting on the termination of the franchises; and the public convenience required the continued operation of the system by either United, or, after payment to the property's fair value to United, by the city. The Court rejected United's contentions.

"The conclusion to be drawn from our determination of the different propositions discussed is that the contractual relations between these parties ended upon the expiration of the franchises, and all rights in the defendant company to occupy the city streets, and maintain and operate a street railway thereon, then terminated, and defendant thereafter became a trespasser; the complainant [the city] has the absolute and unquestioned right at any time to compel the defendant company to vacate the streets upon which these franchises have expired, and to require it to remove its property therefrom within a reasonable time, and, if necessary, for that purpose, to enforce its right by a writ of assistance from this court." 172 Mich. 136, 137 N.W. 645, 654.

Subsequently, in Detroit United Railway v. City of Detroit, 255 U.S. 171 (1920) the Supreme Court had occasion to consider the constitutionality of the city using the expired franchise as a lever in bargaining for the purchase of United's facilities. United filed suit in District Court seeking to enjoin the city from acquiring or constructing a street railway system alleging, inter alia, the city was attempting to violate the company's rights under the fourteenth amendment by engaging in a scheme designed to force the company to part with its property at less than its fair value or to cease operations in the streets and remove its property. The Supreme Court sustained the District Court's dismissal of United's complaint holding that since:

". . . the city was under no obligation to purchase the property, it was free to name its own terms, which United was free to accept or reject. But if the city has the right to acquire the property on the best terms it can make with the company in view of the expiration of the franchise, an attempt to carry out such purpose by an offer to buy the property at much less than its value would not have the effect to deprive the company of property without due process of law. 255 U.S. at 177.

Thus, if a municipality determines it is economically feasible to do so and if its voters concur, it may enter the electric utility business by the simple expedient of refusing to renew the existing utility's franchise. This "periodic competition" is virtually identical to that found by the Supreme Court to exist in United States v. Otter Tail Power Company, 410 U.S. 366 (1973), and while the maximum franchise period allowed by the Michigan Constitution, thirty years, is slightly longer than the ten to twenty year franchise periods involved in Otter Tail, this in no way negates the existence of such potential competition.

2. A Municipality may Enter the Electric Utility Business in Competition with an Existing Utility Providing Service Under a Valid Franchise

An exception to the general rule that a utility must obtain a franchise from a municipality to conduct local business may occur where a utility or its predecessor was serving within a municipality prior to the adoption of the Constitution of 1908. In 1905, the Michigan legislature enacted a statute granting companies engaged in the production and supplying of electricity the right to construct and maintain poles and wires across public streets, highways, etc., and to distribute and deliver such electricity to customers. (Public Acts Michigan, 1905, Act No. 264--The "Foote Act"). This statute was abrogated by adoption of Section 28, Art. VII of the Constitution of 1909 11/ and various statutes. (Mich. Stat. Ann. §§22.171, Public

11/ This provision was essentially identical to the present Art. VII, Section 29 of the 1963 Constitution, discussed above.

Acts Michigan 1909, Act No. 266). It has been held that the rights conferred by the Foote Act were in the nature of a vested property right and subsequent statutory or Constitutional enactments could not, consistent with the contract clause of the Federal Constitution (Art. I, §10), revoke these rights. City of Lansing v. Michigan Power Company, 183 Mich. 4 00 (1914). 12/ Moreover, while these rights of unspecified duration have been held to be not perpetual, they continue for the possible existence of the corporate grantee. Michigan Public Service Co. v. City of Cheboygan, 324 Mich. 309, 37 N.W. 2d 117 (1949). 13/ Notwithstanding existing service under a valid franchise, a municipality may begin generating and/or distributing electrical energy or expand its existing distribution system so as to directly compete with the franchised utility, Muskegon Traction & Lighting v. City of Muskegon, supra; Michigan Gas & Electric v. City of Dowagiac, supra.

12/ This seminal case regarding the irrevocability of "Foote Act" franchises was decided by the Michigan Supreme Court in 1914, and subsequent Michigan cases appear to accept this premise without question. While Federal courts are bound by the interpretation of state law given by the highest court of the State, Minn. v. Probate Court, 309 U.S. 270 (1940), City of Lansing was decided on an interpretation of the Federal Constitution and was not brought before a Federal Court. Michigan Gas, though maintaining its Foote Act rights, went into receivership in 1918 as the result of competing with the city. (Brush, direct, Tr. 7995-96)

13/ The possible corporate existence of a Foote Act franchise is thirty years plus an apparent infinite series of thirty year extensions. The Michigan Supreme Court has not addressed the time limit on these rights but rather seems consistent with rulings such as : "[W]e are not called upon to determine how far into the future the franchise may continue. It is sufficient to say that it will continue until 1958 at least." City of Constantine v. Michigan Gas & Electric Co., 296 Mich. 749, 296 N.W. 847, 852 (1941).

Michigan Gas & Electric Co. involved a suit by the company to enjoin the City of Dowagiac from enlarging or extending its electric lines for the sale and distribution of electrical energy and from generating and distributing electrical energy for sale to the public. The trial court apparently entered such a decree and when the city sought to extend their system to furnish electricity to several individuals, the trial court found the defendants guilty of contempt.

On appeal the Supreme Court reversed the conviction of contempt, holding that since the city had Constitutional and statutory authority to extend its electrical distribution system, which authority could not be abdicated by any franchise, only an improper exercise of such power could be enjoined. 14/

> The [trial] court was wholly without jurisdiction to make any decree in violation of the constitution and the laws of the State covering the ownership and operation of works for the sale and distribution of electrical energy, and we cannot find it assumed to do so. Assuming, as seems to be conceded, this decree was valid, defendants sought to extend their lines or distribution system so as to furnish electricity to some private individuals. This they clearly had the general power and authority to do. The thing of which plaintiff had a right to complain was the irregular or improper exercise of that power. (273 Mich. at 155, 156).

14/ Unfortunately, the court does not set forth, in any detail, the facts involved. Nevertheless, a reasonable reading of the opinion indicates that Michigan Gas, which held a franchise within the city of Dowagiac, sought a preliminary injunction against the city extending its distribution facilities into an area in which Michigan Gas held a franchise. The trial court issued such an injunction pending further proceedings and when the city nonetheless extended its facilities, Michigan Gas petitioned the court to find the superintendent of the board of Public Works guilty of contempt.

In Muskegon Traction, supra, the plaintiff, holder of a franchise to serve within the city, sought to enjoin the establishment of a municipal lighting plant. The court, in rejecting the contention that the city's entry into competition with plaintiff was unconstitutional interference with its vested franchise rights, stated:

> It would, we think, scarcely be contended that the city might not license another competing company to use its streets, etc., for the purpose of furnishing a necessity to the inhabitants thereof. (Cites omitted). If it may do this, why may it not itself engage in such competition? Sections 23 and 24 of Article 8 of the Constitution of 1909 15/ clearly clothe cities and villages with necessary authority to engage in such enterprises . . . ." (167 Mich. 340)

It should be noted that although apparently not claimed, Muskegon Traction did in fact hold a Foote Act franchise. The ordinance granting it a license to operate within the city was enacted in 1900 and the company put in operation "a completely equipped and extensive plant which [provided] service to the individual consumers as well as to the city" (167 Mich. 339). The company began operation under a city franchise, but the Foote Act, passed in 1905, granted it a state franchise and the company was not required to elect between or disclaim the city franchise. Village of Constantine v. Michigan Gas & Electric Co., 296 Mich. 719, 296 N.W. 847 (1941).

The rationale of Muskegon Traction and Michigan Gas & Electric, allowing a municipal corporation acquire, own, or expand an

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15/ The Constitution was enacted in 1908 and took effect January 1, 1909 and is referred to as either Constitution of 1908 or Constitution of 1909.

electric system in direct competition with a utility holding a valid franchise, is clearly applicable to all franchises, since neither municipally granted franchises 16/ nor Foote Act franchises 17/ are exclusive.

3. A Municipality may Enter the Electric Utility Business by Condemning the Property and Franchise of the Serving Utility

Finally, a municipal corporation is authorized by Michigan law to enter the electric utility market by condemning not only land and property necessary to construct, operate or maintain an electric system, but can obtain, by eminent domain, the franchises and property used in the operation of companies or individuals engaged in the electric utility business. (Mich. Stat. Ann. 5.2079 -- Home Rule Cities) Additionally, any city with a population in excess of 25,000 inhabitants is authorized "to take for public use the absolute title in fee to any public utility for supplying water, light, heat, power or transportation to the municipality and the inhabitants thereof within or without its corporate limits, the same being then and there the private property of any person or of any corporation. . . ."

16/ See Op. Atty. Gen., Mich. 1928, pp. 62-64, holding that a municipality is without the power to grant an exclusive franchise.

17/ Although the exclusivity of Foote Act franchises has never apparently been litigated, there seems to be no dispute regarding this issue. In Michigan Public Service Co. v. City of Cheboygan, 324 Mich. 309, 37 N.W. 2d 115 (1949), the plaintiff company sought to enjoin the city from acquiring and operating electric generating plant or distribution system. The court, while upholding plaintiff's Foote Act rights, affirmed the lower court's dismissal of the complaint, relying in part on the non-exclusive nature of such franchises. "Although the corporate plaintiff has the right to use the city streets and alleys for its poles and wires, by virtue of Act No. 264, Pub. Acts, 1903, appellants concede that this is not an exclusive right." (37 N.W. 2d at 122)

(Mich. Stat. Ann. 8.71) While the statutes generally require a jury finding that both the public improvement and property taken are "necessary," this, similar to the other prerequisites to acquiring an electric system, (supra) merely established procedural requirements and the standard for compliance. It in no way prohibits exercise of the power.

C. Regulation of and Restriction on the Operation of a Municipal Electric System

1. The "25% Rule" and Amendments Thereof:

Municipal utilities, not being subject ot the regulatory power of the MPSC 18/ have few externally imposed limitations 19/ on their retail operations. Beyond technicalities relating to acquisition and financing, the major restriction on a municipal electric utility relates to the territory in which it may operate. 20/ Until recently, a municipality could sell outside its

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18/ In fact, a proposed public utility bill which would have required municipalities to obtain a certificate of convenience and necessity from the MPSC prior to entry into electric utility operations was held to be repugnant to the Michigan Constitution. Op. Atty. Gen., Michigan 1915, p. 397, at 402-403.

19/ The power of a municipality to engage in the generation and distribution of electricity is founded in the Constitution and authorized by the statutes but ultimately is governed by the charter of the municipality involved. Sault Ste. Marie City Commission v. Sault Ste. Marie City Attorney, supra. However amending a city charter, as necessary, is a local political affair, as are the necessary resolutions by the city council, and cannot, therefore, be considered external limitations.

20/ Also, though of minor importance, municipalities are restricted as to the period for which they can contract. Statutory provisions relating to lighting contracts between electric companies and cities and villages limit such contracts to periods not more than ten years. (Mich. Stat. Ann. 5.1427, 5.1980, 5.2472) Sault Ste. Marie City Commission v. Sault Ste. Marie City Attorney, supra. Cf. City of Detroit v. Consumers Power Co., 312 Mich. 466, 182 N.W. 145 (1921) holding the ten year limitation applicable to contracts for lighting public [continued on next page]

city limits no more than 25% of the electrical energy which it sold within its boundaries. The restriction, first incorporated in the Michigan Constitution of 1908 (Const. 1908, Art. VIII, Sec. 23), was retained in the Constitution of 1963 but amended to add the language, "except as greater amounts may be permitted by law." (Const. 1963, Art. VII, Sec. 23). Since 1963 several bills were introduced before Michigan legislature which would have amended this "25% Rule" and allowed greater sales by municipals outside their corporate limits. However, no such legislation was enacted until June of 1974.

On June 20 and June 23 of this year, two bills relating to the 25% rule were signed into law by the Governor of Michigan. (Pub. Acts Mich. 1974; Act No. 157; June 20, 1974; and Pub. Acts Mich. 1974, Act. No. 174, June 23, 1974). Act No. 174 amended Mich. Stat. Ann. 5.1534, "Permissible Village Charter Provisions," by deleting the clause, "(g) For selling and delivering heat, power and light without its corporate limits to an amount not to exceed 25% of that furnished by it within the corporate limits," and adding a subparagraph (n). This new subparagraph authorizes a village to provide in its charter for sales of electric power outside its corporate limits in such amounts as may be determined by the legislative body of the village. Sales "at other than wholesale" 21/ are limited to the area of any

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20/ [continued] places but does not restrict the power of a municipality to contract for the benefits of the inhabitants. However, the statute in question, as quoted by the court, appears different since, unlike the statutes above, it did not contain the clause "or the inhabitants thereof."

21/ "Wholesale" is defined as "the sale or exchange of heat, power, or light between public utility systems, whether municipally, cooperatively or privately owned."

city, village or township which is either contiguous to or presently served by the village. Also, to serve a customer presently receiving electrical service, the village must obtain permission from the serving utility. 22/ Thus, under the new law, a village, at its on discretion, can compete for and serve new retail loads within a substantial area surrounding the village. And since the fact that a customer is outside the city limits does not affect the public or municipal characteristics of the utility, Geneva Township v. City of South Haven, 261 Mich. 492, 246 N.W. 196 (1933), these sales are not subject to the jurisdiction and power of the Michigan Public Service Commission (see infra).

The second recent Michigan enactment, Act 157, amends Michigan. Stat. Ann. 5.4083, [Section 3 of Act 35 of 1951, ("Inter-Governmental Contracts between Municipal Corporations")]. As amended, Act 35 of 1951 grants cities and villages the right to contract or join with any other municipality or person ("any person, firm corporation, the United States Government or the state or any of its subdivisions," Mich. Stat. Ann. 5.4083) to furnish outside its city limits any lawful municipal service which it furnishes within its corporate limits, including the

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22/ This restriction, "a village shall not render heat, power or light to customers . . . already receiving such service from another utility . . ." (emphasis added) appears to leave open the question whether permission is required if a customer requests a different class of service from Utility A could arguably receive three-phase service from a village without the permission of Utility A since the customer had not been receiving such three-phase service.

sale and delivery of heat, power, and light in such amounts as may be determined by the governing body of the municipal utility. Similar to Act 174, discussed supra, sales other than wholesale are limited to contiguous villages, cities and townships and to any other city presently served, and if a customer outside the city limits is receiving service, permission from the supplying utility to sell to that customer is required.

Despite these amendments, there is serious question as to whether or not the 25% rule has been abrogated entirely. Clearly villages are no longer restrained by the rule. However, Mich. Stat. Ann. 5.4084, which establishes the construction to be given Act 35 of 1951, (Inter-governmental Contracts) states: "Nothing contained in this act shall be construed to grant the right . . . to contract to furnish municipal services outside the corporate limits except in accordance with the constitutional limitations on such sales. The constitutional limit is the "25% Rule" "except as greater amounts may be permitted by law." (Const. 1963, Art. VII, Section 23). Since the legislature has seen fit to grant Home Rule and fourth class cities the right to exceed the 25% rule solely in Act 35 of 1951 and has not amended the statutes 23/ specifically relating to the electric utility operations of these cities, there exist a direct statutory conflict which will apparently have to be reconciled by further legislation.

23/ Fourth Class Cities' statutes do not expressly contain the 25% limit. However, to the best of our knowledge, Mich. Stat. Ann. 5.2076 (Home Rule Cities) presently contains the 25% limitation.

Act No. 157, amending the Inter-government contract statutes was approved on June 20, 1974 and Act 174, amending the authority of villages, on June 23, 1974. The chronology of these enactments seem to indicate that the Villages Act was amended to conform with the Inter-government Act. It therefore appears likely that the Michigan legislature will subsequently enact an amendment to the Home Rule Cities Act to conform its provisions with the Inter-government Contract Act, or at least enact legislation eliminating the statutory conflict.

2. A Municipality may Eliminate the Impact of the "25% Rule" by Expanding its Corporate Boundaries

Assuming that the 25% Rule currently applies to cities and assuming further that the Michigan legislature does not resolve the statutory conflict by abrogating the rule, competition between municipal electric systems and other public utilities, specifically Applicant, while inhibited to a degree, is obviously not eliminated. Besides being able to compete for loads until the 25% limit is reached, a municipality may extend its corporate limits with the result that the loads served within the annexed territory are no longer included in the 25% outside the municipality but rather are added to the inter-city sales thereby increasing the base on which the 25% is calculated.

The method or procedure by which municipalities can annex territory is delineated by various statutes, 24/ which provide generally that the matter be submitted to the qualified electors

24/ Mich. Stat. Ann. §5.1512 (Villages); Mich. Stat. Ann. §5.1609 (Fourth Class Cities); Mich. Stat. Ann. §5.2095 (Home Rule Cities).

of the areas affected. A majority vote of such electors will accomplish the annexation. It should be noted that a proposal to annex territory may be initiated by either a resolution of the city council or a petition of the electors directed to the governing body of the municipality or county. If a petition meets the statutory requirements as to number of electors, etc., the city council must call for an election on the question of annexation.

III. MICHIGAN LAW AND REGULATION REGARDING PRIVATE CORPORATION UTILITIES AND RURAL ELECTRIC COOPERATIVES

A. Municipal Jurisdiction and Power Over Private Corporation Utilities and Cooperative Electric Utilities

Private Corporation utilities and, since 1965, rural electric cooperatives which operate an electric utility in Michigan are subject to the jurisdiction of the Michigan Public Service Commission (Mich. Stat. Ann. 22.13(6)). Additionally, these utilities are subject to regulation by any township or municipality through which they run transmission lines or in which they conduct a local business. The power of the municipality over the utilities arises from its reserved right to control its highways, streets and public places and the constitutional 25/ and statutory 26/ requirement that to transmit electricity through a municipality or to transact a local business requires a franchise from the governing body of the township or municipality. Absent possession of a valid unexpired franchise, a utility maintaining electric

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25/ Mich. Const. 1963, Art. VII, Section 29.

26/ Mich. Stat. Ann. 22.171.

facilities within a municipality or township is engaged in a continuing trespass and the municipality may maintain an action to require the utility to remove its facilities. City of Detroit v. Detroit United Railway, supra; Township of Bangor v. Bay City Traction & Lighting Co., 147 Mich. 165, 110 N.W. 490 (1907).

Beyond the right to enforce reasonable restrictions as to the safety of facilities, etc., a municipality may establish, by franchise contract the rate and terms and conditions of service governing franchise-grantee's operations within the community. Detroit v. Michigan Public Utilities Commission, 288 Mich. 267, 286 N.W. 368 (1939). This power is contractual in nature 27/ since the Constitution provision reserving to municipalities reasonable control of their streets, alleys and public places, does not delegate to them the governmental power to fix rates. City of Niles v. Michigan Gas & Electric Co., 273 Mich. 255, 262 N.W. 900 (1935). The authority to establish rates by franchise ordinance is subject to the general prohibition against a municipality contracting for electricity for a period in excess of ten years even where the franchise is granted for a thirty-year period. City of Niles v. Michigan Gas & Electric Co., supra. See also City of Jackson v. Consumers Power Co., 312

27/ City of Niles v. Michigan Gas & Electric Co., supra. See also City of Kalamazoo v. Kalamazoo Circuit Judge, wherein the court stated:

> "The city had the unquestionable right to grant to any person, firm or corporation a franchise to occupy its streets and alleys for convenience of gas to customers. But it was under no compulsion to convey such right to any one. The subject of the grant rested in contract [with any public utility]." 200 Mich. 142. (emphasis added)

Mich. 437, 20 N.W. 2d 265 (1954).

B. Michigan Public Service Commission Jurisdiction and Power Over Private Corporation Utilities and Cooperative Electric Utilities

1. Michigan Public Service Commission Jurisdiction Generally

Except for the limited jurisdiction of municipal corporations, the operations of corporately owned and cooperative electric utilities in Michigan are regulated by the Michigan Public Service Commission (MPSC), which is vested with the power and jurisdiction to regulate rates, fees, charges, service, rules, conditions of service and other matters pertaining to the formation, operation or direction of such utilities. (Mich. Stat. Ann. §22.13(6)) Nothwithstanding the extremely broad language of this code section, the MPSC, being solely an administrative body created by statute, has no common law powers but rather warrant for exercise of its power and authority must be found in other statutory enactments. Huron Portland Cement Company v. Public Service Commission, 351 Mich. 255, 88 N.W. 492, (1958). 28/ It should be noted that many of the statutes relating to the regulation of Michigan public utilities vest the regulatory power in either the Michigan Railroad Commission

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28/ See also Northville Coach Lines, Inc. v. City of Detroit, 379 Mich. 317, 150 N.W. 2d 772 (1967) wherein the court stated:

> PA 1939, No. 3 [Mich. Stat. Ann. §22.13(6)], has been before our Court several times, and in each instance has been held to be a mere outline of jurisdiction vesting the Commission with no specific powers. . . ." 379 Mich. at 330.

or the Michigan Public Utilities Commission, both of which have been disbanded with all of their relevant powers now held by the MPSC. In addition to the requirement that MPSC jurisdiction be founded explicitly in the statutes, the Colton decision, FPC v. Southern California Edison Co., 376 U.S. 205 (1964), 29/ restricts, in most circumstances, any MPSC assertion of jurisdiction over the wholesale-for-resale activities of any Michigan electric utility. A final major restriction on the authority of the MPSC is the express statutory denial of jurisdiction over municipally-owned electric systems.

Subject to these limitations, the power and jurisdiction of the MPSC may be broken down into essentially two relevant areas: (1) regulation of rates, charges, and conditions of service; and (2) regulation, under certain conditions of service territory and customers. Additionally, the MPSC has been empowered to undertake many activities and to require certain actions by public utilities subject to its jurisdiction. These requirements relate primarily to administrative and informational activities and are not truly relevant to the present controversy since they neither authorize nor restrict any competitive activity by a public utility. 30/

29/ See also Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83.

30/ For example, of only tenuous relevance is the requirement that any corporation or association may issue stocks, bonds, notes, or other evidence of indebtedness only if authorized by the Michigan Public Service Commission (Mich. Stat. Ann. §22.101). While the Commission may deny a petition to issue securities or may condition its, this power, insofar as it relates to the potential for competition in the sale and distribution of electric power, appear at most to be procedural, especially since the statute explicitly excludes municipal corporation and is not applicable to a non-profit corporation formed to furnish electricity to its members only. Op. Atty. Gen. Mich. 1937. p. 66.

2. Michigan Public Service Commission Jurisdiction Over Rates, Charges and Conditions of Service

Michigan law requires that prior to putting into force any rate or charge for supplying electricity, a Michigan public utility must first petition the MPSC for authority to initiate such rate or charge and secure affirmative action from the MPSC approving such rate or charge. (Mich. Stat. Ann. 22.152) The statutes and the cases decided thereunder establish the considerations to be made in determining a just and equitable rate, and between the bounds where a public utility rate may be said to be so low as to be confiscatory and a point where it may be said to be so high as to be a burden upon the public, there is a "twilight zone" within which the judgement of the MPSC may operate without judicial interference. Detroit v. Michigan Railroad Commission, 209 Mich. 395. In other words, the MPSC is vested with broad discretion and authority in establishing a just and reasonable rate for the supply of electricity.

3. Michigan Public Service Commission Jurisdiction to Restrict Service Territories

The MPSC power to, in certain instances, establish service, territories or allocate customers is, in most cases, negative. The Commission does not direct a utility to serve a particular customer or territory, but rather prohibits a second utility from engaging in retail operations with respect to a particular customer or in a specified territory.

An apparent exception to this general rule is Section 1 of Act 106 of 1909, "Transmission of Electricity Through Highways."

(Mich. Stat. Ann. 22.156), which provides that "[t]he Commission shall have power in its discretion to order electric current for distribution to be delivered at suitable primary voltage, to any city, village or township through which a transmission line or lines may pass; to order service to be rendered by any such electric utility in any case in which it will be reasonable for such service to be ordered. . . ." Huron Portland Cement Company v. Michigan Public Service Commission, supra, involved a suit by the Huron Portland Cement Company to compel the Michigan Public Service Commission to order the Consumers Power Company, rather than the Alpena Power Company, to serve it. The court held that since Consumers Power Company had no transmission line which passed through the city, did not profess to serve the area and had requested no certificate of public convenience and necessity to the area, the MPSC had no authority under the statute (22.156) to order Consumers to furnish Huron Portland Cement direct electric service.

The court did not discuss the phrase in Section 6, "through which a transmission line or lines may pass," (emphasis added) but rather appears to have concluded that ordering such service would not be "reasonable." Also, the court apparently failed to find the requisite legislative mandate, "in the clearest possible terms," empowering the MPSC to order Consumers to serve Huron Portland. Moreover, the Court noted that even were such legislative mandate found, ordering service would present a serious constitutional question. The court did not reach this issue

since the matter could be resolved without considering the constitutionality of MPSC jurisdiction, but did quote, in a footnote, a California decision stating:

> "Neither the railroad commission nor any other governmental agency possesses the power to compel a street railway company to extend its streetcar line at its own expense into a territory which it does not and has never undertaken to serve." Hollywood Chamber of Commerce v. Railroad Commission, 194 Cal, 307, 219 P. 983.

Thus it appears, at least in part, the court construed the Michigan statute, particularly its reasonableness provision, to avoid reaching the constitutional question and thereby narrowing the statute substantially. While such a reading may effectively eliminate the impact of the provision "through which a transmission line or lines may pass," it would be consistent with an earlier opinion of the Attorney General holding that the Michigan Public Service Commission cannot order a utility to serve into an area in which it has not previously served. Op. Atty. Gen. Mich., 1919, p. 67.

The statement in City of Saginaw v. Consumers Power Company, 213 Mich. 460, 182 N.W. 146, (1921) that "A public service corporation is bound from the very nature of its business to furnish such public service in such quantities as the public may require. . . ." is clearly distinguishable in that the power company had been serving in the area. Likewise, cases such as Traverse City v. Consumers Power Company, 340 Mich. 85, 64 N.W. 2d 694 (1954) holding that to restrict Consumers Power Company from rendering electrical service to an area beyond its established "Foote Act" franchise within the corporate limits of the

muncipality "would thwart the very nature and object of a public utility," provide no basis for the MPSC ordering an extension of facilities since the impetus or decision to extend facilities and service came from the regulated utility rather than the regulatory agency. Thus it seems doubtful that the Michigan Public Service Commission has the power to order service to a particular territory or customer if additional facilities would be incident or required for the extension of such service.

On the other hand, Pub. Acts Mich. 1929, Act No. 69, "Certificate of Convenience and Necessity for New Gas or Electric Projects, " (Mich. Stat. Ann. 22.141), requires utilities to obtain a certificate of public convenience and necessity from the Michigan Public Service Commission prior to providing service in any municipality in which another utility is already serving. This requirement does not apply, however, to a municipal electric system seeking to serve in new areas or to a utility proposing to serve in an area being served by a municipal system. 31/

A second restriction on the territory and customers which a utility may serve is found in the Michigan Public Service Commission's rules governing the extension of single phased electric service which were adopted in 1966. (In the matter phased electric service, number U-2091 (MPSC, March 24, 1966)). Under the "single phase rule" an existing customer may not

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31/ The term "public utility" is defined by the act as being "other than municipal corporation." (Mich. Stat. Ann. (22.141).)

transfer from one utility to another and a utility with facilities nearest to perspective customer has the right to serve that customer unless its distribution facilities and the facilities of one or more other utilities are located within 3000 feet of the customer or there are no distribution facilities of any utility located within 2,640 feet. Currently, the MPSC is considering adoption of a similar territorial allocation rule dealing with loads served with three phased distribution line. It should be noted that neither the single phased rule nor the three phased rule, if in fact adopted by the MPSC, restrict the activities of municipal electric systems since, as pointed out above, the MPSC has been expressly denied jurisdiction over municipally owned electric systems. Also, the rule and proposed rule governs only extensions by two or more utilities subject to its jurisdiction. Therefore, extensions by cooperative, or private corporation utilities in competition with municipal utilities would not be limited by the single phase or three phase rule.

Despite the fact that the "single phase rule" has governed the activities of cooperative and private corporation utilities since 1966, its validity is open to serious question. As pointed out above, the MPSC must find specific legislative mandate for the exercise of its regulatory power, Huron Portland Cement Co. supra, and such mandate is not to be found in the broad language of Mich. Stat. Ann. §22.13(6). Michigan Bell Telephone Co. v. Public Service Commission, 315 Mich. 533, 24 N.W. 2d 200(1946). The

statutes nowhere contain specific authorization for the adoption of service area regulation by the MPSC and in adopting such rules, the Commission cited no authrotiy. While an argument could be presented that authority for the single phase rule is found in the pernumbra of Act 69 of 1929, (Certificate of Convenience and Necessity), this conflicts with both the general rule as to the necessity for specific statutory authority for MPSC regulation and the terms of Act 69. First, the Act refers solely to existing service "in any municipality" and the single phase rule does not govern exclusively within municipalities. Secondly, the Act sets forth matters which the MPSC "shall take into consideration," (Mich. Stat. Ann. 22.145) thereby implying the necessity for a case-by-case determination. Finally, the single phase rule, unlike Act 69, does not primarily relate to existing service.

Since it is a well established rule that jurisdiction of a court or agency cannot be conferred by waiver or by longstanding adherence, 32/ the fact that the rule has remained unchallenged since 1966 is irrelevant. If the rules are beyond the authority of the Commission, as appears likely, they may subsequently be overturned thereby eliminating whatever impact they have on electric utility competition in Michigan.

Thus, while the MPSC can regulate rates, establish conditions for service, require nondiscriminatory service to all similarly situated customers, and to a certain extent, limit the territories in which public utilities may operate, it appears to

32/ See Department's Brief, 51-52.

be without authority to compel a public utility to extend its facility so as to serve a particular customer or any particular area. Moreover, neither the single phase rule nor the requirement for a certificate of convenience and necessity is an absolute prohibition against expanding into a particular territory. For example, paragraph 8 of the "single phase rule" states "a utility may waive its right to serve a customer or group of customers porvided that another utility is willing and able to provide the required service and the Commission is notified and has no objections." (D.J. Exhibit No. 9, p. 6) Likewise the Act regarding certificates of convenience and necessity establishes procedures for obtaining the issuance of such a certificate. It does not prohibit certification if another utility is serving. Admittedly waiver by utility of its "single phase rule" right to serve and obtaining a certificate despite reasonable reliable service by an existing utility are unlikely events. Nevertheless, they are not necessarily precluded as a matter of law.

UNITED STATES OF AMERICA

BEFORE THE

ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY BRIEF OF THE UNITED STATES DEPARTMENT OF JUSTICE, 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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