UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

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

INTERVENORS' TRIAL BRIEF AND STATEMENT OF POSITION

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Intervenors have recently submitted for the Trial Board's consideration two major pleadings. These are their "Motion to Limit Discovery and Issues and Alternatively for Summary Finding Requiring Imposition of License Conditions" (August 27, 1973)*/, and "Memorandum Concerning the Impact of the Louisiana Power & Light Company Memorandum and Order on the Proposed Midland License Application" (October 19, 1973). In addition, there was extensive oral argument October 19, 1973, which entailed a statement of the parties' legal positions and also the "Reply of the Department of Justice on Issues Raised Other Than Disqualification Raised by Applicant's Answer of May 9, 1972"(June 9, 1972), and the "Appeal by Non-Parties from Adverse Orders Granting Subpenas in Favor of Consumers Power Company" (March 16, 1973), in which intervenors concur.

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*/ Cited "Motion to Limit Discovery and Issues . . . " throughout this brief.

Along with Intervenors' prepared testimony and testimony presented by the Department of Justice, we refer the Board to these pleadings setting forth Intervenors' position. */

A summary of Intervenors' position is as follows: Coincidental developments in the field of nuclear energy and power generation have lead to economies of scale in building large nuclear generators, such as the proposed Midland Units. It is widely predicted that nuclear generation will become a major source of electric energy, and very possibly the main source. These developments have resulted in large part from public financed Government research, development and funding.

Without obtaining transmission and coordination services from Consumers Power Company, it would be impractical for small utility systems, such as Intervenors, to construct and operate large nuclear units. Intervenors do not believe that on this account there should be a further concentration of the bulk power supply industry. Nor do Intervenors believe, as Consumers Power Company suggests, that the remedy should be restricting Intervenors to the purchase of wholesale power from Consumers Power Company or the operation of small unit generation.

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*/ Citations and testimony references are omitted from this summary, but are contained later in this brief and in the prior pleadings which are referred to above.

The 1970 amendments to the Atomic Energy Act were passed to assure that developments in nuclear power generation not result in further concentration in the industry. Specific reference was made to existing antitrust law. Section 105(c) is a direct and specific expression of Congressional concern, 41 U.S.C. 2135. Moreover, even without this statutory mandate, the Commission could not grant the license without appropriate conditions. The law obligates Federal agencies to consider legislative policy, including antitrust statutes under the more general "public interest" licensing standards contained in most regulatory acts. Thus, the Atomic Energy Act makes the general law explicit. Moreover, the policies favoring competition established by the antitrust laws are very strong ones. Courts have held consistently that absent a compelling justification licensing and regulatory agencies must neither encourage nor ratify company's anticompetitive actions.

In part due to the economies of scale associated with the generation and transmission of power referred to above, the control of bulk power resources has become concentrated. Individual vertically and horizontally integrated utilities, such as Consumers Power Company, have grown to great size. Furthermore, large utilities have entered into "coordinating" or "pooling"

transactions and transmission agreements, whereby they have acted together to supply various wholesale power service. Thus, for example, major utilities, including Consumers Power Company, will use each other's generating and transmission resources to provide power. They work in concert to sell and exchange power so that the most efficient generating units are built and are operated.

If the Company had not achieved its large internal size or if it did not have these various pooling and interchange arrangements, the proposed Midland Units would be of far reduced value to Consumers Power Company, if they could be constructed and operated economically at all. The Midland Units are planned to become part of a large, integrated and coordinated generation and transmission network. Absent such integration, the Company would have to have a large proportionate amount of reserve capacity to maintain a firm supply of electric generation from these units, thereby insuring the systems continued reliability. Alternatively, the system would have to build smaller units. However, this would reduce the Company's ability to obtain economies of scale.

For the very same reasons that the pooling arrangements will increase the value of the Midland Units to Consumers Power

Company, granting Intervenors direct access to that Midland power (either through purchase of an ownership interest in the plant or unit power from it) without granting them the right to participate on an equivalent basis in the existing "pooling" or interchange arrangements will diminish the value of that access. For example, if Intervenors were granted the right to own a portion of the units, but not permitted the right to obtain "emergency" and "maintenance" power on an equivalent basis to Consumers Power's purchases of such forms of energy, then the cost of Midland power to Intervenors will be increased. Without the availability of such backup services, to sustain a firm power source Intervenors would have to have larger amounts of idle or "reserve" capacity of generation than they would if they could obtain pooling and interchange service. On an isolated system, there must be at least enough reserve capacity to back up the largest power source. This would mean that a city might have to maintain an equal amount of extra generation capacity equal to the Midland power he can purchase unless he gets "emergency" and "maintenance" power. The exclusion of Intervenors from the integrated and coordinated network of generation, transmission, planning and operations that are represented by the Michigan Power Pool and other pooling and interchange agreements

would reduce the benefits of their owning a portion of the Midland Units. Indeed, by controlling the costs or refusing to deal in attendant integrating or coordinating wholesale power services, Consumers Power Company could negate whatever advantages Intervenors might gain from owning a portion of Midland power.

The central thrust of Intervenors' position is that they be granted the opportunity to have direct access to the Midland Units and that they be granted access to pooling and transmission arrangements on an equivalent basis to those agreed to in fact by the major investor-owned utilities. In simple language, they want to be let into the club.

Intervenors' right to relief stems directly from the Atomic Energy Act. If the license is granted unconditioned, the development of nuclear energy will disproportionately benefit the large investor-owned utilities and deny its benefits to the smaller utilities. We point out to the Board that we are not advocating a "special" doctrine. As we note above, every regulatory agency has an obligation to assure that its actions are not in conflict with national policy. Moreover, other utilities have voluntarily agreed to appropriate license conditions.

The above general statement briefly outlines our position. The facts relied upon agree with those stated in the Company's proposed testimony. While there may be differences of emphasis, expression or quantification, neither Applicant, Intervenors, the Department of Justice or the AEC Regulatory Staff disagree about the essential structure of supplying bulk power. The major differences appear to be ones of interpretation of law and of the rightness or wrongness of Consumers Power Company's activities in seeking to exclude Intervenors from access to the Midland Units, transmission and pooling on an "equalized reserves" basis. Therefore, we suggest the issues can still be limited and a long expensive trial avoided.

I

FACTS EITHER AGREED TO OR NOT LIKELY
TO BE CONTESTED BY CONSUMERS POWER COMPANY

1. The Midland Units applied for will be nuclear units capable of generating approximately 1,300 mw of base load power and its associated energy. (Testimony of Janjai Chayavadhanangkur, p. 3.)

2. The Midland Units should operate at at least an eighty percent load factor. (Deposition of Harry R. Wall, Vice Chairman and Director of Consumers Power Co., p. 23.)

3. In 1972 net nuclear generation accounted for only 2.8 % of the total net generation of the F. P. C. Class A & B utilities, but nuclear generation in projected to be 49.2% by 1990. (Exhibit -- (Jc-1), based upon Federal Power Commission and Edison Electric Institute statistics.)

4. Consumers Power Company's 1972 load was 4,080 mw. Its 1972 nameplate ratings were 2,846.0 mw steam, 886.7 mw nuclear, 68.0 hydro-electric and 496.9 other totaling 4,297.6 mw. Its 1982 projections are a load of 8,020 mw and generation of 4,568.0 nuclear, 2,0868 mw hydro-electric, 496.9 other, totaling 11,994.7 mw. (Exhibit - (JC-3)).

5. In 1972 Consumers Power Company had approximately 910,513 customers, 22,078,474 mwh sales, $416,994,000 annual electric revenues, $457.98 revenue per customer, $750,453,000 total operating revenues $784,423,062 electric utility plant and $2,530,592,437 total assets. (Source - Exhibit - JC-4, Testimony of Janjai Chayavadhanangkur, p. 10; Consumers Power Company 1972 Annual Report.)

6. The total loads of intervenors is less than the power to be generated from the Midland Units. (Source: Testimony of Janjai Chayavadhanangkur, Exhibit JC-3, JC-4.)

7. Apart from the Luddington Hydro-Electric Project, in its general area of service except for Lansing intervenors own no generating units of more than 30 megawatts. Lansing has no apart from unit greater than 160 mw. (Source - Testimony of Dr. Peter Gutmann, p. 12 See Exhibits JC-3, JC-4.)

8. Consumers Power Company and Detroit Edison Company own all transmission facilities within Consumers Power's general area of service operated at greater than 138 kv. No system within Consumers Power's area of service other than Consumers Power and Detroit Edison is planning any transmission at voltage levels of above 138 kv. (See Testimony of Peter M. Gutmann, 19, p. 29-30; Deposition of Alphonse H. Aymond, pp. 181-182.)

9. The Midland Units will be a significant source of base load power to Consumers Power Company.

10. Nuclear energy is likely to be an important - - if not the dominant -- source of electric energy in the future. (Source - Testimony of Janjai Chayavadhanangkur, pp 3-5 Exhibit _ Jc-1.)

11. It is important for Consumers Power Company to be able to utilize nuclear electric generating facilities in connection with its over-all bulk power supply system because of the limited availability of fossil fuels. (Source: Deposition of Alphonse H. Aymond, President and Chairman of the Board of Directors of Consumers Power Company, p. 138. See Discovery Document No. 23001.)

12. There are serious problems obtaining gas and oil supplies for electric generation. Fossil fuel availability is especially uncertain in view of environmental strictures. (Source: See, e.g., Deposition of Alphonse H. Aymond, p. 138, 165-166, 222-226. Deposition of Harry R. Wall, pp. 19-21, 104-108.

13. Especially in view of possible environmental or fuel availability problems, it is important for generating electric utilities to have a variety of sources of generation. (Source - See Deposition of Harry R. Wall, p. 21.)

14. Nuclear generation appears to be a promising source of future generation, in terms of cost, potential generation output, fuel availability and environmental acceptability. (Source: See, e.g., Deposition of Alphonse H. Aymond, pp. 165-166, 223-226.)

15. The Midland Units are likely to produce as low if not lower costs of energy for base load purposes as any alternative. (Source: Deposition of Alphonse H. Aymond, p. 226.)

16. There are substantial economies of scale associated with building large scale generation units and high voltage transmission lines. (Source: Testimony of Consumers Power's witnesses Joe D. Pace, p. 38; Irwin M. Stelzer, p. 19.)

17. These economies of scales may act as a barrier to bulk power supply competition from smaller systems. (Source: Testimony of Consumers Power's Witness Joe D. Pace, p. 38.)

18. Relatively small generating units, even for base load operation, may have higher costs -- particularly substantially higher capital costs -- than the large units employed by major integrated bulk suppliers. (Source: Testimony of Joe D. Pace, p. 65.)

19. The possibility for significant competition in the transmission of electricity is quite small. (Source: Testimony of Irwin M. Stelzer, p. 19-21; Testimony of Dr. Peter Gutmann, pp 14-15.)

20. Economies of scale in generation appear to be increasing with the advent of nuclear powers.

21. The nature of the electric industry is such that for purposes of economy, reliability and environmental protection, it is necessary to integrate sources of base load, intermediate and peaking units. (Source: Depostion of Harry R. Wall, pp 21-25.)

22. Base load units have high associated capital costs but relatively low operating costs per kwh. (Source: Testimony of Janjai Chayavadhanangkur, pp. 6-10, Exhibit - Jc-3.)

23. Peaking units tend to have high unit operating costs parking, but low associated capital costs. (Source: Testimony of Janjai Chayavadhanangkur, pp. 6-10, Exhibit - Jc-3.)

24. Consumers Power Company predicts that approximately 50-70 % of its generation will be base load, 20-35 % intermediate generation and 10-20 % peaking generation. (Source: Deposition of Harry R. Wall, p. 22, Testimony of Janjai Chayavadhanangkur, p. 8.)

25. The transmission network acts to integrate the various plants into a cohesive system. (Source: Testimony of Joe D. Pace, p. 38; Testimony of Abraham Gerber, pp 6-9.)

26. The transmission network allows the utilization of power from the most efficient available generating plants at any particular time to serve total loads and to quickly dispatch "back-up" power in the event of an outage of generation on the line. (Source: See Testimony of Joe D. Pace, p. 38; Testimony of Abraham Gerber, pp 6-9.)

27. Transmission availability is necessary to utilize the economies of scale from large plants, since it ties together many individual units to allow continued electric service in case of an outage of the large unit. (Source: Testimony of Abraham Gerber, pp 6-9.)

28. The coordination of generation from many units through a transmission network is necessary to support large individual units; otherwise, service would be threatened with the outage of a particular large unit. (Source: Deposition of Harry R. Wall, pp 43-47.)

29. Absent the tieing together of a number of units through a transmission system, individual units would have to be smaller or the amount of reserves would have to be higher to prevent loss of service in the event of an outage of the large unit. (Source: Deposition of Harry R. Wall, pp 31-43.)

30. The providing of reserve capacity is expensive in that it represents "idle" capacity.

31. Consumers Power Company can economically build plants such as the Midland Units because of the size of its markets for power either on its own or other systems. (See Testimony of Abraham Gerber, pp 8-9; Testimony of Janjai Chayavadhanangkur, p. 17.)

32. Consumers Power Company's operations are very closely coordinated with Detroit Edison. This coordination provides for (a) a central dispatch of power; (b) joint planning and staggered construction of generating and transmission facilities; (c) common use of transmission facilities; (d) provision for mutural assistance in providing back-up emergency and maintenance power and coordinated maintenance; (e) provision for various kinds of power sales and exchanges including seasonal diversity exchange; interchange power (i.e., sales); economy exchange, etc. (Source: Testimony of O. Franklin Rogers, pp 9-16; see generally testimony of Abraham Gerber and Deposition of Harry R. Wall.)

33. Consumers Power Company has entered into facilities and interchange arrangements with other large investor-owned companies, including the Michigan-Illinois-Indiana-Ohio (MIIO) group and Hydro Electric Company of Ontario ("Ontario Hydro"). (Source: Testimony of O. Franklin Rogers, pp 11-14.)

34. Through these other interchange arrangements, Consumers Power Company can obtain use of the transmission facilities of the involved companies, emergency and maintenance back-up power and exchanges of energy on an economy basis ("seasonal". "diversity", or "economy" energy). (Source: Testimony of O. Franklin Rogers, pp. 10-14).

35. Consumers Power Company has also entered into an arrangement with Commonwealth Edison whereby through using intermediate transmission lines it sells "unit" power from the Luddington pumped storage units. (Source: Testimony of Abraham Gerber, p. 31; Testimony of O. Franklin Rogers, pp 12-13.)

36. Through its interchanges with Ontario-Hydro, which in turn is interconnected with Niagara Mohawk, power generated by Consumers Power Company reaches as far as the New York Power Pool or further. "Order authorizing transmission of Electric energy to Canada and superseding prior authorization.", Detroit Edison Company and Consumers Power Company, FPC Docket E-7206, (October 10, 1972), Appendix A of "Motion to limit Discovery and Issues ...", supra

37. Interconnection and pooling arrangements continue the historic industry trend of system integration while maintaining the separate institutional identity of the participants. (Source: Testimony of Abraham Gerber, p. 6.)

38. Consumers Power Company's growth has been achieved in part through the acquisition of other utility systems in whole or part and other utility system facilities. (Source: Discovery Documents contained in Appendix H to "Motion to limit Discovery and Issues ...", supra.)

39. Consumers Power Company was formed from smaller companies. (Discovery Doc. 013463.)

40. Consumers Power Company has attempted to acquire other utility systems in whole or part. (Source: Same as # 38.)

41. Consumers Power Company has attempted to limit generation on the part of intervenors. (Source: Same as # 38.)

42. Certain of intervenors have excess generating capacity which could be sold to other intervenors or third-party systems, if they could purchase transmission services from Consumers Power Company. (Source: Exhibit - Jc-3, p. 11; Jc-4.)

Intervenors do not think that there are factual issues concerning either the specific advantages of large unit nuclear generation or the economies of scale associated in general with large size generators or high voltage transmission lines. Nor do they believe the Company contests the advantages of having an integrated generation and transmission network or of its various pooling agreements.

For example, their witnesses state (Joe D. Pace: p. 38):

> "The existence of substantial economies of scale in the electric utility industry may also act as a barrier to bulk power supply competition from small systems. It is well accepted that large base load generating units tied into an integrated system by high voltage transmission facilities may offer substantial cost savings over the use of small base load units and relatively low transmission."

(Irwin M. Stelzer, p. 65):

> "Self-generation is an alternative always available to any electric utility for satisfying its bulk power requirements. If the system is small, of course, it will have to utilize relatively small generating units even for base load operation and such units may have higher costs -- particularly substantially higher capital costs -- than the large units employed by major integrated bulk power suppliers."

(Abraham Gerber, pp. 6-9):

> "Originally, the electric utility industry consisted of small isolated plants which provided the generation and distributed the power over small localized areas. . . .
>
> "As it became possible, with the development of alternating current transmission, to transport electric power over greater distances, the areas served from a single plant could be increased and individual plants could be tied together electrically into systems under common ownership. Transmission became the physical integrating medium. . . . Opportunities for achieving substantial economies of scale in generation became available. Furthermore, tying two or more plants together with transmission made possible more reliable service, lower reserves and other economies. The continued development of transmission technology and growth in electric power use expanded the opportunities for achieving these advantages by consolidating more areas into larger single integrated systems with transmission as the integrating medium. As generating unit size grew to achieve economies of scale, transmission voltages increased commensurately to make possible lower cost per unit of transmission capacity as well as lower line losses. Interconnection and pooling agreements have been developed in an effort to capture additional benefits of scale economies and integration while maintaining independent corporate identities
>
> "Q. You have referred to transmission as the integrating medium. Could you please explain the term integrating medium?
>
> A. Yes. By integrating medium I mean that the transmission system provides the means whereby the total complex of plants and loads can be tied together into a single coordinated, integrated system in which all parts of the system are planned and operating in synchronism to obtain

> the required output with optimum efficiency. The transmission system also makes possible increased reliability by permitting a large number of plants to satisfy the electricity demands in the event that any one of them should be shut down either for planned maintenance or under emergency conditions. It permits the reduction in standby reserve requirements, since with numerous generating units and plants, the probability of forced outage imparing service at any one time is reduced. It permits the exploitation of diversity in demand with less capacity than would be required to meet the sum of the peak demands in each community at whatever time they may occur. It permits planning maintenance so that a unit or plant can be shut down while others carry the load and it, of course, permits operation in a manner which would provide the generation from the most efficient combination of plants and transmission. The integrated transmission system also permits assurance of reliability of service even in the event of outage of any transmission segment, whether it be for maintenance or forced outage emergencies. These benefits of integration are attainable only because of the availability of transmission capable of carrying the generation of a large number of plants in such a fashion that the load can be served in any part of the system from any combination of generating units and plants."

It is equally not an issue that Consumers Power Company refuses to grant Intervenors the relief that they seek in terms of access to the nuclear facilities themselves or to the related transmission and coordinating services. The Company has limited interchange arrangements with members of the Michigan Municipal and Cooperative Power Pool, Lansing and Holland, but it refuses

to agree to "equalized reserves" or to the sale of transmission service to intervenors separate from its sale or exchange of power.*/

There are other matters of testimony or documentary evidence, which are matters of record. Consumers Power Company has attained its large size partially through a process of consolidation and purchase of other utility system.**/ Looking at the evidence most favorable to Consumers Power Company, it has at least been willing to take over smaller competing utilities adjacent to it or within its service area..Moreover, there is additional evidence of concerted activities by the Company to expand through take-overs and to limit generation by competing systems. Mr. Robert H. Paul, presently General Supervisor of Commercial Electric and Governmental Services for Consumers Power Company has stated:

> "The first goal of our Marketing activity or program concerning other utility systems in our service area is, of course, to acquire th systems. Since 1950, Consumers Power has

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*/ These agreements will be placed into evidence and are discussed in the testimony of Intervenor witness O. Franklin Rogers, pp. 14-16

**/See eg., discovery exhibits attached to "Motion to Limit Discovery and Issues...", Appendix H.

> purchased 6 municipal electric systems. An offer to purchase the Charlevoix system was turned down, but we are now supplying most of Charlevoix' requirements. In 1965, when it became apparent that Traverse City was about to expand its generating plant, we attempted to head this off with a lease proposal . . . Also in 1965, we offered to purchase the St. Louis electric system for $825,000. . . . . We are in the process of submitting purchase proposals to the City of Allegan for its system and to Grand Rapids and the City of Wyoming for their street lighting systems . . . Discovery Document No. 19814, 19816-19817. (1966) */

There is further evidence that Consumers Power Company acted to prevent expansion of competitive generation by smaller systems within its service territory and to limit the operation of existing generation. Noteworthy is the Company's attempts to block loans to rural electric cooperatives from the REA for generation purposes. eg., Discovery Docs. 007638. "Motion to Limit Discovery and Issues", Appendix H.

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*/ The statement was apparently part of a speech to division engineers of Consumers Power Company, which therefore could be expected to influence policy of the Company and have considerable impact. Deposition of R. L. Paul, p. 257.

There is also evidence that Consumers Power Company has overtly and covertly entered into both state and local politics to maintain or increase its effective monopoly and that it has used its power as a supplier of both natural gas and electricity to achieve this result. Since the Company and Board have refused discovery into this area, these facts must be assumed correct.*/

There is, furthermore, evidence of refusals to deal. Specifically, the Applicant has refused to grant access to the proposed Midland Units, its high voltage transmission lines or to coordination arrangements similar to those embodied in the Michigan Power Pool, although in some instances but not in others it has agreed to more limited arrangements.**/

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*/ "Motion for Reconsideration of the Trial Board's November 28, 1972, Order and Motion to Compel" (June 29, 1973).

**/See generally, Testimony of Dr. Peter M. Gutmann, pp. 23-25. If Consumers Power is willing to provide these services it should so state.

II

CONSUMERS POWER COMPANY'S "DEFENSES" PROVIDE NO BASIS FOR ISSUING THE MIDLAND LICENSES UNLESS THEY ARE CONDITIONED TO AVOID ANTI-COMPETITIVE IMPACTS

As stated earlier, there appears to be no difference in the facts stated by the parties that are important to the outcome of the case. However, Consumers Power Company indicates that it is preparing elaborate reasons why the Midland licenses should not be conditioned to provide Intervenors access to Midland Power and attendant services.

Consumers Power Company's argument against a conditioning of the license depends upon its establishing a limited definition of "monopoly power". It states that in order to have monopoly power the Company would have to have a dominant market position, power over price, and exclusionary power. (Testimony of Joe D. Pace, p. 30-31). The Company goes on to argue that limitations on entry into the market stems from a combination of government regulations and economics. See generally testimony of Joe D. Pace.

According to the Company, the limitations are political, economic or environmental. Consumers Power did not cause the monopolization. The Company further argues that it is subject to wholesale and retail price regulation and therefore cannot control price. Finally, it goes through an elaborate analysis to prove that, except where monopoly has been granted by law, the Company does not have a dominant position.*/

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*/ The Company depends upon statues and regulations justifying its restrictive practices. But see Otter Tail Power Co. v. United States, 410 U. S. 366 (1973), and Gulf States Utility Co.v FPC, 411 U. S. 747 (1973), both discussed, infra. p. 42-48 These cases hold antitrust policy applicable to wholesale power transactions.

At the same time the Company attempts to use the law as a shield against license conditioning, it has refused inquiry into "political" questions. Thus, it bars inquiry into its roles in influencing Government action on which it relies. But see , Sacramento Coca-Cola Bottling Co. v. Chauffers Locals 150 440 F. 2d 1996, 1998-1999 (Ca 9, 1171, cert. denied, 404 U S. 826 (1971); George R. Whitten, Jr., Inc., v. Paddock Pool Builders, Inc., 424 F. 2d 25, 31-34, (CA 1, 1970); cert. denied 400 U. S. 850 (1970); Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F. 2d 1286 (Ca 5, 1971): cert. denied, 404 F.2d 931 (CADC, 1971); cert, denied, 404 U. S. 1047 (1972): Hecht v. Pro-Football Inc., 444 F. 2d 931 (CADC, 1971); cert. denied, 404 U. S. 1047 (1972).

At the root of Consumers Power Company's various arguments is a mixing of the wholesale and retail power markets.*/ Obviously, Consumers Power Company is correct in that there is either limited or no competition in some areas of the state for retail customers where the Company has perpetual franchises under the Foote Act.**/ It is equally correct, that in other areas like Traverse City, there is house to house competition for sales. While it is easy to engage in a numbers game, the fact is that in some areas of the state there is much competition for retail customers; in other areas there is not.

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*/ By retail power markets, we refer to sales of electricity to ultimate customers such as homes, offices or manufacturers for such uses as heating, lighting, etc., By wholesale power markets we refer to the whole spectrum of specialized wholesale transactions. Wholesale power transactions include various services such as the provision of firm "full requirements" power to meet the totality of a customer's needs for all purposes, specialized transactions such as the sale of emergency power on a "when available" basis in the event of a plant outage on the purchaser's system, transmission service or power from a particular unit. The popular conception of mixing the two types of sales is belied by the fact that utilities may sell power predominantly or solely at either retail or wholesale. (Compare Bay City which sells at retail, but buys all its power from Consumers Power, and the Power Authority of the State of New York (PASNY) which sells only at wholesale. As pooling and interchange arrangements demonstrate there is a wide variation in specialized wholesale power services. (See e.g., Testimony of Abraham Gerber). Consumers Power is willing to be required to sell at wholesale to distributors, but not to be required to allow those distributors to compete with it for wholesale sales or to purchase from others at wholesale.

**/ There can be some competition for retail customers in these areas either on the fringes or for the location of customers. There is also the indirect competitive or "yardstick" effect of the impact of lower rates in adjacent areas. Interestingly, Mr. Foote who is credited with the Act providing for perpetual franchises was also the founder of Consumers Power Co. Bush, Future Builders: The Story of Michigan's Consumers Power Co., pp. 63-70, Discovery Doc. 10580 et seq.

The extent of control by either Consumers Power Company, Intervenors or anybody else in terms of market shares for retail customers is irrelevant to the question of whether Consumers Power Company is justified in refusing to deal fairly in wholesale transactions, such as providing access by other utilities to the Midland Units or refusing to sell transmissions and coordination power services. There is certainly potential (and existing) competition in bulk power supply markets.*/

Intervenors agree that there are economies of scale in wholesale power generation and transmission. Particularly, they agree that high voltage transmission facilities serve as an "integrating" medium among plants and that they cannot practically and economically be duplicated by Intervenors. Testimony of Joe D. Pace, p. 38, Abraham Gerber, p. 7. **/

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*/ The degree of monopolization of retail sales in various areas of service is often determined by state law. While in certain situations this can result in separate violations of antitrust laws, we do not deem it necessary for the Commission in this case to determine the degree to which states can limit competition in electric service at the retail level. This is not to say that use of monopoly power over wholesale facilities can be used to affect competition for non-monopoly services. E.g., United States v. Aluminum Co. of America, 148 F2d 416 (CA2, 1945). This issue is discussed infra. Nor would we view it legal for the Applicant to use its monopoly power over other services, such as natural gas, to aid it in retail competition.

**/ Additionally, there are various obvious environmental problems to the duplication of transmission facilities. Testimony of Janjai Chayavadhanangkur, p. 26.

However, while these factors may justify the ownership of high voltage transmission facilities by Consumers Power Company or the licensing of the Midland Units, they do not justify Consumers Power Company's barring access to these facilities and services to actual or potential competitors. As we discuss in Section II, the law is clear that a "bottleneck" monopolist cannot refuse to deal in bottleneck services; nor can he do so on a discriminatory basis.

It is clearly documented from the discovery and is a matter of public record that Consumers Power Company has expanded by taking over adjacent smaller systems.

The unwillingness of Consumers Power Company to treat Interveners in the same manner that it treats other large invester-owned utilities underscores its basis premises that Intervenors are to be considered customers and not utilities. It is willing to sell them power as customers. It is unwilling to have them enter or participate in various types of wholesale power transactions -- at least to an extent which the company cannot control. Indeed, its expressed willingness to sell wholesale power is in substitution for allowing wholesale power competition. E.g., Testimony of Joe D. Pace, p. 45.

The second major thrust of the Company is that it has no power over price, since the rate it may charge is regulated. E.g., Testimony of Joe D. Pace, pp. 43-53. Here again is the

unstated premises that the municipal or cooperative intervenors are customers, not utilities and that, therefore, they are not entitled the same treatment as other utilities engaging in wholesale services. Consumers Power Company in fact deals with other utilities on a basis of other than fully allocated costs and is willing to separate out the various types of wholesale power transactions. It grants access to the transmission lines of the Company and other utilities in the sale of wholesale power transactions. Thus, for example, the lines of Consumers Power Company are used to transmit power between Detroit Edison Company and Toledo Edison Company*/ It uses the transmission lines of other utilities to transmit power to Ontario-Hydro, Commonwealth Edison and other utilities*/ It refuses these rights to Interventors.

To the extent that Consumers Power Company argues that the appropriate remedy for Intervenors is to buy wholesale power from the company, it ignores the illegality of its using its dominant position over large base load generating units

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*/ Deposition of Harry R. Wall, p. 65;

*/ Deposition of Harry R. Wall, p. 66; Testimony of O. Franklin Rogers, p.11.

and transmission facilities to affect or limit sales in other wholesale services (or in those services themselves). See Section II, infra, for case citation. */ The fact that it will not sell wholesale power services separately to intervenors or will do so only on discriminatory terms is a classic example of "tie in" sales. E.g., United States v. Griffith, 334 U.S. 100 (1948); International Business Machines v. United States, 298 U.S. 131 (1936).

The Company gives two separate justifications for refusing to agree to license conditioning as Intervenors suggest. The first is that to do so could be discriminatory as against other customers because intervenors would be getting favored treatment; the second is that the company should not have to aid a competitor. It is not unfair to retail customers

*/ Consumers Power's argument that it need not sell a potential competitor bulk power services because of their allegedly unfair tax and financing advantages illustrates its power over the market. Through denying the sale of services or pricing them discriminatorily, it has the power to eliminate any advantages possessed by competitors that it deems unfair (i.e., a strong control over the market). This is analogous to a railroad which priced coals closer to market at a higher rate than goods further from market to equalize the price at the point of delivery. Such use of power to control price at different stages of commerce has been condemmed. American Tobacco Co. v. United States, 328 U.S. 781 (1946). United States v. Reading Co. 253 U.S. 26 (1920); Apex Hosiery Co. v. Leader, 310 U.S. 469 491, m.14 (1940).

to sell power services at wholesale for other than the retail price.*/ Moreover, to the extent that competition reduces retail costs of intervenors, the most likely result is a downward pressure on retail prices. We are at a loss to see how this will harm other retail customers.

The Company's real fear, expressed by its President and Chairman of the Board in depositions and repeated in its testimony, is that the granting of equal access by intervenors to wholesale services will aid intervenors in competition for retail customers. E.g., Deposition of Alphonse H. Aymond, pp. 46-48, 122-125, 183-184, 199-203. Testimony of Joe D. Pace, p. 78. This attempt by Consumers Power to use its monopoly power over transmission and other bulk power services to limit competition is clearly contrary to law.

Intertwined with the above "two defenses" is the Company's government action defense. This come to the proposition that, since federal and state commission regulate rates or other actions of the Company, antitrust laws need not be

*/ The Company appears to be trying to turn the antitrust law upside down. It is insisting that it will only sell power to intervenors at prices comparable to that which it sells retail customers. Obviously, intervenors who have to pay distribution costs will be limited in their ability to compete for retail customers. This is the classic "price squeeze". United States v. Aluminum Company of America, 148 F2d 416 (Ca2, 1945). See Richmond Power & Light v. FPC, 481 F2d 490 (CADC, 1973).

applied. The Atomic Energy Act is contrary. Sec.105c. Moreover, regulation and competition are complementary -- not mutually exclusive substitutes. Indeed, the courts have held that, except where there is a clear demonstration to the contrary, regulatory agencies should attempt to encourage competition and not supplant it. E.g., Northern Natural Gas Co. v. FPC, 399 F2d 953 (CADC, 1958).

The company seeks to build elaborate "efficiency" arguments. These translate to an asserted right by Consumers Power Company to refuse to deal because municipals or cooperatives may have tax or financing benefits.*/ As a proposition of law, Consumers Power Company has no right to engange in self help by refusing to deal in order to negate what it considers to be unfair competition.**/ Moreover, the company ignores that the advantages it complains of are granted by law. If it deems these advantages unfair, its redress is to the legislators and not to the use of its own monopoly power

*/ Profit ability of a competitor provides no license to violate the antitrust laws Utah Pie Co. v. Continential Baking Co., 386 U.S. 685 (1967).

**/Consumers Power Company itself benefits from not inconsiderable tax benefits. See Deposition of Alphonse H. Aymond, pp. 172-174.

to exclude intervenors from the benefits of access to nuclear generation and related transmission and other services.*/

The antitrust review provisions in the Atomic Energy Act were passed by Congress precisely for the purpose of protecting the smaller utility systems against use of monopoly power by the larger investor owned utilities, such as Consumers Power Company. Congress was well aware that most of the smaller utilities were governmentally or cooperatively owned. Had it so chosen, Congress could have viewed the advantages of the smaller systems as offsetting the advantages possessed by the larger systems. It failed to do so.

The so-called "tax" issue is artificial in any event. If the Company were to take a passing glance at reality, it would recognize that it dominates the western portion of the lower Michigan Peninsula. Furthermore, the number of municipals and cooperatively owned electric plants has been steadily declining. E.g., testimony of Joseph C. Swidler on S. Bill No. 218, Hearings

*/ Consumers Power Company is attempting to raise in a respectable quise the issue of public versus private power. For years, investor owned utilities have protested against what they have considered to be unfair tax benefits enjoyed by "public power" entities. In Otter Tail itself the trial judge refused to go into such matters was affirmed. They should not be dealt with here -- as Judge Divitt in Otter Tail stated -- to avoid the trial becoming "a life-time mission". "Motion to Limit Discovery and Issues . . ." pp. 3-5, Appendix A. Actually, strong arguments can be made for a retention of these benefits on their merits, principal among them being the fact that the funds for intervenors have been sel -generated or supplied by the public.

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Before the Committee on Commerce, United States Senate, 89th Congressional, 1st Session, pp. 69-70. The alleged threat of municipals or cooperatives taking over Consumers Power Company, a three billion dollar enterprise, is on its face absurd. To read Consumers Power Company testimony, one would think it were intervenors who would be building the plant and the owning the major and production generation facilities in the lower peninsula and Consumers Power Company, who was petitioning for equal treatment.

There are various forms of ownership of electric utilities (or other businesses). Each have different advantages. Thus, for example, as it mentions in its testimony, Consumers Power Company enjoys the benefits of perpetual franchises in certain areas which it has obtained from the legislature, other long term franchises and limitations on competition. Testimony of Joe D. Pace, pp. 8 ff. Compare Cities of Lexington v. FPC, 295 F2d 109, 116 (CA4, 1961). It has further advantages which stem from its sheer size in terms of the numbers of customers that it serves, its large area of service, its large assets and revenues, etc., It has negotiated beneficial pooling and interchange agreements. Presumptively its size allows to hire trained and experienced personnel in diverse fields as management, marketing, engineering and financing. (Indeed if such advantages are not present, the company should perhaps be

broken into smaller components.) It has the additional advantage of being a combination company with large natural gas markets.*/

We raise these points not to argue the benefits of large investor owned companies, but merely to point out that advantages are not all a one way street. However, ultimately the factual question of the balance of advantages between forms of ownership is irrelevant. The question posed is whether, because intervenors posses certain advantages of economic value, Consumers Power can offset those advantages by refusing to deal.**/ In any event, profitability is a product of rate levels, market area managerial ability and other variables.

Consumers Power Company makes the argument that intervenors do not need access to the Midland Unit or to the Michigan Power Pool facilities or arrangement, since substitutes are available. These substitutes are self generation, which the company admits is uneconomic, or buying wholesale power from Consumers Power Company. It is a reiteration in a different form of the argument that intervenors do not have a

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*/ There is indication that the company has used such natural gas to compete with intervenors for electric sales. In view of the denial of our discovery on this point, this must be accepted as true.

**/Consumers Power Company has attempted to quantify the value of these advantages. Our silence on the point does not mean that we necessarily accept the attempted quantification. However, we consider the discussion on the point irrelevant.

right to compete in equal terms in wholesale power market. Moreover, Consumers Power Company's arguments might have more force if it were willing to grant access to bottleneck facilities. At the same time it argues that alternatives are available, it is limiting those alternatives. Unless intervenors can buy transmission services, they cannot buy and sell from each other or from other major investor owned utilities.

Consumers Power Company makes a number of minor arguments that granting intervenors the relief they seek will be unfair. We do not attempt to address them all here. One such example is that, if it had to sell intervenors transmission services, they might "cream skim" or request distance delivery points to engage in "unfair competition". Testimony of Joe D. Pace, pp. 76-79. We understand there will be separate hearings on remedy and believe these points can be dealt with then. However, even assuming the company were correct on any of these

arguments, appropriate general relief can be fashioned. Indeed intervenors had offered to meet with the company to discuss our suggested licensed conditions where specific problems could have been discussed, but the company refused. Intervenors are ready now or at any time to meet and discuss these problems. We do point out that the examples raised by Consumers Power Company do not justify the Company's blanket refusals to deal in wholesale power services. Moreover, most of its specifically examples are merely justifications for its refusal to deal or its discrimination which do not meet the point of the basic unlawfulness of such actions or present reasons why intervenors should be limited from competing with the company. */

*/ With regard to the cream skimming arguments, if the company is arguing that there should be exclusive retail service territories, the argument is legislative. If it is concerned about the method of pricing by the Michigan Public Service Commission, which may allow intervenors, in some situations, to compete for "its" customers, it can address its argument to rate regulation bodies. The main thrust of the position appears that it should not have to compete on the basis of price.

With regard to the distance delivery point question, Consumers Power Company itself argues that competition for retail customers is limited by the 25% rule testimony of Joe D. Pace, pp. 17-18. Moreover, we are constrainted to note that Consumers Power Company has not been unsuccessful in competing for the very large customers.

III

APPLICABLE ANTITRUST LAW HOLDS CONSUMERS POWER'S REFUSALS TO DEAL UNLAWFUL

In our "Motion to Limit Discovery, and Issues" and in argument to the Board concerning the Louisiana Power & Light order Interveners and the Department of Justice argued the legal basis why we thought the license proposed by Consumers Power Company could not be granted unless it contained appropriate conditions (August 27, 1973). Interveners again set forth a summary of their basic position at the beginning of this brief. The testimony of Consumers Power Company confirms that the parties are not in dispute concerning the facts. At various times, the Department of Justice and Interveners have suggested possible stipulations, but these suggestions were refused. Now that the Trial Board will have the testimony of all parties, Interveners believe that the Trial Board can readily ascertain that the question evolves into one of application of legal principle. We therefore request that after reviewing the testimony of the Applicant, Interveners, and the Department of Justice, the Trial Board determine whether the basic facts are in dispute and use its authority to obtain stipulation, if there is no dispute.

Then it can review the law to see whether summary disposition of at least some issues is warranted.

By taking this approach, Interveners believe that the Trial Board can perform a real service not only in this case, but in other cases. Informally, many times, the Board or parties have proclaimed this a lead case because this will be the first to be tried. However, no advantage results from days of hearings for their own sake.

We believe that the central thrust of the LP&L order in which the Commission ordered argument*/ was a concern by the Commission of a dragging out of antitrust license cases more than necessary and an attempt to encourage limitation of the issues without sacrificing of substantive rights. The emphasis on energy conservation and development of energy resources underscores the importance of developing expedited procedures. We in no way wish to suggest that hearings should be curtailed concerning factual issues, which can reasonably affect decision, but frankly we are appalled at the prospect of months of hearing, where disagreements appear to be of matters of application of legal principles and not of fact.

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*/ "Memorandum and Order", Louisiana Power and Light Company, Docket No. 50-382A (October 1, 1973).

By adopting the procedure we suggest, similar to the Board's actions in the LP&L case, this Trial Board may be able to save weeks or months of costly and burdensome hearings.

There will be testimony in the record by the Company and Interveners agreeing that there are substantial economies of scale in bulk power generation and transmission. There will be further testimony of the integrated nature of generation and transmission and of the advantages and necessities of various types of pooling transactions.

There is also agreement that adequate reserves are necessary to support large units, because of the potential of loss of service that can result from plant incapacities. Thus, without available "pooling" arrangements, large unit generation from the Midland Units would either be less economic (because of the necessity to carry larger proportionate reserves), less reliable, or both. As a practical matter, but for its large size and pooling arrangements, Consumers Power Company would not be building the Midland Units, but would have to build plants of a smaller size.

While we are trying to capsulize complicated contractual arrangements, which are explored at much greater length in the testimony of both the Company, Interveners and the Department of Justice, the fact remains that today large generation and transmission of energy is conducted in an integrated fashion. If the Midland Units are constructed and operated without appropriate conditions, the Midland Units will perpetuate Consumers Power Company's monopoly of large scale generation and transmission. Indeed, with the probable increasing reliance on large nuclear units, this monopoly power will undoubtedly become increased vis-a-vis the smaller utilities.*/ This is precisely the result the Act -- especially the 1970 amendments -- was specifically designed to avoid.**/

Consumers Power Company's refusal to provide access: (1) to nuclear generation and (2) to transmission service is the type of refusal to deal long condemned by the antitrust laws. A bottleneck monopoly can not lawfully refuse to deal in bottleneck or attendant services. United States v. Terminal Railroad Association, 224 U.S. 383 (1912); Associated Press v.

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*/ See, e.g., testimony of Janjai Chayavadhanangkur, pp. 3-5.

**/ We note that the statute is written in terms of "creating or maintaining a situation inconsistent with the antitrust laws". It is Interveners position, that, since Consumers Power Company already has a monopoly of the major generation and transmission

United States, 326 U.S. 1 (1945); Silver v. New York Stock Exchange, 373 U.S. 341 (1963). Nor may a monopolist use the defense of refusing to deal in order to avoid competition. Eastman Kodak Company v. Southern Photo Company, 273 U.S. 359, 375 (1927); Lorain Journal Co. v. United States, 342 U.S. 143 (1951).*/

Consumers Power Company, however, refuses to recognize the force of these antitrust principles. Apparently, its position is that the electric power industry should somehow be immune.

Thus, despite the clear command of the Atomic Energy Act amendments, recently passed by Congress and the antitrust case law, it presents much testimony on the lack of desirability of allowing equal access by Interveners to its bottleneck facilities.

**/ Continued
in the lower Michigan Peninsular, a situation inconsistent with the antitrust laws will be "maintained". The basic "situation" inconsistent with the antitrust laws is the use by Consumers Power Company of its bottleneck monopoly power over these facilities and actions, in concert with other utilities, to block Interveners from the transmission and interchange agreements. The development of increasing economies of scale and large unit generation, such as nuclear power, must inevitably enhance Consumers Power Company's position, if the Company can continue to isolate Interveners. Thus, even if a situation were not in existence, it certainly would be "created" by the permanent exclusion of Interveners from nuclear power development and necessarily related transactions.

*/ The Company's exclusionary arrangements also constitute "barriers to competition," United States v. United Shoe Machinery Corp.,

Moreover, the Company ignores that the Supreme Court has recently applied these very principles to the wholesale power industry, citing "bottleneck" monopoly cases. Otter Tail Power Company v. United States 410 U.S. 366, (1973).

In various of its pleadings Consumers Power Company has attempted to narrow or avoid the thrust of Otter Tail. This is despite the fact that counsel for the Company before decision by the Supreme Court recognized it as having a potentially profound bearing on the outcome of this case. (Tr. 103-104) While artifical distinctions may be made, every case has an essential thrust. Otter Tail involved a case of a major invester-owned power company attempting to prevent communities in which it was still selling power at retail from starting their own retail distribution system by refusing to sell wholesale power to the communities, refusing to "wheel" power to such systems, supporting "litigation designed to prevent or delay establishment of those systems" and acting to prevent other power suppliers from selling to those systems. The contention of Otter Tail, as expressed by the Supreme Court,

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*/ Continued
110 F. Supp. 295, (D. Mass., 1953), Affirmed per curiam 347 U.S. 521 (1954).

was that "by reason of the Federal Power Act it is not to subject to antitrust regulation with respect to its refusal to deal". The Company attempts to restrict Otter Tail to its facts. Therefore, it argues, that since it is willing to sell power to wholesale, this is all that is required.

What Consumers Power Company ignores is that a prime complaint against the Otter Tail was its refusal to use its transmission lines to transmit power between the Bureau of Reclamation and other entities and the towns affected; a major question in the case was the refusal to deal by Otter Tail, which included the refusal to sell transmission. The case extensively discusses the question of "wheeling" and the decree of the District Court specifically enjoins the Company "from refusing to 'wheel' electric power overs the lines from the electric power supplies to existing or proposed municipal systems in the area and from entering into or enforcing any contract which prohibits use of Otter Tail's lines to 'wheel' electric power to municipals electric power systems or from entering into or enforcing any contract which limits to whom and areas in which Otter Tail or any other electric power company may sell electric power." The Company also ignores the citation of a number of cases, in Otter Tail which establish the bottleneck monopoly principles.*/

*/ United States v. Griffith, 334 U.S. 100, 107; Lorain Journal v. United States, 342 U.S. 143, 154, Eastman Kodak Company v.

The Company's contentions that it is unfair to force it to deal on equal terms with Intervenors, were the same as those made in Otter Tail that "without the weapons which it used, more and more municipalities will turn to public power and Otter Tail will go downhill." However, the Supreme Court replied that: "The promotion of self interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." citing United States v. Arnold Schwinn &Company, 388 U.S. 365.

By any fair reading, Otter Tail establishes that the "bottleneck" principle of antitrust law, and the Sherman Act more generally, applies to wholesale power transactions; it specifically applies to failures to sell transmission services. Moreover, the Supreme Court brushed off Otter Tail's economic argument of claimed potential demise, stating both that it is unlikely, but that if it were to occur the Federal Power Commission (and presumptively other regulatory agencies) could then deal with the problem. In short, the Supreme Court undercut any conceivable basis for Consumers Power Company's claim that it could forestall threatened competition by the municipal and cooperative utilities by refusing to deal.

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*/ Continued
Southern Photo Materials Co., 273 U.S. 359, 375, Schine Chain Stores v. United States, 334 U.S. 110, 119, Associated Press v. United States, 326 U.S. 1. In citing these cases, the Supreme Court stated: "The District Court determined that Otter Tail has a strategic dominance in the transmission of power in most of its service area and that it has used this dominance to foreclose potential entrance into the retail area from obtaining electr c power from outside sources of supply."

The Company, which for other purposes ignores the distinction between monopolizing wholesale and resale services, here relies on the wholesale-resale distinction to argue away Otter Tail. Since it agrees to sell power to municipals and cooperatives, it need not sell transmission or other monopoly services. However, the fact that Otter Tail involved an absolute refusal to sell transmission services or wholesale power and Consumers Power Company only refuses to sell transmission services and coordinating services constitutes no real distinction. Otter Tail was refusing to transmit Bureau of Reclaimation power and other power to the involved communities and was enjoined from doing so. Moreover, Otter Tail cites Gainsville Utilities v. Florida Power Corp. 402 U.S. 515, 517-520, stating "We recently described the difficulities and problems of those isolated electric power systems . . . Interconnection with other utilities is frequently the only solution." Otter Tail itself was then cited by Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747 (1973), which in turn broadly upheld the applicability of the antitrust laws to the electric power industry and the requirement that the Federal Power Commission give consideration to these policies in its actions Gulf States strongly confirmed the broad applicability of the antitrust laws to this industry and the presumption

of their enforcement. Indeed, the Court stated that the Federal Power Act "had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control and to provide effective federal regulation of expanding business and transmitting and selling electric power and interstate commerce . . . The Act was passed in the context of and in response to great concentrations of economics and even political power vested in the power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utilities holding companies." Since, unlike the Federal Power Commission, this Commission was given an explicit mandate to apply antitrust policy to the electric power industry, and direct reference is made to the antitrust laws, and since Otter Tail and Gulf States, the Commission cannot lawfully accept arguments which support the reasonableness of refusals to deal by Consumers Power Company.*/

Otter Tail confirms the applicability of the "bottle-neck" cases -- and the antitrust law generally -- that a vertically and horizontally integrated company such as Consumers Power Company,

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*/ In Otter Tail the monopolized facilities referred to were only subtransmission facilities, and did not include the extensive monopolization of bulk power generation and transmission owned by Consumers Power Company.

cannot refuse to deal in bottleneck or monopoly service. Nor can it use its control over these services to affect competition at other levels of service. E.g., Baltimore and Ohio Railroad Company v. United States, 264 U.S. 258 (1924), "Chicago Junction Case"; United States v. Griffith, 334 U.S. 100 (1948); United States v. Aluminum Company of America, 148 F. 2nd 416 (CA2, 1945).

Similarily, Gainesville establishes that Consumers Power Company cannot refuse to coordinate with small publicly-owned utilities on a basis similar to the exchanges it makes with larger utilities. Gainesville v. Florida Power Corp., 402 U.S. 515 (1971). In its testimony, Consumers Power Company recognizes the great advantages that it receives from its coordination arrangements. Yet it is unwilling to extend similar arrangements to intervening entities.*/

Applicant does not deny the advantages of being able to install and operate nuclear generation. Indeed, if it did, it should not be applying for the license. Moreover, the recent

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*/ Indeed, Consumers Power Company states a purpose to its pool arrangements was to keep out "undesirables". As Judge Leventhal put it, Gainesville categorically rejects the proposition that small municipally or cooperatively-owned utilities should be interconnected "on terms more onerous than those required of other investor - owned utilities . . ." Lafayette, Louisiana v. SEC, 454 F. 2nd 941, 952 (CADC, 1971), affirmed Gulf State Utilities v. FPC, 411 U.S. 747 (1973).

highlighting of the lack of availability of fossil fuels and of the importance of environmental considerations make even more apparent the necessity of maintaining alternatives, especially for a service as important as electric power generation.

Smaller systems are no less entitled to participate and to compete in bulk power markets using this source of future electric power than Consumers Power Company.

In the light of cases condemning activities of refusals to deal, such as those herein engaged in by Consumers Power Company, the Trial Board must take a broad view of the appropriate relief to be granted. Where there is a violation of antitrust policy, there can be no public interest in doing less.*/

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*/ As was stated by Judge Leventhal, concerning the interpretation of the Federal Power Act: ". . . The Act is not to be given a tight reading wherein every action of the Commission is justified only if referable to express agency authorization. On the contrary, the Act is one that entrusts a broad subject-matter to the administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines . . . the statutory authority to issue certificates or permits on conditions implies broad authority to take effective action to achieve regulation in the public interest. We are mindful of the liberal interpretation the Supreme Court has given similar provisions and other statutes as reflecting broad authority, in appropriate cases of correlative duty to effectuate the public interest.

Finally, we observed that the breadth of agency discretion is, if anything at zenith when the action relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to achieve maximum effectuation of

The Board should consider that there is no public interest in permitting a continuation of Consumers Power Company's refusals to deal or to coordinate on an equalized basis. Compare Colorado Antidiscrimination Commission v. Continental Airlines, 372 U.S. 714 (1953); Souchern Steamship Co., v. NLRB, 316 U.S. 31 46-49 (1942). As the Supreme Court admonished the NLRB the policies of a particular regulatory agency must make reference to relevant policies external to this specific regulatory authority of a particular agency or authorizing statute. The Court continued:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may fully ignore other equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task". 316 U.S. at p. 47

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*/ Continued
Congressional objectives. This source of discretion is available . . . with the agency's order, though having aspects of individual fault, is a denial to a wrong-doer to the businessman, for the purpose of maintaining the fairness, equity and efficiency of the program. Here the case is stronger, for the petitioner seeks a license or privilege. While that license may not be unreasonably or unlawfully withheld, it certainly need not be extended to an applicant not ready to regress his default by discharging the duty he should by rights have assumed without nudging."

Here, the Atomic Energy Commission has a direct Congressional authorization to consider antitrust policies regarding an industry where the Supreme Court has just recently confirmed the breadth of those policies.

CONCLUSION

Unlike the case of other major utilities which have agreed to license conditioning, Consumers Power Company has been both adamant and obdurate in its refusals to agree to the basic type of conditioning that would allow itself and smaller utilities in the area to share in the benefits of nuclear power development. Despite Atomic Energy Commission legislation and clear holdings by the Supreme Court of the United States determining the applicability of antitrust principles to the wholesale power generation and transmission business, the Company continues to refuse to agree to any substantial limitations on its self proclaimed rights to refuse to deal on equivalent terms with other utilities. Thus, despite the clear existence of an energy shortage and the needs for cooperation among various utilities to maximize efficiencies through coordination and planning, Consumers Power Company continues to place its interests above the law.

If after reading the testimony, the Commission finds that there are factual issues to be tried, they should be tried. However, neither this Commission, the Trial Board, the parties, nor the public should be subjected to months of litigation, if there is substantial agreement on the facts and if the law is clear. Moreover, even if the Trial Board should determine that either Applicant or the Department of Justice or ourselves are incorrect on the law, if we are dealing with legal issues, they can be decided now.

Since we do not believe the issues are factual, and since we do believe that it is now clear that the defenses raised by Consumers Power Company are legal ones, the issues should be decided at this time. Therefore, we respectfully request that the Trial Board set forth those factual issues which all parties agree upon in their testimony or which are matters of public record and determine that the case is ripe for summary judgment, possibly calling for briefing addressed to that issue.

Respectfully submitted,

Robert A. Jablon

Robert A. Jablon

November 20, 1973

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document in the above-captioned matter was served upon the following by deposit in the United States mail, first class or air mail, this 20th day of November, 1973.

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