UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of SOUTH CAROLINA ELECTRIC & GAS COMPANY and SOUTH CAROLINA PUBLIC SERVICE AUTHORITY (Virgil C. Summer Nuclear Station)	Docket No. 50-395A

RESPONSE OF SOUTH CAROLINA PUBLIC SERVICE AUTHORITY TO THE NUCLEAR REGULATORY COMMISSION'S REQUEST FOR COMMENT ON ITS "SIGNIFICANT CHANGES" CRITERIA AND FOR A FACTUAL UPDATE.

Introduction

This Memorandum is the response of the South Carolina Public Service Authority (the "Authority") to the Nuclear Regulatory Commission's Memorandum and Order dated June 30, 1980 requesting the views of the parties regarding the Commission's proposed criteria for the "significant changes" determination under Section 105c(2) of the Atomic Energy Act of 1954.[1] The Commission also requested comments on the suggested application of these criteria to Central Electric Cooperative's ("Central") petition which seeks an antitrust review of the Virgil C. Summer Nuclear Facility

1 42 U.S.C. § 2135c(5).

operating license application. Central has urged the Commission to find that there have been "significant changes" arising out of the activities or proposed activities of South Carolina Electric and Gas ("SCEG") and the Authority, thus mandating a second antitrust review.

In its Memorandum and Order, the Commission announced three criteria which must be met before a finding of "significant changes" may be made. While the Commission expressly qualified its Memorandum and Order to make clear that it was not a final decision, it nevertheless tentatively suggested that Central's allegations may be sufficient to satisfy two of these criteria.[2] The Commission appears to have declined to reach a tentative decision as to the third. Rather than rendering a final decision on these issues, the Commission sought the views of the Attorney General and the parties on the correctness of its legal standard. In addition, it has requested a factual update from the parties regarding new developments in the negotiations with Central. Finally, the Commission solicited the views of the Department of Justice as to whether its threshold analysis suggests that a hearing would be appropriate at the operating license stage. Presumably, this request is designed to provide some indication of the Department's views on the merits of this controversy,

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2 Memorandum and Order at 32.

making easier the Commission's application of its "significant changes" criteria to the facts.

For the reasons set forth below, the Authority respectfully submits that the Commission adopted an incorrect legal standard for the "significant changes" determination and incorrectly applied its suggested standard to the facts presented in this case.

The question presented may be simply stated:

Does enactment of a statute by the State of South Carolina, at the urging of the applicants, mandating territorial exclusivity for the Authority trigger the "significant changes" standard for a second antitrust review under the Act?

The answer is clearly "no." Such activities are constitutionally protected and entirely outside the scope of the antitrust laws; petitioning the South Carolina legislature and adhering to the State's subsequent command are fully protected from the reach of the antitrust laws by the principles set forth in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1965) and Parker v. Brown, 317 U.S. 341 (1943), and are in no sense "inconsistent with the antitrust laws" so as to require a remedy under the Act. Thus, there can be no showing of "significant changes" under the Act that could trigger a second antitrust review in this proceeding.

I. Background of the Controversy

a. Uncontested Facts

In the late 1960's, the electric cooperatives in South Carolina, including members of Central, sponsored legislation providing territorial exclusivity for the cooperatives vis-a-vis the investor-owned utilities. This legislation was enacted into law in 1969, and resulted in a thorough scheme of territorial and customer allocation among South Carolina electric utilities.[3] The only South Carolina electric utility without an exclusive service area was the Authority, itself an agency of the State of South Carolina.[4] Following the passage of this legislation, discussions were initiated between the Authority and the investor-owned utilities to obtain additional legislation that would include the Authority in the statutory scheme. These discussions concerning territorial exclusivity for the Authority were reported extensively in the South Carolina newspapers, and were discussed in correspondence between the Authority and Central on numerous occasions between 1971 and 1973. Central was entirely aware of the Authority's interest in territorial

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3 South Carolina Act No. 432 of 1969.

4 The Authority is regulated by the state only through the legislative process; it is not subject to the jurisdiction of the South Carolina Public Service Commission (§ 58-27-10 of the 1976 Code of Laws of South Carolina). It is required by law to set rates on a "cost of service" basis; any profits are refunded to the state general fund (§ 58-31-110).

legislation, and even participated to a limited extent in these lobbying efforts.[5]

SCEG's quest for nuclear generating capacity arose in this same time period. On June 30, 1971, SCEG filed an application for a construction permit for the Virgil C. Summer Nuclear Station (Unit 1). Pursuant to section 105c(1) of the Atomic Energy Act, the Department of Justice conducted an antitrust review of the proposed license, and on March 31, 1972 recommended that no antitrust hearing be held, so long as SCEG carried out its commitment to eliminate certain restrictive features in its wholesale contracts with competing municipalities and cooperatives.[6] During this period the Authority engaged in negotiations with SCE&G looking toward a partial ownership interest by the Authority in SCE&G's proposed Summer Nuclear Station; Central had been advised of these negotiations as early as 1971 through direct written communications from the Authority. On March 21, 1973 the Commission issued SCEG a construction permit for Summer Unit 1.

Also in March 1973, the South Carolina legislature enacted a statute authorizing the Authority to acquire an ownership interest in the Summer facility, and the Authority

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5 See Reply of South Carolina Public Service Authority to Amended Petition of Central Electric Cooperative and To Commission Order of January 26, 1979 at 14-15, 17-18.

6 See 37 Fed. Reg. 7265 (April 12, 1972).

continued its negotiations with SCE&G concerning a partial ownership interest.[7] About three months later, on July 9, 1973, the South Carolina legislature passed legislation, discussed in more detail below, granting territorial exclusivity to the Authority -- placing the Authority on equal footing with South Carolina's other electric utilities, all of which were governed by the 1969 territorial legislation.

On October 18, 1973, after a long period of negotiations -- of which Central was aware and, indeed, which Central encouraged -- SCEG and the Authority consummated an agreement transferring one-third of the Summer Nuclear facility to the Authority. The ongoing negotiations between SCEG and the Authority regarding sale of a part interest in the Summer facility were specifically recognized by the Department of Justice in its March 31, 1972 Advice Letter recommending that an antitrust hearing was not required on SCEG's construction permit application.[8] After consummation, SCEG sought to amend its license application to specify the Authority as a co-licensee. Public notice was given in the Federal Register on October 17, 1974 and no requests for a hearing on this matter were received by the Commission. The Nuclear Regulatory Commission staff reports that the Department of Justice indicated at the staff level that no

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7 Code of Laws of South Carolina § 58-31-200 (1976).

8 The Advice Letter notes that "we are advised that negotiations are proceeding smoothly." 37 Fed. Reg. at 7266.

further antitrust review was required because of the sale of part interest in Summer to the Authority.[9] On December 3, 1974, the requested amendment to the Summer license application was approved by the Commission.

On December 10, 1976, SCEG filed for an operating license for Summer Unit 1 and submitted additional antitrust information, which was supplemented in a February 24, 1977 filing. The NRC staff conducted its own field investigation of the possible issues arising under the license. On December 6, 1978, while the NRC staff was in the "final stages" of making a recommendation on whether "significant changes" had taken place warranting an antitrust review at the operating license stage, Central filed a petition requesting a hearing on antitrust issues. While Central's allegations of "significant changes" were many faceted, the thrust of its position rested upon the Authority's ownership interest in the Summer Nuclear facility and the grant of territorial exclusivity to the Authority -- both by virtue of legislative action by the State of South Carolina. Central amended its petition on January 31, 1979 after the Commission ordered further clarification of Central's allegations, and the amended petition provides the basis for this controversy.

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9 NRC Staff Response to Amended Petition of Central Electric Power Cooperative, Inc. For Significant Change Determination and to Commission Order, March 19, 1979 (hereafter "Staff Report") at 5.

After undertaking an extensive evaluation of circumstances occurring since the 1972 construction permit review, including Central's allegations and the responses of the applicants, the NRC staff, on March 19, 1979, concluded that the Commission should not make a finding that "significant changes" had occurred warranting a second antitrust review.[10]

With this factual background, we will now turn to the issues that the Commission has requested that we address. We will first briefly review the status of the Authority's negotiations with Central concerning joint ownership of generating facilities and access to transmission facilities, and then discuss the "significant change" issue.

b. Factual Update of Negotiations with Central

As we indicated in our July 28, 1980 letter to the NRC staff, the Authority and Central have on a continuing basis discussed joint ownership of generation facilities and access to transmission facilities. These discussions have culminated in a series of tentative agreements between the Authority and Central which will eventually supplant virtually all existing contractual agreements between the parties. The agreements have been approved by the Board of Directors of both organizations and have been submitted to the REA for approval. The Authority recently received from Central

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10 Id. at 9.

comments directed toward certain provisions of the proposed Power System Coordination Agreement which, presumably, were suggested by the REA. The Authority is presently evaluating these comments. One such agreement, an interim amendment to the "F" Power Contract between the parties, has received REA approval and has been in effect since July 1, 1980; the remaining agreements remain under consideration by the REA. Since detailed information concerning these agreements was provided to the NRC staff on July 28, 1980, we are appending to this memorandum a copy of that submission.

In brief summary, the new agreements provide Central with the opportunity to obtain an ownership interest in future generation facilities constructed by the Authority and to join with the Authority in the coordination and planning of future generating and transmission facilities. The agreements also grant Central an option to purchase a one-third interest in the Authority's share of the Summer Nuclear Station. (The Authority holds a one-third interest in the facility; SCE&G holds the remaining interest.) These tentative agreements were entered into after the Constitution of the State of South Carolina was amended to authorize the Authority to become a part owner with electric cooperatives in electric generation and transmission (Article X, Section 11). The South Carolina Legislature also enacted legislation granting to the Authority the power to become a joint owner with Central in generation and transmission facilities and

the power to "make plans and enter into such contracts as are necessary or convenient for the planning, financing, acquisition, construction, ownership, operation and maintenance of such plants and facilities...." (Section 58-31-210; copy attached hereto.)

Although the Authority, after lengthy good-faith negotiations, believed that Central's desire to participate with the Authority in future transmission facilities had been accommodated by the foregoing tentative agreements, Central, apparently sensing an opportunity to enhance its bargaining position via this proceeding, now voices dissatisfaction with the terms of these tentative arrangements. That is, while the Authority was advised that Central's Board of Directors had approved the tentative agreements, and believed that arms length bargaining on both sides had resulted in an arrangement satisfactory to Central, Central's submission of August 5, 1980 to the NRC staff criticizes the terms of the agreements, characterizing portions as "wholly illusory" and leaves the impression that the agreements, which were negotiated by the officers of both parties over a period of more than a year, are meaningless.

There is little that can be said concerning Central's position with respect to these agreements, except to emphasize the context in which the complaints are now raised. Of course, Central is not entirely satisfied with all of the terms of each of the agreements; certainly the Authority is

not entirely satisfied. But such dissatisfaction is not unusual after arms length bargaining. While the Authority is an agency of the State of South Carolina, it is not a charitable institution and, while it is understandable that Central would prefer, for example, to be the recipient of an outright gift of generating facilities, the Authority quite obviously cannot accommodate those desires. Central has sought to participate with the Authority in future growth, and such participation has been granted to the extent possible, and on reasonable terms consistent with sound business judgment. The Authority has not refused to deal with Central; indeed, Central has gained access to facilities under terms and conditions approved by its Board of Directors and which have been submitted to the REA for approval.[11]

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11 Central's August 8 letter suggests that somehow the Authority is obtaining an advantage by the condition in the proposed agreement with Central requiring the retirement of certain of the Authority's mortgage bonds by Central as a condition to its purchase of an ownership interest in Summer. Central's counsel apparently misunderstands the reason for this requirement. Pursuant to the contract terms with the holders of the Authority's Priority Obligation bonds, if the Authority sells certain assets -- and the Authority's interest in Summer is included in these assets -- the Authority must redeem the bonds at their face value. Currently, the bonds are valued at much less than their face value. This obligation cannot be avoided, and would be a direct consequence of a purchase by Central of an interest in Summer. It is only reasonable that Central should bear the extra cost of retiring these bonds, since but for Central's desire to purchase part of Summer that cost would not arise for the Authority. Clearly, the Authority derives no benefit from this requirement, but rather merely seeks to avoid a loss.

The Commission should not tolerate any effort -- if it be the case -- by Central to use this proceeding as a club to strike an entirely one-sided deal. Central's belated contentions concerning these tentative agreements have no relevance whatever in this proceeding. The agreements guarantee Central on a cost of service basis a long-term source for all of its bulk power needs and provide it with an opportunity to participate in ownership of future generating facilities. In essence, the Authority is willing to enter into a long-term joint-venture with Central for generation of the power required to meet both the Authority's and Central's future needs. These agreements assure Central's members of access to all the bulk power necessary for those members to be strong competitors in the sale of retail power; thus, an NRC license remedy is not required.

c. Central's Allegations

Stripped to its essentials, Central's principal contention appears to be that the Authority and SCEG entered into a continuing covert conspiracy after the construction permit review whereby SCEG agreed to sell the Authority an interest in Summer Unit 1 if the Authority would agree to push for legislation granting the Authority a limited exclu-

sive territory.[12] The effect of this conspiracy, Central asserts, is to remove the Authority as a strong competitor to SCEG in South Carolina, and to create a "significant change" warranting antitrust review of the operating permit application.

The existence of a covert conspiracy or any quid pro quo has been denied by affidavits submitted by SCEG and the Authority, and Central has not come forward with one shred of evidence to support its claim. Indeed, all evidence points against such a conspiracy. The two pieces of legislation upon which Central's quid pro quo conspiracy theory rests were enacted several months apart by the South Carolina legislature, a body that neither the Authority nor SCE&G could control, and the Authority's efforts on behalf of this legislation were a matter of public record and were in no sense covert. In fact, beginning in 1971, the Authority

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12 As stated, on July 9, 1973 the South Carolina Legislature enacted Article 3 of the Laws Governing the South Carolina Public Service Authority, §§ 58-31-310 et seq. of the 1976 Code of Laws of South Carolina. This Article provides, inter alia, that the Authority's lawful service area shall consist of the defined portions of Berkley, Georgetown and Horry Counties (§ 58-31-33), that the Authority may continue to service "premises, customers and electric cooperatives served by it on July 9, 1973" (§ 58-31-320), that the Authority may serve customers within the reach of its transmission lines who are located outside its service area where it is replacing a lost customer (§ 58-31-200), and that the Authority shall also have a right to serve any load of 750 kw or larger assigned to the cooperatives who are members of Central, if chosen by the customer (§ 58-31-390).

continually kept Central posted on the status of its negotiations with SCE&G concerning territories as well as participation in the Summer Nuclear Unit. There is simply no support for Central's contention that the Authority would have opposed the 1973 territorial legislation in the absence of an alleged "deal" with SCEG.[13] After all, Central itself supported the 1969 South Carolina legislation that divided territories among cooperatives and investor-owned utilities.[14]

While it is true that both the Authority and SCEG supported the legislation authorizing the Authority's participation in Summer, and it is true that the Authority supported the 1973 territorial legislation, only unsubstantiated speculation ties support for this legislation to a broader conspiracy to remove the Authority as an effective competitor to SCEG in South Carolina. The Commission's own rules make clear that such speculation cannot provide the basis for

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13 As we indicated in our March 7, 1979 Reply Memorandum, the Authority supported the territorial legislation because it believed that it would be hard pressed to "keep up with load growth in the three counties and with Central's load growth." (Affidavit of Robert S. Davis attached as Exhibit G to the Authority's March 7 Reply Memorandum). The Authority's proposed construction program called for the expenditure of large sums for additional generating capacity, and it was believed that an exclusive service area would protect those investments.

14 See Authority's March 7, 1979 Reply Memorandum at 14-15.

further proceedings,[15] and the Commission in its Memorandum and Order quite correctly appears to give no credence to this broad "conspiracy" theory. Instead, the Commission focuses on alleged joint action to get the legislation passed and suggests that these lobbying efforts, in conjunction with the eventual enactment of the July 9, 1973 territorial statute by the South Carolina legislature, may warrant an antitrust review of the operating license application.

Thus, this legislation has become Central's major point of contention -- despite the fact that Central was unaffected by its passage.[16] Indeed, the NRC staff concluded based upon its investigation of these issues that the "1973 Acts do not show anticompetitive effects in South Carolina today," that the Authority is a "stronger utility" now than it was in 1972. To the extent Central bases its claims of "changed circumstances" on the weakness of the Authority as

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15 Central's unsupported allegation of an anticompetitive scheme cannot survive the Authority's and SCEG's Motion for Summary Disposition. Central has failed "to set forth specific facts [that would be admissible in evidence] showing that there is a genuine issue of fact" as required by 10 CFR § 2.749(b) for further proceedings under the Act. Cf. First National Bank v. Cities Service Co., 391 U.S. 253 (1968).

16 The statute provides that all customers previously served by the Authority, and their load growths, including Central's members regardless of location, may continue to be served. Code of Laws of South Carolina § 58-31-320 (1976).

a provider of wholesale power, the NRC staff found the concern unwarranted.[17]

In addition, Central appears to allege that as part of this anticompetitive scheme Central has been denied access to bulk power. Central alleges that SCEG has been unwilling to make power transmission arrangements except on an ad hoc basis, and that the Authority has refused to permit Central to share ownership in Summer Nuclear Station. Central also alleges that the Authority adopted a "dual rate" structure in the sale of its power to Central under the Pee Dee Fiber contract and, finally, that the Authority offered to acquire Central.

As noted, Central and the Authority have recently concluded a comprehensive series of agreements for joint ownership of generation facilities which, among other things, grant to Central an option to purchase one-third of the Authority's share of the Summer Nuclear Station. With

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17 Staff Report at 48-49. Central also points to the fact that under the 1973 legislation, the Authority can compete for customers outside its service area who use more than 750 kw and alleges this alters the competitive situation in South Carolina to Central's disadvantage. However, as the Staff Report indicates, this provision which, incidentally, Central sponsored and insisted upon, does not disadvantage Central vis-a-vis the situation existing prior to enactment of the 1973 legislation, since prior to that legislation, the Authority was free to compete with Central for any customer in any area. After the 1973 legislation, the Authority may compete outside its service area with Central only for customers who use more than 750 kw. See discussion, Staff Report at 39.

respect to the suggestion that SCE&G has denied Central access to bulk power, it is clear that SCE&G has not refused to wheel power to Central; it has in fact done so on a point of service basis. Moreover, we are advised that SCE&G has and is negotiating with Central concerning its bulk power needs. Not surprisingly, the NRC staff's investigation led it to conclude that there had been no refusal to provide Central with essential transmission services.[18] As far as the "dual rate" allegation and related claims are concerned, the Commission concluded tentatively that these were not meritorious, and we see no reason to re-examine that conclusion.[19]

In short, there is no support for Central's wide ranging allegations, and the Commission's Memorandum and Order gives little if any credence to Central's specific charges. The Commission does, however, suggest that "significant changes" may have occurred as a result of the 1973 legislation granting the Authority territorial exclusivity, an event that occurred subsequent to the Attorney General's 1972 advice letter. Thus, the question presented is a narrow one, namely, whether this territorial legislation and

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18 Staff Report at 50-51.

19 Memorandum and Order at 30 n. 54. The Staff also concluded that the "dual rate allegations are without foundation and do not differ significantly from the situation which existed during the Attorney General's review in 1972." Staff Report at 52.

the applicants' petitioning efforts on its behalf constitute a "significant change" under the Act.

d. Commission's June 30, 1980 Memorandum: Determination of "Significant Change"

In its Memorandum and Order, the Commission set forth three legal criteria, or requirements, that must be met in determining whether "significant changes" have occurred since the mandatory antitrust review at the construction permit stage, thus warranting a second antitrust review at the operating license stage. These three requirements are that: (1) the alleged changes must have occurred since the previous antitrust review; (2) they must be reasonably attributable to the licensee; and (3) they must have antitrust implications that would likely warrant some Commission remedy.

Applying these criteria to the facts of this case, the Commission tentatively determined first that the alleged conduct took place after the Department's March 31, 1972 recommendation, rejecting applicant's arguments that the Department's recommendation anticipated these alleged changes. The Commission also tentatively determined that the applicants presented and actively sought the 1973 territorial legislation that is "at the heart of Central's complaints" so that such legislation may be reasonably attributed to applicants.[20]

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20 June 30 Memorandum and Order at 20.

Thus, the Commission indicated that the second test for "significant changes" under the proposed criteria appeared to be satisfied.

Finally, the Commission determined that the third test might also be satisfied, tentatively concluding that some remedial action ought to be available that does not create a conflict with South Carolina's regulatory scheme. The Commission opined that "Applicants seem to possess considerable freedom of choice under the state regulations."[21] As previously indicated, however, the Commission did not formally decide these issues, but instead referred them to the Attorney General for advice. Nor did the Commission suggest or discuss any specific remedies.

While the Commission's three legal criteria for the "significant changes" determination may in the abstract provide a valid test, the application of this three pronged test to the facts present here gives rise to a result that is squarely inconsistent with the congressional purpose underlying the antitrust review procedures of the Atomic Energy Act. As applied here, the Commission's proposed standards would have at worst the effect of converting constitutionally protected activity -- petitioning a state legislature -- into something closely akin to an antitrust violation and at the least would result in burdening all

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21 Id. at 30.

concerned with the trouble and expense of a second and wholly unnecessary antitrust review proceeding. Such a result is inconsistent with the Atomic Energy Act, the substantive antitrust law and the United States Constitution. Eastern Railroad Presidents Conference v. Noerr Motor Freight Co., 365 U.S. 127 (1961).

Moreover, as the NRC staff report recognized, little if anything of substance has changed since the Department's March 31, 1972 letter recommending no antitrust hearing. The only change has been the 1973 enactment of a South Carolina statute granting territorial exclusivity to the Authority -- a statute that placed the Authority in the same position as the prior territorial legislation had placed South Carolina's other electric utilities, including Central's members, in 1969 (well before the Attorney General's advice letter in 1972). The Authority may not lawfully disregard the commands of this statute, and any anticompetitive effects arising from the statute are attributable entirely to the sovereign act of South Carolina.

II. Constitutionally Protected Lobbying Activity Related to Passage of a State Law Cannot Provide the Basis for a Finding that Activities Under the License Would Create or Maintain a Situation Inconsistent with the Antitrust Laws.

In applying the "significant changes" standard triggering a second antitrust review, the competitive effects of a license application must ultimately be judged by whether

"activities under the license would create or maintain a situation inconsistent with the antitrust laws." This standard applies to an antitrust review at both the operating and construction permit stages.[22] Thus, it is simply wrong at the operating license stage to interpret the "significant changes" criteria to trigger an antitrust review in circumstances where the alleged conduct is not in any respect "inconsistent with the antitrust laws." The Commission's Memorandum and Order recognizes the need to carefully screen petitions for antitrust review to avoid unnecessary cost and delay. Yet, the Commission's suggested application of the "significant change" criteria to the facts of this case would result in just such unnecessary review, since activities directed toward petitioning the legislature coupled with the subsequent enactment in 1973 of a statutory command by the state cannot constitute a "situation inconsistent with the antitrust laws" under 42 U.S.C. § 105(c)(5). While this is clear in any context, it is abundantly clear in the context here, where the State of South Carolina in 1969 expressed a

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22 As the NRC Staff's Report indicates, "a petition such as Central's amended petition, if granted, would trigger only a preliminary step of referral of the matter to the Attorney General for advice as to whether to hold an antitrust hearing. Staff Report at 15 n. 30. The standard for review ultimately by the Commission would be that contained in Section 105c(5), whether "activities under the license would create or maintain a situation inconsistent with the antitrust laws."

preference for territorial exclusivity in the generation and transmission of electric power -- a fact that the Attorney General's 1972 advice letter expressly recognized.

The Commission suggests that the "significant changes" standard can be invoked whenever new anticompetitive activity may be fairly attributed to the applicants -- a causation approach. To support this conclusion the Commission points to the legislative history of the 1970 amendments to the Act. Specifically, the report of the Joint Committee states that,

> "it would be unfair to penalize a licensee for significant changes not caused by the licensee or for which the licensee could not reasonably be held responsible or answerable."23

We do not quarrel with the basic approach tentatively adopted by the Commission; causation is of course a necessary condition for finding "significant changes." However, it is not enough to show that the applicants' activities were causally related to an "anticompetitive" situation, since not all anticompetitive situations are inconsistent with the antitrust laws or those laws' clear policies. For example, a firm that does not possess monopoly power may unilaterally refuse to deal in most circumstances with another without violating the antitrust laws or antitrust

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23 H.R. Rep. No. 91-1470, 91st Cong., 2d Sess., 29 (1970) (hereafter "Joint Committee Report").

policies, even where such refusal has an anticompetitive effect.[24] Similarly, producers in an industry whose activities are statutorily immune from antitrust challenge may limit competition among themselves according to the terms of such statute without violating antitrust principles.[25] Thus, it is not enough to say that the applicants' activities caused an anticompetitive situation. If Congress had desired the application of a license remedy whenever there existed an anticompetitive situation for which applicants had some degree of causal responsibility, it would have chosen a different standard than "inconsistent with the antitrust laws."

Other portions of the Joint Committee Report mandate that the standard for antitrust review should not involve consideration of factors "beyond the antitrust laws and policies clearly underlying those laws," and that unlike the AEC's [now NRC's] developmental regime, the licensing provisions do not contemplate affirmative "strengthening

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24 United States v. Colgate & Co., 250 U.S. 300 (1919); Consumers Power Company (Midland Plant, Units 1 and 2) LBP-75-39, 2 NRC 29 (1975), reversed, ALAB-452, 6 NRC 892, 1025-1031 (1977) (monopoly power is required before refusal to deal constitutes a "situation inconsistent with the antitrust laws").

25 See, e.g., The Capper Volstead Act of 1922, 42 Stat. 388 (1922), 7 U.S.C.A. § 291 (1973) (farmer cooperative exemption).

[of] free competition in private enterprise."[26] Moreover, the Joint Committee also makes clear that where activities of third parties are involved, the applicant would not be subject to remedies under the Act unless the "applicant is culpably involved in activities of others."[27] The dictionary defines culpable as: "responsible for wrong or error; deserving censure; blameworthy."[28] Clearly, seeking and obtaining legislation similar to if not identical with that already granted to other electric utilities, and thereafter following that legislative command is not culpable conduct as that term is commonly understood by any citizen or uncommonly understood by antitrust or nuclear power practitioners.

Thus, while the Commission in carrying out its antitrust review responsibilities may take into account the policies underlying the antitrust laws by, for example, applying the "unfair methods of competition" standards of Section 5 of the FTC Act, it may not attempt affirmatively to foster competition through the licensing process. The legislative history of the 1970 Amendments make clear that Congress did not intend the NRC to use its licensing powers to promote competition where the applicants had not engaged

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26 Id. at 15.

27 Id. at 31.

28 The American Heritage Dictionary of the English Language (1969) at 321.

in conduct that could be considered contrary to antitrust enforcement policy.[29] Clearly, conduct which has been uniformly held to be constitutionally protected and completely outside the scope of the antitrust laws cannot provide the basis for a "situation inconsistent with the antitrust laws." Accordingly, it can also not be the basis for a "significant changes" finding, triggering a second antitrust review.

Lobbying activity, whether or not anticompetitive in purpose or effect, does not violate antitrust law or antitrust policy. One or more persons may petition a legislative body to enact a statute, even an anticompetitive statute, and thereafter conduct their activities under that statute's command, and throughout this process act entirely consistent with the antitrust laws. This was established by the classic case of Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra. In that case, the Court held that the

> "Sherman Act does not apply to the activities of the [defendants] at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws."[30]

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29 As the Staff Report recognizes, "the antitrust laws are applied to NRC licenses as they would be applied in traditional antitrust forums." Staff Report at 27.

30 365 U.S. at 138.

The Court suggested that to apply the antitrust laws to efforts legitimately aimed at influencing governmental action "would raise important constitutional questions," because the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[31]

The only exception to the Noerr holding arises where the petitioning is not in fact intended to primarily seek legislative changes, but rather is a "sham" to cover a scheme designed to injure competition directly.[32] This exception does not apply here; it is not alleged that the lobbying activities at issue in this proceeding were designed to directly injure competition rather than to seek passage of legislation. Indeed, the State of South Carolina passed almost identical territorial legislation in 1969; in view of this it is difficult to see how efforts to secure passage of the 1973 legislation could be characterized as a "sham." The applicant's lobbying activities are clearly within the zone of protection afforded by Noerr.

Nor do the antitrust laws reach anticompetitive conduct compelled by the State as sovereign, Parker v.

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31 Id.

32 See California Motor Transport Co. Trucking Unlimited, 404 U.S. 508 (1972).

Brown, 317 U.S. 341 (1943). As the Parker Court stated:

> "We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."33

Thus, when a petitioner is successful in obtaining an anti-competitive statute from the State, the result is not challengable under or preemptable by the federal antitrust laws. For this reason also it would make little sense to subject the act of petitioning the state legislature to challenge under those laws.

Applying these principles to the facts here, it seems clear that any interpretation of the licensing provisions of the Atomic Energy Act that would expose Applicants to possible remedies, such as a modification of the requested license, for engaging in constitutionally protected lobbying activity would contravene the Court's reasoning in Noerr; and, as the Court indicated, Congress' intent to invade fundamental freedoms cannot be lightly implied. In addition, as the Commission itself recognized, the anticompetitive changes that took place since 1972 were the result of a command by the state of South Carolina, and under Parker, South Carolina's decision is itself immune from antitrust attack.

This is not a case in which the statute merely authorizes anticompetitive conduct by private parties so

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33 317 U.S. at 350-351.

that an antitrust remedy may be appropriate to enjoin those parties from accepting the state's authorization. Here the Authority, itself a state agency, is compelled by statute to sell in a prescribed, exclusive area. Thus, any NRC remedy directed at affecting the competitive balance in South Carolina as compelled by state law would seem to run counter to the principles of Federalism recognized in Parker as well as the express intention of Congress concerning the scope of antitrust review under the Act.

The Commission's criteria for a determination of "significant changes" should be modified, at the very least, to exclude from consideration activity by the applicant directed at lobbying the government and activity, even though anticompetitive, that is compelled by state law.

III. Even Applying the Commission's Legal Standard, There Is No Basis for Finding "Significant Changes" Since the Issuance of the Construction Permit for Summer.

We believe as explained above that the Commission's announced criteria for the "significant changes" determination are incomplete, but even if those criteria were correct, appropriate application of them to these facts would lead to the conclusion that Central's allegations do not satisfy the criteria. First, as we previously pointed out to the Commission, the gravaman of Central's allegation of changed circumstances, the 1973 statute granting the

Authority an exclusive service area, did not represent a new direction in policy for South Carolina. Since 1969 the state had assigned exclusive service areas to cooperative and investor-owned utilities, such as SCEG; this fact was noted in the Department's March 31, 1972 letter recommending no antitrust hearing at the construction permit stage. It is reasonable to assume that the Department's 1972 recommendation was predicated on an awareness of the general policy of South Carolina of assigning utilities service areas.

Thus, while the enactment of the 1973 legislation represented a change, it did not represent a "significant change" within the meaning of Section 105C(2). As previously discussed, the NRC staff concluded that the 1973 legislation did not significantly alter the competitive situation in South Carolina as it existed at the time of the operating permit review.[34]

In addition, the Commission indicated that to invoke the "significant change" standard, the change in competition must be "reasonably attributable to the applicants." The Commission suggests that this test is satisfied here by applicant's presentation of and active support for the legislation. We submit that as a matter of law, the 1973 legislation may not be "attributed" to the applicants. A supervening independent force, the South Carolina legisla-

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34 Note 9, supra.

ture elected by the people of South Carolina, imposed by its will the restriction on the authority's competition. It makes little sense for purposes other than a newspaper report to attribute legislation to public supporters. As Parker v. Brown and its progeny indicate, there is no room in antitrust proceedings for an inquiry into the motives of a state legislative once it has acted, and neither private parties nor the Authority -- which is an agency of the State -- may be held responsible for the effects of such action in antitrust forums.

Finally, the Commission indicated that the "significant changes" standard would not be satisfied if the changed condition could only result in a de minimis remedy. In this case, the Authority has already agreed with Central to sell it a share of Summer as part of a series of comprehensive agreements for joint ownership of generation facilities. There are no remaining problems, imagined or real, that could conceivably require a remedy. Certainly, the 1973 legislation is protected by the mantel of Parker v. Brown, and there is nothing the Commission can order that would alter the territorial situation in South Carolina. Thus, this aspect of the Commission's test is not satisfied under the circumstances present in this case. Even before the culmination of these agreements between Central and the Authority, the NRC staff concluded that "indications thus

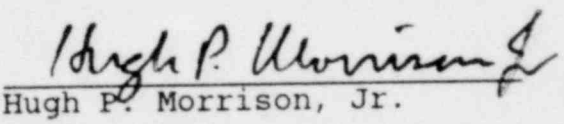
far are that Central will have adequate assurance of competitive choices in 1987 when it needs to develop a new power supply" due to the expiration of its "F" power contract with the Authority. (Staff Report at 80-81). The joint ownership agreements make this conclusion inescapable.

Conclusion

For the foregoing reasons, the Commission should find that there have been no "significant changes" since the construction permit antitrust review warranting further inquiry.

Respectfully submitted,

CAHILL GORDON & REINDEL



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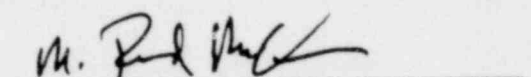

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Dated: August 25, 1980

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RESPONSE OF SOUTH CAROLINA PUBLIC SERVICE AUTHORITY TO THE NUCLEAR REGULATORY COMMISSION'S REQUEST FOR COMMENT ON ITS "SIGNIFICANT CHANGES" CRITERIA AND FOR A FACTUAL UPDATE were mailed this 25th day of August, 1980, by first class mail, postage prepaid, to the following:

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