UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
SOUTH CAROLINA ELECTRIC & GAS COMPANY and	)	NRC Docket No. 50-395A
SOUTH CAROLINA PUBLIC SERVICE AUTHORITY	)	
(Virgil C. Summer Nuclear Station, Unit 1)	)	

NRC STAFF RESPONSE TO
COMMISSION REQUEST FOR COMMENTS

The NRC Staff hereby submits its response to the Commission's request for comments on its Memorandum and Order of June 30, 1980. In that Memorandum and Order, the Commission asked the parties to comment on: (1) new factual developments occurring after the last submission of pleadings to the Commission, (2) the criteria developed by the Commission to govern a "significant changes" decision under Section 105c(2) of the Atomic Energy Act of 1954, as amended,[1/] and (3) the Commission's application of those criteria in the instant proceeding.

To prepare its response to the first request, the NRC Staff has elicited certain factual information from the parties. The Staff's comments are necessarily limited to this updated information, which was received between July 29 and August 7, 1980.[2/]

1/ 42 U.S.C. § 2135c(2).

2/ Review of the parties' responses of August 25, 1980, to the Commission's request in its Memorandum and Order reveals that the parties, particularly Central Electric Power Cooperative, Inc., have submitted more comprehensive materials to the Commission than were obtained by the Staff. The Staff is, therefore, not in a position to comment on the material it had not received by August 7, 1980. See note 3, infra.

I. STAFF COMMENTS ON NEW FACTUAL DEVELOPMENTS

As indicated above, the Staff requested the parties to provide certain information to aid the Staff in updating its analysis of the competitive situation in the relevant areas of South Carolina.[3/] In their responses, parties indicated differing interpretations of some of the recent events and agreements. Based on the information submitted, the Staff's preliminary conclusions are that Central is being availed increased power supply options from both SCEG and Santee Cooper (despite some reservatons being voiced by Central concerning certain contractual provisions or offers); that these new power supply opportunities for Central enhance its own economic well-being; and finally, that these new developments are pro-competitive in that many of Central's previous allegations of anticompetitive effects resulting from changed circumstances have been redressed.[4/]

A. Santee-Cooper - Central

Santee Cooper and Central have been discussing various power supply arrangements, seemingly on a continuing basis, since January, 1979. A fairly comprehensive agreement has been reached, which is embodied in the "Power System Coordination and Integration Agreement Between South Carolina Public Service Authority and Central Electric Power Cooperative, Inc." (hereinafter

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3/ These requests were made by letter dated July 8, 1980 from NRC Staff counsel to representatives of Central Electric Power Cooperative, Inc. ("Central"), South Carolina Electric & Gas Co. ("SCEG"), and South Carolina Public Service Authority ("Santee Cooper").

4/ See Amended Petition of Central Electric Power Cooperative, Inc., at 49.

"Agreement"). One portion of the Agreement has been implemented, while the rest has been sent to the Rural Electrification Administration for its evaluation.[5/] This Agreement replaces most of the existing contractual relationships between Central and Santee Cooper, and provides a multiplicity of planning and operational opportunities for Central.

The Agreement, among other things: (1) establishes joint planning and coordinated operations for the two systems; (2) provides for Central to purchase 45% of Santee Cooper's Cross Generating Facility (coal-fired); (3) gives Central an option to buy one-third of Santee Cooper's entitlement in the Summer Nuclear Generating Station; (4) affords each party the option to share ownership in future generating units; (5) requires Santee Cooper to wheel power which Central obtains elsewhere; (6) obligates Santee Cooper to provide partial requirements power for Central; and (7) establishes economic dispatch of generation and transmission for a combined Santee Cooper/Central system.

Nevertheless, Central's attorney has indicated to the NRC Staff that the Agreement contains certain terms which are less than totally satisfactory to Central.[6/] The Staff finds it difficult to evaluate these arguments on the

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5/ See letter dated July 23, 1980, from W. C. Mescher, of Santee Cooper, to F. D. Chanania, of the NRC Staff, at 1-2 (Attachment No. 1 hereto).

6/ Letter dated August 5, 1980 from W. E. Brand, representing Central, to F. D. Chanania, of the NRC Staff, at 3-6 (Attachment No. 2).

basis of the facts submitted; however, the Staff believes the Agreement is a major advance for Central towards the power supply options it claims it had been unlawfully denied.

B. SCEG - Central

SCEG and Central have apparently met twice since January, 1979 to discuss matters directly pertinent to this proceeding. These meetings and other correspondence between Central and SCEG have centered around wheeling and joint ownership of generation. SCEG has made an offer of generation co-participation to Central for approximately 31 MW, which is the load of Berkeley Electric Cooperative, Inc., one of the member distribution cooperatives of Central. To Staff's knowledge, Berkeley is the only part of Central's system that is served directly by SCEG. Except for the Berkeley situation, Central's present power contracts provide that Santee Cooper must serve all of Central's other loads, consistent with the South Carolina statutory scheme. This situation has not changed. Central maintains, however, that any arrangements with SCEG should be made considering Central as a whole, not just Berkeley. On August 6, 1980, Central and SCEG officials met again, but no further information has been forthcoming.7/

Certain other facts have come to the Staff's attention which relate to Central's activities in seeking new power supply options, continuing South Carolina legislative regulation of electric utility matters, present status of litigation against SCEG, and relative growth rates of the involved parties. In brief, these are:

7/ See Attachment No. 2, at 1-2.

a) P. T. Allen, Executive Vice President and General Manager of Central, indicated in a letter dated June 19, 1979, to T. C. Nichols, Jr. of SCEG, that it was talking to Carolina Power & Light about future power supply options.[8/]

b) The Constitution of the State of South Carolina was amended (effective January 24, 1979) to allow electric cooperatives to jointly own electric facilities with Santee Cooper.[9/]

c) Settlement discussions have occurred in a civil antitrust suit by the North Carolina Electric Membership Corporation against SCEG and the Carolina Power & Light Company.[10/]

e) Central's counsel informed the NRC Staff that Santee Cooper has recently asked Berkeley Cooperative about the possibility of its purchase.[11/]

f) Santee Cooper experienced a 1979 peak demand of 1,352 MW, a 9.8% increase over its previous year's peak demand.[12/]

8/ Attachment to letter dated July 23, 1980 from Troy B. Conner, Jr., representing SCEG, to F. D. Chanania, of the NRC Staff. This letter is Attachment No. 3 hereto.

9/ Attachment No. 1, at 2.

10/ Attachment No. 2 at 2-3.

11/ Id. at 6.

12/ South Carolina Public Service Authority, Annual Report 1979.

g) SCEG experienced a 1979 system peak demand of 2,965 MW, a 20.17% increase over its previous year's peak demand.[13/]

h) Central experienced a 1979 system peak demand of 765 MW, a 11.1% increase over its previous year's peak demand.[14/]

II. STAFF COMMENTS ON SIGNIFICANT CHANGES CRITERIA

In its June 30th Memorandum and Order, the Commission established three criteria for determination of significant changes under Section 105c(2) of the Atomic Energy Act of 1954, as amended, (hereinafter "the Act"). The Commission indicated that such determinations would be based on whether the change or changes:

(1) have occurred since the previous antitrust review of the licensee(s);

(2) are reasonably attributable to the licensee(s); and

(3) have antitrust implications that would likely warrant some Commission remedy.[15/]

13/ South Carolina Electric & Gas Company, 1979 Annual Report.

14/ Central Electric Power Cooperative, Inc., 1979 Annual Report.

15/ Memorandum and Order of June 30, 1980, at 7-9, 16-31.

The Staff is in basic agreement with the Commission's three criteria. Section 105c(2) of the Act requires that the significant changes shall have occurred since the last review of the Attorney General and the Commission and shall also have occurred "in the licensee's activities or proposed activities." The Staff regards the first and second criteria as echoing these two statutory requirements. Further, to assess any change in the licensee's activities, the inquiry has to focus on the activities in which the licensee was engaged at the time of the previous review and compare them to its present activities; activities, in this case, are those policies and practices of the licensee as they impact upon the utilities with whom the licensee is dealing.

Assuming this analysis reveals a change in these factors, the inquiry then shifts to the issue of whether the change is significant. The Staff understands the Commission's third criterion to exclude, as insignificant, those changes in the licensee's activities which are pro-competitive or those which have a de minimus anticompetitive effect on the relevant situation. See Memorandum and Order, at 23-24. The Staff believes that this approach is appropriate.

The Staff has one concern with respect to the Commission's approach to the application of Parker v. Brown in the instant case. The Commission first states that Parker v. Brown is "properly invoked"; the Commission then goes on to decide whether it should be applied, i.e., whether the applicants

have freedom in the state regulatory framework to take certain actions. Memorandum and Order, at 26-31. Under antitrust law, the test is a single one -- whether or not the doctrine applies at all. If it does under the criteria established in Parker v. Brown and its progeny, then the activities under scrutiny are immunized.

In addition, the Staff does not believe that a decision relating to implied repeal of the antitrust laws by another Federal statute is relevant to the issue of whether there is state action immunity under Parker v. Brown. Thus, the citation of U.S. v. Philadelphia National Bank, 374 U.S. 321, 351 (1963), on page 27 of the Memorandum and Order, is inapposite. The Commission rightfully seeks a method to remedy an anticompetitive situation in a way which complements the areas of state regulation. The difference is simply that an activity which satisfies the state action tests remains immunized even if it is "repugnant" to the federal antitrust laws.

Respectfully submitted,

Fredric D. Chanania

Fredric D. Chanania
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 29th day of August, 1980

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO COMMISSION REQUEST FOR COMMENTS in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 29th day of August 1980.

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