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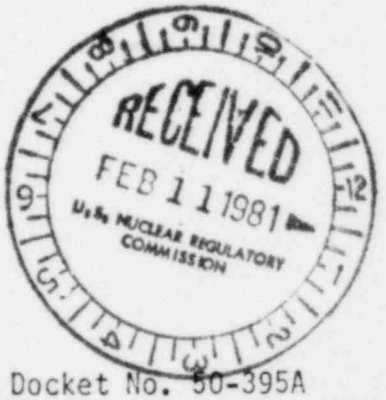
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



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'S ORDER OF JANUARY 15, 1981

I. INTRODUCTION

The NRC Staff hereby submits its response to the Commission's Order of January 15, 1981, which requested comments from the various parties on the effect, if any, of the Power System Coordination Agreement (hereinafter "Agreement") between the South Carolina Public Service Authority ("the Authority") and Central Electric Power Cooperative, Inc. ("Central") on the "significant changes" determination now pending before the Commission.[1/] The Authority submitted this Agreement to the Commission on January 14, 1981, and subsequently reported that the Agreement was approved by the Rural

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1/ The significant changes determination has been sought by Central pursuant to Section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2135c(2).

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Electrification Administration ("REA").[2/] A draft of the Agreement, substantially identical to the final Agreement, had previously been forwarded to the Staff on July 23, 1980, and the Staff briefly discussed the broad outlines of the draft Agreement in its pleading of August 29, 1980.[3/] The Staff concludes that the Agreement has the effect of reducing the likelihood that the Commission's standards for "significant changes" determination could be satisfied,[4/] thereby reinforcing the Staff's continuing position that the Commission need not find that "significant changes" in the licensee's activities have occurred since the previous Attorney General's review.

II. BACKGROUND

In its Memorandum and Order of June 30, 1980, the Commission set forth the standards for "significant changes" determinations made in NRC antitrust reviews at the operating license stage. The Commission stated that such determinations would be based on three criteria:

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

2/ The REA approved the Agreement, with only minor language modifications, on January 19, 1981. See Response of South Carolina Public Service Authority to the Nuclear Regulatory Commission's January 15 Order Requesting Comment on the Agreement Between Central and the Authority, at 2 (Jan. 23, 1981) (hereinafter "Authority Comments"); see also Comment of Central Electric Power Cooperative, Inc., at 2, (Jan. 23, 1981) (hereinafter "Central Comment").

3/ See NRC Staff Response to Commission Request for Comments, at 2-4 (August 29, 1980).

4/ See the second section "Background," infra. As we stated earlier, "the Staff believes the Agreement is a major advance for Central toward the power supply options it claims it had been unlawfully denied." NRC Staff Response, supra note 3, at 4.

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

3. whether the changes have antitrust implications that would be likely to warrant Commission remedy.[5/]

The June 30th Memorandum and Order directed all parties to submit their comments on these three criteria and on their application to the instant proceeding. At the same time, the Commission referred the matter, by way of consultation, to the Department of Justice for its views.[6/]

In its Response to the Commission's June 30th Memorandum and Order, the Staff not only expressed its views in support of the institution of these three criteria, but also noted certain aspects of the draft Agreement which we had received by that time.[7/] We mentioned the "multiplicity of planning and operational opportunities for Central" provided by the draft Agreement, citing Central's opportunities to obtain ownership participation in nuclear generation (the Summer plant) and non-nuclear generation (the Cross coal-fired

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

6/ The subsequent response of the Department suggested certain modifications of the third criteria, but declined to consider whether the Commission should actually find that "significant changes" had occurred. See Response of the U.S. Department of Justice to the Nuclear Regulatory Commission's Request for Comment on its "Significant Changes" Criteria and the Application of Those Criteria, at 4-6, 12-13 (Oct. 10, 1980). The Department has recently further clarified its views as expressed in its October 10th Response. See Comments of the Department of Justice in Response to the Nuclear Regulatory Commission Order of January 15, 1981 (Feb. 6, 1981).

7/ NRC Staff Response to Commission Request for Comments (August 29, 1980).

plant) with the Authority and South Carolina Electric & Gas Company ("SCEG"), joint planning of future generation and transmission facilities by Central and the Authority, the guarantees by the Authority for wheeling power to and from Central's facilities, and the close operational coordination to be effected between Central and the Authority.[8/]

In its letter of August 5, 1980 to the NRC Staff, Central acknowledged these new opportunities provided by the draft Agreement but nonetheless stated certain objections, namely:

(1) coordinated development of baseload generation by Central and the Authority was termed "wholly illusory" because Central could purchase firm power from the Authority more cheaply than it could build and pay for generation with the Authority;

(2) Central could build some transmission facilities, but would be relying on the Authority for most bulk power transmission services over the Authority's transmission lines, which services the Authority agreed to provide;

(3) two areas that were reserved for REA evaluation (provisions for including "construction work in progress" expenses in the Authority's cost of service rates to Central, and provisions for service in new areas of South Carolina).[9/]

As for the third objection, since the REA has evaluated and approved the final Agreement (basically unchanged from the earlier draft), the objections raised by Central appear moot since Central has accepted the final

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8/ Id. at 3.

9/ Id. Attachment 2, at 3-6.

Agreement, as approved by REA.[10/] As to the first and second objections above, Central has not repeated them in its recent Comment filed in response to the Commission's January 15th Order. The Staff presumes that Central no longer asserts these points, particularly since Central's Board of Directors and the REA have approved the Agreement.

Instead, Central's Comment raised two new main points of concern. First, Central believes the Internal Revenue Service might make a ruling on the status of certain Authority bonds which may "defeat the transactions contemplated", and thereby cause abandoment of the Agreement.[11/] Central asserts that its "best case" remains the implementation of the Agreement in its entirety.[12/] Second, under the Agreement, Central's ability to take

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10/ Central Comment, at 2 (Jan. 23, 1981).

11/ Id.

12/ Id. at 3. Central notes the "worst case" as being abandonment of the Agreement and return to pre-existing contracts. Central cites Article XIV, Section P.2. in a manner which would lead one to believe that abandonment of the Agreement is virtually automatic if the IRS renders an adverse opinion on the industrial revenue bond question, but this is a serious oversimplification. After Central pursues all available appeals to overturn an adverse IRS ruling, the Authority and Central are required to renegotiate the Agreement to avoid the impact of the adverse ruling if possible. Article XIV, Section P.1. If the two parties cannot accomplish this themselves, an arbitration panel shall resolve the problem. Id. Section P.1.i. Alternate rate structures may be implemented. Id. Section P.1.ii. If these avenues to avoid the adverse impacts of the ruling do not bear fruit, the Agreement is then suspended pending further renegotiation of the parties and additional IRS rulings. Id. Section P.2 and P.3. Finally, if these steps are unsuccessful and the Agreement must be abandoned, it is only as to those specific provisions causing the adverse bond rulings by the IRS. Id. Section P.3. Provisions have also been made concerning the exact status of the effectiveness of this Agreement and the earlier power contracts during this entire process. Id.

The Staff's view is that even though the above procedures may take time, final abandonment of key elements of this Agreement is an unlikely event, given all the avenues for curing problems in the Agreement and given the accord of Central, the Authority, and REA on the Agreement.

power from base load units not jointly-owned with the Authority depends on delivery of such power to the Authority's transmission lines, i.e., such delivery would depend on wheeling service from other neighboring utilities.[13/]

By contrast, the recent Responses of the Authority and SCEG to the January 15th Order highlight the power supply and planning opportunities afforded to Central under the Agreement. These Responses point, in this regard, to the provisions for Central to obtain:

(1) one-third of the Authority's ownership share in the Summer Nuclear Generating Station (approximately 11% of the total facility), which Central has now declined;

(2) 45% ownership in the Authority's coal-fired Cross Generation Station;

(3) 45% ownership in all future generation faciliities of the Authority (and vice versa);

(4) ownership in generation with utilities other than the Authority;

(5) coordinated planning and implementation of future transmission and other operational matters through the joint Planning and Operating Committees;

(6) "cost of service" rates for power or services provided by the Authority;

(7) a guarantee of wheeling by the Authority of outside power obtained by Central;

13/ Central Comment, at 4.

(8) a separate commitment of wheeling by SCEG for Central.[14/]

III. NRC STAFF'S COMMENTS

A. The Agreement's Effect on the "Significant Changes" Determination

The Staff agrees with the Authority and SCEG that the major effect of the Agreement on the Commission's "significant changes" determination is centered around the third criterion set forth in the Commission's Memorandum and Order of June 30, 1980 -- whether the changes "have antitrust implications that would be likely to warrant Commission remedy." As we noted in our Response of August 29, 1980, this third criterion appropriately focusses, in several ways, on what may be "significant" about any changes since the last Attorney General's antitrust review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have de minimis anticompetitive effects. There is yet another analytical aspect to the third criterion. Not only does the third criterion require an assessment of whether the changes would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes, by their nature, would require.[15/]

14/ See Authority Comments, at 2-5 (Jan. 23, 1981); Comments of South Carolina Electric & Gas Company in Response to Commission Order of January 15, 1981, at 4-6, 8 n.7 (Jan. 23, 1981).

15/ The early identification of possible NRC remedies is not novel with regard to invocation of NRC antitrust proceedings. Antitrust intervention petitions and requests for antitrust hearings, made pursuant to 10 CFR § 2.714, must specify the relief sought by the petitioner. See, e.g., Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-7 and CLI-73-25, 6 AEC 48 and 619 (1973); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559 (1975).

Thus, use of the third criterion results in a realistic analysis which takes into account the total spectrum of the parties' activities, including those that amelioriate or eliminate alleged problems in their business relationships without the need for NRC involvement.

In this vein, application of the Commission's third criterion here reveals that the Agreement itself provides for the remedies which have generally resulted from other NRC antitrust reviews and hearings, e.g., opportunities to participate in nuclear generation, guarantees of wheeling power to and from affected utilities, joint planning of future generation and transmission, and other forms of joint coordination and operation of power resources. In such other cases, the Staff has viewed the NRC antitrust license conditions as a general "charter" for future dealings between utilities, and has left the second step, future contractual implementation of those license conditions, to the parties themselves. Here, contractual implementation of traditional NRC antitrust remedies has already occurred between Central and the Authority. Thus, the likelihood is substantially decreased that the third criterion for finding "significant changes" could be fulfilled under the instant facts.

In this light, the two problems with the Agreement raised in Central's Comment do not undermine this conclusion, particularly as Central states, without equivocation, that the "best case" is for the entire Agreement to be implemented as it now stands. The potential IRS bond ruling is a matter too remote and speculative to convince the Staff that the likelihood of fulfilling the third significant changes criterion is increased. Such IRS ruling cannot be claimed to cause direct abandonment of the Agreement. Rather, Central

can speculate only that such ruling may "defeat" the transactions contemplated. Central, however, fails to support such a view with any reference to the Agreement or any other facts. Absent such support, its first claim does not merit serious consideration.

Central's second objection to the Agreement -- that outside utilities must wheel power to the Authority for delivery to Central -- is similarly without merit. Given the present and proposed transmission facilities of Central,[16/] wheeling of power by neighboring utilities to the Authority for ultimate delivery to Central is the only appropriate and electrically feasible means. Were there a refusal to wheel by the Authority or SCEG, a different situation would exist and Central might have a legitimate anticompetitive complaint. Central has, however, assurances of wheeling from both SCEG and the Authority.[17/] In addition, the specific rates, terms, and conditions of wheeling transactions are matters that the NRC has normally left to the parties and to the Federal Energy Regulatory Commission, in keeping with Section 271 of the Atomic Energy Act.[18/]

16/ See NRC Staff Response to Amended Petition of Central Electric Power Cooperative, Inc., for Significant Change Determination and to Commission Order, at 22-25 and Attachments referred to therein (March 19, 1979).

17/ See note 14, supra.

18/ 42 U.S.C. § 2018. In certain circumstances not present here, some provisions of the Agreement might be viewed as somewhat restrictive on Central's planning or operations (see, e.g., Article VII, Section E.1.b.-E.1.e), but the benefits accruing to Central under the Agreement far outweigh any such potential restrictions and do not provide any basis for the Staff to alter the views expressed herein.

B. Central's Requested Relief

Mention should also be made of the relief which Central itself has requested of the NRC, since its request is the only outstanding recommendation by any party to this proceeding as to remedies which might be the product of an NRC antitrust hearing. Central, in its Amended Petition for a Finding of Significant Change, raised two basic anticompetitive complaints involving two 1973 statutes passed by the South Carolina legislature. One Act permitted the Authority to purchase one-third of the Summer nuclear facility, and the other Act prescribed service limitations for the Authority. Central alleges a pre-legislation conspiracy between the Authority and SCEG, and further alleges two principal anticompetitive effects flowing from that legislation: (1) competitive injury to the Authority from the 1973 Act which prescribed service restrictions that, in turn, adversely affected Central which had "linked its destiny" to the Authority, and (2) the competitive realignment of the Authority away from Central and towards SCEG, fostering new competition between Central and the Authority and less security for Central's long range needs.[19/]

To reach remedies which the Commission might wish to impose with respect to Central's allegations of anticompetitive harm, it would be necessary to ignore the Noerr-Pennington and Parker v. Brown doctrines, discussed in full in earlier pleadings and again by the parties recently.[20/] Such legal

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19/ See NRC Staff Response, supra note 16, at 25-26.

20/ Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Parker v. Brown, 317 U.S. 341 (1943); see also NRC Staff Response, supra note 16, at 26-48.

doctrines constitute substantial, if not total, barriers to a finding of antitrust liability under Section 105c of the Atomic Energy Act and to instituting any NRC remedies which would directly address the alleged anti-competitive situation.

Assuming arguendo that Noerr-Pennington and Parker v. Brown can be put aside for the moment, Central's Amended Petition seeks only two remedies:

(1) the availability and stability of power resources for its future electrical needs, primarily through ownership of such resources,[21/] and

(2) power exchange services from the Authority and/or SCEG.[22/]

The effect of the new Agreement on these stated claims for relief by Central is manifest. Central has now achieved in that Agreement what it earlier sought the NRC to order. Central has ostensibly reasonable opportunities, as approved by the REA, to obtain its future generation and transmission needs with the Authority on a jointly-planned and jointly-coordinated basis, with accompanying guarantees for "cost of service" rates. In addition, Central is assured that the Authority will not thwart Central's opportunities to look to other neighboring utilities for joint development of generation resources, for power purchases, or for other bulk power transactions and services. In these circumstances, the Staff does not foresee any reasonable likelihood that Central's requested relief could lead to remedies meaningfully extending beyond the present power supply arrangements already in effect.

21/ Amended Petition of Central Electric Power Cooperative, Inc., For a Finding of Significant Change, at 5-6, 44, 45, 47, 48 (Jan. 31, 1979).

22/ Id. at 5-6, 45, 46, 48.

This further supports the view that the Commission's third criterion cannot be met in this case.

Central's belated attempt, in its recent January 23rd Comment, to swing the focus of the Commission's attention to SCEG, is an attempt to escape the clear thrust of the Commission's third "significant changes" criterion. With regard to these newest complaints, Central appears unhappy mainly with the rapidity of SCEG counteroffers to Central proposals. The Staff has not seen any factual material that would lead to the conclusion that SCEG is explicitly or constructively refusing, in an anticompetitive manner, to provide Central with power or services. Given the facts we do know and the nature of Central's Amended Petition, the Staff concludes that, as concerns SCEG, the Commission would also not have sufficient reason to find that there were changes which would be likely to warrant Commission remedy.

IV. CONCLUSION

For the reasons set forth above, the NRC Staff considers the Agreement reached between Central and the Authority to diminish the possibility that the third criterion for a "significant changes" determination can be fulfilled. The Staff, in this regard, finds no reason to change its position that the Central's Amended Petition, seeking a determination that significant changes have occurred, should be denied.

Respectfully submitted,

Fredric D. Chanania

Fredric D. Chanania
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 10th day of February, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO COMMISSION'S ORDER OF JANUARY 15, 1981 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 10th day of February, 1981.

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