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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 Unit No. 1)

Docket No. 50-395A

MOTION OF PETITIONER CENTRAL ELECTRIC
POWER COOPERATIVE, INC. FOR PERMISSION
TO CONDUCT LIMITED DISCOVERY

Pursuant to 10 CFR §2.730, Petitioner "for a determination of significant change" Central Electric Power Cooperative moves the Commission for an order permitting discovery limited to facts stated by the Antitrust Division of the Department of Justice to be necessary for a proper determination of the matter pending before the Commission.

In support of its motion, Central states:

1. In any controversy over whether "significant changes" had occurred, the Congress "expects the Commission to consult with the Attorney General in regard to its determination respecting significant changes" and therefore the Department's advice is entitled to special weight.^{1/}

^{1/} H.R. Rep. No. 91-1470, S. Rep. No. 91-1247, 91st Cong., 2d Sess. 29 (1970).

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2. The Department of Justice has advised that:

"There is no dispute that in 1973 SCEG and Santee Cooper lobbied for, and the South Carolina legislature enacted, legislation restricting the area in which Santee Cooper can compete. It is likely that as a consequence of this legislation, Santee Cooper has altered its "activities or proposed activities" under the license in that it ceased competing for the business of municipalities and cooperatives, other than Central, outside its three-county service area. This change in Santee Cooper's "activities or proposed activities" would have taken place since the prior antitrust review of March 31, 1972. Thus, if the Commission were to conclude that Santee Cooper has changed its conduct as a result of the south Carolina statute the only remaining issue would be whether this change in conduct is reasonably attributable to the licensee(s)."

The Department was not a party to the earlier proceedings in this matter before this Commission, and in any event was not supplied a copy of the of the affidavit of Mr. Robert Davis, Chairman of the South Carolina Public Service Authority dated January 12, 1979 and served with the Authority's Motion dated January 15, 1979. In paragraph (4) of that affidavit, Chairman Davis states concerning "a resolution authorizing negotiations with South Carolina Electric and Gas Company, Duke Power Company and Carolina Power and Light Company with respect to service territories [and] Summer nuclear Station..." that "On the advice of our antitrust counsel, the Authority did not enter into any such agreement nor did it ever act pursuant to any such agreement or restrict its competition in the sale of electric power

before authorized and directed to so by Act No 412 of 1973."

3. The clear and obvious import of the Chairman's statement is that following that July 9th, 1973 enactment the Authority did in fact change its activities in accordance with their agreement with the other utilities following the rubber stamping of the agreement by the State Legislature. If there were any remaining doubt as to the meaning of Mr. Davis's statement, it is dispelled by reference to the Reply of the Authority filed March 7, 1979 to Central's Amended Petition and the Commission's Order of January 26th, 1979. This Reply was not served on the Department of Justice, Antitrust Division, and the Department therefore did not know that the Authority conceded that "pursuant to the express provisions of that [July 9, 1973] Act, the Authority, . . . and SCE&G. . . restricted their sale of electricity. Reply of South Carolina Public Service Authority to Amended Petition of Central Electric Eooperative, Inc. and to Commission Order of January 26, 1979 (March 7, 1979) at p. 28. Although not in the possession of Justice's attorneys, it therefore appears that the Commission has on file in this proceeding (1) an admission that the Applicants did not restrict their sales before July 9th, 1973 and (2) did in fact restrict their sales after July 9th, 1973.

4. Unless the Commission is prepared to disregard the advice of the Department on the obvious implication of these facts, no further discovery will be needed at this stage of the proceeding to carry out a determination of significant change based on the advice of the Department. However, if the Commission believes that there is still a question on whether the activities of the licensees theretofore in competition for electric power customers did not change on and after July 9th, 1973 then a proper determination of significant change as expected by the Congress can only be made if the Commission has before it the facts the Department stated it should have for such determination. These include at a minimum, facts bearing on whether the Applicants changed their competitive marketing activities on and after the agreement to allocate service territories and customers or after its adoption by the State Legislature on July 9th, 1973. 2/

2/ In the early 1950's, at the time when Central linked its destiny to Santee-Cooper, SCE&G's President S. C. McMeekin characterized that competition as follows:

Mr. MCMEEKIN. You know why we are afraid of that. We think he is going into our towns and say, "Listen, kick the South Carolina Electric & Gas Co. out. I will sell you power wholesale. You then become a preference customer."

We lost one of our towns that we have been serving for 25 years, the city of Bamberg. REA in Washington said, "These lines (central) are purely to serve the farmer and the co-ops. It is not going to hurt you."

I said, "I believe these lines will hurt me."

Santee-Cooper has recently signed a 10-year contract with that town at the expiration of our contract, 2 1/2 years hence, and take it away from us. We had served that town for 25 years.

(continued on next page)

5. The Department has also advised that even "If the Commission concludes that Santee-Cooper has not altered its conduct in response to the South Carolina statutes, then the Commission should determine whether Central's other allegations have merit. Central's other allegations are in effect:

(1) that there is a "power exchange market" in North and South Carolina;

(2) that prior to 1973 Santee-Cooper was systematically excluded from that market by SCE&G, CP&L Co. and Duke;

(3) that these utilities had monopoly power in that market;

(4) that SCE&G and others were concerned about Santee-Cooper and Central underselling them in the market-

2/ (continued from previous page)

Senator HAYDEN. How big a town is it?

Mr. MCMEEKIN. Three or four thousand, but that is only the beginning.

* * * *

Senator O'MAHONEY. When was this statement made to you by the manager of Santee-Cooper?

Mr. MCMEEKIN. I do not recall the exact date. Recently we had a meeting of almost 100 representatives from operating cooperatives, REA co-ops, their board of directors, the directors of our company, the directors of Carolina Power & Light co., and we met in Columbia. Santee-Cooper representatives were there. We met to try to see if there was not some way we could work out a committee that could come up with a solution of the difficult problem we have.

At that meeting Mr. Jefferies said that there is enough power for us, but "I must compete with you because competition is the life of trade. I expect to compete with you." [82nd Congr., 1st Sess. Hearing Before a Subcommittee of the Senate Appropriations Committee on H.R. 3790, Interior Department Appropriations for 1952, Part I at 1041-2, 1044.

place if Santee-Cooper got access to power exchange services;

(5) that prior to 1973 Applicants and Duke Power Co. and Carolina Power & Light Co. met to determine whether Santee-Cooper would agree to limit its competition with the aforementioned private utilities and South Carolina Electric & Gas Co. in exchange for expanded coordination and access to power exchange, including an opportunity to share in the coordinated development of the Summer Nuclear Unit;

(6) that the bargaining representatives of the private utilities were instructed not to negotiate on power exchange unless and until agreement had been reached on territory and customer allocations;

(7) that only following agreement on service territory and customer allocations and agreement of Santee-Cooper to join with it to obtain a hoped for legislative immunity from the antitrust laws did the private utilities agree to coordination with Santee-Cooper; and lastly

(8) that following July 9th, 1973 Central sought power exchange services on reasonable terms from each of the Applicants but without success.

6. The pleadings submitted by the parties heretofore show that of these facts Nos. 6, 7, and 8 are presently in dispute.^{3/} Affidavits submitted by the Petitioner and documents unauthenticated in this proceeding, but submitted by the

^{3/} Of course others may be in dispute at a later time if an antitrust review is granted.

Department of Justice in other proceedings before this Commission appear to establish the Petitioner's allegations. Affidavits submitted by the Respondents flatly reject these conclusions.

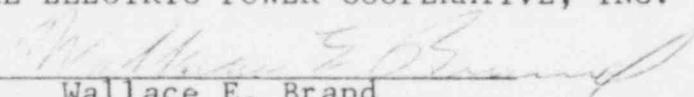
7. The Commission's rules contemplate the use of discovery to resolve controversy over disputed questions of fact, however §2.740 of the Commission's rules limits the use of discovery in a proceeding on an application for a construction permit or an operating license until the factual matters in dispute have been resolved and determined relevant. The Commission's Order on the Attorney General's advice by way of its comments will serve to make the necessary determinations an relevance and will, we expect, suitably narrow and set forth the facts in controversy pertinent to a significant change determination. Therefore, unless the Commission chooses to ignore the Department's advice, or it finds that the record already shows that Santee-Cooper and SCE&G changed their competitive activities on and after July 9th, discovery on the foregoing matters will be necessary.

8. In order to expedite further proceedings, Petitioner has set forth in appendices A and B its Requests for Documents and a list of Depositions it believes are necessary at a minimum to resolve disputed factual issues at this stage of the proceeding.

Respectfully submitted,

CENTRAL ELECTRIC POWER COOPERATIVE, INC.

By


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