UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of HOUSTON LIGHTING & POWER COMPANY PUBLIC SERVICE BOARD OF SAN ANTONIO CITY OF AUSTIN CENTRAL POWER AND LIGHT COMPANY (South Texas Project, Unit Nos. 1 and 2)	)	NRC Docket Nos. 50-498A 50-499A
TEXAS UTILITIES GENERATING COMPANY, et al. (Comanche Peak Steam Electric Station, Units 1 and 2)	)	NRC Docket Nos. 50-445A 50-446A

REPLY COMMENTS OF THE CENTRAL AND SOUTH WEST COMPANIES TO COMMENTS OF THE PUBLIC UTILITIES BOARD OF THE CITY OF BROWNSVILLE, TEXAS OPPOSING PROPOSED SETTLEMENT LICENSE CONDITIONS

Pursuant to the order of this Board, Central Power and Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company and West Texas Utilities Company (collectively the "Central and South West Companies" or "CSW") hereby respectfully submit their reply comments to comments filed by the Public Utilities Board of the City of Brownsville, Texas ("Brownsville"). Proposed license conditions and related stipulations in these consolidated proceedings were submitted to this Board on September 14, 1980. At a prehearing conference held on October 24, 1980, the Board directed Brownsville to file comments on the proposed license conditions by November 10, 1980; by order of Chairman Miller this date was extended to November 12,

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1980. The Board directed other parties to file reply comments to Brownsville's comments by November 24, 1980; on November 20, Chairman Miller extended this date to December 3, 1980.

During the last several months, CSW has conducted extensive negotiations with Brownsville regarding many issues with a view toward arriving at an overall settlement of differences between Brownsville and CSW in this proceeding and in related proceedings before the FERC and SEC. Because an overall settlement has not yet been finalized, CSW will not refer herein to the details of tentative agreements already reached on specific issues, but will answer Brownsville's contentions as though no agreement had been reached on any issue.

Introduction

Brownsville makes numerous allegations regarding deficiencies that it finds in the proposed license conditions, but few of these allegations bear any relation to the antitrust laws or the policies underlying those laws. The only general allegation directly implicating antitrust concerns is the assertion that a conspiracy exists to keep interstate power out of the area served by members of the Electric Reliability Council of Texas ("ERCOT"). CSW agrees that such an anticompetitive conspiracy existed in the past, and indeed argued at length to that effect both here and in West Texas Utilities Co. v. Texas Electric Service Co., 470 F.Supp. 798 (N.D. Tex. 1979). CSW believes, however, that

the overall settlement upon which the proposed license conditions and Stipulations were based will adequately remedy that situation if the direct current interconnections envisioned by the settlement are implemented. The license conditions do not by themselves guarantee that the interconnections will be constructed, but they do require Houston Lighting & Power Co. ("HLP") and the Texas Utilities Companies ("TUCS") to use their best efforts to secure approval of the interconnections at FERC. CSW believes that prospects for such approval are reasonably good. Once the interconnections are installed, Brownsville's only real antitrust concerns will have been remedied; an interstate market will for the first time become available to systems within ERCOT.

Although CSW supports all of the proposed license conditions, these reply comments address only those issues raised by Brownsville that impact directly on CSW or CPL. Therefore Brownsville's extensive comments opposing the so-called disconnect provision are not addressed herein. CSW would add only that Brownsville's suggestion (Comments, p. 7) that action on the so-called disconnect provision be deferred "until FERC has made its determinations" is not appropriate. The disconnect provision contained in the license conditions is not an issue in the interconnection case pending at FERC. The Supplemental Offer of Settlement filed in that case on October 8, 1980 explicitly recognized this fact:

> Proposed License Conditions with respect to the establishment, maintenance, modification or utilization of any interconnection between ERCOT and the SWPP have been agreed upon by the Nuclear Regulatory Commission (NRC) staff and the Department of Justice and by the signatories hereto and filed in proceedings at the NRC. Any conditions imposed by the NRC in these proceedings are independent of the proposed orders herein. The proposed order attached hereto contains the only provisions at the FERC governing the establishment, maintenance, modification or utilization of the Interconnections.

Since the FERC will not be reviewing the disconnect provision contained in the proposed license conditions this Board should not defer its approval of the provision.

I. Brownsville's Objections to Proposed License Conditions Relating to Transmission Services

Brownsville offers a baker's dozen of objections to the transmissionrelated provisions of the proposed license conditions. All of these allegations, however, repeat the same argument in different ways. The argument is that because CPL has allegedly engaged in past anticompetitive activities regarding the provision of transmission services to Brownsville, it cannot be trusted to carry out the wheeling provisions contained in the license conditions in a fair manner. Consequently, Brownsville suggests that in order to prevent recurrence of such anticompetitive situations CPL must be required to submit transmission rates to this Commission before the proposed license conditions may be approved. This suggestion would, if followed, impose an unnecessary

burden upon this Commission. As part of the overall settlement, CSW has committed itself to file wheeling rates at the FERC within three months of approval of the settlement, such rates to employ a specific methodology identified in the September 11, 1980 letter agreement between FERC litigation staff, HLP, TUCS and CSW.[1/]

An Atomic Safety and Licensing Appeal Board has already recognized that specific rates, terms and conditions of wheeling should be left to the FERC. In Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3) ALAB-560, 10 NRC 265 (1979) the Appeal Board approved license conditions requiring the Applicants to "wheel power to, from and between the other systems in the CCCT, subject to allocations of available transmission capacity in certain circumstances". 10 NRC at 281. The only reference to actual wheeling rates, however, occurs in the final paragraph of the license conditions: "The above conditions are to be implemented in a manner consistent with the provisions of the Federal Power Act and all rates, charges or practices in connection therewith are to be subject to the approval of regulatory agencies having jurisdiction over them".[2/] CSW submits that the approach of the Appeal Board in Davis-Besse is the appropriate one. Moreover,

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1/ This letter agreement is referred to in Paragraph I.B.(10) of the proposed South Texas Project license conditions.

2/ 10 NRC at 296-97.

there is even less reason for the Board to get involved in setting wheeling rates here than there was in the Davis-Besse proceeding. Here there is not only a commitment by the Applicants to wheel, but also an actual methodology for fixing wheeling rates, as well as CSW's commitment to file a wheeling rate at FERC within three months of final approval of the Supplemental Offer of Settlement by FERC.

This and all of Brownsville's remaining contentions regarding the fixing of transmission rate structures are issues appropriate for consideration by the FERC in connection with the required wheeling rate filings, and need not and should not be considered by this Board in determining whether the proposed license conditions are consistent with the antitrust laws.

Finally, Brownsville contends that "it is not clear where FERC jurisdiction ends and Texas PUC jurisdiction begins on an instantaneous joint-system wheeling transaction".[3/] Brownsville does not appear to request any specific relief in connection with this contention. CSW submits that the contention bears no relation to the question whether the proposed license conditions are consistent with the antitrust laws. The respective jurisdictions of FERC and the TPUC are fixed by statute. This Board can neither enlarge nor contract the jurisdiction of either agency.

3/ Comments at 23.

II. Brownsville's Contentions Regarding Participation In The South Texas Project

Brownsville argues that although the proposed license conditions require CPL to offer Brownsville participation in the STP on reasonable terms, as well as to provide associated transmission and backup services, the license conditions should not be approved until "the precise terms and conditions of STP participation including rates, terms and conditions of related transmission and backup service" are finalized.[4/] There is no warrant for this demand. The license conditions specify that reasonable terms will be offered. It would not be appropriate for this Board to act as an arbitrator and write a contract for the participants in STP. If disputes arise later, Brownsville can always seek to enforce the license conditions, which require a reasonable offer. Brownsville has not indicated its intent to participate in the STP and has until January 1, 1983 to do so. Surely this Board cannot be expected to wait more than two years to approve the proposed license conditions, while Brownsville decides whether it wants to participate in STP, and then while the terms of its participation are negotiated. Moreover, a Participation Agreement for the STP is already in existence between the current owners of the STP, the terms of which will form the basic terms for any

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4/ Comments at 25.

participation by Brownsville in the STP. Brownsville has not indicated how, if at all, any of the terms in this Agreement are objectionable under the antitrust laws.

For the same reason Brownsville's suggestion that it be given until six months after the "participation agreement and all related contractual matters are finalized" before it must elect to participate in the STP is unjustifiable.[5/] This cart-before-the-horse approach would require the parties to engage in detailed negotiations, perhaps to no avail, if Brownsville decides it does not like the final terms. Brownsville will have a wheeling rate to it from STP long before January 1, 1983, as well as capital cost estimates and the basic terms of its participation as set forth in the Participation Agreement. This information should certainly be sufficient to permit Brownsville to make a meaningful decision by January 1, 1983.

Brownsville objects to the provision in the license conditions that allows CPL to refuse to construct additional transmission facilities to accommodate wheeling if construction would be infeasible or would unreasonably impair system reliability or emergency transmission capacity, as that might be applied to Brownsville's participation in the STP. Brownsville argues that the license conditions should not be approved until "all arrangements under that provision" are

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5/ Comments at 25.

agreed to.[6/] This demand is obviously impracticable because the provision clearly speaks to a situation that might arise at any time in the future. The possibility that CPL might invoke paragraph I.B.(4) of the license conditions at some time in the future is remote and speculative and need not and should not now be considered by this Board. For this Board to specify further those circumstances under which CPL would be excused from constructing additional facilities would require a degree of prescience which would be r e indeed. Moreover, CPL is obligated by the proposed license conditions (I.B.(1)(b) and I.B.(3)) to provide reasonable transmission services. If, in the future, CPL refuses to provide any specific transmission service, Brownsville can request that this Commission enforce those obligations.

III. Brownsville's Argument Regarding Participation in TIS and STIS

Brownsville argues that the license conditions must contain some provision that current TIS and STIS policies will not be changed to its disadvantage and that the Applicants will not withdraw from those groups to its disadvantage, alleging as a basis that Brownsville was excluded from those groups in the past. It is simply not clear what Brownsville is proposing here or, more importantly, what relation this question has to approval of the proposed license conditions.

6/ Comments at 25.

TIS and STIS are voluntary organizations of which Brownsville is a full member like all other members. CSW submits that Brownsville has not shown any situation inconsistent with the antitrust laws that the relief requested, insofar as it is intelligible, would be necessary to remedy.

IV. Brownsville's Comments Regarding Bulk Power Offers

Brownsville argues that the provision in the license conditions that requires CPL to sell bulk power to entities with 200 MW or less of generation (I.B.(5)) should be modified to read 200 MW "as of the date of the license";[7/] otherwise, Brownsville argues, bulk purchasers may be discouraged from installing generation. Like so many of Brownsville's arguments this is wide of the mark in that it fails to specify why this Commission should make such a modification pursuant to its jurisdiction to remedy situations inconsistent with the antitrust laws. Brownsville's suggestion that the absence of such language as it proposes might discourage the addition of generating facilities not only has nothing to do with the antitrust laws, but also has nothing to do with realistic electric utility system planning. One would suppose that the decision whether to install additional generation would be based on whether that generation would be more economical than purchased power. Surely Brownsville

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7/ Comments at 27.

would not elect to forego installing its own generation merely to retain the right to purchase more expensive electricity from another utility.

Brownsville demands that bulk power services be made available on a non-discriminatory basis. The conditions already require CPL to provide Brownsville the full range of bulk power services, including full and partial requirements bulk power (I.B.(5)); transmission services (I.B.(3)), including planning for transmission facilities necessary to accommodate transmission services (I.B.(4)); to share information and conduct joint studies (I.B.(2)) and to provide an opportunity to participate in the South Texas Project, as well as reasonable transmission services and reasonable coordination services (including reserve sharing, back-up power, maintenance power and emergency power) necessary to permit Brownsville to have effective access to power from STP obtained from CPL. (I.B.(1)) What Brownsville seeks in addition is not specified; nor is it clear what Brownsville means when it argues that these services should be provided "with the same availability" that other services are provided to other customers.

Brownsville argues, with respect to the last sentence of Paragraph I.B.(5) of the STP conditions, that "[c]urtailment should be reasonable and non-discriminatory not only 'where possible' but generally".[8/] How Brownsville

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8/ Comments at 27.

can possibly object to this condition in its present form is inconceivable. Under this condition any curtailment of full or partial requirements sales must be non-discriminatory unless for some reason this is not possible. Surely CPL should not be required as a matter of law to perform an act that is not possible.

Brownsville contends, again with respect to Paragraph I.B.(5), that centralized dispatch among the four CSW operating companies constitutes a discriminatory basis for bulk power transactions. CSW submits that this conclusory allegation is wholly untenable. In the first place, Section 11 of the Public Utility Holding Company Act, 15 U.S.C. Section 79k, requires that a holding company constitute an integrated system, one criterion of which is coordinated planning and operations and the economies they make possible.[9/] Moreover, Brownsville cites no authority to support the proposition that economic dispatch among the operating subsidiaries of a holding company has ever been regarded as unfairly discriminatory against non-affiliated systems. In fact, it can be expected that centralized, economic dispatch of the CSW System will inure to the direct and substantial benefit of Brownsville, in that it will result in lower costs for all CSW customers, including Browsnville, than if such economic dispatch did not occur.

9/ See, e.g., Middle South Utilities, 35 S.E.C. 1 (1953).

V. Brownsville's Comments Concerning the Proposed DC Interconnections

Brownsville argues that the dc interconnections proposed as part of the overall settlement encompassing this proceeding as well as those before FERC and the SEC "are not in the public interest and would create or maintain a situation inconsistent with the antitrust laws."[10/] Brownsville attempts to substantiate this general allegation by alleging several ways in which the proposed interconnections would be inferior to alternating current (ac) interconnections.

CSW maintains that comparison of the proposed interconnections with an alternative is irrelevant to approval of the proposed license conditions by this Board. The only situation inconsistent with the antitrust laws that Brownsville has discussed is the past conspiracy by certain members of TIS to bar interstate interconnections. The present proposal for the first construction of interstate interconnections ends that situation and is therefore pro-competitive. This in itself removes the clear antitrust violation that existed in the past. As the Department of Justice's representative stated at the October 24 pre-hearing conference:

> The Department believes that the DC interconnection or an interconnection is preferable to no interconnection We think that will be pro-competitive. That will

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10/ Comments at 28.

> create some opportunities for interstate power transfers that didn't exist before.[11]

Nothing in the antitrust laws indicates that this Board should withhold its approval from the proposed license conditions on the ground that another form of interconnection, which might be implemented after lengthy litigation, might be preferred by one system over the proposed interconnections, which are broadly acceptable to the other affected utilities and governmental parties in this proceeding.[12] This is particularly so since Brownsville will retain its rights to construct whatever interconnection it chooses in the future, and will have rights under the Suppl-

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11/ Transcript at 1227.

12/ Under the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §16, United States District Courts have an independent duty to determine that any consent judgment proposed by the Department of Justice in a civil antitrust action is in the public interest. In applying this standard the district courts have held that they need not determine whether the proposed settlement is the best settlement possible before approving it:

> It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest.

United States v. Gillette, 406 F.Supp. 713, 716 (D. Mass. 1975). CSW has recently filed with the FERC Supplemental Comments on the Petition of the Department of Justice for Leave to Intervene containing more detailed citation of authority that an antitrust settlement need not be the best possible settlement that could be obtained. A copy of these Supplemental Comments is attached hereto.

mental Offer of Settlement at FERC to have access to the dc interconnections. CSW therefore, maintains that none of Brownsville's specific contentions regarding the superiority of ac interconnections tends to show that the proposed dc interconnections create or maintain a situation inconsistent with the antitrust laws.

CONCLUSION

Brownsville's comments should not persuade this Board to modify or disapprove any of the license conditions submitted to it in these proceedings. The vast majority of Brownsville's objections have nothing to do with the antitrust laws or the policies underlying those laws and Brownsville has in fact made no effort to show this Board or the other parties how any of the proposed license conditions may result in any anti-competitive effect either on Brownsville or anyone else. It is worth noting again, in conclusion, that the only antitrust analysis set forth in Brownsville's comments relates to the anti-competitive effects of a perpetuation of the electrical isolation of ERCOT.[13/] The overall settlement among CSW, HLP and TUCS provides for a remedy of this situation through dc interconnections with guarantees of access to these interconnections by other systems. The license conditions are consistent with this remedy by requir-

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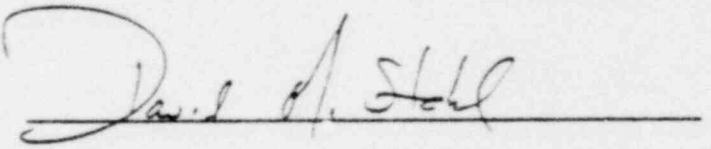
13/ Comments at 31-80.

ing CSW, HLP and TUCS to use their best efforts to secure a FERC order implementing dc interconnections as well as providing for wheeling and other coordination services as noted. The license conditions further remedy the intrastate only restriction addressed so extensively by Brownsville by prohibiting agreements to refuse to deal for the purpose of maintaining an exemption from Federal Power Act jurisdiction as well as disconnections or refusals to interconnect which are the result of concerted action. The central antitrust issues are adequately addressed by the proposed license conditions, and this Board should approve those conditions.

Respectfully submitted,

ISHAM, LINCOLN & BEALE



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