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August 22, 1980

Samuel J. Chilk
Secretary to the
Commission
U. S. Nuclear Regulatory
Commission
Washington, D.C. 20555

In the Matter of
South Carolina Electric & Gas Company, et al.
(Virgil C. Summer Nuclear Station)
Docket No. 50-395A

Dear Mr. Chilk:

This letter is being submitted on behalf of South Carolina Electric & Gas Company ("SCE&G") in response to the Nuclear Regulatory Commission's ("NRC" or "Commission") Memorandum and Order dated June 30, 1980 ("Memorandum") in the captioned proceeding. 1/ The Commission requested information regarding new developments since the date of earlier pleadings filed by SCE&G and South Carolina Public Service Authority ("Santee Cooper"), a co-licensee in this proceeding (collectively "Licensees"), in response to the petition by Central Electric Power Cooperative, Inc. ("Central") for a finding of "significant changes" under Section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2135c(2). The Commission has also sought the comments of these companies as well as the Department of Justice and the NRC Staff with regard to the appropriateness of criteria it established for deciding "significant changes" issues, including their application in its Memorandum to the facts in this instance.

Specifically, the Commissioners requested "that the parties and the Attorney General provide us with any comment

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1/ South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station), Docket 50-395A, "Memorandum and Order" (June 30, 1980).

they might have on those criteria and how we have applied them in this memorandum" and that information be provided with regard to any new developments. This response sets forth our legal position on the former point. Information concerning new developments was provided to the Staff pursuant to its request, dated July 8, 1980, for information to provide it the basis to respond to the Commissioners' request. Information concerning new developments will be submitted to the Commission under separate cover in a statement verified by an officer of the company.

The basic error by the Commission is that it apparently wishes to rehash the same matters considered at the construction permit stage which the Attorney General found would not create or maintain a situation inconsistent with the antitrust laws. Apparently, as well, the drafters of the Memorandum do not feel bound by the opinions of the Supreme Court in the Noerr-Pennington line of cases and have now managed to reach the implausible result of imposing even stricter agency review on antitrust matters at the operating license stage than at the construction permit stage - wholly contrary to the intent of Section 105 of the Atomic Energy Act.

With regard to the Memorandum, we believe that the criteria utilized by the Commission were both erroneously and imprecisely defined, and that the Commission failed in some instances even to apply its own standards. These deficiencies are discussed in the seven points enumerated below. In our view, the format and standards used by the Commission in rendering its Memorandum as applied to the facts herein are defective for the following reasons:

1. The Commission incorrectly defined "significant change." In our view, the Commission's definition of what constitutes a "significant" change is incorrect as a matter of law. By looking to the likelihood of additional remedies instead of examining the nature of the alleged activity, 2/ the Commission has put the cart before the horse. The Commission also stated that a change would be deemed "significant" if the operating license antitrust review would be expected to have "greater than de minimus results." 3/ There is no support for the proposition that the statutory standard of "significant" means "greater than de minimus" or

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2/ Memorandum at 23-31.

3/ Id. at 24.

anything other than the plain meaning of the word itself. Considering its "concern with possible unfairness to utilities and their investors should they be required to run the antitrust review gauntlet twice, at both the construction permit and operating license stages," 4/ Congress certainly intended "significant" to mean "substantial." Thus, a change in the licensees' activities should not be deemed "significant" so as to trigger antitrust review at the operating license stage unless the activities substantially altered the competitive posture of the licensee(s) and the antitrust petitioner.

Further, we disagree that there has been any "change" at all with regard to the licensees' activities. Thus, the Commission's finding that all the changes alleged by Central have occurred or were alleged to have occurred on dates subsequent to March 31, 1972, the date of the Attorney General's antitrust advice, is not supported by the record. Central's allegations pertain either to the ongoing policies of the licensees or conditions that predate the Attorney General's review in 1972. The Commission's approach distorts the proper meaning of the word "change" within the context of Section 105c(2), which is some alteration in the competitive status quo at the time of the initial antitrust review, allowing for circumstances whose future occurrence was fairly predictable in the natural course of events.

For example, the Commission agreed that the 1973 State territorial legislation is at the heart of Central's allegations, 5/ but ignored earlier legislation enacted in 1969 which similarly set territorial limits on competition among South Carolina utilities, and of which the Attorney General took cognizance in rendering his advice in 1972. In our view, a State law requiring allocation of service territories cannot, in the context of the supplementary antitrust review required under Section 105c(2), be deemed a "change," let alone a "significant change," if it is merely a continuation of an existing State policy governing such competition. Thus, if a State has a historical policy of regulating competition among utilities by the allocation of service areas, there is no "change" in the activities of the licensee(s) by virtue of new legislation that continues and

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4/ Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1315, 1321 (1977).

5/ Memorandum at 20.

reaffirms the existing policy. 6/ It is especially noteworthy that, as indicated, the Attorney General reviewed the earlier South Carolina legislation in making his recommendation to the NRC in 1972 and found no anticompetitive conduct. 7/

Thus, we disagree that any new legislation is, per se, a "change" within the meaning of Section 105c(2). While we concur with the Commission in its belief that an affirmative finding of "significant changes" depends upon new activity with "negative antitrust implications," we believe that an activity without such negative implications cannot be a "change" at all under Section 105c(2). Correspondingly, a "change" would be "significant" only if the antitrust implications were significantly negative.

The Commission further erred by focusing upon certain negotiations among the parties since 1972 as though the mere discussion of issues would constitute a "change" in the activities of the licensees. For example, the Commission referred to negotiations between Santee Cooper and Central for part ownership in the Summer facility 8/ and bulk power transmission as though these negotiations themselves have somehow altered the status quo, that is, the relative position of the parties in competition with each other as examined by the Attorney General in 1972.

In our view under Section 105 of the Act, a "significant change" can result only from the actions of a licensee. An act of a third party without more cannot itself be a "significant change" requiring further antitrust review. To hold otherwise would permit any third party to create a "significant change" repeatedly merely by contacting a licensee to propose even the most outrageous scheme which,

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6/ By comparison, the Commission in South Texas asked "why enforcement of a contract right, known to all parties and the Attorney General at the time of the construction permit antitrust review, may constitute 'changed circumstances' such as may justify the imposition of antitrust conditions." South Texas, supra, 5 NRC at 1320.

7/ See 37 Fed. Reg. 7266 (April 12, 1972).

8/ As discussed in point No. 4, infra, access to Summer was never raised as an issue by Central.

if adopted, might result in a "significant change." To deem such activities to be "changes" permits a nonlicensee to take unilateral action, e.g., an attempt to negotiate unreasonable demands, as here, in order to gain tremendous leverage by the threat of an operating license hearing.

Also, the Commission cites Central's new request for wheeling by SCE&G 9/ without any indication of a change in SCE&G's transmission policy. In point of fact, as noted in SCE&G's verified statement, it was not wheeling power for Central in 1972 when the Attorney General made his review and recommendations. The first request made by Central for wheeling occurred during unrelated proceedings involving a hydroelectric facility in 1977.

In short, there is no basis for the Commission to examine negotiations among the parties in the abstract rather than in relation to the status quo in 1972. And there is no discussion whatsoever in the Commission's decision of any predatory tactics by the Licensees with regard to any issue that could even remotely be considered a basis for finding "significant changes" in their activities since the initial antitrust review.

2. Neither State legislation nor lobbying activities are attributable to the Licensees. The law provides that any antitrust review at the operating license stage should be limited to activities reasonably attributable to the licensees.10/ However, in applying that principle to this case, the Commission has eviscerated the Supreme Court decisions and attempts to destroy protection to which American citizens are entitled under the Noerr-Pennington doctrine.11/ In essence, the Commission has held that South Carolina's adoption of a statutory scheme allocating service territories among utilities was "reasonably attributable" to the licensees since they were substantially involved in lobbying for its passage. This result is squarely contrary to the Noerr-Pennington principle that such lobbying activities are

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9/ Memorandum at 25.

10/ Id. at 20.

11/ Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

protected by the First Amendment and therefore beyond the pale of the antitrust laws.12/ The Commission did not suggest that it was inappropriate to apply Noerr-Pennington to its antitrust proceedings in general, but held that it was inapplicable to "our limited causation-type determination" in a "significant changes" determination.13/ In effect, the Commission created a rule apparently based upon the proximate cause test used in tort law and wholly ignored the principle of Noerr-Pennington in holding that the statutory scheme could be reasonably attributed to the Licensees because they lobbied for its passage. The Commission's analysis is clearly wrong for two reasons.

First, there is no basis in the express language of Section 105 for such a rule by which an otherwise valid defense at law is eliminated. The Commission has simply

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12/ The Noerr-Pennington doctrine provides absolute immunity to the Licensees for their lobbying efforts even if it could be proven that the "sole purpose in seeking to influence the passage and enforcement of [the territorial legislation] was to destroy [competition]." 365 U.S. at 138-39. Similarly, the Supreme Court has stated that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670. The application of this principla to the electric power industry was made clear by Mr. Justice Blackmun in his concurring opinion in Cantor v. Detroit Edison Co., 428 U.S. 579, 610 (1976), which recognized that "[e]very state enactment is initiated in its way, by its beneficiaries" and that "the process of enactment is likely to involve such a complex interplay between those regulating and those regulated that it will be impossible to identify the true initiator." See also Metro Cable Company v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975); American Telephone and Telegraph Co. v. Delta Communications Corp., 408 F.Supp. 1075 (S.D. Miss. 1976).

13/ Memorandum at 22.

misconstrued language in the report of the Joint Committee on Atomic Energy on the meaning of "significant changes,"14/ from which the Commission derived its "reasonably attributable" requirement. The Joint Committee stated that "significant changes" would not include activities "for which the licensee could not reasonably be held responsible or answerable."15/ The Commission, however, erroneously interpreted the words "responsible" and "answerable" to involve an analysis of causation-in-fact. But these words, as used by the Joint Committee, in the context of restricting the scope of an operating license antitrust review, were undoubtedly intended to be construed in their ordinary legal sense, which has nothing to do with causation but rather implies a legal liability. Such construction is required "not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." State of Maine v. Thiboutot, 48 U.S.L.W. 4859, 4863 (June 25, 1980), quoting Puerto Rico v. The Shell Co. (P.R.). Ltd., 302 U.S. 253, 258 (1937).

Notably, Black's Law Dictionary defines "answer" as denoting "an assumption of liability, as to 'answer' for the debt or default of another." It defines "responsible" as "liable, legally accountable or answerable." The courts have similarly construed these words. See generally The Mary F. Barrett, 269 F.2d 329, 334 (3rd Cir. 1922); Bostick v. Usury, 221 Ga. 647, 146 S.E.2d 882, 883 (1966); Manassas Park Development Co. v. Offutt, 203 Va. 382, 124 S.E.2d 29, 31 (1962); Penn v. Commercial Union Fire Insurance Co., 223 Miss. 178, 101 So. 2d 535, 537 (1958); Sams v. Cochran & Ross Co., 188 N.C. 731, 125 S.E. 626, 629 (1924).

Second, the Commission's test makes no sense whatever in the overall scheme of the statute. It is legally ridiculous to hold that lobbying is protected, but that lobbying as the "causation" is not. Clearly this is a distinction without a difference. At the construction permit stage, it would not matter whether all of the activities comprising the total competitive picture could be "reasonably attributable" to the licensee(s). Therefore, the causation-type analysis adopted by the Commission in its Memorandum would

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14/ The phrase "significant changes" was added to Section 105 by the 1970 Amendments to the Atomic Energy Act of 1954.

15/ U.S. Code Cong. & Adm. News 4981, 5010 (1970).

be inapplicable. It follows that the Noerr-Pennington doctrine would be given full play so as to immunize any lobbying activities from consideration in determining under Section 105c(5) whether the grant of a license would create or maintain a situation inconsistent with the antitrust laws. But, as the Commission itself recognized in Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1321 (1977), Congress envisioned "a limited scope of review" at the operating license stage.

It cannot be reconciled with the statute that Noerr-Pennington would afford less protection during the more narrow antitrust review at the operating license stage than before.16/

Obviously, the suggestion in the Report of the Joint Committee on Atomic Energy that "significant changes" would not include activities for which the licensee could not reasonably be held responsible or answerable was a limitation on the exercise of the NRC's authority and was not meant to expose a licensee to any greater antitrust liability or broaden the scope of NRC antitrust review. Its explanation was certainly not intended to deprive a licensee of an otherwise valid defense or immunity under the law. What Congress plainly meant as a circumscription of the Commission's jurisdiction cannot justify a curtailment of a licensee's rights.

Accordingly, contrary to the interpretation which the NRC would impose, Congress intended "licensee's activities" to include only those for which it could be held legally accountable, not those with which it might merely have been involved. Since the licensees are protected by Noerr-Pennington as a matter of law, they could not be "responsible" or "answerable" for the independent State action which ultimately followed any lobbying activities under Section 105c(2), and neither such activities nor the service area allocation plan enacted by South Carolina could, under a proper interpretation of the rule, be reasonably attributed to them.

16/ Another incongruity under the Commission's interpretation is that a licensee would have absolute immunity for its lobbying activities in a criminal or civil action under the Sherman Act but would be subject to antitrust claims in NRC proceedings under the same statute at the operating license stage.

3. "State action" allegations should have been rejected as a matter of law and the two remaining contentions decided on the record. The Commission correctly found that the State of South Carolina has adopted a regulatory scheme in the power supply market and that the doctrine of Parker v. Brown, 317 U.S. 341 (1940), had been properly invoked by the licensees.17/ It appears that the Commission has concluded that in these circumstances only two issues relating to a determination of "significant changes" could survive. These are Central's participation in the Summer facility and the terms for transmission services.18/

Assuming arguendo that these issues could not also be decided in Licensees' favor as a matter of law under a Parker v. Brown analysis, the Commission could and should have disposed of these two "issues" on the basis of the record before it. First, participation in Summer was never really an issue at all. The Commission's statement that "the parties do not dispute . . . Santee Cooper's refusal to share ownership"19/ in the facility is simply incorrect. In fact, the Attorney General had stated in his 1972 advice to the Commission that Central was interested in obtaining a share of the facility but was awaiting the outcome of negotiations between Santee Cooper and SCE&G.20/ Notably, Central did not list access to Summer as an issue,21/ and in fact admitted that Santee Cooper had offered it a share of its part ownership in Summer. As to the reason it chose not to participate, Central merely asserted in wholly conclusory fashion that "no definitive proposal has been forthcoming," and went on to speculate as to "an implication that Central would have to assume certain heavy financial burdens that could destroy any benefits flowing from Central's ownership interest."22/ Under the circumstances, we see no basis upon which the Commission should have interjected any issue of access into its analysis and decision.

17/ Memorandum at 29-30.

18/ Id. at 30.

19/ Id. at 25.

20/ 37 Fed. Reg. 7266 (April 12, 1972).

21/ See amended petition at 49.

22/ Id. at 45.

With regard to transmission services by SCE&G, it has been noted above that no wheeling to Central was provided in 1972,23/ and the record is entirely devoid of any basis upon which Central could claim or the Commission could find any "change" at all with negative antitrust implications in SCE&G's policy regarding wheeling or any other transmission service. This issue should have been disposed of on the basis of the record, just as the Commis sion was able to conclude that Central's "dual rate" claims lack merit because Santee Cooper's rates were cost-justified.

4. The Commission failed to perform its nondiscretionary, threshold duty to make preliminary findings. In referring this matter to the Attorney General for its "threshold analysis" as to whether "it would recommend a hearing were it to conduct a statutory OL Summer license review,"24/ the Commission failed to meet its mandatory obligations under Section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2135c(2). In doing so, it violated the Licensees' rights under that section. The Commission may not refer possible antitrust cases to the Department of Justice for review at the operating license stage without at least having made a preliminary determination as to "significant changes" under Section 105c(2). In Houston Lighting & Power Company (South Texas Project, Units Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1310 (1977), the Commission held that the language of subsection c(2) explicitly "requires the Commission to make a threshold determination before the Attorney General's advice concerning a possible second antitrust proceeding can be sought - namely a finding that the licensee's activities have significantly changed subsequent to the construction permit antitrust review."25/

23/ The Federal Power Act, 16 U.S.C. §791a, et seq. [repealed], which was in effect at that time, did not require utilities to wheel power for each other. As discussed above, SCE&G did not receive a wheeling request from Central until Central intervened in a hydroelectric proceeding in 1977.

24/ Memorandum at 29.

25/ (Emphasis added). The fact that the Commission may subsequently consult the Attorney General with regard to its determination (Memorandum at 29), does not authorize the Commission to abdicate its responsibility to make an initial determination itself. As the Commission noted in South Texas, referral to

(Ft. 25/ continued on next page)

Thus, the Commission in South Texas expressly held that the duty to make an initial statutory determination under Section 105c(2) is nondiscretionary. Accordingly, there is no basis upon which the Commission may refer the matter to the Attorney General for his advice prior to its own threshold findings on "significant changes."

5. The Commission failed to stick to any specific "changes" discussed throughout its decision. Under the two-tiered statutory scheme of antitrust review under Section 105, further review cannot be conducted after the construction permit stage in the absence of significant "changes" in the activities of the licensee(s). Although the Commission talks about a number of "changes" relevant to its examination of the statutory issue, it fails to identify at the outset of its Memorandum precisely what "changes" are under consideration, or as a general matter, what types of changes are relevant to its inquiry. Thus, the Commission discusses different events or circumstances as the "changes" under review in each of the different portions of its decision anaylzing each of the three criteria, with no tie or consistency between sections.

For example, in its discussion of whether the petition alleges changes occurring after the initial antitrust review, the Commission refers to "Santee Cooper's changed competitive role" and also refers to South Carolina legislation enacted in 1973 regarding the allocation of service areas.26/ Examining the next criterion, whether the changes are reasonably attributable to the licensees, the

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25/ (continued)

the Attorney General does not "imply any judgment on [the Commission's] part as to the necessity for a hearing, let alone any necessity of the imposition of license conditions." The "significant changes" determination by the Commission only means that the facts "are of such a nature as to convince [the Commission] that the Attorney General must be consulted." 5 NRC at 1319. Accordingly, the "consultation" envisioned by the Joint Committee was intended to assist the Commission in deciding whether further antitrust review, possibly leading to a hearing and license conditions, was necessary, but was not intended to relieve the Commission of its initial responsibility in determining whether "significant changes" had occurred.

26/ Memorandum at 18.

Commission refers exclusively to lobbying activities in support of the State legislation. In the third section, analyzing whether antitrust implications would be likely to warrant Commission remedy, the Commission discusses Santee Cooper's authorization under State law to purchase a share of the Summer facility, Santee Cooper's alleged refusal to share ownership in Summer with Central,27/ and SCE&G's alleged refusal to engage in all of the power exchange services requested by Central. As a result of this meandering, it is never clear throughout its opinion exactly what "changes," if any, upon which the Commission has focused or is basing its decision.

6. Central's petition is untimely. The Commission held that, in the absence of any directly controlling benchmark, the timeliness of Central's petition depends on whether it had been submitted "sufficiently promptly" after the operating license application.28/ However, the Commission then failed to apply its own test. Implicit in the Commission's analysis is the recognition that the Staff erred in not giving public notice of an opportunity for antitrust review upon the amendment of the license to include Santee Cooper as a co-owner 29/ and later upon the submission of the application for an operating license.30/

27/ As discussed under point No. 4, supra, this allegation has no basis in the record and was not even raised by Central.

28/ Memorandum at 14.

29/ The Commission stated that the Staff did not even request the Licensees to furnish the usual Appendix L information. It is noted that Appendix L was adopted by amendments to 10 C.F.R. Part 50, published at 38 Fed. Reg. 3955 (February 9, 1973), effective March 11, 1973. SCE&G's application to amend its license to include Santee Cooper as a one-third co-owner was submitted on May 17, 1974.

30/ The Commission also stated in passing that these mistakes are not expected to recur because of recent changes in operating license antitrust procedures, not yet published, by which the Commission has delegated to the Staff its responsibility for making "significant changes" determinations. This delegation was effected by a memorandum dated September 12, 1979 from Chairman Hendrie to the Directors of Nuclear Reactor Regulation

(Ft. 30/ continued on next page)

Accepting, arguendo, that Central should not be prejudiced by the Staff's oversight in failing to give adequate public notice on these occasions, neither should the Licensees. The Commission's decision is therefore deficient because it does not include any analysis of whether such prejudice in fact occurred, i.e., whether Central did submit its request for further antitrust review "sufficiently promptly" after the operating license application in the context of its knowledge of the facts.

The only two reasons cited by the Commission in holding the petition to be timely are, quite clearly, irrelevant to the stated test. The first reason, that the Staff had not

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30/ (continued)

and Nuclear Material Safety and Safeguards. It is our understanding that the underlying document by which the delegation was intended to be authorized, SECY-79-573 (May 24, 1979), has not been placed in the NRC Public Document Room. It is our further understanding that there has been no notice of rule-making for the proposed delegation. The Commission's delegation of authority over substantive decision-making is ordinarily made public and subject to notice in the Federal Register, e.g., the delegation of authority in export-related areas by the Commission on July 17, 1980. Nonetheless, it appears from the public notice given by the NRC in 44 Fed. Reg. 58557 (October 10, 1979) that the delegation is in effect as to other cases. We are uncertain whether any of the criteria in the Commission's delegation to the Staff are different from those used here, but we think it is confusing for the Commission to allude to procedures in an unknown delegation of authority. Nonetheless, it is noteworthy that had the Staff acted as the Commission's delegate with respect to Central's petition, it would have found, on the basis of its pleadings to date, no such significant changes.

yet made its own recommendation regarding "significant changes," is obviously immaterial in determining whether a p ospective petitioner has itself acted in a timely manner. There is no requirement under the Atomic Energy Act of 1954, comparable to the necessity of a "negative declaration" as to environmental impacts,31/ that the Staff make a negative finding on "significant changes" before an operating license may be granted. For years, the Commission has routinely issued operating licenses without receiving Staff comments or determinations as to significant changes. Whether or not a petitioner has filed promptly must, therefore, be decided from the perspective of the petitioner, not the Staff, which in this instance is just another party.32/

As its second reason, the Commission stated that there had not been an earlier, unambiguous notice of opportunity for antitrust comment. This statement begs the question of whether or not Central had, under the totality of the circumstances, filed its petition "sufficiently promptly." Had the Commission analyzed Central's knowledge of these proceedings, including the prior antitrust review by the Attorney General in 1972, the 1974 license amendment and the application for an operating license, it would have found the petition untimely. As the Commission recognized in South Texas, fairness to utilities engaged in long range planning means that a potential petitioner for antitrust intervention should not be permitted "to stand on the sidelines at the construction permit stage and raise a claim at the operating license stage that could have been raised earlier."33/ In making its "significant changes" decision,

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31/ See 10 C.F.R. §§51.5(c); 51.7.

32/ Thus, as noted, the Staff in this case ultimately found that there had been no significant changes and, on its own, would have so determined as the Commission's delegate. Central has never suggested that it delayed its filing in order to await Staff findings, or that it was even aware of the Staff review. By analogy, Staff review of an application for an operating license will obviously continue for years after the time has passed within which an intervenor may seek a hearing as to health and safety matters at the OL stage. Yet, the mere fact of the Staff's ongoing review is not justification for late intervention.

33/ South Texas, supra, 5 NRC at 1321.

the Commission should therefore give close scrutiny as to whether Central has, indeed, stood on the sidelines during the years since the Attorney General's review with respect to each or any of the issues it now raises.34/

7. The Commission improperly ignored Licensees' motions for summary disposition. The format adopted by the Commission for determining "significant changes" apparently does not include an opportunity for the Commission to consider a licensee's motion to dismiss or, in the alternative, for summary disposition. We believe that the procedural rules of Part 2 should be equally applicable to such petitions and that, in particular, simple responses and summary disposition are appropriate means to treat allegations like those asserted by Central which have no basis in the record and which are so ambiguous as to create the false impression that a hearing is needed.35/

In terms of Licensees' motions herein, there is ample information to support a recommendation by the Department of Justice that no antitrust hearing at the operating license stage is required under the scope of review permitted by Section 105c(2). Access to the Summer facility is not now and never has been an issue at all. There has been no new activity with negative antitrust implications regarding SCE&G's wheeling policy or any other policy regarding its

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34/ See generally SCE&G's Motion to Dismiss or, in the Alternative, for Summary Disposition (December 21, 1978); Santee Cooper's Motion to Dismiss or, in the Alternative, for Summary Disposition (January 15, 1979); SCE&G's Answer to Central's Amended Petition (March 7, 1979); Reply of Santee Cooper to Amended Petition (March 7, 1979).

35/ The time consumed and the costs of antitrust hearings are too great a burden to impose upon any person in the United States, corporate or otherwise, unless the law clearly requires such a course of action. We do not believe that Congress intended the NRC to conduct hearings for their own sake. Thus, we noted earlier that Central filed what purported to be an amended petition in which it commingled 45 pages ot its legal theory of the case along with vague allegations and conclusory statements. The manner in which Central has pleaded its case has no doubt contributed substantially to the misunderstanding of the Commission as to the real issues in controversy and to the substantial delay in the rendering of a decision.

transmission services for the simple reason that it never provided such services to Central at the time of the 1972 construction permit antitrust review.36/ These matters should therefore have been decided by the Commission in favor of Licensees by way of summary disposition, thereby obviating the need for any recommendation from the Department of Justice.

Sincerely,

Troy B. Conner, Jr.

Troy B. Conner, Jr.
Counsel for South Carolina
Electric & Gas Company

cc: Service List

36/ As noted, the wheeling issue is the only matter in the Commission's decision that involves SCE&G. Therefore, the Commission should now make an express determination that no significant changes have occurred with respect to that policy since 1972 regardless of any finding concerning Santee Cooper. Accordingly, any antitrust conditions in the operating license would not apply to SCE&G.