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January 25, 1990

Room P-223
Phillips Building
7920 Norfolk AVE.
Bethesda, MD 20814

RE: System Energy Resources, Inc.; Louisiana Power & Light Company, Arkansas Power & Light Company, Docket Nos. 50-416A; 50-417A; 50-382A; and 50-368A Anti-trust Additional Comments and Request for Re-Evaluation.

Dear Sir.

Enclosed please find the original and one copy of Additional Comments and Request for Re-Evaluation of Cities of Benton, Conway, North Little Rock, Osceola, Prescott, and West Memphis, Arkansas and the Farmers Electric Cooperative Corporation in the above captioned matter. I would appreciate your returning a file marked copy of the Comments only to me in the enclosed, self addressed, stamped envelope.

Cordially,

Zachary D. Wilson By Brian C Donahue

Zachary D. Wilson

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Enclosures

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#1106
12/29/89

UNITED STATED OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

54FR53200
12/27/89
(1)

SYSTEM ENERGY RESOURCES, INC.

DOCKET NOS. 50-416A; 50-417A; 50-382A; AND 50-368A

ADDITIONAL COMMENTS AND REQUEST FOR RECONSIDERATION OF CITIES OF BENTON, CONWAY, NORTH LITTLE ROCK, OSCEOLA, PRESCOTT, AND WEST MEMPHIS, ARKANSAS AND THE FARMERS ELECTRIC COOPERATIVE CORPORATION (Collectively Arkansas Cities and Cooperative)

These Comments are submitted in response to a Notice published December 27, 1989 (54 F.R. 53200-03), calling for expressions of views on the issuance of facility operating license amendments and a proposed no significant hazards consideration determination concerning the transfer of operational mangement and control of Grand Gulf Nuclear Station Units 1 and 2 to a new Entergy Corporation subsidiary (Entergy), Entergy Operations , Inc. (EOI). This comment also relates to similar notices published concerning AP&L's Arkansas Nuclear One Units 1 and 2 and LP&L's Waterford Unit 3. This comment reaffirms and readopts all of the statements made as a part of the Arkansas Cities and Cooperative's previous Comment, filed December 1, 1989 and urges that the considerations raised both in this and the previous referenced document be examined or re-examined by the Nuclear Regulatory Commission (NRC)

Staff and the Commission before any final decision authorizing consolidation is made.

During its recent anti-trust review of the proposed creation of EOI and the vesting of operational control over the nuclear facilities belonging to Arkansas Power and Light Company (AP&L), Louisiana Power and Light Company (LP&L) and Mississippi Power and Light Company (MP&L) the NRC Staff recognized some danger from the combination to the public interest. To combat those problems the NRC Staff used its power under 10 CFR Part 50 to condition the license amendment. Unfortunately, the conditions are not adequate to protect the public from all of the anti-competitive effects of the planned action because each license and amendment contains somewhat different conditions.

The Amendment to Grand Gulf Unit 2 operating license requires MP&L and Systems Energy Resources,Inc.(SERI) continue to meet the anti-trust conditions from Appendix C of the original license pending an ongoing anti-trust review and, that MP&L and SERI "are responsible and accountable for the actions of their respective agents," presumably meaning EOI, for violations of the anti-trust conditions in Appendix C of the Amendment. Appendix C of the Amendment is identical to Appendix C of the original license. It

requires that the plant operator provide interconnection services and coordinate reserve sharing and planning with all entities in the Western Mississippi area. The conditions also require that the owning Public Utility give those same entities liberal access to transmission services both within and outside western Mississippi. Also, the conditions require that plant operators sell power to any independent entity in the Western Mississippi area who proposes "to engage in retail distribution of electric power." Finally, Appendix C requires that the licensee "shall exert their best effort to obtain participation in" additional nuclear facilities "by any entity(ies) in the Western Mississippi area requesting such participation on terms no less favorable than the terms of the licensees participation therein." Grand Gulf Unit 2 construction permit contains similar conditions to those contained in the Unit One license.

Waterford Unit 3 license requires that LP&L continue to comply with its current license conditions and that LP&L is "responsible and accountable for the actions of its agents" if, those actions violate the above mentioned condition. The license conditions originally imposed upon LP&L's operation of the Waterford Unit are similar to those imposed on Grand Gulf Unit 1 in that they provide that independent

entities within the state of Louisiana have rights of interconnection, transmission access, reserve planning and sharing and most significantly, the right to participate in the ownership of any power generation facility in which the owners of Waterford participate.

AP&L's ANO Unit 1 is exempt from §105 anti-trust review, but Unit 2 is not exempt. The Amendment to the Unit 2 operating license contains the only conditions that "EOI shall not market or broker power or energy from Arkansas Nuclear One, Unit 2. AP&L is responsible and accountable for the actions of its agents to the extent said agent's actions affect the marketing or brokering of power or energy from ANO Unit 2".

The conditions imposed upon Grand Gulf and Waterford grant the utilitys' competitors significant rights to interconnection, power reserve sharing, transmission access and access to ownership of future facilities. These rights have specifically not been granted to entities within the state of Arkansas. If and when the management consolidation occurs, entities within Western Mississippi and Louisiana will retain these rights which will then expand, if indirectly, to the nuclear facilities in Arkansas. This will give entities within Western Mississippi and Louisiana an undue competitive advantage in the ability to attract customers to their service areas as compared to their

competitors in the cities of West Memphis, Osceola and Prescott, Arkansas. This advantage will be magnified when ANO Unit 1 and 2 are added to the reserve sharing and planning pools.

In addition to the problems identified above, the Safety Evaluations conducted by the Office of Nuclear Reactor Regulation seem to indicate that NRC is unable to impose the additional requested license conditions upon the proposed consolidation becase commenting parties did not provide adequate proof of the anticompetitive implicaton arising from the transaction. As far as we have been able to discover, 10 CFR Part 50.91 does not impose any particular burden of proof upon individual commenting upon transactions like those under consideration at present. The regulation merely invites comment from interested parties upon which the NRC staff can and will act if it appears necessary.

In conclusion, the Arkansas Cities and Cooperative request that the NRC consider in addition to issues raised in its Anti-trust comments, the possibility that undue competitive advantage will likely accrue to entities within the Western Mississippi area and the State of Louisiana as compared to independent entities within the State of Arkansas as a result of disparate

license conditions imposed upon ANO Unit 2 Waterford Unit 3 and Grand Gulf Units 1 and 2. As is indicated in the previous comment, Cities and Cooperative allege that the change in financial structure of the Grand Gulf Nuclear Station be considered a significant change rather than merely an accounting change. Information presented in both this comment and the comment previously filed on this subject demonstrate this fact and the probable detrimental effect and results of this action.

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By Brian C Donahue

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UNITED STATED OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

SYSTEM ENERGY RESOURCES, INC.; LOUISIANA POWER & LIGHT COMPANY, ARKANSAS POWER & LIGHT COMPANY

DOCKET NOS. 50-416A; 50-417A; 50-382A; AND 50-368A

COMMENTS OF CITIES OF BENTON, CONWAY, NORTH LITTLE ROCK, OSCEOLA, PRESCOTT, AND WEST MEMPHIS, ARKANSAS AND THE FARMERS ELECTRIC COOPERATIVE CORPORATION (Collectively Arkansas Cities and Cooperative)

TO:

Eileen M. McKenna, Acting Chief, Policy Development and Technical Support Branch, Program Management, Policy Development and Analysis Staff, Office of Nuclear Reactor Regulation.

I.

INTRODUCTION

These Comments are submitted in response to a Notice published November 1, 1989 (54 F.R. 46168-01), calling for expressions of views on anti-trust issues concerning application for license amendments for four nuclear plants currently operated by the companies captioned above that a new Entergy Corporation

subsidiary (Entergy)[1], Entergy Operations, Inc. (EOI), will manage and operate.

Three of the licenses subject to the amendment proceedings, numbers 50-417A LP&L (Waterford III), 50-416A SERI (Grand Gulf I), and 50-368A AP&L Arkansas Nuclear One, Unit II, (ANO II) were issued subsequent to the 1970 Amendments to Section 105(c) of the Atomic Energy Act, 42 USCA §2135, and are presumably, therefore subject to the imposition of, or modification to existing anti-trust conditions.

It is axiomatic that the 1970 Amendments required the NRC to conduct a pre-licensing anti-trust review of applications for licenses to construct and operate nuclear power plants. Under the 1970 Amendments, NRC was required to make a finding as to whether the granting of a license would "create or maintain a situation inconsistent with the anti-trust laws," and it has the authority to issue or continue a license, to refuse to issue a license, to rescind or amend a

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[1] Entergy Corporation is a registered Public Utility Holding Company that was formerly known as Middle South Utilities, Inc. Entergy owns all of the outstanding shares of common stock of Arkansas Power and Light Company (AP&L), Louisiana Power & Light Company (LP&L), Mississippi Power & Light Company (MP&L), and New Orleans Public Service, Inc. (NOPSI), Entergy also owns Systems Energy Resources, Inc. (SERI) the licensee for Grand Gulf I.

license, and to issue a license with conditions it deems appropriate.

LP&L's license for the Waterford III plant contains anti-trust conditions. A copy of the Waterford III license conditions are attached hereto as Exhibit "A". MP&L[2] and SERI's license for Grand Gulf I license has appended to it anti-trust conditions which are attached hereto as Exhibit "B". Conversely, the licenses for AP&L's Arkansas Nuclear One Unit I (ANO I) license number 50-382A, and ANO II have no anti-trust conditions. The ANO I license was issued in 1967 prior to the 1970 Amendments, and apparently is a "grandfathered" section 104(b) plant.[3] ANO II's freedom from anti-trust license conditions was recommended in an Opinion Letter of the Attorney General of the United States dated December 30, 1971, which appears at Federal Register Volume 36, page 25,341. A copy of a federal depository microfiche of the ANO II Attorney General's Opinion Letter is

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[2] MP&L is a co-licensee with SERI (f/k/a Middle South Energy, Inc.[MSE]) and the geographic area of the license conditions is "Western Mississippi" the MP&L retail and wholesale service territory; even though Grand Gulf Unit I is a "wholesale" generator the rates of service for which are subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC); infra Part VI.

[3] Fort Pierce v. NRC, 606 F.2d. 986,(D.C. Circuit) 1979.

attached hereto, along with a typed summary for easier review, and is marked Exhibit "C".

The Attorney General's Opinion Letter identifies fifteen Arkansas municipal electric utilities constituting approximately seven percent (7%) of the retail market in Arkansas. The Opinion Letter also identifies the Southwestern Power Administration system which "supplies power to half of the municipals in Arkansas". The attached Exhibit "D" is a current American Public Power Association pre-publication which lists all the municipally owned electric utility systems in Arkansas. Six municipal systems are AP&L wholesale customers[4] and along with one (1) REA Cooperative are submitting these Comments. The Arkansas Cities and Cooperative identified below as of the issuance of the Opinion Letter were full requirements wholesale customers of AP&L. The effect of the ANO II license upon AP&L's wholesale customers was not seemingly considered in the 1971 Attorney General Opinion Letter.

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[4] Although not a majority in number of municipal systems, the AP&L wholesale customers are far greater in size than the balance of the Arkansas municipal systems, and are situate, for the most part, in the Little Rock and Memphis, Tennessee SMSAS.

II.

SUMMARY OF CONCLUSIONS

In summary, the Arkansas Cities and Cooperative recommend that inter alia due to reallocation of nuclear power plant costs of the Entergy subsidiaries nuclear plants, as reflected in a series of decisions by FERC and United States Circuit Court of Appeals for the D.C. Circuit identified in these Comments, the Application of Entergy to create EOI will create or maintain a "situation inconsistent with the anti-trust laws", and that such events and other factors both prior to the issuance of the Licenses for Waterford III, Grand Gulf I, and ANO II may be "changed circumstances" warranting modification of existing license under §105(c) of the Atomic Energy Act.

As explained in Part IV. subsection E, while Cities and Cooperative are obligated by a certain Memorandum of Understanding (MOU) with AP&L with respect to how they seek Transmission Grid Access, all other typical nuclear license anti-trust conditions should be imposed upon the service territories of all Entergy operating subsidiaries, and in the event the described MOU does not become effective, or terminates by its terms, then transmission grid access conditions be issued in favor of the commenting parties. A copy of the MOU is attached as Exhibit "E"

III.

DESCRIPTION OF COMMENTING SYSTEMS

Arkansas Cities and Cooperative are all either Arkansas municipal corporations of the first class (Cities of Benton, North Little Rock, Osceola and Prescott), or a political subdivision of the State of Arkansas, West Memphis Utilities Commission, or an Arkansas not-for-profit corporation, the Conway Corporation, and an Arkansas not-for-profit rural electric cooperative corporation, the Farmers Electric Cooperative Corporation (FECC).

Arkansas Cities and Cooperative all own and/or operate electric generation and distribution systems or electric distribution systems within the State of Arkansas. All are full or partial requirements wholesale customers of the AP&L, one of the applicants in the consolidated proceedings to which these comments are addressed. Conway, Osceola and West Memphis comprise one distinct wholesale group who own jointly with AP&L and others own undivided ownership interests in two large coal-fired steam electric generating

stations located within the State of Arkansas.[5] The other wholesale customers are either full requirements or partial requirements customers having self-owned generation to satisfy portions of their respective electric capacity commitments necessary to serve their customers. The City of Prescott and FECC are full requirements customers of AP&L, and the Cities of Benton and North Little Rock (NLR) are partial requirements customers of AP&L with limited self-owned generating capacity.

IV.

DESCRIPTION OF COMMENTING PARTIES CURRENT AGREEMENTS AND PRIOR AGREEMENTS WITH AP&L

A. Cost of service formula rate customers.

Conway, Osceola, and West Memphis Arkansas (Arkansas Cities I), receive "partial requirements" electric utility service from AP&L pursuant to Power Coordination, Interchange, and Transmission Agreemerts [Agreement(s)] on file with the FERC. Arkansas Cities I own electric generation and distribution systems, which, in addition to receiving partial requirements electric service from AP&L, are also co-owners with

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[5] In other regulatory proceedings, Entergy Corporation is seeking the "spin-off" portions of the Independence Steam Electric Station of which Conway, Osceola and West Memphis are co-owners into a new IPP subsidiary Entergy Power, Inc. described infra Part IV, subsection E.

AP&L and others of the two coal-fired steam electric generating stations in Arkansas. Arkansas Cities I purchase from AP&L all of their supplemental power and energy requirements substantially in accordance with the Agreements and "secondary" "Peak Power Agreements" on file with the FERC. The Agreements provide for the pricing of supplemental power purchases via formula rates and provide for the transmission of Arkansas Cities I jointly owned coal-fired generation resources and "peak power" purchases from third parties. The Conway, Osceola and West Memphis/AP&L Agreements were executed in 1979 and 1980, and are the subject of continuing proceedings in FERC Docket No. ER89-159-000. Conway, Osceola and West Memphis "Peak Power" Agreements are "Fixed Rate" Agreements[6], which provide power as if the Cities had constructed their own generation to serve peak needs.

B. Fixed Rate Customers. The Cities of Benton, NLR and Prescott, Arkansas and FECC (Arkansas Cities II and Cooperative) receive full or partial requirements electric service from AP&L pursuant to Power Agreements which provide for fixed power and energy charges from

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[6] The NLR/AP&L Agreement terminates on July 3, 1991. Neither AP&L nor NLR have any renewal rights under the Agreement and AP&L has offered NLR an Agreement identical to that for Benton for service after July 31, 1991.

1986 through mid 1991 and to Benton, Prescott and FECC thereafter, until five (5) years notice is given, at formula rates substantially similar to the formula rates payable by Arkansas Cities I under the Agreements. Benton has limited "self-owned" oil and gas fired diesel generation from which it satisfies less than twenty-five percent (25%) of annual demand. NLR currently receives service under a Fixed Rate Agreement which expires July 31, 1991. NLR also operates a hydro-electric generating station on the Arkansas River, FERC license number 3449. The Murray Hydro-Electric Project which provides less than twenty-five percent (25%) of the City's capacity requirements. AP&L provides NLR limited transmission service for portions of the hydro-electric capacity from the Murray project. Additionally, NLR's Power Agreement has transmission grid access for power purchases from third parties until the expiration of the Fixed Rate Agreement.

Arkansas Cities II and Cooperative's fixed rates for service from 1986-1991, are not subject to current amendment or change.

The three types of Agreements price wholesale power and energy as stated either under "fixed rates" until mid-1991 and for Benton, Prescott, and FECC thereafter under "cost of service formula rates" or

under "cost of service formula rates" with credits to billing demand and energy, in Conway, Osceola and West Memphis' case for capacity and energy from their co-ownership in the coal plants and, after September 1991, in Benton's case for its limited self-owned generation. The Benton, NLR, Prescott and FECC "fixed rate" Agreements are intended by all parties to be "Sierra Mobile" Agreements,[7] not subject to FERC regulatory change, while the "cost of service formula rate agreements" are subject to changes at various times and under various circumstances either under Sections 205 or 206 of the Federal Power Act, 16 USCA §824d. Examples of current Agreements are attached hereto as Exhibits "F" (NLR) ,"G" (Prescott), "H" (Conway Formula), and "I" (Conway Peak Power).

C. Prior Agreements. Prior to the "Cost of Service Rate and Fixed Rate" Agreements, AP&L and the Arkansas Cities and Cooperative all had substantially similar long-term, twenty year, full requirements Power Agreements. Some illustrative Agreements, one for full requirements between AP&L and NLR, one between AP&L and Conway, and one between AP&L and Benton are attached for reference as Exhibits "J" (Benton), "K" (NLR) and

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[7] Federal Power Commission v. Sierra Pacific Power Co., App. D.C. 1956, 76 S.Ct. 368, motion denied 350 U.S. 348, 351 U.S. 946.

"L" (Conway). These Agreements are substantially similar to the Agreements that were in effect at the time of the nuclear operating licenses were issued to AP&L for ANO I and ANO II. These Agreements were effective for twenty year periods and terminated at various times or were superceded at various times between 1980 and 1986 by the current Agreements in Section A of this subpart. Power and energy were priced under the twenty year Agreements at cost of service rates less a "ten percent discount" from "cost of service rates. Additionally, the Agreements contain "rust down" provisions which either prohibited any additional self-owned generation beyond that currently owned or compensated the municipal system for not utilizing its self-owned generation.

D. Limitations on Transmission Grid Access sources or construction of generation within Current and Prior Agreements.

The Current and Prior Agreements have either specific limitations on rights to construct self-owned generation granted financial benefit for not constructing generation provide limited access to the transmission grid of AP&L and its sister companies to acquire power and energy from third party suppliers, and contained no coordination, reserve sharing, plant

buy-in rights, or other features akin to those within a typical nuclear license anti-trust condition.

(i). Transmission Grid Access availability. Transmission grid access under the Cost of Service Formula Rate Agreements is limited to "peak power". There is no transmission grid access in the "fixed rate" Agreements for Benton, Prescott and FECC.

NLR's transmission grid access in its Power Agreement terminates on July 31, 1991. Additionally, the Prior Agreements have no transmission grid access rights. It was not until 1980 that any "wheeling" rights were envisioned within any of the Agreements between AP&L and Arkansas Cities and Cooperative. In 1980, in order to transport power and energy to the Cities of Conway, Osceola and West Memphis from their interests in the coal plants, AP&L granted those entities "wheeling" rights for transportation of that dedicated power and for the transportation of "peak power" which those three Cities might obtain from the Southwestern Power Administration or others. In 1985, the Coopertive sought transmission grid access to purchase power from a third

party power supplier outside of AP&L's load control area. The third party supplier was the City Water and Light Plant of Jonesboro, Arkansas, a partial Southwestern Power Administration wholesale customer. AP&L refused transmission access, after which an action, styled Farmers Electric Cooperative Corporation and City Water and Light Plant of the City of Jonesboro, Arkansas v. Arkansas Power and Light Company, United States District Court for the Eastern District of Arkansas, case number LRC-86-118, was filed seeking a mandatory injunction to obtain access. The suit was settled and Cooperative remains a full requirements customer of AP&L without transmission grid access.

(ii). Restrictions on self-owned generation. With respect to self-owned generation, under the prior Agreements, such as the Benton, Conway and AP&L Agreements, AP&L customers were given credits for not operating "self-owned generation", so called "rust down" provisions and were specifically precluded by the Agreements from installing new generation during the Agreement's term. Under the current Agreements, AP&L has, in Conway,

Osceola and West Memphis' case and most recently for Benton, Prescott and FPCC, offered "peak power" Agreements which have the economic effect of forestalling the need for construction of new generation since power and energy purchases are priced similar to costs a City might incur to build an inexpensive gas or oil fired "peaker". Also, self-owned generation is limited to twenty-five percent (25%) of the prior years peak in Benton and Prescott's Agreements.

E. Status of Entergy Power, Inc.'s (EPI) creation, the MOU and related Securities and Exchange Commission, Arkansas Public Service Commission and Federal Energy Regulatory Commission proceedings concerning EPI.

When AP&L decided to seek the "spin-off" of excess generation capacity and to create a new generation subsidiary, it offered to Arkansas Cities and Cooperative transmission grid access similar to that to be offered its new affiliate EPI. Arkansas Cities and Cooperative have recently entered into a MOU which provides transmission grid access to Arkansas Cities and Cooperative substantially similar to that which will be granted EPI if, but only if the EPI transactions are approved by the Arkansas Public

Service Commission (APSC) and the Securities and Exchange Commission (SEC). As of the date of filing of these Comments, hearings on the EPI question before the APSC have been indefinitely postponed. The SEC application has been made, however, a Notice of the Filing has not been published. A copy of the MOU is attached as Exhibit "E".

A related filing (approval for which is not a precedent to Arkansas Cities access to AP&L's transmission grid under the MOU) has been filed in FERC Docket No. ER90-38-000 and has been vigorously opposed by two state regulatory authorities, who, among other things, contend the property transfers are not a FERC jurisdictional issue.[8]

These Comments and any requests for the imposition of anti-trust conditions on the AP&L plants or extensions on other plants anti-trust conditions are subject, as far as transmission grid access, to the MOU, and nothing within these Comments is intended by Arkansas Cities and Cooperative to be an attempt to

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[8] The City of New Orleans Notice of Intervention making such Agreements is attached as Exhibit "M".

gain transmission access other than through the MOU so long as it remains effective.[9]

F. The MOU nevertheless grants Arkansas Cities and Cooperative "wheeling rights", and not other "services" envisioned within a typical nuclear license's anti-trust conditions.

The rights granted to the Arkansas Cities and Cooperative under the MOU to transmission grid access are substantially similar to those within a standard FERC Transmission Agreement. The MOU's provisions do not encompass the additional conditions that appear within a typical anti-trust conditioned license such as coordination services, rights to purchase interests in nuclear plants, rights to purchase interests in other future generation, and reserve sharing.

V.

ENTERGY CORPORATION SUBSIDIARY'S NUCLEAR LICENSES

A. Status of ANO I as "R&D" and ANO II as Commercial license with no anti-trust conditions license.

The Arkansas Cities and Cooperative have never had the benefit of any "anti-trust" conditions imposed upon AP&L's licenses for its two nuclear plants and within their geographic vicinity. Arkansas Cities and

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[9] By its terms the MOU terminates December 31, 1990 if SEC and APSC approvals have not been obtained.

cooperative indicated that ANO I was a pre-1970 Amendment nuclear unit, not subject to anti-trust conditions, as the operating license issued for it was under the old Section 104B of the Atomic Energy Act. The ANO Unit II, even though subject to the review provisions of Section 105(c), on December 30, 1971, received an advisory letter from the Attorney General recommending no anti-trust conditions. See Exhibit "C".

B. Status of other Entergy Corporation Nuclear licenses as "commercial licenses" with broad anti-trust conditions imposed by NRC.

The lack of anti-trust conditions on the Arkansas nuclear plants differs from States where the Waterfored III and Grand Gulf I plants are located. Anti-trust conditions are imposed upon the Grand Gulf Unit I in Mississippi and the Waterford III Unit in Louisiana. The Louisiana and Mississippi licenses contain anti-trust conditions which are geographically limited to the State of Louisiana for Waterford III and only within the service territory of MP&L in "Western Mississippi" for Grand Gulf I.

C. FERC Decisions treating Entergy nuclear units as "system" plants and related changes in status since prior Nuclear License's Issuance are

"significant changes" within the meaning of Atomic Energy Act §105.

The Waterford III and Grand Gulf I licenses were issued prior to final decisions in unrelated FERC and United States Circuit Court of Appeals proceedings initially involving the pricing of power and energy to be sold by the Grand Gulf subsidiary MSE (now SERI) to the Middle South Operating Companies (now Entergy) pursuant to the MSU "System Agreement" governing transactions amongst the operating companies. As of the issuance date of the Grand Gulf I Nuclear License pursuant to the agreement then effective amongst the operating companies of MSU, the costs of Grand Gulf I were to be divided as follows:

LP&L	38.57%
MP&L	29.80%
NOPSI	31.63%
AP&L	0%
	100%

After five years of FERC litigation, the final Appellant decision on these questions was handed down in 1989 in the case of City of New Orleans v. FERC, 875 F. 903 (D.C. Circuit 1989) where the U.S. District Court of Appeals affirmed the second Grand Gulf allocation methodology made by FERC. This methodology "equalized" all the nuclear generating units costs over the entire multi-state Middle South System, thus reducing or eliminating any state regulatory

jurisdiction to control the nuclear power plants benefits and costs. Copies of the FERC decisions are Attached hereto as Exhibit "N" enclosed, and as will be explained, are of major impact to the Entergy system and undoubtedly constitutes a significant change[10] within the meaning of the Atomic Energy Act.

D. Detailed Examination of Entergy Corporation and its affiliates, and the Grand Gulf cases.

The Entergy operating companies and SERI together form the Entergy system. The SEC has found that "[t]he operating subsidiaries in the MSE system have been an integrated system since 1930." In the Matter of Middle South Utilities, Inc. Middle South Energy, Inc., Mississippi Industries, Inc., 808 F.2d 1525, 1550, n.99 (D.C. Cir. 1987). Similarly, the FERC has determined that "the Middle South companies constitute a highly coordinated integrated electric system" on which

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[10] The full citation list of relevant decisions are Middle South Energy, Inc., 31 FERC ¶61,305 Opinion No. 234 (1985), reh'g denied, 32 FERC ¶61,425 Opinion No. 234-A (1985). FERC's decision in Opinion 234 was initially affirmed in Mississippi Industries v. FERC, 808 F.2d 1525 (D.C. Cir. 1987), but later reversed and remanded, 822 F.2d 1104 (D.C. Cir. 1987). Upon rehearing, FERC's prior decision was reaffirmed, System Entergy Resources, Inc., 41 FERC ¶61,238 Opinion No. 292 (1987), reh'g denied, 42 FERC ¶61,091 Opinion No. 292-A (1988) affirmed City of New Orleans v. FERC, 875 F.2d 903 (D.C. Cir. 1989(. These decisions are cited throughout this document.

"planning, construction, and operations . . . are conducted primarily for the system as a whole." 31 FERC at 61,645.

Resource planning on the system has been governed since 1951 by agreements between the companies known as "System Agreements". All are subject to review by FERC. The current Agreement dated 1982, was approved as modified by FERC in its Opinion No. 234, 31 FERC ¶61,305. Article III of the 1982 System Agreement sets forth several goals of the system including the coordinated planning of generation facilities (Section 3.01) and the diversification of the system's generation system to include nuclear and coal capacity (Section 3.03).

In Op. 234, 31 FERC ¶61,305 after an extensive review of the System Agreement and the history of the system's implementation of the agreement, the FERC found that "decisions on the . . . System are made based on a overall System plan and primarily for the system as a whole, " 31 FERC at 61,650 (emphasis in original); that critical decisions "to build new generating units, are made . . for the benefit of the system as a whole, " id. at 61,646; and that, in fact, "every unit on the . . . system had been constructed to meet system load." Id. at 61,633 (emphasis added).

These findings were repeatedly affirmed by the D.C. Circuit. See e.g. 808 F.2d at 1556.

Further, the Commission found that the system's plan, quoted above, of diversifying its fuel base by the addition of coal and nuclear capacity was reasonable. 31 FERC at 61, 656. This finding, too, was cited with approval by the D.C. Circuit. See e.g. 808 F.2d at 1538.

The System Agreement provides for central dispatch of all the generating units on the Entergy system and for routine sales of energy between the system operating companies. A section of the System Agreement provides in part that:

> The System Capability shall be operated as scheduled and/or controlled by the System Operator to obtain the lowest reasonable cost of energy to all the Companies. . . .

Section 30.03 provides that "energy from the lowest cost source available. . . shall be allocated. . . first to the loads of the Company having such sources available. . . ." This provision permits companies to have "first call" on their own lowest operating (variable cost units. 808 F.2d at 1554. Excess energy is sold to other companies throughout the system pool under Service Schedule MSS-3. 31 FERC at 61,656; 808 F.2d at 1540 n.57.

In addition to MSS-3 energy sales, the System Agreement provides for the sharing of capacity among the system companies by unit power sales, pursuant to Service Schedule MSS-4, and by reserve equalization payments, pursuant to Service Schedule MSS-1. 31 FERC at 61,656. Citing these provisions, FERC concluded in Op. 234 that its "Grand Gulf allocation [ordered therein], coupled with the operation of the 1982 System Agreement, will result in just, reasonable, and non-discriminatory rates for the . . . operating companies." Id.

In Mississippi Industries v. FERC, there is discussed the initial plans for the Grand Gulf Unit I. MP&L the operating company designated to have Grand Gulf and whose service territory sets the geographic limits on Grand Gulf license did not have the resources to finance the construction of the plant. MSU therefore, made a system decision to create MSE in 1974 for financing purposes. MSE acquired full title to Grand Gulf in June of 1974 when all four Middle South operating companies entered into an "availability Agreement" under which each operating company put its credit backing behind Grand Gulf. (Mississippi Industries v. FERC at 1533).

At the time MSE was first formed no clear plan existed to allocate responsibility for Grand Gulf's

capacity to each of the companies. Over the years various allocation plans were put forward, ultimately resulting in the Unit Power Sales Agreement (UPSA). The UPSA was executed on June 10, 1982. Although all the operating companies are signatories to the UPSA, it only provided for sale of Grand Gulf capacity and energy by MSE to three of the operating companies: LP&L, MP&L, and NOPSI, but not to AP&L, 26 FERC at 65,095. It was only after the FERC opinion 234 to remedy the alleged undue discrimination created by the system agreement and the 1982 system agreement that the Commission allocated Grand Gulf responsibility as follows in order to equalize nuclear costs among the operating companies:

AP&L	36%
LP&L	15%
MP&L	33%
NOPSI	17%

Based on the foregoing decision it is obvious that economic impact (both positive and negative) of the nuclear units of Entergy Corporation, no longer are limited to isolated geographic areas. Costs of nuclear plants have been "equalized" and are no longer allocated to the companies based on which company holds the nuclear license or the plants geographic location. The EOI transaction contemplated in this docket will forever remove from MP&L any significant economic

cheaper nuclear power and energy, by denying access to other necessary, ancillary services, such as transmission service, power coordination services and the provision of reserves.

At the time ANO I and ANO II were licensed, the municipal and cooperative electric distribution systems, as full-requirements customers of AP&L, believed that the benefits of low-cost nuclear energy would flow to them through their wholesale rates. These non-applicants did not foresee the possibility that having AP&L as their sole supplier of power and energy could jeopardize their ability to supply economic energy to their retail customers. Therefore, they did not pursue the attachment of anti-trust conditions to the license of ANO II.

In particular, the Arkansas municipal/cooperative customers of AP&L did not (and could not) foresee that their wholesale rates would be based, not on AP&L's costs of generation, but on the system-wide, pooled costs of Middle South Utilities (Entergy, Inc.), including the costs of the Waterford and Grand Gulf nuclear units constructed by companies affiliated with AP&L, to serve loads outside of the Arkansas service territory of AP&L.

If the municipal and cooperative distribution systems in Arkansas did not have to compete at retail

relationship whatsoever to the Grand Gulf plant, or to "Western Mississippi". That relationship has been minimal in the past and, even though MP&L was a named party in the Nuclear License, the limitation of anti-trust conditions to "Western Mississippi" has never had any significant relationship to the intended use for the plant or for the way the FERC has priced it to the subsidiary companies.

VI.

ECONOMIC EXPLANATION OF BENEFITS AND NECESSITY FOR ANTI-TRUST CONDITIONS.

Since the original licenses for ANO I and ANO II were granted to AP&L in 1968 and 1971, respectively, the economic conditions of electricity generation and wholesale and retail distribution have changed significantly.

When these licenses were granted, nuclear generation held the promise of being the most cost-effective means of supplying bulk power. The primary anti-trust concern was whether smaller generation and distribution systems (non-applicants) in the geographic area of the applicant/operator(s) of the nuclear facility would be placed at a competitive disadvantage vis a vis the owner(s) of the nuclear facility. This competitive disadvantage could arise from the applicant's ability to bar access to potentially-

with AP&L and other large, integrated investor-owned systems, the consequences of not having sufficient access to alternative suppliers would be limited to the rate impact on their existing retail customers. But, competition for retention of loads, particularly industrial and commercial loads, is even more keen today than it was 15-20 years ago. Industrial loads can and do migrate from one service territory to another in search of economical locations in which to operate, and part of the location decision is based on energy costs. Further, and more important, some of the largest retail customers of both AP&L and its wholesale municipal customers have available to them alternative sources of energy which did not exist when ANO was licensed. Specifically, the various types of cogeneration techniques which have been encouraged by Federal law (PURPA) now enable some non-utilities to compete directly with local distribution utilities for retail load. Municipal/cooperative distribution systems must be able to seek out the most efficient suppliers of their requirements, in order to minimize the potential for bypass of their systems by co-generators and migrating industrial loads.

The growing necessity for adequate access by municipal systems and other non-owners of transmission capacity is highlighted by the fact that the FERC has

an on-going Task Force which is assessing the problems of electricity transmission in the United States. As part of its contribution to the proceedings of the task force, the American Public Power Association has offered the following observations about the importance of transmission access, which are cited in part:

> The outcome of the debate over transmission access and pricing will significantly affect the structure and performance of the electric utility industry -- and the price of energy paid by consumers -- for decades hence. Transmission is essential to the provision of electric power, yet it can only be supplied under conditions of monopoly. Regulatory policies and antitrust enforcement efforts have not provided sufficient or timely remedies to the anticompetitive access problems suffered by many non-owners of transmission facilities. The transmission bottlenecks that remain greatly limit the efficiencies that can be realized through the enhanced competition in bulk power markets. Maintaining the status quo will work well for transmission owners, but will be detrimental to the many non-owners who have been denied access or offered access only after delays or on unreasonable terms. [The Transmission Task Force's Report to the Commission, Electricity Transmission: Realities, Theory and Policy Alternative, FERC, October 1989, p. 298.]
>
> All parties will benefit if current practices restricting transmission access are removed. The following ten points summarize the benefits that can occur:
>
> 1. Moving power from areas of surplus to areas of deficit can save money for ratepayers, shareholders, and taxpayers by securing useful production from sunk investment, and decreasing the need to build expensive new capacity.
>
> 2. Sharing of transmission facilities is important to reducing environmental impacts, protecting public health, making the most economic decisions on new plant investment,

providing fuel diversity, preventing unnecessary duplication, conserving land need for rights-of-way, and protecting consumers against monopoly.

3. Using hydropower and nuclear power, which do not produce sulfur dioxide and carbon dioxide that contribute to acid rain and the "greenhouse effect", requires transmission to tie large, site-specific generating stations to load centers.

4. Equitable access to transmission permits and encourages coordination among utilities which maximizes effectiveness of operation, including economy exchanges, reserve sharing, emergency backup, maintenance power, and time and seasonable diversity arrangements.

5. Establishing rules for more open access to transmission as opposed to preserving utility cartels is similar to discarding protectionism and embracing free trade because it fosters keener management.

6. Linking electric utilities in a more effective manner can allow interregional transfers of electricity to help deal with loss of power in a natural disaster, a national emergency, or a foreign embargo.

7. Regional disparity in retail rates [a ration of 8-1 across the nation] can be reduced to give greater stability to manufacturing and commercial endeavors.

8. Expansion of transmission services would stimulate planning by all utilities to capital, diversity fuel mixes and spread risks in building new generating capacity.

9. More and better information would be automatically available to regulatory, policy makers, utilities and consumers if transmission were treated in a more open manner, and improved judgments on need and method of supply would be available.

10. Improved cooperation in transmission increases utility ability to meet economic and technical demands, and decreases the pressure for mergers which result in

undesirable concentration of control over a basic energy source. [Ibid., p. 300-301.]

VII.

LEGAL ANALYSIS

Alabama Power Company v. Nuclear Regulatory Commission, 692 F2d. 1362 (Rehearing denied 698 F2d. 1238), Denied 104 Supreme Court 72, 464 U.S. 816 (1982) is the latest word on the power given to the NRC to prevent and/or remedy possible anti-trust violations. Alabama established that the NRC had broad discretion to remedy possible anti-trust violations. Alabama's holding in that decision established three principal points:

1. The Commission is not prohibited from considering the anti-trust implication of an activity of a licensed applicant other than those directly arising from the activity sought to be licensed;
2. The Commission is not required to limit its concerns to activities which are mature violations of anti-trust laws but may take a forward look toward potential anti-competitive results;
3. The Commission did not exceed it authority by ordering ownership access to new plants.

The Alabama holding stated that the Commission had the authority in considering alleged anti-competitive actions which occurred many years, even decades, prior

to applications for operating license for nuclear plant power. Alabama also states that the NRC may rescind or refuse to issue a license if this result would follow a situation that was inconsistent with anti-trust law and the Commission may attach appropriate conditions to a license to rectify the anti-competitive consequences of the license activity. Id. at 1564. The Alabama holding is based on the Commission decision set out at 13 NRC 1027 (1981) under the same heading. The Licensing Board found five instances of anti-competitive actions by the applicant, and, invoking several public interest considerations, the Commission ordered the imposition of a number of conditions on the applicant. The principle conditions required for:

1. The applicant to provide AEEC with access to the Farley plant in the form of unit power;
2. To provide transmission services to enable AEEC to make effective use of power; and
3. To provide AEEC with back up bulk power to cover those situations when Farley is down for maintenance or other cases.

Alabama also states that the adequacy of a particular remedy in light of Section 105(c) 6 of the Atomic Energy Act involves two basic factors which are:

1. On a case by case basis whether the remedy neutralizes the impact of the licensed facility

upon a competitive situation in a particular market in light of the affirmative findings; and

2. Whether the remedy selected has access to the applicants activities under the license.

In light of the facts and circumstances discussed in Part VI, the two criteria above have been established and, based on the broad discretion of authority given to the Commission, the licensing board should impose the appropriate licensing conditions on ANO II or extend the Grand Gulf license conditions to the entire geographic service area of Entergy Corporation subsidiaries.

South Carolina Electric and Gas Company and South Carolina Public Service Authority, 11 NRC 817 (1980); 13 NRC 862 (1981) established the need to show "significant changes" have taken place since the initial hearings. According to the South Carolina case which states that a significant change is one that has occurred subsequent to the previous review by the Attorney General and the Commission in connection with the construction permit for the facility (citing Houston Lighting and Power Company 5 NRC 1303 (1977) and Texas Utilities Generating Company, 7 NRC 950 (1978) as authority). According to the South Carolina case, to constitute "significant changes" you must look at three factors:

1. Must have occured since the previous statutory anti-trust review.
2. Must be fairly attributable to the licensee in a causation sense; and
3. Must have anti-trust implications likely to warrant Commission remedy.

South Carolina, 11 NRC 817, 829, also states that the Commission will look at Comments in making its decision, once again, the "significant changes" in regard to the Grand Gulf licensing have been discussed in Part V, and VI and appear to meet all standards required by the "significant change" doctrine.

Toledo Edison Company, (Davis-Besse Units 1, 2 & 3), 10 NRC 265 (1979), is a case that involved MELP, which is a municipal power system which both purchased power at wholesale from CEI and competed with it at retail. Cleveland alleged that the utility had exercised its control over generation and facilities anti-competitively to block MELP's attempt to obtain bulk power at lower costs from other sources. In addition to other relief, the City asked for license conditions to help MELP have access to power generated by the Nuclear plant, and were granted the conditions requested including the following:

1. Refrain from conditionary energy sales on anti-competitive terms.

2. To make reasonable interconnections.

3. To wheel power.

4. To offer CAPCO membership.

5. To sell maintenance, economy, and emergency energy.

6. To share reserves.

7. To offer access to the nuclear plants.

8. Not to assert prior CAPCO arrangements to avoid compliance with remedial consitions.

9. To require applicants to sell wholesale power to certain systems public powers systems.

Once again, given the broad discretion afforded to the Commission under the Alabama case, supra, in formulation of remedies to possible anti-trust violations and the "significant changes" that have occurred discussed in South Carolina, supra, the Commission should impose the appropriate license conditions on ANO II and/or extend the Grand Gulf license conditions to the entire service area of Entergy Corporation subsidiaries.

VIII.

SERVICE LIST

In the event the Commission establishes a service list in this proceeding. The names and addresses of all persons whose name should be contained on the

official service list for Arkansas Cities and

Cooperative are:

Mr. James H. Brewer
Conway Corporation
Post Office Box 99
Conway, AR 72032

Mr. Jack Wilson
Utility System
316 West Hale Avenue
Osceola, AR 72370

Mr. William H. Johnson
West Memphis Utilities
Post Office Box 38
West Memphis, AR 72301

Mayor Rodney Larsen
City Hall
Post Office Box 607
Benton, AR 72015

Mr. John Walden
City Hall
Post Office Box 607
Benton, AR 72015

Mr. Larry Stockton
City Hall
Post Office Box 676
Prescott, AR 71857

Mr. Gene Sweat
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Post Office Box 400
Newport, AR 72212

Mrs. Cathern Wilkins
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IX.

SUGGESTED "SYSTEM-WIDE" IMPOSITION OF ANTI-TRUST CONDITIONS BASED ON GRAND GULF I CHANGES, AND EOI FORMATION.

Based on the foregoing, Arkansas Cities and Cooperative recommend that the NRC and the Attorney General give consideration to the extension of anti-trust license conditions to the entire multi-state territory served by the Entergy Corporation's nuclear plants either by imposing such conditions on ANO II, or by extending the Grand Gulf I's condition's geographic area.

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