UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Michael C. Farrar, Chairman
Richard S. Salzman

In the Matter of	)	
	)	
ALABAMA POWER COMPANY	)	Docket Nos. 50-348A
	)	50-364A
(Joseph M. Farley Nuclear Plant, Units 1 and 2)	)	
	)	

DECISION

June 30, 1981

(ALAB-646)

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Messrs. S. Eason Balch, Sr., Birmingham, Alabama, and Terence H. Benbow, New York, New York, argued the cause for the applicant, Alabama Power Company; with them on the briefs were Messrs. Robert A. Buettner and Joseph W. Blackburn, Birmingham, Alabama, and Theodore M. Weitz and David J. Long, New York, New York.

Mr. D. Biard MacGuineas, Washington, D. C., argued the cause for intervenor, Alabama Electric Cooperative; with him on the briefs were Messrs. Bennett Boskey, James C. Hair, Jr., and Edwin F. Huddleson, III, Washington, D. C.

Mr. David C. Hjelmfelt, Washington, D. C., argued the cause for intervenor, Municipal Electric Utility Association of Alabama; with him on the briefs were Messrs. Reuben Goldberg, Glenn W. Lethan and Michael D. Oldak, Washington, D. C., and Maurice F. Bishop, Birmingham, Alabama.

1/ The third member of this Board, Jerome E. Sharfman, resigned from the Appeal Panel after oral argument was held and did not participate in this decision.

Mr. John D. Whitler argued the cause for the Attorney General of the United States; with him on the briefs were Assistant Attorney General John H. Shenefield, Deputy Assistant Attorney General Joe Sims, and Messrs. Donald L. Flexner, Joseph J. Saunders, C. Kent Hatfield and David A. Leckie.

Ms. Jane A. Axelrad argued the cause for the Nuclear Regulatory Commission staff; with her on the briefs were Messrs. Joseph Rutberg and Michael B. Blume.

DECISION

June 30, 1981

(ALAB-646)

Opinion of the Board by Mr. Farrar:

This is the third antitrust case arising under Section 105c of the Atomic Energy Act[2] to reach us on the merits. The first, Midland, involved a nuclear plant being constructed by Consumers Power Company, which serves most of Michigan's lower peninsula. ALAB-452, 6 NRC 892 (1977).[3] The second, Davis-Besse, dealt with a number of reactors proposed for construction in Ohio and western Pennsylvania by several utility companies serving the City of Cleveland and the rest of the "CAPCO" territory. ALAB-560, 10 NRC

2/ 42 U.S.C. §2135(c).

3/ Reversing and remanding Consumers Power Co. (Midland Units 1 and 2), LBP-75-39, 2 NRC 29 (1975).

265 (1979).[4] Unfortunately, our rulings in both Midland and Davis-Besse did not come down until after the Licensing Board's two-step decision in the matter now before us.[5] Necessarily, then, that Board's opinions, in general carefully and thoughtfully crafted, were written before it had the benefit of any appellate guidance.[6]

In those opinions, the Board below ruled that Alabama Power Company's construction and operation of the two-unit

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4/ Affirming as modified Toledo Edison Co. (Davis-Besse Units 1, 2 and 3), LBP-77-1, 5 NRC 133 (1977).

5/ The first of the Board's decisions (Phase I) dealt with what might be called the question of "liability" (LBP-77-24, 5 NRC 804 (April 8, 1977)); Phase II addressed the matter of remedies (LBP-77-41, 5 NRC 1482 (June 24, 1977)).

6/ As already indicated, at that point our Midland and Davis-Besse decisions had not been written. And, to this day, neither the Commission itself nor the courts have spoken about the merits of an NRC antitrust case: (1) Any need for further review of Midland was eliminated when the parties reached a settlement while the case was on remand below. That settlement was approved by the Licensing Board last August (LBP-80-21, 12 NRC 177); because the parties were in agreement, we declined to review the matter (ALAB-610, 12 NRC 174 (August 26, 1980)). (2) In Davis-Besse, on the other hand, the Commission declined applicants' request that it review our decision. The case was then appealed to the United States Court of Appeals for the Third Circuit under the name Duquesne Light Co. v. NRC; the applicants later withdrew their appeal and the case was dismissed on October 8, 1980.

Farley nuclear power plant would create and maintain "a situation inconsistent with the antitrust laws" within the meaning of the statute unless certain remedial conditions -- including access for one of the intervenors by way of purchases of "unit power"[7] -- were included in the nuclear licenses. No stay having been sought, the conditions imposed have been in force while the parties' cross-appeals have been pending before us.[8]

Alabama Power tells us in its appeal that none of its past conduct warranted the finding of antitrust "liability"[9] and that, in any event, the remedy selected was too drastic. Its opponents -- the Alabama Electric Cooperative (AEC), the Municipal Electric Utility Association of Alabama (MEUA),

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7/ The Board below defined unit power as "power purchased on a contractual basis in the form of a percentage share of the output from a particular power plant. The cost of unit power includes the owner's cost of capital, costs of construction, cost of fuel and operation, and a rate of return on investment." 5 NRC at 1502.

8/ Unit 1 began commercial operation on December 1, 1977; Unit 2 recently received its operating license.

9/ That is, the finding that its activities under an unconditioned license to operate the Farley plant would maintain a situation inconsistent with the antitrust laws specified in Section 105 of the Atomic Energy Act.

the United States Department of Justice, and the NRC staff -- take the opposite tack. Their appeals argue that the applicant's past conduct was more egregious than the Board found and that a more sweeping remedy is in order.[10/]

As we explain in this opinion, we find the Licensing Board's rulings not fully in accord with the principles laid out in decisions issued by us since then. In terms of the positions taken by the parties here, the upshot is that Alabama Power's opponents are entitled to a somewhat more favorable result than they obtained below. Specifically, we find that AEC should be afforded ownership access to the Farley units and that, while applicant need not extend such access to MEUA, the municipals are entitled to access to applicant's transmission system.

10/ This capsule description of the parties' appellate positions is intended only to set the stage; it does not, of course, even begin to hint at the precise nature of the questions presented in the 1,000 pages of briefs filed with us. In that connection, the record below consisted, inter alia, of nearly 30,000 pages of transcribed testimony.

I.

BACKGROUND AND SUMMARY

By amending the Atomic Energy Act in 1970, Congress gave this Commission added duties to fulfill in connection with its licensing of nuclear power plants. Since that time, it has had to consider, in addition to safety and environmental matters, the antitrust ramifications of its licensing actions.[11/] Specifically, as we said in Midland (6 NRC at 897, footnotes omitted):

> Under Section 105c of the Atomic Energy Act, it must review applications for permits to construct commercial nuclear power facilities to determine if the activities sought to be licensed would create or maintain situations inconsistent with the antitrust laws or their underlying policies. Where such a result would follow, the Commission may refuse a license (or rescind one previously issued) or attempt to rectify the anticompetitive consequences by attaching appropriate conditions to the license. As the Commission has reiterated, the Atomic Energy Act's antitrust provisions reflect "a basic Congressional concern over access to power produced by nuclear facilities" and represent

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11/ The Commission's responsibilities in the antitrust sphere prior to 1970 were less definitive. See Cities of Statesville v. AEC, 441 F.2d 962 (D.C. Cir., in banc, 1969) and the history recited in Toledo Edison Co. (Davis-Besse Unit 1), ALAB-323, 3 NRC 331, 337-40 (1976).

> legislative recognition "that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds [which] should not be permitted to develop into a private monopoly via the [NRC] licensing process . . . ."

The governing statute provides the procedures by which this review is to be accomplished; we have described its workings elsewhere.[12/] Here, the review was duly initiated when the Commission referred Alabama Power's construction permit application to the Attorney General of the United States for his advice concerning its potential antitrust consequences. The Department of Justice's analysis led it to respond that the plant should not receive an unconditional license and that an antitrust hearing should be held. In that connection, petitions to intervene filed by AEC and MEUA were granted by the Licensing Board (over the applicant's opposition). The entry of these two organizations alongside the statutory parties -- the Commission staff and the Attorney General -- completed the lineup of participants opposed to the award of an unconditional license to Alabama Power.

12/ Kansas Gas and Electric Co. (Wolf Creek Unit 1), ALAB-279, 1 NRC 559 (1975).

For introductory purposes, the business operations of the utility parties to the proceeding can be simply described.[13] The applicant, Alabama Power, is a wholly-owned subsidiary of the Southern Company, a public utility holding company which also owns Georgia Power Company, Gulf Power Company,[14] and Mississippi Power Company, all of which function under an interchange contract as the Southern Company Pool. Alabama Power generates, transmits and distributes electricity in central and southern Alabama (the eleven most northern counties in the State are served primarily by the Tennessee Valley Authority).[15] At retail, it has residential, commercial and industrial customers; it wholesales electricity to sixteen municipalities with their own distribution systems (twelve of which comprise the membership of the intervenor MEUA), to eleven rural distribution cooperatives,[16] and to

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13/ The Licensing Board's first decision contains a more complete description of the parties' operations as well as of those of other entities in the surrounding area. See 5 NRC at 820-33.

14/ Gulf Power operates in the Florida panhandle.

15/ Southern's operating companies thus embrace a contiguous area covering not only the Florida panhandle and much of Alabama but also southeastern Mississippi and most of Georgia. See D.J. Ex. 1008.

16/ Ten of these are members of the Alabama Electric Cooperative. See fn. 18, infra.

the other intervenor, the Alabama Electric Cooperative. The AEC, in turn, is a generation and transmission cooperative whose membership is made up of four municipalities,[17] two industrial mills, and fourteen rural cooperatives.[18]

In terms of generating facilities, the applicant had in operation at the time of trial thirteen hydroelectric plants and eight fossil-fueled plants, totalling over 6,000

17/ There are a total of 22 municipally-owned systems in the geographic area of interest -- the twelve in MEUA, the four in AEC, four others supplied at wholesale by Alabama Power but not affiliated with either intervening organization, and two that purchase their power requirements from TVA. The Licensing Board lists the town of Robertsdale, one of the unaffiliated municipal systems, as purchasing wholesale power from Riviera Utilities (see 5 NRC at 828); the town now gets its power from applicant. MEUA Brief, 25; APCO Reply Brief, 46-47.

[Throughout this decision, "_____ Brief" refers to the appellate briefs filed by the parties on November 14, 1977; "_____ Reply Brief" refers to the responses filed on April 14, 1978. The parties will be referred to in such citations as APCO, AEC, MEUA, Justice, and Staff.]

18/ AEC supplies all the power requirements of its municipal and industrial members and three of the rural co-ops, as well as some of the needs of five other co-ops (who are also customers of Alabama Power); these constitute AEC's "on-system" members. It has no direct physical access to five co-ops in Alabama (who receive all their power from the applicant) and to one in Florida (served by Gulf Power). These six are called its "off-system" members.

megawatts in capacity.[19] By comparison, the AEC had two hydro and six fossil plants totalling 13 megawatts. The MEUA's members had no generating capacity.

We need not pause here to describe how the electric utility industry generally functions, in Alabama and elsewhere, to produce a reliable electric power supply. We went into that subject in detail in Midland,[20] and the Board below -- after finding that "the principles of electric power supply production and coordination are generally applicable throughout the electric utility industry" and "do not vary significantly among electric utilities regardless of differences in locations * * * " -- covered the subject quite thoroughly itself here. 5 NRC at 833-37.

The Licensing Board had to deal with numerous claims made by the applicant's opponents concerning alleged anti-competitive practices it was said to have engaged in through the years. In order to evaluate those claims in context,

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19/ Of the eight fossil-fueled plants, applicant owns six of them outright, and shares in the ownership and output of the two others. The capacity figure shown includes only applicant's portions of the two shared facilities. See 5 NRC at 21-22.

20/ See particularly 6 NRC at 950-57.

the Board first undertook to determine what product and geographic markets were relevant. It concluded that the applicant's service area constituted the relevant geographic market; the only product market it held relevant was that for wholesale power. In this regard, the Board rejected the notion that there was a market in either of the other suggested products -- i.e., retail power or coordination services.[21/] 5 NRC at 879-894.

Using its findings delineating the relevant market as a touchstone, the Board found that the applicant possessed monopoly power in that market (5 NRC at 896-901); it then reviewed the evidence bearing on the applicant's alleged anticompetitive practices (5 NRC at 901-957). In all instances but five, the Board exonerated the applicant. With respect to those five transactions, however, it found the applicant's conduct to have been anticompetitive in nature and to have resulted in a situation inconsistent with the antitrust laws. The upshot was the conclusion that the activities under the nuclear licenses would maintain that situation (5 NRC at 957-961).

21/ Based largely on its rejection of the retail power market, the Board concluded that MEUA was not entitled to any access to the Farley units. See 5 NRC at 961.

In other words, the Board held that the nuclear licenses had to be conditioned to ameliorate the effects of the anti-competitive situation then existing. The hearing then moved into its second phase, having to do with the appropriate remedy. The Board heard additional evidence on that score (but did not allow MEUA to participate[22]) and then rendered its second and final decision. It imposed a number of conditions upon the license, but rejected others which the applicant's opponents believed were necessary. In terms of access to the nuclear facility itself, the Board held that allowing AEC to purchase unit power was sufficient and that no ownership participation was called for.

As already indicated, all parties appealed. Among them, they manage to challenge -- from both sides -- nearly every significant holding made by the Board below.[23]

In deciding the matter, we take up first -- and reject -- certain broad arguments the applicant makes that, if accepted, would largely insulate its actions from antitrust scrutiny (Part II). In Part III, we then consider the questions

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22/ See 5 NRC at 1484 n. 5.

23/ As previously intimated (see fn. 17, supra), all parties filed concurrent briefs as appellants on November 14, 1977. Before their responsive briefs were due, we handed down Midland. The time for filing the second set of briefs was then extended to allow the parties to adjust their thinking to take Midland into account. Oral argument was held on March 8, 1979.

raised as to the nature of the relevant markets. Although we are in total agreement with the Board below on its determination of the market for firm wholesale power, the principles we set out in Midland and Davis-Besse -- both handed down after the decision below -- lead us to disagree with the Licensing Board's rejection of the proposed markets for coordination services and retail power.

We proceed in Part IV to hold that the applicant has monopoly power in these other markets as well as in the wholesale market. We turn then to that aspect of the appeals which gives us the most difficulty: to what extent the applicant has used its monopoly power in violation of the antitrust laws or their underlying policies. The Licensing Board found it had done so only in certain respects; we believe that in reaching that conclusion it cast the applicant's activities in too favorable a light. With respect to MEUA, we also had to reassess the findings below in light of our holding expanding the relevant markets in the case. The additional violations we perceive and our findings relating to MEUA are discussed in Part V. Finally, we turn in Part VI to the question of what remedies are appropriate in light of our additional findings on "liability" together with those violations already perceived by the Board below.

II.

APPLICANT'S ARGUMENTS AGAINST ANTITRUST SCRUTINY

The applicant raises three broad arguments against antitrust scrutiny. First, it argues that there is no room here for any finding of "liability" because it is so "pervasively regulated" that it cannot be held to possess monopoly power in the relevant market. It next contends that Section 105c of the Atomic Energy Act forbids a broad inquiry into its past activities for findings of liability -- that any remedial action taken against it must be based solely on its predicted or potential future activities. Finally, it argues that the Licensing Board was wrong in basing its findings of liability on "anti-competitive conduct." According to the applicant, Section 105c requires that actual violations of the antitrust laws or the clear policy underlying them be found. We deal with these arguments in order.

A. Pervasive Regulation

As noted by the Licensing Board,[24/] this proceeding arises under Section 105c of the Atomic Energy Act, which requires the Commission to determine in connection with its licensing of

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24/ 5 NRC at 812.

the Farley plant "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105c." The specified antitrust laws are the Sherman Act,[25/] Wilson Tariff Act,[26/] Clayton Act,[27/] and the Federal Trade Commission Act.[28/] For the purpose of making the required finding, the Licensing Board conducted an inquiry into the applicant's activities. Measuring these activities principally against three of the specified antitrust laws -- the Sherman, Clayton and the Federal Trade Commission Acts -- and the policies underlying them, the Board found that in five instances the activities engaged in by the applicant came within the proscription of those laws and their policies. In reaching these conclusions, the Board first conducted a market analysis (applying recognized antitrust principles) and found that a market for wholesale power existed in the applicant's area of operations. Proceeding further, it then found that the applicant enjoyed monopoly power in that market.

25/ 15 U.S.C. §§1-7.

26/ 15 U.S.C. §§8-11.

27/ 15 U.S.C. §§12-27, 44; 18 U.S.C. §402; 29 U.S.C. §§52-53.

28/ 15 U.S.C. §§41-49.

The applicant vigorously objects to the finding that it possesses monopoly power in the relevant market. In the portion of its brief devoted to this issue,[29/] applicant argues that to have monopoly power it must first be shown that it has the power to control prices or to exclude competitors from the relevant market. Detailing the extent to which it purportedly is regulated, it insists that this "pervasive regulation" by the state and federal governments precludes it from having either of the necessary powers.[30/]

Applicant's contention is not new. We find that it merely attempts to put in different clothing a time-worn and discredited argument that seeks to justify immunity from the antitrust laws. It is too late in the day for the argument

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29/ APCO Brief, 5-13.

30/ In applicant's words: "Applicant will demonstrate that state and federal regulation to a substantial degree control all aspects of Applicant's growth and development, its marketing practices, its operations, and its wholesale and retail rates. The existence of this regulation negates the inference of the Board that Applicant possesses either the power to control prices or exclude competitors." Id. at 2. According to the applicant, the activities which are regulated include: rates and charges, finance, entry into service area, withdrawal from service and abandonment of facilities, acquisition, merger and consolidation, system extensions, transmission and interconnections, coordination reliability and quantity of service, arrangements with service organization and suppliers, accounting, and competition. Id. at 5-13.

that state and federal regulation -- even with respect to electric utilities -- bring with them a form of dispensation from the antitrust laws. If any earlier doubt existed on this score, it was put to rest by the Supreme Court several years ago. As observed by the Court of Appeals for the Seventh Circuit in City of Mishawaka, Ind. v. Indiana & Michigan Electric Co. (Mishawaka I),[31] citing Cantor v. Detroit Edison Co.,[32] it is a "now settled axiom that after Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359, 'there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities.'"

In recognition of this proposition, the applicant urges that it is not arguing for immunity from the antitrust laws.[33]

31/ 560 F.2d, 1314, 1321 (1977), cert. denied, 436 U.S. 922 (1978).

32/ 428 U.S. 579, 596 n. 35 (1976).

33/ At oral argument before us, applicant's counsel was asked whether the applicant's assertion that the Alabama Public Service Commission considered anticompetitive matters in dealing with matters before it insulated the applicant from antitrust liability. Mr. Balch, applicant's counsel, answered as follows:

> "I don't believe we are contending that Applicant is immune from anti-trust liability. If the board has the impression that we are considering that, I would like to state here and now we are not contending that."

App. Tr. 21-22. ["App. Tr." refers to the transcript of the oral argument held before us on March 8, 1979; "Tr." refers to the transcript below.]

Rather, as we understand it, the applicant is relying upon a facially different argument: that it cannot be found to possess monopoly power. In the words of its counsel:

> I am suggesting that if there is a federal agency or a state agency which has the ultimate control over prices, that Alabama Power Company cannot, as a matter of definition, have the power to control its prices. 34/

This formulation of applicant's argument does not aid its case. In Midland, we were confronted with essentially the same argument and found ourselves compelled to reject it. The applicant for a nuclear power license there, like the applicant here, was seeking to avoid antitrust scrutiny of its activities. One of the bases on which it attempted to do so was the regulation to which some of its activities were subjected under the Federal Power Act. Rather than claiming immunity from the antitrust laws because of this regulation, it had argued that because the Federal Power Commission 35/ might order it to interconnect with other utilities, the company ipso facto lacked monopoly

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34/ App. Tr. 34.

35/ Now the Federal Energy Regulatory Commission (FERC).

power. To that we responded:

> We fail to perceive how a regulatory scheme that admittedly grants no immunity from the antitrust laws, by its mere existence, alters the character of what is otherwise monopoly power. Consumers' argument is an attempt to slip in via the back door a proposition the courts have barred at the front, namely, that regulation for other purposes can attenuate the antitrust laws. That argument has been rejected. Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687, 691-92 (9th Cir. 1977); International T. & T Corp. v. General T. & E. Corp., 518 F.2d 913, 935-36 (9th Cir. 1975), and cases cited. The best that can be said for it is that "the impact of regulation must be assessed simply as another fact of market life." Id. at 936.

6 NRC at 1008.[36/]

36/ Moreover, as noted in the margin of our Midland decision, "it is settled that even conduct formally approved by a regulatory agency may be the basis of an antitrust violation where agency approval conveys no exemption from the antitrust laws. United States v. Radio Corp. of America, supra, 358 U.S. at 350-51; Cantor v. Detroit Edison Co., supra, 428 U.S. at 596-98; California v. FPC, 369 U.S. 482, 489 (1967); United States v. Philadelphia Bank, supra, 374 U.S. at 350-52; Litton Systems, Inc. v. Southwestern Bell Tel. Co., 539 F.2d 418, 422-24 (5th Cir. 1976); City of Mishawaka v. Indiana and Michigan Electric Co., supra; Almeda Mall, Inc. v. Houston Power and Light Co., supra, Trade Reg. Rep. par. 61,485 (S.D. Tex. 1977)." 6 NRC at 1008 fn. 47.

We know of no reason why that same response is not dispositive of the applicant's "pervasive regulation" argument here.[37/] To be sure, the argument in Midland was made in terms of the Federal Power Commission, while the asserted justification here is the increased restriction on the activities of applicant as a result of both state and federal regulation. But we see no significant difference in the two situations. What the argument boils down to in either case is that government regulation somehow serves to relieve the activities from close scrutiny under the antitrust laws. The law on this point is well-settled against the applicant's position. As Midland makes clear, the applicant's claim of the impact "pervasive

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37/ In conjunction with its "pervasive regulation" argument, the applicant stresses that "the electric utility industry, in its historical development has been recognized as a natural monopoly." APCO Brief, 19. Without ruling on the validity of the applicant's statement, we fail to see how a natural monopoly status aids the applicant's central argument that it cannot be found to possess monopoly power because the power to set prices or exclude competitors lies elsewhere, in the state and federal regulatory agencies. By definition, a natural monopolist has the power to exercise requisite control over prices or potential competitors. If anything, the applicant's argument on this score is self-defeating.

regulation" has on its activities is simply another factor which must be assessed in examining applicant's activities for conformance to the antitrust laws.[38/]

38/ Accord, Davis-Besse, supra, ALAB-560, 10 NRC at 282-86.

Brief mention should be made here of the Public Utility Regulatory Policies Act of 1978 (PURPA) (Pub. L. No. 95-617, 92 Stat. 3117). Counsel for applicant sought to inject PURPA into the proceeding at the oral argument before us (App. Tr. 242-45, 256); we declined to consider the Act at that time but invited applicant to submit a written memorandum on its importance to the case. Applicant sent us a memorandum on March 16, 1979; all the other parties submitted responses. According to the applicant, the existence of PURPA should have a "substantial impact on this Board's deliberations," including our decision on the existence of monopoly power. APCO Memorandum, 4. We think otherwise. We have carefully reviewed all the submitted materials; we are in complete agreement with the basic position of the applicant's opponents on this point. Nothing in PURPA causes us to change our findings on monopoly power, applicant's past conduct, or the appropriate remedies in this case.

B. Scope of Inquiry

We turn now to the applicant's second broad argument against granting any antitrust relief. Specifically, it would have us set aside the Licensing Board's findings of liability -- which formed the basis for that Board's remedial action -- as founded upon a number of critical errors. Applicant's point seems to be that the Board roamed so far afield and delved so deeply in conducting its inquiry into applicant's activities that it went beyond the permissible reaches of Section 105c of the Act. According to this argument, the Act allows inquiry only into activities likely to occur in the period after the license is issued and not (as was done here) into the applicant's past activities.

The applicant argues that a rule barring consideration of past activities is compelled by the narrow scope of Section 105c inquiry intended by the Joint Committee on Atomic Energy. Alluding to the Joint Committee's statement that the licensing process should be used to "nip in the bud any incipient antitrust situation," the applicant contends that this "clearly focuses on future, not past, activities."[39/] In this same vein, the applicant intimates

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39/ APCO Brief, 44.

that this is what the Joint Committee intended when it "made it clear that the standard it was expecting a board to apply was that 'it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policy clearly underlying these laws.'" (Emphasis supplied by the applicant.) 40/

In our judgment, the applicant has misapprehended the thrust of the Joint Committee's statements. It derives from them an intent which does not give consideration to the statements in their entirety; nor does it give recognition to the words of the statute to which the statements relate. Properly considered, the statute could not reasonably support the position the applicant advocates.

As already seen, Section 105c requires the Commission, in conjunction with its review of a license application for a nuclear power plant, to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws." It is significant that Section 105c is concerned with both a

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40/ Ibid.

situation which would be creaced when the license issued and a situation which would be maintained by the license issuance. Although this latter finding does require an assessment of the future, it equally clearly requires a review of the situation which preceded the license. In other words, as we held in Wolf Creek,[41/] a determination of the antitrust effects of granting a license can be made only after the situation leading up to the grant has been ascertained.

Read with these words and meaning of Section 105c in mind, the statements of the Joint Committee take on a far different hue than that painted by the applicant. The Joint Committee's statement that the licensing process should be used to "nip in the bud any incipient antitrust situation" can thus be seen as an endeavor to explain Section 105c's injunction against the use of a nuclear license to "create" a situation inconsistent with the antitrust laws, and not, as the applicant insists, as a limitation on the scope and level of antitrust inquiry.[42/] Similarly, the Joint Committee's statement that a "reasonably probable" standard shall apply in making the antitrust determination called for by Section 105c, deals with the degree of probability which governs that

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41/ Kansas Gas and Electric Co. et al. (Wolf Creek Station Unit No. 1), ALAB-279, 1 NRC 559, 567 (1975).

42/ Id., 1 NRC at 572-73.

determination.[43] Neither the Joint Committee's words nor any reasonable inferences from their context fairly support the applicant's suggestion that there exists a ban against looking other than forward at the applicant's projected activities under the license. Indeed, both the statute and the Joint Committee's statements strongly suggest otherwise. As we recognized in Wolf Creek, their requirement of Commission assessment of the antitrust implications of future activities of the applicant cannot be made in vacuo.[44] Here, as elsewhere, the past is prologue. Past conduct, good or bad, often indicates what future conduct might be. This was recognized by no less than the Supreme Court when it warned that "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."[45] This indicates that a meaningful assessment of the issue before us -- i.e., whether issuance of a license for construction and operation of a nuclear power plant would create or maintain a situation inconsistent with the antitrust laws -- cannot be made without first considering the current and past activities of the license applicant. We have little

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43/ Midland, supra, 6 NRC at 927 (quoting the Joint Committee Report); Wolf Creek, supra, 1 NRC at 569-70.

44/ Wolf Creek, supra, 1 NRC at 572-73.

45/ United States v. Swift & Co., 286 U.S. 106, 116 (1932) (Cardozo, J.).

hesitance in construing Section 105c as permitting inquiry into the past activities of the applicant; indeed, the statute and Commission decisions require it. Wolf Creek, supra, 1 NRC at 573 and authorities there cited.

C. Standard for Finding of Liability

Applicant's third broad argument concerns the standard utilized by the Licensing Board in arriving at its finding on monopolization. As we understand its position, the applicant seems to advance three grounds for faulting the way in which the Board reached its findings. First, it says that "the Board concluded that it need not find a violation of the antitrust laws, but could be satisfied with a showing of 'anticompetitive' conduct which need not have been bottomed on a specific violation."[46/] It next states that the Board considered not only "anticompetitive" conduct but conduct which "tended" to be anticompetitive.[47/] It then argues that in proceeding on these premises the Board failed to base its conclusions on the antitrust laws.[48/] In short, the applicant seems to be arguing that (assuming it is wrong in its position that consideration of past activities is barred) under Section 105c all that is cognizable are actual

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46/ APCO Brief, 44.

47/ Ibid.

48/ Id. at 47.

violations of the antitrust laws. As we understand applicant's argument, it believes this standard was contemplated when "the Joint Committee made it clear that the standard it was expecting a board to apply was that 'it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policy clearly underlying these laws.'"[49/]

We find this argument without merit. In Midland, we addressed the question, inter alia, of whether finding a "situation inconsistent with the antitrust laws" necessarily depended upon a finding of actual violations of those laws.[50/] We there ruled that Section 105c was not restricted to actual violations:

> The Licensing Board was correct in holding that proof of an actual violation of the antitrust laws is not required to show the existence of a situation "inconsistent with" them for Section 105c purposes. The Congressional framers of the section (the members of the Joint Congressional Committee on Atomic Energy) were originally divided between those who favored proof of an antitrust violation before allowing Section 105c remedies to be imposed and those who thought a showing of circumstances merely "tending" to

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49/ Id. at 44 (emphasis deleted).

50/ See 6 NRC at 907-14.

> such a violation should suffice to allow that relief. An accommodation between the two views was eventually reached. The members of the Joint Committee agreed that proof of conditions which ran counter to the policies underlying those laws, even where no actual violation of statute was made out, would warrant remedial license conditions under Section 105c. We need not linger over the matter; this compromise is expressly manifested in the report of the Joint Committee and is reflected in the Commission's decisions. 51/

These observations apply to applicant's argument here as well. In this respect, we find no evidence to support applicant's charge that the Licensing Board considered conduct which "tended to be anticompetitive" in making its five findings of monopolization. Our analysis of the Licensing Board's decision reveals that each of its findings of monopolization was made on the basis that the acts in question were "anticompetitive."

Finally, we turn again to Midland for the answer to the applicant's argument that the Licensing Board erroneously based its findings on mere anticompetitive conduct. The Licensing Board there had reasoned that a "situation inconsistent with the antitrust laws" within the meaning of Section 105c amounts to "anticompetitive conduct." The Department of Justice criticized that analysis, claiming that a focus solely

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51/ Id., 6 NRC at 908-09 (footnotes omitted). Accord, Wolf Creek, supra, 1 NRC at 570.

upon conduct without consideration of market structure would ignore essential elements in such a situation. We rejected the Department's argument:

> We do not agree that the Licensing Board's determination to concentrate on the applicant's conduct necessarily caused it to go astray in the manner suggested by the Department. What an inquiry is labelled is of lesser moment than how it is carried out. In our judgment, evaluation of business "conduct" in a case like this one, exploring charges essentially bottomed on Section 2 of the Sherman Act and its underlying policies, requires the application of the same monopolization and policy concepts as an investigation of an anticompetitive "situation." This is so because, as with other statutes, actions permissible under the antitrust laws in one situation may be proscribed in another. An antitrust analysis of an applicant's conduct must therefore be undertaken in the context of the "situation" in which that conduct occurred -- in other words, against the background structure of the relevant market. Of course that analysis of a utility's conduct must (among other things) be sensitive to judicial and FTC antitrust rulings that the actions of a dominant business enterprise have to be tested against a more stringent standard than applies to actions of smaller concerns in highly competitive markets, and must also take account of the general rule that electric utilities are not exempt from the Federal antitrust laws, particularly where they voluntarily enter into commercial relationships governed in the first instance by business judgment and not regulatory coercion. 52/

This analysis is dispositive of applicant's argument here. We hold that, in applying Section 105c to the instant case, the Licensing Board did not err in the manner suggested by the applicant; our own antitrust scrutiny must go forward.

52/ Id., 6 NRC at 912-13 (footnotes omitted).

III.

RELEVANT MARKETS

At the outset, we endorse -- over the applicant's objection -- that portion of the Licensing Board's analysis which led it to conclude that the market for wholesale power in the applicant's service area was a relevant market for the purposes of this proceeding. For the reasons which follow, however, we disagree with that Board's holding that there are no other relevant markets. As we explain, there are relevant markets both for coordination services and retail power; the geographic bounds of both markets also correspond to the applicant's service area.

A. Coordination Services Market

1. The Product Market. In the electric utility business, there is a common practice among the companies of interchanging power and energy and sharing responsibility for building new generating facilities to achieve economic benefits unattainable by an individual utility acting alone. Generally known as "coordination," the practice includes various arrangements among utilities for reserve sharing, emergency exchange of power and energy, economy exchange of power and energy, maintenance scheduling, seasonal capacity exchange, and staggered construction. The simple purpose of these

arrangements is to allow producers of firm power[53] to lower their costs of production.

In the proceeding below, Justice, AEC and MEUA claimed that the sale or exchange of such power and energy and associated services comprised a relevant market for antitrust purposes -- namely, a "coordination services" market separate from the wholesale and retail power markets.[54] Although taking a somewhat different position, the staff also claimed that there was a market for such services.[55] Not surprisingly,

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53/ We defined firm power in Midland as "essentially a utility commitment to supply electric energy to a customer on demand for as long as needed. One contracting for firm power (whether at retail or wholesale) is buying not merely energy, but assurance that (barring some extraordinary unforeseen circumstance) the utility will make that power available without interruption when called for." 6 NRC at 950.

54/ Justice and MEUA referred to it as a "regional power exchange" market. Justice Prehearing Brief Below, 55-58; MEUA Prehearing Brief Below, 28-31. AEC denominated it as the "bulk power supply services market." AEC Prehearing Brief Below, 24. We first adopted use of the term "coordination services" market in our Midland decision. We use that term here as we think it best describes the practice which makes up that market. For a detailed discussion of the factors which make up the coordination services market, see Midland, 6 NRC at 902-03, 949-77.

55/ The staff's original position was that the elements of the coordination services market combined with the market for firm wholesale power to form a single bulk power services market. Staff Prehearing Brief Below, 52-54. However, it no longer adheres to this position. In view of our Midland decision, the staff now concedes that a separate market for coordination services exists. Staff Reply Brief, 43-44.

the applicant denied the existence of such a market.[56]

The Licensing Board rejected the proffered coordination services market on the ground that it "clearly would include a variety of factors that in no way could be close substitutes for one another." 5 NRC at 886. Although the Licensing Board expressly recognized that in some cases a number of diverse services could be clustered and treated as a single market (citing United States v. Philadelphia National Bank),[57] it apparently thought that United States v. Grinnell Corporation[58] precluded that treatment here. Interpreting Grinnell as requiring the factors making up the proffered market to be "reasonably interchangeable" with each other, the Board found that they were "not usually close substitutes for one another" and, hence, "not in the same market." Id. at 887.

On appeal, the parties essentially adhere to their original positions. The applicant supports the Licensing Board's decision, its principal post-Midland argument being that the existence of a coordination services market in the

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56/ See APCO Proposed Findings, 447-57.

57/ 374 U.S. 321 (1963).

58/ 384 U.S. 563 (1966).

area involved here lacks evidentiary support.[59] The other parties oppose the conclusion reached by the Licensing Board.[60] Their argument basically is that not only is there evidence indicating the existence of such a market, but that a finding to that effect is required by Midland and applicable judicial decisions. We agree with this position.

a. Because the Licensing Board decision turned on what it considered to be the teaching of Grinnell, we begin our analysis with a detailed review of that case. Grinnell involved the question of whether the defendant company had monopolized the market for accredited central station service[61]

59/ APCO Reply Brief, 23-38.

60/ Justice Brief, 135-149; Justice Reply Brief, 14-20; Staff Brief, 10-20; Staff Reply Brief, 42-44; AEC Brief, 83; AEC Reply Brief, 11-13; MEUA Brief, 41-46.

61/ Central station service, simply put, protects premises by installing thereon fire or burglary (or both) detection devices which automatically transmit an electric signal to a central station which is manned 24 hours a day. Upon receipt of a signal, the central station, where appropriate, dispatches guards to the protected premises and notifies the police or fire department directly. An accredited central station service is one which has been approved by insurance underwriters. 384 U.S. at 566-67.

in violation of Section 2 of the Sherman Act. The District Court had treated the entire accredited central station service business as a single market.[62/] The company argued, however, that the individual central station services are so diverse that, under du Pont,[63/] they cannot be lumped together to make up the relevant market.

In upholding the lower court's decision, the Supreme Court declared:

> But there is here a single use, i.e., the protection of property, through a central station that receives signals. It is that service, accredited, that is unique and that competes with all the other

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62/ Among the various central station services offered were the following:

(1) automatic burglar alarms;
(2) automatic fire alarms;
(3) sprinkler supervisory service (any malfunctions in the fire sprinkler system -- e.g., changes in water pressure, dangerously low water temperatures, etc. -- are reported to the central station); and
(4) watch signal service (night watchmen, by operating a key-triggered device on the protected premises, indicate to the central station that they are making their rounds and that all is well; the failure of a watchman to make his electrical report alerts the central station that something may be amiss).

Id. at 566 n.4.

63/ United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) (the cellophane case).

> forms of property protection. We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities. To repeat, there is here a single basic service -- the protection of property through use of a central service station -- that must be compared with all other forms of property protection.

384 U.S. at 572.

The Court went on to say:

> Burglar alarm service is in a sense different from fire alarm service; from waterflow alarms; and so on. But it would be unrealistic on this record to break down the market into the various kinds of central station protective services that are available. Central station companies recognize that to compete effectively, they must offer all or nearly all types of service. * * * We held in United States v. Philadelphia Nat. Bank, 374 U.S. 321, 356, that "the cluster of services denoted by the term 'commercial banking' is a distinct line of commerce." There is, in our view a comparable cluster of services here.

Then, specifically addressing du Pont, the Court explained:

> There are, to be sure, substitutes for the accredited central station service. But none of them appears to operate on the same level as the central station service so as to meet the interchangeability test of the du Pont case. Non-automatic and automatic local alarm systems appear on this record

> to have marked differences, not the low degree of differentiation required of substitute services as well as substitute articles.

Id. at 572-73.

The Supreme Court in Grinnell did not, as the Licensing Board apparently thought, lay down a rule that a market could never be comprised of products and services which were not interchangeable with each other. For, in holding that the combination of services comprising the central station service constituted a relevant market, the Court expressly indicated that it was following the course it had adopted in Philadelphia National Bank. In that case, the Court found that the cluster of clearly diverse products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking"[64/] comprised a product market "sufficiently inclusive

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64/ More specific examples of banking "products" identified by the Court were: unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, revolving credit funds. Examples of banking services included: acceptance of demand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety deposit boxes; account reconciliation services; foreign department services (acceptances and letters of credit); correspondent services; and investment advice. 374 U.S. at 326 n.5.

to be meaningful in terms of trade realities." 374 U.S. at 356-57.

To be sure, the Court in Grinnell did take note of its ruling in du Pont that products and services which consumers may reasonably interchange for the same purposes make up a relevant market. But in Grinnell, the "interchangeability" with which the Court was concerned related to whether there were in the market place available alternatives to overall central station service itself; the Licensing Board's application of the "interchangeability" test here would indicate a contrary belief that the individual products and services making up the central station service had to be interchangeable with each other. In other words, the fact that central station service was made up of various products and services which were not interchangeable did not prevent the Court from holding the central service itself to be a relevant market. In this respect, the Court's action was not novel. It did no more than follow an avenue it had opened up in Philadelphia National Bank some three years earlier.[65/]

65/ For other cases holding that a bundle of products and services can constitute a relevant market, see United States v. Connecticut National Bank, 418 U.S. 656 (1974); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); United States v. Phillipsburg National Bank, 399 U.S. 350 (1970); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954); Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780 (S.D. Texas 1971), aff'd, 476 F.2d 989 (5th Cir. 1973).

b. Owing to the erroneous view it took of Grinnell, the Board below rejected the proffered coordination services market on grounds we cannot uphold. We must then take the next step and ascertain for ourselves whether such a market exists in terms of "commercial or trade realities" and, if so, what that market's dimensions are. Fortunately, that work has been made easier by our prior decision in Midland. Notwithstanding the fact that Midland involved other utilities in a different part of the country, we find its teachings useful here for the reason expressed by the Licensing Board based on its analysis of the evidence in this case:

> The principles of electric power supply production and coordination are generally applicable throughout the electric utility industry (Mayben, Direct, pp. 3-9). These principles do not vary significantly among electric utilities regardless of differences in locations, although they may change to a certain extent depending on corporate policy and financial requirements (Mayben, Direct pp. 8-9; Tr. 5,576-5,586; FPC National Power Survey, Part I, Chapter 17 "Coordination for Reliability and Economy," December 1971).

5 NRC at 834.

In Midland, we traced in painstaking detail the operations of the electric utility industry.[66/] We discussed the manner

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66/ See 6 NRC at 949-74.

in which utilities interact with each other in planning for and constructing the necessary transmission and distribution facilities and in operating them. We explained how, because of the peculiar characteristics of electricity, utilities buy, sell and exchange surplus bulk power and associated services to improve the efficiency and reliability of their operations. For reasons there discussed, we concluded that there existed a separate coordination services market consisting of these types of transactions. We stated:

> [C]oordination arrangements usually comprise several differing types of surplus power transactions and associated services . . . . [T]hese various power transactions are not reasonably interchangeable with wholesale power. But neither are they necessarily interchangeable with one another. All, however, serve an essentially similar function. That function is facilitating production of firm bulk power at lower cost and with greater reliability by making profitable use of otherwise surplus generating capacity. These arrangements constitute a "bundle of services" which merits recognition as a distinct market similar to the way various services offered by commercial banks fall in one and the same product market. United States v. Philadelphia National Bank, supra, 374 U.S. at 356.

6 NRC at 975.

We know of no compelling reason for reaching a different conclusion here. As will be seen, the evidence in

this proceeding reveals that the same kinds of transactions found to occur in Michigan take place in Alabama as well.[67/]

The Southern Company Power Pool Intercompany Interchange Contract (D.J. 3009),[68/] to which applicant is a party, provides the contractual framework within which the members of the Pool engage in coordination services transactions. Although not every type of service available under the agreement is specifically identified, the terms of the agreement, viewed in light of the manner in which the utility industry generally operates, leave little room to doubt that the various coordination services activities are actively pursued by the utilities involved.

For proof of the validity of this observation, we need but cite applicant's own admission contained in the power pool agreement:

* * *

> WHEREAS, each of the POWER COMPANIES and their respective customers achieve substantial economies through the common planning,

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67/ We found in our Davis-Besse decision a similar market to exist in the territories served by the utilities there involved. 10 NRC at 287, 301-02.

68/ In referring to the exhibits and testimony submitted below, we have followed the system of notation used by the Licensing Board. See 5 NRC at 820 n.4.

development, and coordination of their operations which they have successfully practiced for many years, and

WHEREAS, such common planning, development, and coordination provides certain advantages to POWER COMPANIES and their respective customers including:

(a) The staggering of the construction of new generating facilities so that each of the respective POWER COMPANIES can construct and install for their respective territorial loads the optimum size generating facilities which produce maximum economies of scale;

(b) An opportunity for each of the respective POWER COMPANIES to dispose of surplus energy and capacity that may be available from time to time due to the staggered construction of generating units, seasonal variations in demands for electric power, and variations in patterns of the diversity of loads imposed from time to time on the respective POWER COMPANIES;

(c) An opportunity to utilize the seasonal and diversity patterns of other utilities not contiguous to each of the respective POWER COMPANIES for the outlet of surplus capacity and energy which may be available from time to time, together with the opportunity, because of such variation in seasons and diversity of loads, to acquire from other utilities energy at a low cost and thus avoid or defer the construction of generating capacity to meet seasonal loads;

(d) The opportunity to pool reserves thus reducing the magnitude of reserve capacity required by the respective POWER COMPANIES in order to assure reliable service to their respective customers and

> (e) Improvements in the reliability of electric service through the use of transmission interconnections which provide the respective POWER COMPANIES with the opportunity to call upon one another as well as other utilities with which they, or any of them, are interconnected to provide backup service in case of emergencies or breakdowns in excess of the reserves carried by the respective POWER COMPANY;
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> * * *

D.J. 3009, pp. 2-3 (emphasis supplied).

Other evidence confirms that the applicant engages in various "coordination services" transactions. It participates in joint ownership arrangements as, for example, with the Georgia Power Co. over the Gaston coal-fired generating plant (D.J. 1002); it shares reserves with the other companies in the Southern Pool (D.J. 603, 604, 605, and 3009); it engages in short-term capacity exchanges with neighboring utilities (Mississippi Power and Light, D.J. 3002; Duke Power Co., D.J. 3003; South Carolina Electric & Gas Co., D.J. 3004; Tennessee Valley Authority, D.J. 3007; and Florida Power Corporation, D.J. 3008); it participates in seasonal capacity exchanges with TVA and with the Florida Power Corporation (D.J. 3007, 3008, 3009, 603, 604, and 605); and it exchanges emergency, maintenance and economy energy with other utilities (D.J. 3002, 3003, 3004, 3007, 3008, 3009, 603, 604, and 605).

Even without our Midland decision as precedent, we would reach the same conclusion here. As we have emphasized, court decisions teach that, for antitrust analysis purposes, a relevant market must reflect commercial or trade realities.[69/] Guided by that rule, our review of the record in this proceeding persuades us that there exists a coordination services market comprised of the types of transactions for the sale and exchange of power and energy and associated services discussed above.[70/]

c. The applicant does not disagree with the applicability of the "trade realities" rule to the matter at hand. Indeed, it specifically endorses that rule's controlling

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69/ See, e.g., Phillipsburg National Bank, supra, 399 U.S. at 360; Grinnell, supra, 384 U.S. at 571-76; Philadelphia National Bank, supra, 374 U.S. at 356-57.

70/ In Midland, we excluded from the coordination services market there involved "developmental coordination" -- i.e., the construction of power plants on a staggered basis or as joint ventures by two or more utilities with the intention of sharing the power generated by them -- but included within that market the purchase and sale of "unit power" from such plants. 6 NRC at 976. Similarly, we do not include "developmental coordination" within the coordination services market held to exist here.

effect here.[71] It does, however, dispute the conclusion advocated by its opponents. Its position essentially is that, whatever may be said of the electric utility industry generally, the evidence in this record simply is insufficient to show a coordination services market exists in the area of interest here.[72]

To support this position, the applicant challenges the testimony of Mr. Mayben and Dr. Wein, Justice's two principal witnesses. At the core of its attack is the proposition that these witnesses possess no factual knowledge of the operations of the utilities in Alabama (beyond the terms of certain contracts

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71/ In applicant's own words:

> "The touchstone of market analysis is identifying patterns of trade and commercial realities in a designated area."

APCO Reply Brief, 37.

72/ Applicant also advances another argument. Avowedly to show the "lack of commercial reality" of the coordination services market, the applicant explains in detail how it is part of an "integrated public utility system" with three other utilities which form the Southern Company, a holding company approved by the SEC; and how AEC gained by obtaining its deficit power and energy requirements from applicant rather than from the four-company power pool. APCO Reply Brief, 32-37; see also App. Tr. 79-92. Far from showing a lack of commercial reality, the fact that AEC and the applicant engage in such arrangements and that AEC finds it economical to do so indicates the very opposite -- that there is a market for bulk power to meet deficit requirements.

and rate schedules furnished them) and that, consequently, their testimony lacks foundation and i entitled to no weight.[73/]

We cannot accept applicant's position. To begin with, we disagree with its thesis regarding the state of the witnesses' factual knowledge of the operations of the utilities involved. Both Mr. Mayben and Dr. Wein have expertise in the utility field.[74/] Beyond that, Mr. Mayben had studied not only the terms of the power pool

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73/ APCO Reply Brief, 23-38.

74/ Mr. Mayben is a professional engineer registered in some thirteen states. Since 1965, he has been a partner and supervising executive engineer with R. W. Beck and Associates involved in providing consultant engineering services to various utilities. His work experience has included the design of power generating stations, high-voltage transmission lines and substations; and power supply planning with particular concern with power pooling and coordinated supply. He has served as the principal Systems Engineer to the Missouri Basin Systems Group (MBSG), a power planning and power pooling organization, whose electric utility members have generation and transmission facilities covering a multi-state area in the Upper Missouri River Basin. Since 1967, he has also worked extensively in the development and implementation of an ongoing bulk power supply program for the Nebraska Public Power District, a utility which has the bulk power responsibility for a major portion of the State of Nebraska. Mayben, Direct, 1-5.

(FOOTNOTE CONTINUED ON NEXT PAGE).

and other agreements entered into by the utilities in Alabama and in the neighboring areas, but the rate schedules on file with the Federal Power Commission (now Federal Energy Regulatory Commission); in addition, and perhaps most important, he had analyzed the pool operating minutes --

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74/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Dr. Wein's background is equally impressive. He is a professor at the Graduate School of Business Administration at Michigan State University, a position he has held since 1959. From 1961 through 1963 he was on leave while serving as Chief Economist and Head of the Office of Economics of the Federal Power Commission (now Federal Energy Regulatory Commission). Thereafter, he, along with others, established the Institute of Public Utilities at Michigan State University in 1965. Before becoming a professor at Michigan, he was Associate Professor of Economics and Industrial Administration at the Carnegie Institute of Technology, a consulting economist for industry, principal economist of the Antitrust Division of the Justice Department (where he also served as special advisor to the Attorney General on antitrust problems in the steel industry), principal economist in the Office of Price Administration, a senior statistician with the Army Air Forces, a principal economist in the War Production Board and a junior economist in the U.S. Commerce Department. He holds a masters degree in economics from Columbia University and a Ph.D. in economics from the University of Pittsburgh. Wein, Direct, 1-16.

which detail the actual transactions that take place.[75/] Dr. Wein, in turn, based his testimony on the existence of a coordination services market in large part on what

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75/ On cross-examination, Mr. Mayben explained the basis for his knowledge of the operations of APCO in the following manner:

> Q. Mr. Mayben, am I correct in my understanding that the knowledge which you have of such portion of the so-called regional power exchange market denominated by you is based upon transactions reflected in certain rate schedules on file with the Federal Power Commission which were furnished to you by the Department of Justice?
>
> A. Yes, that information was used in my preparation of this proposed Exhibit 101.
>
> Q. Does your knowledge of such portion of the regional exchange market come from any other source of information which you can specify?
>
> A. Yes. It comes from my experience in working with clients who are engaged in regional exchange activities and my ability to interpret contracts as to the types of transactions which customarily occur under interconnection agreements which have interchange type service schedules to them.
>
> Q. Other than this general knowledge, Mr. Mayben, is there any other source for the particular regional power exchange market which you assert here?
>
> A. Well, of course, I did examine the pool Operating Committee Minutes, and information there led me to believe that in fact there were transactions taking place pursuant to the contracts that the Department of Justice provided to me.

Tr. 1721-22.

he learned from Mr. Mayben concerning the manner in which utilities operated.[76/] Considering the universality of

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76/ Dr. Wein explained the basis for his testimony as follows:

> MR. MILLER: Just a minute. You were asked about Mr. Mayben.
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> THE WITNESS: That's right. I asked him then whether the structure of the industry -- of course I know some of that myself, but I wanted to get his view, as to whether wholesale power was a reasonable type of transaction, one which occurs in Alabama, and of course I asked about the [Midland] case, because we were both associated there, too.
>
> Yes. He thought that there are wholesale transactions and he described the kinds of conditions under which wholesale transactions take place.
>
> Of course, there was a question of retail, where does wholesale leave off and retail begin. That sort of thing. That's the sort of thing I asked Mr. Mayben to do.
>
> In the [Midland] case, I asked him to do another.
>
> MR. MILLER: I don't think you were asked about that.
>
> THE WITNESS: I'm sorry. I sort of mix these things up.
>
> BY MR. BALCH:
>
> Q. Did you ask Mr. Mayben to undertake this analysis or investigation without any further delineation or instructions?
>
> A. Which analysis and investigation?

(FOOTNOTE CONTINUED ON NEXT PAGE).

these utility practices, confirmed by the Board below and

76/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE).

Q. You said you asked him to find out what kind of transactions take place.

A. He didn't have to make any analysis or investigations. He knew. He just told me and explained to me what they meant. Then I read up about it.

CHAIRMAN GLASER: Well, did he tell you what the source of his knowledge was?

THE WITNESS: Well, he said the source of his knowledge was, he was an engineer, had negotiated many contracts and he knows the business. I didn't know beyond that.

BY MR. BALCH:

Q. Did you assume that the same kind of transactions would take place in the southeast as have taken place perhaps in the northeast or the Missouri Basin?

A. All I asked him were the kinds of things that would take place in a power pool. Then I asked him, did it make much difference whether it would be in Alabama or any other place and he said, the importance might change. Some might have more sorts of transactions. Some might have less sorts of transactions. But in effect, the transactions, all could be classified under very common classification.

Q. Did he choose the transactions from which his analysis would be made, or did you choose the transactions from which the analysis would be made?

A. I think we sort of jointly agreed on what the transactions were.

Tr. 13,358-60.

by us in Midland,[77] we find no merit to the applicant's position that the testimony of Mr. Mayben and Dr. Wein lacks factual foundation.

An even more compelling reason requires rejection of applicant's argument. Although expressed in terms of a failure of the other side's proof, the unstated premise underlying the argument is that applicant in fact does not engage in the kind of coordination activities to which Mr. Mayben and Dr. Wein testified. The critical failing of this premise is that it runs directly counter to the very words subscribed to by the applicant and the other parties to the Southern Company power pool agreement -- an agreement which has continued in effect for some 30 years.[78] In that agreement, the signatories not only specifically admitted to having "successfully practiced for many years . . . common planning, development, and coordination of their operations," but also to a desire to "continu[e] . . . coordinated operation."[79]

77/ See 5 NRC at 833-37 (Farley below); 6 NRC at 949-74 (Midland); see also pp. 38-39, supra.

78/ The power pool agreement bears an original date of October 16, 1950. This gives an indication of the extended period during which applicant has been involved in coordination activities. See D.J. 3009.

79/ Id. at pp. 2-4.

Applicant would now have us disregard those words as no more than wasted ink. This we cannot do.

To sum up, we are satisfied from our review of the record that, for purposes of this proceeding, a coordination services market exists in the general area of applicant's operation. We need only to determine its geographic dimensions to complete our analysis of that market. We turn now to that task.

2. The Geographic Market. In the proceeding below, Justice took the position that a coordination services market "by its very nature does not lend itself to precise geographic market definition. Electric utilities with access to this market range far and wide in search of useful power exchange transactions; they are not restricted to specific geographic limits or certain identified utilities with whom they may deal."[80/] For these reasons, Justice maintained that precise definition of the geographic boundaries of this entire market is not necessary to a consideration of monopolization charges; it suffices to focus attention on a separate economic entity or submarket within the broader market.[81/]

80/ Justice Prehearing Brief Below, 57.

81/ Id. at 58.

In Midland, Justice took a similar position. On that occasion, we said:

> We agree with Justice's legal position. Where a discrete submarket exists within an overall geographic market, monopolization of the submarket is itself an antitrust violation. Brown Shoe Co. v. United States, supra, 370 U.S. at 336-37; Case-Swayne Co. v. Sunkist Growers, Inc., supra, 360 F.2d at 455-59; In re Luria Brothers and Co., supra, 62 FTC at 612-14. A submarket must correspond to commercial realities and be economically significant, Brown Shoe, supra, and its existence is a question of fact that must be "charted by a careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for suppliers." United States v. Philadelphia National Bank, supra, 374 U.S. at 359.

6 NRC at 977.

Those same observations guide us here. The record in this proceeding discloses that the applicant engages in exchanges of power directly or through other Southern Pool members with surrounding electric utilities, including Mississippi Power & Light Co., Florida Power Corp., Duke Power Co., South Carolina Electric & Gas Co., and TVA (Mayben, Direct, 54-55; D.J. 101, 3002, 3003, 3004, 3007, 3008; Wein, Direct, 62-64). Thus, at first impression there might seem to be support for a finding of a broad geographic market encompassing the areas in which these utilities operate.

But we need not pause to look for a precise definition of the geographic boundaries of such an overall market. For that is not the market relevant to our inquiry. For purposes of this proceeding, we must focus on that market area, within the overall market, to which the smaller utilities in Alabama can practically turn for suppliers.

The record in this proceeding discloses that the area within which AEC and the other utilities comprising MEUA[82/] may seek coordination services is limited to applicant's service territory and nearby environs -- central and south Alabama. Applicant owns all transmission lines in the area over 115 kv and controls all transmission facilities to utilities outside that area. 5 NRC at 900-01; D.J. 1000;

82/ While MEUA might arguably be considered a participant (or potential participant) in the coordination services market, we think it worth repeating a point we made in Midland: for a utility without any generating capacity of its own, "[c]oordination power services are not useful to it and for its purposes are not functionally interchangeable with wholesale power. In short, given the nature of coordination power, [non-generators] literally cannot substitute coordination power for wholesale power as a long-term source of firm electric power." 6 NRC at 963. As the Board below noted, none of the members of MEUA owns or operates any generating facilities. 5 NRC at 827.

D.J. 1006; D.J. 1008; AEC X CRL-1A; St. John, Direct, 7, 39; Harris Tr. 25,455-59. As a result, it has the power to grant or deny access by AEC and the other utilities to the kind of coordination services engaged in by APCO. For these reasons, we conclude there exists, for purposes of our antitrust analysis, a relevant coordination services market in central and south Alabama, the area within which AEC and the other smaller utilities are confined for access to that market in terms of "commercial or trade realities."

B. Retail Market

In the proceeding below, Justice and both intervenors submitted that the retail market for firm power constituted a relevant market within which to examine applicant's conduct.[83/] The product market was defined as the supply of firm power to the ultimate consumer;[84/] the geographic market was seen as corresponding to central and southern Alabama,

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83/ The NRC staff argued below the relevance of only one market -- that for "bulk power supply and bulk power supply services." Staff Proposed Findings, 27 (¶3.02). On appeal, the staff changed its position in light of our decision in Midland; it now maintains that separate markets exist for coordinated services and for wholesale power. Staff Reply Brief, 42-45; see also, fn. 55 supra. The staff made no mention of the retail market either below or on appeal.

84/ See, e.g., Justice Proposed Findings, 62 (¶4.01).

"the area where applicant sells or could reasonably compete to sell at retail."[85/]

The Licensing Board agreed that "[r]etail firm power is clearly a distinct product market." 5 NRC at 887. Citing Otter Tail Power Co. v. United States,[86/] the Board further found that the economic viability of retail distribution systems is worthy of antitrust protection. Id. at 889. It nevertheless rejected the proposed market. While conceding that some competition exists "in the interstices of the service areas of retail distribution systems," the Board found that the local distribution of retail power is a natural monopoly and that the rivalry among retail sellers is insufficient to bind all of central and south Alabama into one geographic market. Id. at 888. And, while it determined that the hundreds of individual local markets would have been proper subjects for examination, the Board saw no purpose in examining such "natural monopoly" situations for antitrust violations. The Board concluded: "Competition between retail distribution systems, if it is of only infra-marginal proportions, is presumably outside of the scope of antitrust remedy." Id. at 889 (emphasis in original).

85/ See, e.g., Justice Proposed Findings, 65 (¶4.07)

86/ 410 U.S. 366 (1973), affirming in part and remanding in part, 331 F. Supp. 54 (D. Minn. 1971).

The Board sought to bolster its conclusion by referring to Otter Tail. In that case, the Board wrote, "the focus [was] upon the retail distribution entity as a buyer (or potential buyer) in the wholesale power market." Every anticompetitive practice in the case was said to have taken place at the wholesale level. The relief decree "in every facet, affected retail distribution systems in their access to and role as buyers in the market for bulk wholesale power." This led the Board to write that there is a "market which is singularly relevant for the licensing of nuclear facilities to generate electricity: the market for wholesale power." Id. at 889-890.

Justice, AEC, and MEUA all excepted to the Board's rejection of the proffered retail market.[87/] On appeal, they argue that the Board was factually incorrect when it failed to find sufficient competition at retail to justify grouping central and south Alabama into one geographic market. Moreover, they cite both Otter Tail and our decision in Midland as requiring reversal of the rejection below of the retail market.

87/ Justice Exceptions, pp. 2-3 (Exceptions 6 and 7); AEC Exceptions, pp. 2-3 (Exceptions 5 and 6); MEUA Exceptions, pp. 1-2 (Exceptions 4, 5 and 6).

1. The Market in Otter Tail. We begin our analysis by taking issue with the Licensing Board's interpretation of Otter Tail. As the Board stated, the violations in that case took place at the bulk power level; the remedies were applied at that level as well. But the market involved in the case was the retail market. It was this market that the defendant was attempting to monopolize; the remedies were designed to effectuate competition at the retail level, not the wholesale level. The district court's decision in Otter Tail puts any doubt about this to rest. See 331 F.Supp. 54, 58, 61 (D. Minn. 1971).

In the case now before us, applicant is allegedly attempting to monopolize (or has succeeded in monopolizing) three separate markets. It is further claimed that an unconditioned license to operate the Farley facility assertedly will have anticompetitive effects on all three markets. In such a situation, we do not read Otter Tail as mandating that we restrict ourselves to an analysis of the wholesale market. To the contrary, we see that case as standing for the proposition that the markets relevant for analysis are all those in which anticompetitive effects may be felt.

2. The Product Market. Beyond its espousal of the view that the bulk-power market is the "singularly relevant" market

in NRC antitrust actions,[88] the Licensing Board appeared to have one fundamental problem with the proposed retail market: it simply did not believe there was sufficient actual (or potential) competition at retail to justify antitrust analysis. The advocates of the market contend that the Board was factually incorrect in its assessment of the amount of competition at retail; they see the retail situation in Alabama as nearly identical with the situation we found in Midland to exist in Michigan.[89] Applicant, on the other hand, argues that the potential for retail competition in Michigan was far greater than in Alabama; it sees no inconsistency between the Licensing Board's decision and Midland.[90]

In assessing the extent of retail competition, it is important to consider the nature of the industry involved. Most retail consumers of electricity are locked into a particular supplier; the residents of Birmingham, for example, must currently look to applicant for their electric needs. As the Supreme Court said in Otter Tail (410 U.S. at 369): "[e]ach town . . . generally can accommodate only one distribution system, . . . making each town a natural monopoly market

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88/ A view not shared by us in Midland (6 NRC at 949-97) and Davis-Besse (10 NRC at 270, 301-02); in both cases all three markets offered here were found relevant.

89/ Justice Brief, 148-49; Justice Reply Brief, 24-28; MEUA Brief, 6-17.

90/ APCO Reply Brief, 38-44.

for the distribution and sale of electric power at retail." Clearly we are not dealing with a product that is susceptible to intense competition for every sale.

This is not to say that retail competition is either impossible or unprotected by the antitrust laws; Otter Tail, Midland, and City of Mishawaka v. American Electric Power Co. (Mishawaka II)[91] are cases that all hold otherwise. Although competition for individual users already taking electric service from a supplier may be unlikely to occur,[92] competition can take place for certain new loads or for the right to be sole distributor in a municipal area.[93]

91/ 465 F. Supp. 1320 (N.D. Ind. 1979), aff'd in part and remanded on other grounds, 616 F.2d 976 (7th Cir. 1980), cert. denied, 449 U.S. ___, 66 L.Ed. 2d 824 (1981).

92/ Although such competition is rare, we found in our Davis-Besse decision that street-to-street, head-to-head competition took place in a good part of the City of Cleveland. 10 NRC at 274. While there is less of it in Alabama, the Board below found such competition in the Town of Samson. 5 NRC at 888.

93/ The fact that local distribution may be a natural monopoly does not mean the identity of the monopolist cannot change. In Otter Tail, for example, the sole competition found by the Court was for the control of local distribution monopolies.

There can also be "yardstick competition";[94/] the existence of a potential competitor may have an effect on the actions of another distributor.

In Alabama, franchise, individual load, and yardstick competition are all present to some degree. In terms of franchise competition, Alabama law prohibits utilities from serving within municipal corporate limits without the permission of the municipal government.[95/] An examination of a list of applicant's franchises (prepared in 1973) reveals that applicant had 313 different franchises in 273 municipalities. Of those, only 26 franchises in 24

94/ "Yardstick competition" is a form of competition in which two sellers (in this case, distributors of retail power), not directly competing against each other for sales, have their pricing policies (and any other practices deemed relevant by purchasers) compared. As it relates to the retail distribution of electricity, a local distributor's performance is measured against that of other nearby utilities. If yardstick competition exists in the area, the local distributor will have to compare favorably with the other utilities or it will be replaced. If this form of competition is not present, the local distributor need not be concerned about meeting the price and services of other utilities.

95/ Farley Direct, 46; 562-64; Alabama Constitution of 1901, §220.

locations are terminable; the balance are perpetual.[96/]

In terms of its retail sales, in 1973 applicant made 51% of such sales in municipalities where it holds perpetual franchises, 9% in municipalities where it has terminable franchises, and 40% outside of municipalities (where no franchises are required).[97/] Perpetual franchises in Alabama are not exclusive;[98/] municipalities may offer competing franchises to other utilities. Under the terms of the Booth Act,[99/] however, municipalities may not establish a municipally-owned system without first offering to purchase the facilities of the existing franchisee. Should the franchisee decline the offer, the municipality may establish its own competing system, but the original franchise (unlike in

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96/ APP.X JMF-82. Of the terminable franchises, three (Bay Minette, Brewton, and the transmission franchise in Dothan) are listed as "terminable;" the other franchises expire in a certain number of years (usually thirty years after issuance). While our arithmetic does not square with applicant's testimony that it holds franchises in only 261 municipalities (Crawford Direct, 30), the discrepancy may be based on the limited nature of some of the franchises listed in JMF-82.

97/ Crawford Direct, 119. In comparison, 45% of Consumers Power's retail sales were made under perpetual franchises. Midland, 6 NRC at 933.

98/ See Bessemer v. Birmingham Electric Co., 248 Ala. 345, 27 So. 2d. 565 (1946).

99/ Title 48, Alabama Code §§342-347.

Michigan and in the states served by Otter Tail) would still be in effect.[100/] Thus, in the vast majority of its service area, applicant can be subjected to head-to-head competition, but it cannot necessarily be replaced. Due in no small part to the economic difficulties inherent in establishing a competing system, no municipality in applicant's service area has ever set up a distribution system to compete against one of applicant's franchises.[101/]

Alabama Power has acquired some other distribution systems since 1950, but it takes pains to point out that none of these acquisitions has been at the expense of municipally-owned systems.[102/] The primary acquisition was that of the Birmingham Electric Company (by merger) in 1952.[103/] Other acquisitions included Liddell Power Company (a privately-owned utility largely operating in Camden, Alabama) in 1955,[104/]

100/ There is some question as to whether a municipality possesses the authority to condemn an established distributor's property. See App. Tr. 151.

101/ The town of Ozark initiated a proceeding under the Booth Act in 1956 in an attempt to establish its own distribution system. Applicant elected not to sell its facilities and the town never constructed a competing system. See Alabama Power Co. v. Alabama Public Service Commission, 267 Ala. 474, 103 So. 2d. 14 (1958).

102/ APCO Reply Brief, 39.

103/ Farley Direct, 227-32.

104/ Id. at 246-47.

the electric facilities of West Point Manufacturing Company (a textile company that previously provided electric service to its former "mill villages") in 1960,[105] and the electric facilities of Mount Vernon Mills (another textile company) in 1968.[106] During this same time period, the company sold small amounts of its distribution system in areas into which the cities of Bessemer, Sylacauga, and Opelika extended their corporate limits.[107] In addition to these transactions, applicant has been approached at times by towns requesting that it supply retail service in lieu of the service then being provided by cooperatives.[108] In other instances, unincorporated rural communities presently served by cooperatives have considered incorporating and extending a franchise to applicant.[109]

As mentioned earlier (see pp. 58-59, supra), there is no head-to-head competition for most electric loads. Nonetheless,

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105/ Id. at 270-71.

106/ Id. at 322-23.

107/ Id. at 247-51.

108/ See, e.g., DJX 4012-24 (Town of Samson); DJX 4205-16 (Fulton); DJX 4319 (Clio); DJX 4320 (Red Level); DJX 4321 (Goshen).

109/ See, e.g., DJX 4185 (Pennington); DJX 4317-4318 D (Riverview).

all the parties agree that there is some competition for individual loads.[110/] This competition occurs in: (1) the town of Samson (served by both applicant and Covington Electric Cooperative, which compete on a house-by-house basis); (2) outlying areas annexed by a municipality where another supplier currently serves at retail;[111/] (3) rural areas either where competition for individual loads is permitted (in certain circumstances) by non-duplication agreements or where rural systems are located near each other and have not signed any such agreements; and (4) outlying areas where a municipally-owned system wishes to expand.[112/] Applicant argues that the opportunities for such head-to-head competition are "minimal."[113/] While we can agree that there

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110/ See, e.g., APCO Reply Brief Below, 228; Justice Proposed Findings, 41-45 (¶¶2.35 - 2.45). ["_____ Reply Brief Below" refers to the parties' responses below to the proposed findings of fact.]

111/ In such a situation, the system franchised by the municipality (or, if the case may be, a municipally-owned system) can compete in the annexed area with the preexisting distributor. Head-to-head competition can result or the nonfranchised system can sell its facilities to the other system.

112/ In Alabama, there does not appear to be any legal limit to the extent municipally-owned systems may expand outside municipal corporate limits, subject to the grant of a franchise should the system wish to provide service in another incorporated area. In Michigan, by contrast, the expansion of municipal systems beyond municipal corporate boundaries is limited. Midland, 6 NRC at 940.

113/ APCO Reply Brief Below, 228.

is not head-to-head competition for the great percentage of retail sales in the area, we do not believe such competition can be ignored. 114/

114/ In this context, we note the following dialogue between applicant's president, Joseph Farley, and counsel for the Department of Justice (at Tr. 20,804-05):

Q: Don't your franchises substantially protect you against the loss of your retail business?

[Mr. Farley]: No sir, they are non-exclusive and there is an awful lot of load that is outside of municipal corporate boundaries, particularly industrial business today tends to locate outside the municipalities rather than in the middle of urban areas.

Q: So the fact that you have franchises that are to a great extent perpetual to serve in municipalities doesn't give you the feeling of being protected against losing business in those areas where you are franchised, Mr. Farley?

A: No sir, they are perhaps of some protection but as I have pointed out to you in the first place we experienced all the 11 counties of northern Alabama in which we had franchises and municipalities and we saw what happened there, that we were not protected there in any sense. We also know that a great deal of growth, industrial and commercial growth at this point in time tends to be outside of municipal corporate boundaries. Municipalities are finding it at least in our area harder and harder to extend their corporate limits and the tendency, as I said, is for a lot of the major industrial growth and some of the commercial growth to be outside of the municipal franchised areas.

Q: Are you saying there is a possibility of competition for such growth to serve such growth electrically, is that right?

A: Well, yes, sir, even when both systems are there. At retail if a load is over a certain size, 200 megawatts, under the tariffs that have been filed without, I might add, protest from the cooperatives, it's either party's business.

There is also yardstick competition taking place in ALabama. The Licensing Board wrote: "possibly the yardstick most often used in measuring the performance of any retail distribution system in central and south Alabama is that of another distribution entity in the same area."[115/] The presence of yardstick competition plays a significant role in franchise and individual load competition; when one utility cannot meet another's rates or service, it can lose customers.[116/]

In sum, retail competition is not completely absent from central and southern Alabama. Nor has applicant shown us any legal prohibitions barring greater competition. To be sure, the economic barriers to increased competition are substantial. The same was true in Midland where we found the retail market relevant. We repeat what we said there:

> This is not to suggest that competition to distribute electric power in lower Michigan is totally free and open, or even that major

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115/ 5 NRC at 888.

116/ See, e.g., DJX-4329E (Vanity Fair Mills chooses service from Clark-Washington Cooperative because its bid was lower than applicant's); DJX-4319 (town of Clio expresses interest in service from APCO because cooperative service is more expensive); DJX-203 (City of Dothan challenges applicant's service to the town of Taylor by claiming Dothan's municipal system could provide better and cheaper service).

> market changes are in the offing. But because this potential competition manifests itself only periodically and is more limited than that found in some unregulated markets, it is not for those reasons less deserving of antitrust protection. To accept Consumers' position on the relevant retail geographic market would in effect nullify that protection. That result is simply out of line with the recent Supreme Court decisions in this area.
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> It must also be kept in mind that Consumers was not born with a 77% or 100% portion of that retail market. Rather, it acquired its large share in no small part by the same slow competitive processes that it now suggests are too unlikely and remote for us to consider.

6 NRC at 988-89 (footnotes omitted).

We note too that, in similar circumstances involving the wholesale market in this case, the Licensing Board found the proposed market relevant for antitrust analysis. The Board recognized the obstacles to wholesale competition:

> A municipality served by Applicant under a franchise cannot shift easily to AEC; an AEC member cannot shift readily to Applicant for wholesale power. Clearly we are talking about competition at the margin here. As Applicant's witness Crawford testified in response to a question as to whether there was competition for wholesale loads: "The answer to that question is a qualified yes." (APP.X BJC-A (Crawford) p. 131).

5 NRC at 895.

The Board nonetheless concluded the market was relevant:

> Yet one of the lessons of economics is the importance and efficacy of marginal adjustments. In economic matters, tails often do wag dogs. In this market setting, it is precisely because buyers are often locked into one seller, and a seller limited to a definite geographic area for its retail customers, that the "tail wag" should be preserved. It represents one outlet for the limited competition possible in electric power supply. It is the very type of competition that, in regulated or quasinatural monopoly settings, the antitrust laws should be especially zealous to maintain, either to mitigate any undesirable effects of the market structure or the shortcomings of regulatory authorities. The preservation of this rivalry would seem to require the existence of a number of different buyers and sellers (although not at the expense of economic efficiency).

Id. at 895-96.

We think the same analysis holds true for the retail market. Competition in the market may be limited, but it is nevertheless entitled to protection under the antitrust laws.[117/]

3. The Geographic Market. There remains the task of defining the geographic boundaries of the retail market. The Licensing Board concluded that no relevant geographic market could be found; it specifically rejected applicant's service area as the relevant market. (5 NRC at 888-89). We disagree.

117/ See, Midland, supra, 6 NRC at 988.

In determining relevant markets, courts must "delineate markets which conform to areas of effective competition and to the realities of competitive practice." Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 710 (7th Cir. 1977), cert. denied, 439 U.S. 822 (1978), quoting L. G. Balfour Co. v. F.T.C., 442 F.2d 1, 11 (7th Cir. 1971). The District Court in Mishawaka II, supra, a monopolization case involving a large Midwestern utility, found the application of this "practical approach" to be "relatively simple." The court explained its determination that defendant's service area constituted the relevant market:

> "The geographic location of the market is usually determined by an examination of the areas in which the particular firm actually competes or operates. If it concentrates its sales and service in one area, this area will normally be the relevant market." E. Kintner, An Antitrust Primer, A Guide To Antitrust And Trade Regulation Laws For Businessmen, pp. 102-103 (2d Ed. 1973).
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> Here, defendant I & M has a clearly defined service area in Indiana and Michigan within which it sells electric power and energy at retail pursuant to franchises granted by the municipalities and townships. I & M has tariffs on file for those areas in the Public Service Commissions of Indiana and Michigan, pursuant to which it offers to sell electricity at retail to all interested buyers. Moreover, as the defendants have stated, no other public utility is allowed to sell electric energy at retail within this area.

465 F. Supp. at 1325.

Applicant protests the use of its service area to denote the geographic scope of the retail market. Its argument is two-pronged: if the test is "the area where applicant sells or can reasonably extend its retail sales," the whole state should be included in the market. If, on the other hand, "commercial reality is used as a guidepost, the market should be broken down into small submarkets where competitive conditions are similar.[118/]

We have no trouble in rejecting the contention that the whole state constitutes the appropriate geographic market. We think the Board below applied the correct principle in rejecting the same argument applied to the wholesale market:

> The entire state of Alabama would be an appropriate geographic market area only if wholesale suppliers in northern Alabama (TVA is the obvious entity involved here) could compete for retail loads in central and southern Alabama and Applicant could sell in the eleven northernmost counties of the state as well. Such is not the case.

5 NRC at 893. The Board noted that applicant does not attempt to sell power in the northern counties and that

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118/ APCO Reply Brief, 42-44. See also, APCO Reply Brief Below, 209-34.

TVA is legally prohibited from selling power in most of the rest of the state. Ibid.[119] Given these circumstances, we see no reason to utilize the political boundaries of the state as the geographic limits for the retail market.

It is certainly true, as the applicant points out,[120] that the competitive situation differs in various parts of applicant's service area. But the same was true in Otter Tail; the different states involved had different franchise limitations and regulatory requirements, and certain municipalities had greater access than others to alternative transmission lines.[121] Nonetheless, the District Court in that case rejected the argument that each town in the defendant's service area be regarded as a separate geographic market.[122]

119/ TVA is prevented by statute (16 U.S.C. §831n-4(a)) from supplying power in areas not receiving power from TVA before July 1, 1957. Prior to that date, the only systems receiving power from TVA in south and central Alabama were the municipally-owned ones operating in the cities of Bessemer and Tarrant City. 5 NRC at 828, 829, 893.

120/ See APCO Reply Brief, 43.

121/ See 410 U.S. at 371.

122/ 331 F. Supp. at 58-59. The District Court's market definition was apparently accepted by the Supreme Court. See 410 U.S. at 369-70.

In Midland as well, the applicant argued that its service area could not be considered a relevant geographic market. In that case, the applicant proposed that an "open/closed" distinction be made; areas where competition was considered highly improbable were to be excluded from consideration.[123/] The applicant here offered the same argument to the Board below.[124/] We need not rehearse in detail the reasons why we rejected this argument in Midland.[125/] We do think it worth repeating that, although different competitive factors might justify the division of a market into various submarkets:

> "submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." This is especially true where the charge is that a firm has monopolized that broader line of commerce. [Applicant's] arguments in effect seek to focus our attention on those areas where door-to-door competition is now taking place and to have us ignore those areas where the company has already acquired dominance. To do so would be to manifest tacit acceptance of [applicant's] present market position as sacrosanct. This is simply not the case, legally or factually.126/

123/ See 6 NRC at 978-79.

124/ See APCO Reply Brief Below, 228.

125/ See 6 NRC at 983-90.

126/ 6 NRC at 990, quoting United States v. Greater Buffalo Press, 402 U.S. 549, 553 (1971) and United States v. Phillipsburg National Bank, 399 U.S. 350, 360 (1970).

We adhere to the approach taken in Otter Tail, Midland, and Mishawaka II. Those cases indicate that where a firm operates in a discrete service area and is charged with monopolizing retail sales in that same area, the service area may constitute the relevant geographic market for the purpose of antitrust analysis.

We add one last point. In many cases, the identification of a relevant geographic market is a crucial factor in the case because of its importance in determining a firm's market share (and hence, whether the firm possesses monopoly power). Although we find applicant's service area to be the relevant geographic market for the retail product market, our finding of monopoly power in the retail market is not solely dependent on market shares. See pp. 80-85, infra.

IV.

MONOPOLY POWER

Our determination that there are three relevant markets involved here must be followed by consideration of whether the applicant possesses monopoly power in these markets. This is so because business practices undertaken by those with dominance in the market may not be acceptable even though they would be legitimate if undertaken by those less powerful.[127/]

As we did with the Licensing Board's decision that the wholesale market is a relevant one (see page 30, supra), we adopt as our own that Board's decision that the applicant does indeed have monopoly power in the wholesale market.[128/] Because, however, that Board believed no other markets to be relevant, it had no occasion to examine the extent of the applicant's control of those markets. We do so now.

127/ Midland, supra, 6 NRC at 913, citing United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945); American Tobacco Co. v. United States, 328 U.S. 781, 812-14 (1946); United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342-46 (D. Mass. 1953), affirmed per curiam, 347 U.S. 521 (1954); cf. U.S. Steel Corp. v. Fortner Enterprises, 429 U.S. 610, 612 fn. 1 (1977).

128/ Applicant has excepted to the Licensing Board's treatment of its in-house distribution of bulk power as sales in the wholesale market. APCO Brief, 38-40. For the reasons given by the Board below (5 NRC at 890-92, 894-96) and by us in Midland (6 NRC at 990-97), we agree that such in-house distribution properly belongs in the market.

A. Coordination Services Market

Once again we look to the teachings of Midland to help us determine whether the applicant here possesses monopoly power in the coordination services market. As we there explained (6 NRC at 998):

> The nature of the coordination services market does not . . . lend itself to an easy calculation of market shares. A utility is both buyer and seller in this market. Whether in any given time period it is a net buyer or a net seller is in part fortuitous, depending on operating conditions in its own and its neighboring power supply systems. Justice therefore undertook to show Consumers' possession of monopoly power in this market directly, by proving that its control of access to the market and its domination of power generation and transmission within it gives the company that power. This is a valid approach. (Emphasis in original).

Applicant's domination of power generation and transmission in its area of service is evident. The applicant is a vertically and horizontally integrated electric utility engaged in the generation, transmission and distribution of electricity.[129] As observed by the Board below, applicant's generating capacity in 1974 was 6,246 MW; it had additional planned capacity scheduled to be operative in 1979 of 2,380 MW.[130]

129/ 5 NRC at 820.

130/ Id. at 821-22, 898.

It generates all of the power for its retail power needs. Disregarding the federally-owned capacity utilized in central and southern Alabama, applicant in 1974 held approximately 98% of the generating capacity in that area.[131/]

In contrast, AEC had generating capacity in 1974 of only 137 MW; and a total planned capacity, scheduled for 1979, of 557 MW. It generates only a portion of the power requirements of its members.[132/] As mentioned previously (see p. 10, supra), none of the members of MEUA owns or operates any generating facilities.[133/]

As for transmission, the applicant owns all transmission lines in the market over 115kv and controls all transmission facilities providing access to utilities outside the market area. With respect to lower voltages, applicant is also dominant. AEC owns 995 miles of generally low voltage transmission lines, only 15% of the amount owned by the applicant.[134/] For their part, the members of MEUA own only 71 miles of low voltage lines.[135/]

131/ Id. at 898-99.

132/ Id. at 824-27, 898-99.

133/ Id. at 827.

134/ Id. at 900-01.

135/ Id. at 827.

Although the above is only a rough description of the generating and transmission facilities in central and south Alabama, the dominant position of the applicant in either activity is readily apparent. Its dominance, particularly over the transmission facilities in south and central Alabama, places the applicant in a unique position to control access to the market for coordination services. By refusing to "wheel" power,[136/] it is able as a practical matter to prevent the other utilities operating in the area from coordinating with the larger utilities outside it. This was aptly demonstrated at the hearing below.

During the course of the hearing, the question of how AEC might best coordinate its power generation expansion plans with the purchase of power from the applicant to meet AEC's projected power needs came up for consideration. In this connection, it was brought out that AEC was in the process of installing two 210 MW generating units on the Tombigbee River. This prompted the question of how the surplus capacity in those units, were they to be completed, could be

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136/ "Wheeling" is a term of art in the electric power industry, defined as the "transfer by direct transmission or displacement [of] electric power from one utility to another over the facilities of an intermediate utility." Otter Tail Power Co. v. United States, supra, 410 U.S. at 368.

disposed of by AEC if the applicant did not purchase it. The possibility of some third utility was suggested. But to dispose of the surplus capacity, it was conceded by applicant's witness that the transmission facilities of the applicant would have to be used.[137/] If, for whatever reason, the applicant decided not to accommodate AEC, the cooperative would not be able to dispose of its surplus generating capacity.[138/]

The applicant, however, claims in its brief that AEC is already connected to the system of the Georgia Power Company at the Walter F. George Lock and Dam. It argues that "there is no reason why AEC cannot, if it so desires, engage in power supply transactions with Georgia Power or through Georgia Power's system with Duke Power Company, South Carolina Electric and Gas, Savannah Electric or Florida Power Corporation, all of which are interconnected with Georgia Power's system."[139/] It also claims that AEC owns major transmission lines in close proximity to existing lines of Gulf Power Company and has other lines only a short distance from the South Mississippi Electric Power Association's system. The applicant suggests AEC can interconnect with these utilities

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137/ Harris, Tr. 25,443-44.

138/ Id., 25,444-45.

139/ APCO Brief, 29.

and through them with others.[140] On the other side, Justice points out that "AEC has no interconnection to any utility other than Applicant."[141] This means that without the use of applicant's facilities, additional costly transmission lines would have to be built before AEC is able to coordinate power supply activities with Georgia Power.[142] From the standpoint of the nation's resources and the economy of the ratepayers that would be affected, constructing new lines when adequate facilities exist results in waste and places an additional, unnecessary burden upon ratepayers. In any event, there is no assurance that the other utilities memtioned would engage in the arrangements for the different type of coordination services which would be made possible were interconnection physically available.[143] We reject

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140/ Ibid.

141/ Justice Reply Brief, 30. We accept the validity of this statement inasmuch as applicant's own witness has testified that in any disposition of surplus power by AEC from its planned Tombigbee units, the transmission facilities of the applicant will have to be used. Harris, Tr. 25,444.

142/ An eight-mile extension of a 115 kv line with switching and other equipment to permit interconnection would cost from about $500,000 to $750,000. Brownlee, Tr. 25,663.

143/ According to AEC's counsel, AEC has "no idea whether Georgia [Power] would be willing to engage in it." App. Tr. 106.

the applicant's position. It simply has failed to rebut the showing that its predominant control of transmission and generation gives it monopoly power over the sale of coordinated services in the relevant market area.

B. Retail Market

We wrote in Midland that the retail market lends itself to traditional market share analysis, with market shares being determined by calculating the amount of electric energy in megawatt hours (MWh) each utility sold to its retail customers. 6 NRC at 1009-1010. Applying these methods of determining market shares to the case at bar, the retail market in southern and central Alabama was divided (in 1972) as follows:144/

	MWh sold (x 1000)	% of market
Alabama Power Company	21,657	88
Municipal Systems	1,610	7
Distribution Cooperatives	1,335	5
Alabama Electric Cooperative	62	0

144/ Wein, Direct, 67; Foltz, Tr. 12,841-43.

Applicant's share of 88% is clearly sufficient in normal circumstances to warrant the inference of monopoly power.[145/] Applicant argues, however, that reliance on market shares is misplaced in this case. It claims that the economic characteristics of the industry (and its attendant regulation) result in higher market shares than would be found in a more conventional industry. Moreover, we are told, state and federal regulation of applicant's activities prevent it from possessing monopoly power.[146/]

These arguments are nearly identical to those made by Consumers Power, and rejected by us, in Midland.[147/] We have carefully reviewed that earlier ruling and its application to the facts of this case. We conclude that applicant's argument must fail; we find it possesses monopoly power in the retail market.

145/ See Midland, 6 NRC at 1010-11 and cases there cited.

146/ APCO Brief, 35-37; APCO Reply Rrief, 52-53. Applicant advanced these arguments in the context of monopoly power in the wholesale market (no retail market having been found below). Although we deal with them here in the context of the retail market, our discussion and the arguments themselves apply with equal force to both markets.

147/ 6 NRC at 1011-19.

In the first place, the economic setting of the industry supports the finding that applicant possesses monopoly power. We have noted earlier that, while competition is legally permitted in Alabama, the economic barriers to the entry of new competitors in the industry are high indeed.[148/] As we pointed out in Midland, high entry barriers reinforce the inference of monopoly power suggested by high market shares.[149/]

More importantly, applicant's dominance of transmission and generation facilities further bolsters the finding of monopoly power. As the Board below noted, this dominance enables applicant to influence its present and potential competitors' access to the basic inputs necessary for the production and sales of reliable and economical firm bulk power.[150/] The dominance of what in essence constitute certain factors of production in the industry, viewed in conjunction with applicant's

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148/ See p. 62, supra.

149/ 6 NRC at 1012-13, citing Weber v. Wynne, 431 F. Supp. 1048, 1054-56 (D.N.J. 1977); United States v. United Shoe Machinery Corp., supra, 110 F. Supp. at 343-44; Golden Grain Macaroni Co., 78 FTC 63, 163 n. 9, 180 (1971).

150/ 5 NRC at 899-901. Although the Licensing Board found monopoly power only in the wholesale market, we think it self-evident that the control of the basic components necessary to produce firm bulk power would yield the same result in the retail market.

high market shares and the high economic barriers facing new competitors, would ordinarily compel a finding of monopoly power in the retail market.

It is at this point that the second thrust of applicant's argument presents itself. Monopoly power has long been defined as the power to control prices or exclude competitors.[151/] Applicant would have us believe that the federal and state regulation of its activities precludes it from either controlling prices or excluding competitors and thus from possessing monopoly power.

We have already supplied a general answer to this argument (see pp. 14-21, supra). We need only particularize that answer by adding here that a vertically-integrated utility's ability to monopolize a retail market is not dependent on its ability to set its own retail rates. In Otter Tail, supra, the defendant cut off its retail competitors' supply of wholesale power. In Mishawaka II, the defendant threatened to curtail its competitors' supply and additionally charged them excessive rates for the wholesale power it did supply.

151/ See, e.g., United States v. Grinnell Corp., supra, 384 U.S. at 571; United States v. E.I. du Pont de Nemours and Co., supra, 351 U.S. at 391; American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946).

In both cases, it was the dependence of the retail systems on a vertically-integrated competitor for their source of supply that enabled the integrated utility to monopolize the retail market.

There is no question in this case that applicant's competitors are wholly or partially dependent upon applicant for their supply of electric power. In such a situation, the courts in Otter Tail and Mishawaka II found defendants to be possessed of monopoly power despite the existence of the same federal regulatory scheme under which applicant operates.[152/]

Nor do we believe the existence of the Alabama Public Service Commission (APSC) changes matters in this regard. For example, the Licensing Board found that the applicant

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152/ In Mishawaka II, for example, the District Court described a mechanism by which the defendants were able to circumvent meaningful federal regulation of their wholesale rates in an effort to drive retail competitors out of business. 465 F. Supp. at 1327-29. We do not imply that the applicant here pursued a similar course of conduct, merely that if it had chosen to do so, federal regulation would not have saved applicant's competitors.

unlawfully refused (or threatened to refuse) to sell wholesale power to AEC for resale to the military facility at Fort Rucker. 5 NRC at 942-45. In its appellate papers, applicant conceded that state law prohibits such a refusal.[153/] Given the circumstances, it would appear that AEC could have sought an order from the APSC which eventually might have resulted in AEC's being provided the power. But the state regulatory body was powerless to prevent applicant's initial refusal to deal. As the court in Mishawaka II pointed out, belated aid from regulatory bodies, often forthcoming only after extensive and costly litigation, is not an adequate antitrust remedy.[154/] We think it self-evident that such an inadequate remedial mechanism is insufficient to deprive a regulated utility of monopoly power.

Having found that the applicant possesses monopoly power in each of the relevant markets, we now turn our attention to the charges that it has improperly wielded that power.

153/ APCO Brief, 80-81.

154/ 465 F. Supp. at 1329. See also, Mishawaka I, supra, 560 F.2d at 1325:

> Delay, combined with the multiple rate increases, could mean that the customer has been put out of business by his supplier-competitor. You cannot give refunds to a corpse.

V.

MONOPOLIZATION

A. Situation Inconsistent with the Antitrust Laws

Our review of the Licensing Board's determinations on the various charges of monopolization leads us to observe that the Board did an unusually thorough job of marshalling, discussing and analyzing the sometimes complicated facts surrounding the various transactions. It examined closely each of the allegations of applicant's misuse of its monopoly power. It took into consideration the evidence bearing on each claim and the demeanor and credibility of the witnesses who gave pertinent testimony. On that basis, the Licensing Board viewed the evidence as sustaining only five of the specific monopolization charges.155/

As mentioned at the outset of our opinion, all parties dispute the Licensing Board's conclusions. The applicant contends that the Board was correct in rejecting the bulk of the

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155/ The instances of conduct which the Board found inconsistent with the antitrust laws relate to the following:

(1) Applicant's refusal to offer AEC fair coordination between 1968 and 1972. 5 NRC at 916-25.

(2) Applicant's insertion of contractual provisions in its various agreements with AEC and the municipal electric distribution systems precluding alternate sources of supply. Id. at 931-32.

(3) Applicant's inclusion in its contracts with preference customers of the Southeastern Power Administration (SEPA) requiring them to purchase all their additional power needs from the applicant. Id. at 933-37.

(4) Applicant's conduct with respect to AEC's efforts to provide power to Ft. Rucker. Id. at 942-45.

(5) Applicant's exclusion of smaller utilities from regional coordination. Id. at 946-957.

charges but that it erred in its five findings of anticompetitive conduct. The other parties argue the opposite. Each of them maintains the Board below did not go far enough. While agreeing with the Licensing Board's findings of anticompetitive conduct, these parties claim in various particulars that the Board erroneously decided that other activities were not anticompetitive.[156/] It has thus become

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156/ A summary of the aspects of applicant's conduct which were found not to be inconsistent with the antitrust laws is found in the Board's Phase II decision dealing with remedy. 5 NRC at 1488-90. In capsule form, they cover the following:

1. The various types of coordination for economy and reliability which applicant obtained as a member of the Southern Company pool.

2. Applicant's opposition through use of judicial and administrative forums to AEC's obtaining REA loans for the construction of new generation and transmission lines.

3. Applicant's wholesale rate reductions to AEC occurring at times when AEC was considering installation of generating facilities.

4. The 1972 Interconnection Agreement between applicant and AEC (with elimination of the "protective capacity" provision).

5. Applicant's conduct relating to ownership participation by AEC and MEUA in the Farley plant.

6. Applicant's conduct relating to the generating plant proposed to be constructed by the City of Dothan, Alabama.

(FOOTNOTE CONTINUED ON NEXT PAGE)

incumbent on us to examine the record on all these charges ourselves.[157/]

We have done so, but from a somewhat different perspective than that of the Licensing Board. This stems principally from two factors. The first is that unlike the Licensing Board -- which found the applicant to possess monopoly power only in the market for wholesale power -- we have found that applicant has monopoly power in the coordination

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156/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

7. Applicant's conduct in opposing construction by SEPA of high voltage transmission lines.

8. MEUA's allegations of "price squeeze" practiced by applicant.

9. Applicant's use of the courts and administrative agencies.

10. Other allegations of anticompetitive conduct by the applicant such as offers to purchase various distribution systems, attempted acquisition of certain transmission lines, and efforts to serve a new shopping center near Enterprise, Alabama.

157/ We should note here that, while we generally accord deference to trial board findings, it is settled law that we are not held to the "clearly erroneous" standard of review employed by the federal courts of appeal. Where our review of the evidentiary record convinces us that a different result is warranted, we are free to substitute our judgment for that of the trial board. See, e.g., Midland, supra, 6 NRC at 1022-23; Duke Power Company (Catawba Station, Units 1 and 2), ALAB-355, 4 NRC 397, 402-05 (1976); K. Davis, Administrative Law Treatise (2d Ed. 1980), §17.16.

services and retail power markets as well. This means that we must look upon the applicant's conduct as that of a dominant business enterprise wielding monopoly power over the entire range of activities in which it engages, and judge it under a harsher light than that of a less dominant business concern. As we stated on another occasion, judicial and FTC rulings teach that "the actions of a dominant business enterprise have to be tested against a more stringent standard than applies to actions of smaller concerns in highly competitive markets."158/

The other principle affecting our view of the record is that the evidence must be viewed in its entirety and not with the eye focused only on isolated segments as though they were independent of each other. For the courts have stressed

> the importance of viewing the evidence as a whole to give the antitrust plaintiff the full benefit of his proof, rather than tightly compartmentalizing the case and wiping the slate clean after considering each piece of evidence.159/

158/ Midland, supra, 6 NRC at 913.

159/ Id. at 914, citing United States v. Empire Gas Corp., 537 F.2d 296, 299 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977).

In this connection, the applicant's opponents accuse the Licensing Board, in denying all but five of their claims of misuse by the applicant of its monopoly power, of giving inadequate attention to the pattern of anticompetitive conduct indicated by the record. We agree with their position on this point.

Our own examination of the record with these two principles at the fore suggests strongly that it would be permissible for us to find any number of additional alleged instances of misconduct to have been part of an anticompetitive pattern and thus subject to obloquy. But weighing the record is in no small part a matter of judgment. We must recognize and accept that the Licensing Board heard the witnesses and evaluated their demeanor at first hand; we have only the printed word on the cold page before us. In these circumstances, we are unpersuaded that there is sound cause to substitute our own judgment on most of the conclusions reached below. The licensing boards are, as we have said before, this agency's principal fact finders.[160/] We thus

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160/ See Catawba, supra, 4 NRC at 404.

accept the Licensing Board's findings except in two areas where the record compels findings of a situation inconsistent with the antitrust laws: The first deals with the applicant's selective use of low wholesale rates to discourage AEC from constructing its own generating stations; the second concerns the applicant's refusal to extend an ownership interest in the Farley plant to AEC. We now deal with these matters in order.

1. Low Wholesale Rates. The Licensing Board examined four instances in which APCO was alleged to have lowered its wholesale rates for the purpose of preventing AEC from installing generating units. The Board rejected the allegations, finding no anticompetitive conduct in each instance. Specifically, the Board concluded:

> (1) A 1941 rate reduction to a number of utilities, which came at a time when certain distribution cooperatives were forming AEC and were seeking an REA loan to construct new generation and transmission facilities, was legitimately motivated by applicant's desire to reduce its number of different wholesale rates and not to forestall self-generation by AEC. 5 NRC at 908-09.

(2) A 1946 rate reduction offer to AEC, made after AEC applied for an REA loan to construct a new steam plant and associated transmission lines, was to allow applicant to continue selling wholesale power to AEC and "to dissuade AEC from proceeding with its plans to construct [a generating plant and transmission] which applicant considered uneconomical and a wasteful duplication of its existing facilities;" was made in good faith with the encouragement of REA; and was not anticompetitive in intent or motive. Id. at 910.

(3) A 1950 offer to AEC of a rate reduction, after AEC had again taken action to obtain REA funds for the construction of another version of its earlier planned steam plant, "had the distinct purpose of improving the reliability of AEC's electric system," and did not represent "anti-competitive conduct with the clear purpose of maintaining a monopoly in self-generation." Id. at 911.

(4) A 1958 rate reduction to cooperatives and municipals (the so-called "Coosa" reduction) was essentially forced upon applicant as a condition of applicant's receiving licenses to develop hydroelectric projects on the Coosa River, and was not anticompetitive. Id. at 912-13.

With respect to the Coosa rate reduction, we are satisfied with the findings made below. We do, however, take a different view of the three earlier reductions. We believe they were instituted for the purpose of preventing AEC from developing its own generation, and as such were inconsistent with the antitrust laws.

As a preliminary matter, we address the Licensing Board's treatment of the Noerr-Pennington doctrine. That doctrine, established by the Supreme Court in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), essentially renders immune from antitrust liability actions which seek to influence legislatures, courts, and other governmental bodies even though they are undertaken for anticompetitive purposes. A

third case, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), limited the doctrine somewhat by providing that sham attempts to influence official action are not immune.[161/] As the Board below recognized in an order issued during the Phase I hearing,[162/] evidence of conduct designed to influence governmental action can be used for two purposes. First, a party is always free to show that the conduct falls within the sham exception to Noerr-Pennington. Second, according to the principles set out in Pennington footnote 3, a party can use exempt activities as evidence of general anticompetitive intent in order to shed light on nonexempt activities.[163/]

161/ For example, good-faith litigation may be exempt from antitrust liability, but the repetitive filing of frivolous legal claims for the sole purpose of harming a competitor is not. See, e.g. 404 U.S. at 513; Otter Tail, supra, 410 U.S. at 380.

162/ LBP-75-69, 2 NRC 822 (1975).

163/ 381 U.S. at 670 n. 3. The footnote reads as follows:

> "It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transaction under scrutiny.'"

In this case, there is no question that applicant actively used legal and administrative proceedings in attempts to prevent AEC from installing its own generation.[164/] Applicant's opponents argued below that this use of the legal process fell within the sham exception (and thus was itself inconsistent with the antitrust laws), and that, even if such activity is exempt from antitrust liability, the Board should derive from it evidence of applicant's anticompetitive intent. The Board found the activity protected.[165/] It further ruled that "there is no room for application of Pennington footnote 3 regarding the admissibility of immunized transactions to shed light on the 'purpose and character' of nonimmunized transactions, because the challenged litigation was both immunized and itself not anticompetitive under the antitrust laws."[166/]

We can readily agree with the Board's determination that the use the applicant made of administrative and judicial process is protected under Noerr-Pennington. The

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164/ See 5 NRC at 902-08.

165/ Id. at 902-08, 940-41.

166/ Id. at 941 (reference omitted).

Board's handling of Pennington footnote 3 is quite another matter. We read that footnote as plainly allowing the admission of evidence concerning "immunized" transactions where such evidence sheds light on nonimmunized transactions.[167] As applicant itself admitted, protected Noerr-Pennington material may be used "to show purpose or character of other evidence under scrutiny."[168]

We now turn to the matter of applicant's low wholesale rates. The Licensing Board was unable to find that the rate reductions "represented anticompetitive conduct with the clear purpose of maintaining a monopoly in self-generation."[169] We think applicant's otherwise protected use of judicial and administrative proceedings sheds a good deal of light on those rate reductions. It seems clear to us that applicant

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167/ See Schenley Industries, Inc. v. New Jersey Wine and Spirit Wholesalers Ass'n., 272 F. Supp. 872, 886 (D.N.J. 1967), wherein the District Court wrote:

> In a footnote to the Pennington opinion, the Supreme Court did leave open the use of evidence on protected lobbying activity in the manner Schenley proposes, namely, to demonstrate anticompetitive intent.

168/ APCO Reply Brief Below, 286.

169/ 5 NRC at 911.

was strongly opposed to AEC's installation of generation. Nor do we doubt that the institution of low rates could have served to undermine AEC's efforts in this regard. All this added to the timing of the reductions in question (each occurred at a time when AEC was seriously pursuing new self-generation options) leads us to the compelled inference that the reductions were motivated with the intent of discouraging AEC's self-generation.

Interestingly enough, the Board below agreed that a purpose of the 1946 reduction was to prevent AEC from pursuing a proposal to build a 23 MW plant at Gantt. Although the Board found that the 1941 and 1950 reductions were motivated by applicant's desire to lower the number of rates in its rate structure and to improve the reliability of AEC's system (see pp. 91-92, supra), we find the timing of the reductions more than a coincidence. We can agree with the Licensing Board that the applicant's use of the governmental processes available to it was conduct protected under Noerr-Pennington. But the full circumstances surrounding applicant's rate reductions, including its history of legal opposition to

AEC generation, compel the conclusion that the reductions were part of a long campaign to forestall AEC from installing its own generating capacity.

Our only difficulty in reaching this conclusion stemmed from unease at adopting the notion that AEC could suffer a legally cognizable injury from having a low rate offered, not to one of its competitors, but to itself. Unlike the usual situation, where the offended party is helpless in the face of price concessions offered either to its competitors or to its potential customers, AEC here had the power to defuse the applicant's tactic. It simply could have declined to let the opportunity to purchase power at a reduced rate deter it from building its own generating capacity.

The short answer to our concern is that, owing to the applicant's monopoly position, AEC had no practical alternative to accepting the reduced rate and dropping its plans for expansion. Not only its own short term fiscal health -- a critical matter to a business lacking a monopolist's power -- was at stake; but a refusal of the applicant's offer would

have brought down upon it the objections of the REA and others who might point out that the insistence on going ahead appeared to involve an unnecessary duplication of effort.

What we are left with, then, is the conclusion that these lowered rates were the opening salvo in the pattern adhered to through the years in which the applicant sought to forestall AEC from installing its own generating capacity, and to keep AEC as a captive customer -- even at the cost of short-term profit -- rather than allow it to develop as a competitor, thus assuring applicant's long-term health. As already indicated, it might be possible to build on this to find that a great many more instances of anticompetitive conduct fit into this same pattern. We decline, however, to do so, giving due deference to the analysis of the Board below.

One final matter remains. The Licensing Board found, in regard to the 1946 reduction, that applicant was properly motivated by a desire to prevent "uneconomic and wasteful duplication." (5 NRC at 910.) In the first place, we do

not understand why AEC's construction proposal necessarily involved a duplication of applicant's facilities. Applicant has built numerous generating facilities; if its chief concern was duplication, it could have staggered AEC's proposed construction in with its own plans. More important, we do not believe an ostensible desire on the part of a monopolist to avoid "wasteful duplication" constitutes a legitimate defense under the antitrust laws to charges that the monopolist has prevented prospective competitors from entering a market. The argument that it does is merely another version of the regulated industry defense we addressed earlier (see pp. 14-21, supra). An electric utility may prefer to avoid competition, but it cannot accomplish this goal through anticompetitive means.[170/]

2. Denial of Ownership Access to Farley

a. The other count on which the record compels us to disagree with the Licensing Board involves the applicant's alleged denial of ownership access to the Farley units. The Board below declined to find that the applicant had denied

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170/ See also Davis-Besse, supra, 10 NRC at 323-27.

such access to AEC. According to that Board, there was no "hard evidence substantiating" such a charge; that on the contrary Mr. Farley, applicant's President, "made it quite clear in his testimony before the Board that Applicant does not take the position that it would not sell ownership." 5 NRC at 929.

With all due deference to the Licensing Board, we construe the record differently. Our assessment of all the surrounding evidence persuades us that although the applicant never explicitly stated it was absolutely rejecting the possibility of selling an ownership share in Farley to AEC, it fully intended not to make such a sale unless forced to do so.

From at least 1969, it was applicant's policy to maintain sole ownership in the Farley plant. This was made clear in an internal confidential memorandum of the company circulated among the officers and attorneys representating it in negotiations with AEC.[171/] That memorandum stated in unequivocal language: "The company is unalterably opposed to potential demand from one of more distribution cooperatives,

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171/ D.J. 6040; Vogtle, Cross, Tr. 23,135.

or from AEC, for part ownership in the SEALA nuclear plant."[172/] This policy remained essentially unchanged over the years.[173/] Thus, it is not surprising to find that even though AEC expressed interest in acquiring a share in the Farley plant as early as 1971,[174/] some two years later applicant was still

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172/ D.X. 6040, p.4. "SEALA" was the earlier name for the Farley plant.

173/ On April 6, 1971, shortly after AEC expressed an interest for joint ownership of the plant, the applicant filed Amendment No. 13 to the license application for construction of the Farley units. The amendment stated: "The plant is planned to be wholly owned by Alabama Power Company and is not planned for construction or operation as a joint venture with any other entity." See Justice Brief, 79. In this regard, James H. Miller, Jr., a senior vice-president of Alabama Power who participated in various negotiations and discussions with AEC concerning interconnections and joint ownership participation in Farley, testified:

> CHAIRMAN GLASER: Mr. Miller, the company has never been in favor of a joint ownership arrangement with AEC to your knowledge; has it?
>
> THE WITNESS: Not to my knowledge, no, sir.

Miller, Tr. 21,476.

174/ Letter from AEC to Mr. Farley dated April 27, 1973. App. Exh. BMG-21.

arguing for the sale of unit power.[175] To be sure, applicant's representatives met with AEC on repeated occasions to discuss the subject of access to Farley power,[176] but the meetings did not progress much beyond the exploratory stage. During this period, the applicant's main efforts were directed not so much towards seeking an acceptable

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175/ As late as November 26, 1973, AEC's overtures toward acquiring an ownership interest in the Farley plant were being met by a recitation of claimed barriers against any kind of joint ownership arrangement. AEC Exh. 32. It is significant that the existence of problems claimed to be serious obstacles to joint ownership of the Farley plant were not raised until some two years after AEC's expression of interest in the plant. In 1974, the applicant was still resisting the sale of a share in Farley to AEC. On October 29 of that year, applicant's counsel Mr. Balch wrote to AEC's counsel Mr. Boskey outlining the applicant's understanding of the positions of the parties expressed at a meeting which had been held earlier among representatives of both organizations. In that letter, applicant's counsel continued to urge that "the most fruitful approach to this matter from Alabama Power's point of view is to consider a unit power approach which avoids the complex problems which would arise from any attempt at this time to restructure the ownership of the Farley units." App. Exh. 173 at pp. 11-12. Earlier, on August 16, 1973, Mr. Farley had written to AEC urging that it purchase "power from a mix of the company's generation under applicable rate schedules and, thereby, in effect, have access to the Farley plant." The letter went on to indicate that, inasmuch as AEC indicated a desire to participate specifically in Farley, the applicant invited discussions to explore the possibility of unit power purchase by AEC. AEC Exh. 30.

176/ 5 NRC at 929.

agreement on the joint ownership of the plant but in getting AEC to agree to the purchase of wholesale or unit power. The result was that when these hearings began in late 1974, the parties were far from reaching agreement on joint ownership of Farley, even in principle.[177/] The effect of applicant's actions was to deny AEC reasonable access to Farley.

In holding that the applicant acted to deny AEC an ownership in the plant, we have fully considered the testimony of Mr. Farley. But unlike the Board below, we find in it no support for the proposition that the applicant did not have a position against selling an ownership share in the plant. Rather, we find it to point forcefully the other way.

For its conclusion that the applicant had no position against selling an ownership interest in Farley to AEC, the

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177/ By late 1974, the parties had not yet reached the stage of negotiating over firm proposals. On June 20, 1974, AEC wrote to Mr. Farley to raise several matters including the desire for a meeting to resume discussion on a joint ownership arrangement for the Farley plant. AEC Exh. 35. Mr. Vogtle responded for the applicant. On the subject of joint ownership, the response was no more than a bland invitation to discuss the matter at the next meeting with the request that AEC "furnish any definitive proposal to the Company for review" before the next meeting. AEC Exh. 36. By October of that year the applicant was continuing in its pursuit of a unit power arrangement with AEC. See fn. 175, supra.

Board below relied on two statements made by Mr. Farley at the hearing. On one occasion, Mr. Farley was asked whether his company was willing to provide the municipalities and AEC access to Farley units by means of ownership participation. Mr. Farley's response was:

> The matter as to ownership has been discussed with representatives of the cooperatives and to a certain extent, the municipals, and the company is in this position, that we have not taken the position that we would not sell ownership.178/

Later in the hearing, Mr. Farley was again asked about the request of AEC for an ownership share of the Farley plant. In response to this question by a Licensing Board member, the following transpired:

> [MR. FARLEY]: We have been in negotiations with the Cooperative in ways that have certainly been explored here in this hearing heretofore. I don't consider the sale of the company's property or ownership in the plant or something of that nature quite in the same light that I do the offering of the utility service or utility coordination. We have not, obviously, reached agreement with the cooperative on the sale of a portion of the plant but it is not inconceivable that we might.

178/ Farley, Cross, 19,185.

MR. MILLER: What does that mean, Mr. Farley?

THE WITNESS: It means, sir, that as of this point in time, as I have answered questions heretofore, Mr. Miller, that we don't have a policy that we would not sell a portion of a plant because we may. We think it's got all kinds of problems with it. 179/

True enough, one could read these statements to convey the thought that the applicant has no position against the sale of an ownership interest in the plant. 180/ But to succumb to this would be to be misled by the applicant's judicious phrasing of its answers in the double negative. That tactic cannot obscure the fact that the company has steadfastly avoided indicating directly that it would share ownership. When other testimony of Mr. Farley is considered, it clearly appears that the applicant did not intend to sell. This becomes even more patent when Mr. Farley's statements are viewed alongside the company's dealings with AEC after the time in 1971 when AEC expressed interest in acquiring an ownership interest in the plant.

179/ Farley, Cross, 20,599.

180/ At another instance during the hearing, Mr. Farley was asked about the company's policy toward joint ownership of the plant with others. To this, Mr. Farley's reply was that "there just simply isn't a policy on it." Farley, Cross, 19,198-99. We find this answer inconsistent with the 1969 policy statement and the action subsequently taken by the applicant.

The crucial testimony came after the exchanges relied on by the Licensing Board. Mr. Farley was asked by counsel for the Department of Justice whether the applicant was willing to offer ownership participation in the Farley plant to AEC. Mr. Farley responded:

> I find it difficult to answer the question yes or no . . . .

When asked by the Licensing Board Chairman for an explanation, Mr. Farley replied:

> If this Board were to impose a license condition which were to be upheld that the Company should sell an interest in the nuclear plant, then we'll sell an interest in the nuclear plant. 181/

Thus, when pressed on the point of the applicant's willingness to enter into a joint ownership agreement with AEC, Mr. Farley's testimony was that the company would do so -- but only under compulsion by this agency. Stated in more direct terms, Mr. Farley was saying in effect that the applicant had no intention of voluntarily entering into an arrangement with AEC for joint ownership of the plant.

Mr. Farley's last statement is even more revealing when considered in the context of the 1969 statement in which the

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181/ Farley, Cross, 27,949-50.

policy of the company is expressed as being "unalterably opposed to sharing in the ownership of the plant with AEC or with any one or more of the cooperatives."[182/] Viewed in that light, it becomes clear that the company had a position: to resist to the last selling an ownership share of the plant to AEC.[183/]

b. Our inquiry does not end here. The next step we must take is to determine whether applicant's conduct respecting its refusal to sell an ownership interest in the Farley plant constituted anticompetitive action. For the reasons which follow, we hold that it does.

182/ See pp. 101-102, supra.

183/ The question of whether applicant denied MEUA ownership access is a much closer one. Nothing in the record indicates that applicant would have viewed an ownership request from MEUA more favorably than that from AEC. On the other hand, after reviewing the testimony of Mr. St. John carefully, it seems clear to us that MEUA did not pursue ownership access as actively as did AEC. See Tr. 4547-98. We are particularly concerned with the timing of MEUA's request, which appears to have come well after this proceeding got under way. Tr. 4551-4580.

We believe resolution of this matter is unnecessary to our disposition of the case. We can assume that if a timely request was made, it would have been rejected. The key issue remains whether MEUA is entitled to ownership access. We discuss that point later (see pp. 159-163, infra).

In Part IV of our decision, we found that the applicant possessed monopoly power in the wholesale and retail markets for electricity in central and south Alabama and in the coordination services market in that area. Being possessed of monopoly power, the applicant is precluded by Section 2 of the Sherman Act from willfully using it to preserve or extend its monopoly, to foreclose actual or potential competition, to gain competitive advantage or to destroy competitors. Moreover, it is not only full-fledged violations of the antitrust laws that are of concern in these licensing proceedings. Section 105c of the Atomic Energy Act, which governs the proceeding here, condemns as well conduct which runs counter to the policies underlying those laws.[184/]

Viewed against these limitations on permissible conduct by one who is a monopolist, we have no hesitancy in concluding that the applicant's actions in denying AEC a joint ownership share in Farley constituted anticompetitive behavior. The evidence leaves no doubt in our minds that the actions of the applicant in this regard were deliberately

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184/ Midland, supra, 6 NRC at 1019; see pp. 26-29, supra.

directed toward avoiding sharing in the ownership of the plant for fear that granting AEC an ownership interest in the plant would lead to erosion of the applicant's wholesale and retail business. As candidly put by Mr. J. H. Miller, Jr., applicant's senior vice-president:

> Should intervenors be allowed to acquire a portion of the Farley Nuclear Plant, extending the utilization of subsidized financing, it could bring about an inherently unfair competitive position between them on the one hand and Alabama Power on the other. It could, in fact, in the long-term place Alabama Power's competitive position in jeopardy to such a point that Alabama Power would no longer be viable.

Miller, Direct, 150.[185/]

185/ The testimony of Mr. Farley was to the same effect:

> Q. [Mr. Leckie, Justice Counsel]: You were concerned, though, in the time period 1969 to 1971 with the possibility that your wholesale business might be eroded if you were to sell a share of the Farley Unit to Alabama Electric and/or to the municipal systems?
>
> A. [By Mr. Farley]. We were concerned that the differentials through these facts and financing costs might cause a problem, yes, sir.
>
> Q. Were you concerned with a possible erosion of retail business at that time?
>
> A. Yes, sir, because all along has been the concept in Alabama Electric Cooperative's request that we wheel for them where ever they want. And that would include retail. That thread has been through many of our discussions and negotiations and that remained then and it remains now.

(FOOTNOTE CONTINUED ON NEXT PAGE)

Although the possible future loss of business is undoubtedly of legitimate concern to any business enterprise, it cannot be used by a monopolist to justify conduct designed to preserve or enhance its dominant position in the competitive market. At the very least, if not a violation of the antitrust laws, such conduct runs counter to the policies underlying those laws.

That observation unquestionably applies to the situation here. Applicant's 1969 policy statement and the testimony of its two senior officers leave no doubt as to the company's short and long-range objectives in refusing to share in the

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185/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

CHAIRMAN GLASER: In fact, hasn't it been the case that the company's been concerned about Alabama Electric Cooperative taking away Alabama Power Company's customers since the inception of the cooperative?

THE WITNESS: Well, sir, I wouldn't say, Mr. Chairman, since the inception of it because this didn't really get to be, well, several years -- in the early days of its -- in the late '40's, perhaps, would be a better time. I think the cooperative was organized about '41 or '42, or something like that and it was some years after that before the west --

CHAIRMAN GLASER: In any event, for the last 20 years the company has been concerned about it?

THE WITNESS: Yes, sir.

Farley, cross, 20,802-04.

ownership of Farley: the preservation of its dominant power in the wholesale and retail markets for electricity in central and south Alabama. That objective, as we have seen, is one that is condemned by Section 105c and the antitrust laws referred to therein. This being so, it follows that action undertaken by the applicant toward that end is no less unacceptable under the law.

B. MEUA's Appeal

MEUA was denied a remedy below because the Board found that there was no "significant actual or prospective competition between [MEUA and applicant] at the retail distribution level." 5 NRC at 961.[186/] Implicit in this denial was the Board's view that MEUA was also not a competitor in the wholesale market.[187/] MEUA's appeal is thus essentially double-barreled; it contends both that the rejection of the retail market was incorrect and that it was wrongfully excluded from the wholesale market.

As we explained earlier (see pp. 54-73, supra), we disagree with the Licensing Board's rejection of the retail market.

186/ In the ensuing discussion, the term MEUA refers to both the organization collectively and its members singularly.

187/ See 5 NRC at 1484 n. 5.

Before we analyze the effect of this finding on MEUA's case, we turn to the claim that the Licensing Board erroneously excluded MEUA from the wholesale market.

1. Wholesale Market. Although the Licensing Board determined that there was a relevant wholesale market in central and southern Alabama, it excluded MEUA from the remedial hearing on the grounds that MEUA was not an actual or potential competitor in the market.[188/] MEUA, Justice and staff dispute this ruling, arguing on appeal that the municipals are potential competitors. They argue that this is true because the municipals are on the edge of the market, that applicant's activities in the past have discouraged their entrance, and that such entrance is feasible if the municipals are granted a share of the Farley facility.[189/] MEUA relies on a second string to its bow. In the alternative, it argues that its members are currently in competition in the wholesale market. We deal with this latter argument first.

188/ Ibid.

189/ MEUA Brief, 22-41; Justice Brief, 54-61; Staff Brief, 23-26, 40-42.

a. MEUA advances two bases on which it would have us find that it is presently in actual competition in the wholesale market. It first notes that although it now does not engage in selling power at wholesale, one of its members, Riviera Utilities,[190/] at one time provided wholesale service in Baldwin County. It then claims that Riviera was forced out by applicant's anticompetitive conduct. To prevent the applicant from benefiting from its wrongdoing, MEUA's argument is that we should look upon the market in terms of the situation existing at the time Riviera engaged in wholesale service and not the present. Secondly, MEUA argues that its decision to purchase wholesale power instead of supplying its own needs through self generation is a form of present wholesale competition.

We need not devote much attention to the argument that the exercise of a decision to "make-or-buy" is an indication that actual competition for the sale of wholesale power exists. All MEUA's decision to buy tells us on the record of this case is that it is a wholesale customer of the applicant. Without any generating capacity of its own, we simply do not believe that MEUA as a buyer of electricity at wholesale is in actual competition with a selling entity.

190/ Riviera Utilities is the name of the municipally-owned utility in the town of Foley.

The question of MEUA's past role in the market is a more complicated matter. Although Riviera Utilities lost its last wholesale customers during the course of the proceeding below,[191] there is no dispute that Riviera at one time provided wholesale service to other retailing entities. Indeed, in its description of wholesale competition, the Licensing Board included references to competition between Riviera and applicant.[192] Nonetheless, the Board excluded MEUA from the market without explanation.

Although the Licensing Board did not deal directly with Riviera's role in the wholesale market, it did limit sellers in the market to "those entities generating and providing bulk electric power to distribution entities." 5 NRC at 890. Riviera, it should be pointed out, was not a generating entity. MEUA challenges any suggestion that generation is a precondition to being in the market; it claims the market should include all entities selling bulk power to distribution systems.[193] The fact that Riviera no longer sells power at wholesale, we

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191/ MEUA Brief, 25; 5 NRC at 828.

192/ 5 NRC at 895, citing, inter alia, St. John, Direct, 10-14; DJX 4298, 4301, 4308-4311; Tr. 23,477-23,487.

193/ MEUA Brief, 24.

are told, is not relevant; if Riviera is excluded from the market, "any monopolist would be immune from antitrust liability upon accomplishing destruction of its rival."[194/]

We can agree with MEUA up to a point. Theoretically, ownership of generation need not be a prerequisite to entrance in the wholesale market. And certainly any destruction of a competitor is a fact we could hardly ignore. But our assessment of the record simply does not comport with that of MEUA.

The town of Foley acquired Riviera Utilities in 1941.[195/] Riviera at the time had three wholesale customers in south Baldwin County: the towns of Robertsdale and Fairhope, and the Baldwin County Electric Membership Cooperative. It supplied its wholesale and retail power requirements, in 1941 and at all times afterwards, through wholesale purchases from applicant. Eventually, all of Riviera's wholesale customers decided to take service from applicant instead.

Although MEUA would have us believe that applicant was responsible for Riviera's loss of its wholesale customers, the record indicates otherwise. We find that Foley's role

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194/ Id. at 26.

195/ APCO Reply Brief, 45.

was purely that of a middleman; it purchased power from one party and sold it at a markup to another. Its wholesale customers were prevented by contractual barrier from dealing with applicant directly; when the barriers were removed, the customers elected to receive their power from applicant. In this regard, it should be noted that applicant charges uniform wholesale rates throughout the state; it did not lower its rates to attract the new business. Applicant further claims[196/] -- and the record does not indicate otherwise -- that it received no additional revenue from its new customers; it simply sold the same amount of power at the same price without going through a middleman. When questioned about the loss of Riviera's wholesale customers, Mr. St. John was unable to point to any conduct on applicant's part in taking over service to Riviera's customers that could be considered wrongful.[197/] Nor did he indicate that Riviera sought cheaper sources of bulk power elsewhere (if any were in fact available). In these circumstances, we are simply unwilling to say that applicant contributed to the destruction of its wholesale rival. Common sense would seem to

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196/ APCO Reply Brief, 46 n. 312.

197/ See Tr. 3683-94.

indicate that a wholesale supplier that does nothing more than buy power from one supplier and sell it at a higher price to distributors will be unable to remain in existence if their customers can deal directly with the supplier.[198] Riviera having lost its customers through operation of market forces, we find no basis for faulting the applicant in this regard. This being so, whatever the competitive situation may have been when Riviera was a seller of wholesale power, the fact is that MEUA is not now an actual competitor in the wholesale market.

b. As mentioned earlier, Justice, NRC Staff, and MEUA all argue that MEUA is a potential competitor in the wholesale market. Our attention is directed to any number of court decisions dealing with potential competition as it affects mergers under Section 7 of the Clayton Act.[199]

198/ In this connection, see New England Power Co. v. Federal Power Commission, 349 F.2d 258, 260 (1st Cir. 1965), wherein the F.P.C. noted that the prevailing industry practice was for the middleman to be eliminated and that the Commission could see no reason why the middleman in the case should not be eliminated.

199/ E.g., United States v. Marine Bancorporation, 418 U.S. 602 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); Federal Trade Commission v. Proctor & Gamble Co., 386 U.S. 568 (1967); United States v. Penn-Olin Chemical Co. 378 U.S. 158 (1964); and United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

Applicant questions the propriety of relying on merger cases to determine whether MEUA's members are potential competitors at the wholesale level.[200/] We need not decide this issue, for we do not believe MEUA qualifies as a potential entrant even under the principles enunciated in the cases it cites.

The reasoning for our rejection of the notion that MEUA is a potential entrant to the wholesale market is founded upon our assessment of its ability to enter the market. We accept, for the purposes of argument, MEUA's contentions that it is eager to enter the market, that it is in a similar line of commerce, that actual penetration of the market is unnecessary, and that MEUA is the most likely new entrant.[201/] Nonetheless, we read the cases as requiring a showing that MEUA is either (1) capable of entering the market on its own, or (2) currently influencing competitive conditions in the market. MEUA has not made either showing.

A look at the cases helps illuminate the nature of these requirements. In Marine Bancorporation,[202/] the acquisition of a Spokane, Washington bank by a Seattle bank seeking to

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200/ APCO Reply Brief, 48 n. 322.

201/ See MEUA Brief, 31-41.

202/ See fn. 199, supra.

penetrate the Spokane market was allowed; the Supreme Court found that the purchase did not eliminate the Seattle bank as a potential competitor in the Spokane market because the bank lacked other feasible means of entering the market. The Court thus allowed the acquisition to take place. 438 U.S. at 632-639.

In Falstaff,[203/] the Supreme Court reversed and remanded a decision approving a national brewery's purchase of a New England brewery. The District Court found conclusive the testimony of witnesses for the acquiring firm indicating that it would not have entered the New England market by any other means. The Supreme Court thought otherwise:

> The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market . . . . [I]f it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under §7. The District Court should therefore have appraised the economic facts about Falstaff and the New England market in

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203/ Ibid.

> order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.

410 U.S. at 533-534.

In Procter & Gamble,[204/] the acquisition of a bleach manufacturer by a company specializing in household products was disallowed. The Supreme Court found, inter alia, that the acquisition would eliminate the acquiring company as a potential competitor in the market for bleach. There was no evidence indicating that the acquiring company intended to enter the bleach market de novo; however, the Court found it to be a potential competitor on the ground that de novo entry was feasible and that the threat of de novo entry exerted "considerable influence on the market." 386 U.S. at 580-581.

In the two other cases relied upon by MEUA, Penn-Olin and El Paso,[205/] the potential competitors were substantial forces. In Penn-Olin, the court found both merging companies capable of entering the market independently and noted that

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204/ Ibid.

205/ Ibid.

even if only one company entered the market, the other could have exerted a procompetitive influence by virtue of its position on the edge of the market. 378 U.S. at 173-176. In El Paso, the acquired company (Pacific Northwest) was found to have the capability to enter the California market and to have been "a substantial factor in the California market" through its attempts to enter the market. 376 U.S. at 658-661.

All these cases have a common thread: in each case the test for determining whether a company would be considered by the Court to be a potential competitor in a relevant market involved whether it had a present capability of entering that market or was reasonably viewed by others in the market as having the capability of entering it at any time it desired.

In the case at bar, MEUA seeks to establish its capability of entering the market through rather curious, indeed circular, reasoning. MEUA in the past has forsaken generation because of the costs involved.[206/] In this regard, the Board below found that the municipality of Dothan had not seriously considered installing generation (5 NRC at 930-31); we agree with this finding. No solid evidence was shown to indicate

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206/ Tr. 3635; 27,029-30.

that MEUA is considering building its own generation in the near future; the best that could be said for MEUA's members is that they might possibly be interested in installing peak-sharing units.[207] Nor did MEUA identify any other potential bulk power supplier it has considered dealing with in order to reduce its dependence on applicant's generation. MEUA's potential entrance in the market seems instead to hinge on access to Farley. If it is allowed to purchase a share of the plant, we are told, MEUA will be able to compete at wholesale with applicant.[208] In fact, MEUA's counsel admitted at the Phase II hearing that access to Farley is "a sine qua non of it being likely or feasible for [MEUA] going into the wholesale market." Tr. 27,022.

Like the Licensing Board, we are left unmoved by this reasoning. The ultimate issue in this case is whether this agency should mandate that applicant accord intervenors access to the Farley facility. In terms of potential competition, we believe MEUA's capability to enter the market must be assessed

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207/ See Tr. 3878-3888, 3907-3909. At the time of the hearing below, it appeared that MEUA had made no real studies addressing the installation of peak-sharing generation. Tr. 3907.

208/ MEUA Brief, 30-31.

without regard to the Farley facility.[209] And the record indicates that, without access to Farley, MEUA does not have the capability to enter the wholesale market. We simply can not accept MEUA's argument that if it is granted access to Farley, it could compete in the wholesale market -- and that therefore it is a potential competitor in the market and is entitled to such access.

Nor can MEUA claim recognition as a potential competitor in the market for wholesale power on the basis of the second test -- that it is currently influencing competitive conditions in the market. MEUA contends that applicant was aware of the municipal systems' desires to install generation and reacted to this desire by pursuing a course of anticompetitive conduct.[210] According to MEUA's argument, the applicant inserted anticompetitive conditions into its wholesale contracts in order to prevent AEC and MEUA from installing generating units. But the Licensing Board found no evidence to support

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209/ In this regard, it is useful to explore what MEUA's role in the market would have been if the Farley facility were never built. MEUA's counsel was questioned about this at the Phase II hearing; while his response was necessarily speculative, it is certainly clear that MEUA's entrance into the market would have been far more difficult than that of the potential competitors in the cases it cites. See Tr. 27,030-27,033.

210/ MEUA Brief, 32.

this charge. (5 NRC at 932). Applicant may have been aware of MEUA's desire to enter the market and that MEUA would encounter difficulties in installing generation,[211] but it does not necessarily follow that applicant's conduct was dictated thereby. If a company does not possess the capability to enter a market, it must be assumed, absent evidence to the contrary, that its activities or even its presence do not affect competitive conditions in the market.[212] Given these circumstances, we cannot conclude that MEUA exerted an appreciable influence on the wholesale market.[213]

2. Retail Market. Because the Licensing Board found the retail market not to be a relevant one, it did not address the competitive situation at retail between MEUA and applicant. Before the question of remedy for MEUA can be addressed, we must first examine this retail situation and how it has been affected (if at all) by applicant's past conduct.

211/ MEUA Brief, 29.

212/ Marine Bancorporation, supra, 418 U.S. at 639-640.

213/ We note here that our finding that MEUA is not likely to install its own generating capacity in the future, coupled with the fact that its members have produced no power in the recent past, lead us to the conclusion that MEUA should not be considered a participant in the market for coordination services in central and southern Alabama. Nothing we have seen in the record below changes our view that non-generating utilities have no appreciable role to play in that market. See fn. 82, supra.

a. MEUA is composed of the municipal systems of the following 12 cities: Alexander City, Dothan, Fairhope, Foley, LaFayette, Lanett, Luverne, Opelika, Piedmont, Sylacauga, Troy, and Tuskegee. All twelve purchase the bulk of their power supply from applicant; eleven receive additional power from SEPA.[214/] 5 NRC at 827-828.

Mr. H. Sewell St. John, Sr., the Secretary-Treasurer of MEUA, testified below at great length on the nature of retail competition in central and southern Alabama. His testimony indicated that there is some head-to-head competition, usually for large new loads, between applicant and at least five members of MEUA.[215/] This competition has been limited in part by the existence of territorial agreements between applicant and all five of the municipal systems, but it nonetheless must be reckoned with.

While Mr. St. John was able to show that competition between applicant and MEUA exists, neither he nor any other witness was able to identify any harm that a municipal system

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214/ The City of Troy purchases no SEPA power; it acquires all its power from applicant. 5 NRC at 828.

215/ See Tr. 2894 et. seq. (Opelika); Tr. 2928 et. seq. (Alexander City); Tr. 2996 et seq. (Sylacauga); Tr. 3059 et seq. (Piedmont); and Tr. 3512 et. seq. (Dothan).

had suffered because of applicant's assertedly anticompetitive conduct. This is not to say that applicant has never acted in a manner inconsistent with the antitrust laws in its dealings with the municipals; the Board below found (and we agree) that applicant's wholesale contracts with the municipal distributors on their face would discourage the latter from installing their own generation and transmission and from dealing with alternative bulk power suppliers. But we are simply unconvinced that these contractual provisions had any effect on the municipal's retail business.

In the first place, no evidence was presented to indicate that the municipals were either seriously interested in or capable of building their own generating plants or seeking out other bulk power supplies.[216/] It can by no means be taken as a given that, at a time when applicant's wholesale rates were concededly low and economies of scale were allowing the construction of larger and more efficient units, isolated municipalities would have chosen to enter the generating

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216/ We find instructive the examples referred to by MEUA in its brief as illustrative of applicant's success in discouraging the municipals and AEC from developing alternate sources of bulk power. With the exception of applicant's alleged refusal to coordinate with Dothan (see fn. 217, infra), all relate to situations involving applicant's dealings with the cooperatives instead of with the municipalities. See MEUA Brief, 56-77.

field.[217] Nor can we assume, without supporting evidence, that the municipalities would have looked elsewhere for power. As Mr. St. John pointed out (St. John, Direct, 17), even with access to applicant's transmission lines the number of wholesale suppliers the municipals could have feasibly dealt with was limited. We are never told who these potential suppliers were, what their wholesale rates were, or whether they actually had power available. Nor was our attention pointed to an instance where a municipal system investigated the possibility of using applicant's transmission to buy elsewhere.

The second basis for our belief that the municipals were not harmed by any of applicant's anticompetitive practices stems from the municipals' past success in the retail market. The last municipally-owned system taken over by the applicant was that of the town of Headland more than forty years ago. Tr. 2797. And in those towns where Mr. St. John described retail competition between applicant and

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217/ As far as the record shows, only one municipal, Dothan, considered installing its own generation. The Licensing Board found that there was little evidence presented on this issue (5 NRC at 930-31); we agree. As best as we can tell, Dothan commissioned a study to investigate alternative methods of acquiring bulk power and the study recommended that Dothan continue to purchase power from applicant. See App.X 9 The consultants who performed the study did not explain their decision in their report and they were not called to testify. As for the other municipals, Mr. St. John stated that they never reached the stage of spending money on engineering studies because they did not believe they could generate power as cheaply as they could purchase it. Tr. 3,635.

municipals, the municipals seem to be holding their own.[218] Mr. St. John admitted that the municipals have been profitable, and that applicant has not prevented them from subsisting as viable business entities.[219] Our own review of Mr. St. John's testimony leaves us unconvinced that applicant has even attempted to suppress the municipals, much less succeeded in doing so.

b. MEUA makes one other argument in connection with the retail market. It contends at great length that, since the early 1970s, its members have been subject to a price squeeze rendering them incapable of competing for new industrial loads.[220] It asserts that since that time the

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218/ See, e.g., Tr. 2906-07 (Opelika successfully competed for a shopping center); Tr. 3043-44 (although applicant has a franchise to compete for loads of more than 100 kva in Sylacauga, the municipal system serves all such loads); Tr. 3512 (Dothan served industrial customer outside its contractually-assigned areas).

219/ Tr. 4079-4081. Our point here is not that the applicant lacked the economic power to drive the municipals under, but that the record before us does not show that it attempted to do so. Compare Midland, supra, 6 NRC at 1018-19.

220/ See MEUA Brief, 89-108; MEUA Proposed Findings Below, 52-89. As defined by the Licensing Board (5 NRC at 937):

> A price squeeze involves the economic behavior of a vertically integrated firm viz a viz [a] rival who is not similarly integrated. If a manufacturer both marketed its

(FOOTNOTE CONTINUED ON NEXT PAGE)

applicant has charged MEUA excessively high rates for the wholesale power it purchases.

The Licensing Board rejected the price squeeze argument. It noted that a price squeeze was not apparent on the evidence presented by MEUA. The Licensing Board also saw "no evidence that MEUA members are anything but financially viable." 5 NRC at 939. In addition, it found other evidence in the record which weakened, if not vitiated, the validity of the charge. Moreover, it found that even if a squeeze had existed as charged, it was not of sufficient significance for purposes of Section 105c of the Act.

We agree with the Licensing Board's handling of the price squeeze issue. In the first place, we cannot accept the definition urged upon us by MEUA that a price squeeze occurs whenever "a retailer cannot purchase at a wholesale rate sufficiently low to enable it to compete . . . [at retail with its wholesale supplier] and produce a positive margin sufficiently high to

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220/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

product through its own distribution channel and sold to independent distributors as well, the manufacturer would be engaging in a single price squeeze if it unduly raised the wholesale price to the independent distributors who competed with the manufacturer at retail. A double price squeeze occurs if, in addition to the tactic just mentioned, the vertically integrated manufacturer unduly lowered the retail price of the product in its own outlets as well.

cover the costs."[221/] This definition purportedly reflects the reasoning applied in the landmark Alcoa case.[222/] But we do not believe that case established such a protectionist standard.[223/] The correct focus of a price squeeze, as the Board below found, is on the pricing policies of the integrated firm. In this case, the crucial factor is whether applicant's wholesale and retail prices adequately reflect production costs.[224/] The Board below found no evidence that applicant's retail rates have been kept unjustifiably low,[225/] and nothing alluded to in MEUA's brief convinces us that applicant's wholesale rates are set unfairly high.

221/ MEUA Brief, 92.

222/ United States v. Aluminum Company of America, 148 F.2d 416, 436-438 (2d Cir. 1945).

223/ While Judge Learned Hand never explicitly delineated the elements of a price squeeze in Alcoa, he did find that the defendant's price for the raw material was higher than a "fair price." Id. at 437.

224/ 5 NRC at 937 n. 265.

225/ Id. at 939.

Beyond the question of whether a price squeeze has in fact occurred, we think it important to reiterate the Licensing Board's view of the consideration that can be given to evidence of a price squeeze in an NRC antitrust proceeding. We are not empowered to establish wholesale rates; that function resides in the FERC. We are interested in evidence of a price squeeze only insofar as it sheds light on the "intent and purpose of Applicant in its competitive relationship with other parties."[226/] For the reasons set forth by the Licensing Board, we do not believe MEUA has met its burden in advancing this contention; the evidence does not establish that applicant has set its retail and wholesale rates at levels designed to prevent MEUA from competing for industrial customers.

With our assessment of the factual record made below now complete, we turn to the question of remedy.

226/ 5 NRC at 940.

VI.

REMEDY

In the proceeding below, the Licensing Board -- finding five instances of anticompetitive action by the applicant and invoking several "public interest" considerations -- ordered the imposition of a number of conditions on the licenses which may be issued to the applicant for the two units of the Farley Nuclear Plant. The principal conditions required the applicant (1) to provide AEC with access to the Farley plant in the form of unit power; (2) to provide transmission services to enable AEC to make effective use of that power; and (3) to provide AEC with backup bulk power to cover those situations when Farley is down for maintenance or other causes. 5 NRC at 1501-09. The Board below considered the conditions warranted upon a "weighing and evaluating [of] the various antitrust and other public interest concerns." Id. at 1501-02.

These conditions extended benefits only to AEC. The Licensing Board ruled that MEUA was not entitled to relief because "there was no significant actual or prospective competition between Applicant and [MEUA] at the retail distribution level, nor other conduct of Applicant toward MEUA or

its members which was inconsistent with the antitrust laws within the meaning of Section 105c of the Atomic Energy Act." 5 NRC at 1484. A grant to MEUA of access to Farley under those conditions, according to the Board, "might be considered an unwarranted attempt to restructure the electric power industry at the retail level, rather than fulfilling the statutory mandate of antitrust review under Section 105c." Ibid.

All the parties object. The applicant's basic position is that no remedy in the form of license conditions is warranted by the Licensing Board's findings. If license conditions are nonetheless found necessary, we are told, the sale of wholesale power rather than unit power would be more appropriate.[227/] On the other hand, the remaining parties argue that the remedy does not go far enough. For various asserted reasons, each of these parties claims that the Licensing Board erred in not ordering more extensive relief -- generally ownership access to the Farley plant and greater access to APCO's transmission facilities. Their thesis is that, on the facts of this case, a stronger remedy than that imposed by the Licensing Board is mandated by the Atomic Energy Act and applicable principles of antitrust law.

227/ APCO Brief, 82-89.

A. Remedial Standards Under Section 105c

In view of our findings that the applicant engaged in anticompetitive conduct beyond that which the Board below attributed to it, we need not decide whether the license conditions imposed by the Licensing Board constituted a remedy appropriate to the limited "liability" findings it made. Our finding that the applicant's refusal to grant AEC ownership access to Farley constituted anticompetitive action, along with the other determinations made by us in Parts III, IV, and V, supra, have significantly changed the dimensions of the "situation inconsistent" which must be considered in determining the remedy. The decision that is called for on our part, therefore, is not so much a determination of whether the relief ordered by the Licensing Board should be upheld, but rather what remedy we believe to be appropriate in light of the "situation inconsistent" as we find it.

This brings us to the question of the standard to be applied in determining the license conditions for the plant. The applicant argues that "an antitrust tribunal, given a choice of remedies addressed to anticompetitive conduct, should choose the least onerous adequate remedy available."[228/]

228/ Id. at 84.

It goes on to say that "[i]n the context of Section 105c(6) of the Act, the 'adequacy' of a particular remedy depends upon two principal factors: (1) on a case-by-case basis, whether the remedy neutralizes the impact of the licensed facility upon the competitive situation in a particular market in light of the affirmative findings under Section 105c(5) and detailed evidence of the existing competitive situation in that market; and (2) whether the remedy selected has a nexus to the Applicant's activities under the license."[229/] Implicitly, the applicant is telling us that the Commission's remedial antitrust authority is a narrow one, extending only to the neutralization of whatever competitive advantage the licensed facility may add to the preexisting competitive situation and limited to the activities under the license.

The other parties have a far more expansive view of the Commission's remedial authority. They suggest in varying ways that the Commission has the authority to impose any license conditions it deems necessary to cure or eliminate the situation found inconsistent.[230/]

229/ Id. at 85 (footnotes omitted).

230/ Staff Brief, 32-35; Justice Brief, 9-16; AEC Brief, 41; MEUA Brief, 126.

We find the applicant's view of the Commission's antitrust remedial authority unduly restrictive. It cannot be sustained by the language of Section 105c of the Act; nor is it supported by the legislative history of that provision.

In both Midland[231/] and Davis-Besse,[232/] we had occasion to consider the scope of the Commission's remedial authority under Section 105c.[233/] In the latter case, we were confronted

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231/ 6 NRC at 1094-1100.

232/ 10 NRC at 282-94.

233/ The pertinent paragraphs of Section 105c are (5) and (6). They read:

> (5) Promptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register. Where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a.

(FOOTNOTE CONTINUED ON NEXT PAGE)

with the argument, like the nexus argument of the applicant here, that the Commission may only grant relief that would govern activities under the license. We disposed of that argument with the following answer:

> To begin with, the limiting phrase "activities under the license" is not in Section 105c(6) which governs the scope of relief. To the contrary, paragraph (6) is cast in the broadest terms. In pertinent part it provides where the Commission finds a situation inconsistent with the antitrust laws that it "shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate." The provision conveys the message that Congress did not want nuclear plants authorized in circumstances that would create or maintain anticompetitive situations without license conditions designed to redress them. This construction is fully warranted on the face of paragraph (6). This is also the meaning specifically ascribed to it by its congressional authors, the Joint Committee on Atomic Energy:
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> > "The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to

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233/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

> (6) In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

> eliminate the concerns entailed in any affirmative finding under paragraph (5) [of Section 105c] . . ."

10 NRC at 291 (references omitted).

Then, we went on to explain:

> When construing this provision [Section 105c(6)] in Midland, we stressed that "no type of license condition -- be it a requirement for wheeling, coordination, unit power access, or sale of an interest in the plant itself -- is necessarily foreclosed as a possible form of relief. Section 105c imposes no limits in this respect; it gives the Commission 'authority . . . to issue a license with such conditions as it deems appropriate.'" In other words, as we explained when faced with similar arguments in Wolf Creek, "[S]ection 105c(6) simply directs the Commission to place 'appropriate' conditions on licenses where necessary to rectify anticompetitive situations. This is an invocation of the Commission's discretion, not a limitation on its powers. Had Congress wished to do the latter, it would have said so in unmistakable terms."
>
> The idea that the remedies in the antitrust arsenal are sufficient to overcome the violations is neither original nor recent. Rather, this settled tenet is one of the "principles developed by the Antitrust Division, the Federal Trade Commission, and the Federal Courts" which we apply in proceedings under section 105c. The Supreme Court has reiterated that "relief in an antitrust case must be 'effective to redress violations' and 'to restore competition.'" And "adequate relief in a monopolization case should . . . render impotent the monopoly power found to be in violation of the [Sherman] Act."

Id. at 292 (references omitted).

In sum, the Commission's remedial authority under 105c(6), while not boundless, is more extensive than the applicant believes. The Commission has wide discretion in fashioning "appropriate" license conditions "where necessary to rectify anticompetitive situations." "[N]o type of license condition -- be it a requirement for wheeling, coordination, unit power access, or sale of an interest in the plant itself -- is necessarily foreclosed as a possible form of relief."[234/] And the license condition need not be confined in its application to activities under the license. This is not to suggest, however, that the Commission's authority to impose "appropriate" license conditions is carte blanche. The authority to act may not be divorced from the purposes of the legislation. It does not include the authority to employ license conditions "as an implement to restructure the electric utility industry."[235/]

The question then remains: What are the considerations which the Commission may factor into its decision of "appropriate" license conditions? In its decision, the Board below considered not only antitrust factors but other "public interest"

234/ Midland, supra, 6 NRC at 1099.

235/ Id. at 1100.

factors as well in arriving at the appropriate license conditions for the Farley facility. These public interest factors included (1) the "need for power" (i.e., the need for the generating capacity represented by the Farley plant to meet the anticipated power demands of the applicant's service area); (2) AEC's tax and other advantages stemming from its status as an electric cooperative; (3) the "grandfathered" nature of the antitrust review associated with the fact that construction permits for Farley were applied for prior to the enactment of Section 105c in 1970; and (4) the Board's finding that all anticompetitive conduct by the applicant had ceased by early 1972. According to the Board, Section 105c(6) of the Act mandated that it consider these public interest factors in addition to the relevant antitrust factors:

> It is indisputable that these antitrust laws embody a fundamental national policy regarding the preservation of competition in our economic system. But a finding of inconsistency with the antitrust laws under Section 105c(5) does not end the inquiry, but leads to a consideration of other public interest factors in accordance with Section 105c(6). The latter section requires the Commission then to consider "such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest" (42 U.S.C. Section 1235(c)(6)).

5 NRC at 1496 (footnote omitted).

The propriety of the Licensing Board's use of these public interest considerations as mitigating factors in fashioning appropriate license conditions is disputed by several of the parties.[236/] AEC argues that under Section 105c(6), public interest factors may be taken into consideration only to determine whether to issue or continue a license. Where as here no one is urging the refusal, rescission or revocation of a license, AEC claims that those public interest factors cannot be invoked to allow less stringent license conditions.[237/] AEC sees this result as required by the portion of the first sentence of Section 105c(6) (underscored in its brief) directing the Commission to consider certain factors necessary to protect the public interest "in determining whether the license should be issued or continued."[238/] The NRC staff

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236/ Staff Brief, 43-47; Justice Brief, 28-34, 41-52; AEC Brief, 28-31, 35-38.

237/ AEC Brief, 29-31.

238/ The first sentence of Section 105c(6), with the portion emphasized by AEC underscored, reads as follows:

> "In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest."

Id. at 29.

and Justice follow a different tack. Rather than taking issue with the propriety of considering public interest factors in fashioning appropriate license conditions, they disagree with the Licensing Board's use of those factors in this case. Specifically, they do not believe public interest considerations here lie in favor of mitigating license conditions which otherwise might be appropriate.[239/]

Because we are undertaking to determine the appropriate license conditions ourselves based on a set of findings different from that on which the Licensing Board premised its conditions, it is bootless to spend effort on each detailed aspect of the Licensing Board's assessment of the public interest considerations factored into its decision.[240/] In a more general vein, however, we disagree with AEC's reading of Section 105c(6) that public interest considerations are relevant only for determining whether a license should issue or have its life extended.

In resting on the quoted portion of the first sentence of Section 105c(6) for its interpretation of the statute,

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239/ Staff Brief, 43-47; Justice Brief, 41-52.

240/ The Board's assessment can be found at 5 NRC at 1496-1501.

AEC gives the Section too crabbed a reading. Its error lies in its failure to give full effect to the remaining sentence of the Section: "On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate." With the single qualification that the Commission decision be based on its findings, the operative words of the sentence are without restriction. This being so, we decline to read Section 105c(6) as precluding the Commission from considering the "need for power" and other public interest factors in its determination of license conditions and from imposing less onerous conditions if it decides that both the situation inconsistent found under (5) and the public interest findings under (6) make those conditions appropriate.[241/] This,

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241/ That findings under both (5) and (6) are to be taken into account in fashioning license conditions is made clear in the Report of the Joint Committee on the bill which enacted Section 105c into law:

> The Committee believes that, except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5) while, at the same time, accommodating the other public interest concerns found pursuant to paragraph (6). Normally, the committee expects the Commission's actions under paragraph (5) and (6) will harmonize both antitrust and such other public interest considerations as may be involved.

Report by the Joint Committee On Atomic Energy to accompany H.R. 18679, H.R. Rep. No. 91-1470, 91st Cong., 2d Sess., p. 31 (1970).

of course, does not mean that antitrust concerns should be ignored or overriden by other public interest considerations. For as the Joint Committee's report expressly states, except in an extraordinary situation, the Commission's action under paragraph (5) and (6) should harmonize both antitrust and public interest considerations.[242/]

B. Appropriate Remedial Conditions

1. Objective. Our task, then, is to decide on the license conditions which serve here to "harmonize both antitrust and such other public interest considerations as may be involved." But before we embark on that journey, we turn again to the Atomic Energy Act for an analysis of the purposes and objectives to be served by our decision.

One of the basic foundations on which the Atomic Energy Act rests is the principle of free competition in private enterprise. This principle is manifested at the very outset of the Act by the policy declaration that the "development, use, and control of atomic energy shall be directed so as to . . . strengthen free competition in private enterprise."[243/]

242/ Ibid.; accord, Midland, supra, 6 NRC at 1098 fn. 733.

243/ Atomic Energy Act, Section 1; 42 U.S.C. §2011.

This policy finds manifestation again in Section 105 of the Act. In that Section, the Congress made it clear that the national antitrust laws were to continue in full force and effect with respect to atomic energy matters. It did so by explicitly providing that "[n]othing contained in the Act shall relieve any person from the operation" of the antitrust laws (subsection 105a); and by following with a provision (subsection 105c) which calls for an antitrust review of every nuclear power plant prior to its construction. Thus, through the mechanism of the antitrust laws, the Congress sought to protect free competition in private enterprise in the development and use of atomic energy. Nor did Congress stop with the protection afforded by the antitrust laws. It significantly widened the area of potential Commission action by directing that the policies underlying the antitrust laws must be given effect as well. As a further measure of protection, the legislation was not limited to situations involving actual violations of the antitrust laws or the then-underlying policies. Situations involving the reasonable probability of contravention of those laws and the policies clearly underlying them were also made subject to remedial action by the Commission. 244/

244/ Report of the Joint Committee on Atomic Energy on S4141, S. Rep. No. 91-1247, 91st Cong., 2d Sess., p. 14 (1970), discussed in Midland, supra, 6 NRC at 926-27.

The remedial action the Congressional authors had in mind was that "except in an extraordinary situation, Commission-imposed conditions should be able to eliminate the concerns entailed in any affirmative finding under paragraph (5)."[245/] And as we emphasized earlier (p. 139, supra), this concept is consistent with settled tenets of antitrust practice as manifested by the actions of the courts and the federal agencies which deal with those laws: relief in an antitrust case must be effective to redress violations and to restore competition.[246/]

2. Ownership Access to Farley. In the earlier portions of our decision, we determined that the applicant enjoyed a dominant position in all three product markets. We also

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245/ S. Rep. No. 91-1247 (see fn. 244) at p. 31. In placing the responsibility on the Commission to fashion the appropriate remedy where the antitrust situation was found wanting, these same Congressional authors recognized that "there is not a clear boundary between antitrust considerations in relation to the strengthening of free competition in free enterprise and measures to accomplish such objective for reasons other than the antitrust laws or underlying antitrust policy." Rather than trying to legislate the boundaries of the antitrust considerations, the Joint Committee left it to the Commission to decide. In the Joint Committee's words: "the Commission will have to exercise discretion and judgment." Id. at p. 15.

246/ Davis-Besse, supra, 10 NRC at 292.

determined that the applicant had acted inconsistently with the antitrust laws and the policies thereunder in seven different instances, including its refusal to share ownership of the Farley plant with AEC. We found that this refusal to share in the ownership of Farley was in furtherance of the applicant's long held objective of preserving the dominant power which it enjoyed in all aspects of the electric power business in central and southern Alabama. Upon full consideration of the situation and the requirements and objectives of the Act, the conclusion we must reach is clear: To eliminate the concerns and to strengthen free competition in private enterprise, the license to the applicant for the construction and operation of the Farley plant must, as a minimum, include conditions providing (1) AEC with an opportunity to obtain a proportionate share in the ownership of the plant and (2) reasonable transmission or wheeling services as may be needed by AEC and MEUA.

In lieu of an ownership share in Farley, we considered a license condition -- such as that imposed by the Board below -- requiring the applicant to offer to AEC a share in Farley in the form of unit power. We reject that alternative. We find it would neither strengthen free competition in the applicant's market area nor eliminate the antitrust concerns which we found to exist in that market.

In a unit power arrangement, the purchaser is charged for all of the owner's costs of providing that power, including the costs of capital, of construction, and of fuel and operation. Where the owner is a private utility such as the applicant here, the charge to the purchaser includes a rate of return on the owner's investment.[247/] This means that were AEC to purchase power from the applicant on a unit power basis, it would lose the benefits of the advantageous financing otherwise available to it for the capital costs attributable to its share of the plant. Due to its cheaper capital costs, primarily through the availability of low-cost loans, AEC could save approximately 7 mills per KWH through ownership access to Farley as opposed to unit power access.[248/] It also has certain tax advantages over investor-owned utilities.

The availability of low cost loans to rural electric cooperatives such as AEC is not without good reason. Historically, these cooperatives were established to serve rural areas

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247/ See fn. 7, supra.

248/ By AEC's estimate, its cost of a Kw of power, if it owned 4% of the Farley plant, would amount to 18.9 mills under a joint ownership arrangement, while by the same estimate, applicant's cost of producing power at Farley -- the unit power cost to AEC -- was placed at 26.2 mills. Rogers, Tr. 27,459-62.

where the population is widely-dispersed and the customers have relatively low power demands. Consequently, they were faced with higher costs in bringing power to their customers in comparison to their investor-owned or municipal counterparts whose service areas were generally comprised of more densely populated areas.[249/] Recognizing this factor, Congress enacted legislation to provide capital at low interest rates to enable electric cooperatives to provide service to its customers at rates comparable to those enjoyed by the others.[250/]

In the circumstances of this case, we cannot perceive how a unit power arrangement would promote free competition, let alone "eliminate the concerns." Rather, a unit power arrangement would deprive AEC of its financing advantages -- the very advantages Congress thought necessary for cooperatives such as AEC to operate effectively.

249/ As a result, rural rates for retail use of power historically have been higher than urban rates. St. John, Tr. 4654.

250/ Rural Electrification Act of 1936, 7 U.S.C. §§901 et seq. See also House Report No. 93-91, the House Committee report on the House version of the bill which became P.L. 93-32 establishing a Rural Electrification and Telephone Revolving Fund. U.S. Code Cong. and Admin. News, p. 1365 (1973).

In this regard, the Licensing Board concluded that a "consideration of AEC's tax and other advantages is irrelevant for all purposes under the facts of the instant case." The Board thereupon purported to adopt the Department's suggestion that "one takes his competition as he finds them."[251/] Notwithstanding this pronouncement, the action of the Board in ordering unit power did not leave AEC in its normal competitive position; its real effect was to deprive AEC of its normal financing advantages in connection with the power it would obtain from the Farley plant. These tax and other financing advantages were accorded the cooperatives by the Congress as a matter of governmental policy.[252/] Absent a showing that these advantages serve to operate in derogation of the antitrust laws and the policies underlying them, we know of no sound reason why we should act to keep AEC from enjoying them.[253/]

Generally, the antitrust laws seek to prevent the unreasonable use of market power to gain additional market power.[254/] In this case, it can be expected that the addition

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251/ 5 NRC at 1497.

252/ Midland, supra, 6 NRC at 1019.

253/ We note in passing that the applicant enjoys special privileges accorded by other governmental entities, and is protected against competition from REA cooperatives in much if not most of its service territory.

254/ See, e.g., United States v. Griffith, 334 U.S. 100, 107-08 (1948).

of Farley to the applicant's generating capacity will over the years increase applicant's existing market dominance. Thus, a key consideration here is the action we must take to forestall that expectation from becoming reality. We find that, of the types of arrangements for access to generating capacity generally found in the electric industry, ownership access is likely to be the most effective way of accomplishing this result, because this arrangement will enable AEC to compete more effectively. As a part-owner, AEC will be able to take advantage of the lower interest and tax benefits available to it for financing its share of the plant which will, in turn, translate to lower costs for its share of the output from Farley. In the words of one witness, "there is a very substantial and meaningful difference between Alabama Power Company's costs and AEC's costs on an ownership basis, no matter whose figures you use."[255/] And this observation should hold relatively true even if all parties' costs increase with time.[256/]

We thus render explicit that which implicitly follows from the considerations we have just outlined: No less than

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255/ Rogers, Tr. 27,461.

256/ Ibid.

a proportionate sharing of the ownership of the Farley plant by the applicant and AEC will suffice to accommodate the objectives of strengthening free competition in private enterprise and eliminating the concerns which arise from our adverse antitrust findings related to the applicant's past conduct.[257]

3. Public Interest Considerations. In exercising our judgment in the foregoing respect, we have not overlooked the public interest factors with which the Licensing Board found the antitrust values must be harmonized. We agree with that Board's finding of the need for power[258] and the concomitant decision not to withhold the issuance of a license to the applicant for the construction and operation of the plant. But as regards the other public interest factors considered by the Licensing Board, we do not find cause to follow its lead.

One of these public interest considerations related, in the words of the Licensing Board, to the "grandfathered" nature of the antitrust review.[259] The Licensing Board noted that the applicant had filed its original application for a construction permit on October 10, 1969, and an amendment for

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257/ Of course, these same reasons cause us to reject out-of-hand applicant's argument that the remedy need only be the sale of wholesale power.

258/ 5 NRC at 1500.

259/ 5 NRC at 1498.

authority to construct a second unit on June 26, 1970, both prior to the December 1970 amendments to Section 105c. Notice of the antitrust hearing was not issued by the Commission until June 28, 1972. The Licensing Board found equities flowing to the applicant from this sequence of events.

We fail to find in the "grandfathered" situation any justification for striving to achieve in any less than full measure the antitrust goals embedded in the Atomic Energy Act. Even though the license applications were filed prior to the enactment in 1970 of the current antitrust review provisions found in Section 105c, applicant must be presumed to have known that the antitrust laws would apply to their fullest to any license issued by the Commission. Section 105a of the Act, which was unaffected by the 1970 amendments, made this clear. Indeed, concern with the competitive aspects of licensing in the nuclear area went back to the original atomic energy legislation enacted in 1946.[260/] In these circumstances,

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260/ Section 7(c) of the Atomic Energy Act of 1946 formerly provided that:

> Where activities under any license might serve to maintain or to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field, the Commission is authorized and directed to refuse to issue such license or to establish such conditions to prevent these results as the Commission, in consultation with the Attorney General,

(FOOTNOTE CONTINUED ON NEXT PAGE)

we discount this "grandfather" situation as a mitigating factor in our decision.

We also depart from the Licensing Board's consideration of the "alleged cessation of anticompetitive conduct as a mitigating factor."[261/] According to the Board, "[t]here is no evidence that established conduct inconsistent with the antitrust laws beyond early 1972."[262/] This observation is not altogether true. In at least one instance, the applicant's anticompetitive behavior extended until 1976, when it finally agreed to remove Section 4.2 from its contract with SEPA.[263/] That provision, which in essence required SEPA's preference customers to purchase all of their supplemental power needs from the applicant, had been held by the Board to be anticompetitive.[264/]

260/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

> may determine. The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of fissionable material or atomic energy which appears to have these results.

261/ 5 NRC at 1500-1501.

262/ Id. at 1501.

263/ Stipulation by parties, Tr. 28,317-19.

264/ 5 NRC at 933-37.

But an even more fundamental reason exists for our position. The fact that a transgressor has ceased its anticompetitive activity, especially when such cessation occurs after the onset of legal action,[265/] in and of itself provides no justification for dispensing with otherwise appropriate remedial requirements. As the Supreme Court admonished in United States v. Oregon State Medical Society:

> It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

343 U.S. 326, 333 (1952).

4. Basis for Allocation. Our decision calling for a proportionate ownership of Farley by AEC brings up the matter of how its shares should be determined. The Licensing Board had devised an allocation formula, albeit in terms of unit power shares, "based on a ratio of (a) the aggregate coincident demand of all wholesale-for-resale members of AEC in Alabama during the hour of peak demand on the electric system of [the applicant] in 1976 to (b) the sum of such coincident demands of AEC and the territorial peak-hour demands of [the applicant] (excluding therefrom the peak-hour demands imposed by members

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265/ As noted above, the notice of hearing was issued in mid-1972; the trial commenced in December 1974.

of AEC upon the electric system of [the applicant]) during the hour of peak demand on [the applicant's] electric system in 1976." (Emphasis added.)[266/]

AEC accepts that "participation should be on the basis of the proportion of AEC's on- and off-system wholesale loads in central and southern Alabama to the total loads of both parties in such area."[267/] However, it points out that the peak demands for each of AEC's on-system and off-system members and for applicant do not occur simultaneously.[268/] The result of the Licensing Board's allocation formula, says AEC, enables the applicant to retain a disproportionate share of the facility.[269/] AEC suggests instead that the ratio should be pegged to the load of AEC's on-system and off-system members and of the applicant at the time of their respective peak loads.

We agree with this position of AEC. Basing the allocation formula on the time of applicant's peak demand skews the result in its favor. A more equitable division of ownership would result if the shares were to be determined by the respective

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266/ 5 NRC at 1507.
267/ AEC Brief, 69.
268/ Ibid.
269/ Ibid.

peak demands of AEC and the applicant occurring during 1976. The license condition we impose is based accordingly.

5. Access to Transmission Services. This brings us to the second of the license conditions we have determined are necessary in the circumstances of this case. It is evident that AEC needs access to the applicant's transmission system to make effective use of its share of the output from Farley.[270/] It needs these services to transmit the power both to AEC's on-system and off-system members. Because AEC's on-system members are not interconnected directly to the off-system members, AEC also needs transmission services from its on-system members to its off-system members. But the need by AEC for transmission services is not limited to the power from Farley. To enable AEC to plan for and use in the most efficient manner all of the power to which it may have access -- whether by self-generation or by purchase -- it needs the transmission services of the applicant.[271/] Without access to these transmission services, AEC's system would be an island to itself, isolated from other power sources or systems. Indeed, because it is not interconnected

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270/ Rogers, Tr. 27,357.

271/ Ibid.

with all of its members, AEC is even now dependent on the applicant to bring power to AEC's off-system members.

AEC must have access to other sources of wholesale power as well as markets for any excess power it may have. The applicant enjoys such access through its interconnections with the Southern pool and, through that pool, with other nearby utilities. Through this access, the applicant is in a position to coordinate the various factors of production to produce, buy or sell reliable firm wholesale power under optimum conditions. Without equivalent access AEC would be unable to utilize fully its share of the power from Farley, hindering its ability to compete effectively against the applicant. Such a situation is unlikely to lead to a significant attenuation of the applicant's dominant position in central and southern Alabama, let along strengthen free competition in private enterprise.

6. MEUA's Remedy. Our dissatisfaction with some of the Licensing Board's findings relating to MEUA perforce required us to reexamine the decision below to deny MEUA any remedy in this proceeding. As mentioned earlier, that decision was based on a finding that "there is no significant actual or

prospective competition between [MEUA and applicant] at the retail distribution level,"[272] a finding we cannot accept. (See pp. 57-68, supra). Our disagreement with the decision below also presents us with an apparent due process problem: because the Licensing Board determined that MEUA was not entitled to any remedy, it excluded MEUA from offering evidence at the Phase II remedy hearing.[273]

In the circumstances, we could remand the case to the Licensing Board to allow MEUA an opportunity to present evidence on the subject of remedy. We do not, however, believe such a course is either necessary or desirable. In the first place, our views on remedy are shaped largely by our findings concerning the "situation inconsistent." Defining that situation was the purpose of the Phase I hearing, a phase in which MEUA participated actively. Second, MEUA was allowed to and did make an offer of proof at the Phase II hearing. We have carefully

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272/ 5 NRC at 961.

273/ Tr. 27,189; 27,204.

reviewed the offer[274/] and find nothing therein which would, if developed more fully, cause us to change our opinion on remedy.

As we have said, our choice of remedy is dependent on the situation inconsistent with the antitrust laws. We think it important to place that situation as it affects MEUA in its proper perspective. We have found that MEUA and applicant compete at retail. We have found that applicant, by virtue of its dominant control of generation and transmission facilities in central and southern Alabama, has monopoly power in the retail market. And we have found that applicant has placed anticompetitive restrictions on MEUA's right to pursue other bulk power supply options.

On the other hand, we have found many of MEUA's allegations unsubstantiated by the evidence. In particular, we believe MEUA's role in the wholesale market is that of a buyer, and not in any real sense that of a potential seller. We do not believe anticompetitive contractual restrictions have played a large part in MEUA's failure to develop other bulk power supply alternatives; we think MEUA would have continued as a wholesale customer of applicant regardless of the restrictions. Finally,

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274/ Tr. 27,437 - 27,445.

we see no evidence that MEUA has been harmed in its retail role by any anticompetitive behavior on the part of applicant or that applicant has wrongfully attempted to limit MEUA's retail business. The evidence shows that applicant has monopolized the wholesale market; it does not show that the applicant has unlawfully monopolized the retail market or sought to do so.

In sum, our analysis of the situation relative to MEUA finds it limited to the restrictions placed on MEUA's ability to look elsewhere than to the applicant for sources of bulk power. MEUA is plainly entitled to a remedy that eliminates these restrictions. This includes both the removal of any offensive contractual provisions still in force between applicant and any member of MEUA and the use of applicant's transmission facilities (where available and with appropriate compensation) to enable MEUA to deal with other suppliers of bulk power.

In terms of access to the Farley nuclear facilities, we do not believe ownership access is warranted in the case of MEUA. MEUA has been able to compete effectively in the retail market in the past; we see no indication that an ownership interest is necessary to pry open the market.

Nor is ownership access necessary to remedy the contractual limitations placed on MEUA's right to look for alternative suppliers. The municipals have purchased all their power requirements for decades; assuming power from Farley is fairly included in applicant's wholesale power mix, we fail to see how the nuclear facility will change in any way the situation at retail between applicant and MEUA. MEUA is entitled to enjoy any benefits of lower-cost nuclear power, but should be able to do so (and remain competitive) through the purchase of wholesale power from the applicant. 275/

Nothing in this decision, of course, prevents applicant from selling unit power or a portion of the Farley facilities to MEUA if the two parties so desire. We merely hold today that, in the circumstances of this case, where the two parties have fairly competed at retail for many years and where the Farley facilities will not impede MEUA's ability to continue doing so, the elimination of the situation in the retail market that is inconsistent with the antitrust laws can be accomplished without awarding the municipals the right to purchase a share of the Farley plant.

275/ See excerpts from the legislative history of Section 105c at 5 NRC at 1491-96.

CONCLUSION

The conditions appended to this decision shall be incorporated in the applicant's licenses in lieu of the present antitrust conditions; all exceptions not addressed herein have either been denied or found immaterial to our decision; the Licensing Board's decision is modified in accordance with the foregoing opinion and is affirmed as modified.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

APPENDIX

License Conditions Approved by the Appeal Board

The following license conditions are made a part of any licenses issued to the applicant for the Joseph M. Farley Nuclear Plant, Units 1 and 2:

1. Licensee shall recognize and accord to Alabama Electric Cooperative the status of a competing electric utility in central and southern Alabama.

2. Licensee shall offer to sell to AEC an undivided ownership interest in Units 1 and 2 of the Farley Nuclear Plant. The percentage of ownership interest to be so offered shall be an amount based on the relative sizes of the respective peak loads of AEC and the Licensee (excluding from the Licensee's peak load that amount imposed by members of AEC upon the electric system of AEC) occurring in 1976. The price to be paid by AEC for its proportionate share of Units 1 and 2, determined in accordance with the foregoing formula, will be established by the parties through good faith negotiations. The price shall be sufficient to fairly reimburse Licensee for the proportionate share of its total

costs related to the Units 1 and 2 including, but not limited to, all costs of construction, installation, ownership and licensing, as of a date, to be agreed to by the two parties, which fairly accommodates both their respective interests. The offer by Licensee to sell an undivided ownership interest in Units 1 and 2 may be conditioned, at Licensee's option, on the agreement by AEC to waive any right of partition of the Farley plant and to avoid interference in the day-to-day operation of the plant.

3. Licensee will provide, under contractual arrangements between Licensee and AEC, transmission services via its electric system (a) from AEC's electric system to AEC's off-system members; and (b) to AEC's electric system from electric systems other than Licensee's, and from AEC's electric system to electric systems other than Licensee's. The contractual arrangements covering such transmission services shall embrace rates and charges reflecting conventional accounting and ratemaking concepts followed by the Federal Energy Regulatory Commission (or its successor in function) in testing the reasonableness of rates and charges for transmission services. Such contractual arrangements shall contain provisions protecting Licensee against economic detriment resulting from transmission line or transmission losses associated therewith.

4. Licensee shall furnish such other bulk power supply services as are reasonably available from its system.

5. Licensee shall enter into appropriate contractual arrangements amending the 1972 Interconnection Agreement as last amended to provide for a reserve sharing arrangement between Licensee and AEC under which the Licensee will provide reserve generating capacity in accordance with practices applicable to its responsibility to the operating companies of the Southern Company System. AEC shall maintain a minimum level expressed as a percentage of coincident peak one-hour kilowatt load equal to the percent reserve level similarly expressed for Licensee as determined by the Southern Company System under its minimum reserve criterion then in effect. Licensee shall provide to AEC such data as needed from time to time to demonstrate the basis for the need for such minimum reserve level.

6. Licensee shall refrain from taking any steps, including but not limited to the adoption of restrictive provisions in rate filings or negotiated contracts for the sale of wholesale power, that serve to prevent any entity or group of entities engaged in the retail sale of firm electric power from fulfilling all or part of their bulk power requirements

through self-generation or through purchases from some other source other than licensee. Licensee shall further, upon request and subject to reasonable terms and conditions, sell partial requirements power to any such entity. Nothing in this paragraph shall be construed as preventing applicant from taking reasonable steps, in accord with general practice in the industry, to ensure that the reliability of its system is not endangered by any action called for herein.

7. Licensee shall engage in wheeling for and at the request of any municipally-owned distribution system:

(1) of electric energy from delivery points of licensee to said distribution system(s); and

(2) of power generated by or available to a distribution system as a result of its ownership or entitlement* in generating facilities, to delivery points of licensee designated by the distribution system.

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*"Entitlement" includes but is not limited to power made available to an entity pursuant to an exchange agreement.

Such wheeling services shall be available with respect to any unused capacity on the transmission lines of licensee, the use of which will not jeopardize licensee's system. The contractual arrangements covering such wheeling services shall be determined in accordance with the principles set forth in Condition (3) herein.

The Licensee shall make reasonable provisions for disclosed transmission requirements of any distribution system(s) in planning future transmission. By "disclosed" is meant the giving of reasonable advance notification of future requirements by said distribution system(s) utilizing wheeling services to be made available by Licensee.

8. The foregoing conditions shall be implemented in a manner consistent with the provisions of the Federal Power Act and the Alabama Public Utility laws and regulations thereunder and all rates, charges, services or practices in connection therewith are to be subject to the approval of regulatory agencies having jurisdiction over them.