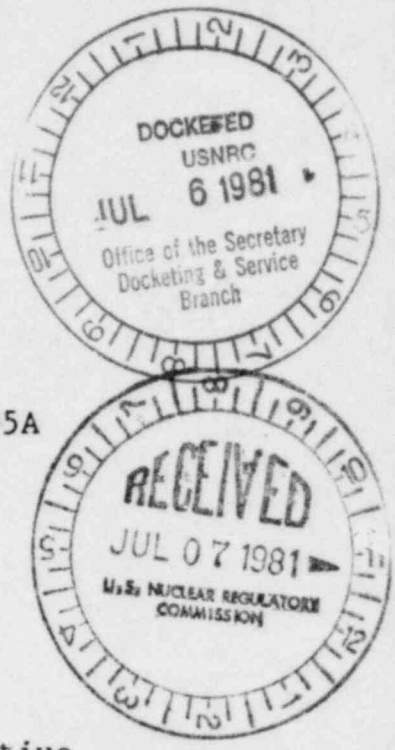
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of	)	
	)	
South Carolina Electric & Gas Company	)	
	)	
and	)	Docket No. 50-395A
	)	
South Carolina Public Service Authority (Virgil C. Summer Nuclear Station Unit No. 1)	)	7/6/81

CENTRAL ELECTRIC POWER
COOPERATIVE'S PETITION FOR REHEARING

Petitioner Central Electric Power Cooperative, Inc. ("Central"), pursuant to 10 C.F.R. §2.771, respectfully submits this petition for reconsideration of the Commission's Order, issued June 26, 1981 and served June 30, 1981, denying Central's petition for antitrust review of the subject license in accordance with 42 U.S.C. §2135(c)(2).

A. Respects in which the Order is alleged to be erroneous and grounds of alleged errors

1. The Commission erred in its finding that Central's papers contained "insufficient substance" and submitted only "generalized hearsay" to support Central's allegation that SCE&G used access to the Summer Nuclear unit as a club to coerce SCPSA's behavior. (Order at p. 25.) Mr. Kelly Smith submitted an affidavit to the Commission that contained the following statement:

> About March 20, 1973, Mr. Lucas Padgett informed me (and said he had just informed Mr. E.V. Lewis) that the bill was to be introduced in the Senate Judiciary Committee the following day in hopes it would become a committee bill. Mr. Padgett stated that this

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legislation was necessary in order for Santee Cooper to conclude its negotiations with SCE&G on the nuclear plant." 1/

Mr. Padgett is a Vice President of SCPSA. 2/ Mr. Smith's testimony concerning this statement made by Mr. Padgett would not be excluded in a federal court on hearsay grounds but would be admissible as an admission under Rule 801(d)(2), Fed. R. Evid. See, United States v. Matlock, 415 U.S. 164, 172n.8 (1974); United States v. Rios Ruiz, 579 F.2d 670, 676 (1st Cir. 1978); United States v. Rosenstein, 474 F.2d 705, 711n.2 (2nd Cir. 1973).

The credibility of Mr. Smith's testimony is reinforced by the timing of the territorial legislation in relation to the conclusion of the Summer sale agreement. The territorial legislation was presented to the Senate Judiciary Commission in March 1973 3/ and was approved by the Governor of South Carolina on July 9, 1973. SCE&G executed a Joint Ownership Agreement with SCPSA on October 18, 1973, providing for the sale of a one-third ownership interest in the Summer unit to SCPSA.4/

1/ Affidavit of Kelly Smith at p. 4, attached to Reply Brief of Central In Response to Motions to Dismiss its Amended Petition, dated March 19, 1979 (emphasis added).

2/ Affidavit of Lucas Padgett, at ¶1, attached to Reply of SCPSA To Amended Petition, dated March 7, 1979. SCPSA never submitted another affidavit from Mr. Padgett rebutting the testimony of Mr. Smith.

3/ Affidavit of Lucas Padgett, at ¶4; Affidavit of Kelly Smith, at ¶ 4.

4/ Attachment 2, attached to NRC Staff Response to Amended Petition of Central, dated March 19, 1979.

The Commission erred in failing to consider documents submitted by Central that establish that SCE&G, in collaboration with Carolina Power & Light Company ("CP&L") and Duke Power Company ("Duke"), had historically attempted to coerce SCPSA to relinquish its trade freedom as a condition precedent to SCPSA's access to the regional power exchange market.5/ SCE&G's express reason for linking territorial integrity with access to power exchange was SCE&G's recognition that the competitive position of both SCPSA and the cooperatives would improve if SCPSA could acquire the economic benefits of power pooling.6/ It was error for the Commission to ignore the historical linkage forged by SCE&G, CP&L and Duke between territorial integrity and SCPSA's access of the CARVA pool in resolving the disputed factual issue of whether SCE&G "used access to a nuclear facility as a club to coerce" SCPSA's behavior.

These documents provide cogent evidence that SCE&G continued to insist on a territorial agreement before executing the Joint Ownership Agreement on the Summer Unit. The significant change for purposes of 42 U.S.C. §2135(c)(2) is that SCPSA finally caved in to the persistent, anticompetitive demands of SCE&G and others in 1973 after resisting them as contrary to its best interest for several years.

5/ Exhibits 6-9, attached to Comments of Petitioner Central Electric Power Cooperative, Inc., dated August 25, 1980.

6/ Exhibits B and C, attached to Reply Brief of Central In Response to Motions to Dismiss its Amended Petition, dated March 19, 1979.

Further, while SCE&G submitted affidavits from its President and Chairman of the Board, 7/ neither affidavit controverted Central's basic allegation that SCE&G agreed to sell to SCPSA an interest in the Summer Unit in consideration of the territorial agreement submitted to the legislature. 8/

As Central has advised the Commission, there are other publicly available documents supporting Central's allegations on this issue and others, 9/ but Central's counsel has been precluded from submitting them to the Commission as a result of SCE&G's filing of a motion for a protective order on August 13, 1980, in the District Court for the Middle District of North Carolina, Greensboro Division. 10/ The District Court in Greensboro has yet to act on this motion. The pending motion for a protective order in this related federal court proceeding precludes

7/ Affidavits of Arthur M. Williams and Virgil C. Summer, attached to SCE&G's Motion to Dismiss, dated December 21,1978.

8/ Petition for a Finding of Significant Change and Request for Antitrust Hearing on Operating License, dated December 6, 1978 at p. 2.

9/ The documents are contained in the files of the United States District Court for the Middle District of North Carolina, North Carolina Electric Membership Corp., et al. v. Carolina Power & Light Co. & South Carolina Electric & Gas Co., No. C-77-396G, and of the United States Court of Appeals for the Fourth Circuit, North Carolina Electric Membership Corp., et al. v. Carolina Power & Light Co. & South Carolina Electric & Gas Co., No. 81-1057.(Interlocutory appeal from a discovery order)

10/ Comment of Central, etc., dated January 23, 1981 at p. 15; Comments of Petitioner Central, etc., dated Aug. 25, 1980 at pp. 15-16; Affidavit of Wallace E. Brand at p. 2, ¶5 attached to Motion for Extension of Time dated July 24, 1980; Letter of Wallace E. Brand to the Honorable Samuel J. Chilk dated Sept. 11, 1980.

neither the staff of the NRC nor the Justice Department from securing publicly available documents. However, since the staff is apparently unwilling to secure the documents and Central is presently unable to transmit them under the circumstances, SCE&G should have no objection to Central's use of a mere dozen documents produced by SCE&G in the federal court case to assist the Commission's reconsideration of its Order, unless, of course, such documents would cast considerable doubt on the contentions made by both SCE&G and SCPSA in this proceeding.

It was therefore error for the Commission to resolve this controversial issue of fact in the present posture of this proceeding. The testimony of Kelly Smith concerning his conversation with Mr. Padgett of SCPSA, the historical link between access to power exchange and territorial integrity, the timing of the legislation in relation to the conclusion of the Summer Unit sale and other facts discussed above, establish that, contrary to the Order, there is "sufficient substance" to Central's allegation to warrant further investigation by the Justice Department. (See also, Affidavit of Patrick Allen, at ¶5 attached to Amended Petition of Central for a Finding of Significant Change, dated Jan. 31, 1979.)

The use of monopoly power in the power exchange market to coerce a viable competitor to agree to a substantial alteration in competitive relations in the power exchange,

wholesale and retail product markets in South Carolina an even outside of South Carolina can only be characterized as a significant change.

2. The Commission erred in its finding that the alleged territorial agreement between SCPSA and SCE&G is protected by the state action doctrine enunicated in Parker v. Brown, 317 U.S. 341 (1943) and its progeny. (Order at pp. 22-23.) There is no state or federal law that compels or even sanctions an agreement between SCPSA and SCE&G that gives SCPSA the exclusive right to negotiate with Central for power exchange services 11/ or to supply Central with firm bulk power. Evidence of such a horizontal market allocation can be found in the minutes of meeting of the Executive Committee of the Virginia-Carolinas group (VACAR) held on September 24, 1976. 12/ At this meeting, Duke informed representatives of SCPSA, SCE&G, and CP&L that it would not permit ElectriCities, a group of North Carolina municipalities, to transfer power from the cities' ownership interest in Catawba outside of Duke's retail service area (i.e. to municipal electric systems served by CP&L and SCE&G). The only reason for such a discussion at a VACAR Executive

11/ Central includes arrangements for the coordinated development of generation and wheeling in its definition of power exchange services.

12/ Exhibit 2, attached to Comment of Central Power Cooperative, Inc., dated January 23, 1981.

Committee meeting was to assure the other members of the committee that Duke was honoring a pre-existing customer allocation agreement which prohibited one member of the boycott from selling capacity to wholesale customers served by another member of the boycott. Other evidence of an agreement to horizonally allocate customers can be found in the minutes of a Carolinas-Virgina pool ("CARVA") Executive Committee meeting held on June 20, 1967, where it is stated that the territorial integrity of the companies must be maintained (i.e. territorial integrity of Duke, CP&L and SCE&G must be protected from encroachments by SCPSA).13/ Territorial integrity could not be maintained if it did not already exist. The basic problem faced by the members of the CARVA Pool was to convince SCPSA to recognize the territorial integrity of the private companies, a problem that would be aggravated if SCPSA became a member of the CARVA pool. As noted by the Justice Department in a pleading filed in another NRC proceeding, SCPSA "was asked to agree to a limitation on its service area" as a prerequisite to its admission to the CARVA Pool, but this "agreement was never consummated." 14/ The significant change in the market-

13/ Exhibit 6 at p. 5 attached to Comments of Petitioner Central Electric Power Cooperative, Inc., dated August 25, 1980.

14/ Exhibit E, attached to Reply Brief of Central In Response to Motions to Dismiss its Amended petition, dated March 19, 1979.

place is not that the former CARVA pool members insisted on a territorial allocation as a prerequisite to SCPSA's access to power pooling both before and after the dissolution of CARVA in 1970, but that SCPSA was coerced into agreeing to the scheme in 1973. The territorial legislation drafted by these companies and approved by the legislature, however, did not give SCPSA the exclusive right to serve Central but simply denied SCPSA the right to serve municipal electric systems and cooperatives that were not members of Central.

Circumstantial evidence of the market allocation is provided by SCE&G's offer to enter into a joint ownership arrangement with Central but limiting the sale of capacity to a few megawatts corresponding to that part of Central's load served by SCE&G at wholesale. That is, SCE&G would not sell sufficient capacity to Central to enable Central to displace wholesale firm power sales to it by SCPSA. Central requested a proposal from SCE&G on a joint ownership arrangement that would include more capacity than the isolated load of Berkely Electric Cooperative served by SCE&G.15/ No such proposal has ever been forthcoming from SCE&G.

The anticompetitive effect of a horizontal market allocation scheme, and the rationale for its classification as a per se violation of the Sherman Act, is that such a

15/ Letters of P.T. Allen to T.C. Nichols, dated May 15, and June 19, 1979, contained in Attachment 3 to NRC Staff Response To Commission Request For Comments, dated August 29, 1980.

restraint denies the victim of the conspiracy the benefits of competition, including a more favorable purchase price or terms and conditions of sale from an alternative seller or sellers. See, Gainsville Utilities v. Florida Power & Light Co., 573 F.2d 292 (5th Cir. 1978), cert. denied, 439 U.S. 966 (1978); Toledo Edison Company et al., 10 NRC 255, 359-361 (1979). Another anticompetive affect of a horizontal customer allocation is that the victim of the conspiracy is placed in a poor bargaining position in negotiations with the seller to whom it has been allocated by the other members of the conspiracy. Having failed in its effort to secure an alternative proposal from SCE&G for meaningful coordinated development of generation, Central's only remaining alternative was SCPSA.

3. The Commission erred in its assessment of the heavy financial burdens imposed by SCPSA on Central's participation in the Summer Unit. (Order at p. 28.) SCPSA insisted on imposing a 30%-of-cost penalty on Central for participation in the Summer Unit by requiring it to absorb all the costs of retiring a $70-million senior security issue without any offset for the benefits that would accrue to SCPSA as a result of changing the majority of its securities from second mortgages to first mortgages.16/ Central has repeatedly

16/ Power System Coordination and Integration Agreement Between SPSA and Central at Article III A, p.12.

maintained that SCPSA's offer would not permit Central to acquire an interest in the Summer Nuclear Unit.17/ The fact that Central did not exercise the option to acquire up to thirty three and one-third per cent undivided ownership interest in SCPSA's share of the Summer Unit is owing to the heavy financial burdens imposed by SCPSA.

The draft of the Agreement submitted by SCPSA to this Commission on January 14, 1981 would have required Central to exercise the option "by January 1, 1981." 18/ REA approved the agreement on January 19, 1981. The REA extended the deadline for exercising the option from January 1, 1981 to January 20, 1981.19/ The foregoing illustrates the illusory nature of the option.

Thus, access to the Summer Unit is involved in this "significant change" proceeding in two ways. First, SCPSA's access to the unit was conditioned on its willingness to forfeit its trade freedom. Second, Central's access to

17/ Affidavit of Patrick Allen at ¶10 attached to Amended Petition Of Central For A Finding Of Significant Change dated Jan. 31, 1979. Comments of Petitioner Central Electric Power Cooperative, Inc., at pp. 11-12, dated August 25, 1980. SCPSA's explanation of this penalty is contained in the merger proposal submitted by SCPSA to Central in October, 1978. Exhibit A, attached to Affidavit of Patrick Allen.

18/ Power System Coordination and Integration Agreement Between SCPSA and Central, at Article III C, p. 11 attached to letter from Hugh P. Morrison to Mr. Chilks, dated January 14, 1981.

19/ Power System Coordination Agreement, at Article II C, p. 12, attached to letter of Wallace Brand to the Honorable Samuel J. Chilk, dated February 12, 1981.

the Unit was precluded altogether by SCPSA's insistence on unreasonable terms and conditions that destroyed economic feasibility of the purchase by Central.20/

4. The Commission erred in its conclusion that the Agreement between SCPSA and Central "laid to rest" Central's allegations that SCPSA has refused to provide Central with power exchange services on practical terms. (Order at pp. 23-24). Prior to 1979, SCPSA refused Central's request for an ownership interest in SCPSA's bulk power transmission.21/ The Agreement reserves to SCPSA the right to construct and own bulk transmission. The Agreement does not permit Central to construct transmission lines to integrate its own generating resources, to integrate its own load centers or to connect its own generation directly to its own load centers when that would be more economical for Central rather than wheeling through SCPSA's transmission system. (Definitions, B p. 4, Act VII, Paragraph E 2, 3, p. 22, see also paragraph D at p. 20).

Furthermore, the Agreement's provision for SCPSA's monopoly of transmission inhibits Central's ability to employ the benefits of the Agreement to secure the membership of

20/ In a concentrated market, where there are a limited number of alternative sellers and each buyer is assigned to a particular seller, the market allocation results in a series of monopolies in the submarkets created by the allocation. As a result, each seller can deal with its allocated captive customer as it sees fit and may either exact monopolistic price, terms and conditions or simply refuse to deal altogether.

21/ Affidavit of Patrick Allen at ¶ 10.

additional cooperatives. To avoid extending this monopoly, Central was obliged to insist upon a provision excluding service to any new members from the coverage of the Agreement. (Appendix B, Article I ¶C, p.66; Definition E, p.4; Article VI, ¶A, p.19.) As a consequence of avoiding the burden of SCPSA's transmission monopoly, Central has thus been forced to forego even the limited benefits of the Agreement in competing for new loads and must, instead, try to compete by starting from scratch in areas not covered by the Agreement.

The Agreement does not incorporate Central's proposal to share existing generation and to have each party bear separately the costs of new power supply associated with the growth of each. Central's proposal would have made the cost of growth through ownership (as compared with growth through firm power purchases) economically feasible. Under this proposal, Central would be comparing the cost of power produced from new, inflated-price plants with the cost of additional firm power produced from Santee Cooper's comparably-priced new plants. Under the arrangement insisted upon by the Authority and contained in the Agreement, however, Central will be comparing the cost of power produced from new units with the cost of power produced from old as well as new units on Santee Cooper's system. (Article V, pp. 17-18; Appendix A and Exhibits 1 and 2 thereof, pp. 62-64; Appendix E, p. 81). That is, it will be comparing the cost

of new capacity with the cost of mixed old and new capacity. This comparison is the bottom line of the feasibility showing that Central must make in order to obtain financing for the new units purportedly available under the new Agreement. Assuming the continuation of general inflation, even at moderate rates, this comparison will never be favorable. Both Central's proposed method and the Agreement's method would recover Santee Cooper's costs. Central's method would maximize joint ownership opportunities as well. The Agreement, however, minimizes such opportunities. It therefore raises unnecessary barriers to competition. See, United States v. United Shoe Machinery Corp., 110 F. Supp. 245, 340 (D. Mass. 1953) aff'd, 347 U.S. 521 (1954) (per curium); see also, Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 & 2), Docket Nos. 50-348A, etc. (ALAb June 30, 1981) at p. 99.

The Commission nowhere addressed Central's contention that the purported opportunity to own portions of generating units is merely "pie-in-the-sky" if, as a practical matter, Central cannot, under these circumstances, get REA approval for financing.

Moreover, the Agreement permits SCPSA to charge Central for plant which SCPSA may wish to construct at some point in time, or what may be called "wishful work in progress." Appendix A, Exhibit I, Paragraph VI, at p. 60 and Paragraph VII at pp. 60-61.

These provisions, along with the terms attached to Central's participation in Summer, are to be expected

when a potential entrant into the bulk power supply business is denied the opportunity to negotiate with more than one existing bulk power supplier. The failure of the Commission to examine the terms and conditions of the Agreement in relation to the totality of circumstances is plain error.

5. The Commission erred in accepting SCE&G's assurances that it will wheel for Central. (Order at pp. 26-27.) For the past four years, Central has made general and specific requests for wheeling services to SCE&G and has received no wheeling. The only conclusion to draw is that SCE&G will not perform any wheeling service for Central. Central made a general request for wheeling services in the proposed licensing conditions furnished to SCE&G in February 1977. 22/ SCE&G rejected this proposal 23/ but offered to "consider" specific wheeling proposals on a case-by-case, point-to-point basis. Point-to-point wheeling would frustrate Central's ability to supply bulk power.24/ Central nevertheless "made further inquiries in one case where point-to-point wheeling might prove helpful to see whether there was anything to their [SCE&G's] proposal."25/ Mr. Allen testifed that no

22/ Affidavit of Patrick Allen, at ¶13; Affidavit of David Springs, at ¶7, attached to Reply Brief of Central In Response To Motions To Dismiss its Amended Petition, dated March 19, 1979.

23/ Id.

24/ Id.

25/ Affidavit of Patrick Allen, at ¶13.

response had been received to Central's request.26/

SCE&G has also assured this Commission that it will consider wheeling for Central from SCPSA to Berkeley Electric Cooperative, a member of Central. As shown in the Affidavit of Mr. T.C. Nichols of SCE&G, Central has made several requests to SCE&G for wheeling services in connection with this isolated load.27/ On August 6, 1980, representatives from Central and SCE&G met to discuss wheeling to Berkeley. SCE&G stated at that meeting that a wheeling tariff for Berkeley was in the mill. SCE&G further agreed to submit a counterproposal to Central's formulation of licensing conditions submitted to SCE&G in February, 1977.

It has now been almost one year since this meeting and, needless to say, SCE&G has not submitted its wheeling tariff for Berkeley or its counterproposal on licensing conditions. The Commission has not stated how many years or even decades must pass before it can reasonably infer that SCE&G has absolutely no intention of wheeling for Central in any case, specific, general or otherwise. At the same meeting Central reiterated its interest in a meaningful joint ownership arrangement with SCE&G. (See text at p. 8, supra.)

A document directly contradicting SCE&G's willingness to wheel for Central, even on a point-to-point, case-by-case basis, is publicly available, but Central's counsel is precluded from transmitting it at the present because of

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26/ Id.

27/ Letter of T.C. Nichols to Samuel Chilk, dated August 25, 1980.

SCE&G's strategic filing of a motion for a protective order in a related district court proceeding.

A significant change finding may be based upon the existence of a group boycott or horizontal allocation between Duke, CP&L, SCPSA and SCE&G that has denied Central an alternative supplier of power exchange services other than SCPSA. Central did not seek joint ownership and power pooling arrangements prior to 1973 and was therefore shielded by SCPSA, which was making such efforts, from the anticompetitive activities and demands by the CARVA cartel. It was Central's concern over SCPSA's changed role in the marketplace that caused Central in 1974 to seek on its own initiative, power exchange services and facilities in order to secure "opportunities for bulk power supply alternatives apart from continued purchase of firm power in bulk from Santee Cooper." (Affidavit of Patrick Allen, at ¶¶8,9,10,13.) Thus, a significant change is Central's new role in the marketplace and the aiming of the boycott at Central, rather than SCPSA. The remedy, of course, would be to impose license conditions on SCE&G requiring it to deal with Central.

6. The Commission erred in refusing to allow Central discovery to further document its allegations. (Order at pp. 17, 18n.44). The prejudicial effect of this error is compounded by the Commission's imposition of an inappropriately stringent standard of proof upon Central. (See pp. 18-21, infra.)

First, the Commission's order ignores the familiar

precept that summary disposition of allegations concerning a conspiracy without the benefit of discovery is inappropriate because the proof of the conspiracy is almost invariably in the hands of the conspirators. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

Second, as Central has advised the Commission repeatedly, 28/ denial of discovery is particularly egregious in this case because proof directly contradicting crucial representations of both applicants is readily available to everyone in the world except Central. The documents in question were discovered from the files of SCE&G in an antitrust suit pending in the Middle District of North Carolina. Central's counsel, who are also counsel to the plaintiffs in the North Carolina case, tendered the documents in question to the Department of Justice on August 6th, 1980. Thereupon SCE&G, one of the defendants in the North Carolina action, lodged a motion for a protective order seeking to prohibit plaintiffs' counsel (and hence, Central's counsel) from employing the documents in this or any proceeding other than the antitrust action. In view of this development, although the documents were at that time, and are still, publicly available in the files of the District Court, 29/ the pendency of SCE&G's motion to date has prevented Central

28/ See N. IV, supra.

29/ See n. 9, supra.

from presenting the documents to the Commission.30/

The Commission could have remedied (and can still remedy) this situation by calling upon SCE&G in a technical order to produce documents, which would not require SCE&G actually to produce anything but merely to relinquish its objections to Central's Counsel's transmission of the documents in question for inspection by the Commission. This procedure would avoid entirely the reason the Commission expressed as the basis for its denial of discovery, namely imposition of an undue burden upon the Applicants. SCE&G can have no reason to oppose such a procedure unless is has something to conceal.

7. The Commission's order held Central had failed to meet its burden of proof. Whether this occurred because the Commission imposed an inappropriately stringent standard of proof upon Central (Order at pp. 17-18) or erroneously concluded that Central's showing did not meet a proper standard (Order at 21-28) is not entirely clear from the Order. At page 17 the Order states that the changes referred to by the statute must be "reasonably apparent". Conceivably, that might suggest that the Commission considers that a petitioner's proof must be self-evident and uncontrovertible, or "clear and convincing". Because Central was

30/ Justice returned the documents to Central's counsel unopened. When the documents had been delivered to Justice, SCE&G had given no indication of its intention to file a motion for a protective order.

given no prior notice of such an extraordinary standard, it assumes that this test was not employed. It seems more likely that the Commission may have employed a "preponderance of evidence" test 31/ more stringent than that ordinarily associated with summary disposition. On the other hand, if the Commission employed a standard such as the standard of whether there exists a genuine controversy over facts material to the disposition of the matter--more suitable to a summary disposition such this--then the Commission erred in applying that standard to the facts.32/

The employment of a standard more stringent that that ordinarily associated with summary disposition is manifestly inappropriate at this stage. As the Department of Justice pointed out 33/ and the Commission expressly recognized, 34/ the statute does not appear to require a full-dress trial to determine whether to have a trial. One consequence of this conclusion, however, apparently eluded the Commission: if a full trial may not be had, less than the proof required to

31/ Order at p. 25 ("we do not find sufficient substance in the papers filed by Central to support" [its allegations that SCE&G coerced SCPSA to seek territorial legislation as the price for access to the Summer unit.].

32/ See, e.g. rule 56(c) Fed. R. Civ. P.; 10 C.F.R. §2.749 (contemplating that discovery has occurred, following standard of Rule 56(c), Fed. R. Civ. P.)

33/ Response of U.S. Department of Justice to NRC's Request for Comment, etc., dated Oct. 10, 1980 at pp. 5-6.

34/ Order at p. 17.

prevail at trial must be allowed to suffice. Stated differently, the Applicants cannot have it both ways: if they are to be spared the burden of trying fully the question of "significant change",35/ they must live with the results of an inquiry less critical of the opposition's proof than that to which they would be entitled at trial. To the extent that the Commission's conclusions go further than to decide whether there has been shown to exist a genuine dispute as to material issues of fact, therefore, they exceed the proper bounds of this preliminary proceeding.

If, on the other hand, the order represents an application of the appropriate standard for summary disposition, it ignores plainly competent evidence controverting material issues. The most obvious example is Central's evidence respecting its allegation that SCE&G coerced SCPSA into seeking territorial legislation as the price of access to the Summer plant. An affidavit submitted by SCPSA denied the allegation. An affidavit submitted by Central controverted SCPSA's denial with an admission against interest of SCPSA's affiant. This was buttressed with memoranda of meetings prepared by SCE&G personnel plainly establishing that SCE&G and other CARVA members would not give SCPSA access to power exchange until the matter of territory and customers was first settled and others showing SCE&G was concerned with competition by Central and its members. Nonetheless, the Order states that the Commission does not "find sufficient

35/ See Order at p. 18.

substance in the papers filed by Central to support this claim.". (Order at p. 25.) Similarly, with regard to Central's allegation that SCE&G refused to wheel, SCE&G represented that it would entertain requests for transmission services on an ad hoc basis. 36/ Central submitted an affidavit controverting the bona fides of SCE&G's commitment. 37/ However, the Commission's order nowhere refers to this affidavit (see Order at pp. 26-27) but, instead, simply accepts SCE&G's representations as true despite the Commission's knowledge that after four years, SEC&G "policy" has not resulted in a single wheeling transaction.38/

In short, if the Commission has employed a standard of proof appropriate for a summary proceeding such as this, it has ignored amply documented disputes as to material issues of fact.

8. The Commission drew an unwarranted inference that Central chose between antitrust remedies in August, 1977.

The statement in footnote 46 of the Commission's June 29 decision (p. 19) reflects an incorrect and unwarranted inference, apparently drawn from Central's comments submitted on August 25th, which the Commission presumably interpreted as "indicating that as early as August, 1977 Central chose to exercise whatever rights it had in this

36/ See Order at p. 26.

37/ See nn.25-26 and accompanying text.

38/ Order at p. 27.

forum". Nothing in the comments justifies that inference, and in fact it is completely unwarranted.

It is true that Central did make a choice of forums. That choice was made late in 1978, long after the North Carolina parties filed their antitrust complaint. The choice was not whether to join in filing the complaint or file with the Commission. Rather, it was to seek to intervene in an ongoing antitrust proceeding or file with this Commission. The reason Central chose not to join in the Complaint on August 1977 was because it wanted to continue to negotiate for power exchange services until any prospect was completely hopeless.

An affidavit of Wallace E. Brand, counsel for Central in this proceeding and for the North Carolina parties in the Greensboro proceeding, filed with the Greensboro Court on September 4, 1980 in connection with the plaintiff's Opposition to SCE&G's Motion for a Protective Order more fully explains this at Paragraphs 3, 4, and 5. The affidavit states generally in ¶¶ 3 and 4 that (1) in 1976 an antitrust investigation was commenced, and (2) in August 1977 the North Carolina parties filed suit in the Greensboro court. Paragraph 5 states as follows:

> Central initially attempted further negotiation with the electric power systems in its area but finally decided to assert rights it learned it had under Section 105(c) of the Atomic Energy Act by filing a petition with the Nuclear Regulatory Commission in December, 1978."(emphasis added)

That affidavit more fully reflects the facts, and nothing in the more abbreviated statement in the comments of August 25, 1980 at pages 14-15 is inconsistent with that statement or justifies an inference that a choice was made at an earlier time.

9. The Commission erred in failing to consider the significance of SCPSA's offer to acquire Central's bulk power supply function and SCPSA's offer to acquire Berkeley Electric Cooperative, a member of Central. (Order at pp. 23-24.) Both offers show anticompetitive intent. Moreover, SCPSA's offer to acquire Central was made at a time when SCPSA and Central were discussing Central's participation in SCPSA's share of the Summer Unit. 39/ Contrary to the Commission's ruling, the anticompetitive nature of the merger offer is not cured by the Agreement but lends additional support to Central's contention that the Agreement is anticompetitive in nature and effect.

10. The Commission erred in rejecting the "significant change" criterion advanced by the Department of Justice. 40/ A reading of the Order as a whole establishes that the Commission attempted in this preliminary proceeding, without the benefit of any discovery, to assess the anticompetitiveness and

39/ Exhibit A, attached to Affidavit of Patrick Allen.

40/ Compare Order at pp. 16-17 with Response of U.S. Department of Justice To NRC's Request for Comment etc., dated Oct. 10, 1980 at pp. 5-6.

remediability of undisputed changes in the competitive environment into which the Applicants seek to introduce the Summer plant. That is, the Commission has in fact conducted a species of antitrust review without resort to the "mechanism for obtaining necessary information from licensees in the context of such a determination." 41/ As Justice pointed out, the Commission's third criterion "is neither provided for by the act nor suggested by its legislative history [and] it would constitute a substantial departure from the scheme that was established by the 1970 amendments to the Act."

B. Relief requested

1. For the foregoing reasons, Central submits that reconsideration of the Order is warranted.

2. Central further submits that prior to conducting its reconsideration, the Commission must obtain the documents produced by SCE&G in the North Carolina district court proceeding which, Central maintains, bear materially upon factual issues in controversy in this proceeding. The Commission can easily accomplish this without imposing any burden upon the Applicants by calling upon SCE&G to give its assent to production of a limited number of these documents to the Commission by Central's counsel. Alternatively, the Commission can direct staff to investigate the public record of the North Carolina proceedings and furnish the Commission with copies of the pertinent documents.

41/ Response of U.S. Department of Justice To NRC's Request For Comment, etc., dated Oct. 10, 1980.

3. Finally, Central submits that reconsideration of the Order in light of all the evidence, including the aforementioned documents, must result in a finding of "significant change" for purposes of 42 U.S.C. §2135(c)(2).

Respectfully submitted,

Wallace E. Brand

Edward E. Hall

Sean T. Beeny

BRAND & HALL
1523 L Street, N.W.
Washington, D.C. 20005

DATED: July 6, 1981

VERIFICATION

DISTRICT OF COLUMBIA, SS:

Wallace E. Brand, being first duly sworn, deposes and says that he is an attorney for Central Electric Power Cooperative, Inc., and that as such, he has signed the foregoing Petition for Rehearing and that the matters and things therein set forth are true and correct to the best of his knowledge, information, and belief.

Wallace E. Brand

Wallace E. Brand

Subscribed and sworn to
before me this 6th day
of July, 1981.

_____
Notary Public

My Commission Expires
on _____.

CERTIFICATE OF SERVICE

I, Wallace E. Brand, hereby certify that I have caused to be served a copy of the foregoing Central Electric Power Cooperative's Petition For Rehearing on the persons listed below by depositing a copy thereof, postage prepaid, in the United States mail this 6th day of July, 1981.

Wallace E. Brand

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Service Authority
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U.S. Nuclear Regulatory Commission
Office of the Secretary
Attn: Docketing and Service Branch
Washington, D.C. 20555

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