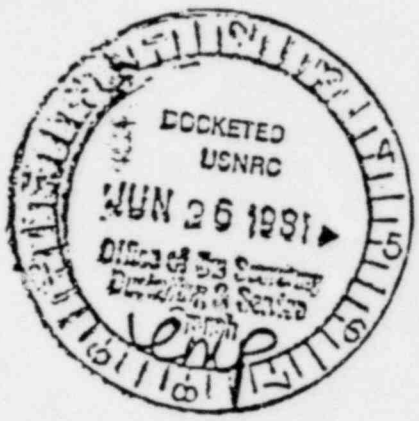
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



COMMISSIONERS:

Joseph M. Hendrie, Chairman
Victor Gilinsky
Peter A. Bradford
John F. Ahearne

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)	)

SERVED JUN 29 1981

DECISION
(CLI-81-14)

The Commission denies the petition [1/] of Central Electric Power Cooperative, Inc. (Central) for an affirmative "significant changes" determination under section 105c(2) of the Atomic Energy Act of 1954, as amended (the Act), 42 U.S.C. 2135(c)(2) (significant changes decision). The effect of today's decision is to preclude statutory antitrust review of South Carolina Electric

1/ On December 6, 1978 Central first petitioned the Commission for a finding of significant changes. Pursuant to the Commission's order of January 26, 1979, Central amended that petition on January 31, 1979. "Petition" in this opinion refers to the amended petition unless otherwise stated.

& Gas Co. (SCEG) and South Carolina Public Service Authority ("Santee Cooper" or "Authority") (jointly, applicants) in connection with their pending application for a license to operate the Virgil C. Summer facility. 2/ Our reasons follow.

I. BACKGROUND

A. The June 30, 1980 Order

The background of this proceeding through June 30, 1980 is set forth in our order of that date, CLI-80-28, 11 NRC 817, which discussed the standards for a significant changes decision, tentatively decided some of the issues comprehended in this matter, and requested the Department of Justice's ("Justice") threshold views on the ultimate likelihood that the Commission would need to place remedial antitrust conditions on the Summer license. Because we had for the first time proposed criteria for a significant changes decision in our analysis of the instant matter, 3/ we invited the

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2/ By this order we also deny the March 23, 1981 Petition to Intervene and Request for Hearing of Fairfield United Action insofar as it requested a significant changes determination and antitrust hearing. Because the petition brings no information or allegation of significant changes other than that already considered and found insufficient in this decision, we need not reach issues of timeliness, sufficiency, standing and the like.

3/ By way of review, the first criterion required that the changes alleged shall have taken place since the previous statutory antitrust review, the second that they should be fairly attributable to the licensee in a causation sense, and the third established that changes would be considered "significant" only when the competitive structure, as changed, would likely warrant and be susceptible to a greater than de minimis license modification.

parties and Justice to provide comments on the criteria and our application of them to the Summer facts. In light of the "staleness" of the record, we further granted an opportunity for the parties to advise of any recent developments.

B. Responses to the Commission's June 30, 1980 Order

Central, SCEG, Santee Cooper, NRC staff and Justice all responded to the Commission's June 30, 1980 Order: 4/

Central agreed with the Commission's analysis in the main, disagreeing only with application of the third criterion insofar as it discussd the limits on the extent to which state regulation displaces the antitrust laws. Central argued that the Atomic Energy

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4/ Page references are respectively to the following documents:

Comments of Petitioner Central Electric Power Cooperative, Inc., August 25, 1980

Letter from Troy B. Conner, Jr. (counsel for SCEG) to Samuel J. Chilk, August 22, 1980

Letter from T. C. Nichols (Vice Pres., SCEG) to Samuel J. Chilk, August 25, 1980

Response of South Carolina Public Service Authority to the Nuclear Regulatory Commission's Request for Comment on its "Significant Changes" Criteria and for a Factual Update, August 25, 1980

NRC Staff Response to Commission Request for Comments, August 29, 1980

Response of the U.S. Department of Justice to the Nuclear Regulatory Commission's Request for Comment on its "Significant Changes" Criteria and the Application of those Criteria, October 10, 1980.

Act's expressed national policy in favor of competition overrides South Carolina's policy in favor of territorial limitations. Thus Central concludes that Parker v. Brown [5/] does not immunize any of applicants' anticompetitive actions. Central also reported inconclusive settlement negotiations with SCEG and Santee Cooper individually. Central alleged that one provision of the agreement with Santee Cooper being negotiated (later reported as adopted) precluding Central from extending its transmission lines was unenforceable as violative of the antitrust laws. [6/]

SCEG, was in fundamental disagreement with the Commission's criteria and analysis. It argued that the definition of significant change should be a substantial change in the competitive structure "allowing for circumstances fairly predictable in the natural course of events" and limited to changes which themselves have negative antitrust implications. [7/] SCEG also argued that the Commission's distinction between assessing causation under the second criterion and determining a violation of the antitrust laws was not only wrong but "legally ridiculous" and that the Commission improperly sought the advice of Justice. As a bottom line, [8/] SCEG

5/ Parker v. Brown, 317 U.S. 341 (1943), is the leading case for the proposition that actions taken pursuant to valid state regulation are immune from the prohibitions of the Federal antitrust laws.

6/ At 9-10.

7/ Letter from Conner at 3.

8/ Id at 16 n. 36.

urged a finding of no significant changes with regard to itself, leaving any potential for operating license conditions only directed toward Santee Cooper. 9/

Finally, SCEG reported it was considering a proposal from Central regarding "wheeling", 10/ which SCEG characterized as Central's only specific transmission service request, 11/ and indicated that there had been no changes in SCEG's competitive relationship with Central and Santee Cooper since December 1978. 12/

Santee Cooper commented that "while the Commission's three legal criteria for a 'significant changes' determination may in the abstract provide a valid test, the application of this three-pronged test to the instant facts gives rise to a result that is squarely inconsistent with Congressional purpose." 13/ Santee Cooper noted a number of recent developments including agreement with Central enabling it to obtain an ownership interest in

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9/ SCEG refuted what it believed to be the Commission's position that Santee Cooper turned down Central's proposal for an ownership share in Summer. The Commission's statement was that Santee Cooper turned down a proposal for joint ownership of transmission facilities. See SCEG letter from Conner at 9. See also 111 NRC at 836.

10/ "'Wheeling,' a term of art, refers to the 'transfer by direct transmission of displacement electric power from one utility to another over the facilities of an intermediate facility.' Otter Tail Power Company v. United States, 410 U.S. 366, 368 (1973)." ALAB-560, 10 NRC 265 (1979), fn. 24.

11/ At 3.

12/ At 7.

13/ At 20.

future generation facilities constructed by Santee Cooper and to join with Santee Cooper in coordination and planning of future generating and transmission facilities. 14/

NRC Staff was in basic agreement with the Commission's criteria, but expressed a concern with respect to the Commission's application of Parker v. Brown and the Commission's understanding of the reach of (state action) immunity. 15/ Staff's "preliminary conclusions are that Central is being availed increased power supply options ...; that these new power supply opportunities ... enhance its own economic well-being; and finally, that these new developments are pro-competitive in that many of Central's previous allegations of anticompetitive effects resulting from changed circumstances have been redressed." 16/

Justice was in accord with the Commission's first two criteria but urged the Commission to modify the third criterion. Justice objected to that criterion because in its view it entailed an antitrust review prior to the significant changes determination contrary to the statutory scheme in section 105c(2). Moreover, Justice averred that there was no mechanism for obtaining necessary

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14/ Santee Cooper advised of (1) a recent amendment to the South Carolina Constitution authorizing Santee Cooper to become a part owner with cooperatives in electric generation and transmission, and (2) empowering Santee Cooper to own jointly with Central generation and transmission facilities. At 8, 9 and 10.

15/ At 8.

16/ At 2 (citation omitted).

information from licensees in that context. 17/ Justice proposed that the third criterion should be: whether the changes are substantial within the competitive environment, i.e., changes in the structure of the market or in the conduct of the licensee with respect to the construction or operation of the licensed plant. Justice noted that it would generally be difficult to determine whether such changes are pro- or anti-competitive without an antitrust review and that it therefore did not include in the criterion a requirement that the change must be adverse. 18/ Justice stated that events unforeseeable at the previous antitrust review, events that were a distinct possibility at the time of previous review but had become certain, and conduct that had previously not been ripe for review at the construction permit (CP) review stage could all constitute significant changes. Justice urged that neither a determination of whether changes were pro- or anti-competitive nor a determination whether remedies were available was appropriate at the significant changes determination stage. 19/

Regarding application of the criteria to the instant facts, Justice noted that its review of the pleadings revealed several strongly controverted allegations of changes that would be sufficient for a significant changes determination if the Commission's own staff found that they were meritorious. But Justice

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17/ At 4-5.

18/ At 6 and n. 12.

19/ At 6-7.

declined to make any preliminary or threshold review. It advised, however, that Central "has made one uncontroverted allegation that may contribute "significant changes" within the meaning of Section 105c(2). Justice discussed that change as follows:

> There is no dispute that in 1978 SCEG and Santee Cooper lobbied for, and the South Carolina legislature enacted, legislation restricting the area in which Santee Cooper can compete. It is likely that as a consequence of this legislation, Santee Cooper has altered its "activities or proposed activities" under the license in that it ceased competing for the business of municipalities and cooperatives other than Central, outside its three-county service area. This change in Santee Cooper's "activities or proposed activities" would have taken place since the prior antitrust review of March 31, 1972. Thus, if the Commission were to conclude that Santee Cooper has changed its conduct as a result of the South Carolina statute, the only remaining issue would be whether this change in conduct is reasonably attributable to the licensee(s).
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> The Department concurs with the Commission's suggestion that, as a matter of law, a licensee's lobbying activities can be sufficient to attribute conduct under the resulting statute to the licensee. However, the Department defers to the Commission to determine whether Santee Cooper's lobbying activities are sufficient in this case. 20/

In light of this view Justice did not reach the issue of Noerr-Pennington (lobbying for anticompetitive legislation is protected by the 1st Amendment), or Parker v. Brown (actions in conformance with valid state regulation are protected) immunities. 21/ According to Justice "the only issue at this stage is whether licensees are responsible or answerable under the Atomic Energy Act, not whether they are liable under the Sherman Act. Justice emphasized:

20/ At 9.

21/ Id.

> [A] "significant changes" determination imposes no liability; it merely triggers antitrust review. Even if an antitrust hearing eventually resulted and the Commission found it necessary to impose license conditions to remedy a situation inconsistent with the antitrust laws, those conditions need not constitute sanctions comparable to those that could flow from liability under the Sherman Act. 22/

C. The Agreement Between Central and Santee Cooper

On January 14, 1981, counsel for Santee Cooper filed a "Power System Coordination and Integration Agreement Between South Carolina Public Service Authority and Central Electric Power Cooperative, Inc." (Agreement) with the Commission. The following day we requested Central, applicants, Justice and the staff to comment on the Agreement's effect, if any, on our pending determination. The main points to emerge from those comments follow. 23/

22/ At 10-11.

23/ Page citations are respectively to the following documents:

Comment of Central Electric Power Cooperative, Inc., January 23, 1981

Comments of South Carolina Electric & Gas Company in response to Commission Order of January 15, 1981, January 23, 1981.

Response of South Carolina Public Service Authority to the Nuclear Regulatory Commission's January 15 Order Requesting Comment on the Agreement Between Central and the Authority, January 23, 1981

Comments of the Department of Justice in Response to the Nuclear Regulatory Commission Order of January 15, 1981, February 6, 1981

NRC Staff Response to Commission's Order of January 15, 1981.

Central maintained that "the agreement does not eliminate the reasons for a finding of significant changes." 24/ In support of that view it raised the spectre that the Internal Revenue Service might challenge some of the provisions thereby defeating the contemplated transactions relating to requirements and joint ownership of generating units. Assuming survival of the Agreement, which Central clearly sees as preferable, Central argued that it is "tied to the pricing or coordination terms of a single party [Santee Cooper]" unless it can obtain contracts for coordination with base load units or wheeling from SCEG and other utilities who are the very ones, according to Central, who have joined in illegal market division agreements. 25/ As a final point Central indicated willingness for post-licensing antitrust review for the facility. 26/

SCEG asserted that the Agreement affords Central the access to power and mechanism for "power exchange services" which it has sought from either SCEG or Santee Cooper. 27/ Quotations from the Agreement were marshalled to support the proposition that Central no longer has any needs from SCEG. 28/ Moreover, SCEG said that the Commission had decided that applicants' conduct leading up to South Carolina's territorial decision was not a factor in the significant changes decision. 29/ The elimination of this factor

24/ At 1.

25/ At 5.

26/ At 14.

27/ At 2.

28/ At 9.

29/ At 3.

served as a further basis for SCEG's view that the significant changes determination should be negative.

Santee Cooper commented that the Agreement removes any arguable basis for imposing any license condition to ameliorate possible antitrust problems. 30/ Central is guaranteed a reliable source of power at cost of service and "Central will under the Agreement approved by REA purchase its bulk power requirements with a few limited exceptions from the Authority." "Thus," Santee Cooper maintains, "there is no basis for further inquiry into Central's allegations regarding [SCEG's] unwillingness to wheel power for Central purchased from sources other than the Authority, particularly since Central has not alleged that [SCEG] has refused to carry out any specific wheeling transaction that was requested." 31/ Santee Cooper argued as a legal matter that the Commission does not have "carte blanche" to impose antitrust licensing conditions 32/ and that the Atomic Energy Act's "legislative history makes abundantly clear, [that] Section 105c was not intended to be a no fault statute for restructuring electric power markets." 33/

Department of Justice declined to make the factual determination whether the Agreement is sufficient to, in effect, eliminate the anticompetitive effect of any change that may have occurred. Justice did note that certain recent comments, particularly those

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30/ At 6.

31/ At 7.

32/ At 8.

33/ At 10.

of Central, caused it to believe that the South Carolina territorial legislation may have had "less competitive significance to Central than may have appeared at first blush." 34/ Moreover, Justice took the occasion to explain its previous advice on the third criterion. It stated that: "In making this determination the Commission should take into account whether an antitrust review would serve no useful purpose and, thus, would be inconsistent with the Congressional intent that antitrust reviews at the operating license stage not be lightly undertaken." 35/

NRC Staff's assessment was that the Agreement provides "ostensibly reasonable opportunities" for Central "to obtain its future generation and transmission needs with the Authority on a jointly-planned and jointly-coordinated basis, with accompanying guarantees for 'cost of service' rates." 36/ Because the Agreement basically gives Central what it sought in its Petition and because traditional NRC antitrust remedies go no further than the Agreement, providing only a "general charter" for dealings between the utilities, staff concludes that the Agreement diminishes the possibility that the third criterion can be met. 37/ Moreover, staff notes that SCEG has given Central its assurances that it will wheel power 38/ and that staff has seen no "factual

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34/ At 4 n. 4.

35/ At 3 n. 3.

36/ At 11.

37/ Staff finds unpersuasive Central's concerns resulting from IRC uncertainties.

38/ At 9.

material that would lead to the conclusion that SCEG is explicitly or constructively refusing, in an anticompetitive manner, to provide Central with power or services." 39/

II. ANALYSIS

With the foregoing as background, we now turn to the merits of the Petition. We shall first consider the criteria to be used for the significant changes determination, then discuss the requirement of a factual basis for the significant changes, and finally apply the criteria to the instant petition.

A. Criteria for the Significant Changes Determination

In our June 30, 1980 Order we clarified that, in considering whether there had been changes since the last antitrust review, the operative date must be the date of the last actual review. We adhere to that view. However the more precise issue arises whether a change anticipated by the review at the construction permit stage but in fact occurring since that review meets the requirement of the statute represented by this first criterion.

Taking into consideration the careful balance struck by the Congress in deciding whether to have any antitrust review at the operating license stage, we find that Justice's suggestion that a significant change could occur when "what had been possible was now certain" 40/ goes too far in one direction. However we also

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39/ At 12.

40/ At 6.

find that Applicants' suggestion that if an event was foreshadowed at the earlier review stage, it may never be a significant change goes far in the other direction. We believe that where some change was anticipated with approval at the previous stage the later actual occurrence of the change could constitute a significant change within the meaning of section 105c(2) if the contours of the actual change were not anticipated and could not reasonably have been anticipated. Thus, for example, if an applicant at the construction permit stage was known to be negotiating with another utility to permit access and those negotiations were later successfully concluded, the occurrence of that event in itself would not be the subject of a significant change. But if that event were, hypothetically, to be linked to the other utility's agreement to an anticompetitive policy regarding transmission that had not been considered at the antitrust review and was not reasonably to be expected, then the access transaction would be a significant change, assuming it also met the other two criteria.

2. Causation

Our June 30, 1980 Order established as the second criterion that the change or changes must be reasonably attributable to the licensee in the sense that the licensee has had sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review. We adopt the criterion.

The applicants have criticized the criterion on the ground that Congress meant to include as significant changes only those for which licensees could be held legally accountable. 41/ We reiterate our view that SCEG's formulation ignores the elements of causation and of fairness and reasonableness that the Joint Committee on Atomic Energy took care to include in their report. 42/ A finding of significant changes, and a fortiori a finding that one criterion for such a finding has been met, is limited to the purpose of determining whether an antitrust review should be held and does not determine the outcome of any such review. Applicants, by arguing that legal accountability must be established at the threshold, would require that the review be essentially completed before it can even be commenced. Any threshold forecast of outcome pursuant to the third criterion is only to avoid a review where no purpose is to be served by holding one, such as where changes have occurred but are not anticompetitive or where anticompetitive effects of changes are beyond the Commission's power to remedy.

41/ SCEG's objection is bound up in its insistence that Noerr-Pennington shields it from our causation finding. We will return to this subject when we analyze our decision on the instant facts.

42/ See H.R. Rep. No. 91-1470, supra.

3. Significance

We decided in our June 30, 1980 Order that "significance" must here be read to mean that the changes have antitrust implications that would be likely to warrant Commission remedy. We affirm that decision.

This criterion has provoked the widest divergence in views, with the poles represented by Justice on the one hand and SCEG and Santee Cooper on the other.

As the staff recognized, "this third criterion appropriately focuses, in several ways, on what may be 'significant' about any changes since the last ... review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have de minimis anticompetitive effects." (Emphasis provided) The staff correctly discerned that the third criterion has a further analytical aspect regarding remedy: "Not only does [it] require an assessment of whether the changes would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes by their nature would require." 43/ The third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects

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43/ Staff's February 10, 1981 Response at 7, noting that early identification of possible NRC remedies is not novel with regard to invocation of NRC antitrust proceedings.

of the competitive structure in relation to the change to determine significance.

B. Requirement of a Factual Basis for the Changes Alleged

In our June 30, 1981 Order we explained the role of the significant changes determination, observing that a finding that significant changes have occurred must precede a formal request for the Attorney General's advice in any statutory antitrust review. Congress has made it abundantly clear that absent such a finding there is to be no antitrust review proceeding at the operating license stage. That Congressional directive may not be circumvented by expanding a petition for significant changes into a proceeding with all the attributes of a full-fledged hearing -- discovery, examination and cross-examination of witnesses and the like. In sum, we do not believe Congress intended that we conduct a proceeding to ascertain whether to have a proceeding. Inherent in that result is a recognition that the parties, other than the Commission do not have discovery or the other means for determining facts commonly associated with formal adjudication.

Thus, we understand Congress's meaning to be that changes in order to be significant must also be reasonably apparent. They must be alterations in the competitive structure or the activities of the licensees discernible from applicants' required submittals, from staff's investigations, or from papers that are filed. In

particular when petitioners request a significant changes determination we expect that the changes which have taken place will be known to them so that they can inform us of them with the factual basis underlying their allegations. 44/ If that, together with staff investigation, does not enable us to determine that significant changes have occurred, then the petition must be denied.

This result is consistent with Congress's expressed intent not casually to burden applicants with a second antitrust review after an extensive antitrust review at the construction license stage. 45/ We can not embark on a second antitrust review without specific facts which show that all of the criteria for the significant changes determination are met.

44/ Accordingly, Central's motion for permission to conduct discovery, which we have held in abeyance, is denied.

45/ Parties may be reminded that other forums exist in which to try allegations of antitrust violations. Furthermore, we are bound to transmit to Justice such allegations as are made to us. See Section 105a of the Act. We consider in this matter that Justice is on notice of Central's allegations. Moreover, in the event that a court of competent jurisdiction finds an antitrust violation by a licensee with some nexus to its nuclear license, we are empowered to take whatever course of action we deem appropriate including among other things conditioning the license or withdrawing it. This is, of course, true before and after an operating license has been granted. Additionally, as a separate matter, if the facts and information supplied by applicants and relied on by us in granting a license are found to be false, the license may be in jeopardy and other measures are available. See Section 186a of the Act and Houston Lighting & Power Co. (South Texas Units 1 and 2), 5 NRC 1303, 1311 (1977). Accordingly, facts relied on to make a significant changes determination have this status.

We do not intend the leeway we have allowed Central for repeated filings to set a precedent; 46/ rather, we wished to be liberal in entertaining whatever information Central put before us by way of compensation for the special circumstance to which we adverted in our Opinion, namely that no statutory review of Santee Cooper was conducted by the Attorney General at the time it became associated with SCEG in the construction of the Summer facility. 47/

46/ In our tentative June 30, 1980 Order we addressed the issue of timeliness and concluded that under the circumstances and in the interest of fairness we should regard Central's petition as timely. We relied, in part, on the fact that Central had not had unambiguous notice of opportunity for antitrust comment. 11 NRC 829-830. We had accepted at face value Central's statement that as soon as it had learned it might have rights it could assert in this proceeding it retained an attorney for the purpose of studying whether it could obtain an antitrust review, and immediately following that study filed the instant petition. Petition at 1. Central has since our June 30, 1980 Opinion cast these facts in a different light, indicating that as early as August, 1977 Central chose to exercise whatever rights it had in this forum. See Comments of Petitioner Central Electric Power Cooperative, Inc., August 25, 1980 at 14-15. However, in light of the decision we have reached on the significant changes determination we need not today decide what effect, if any, our new understanding should have on the timeliness decision.

47/ As we explained in our June 30, 1980 Order, since Fermi (Detroit Edison, et al (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-9, aff'd ALAB-475, 7 NRC 752, 755-56 n. 7 (1978)) review of a new co-owner is required. 11 NRC at 830-831.

C. Application of the Criteria to this Matter

1. First and Second Criteria

We adhere entirely to our earlier views regarding application of the first two criteria, and add only a few words about each.

Concerning the first criterion, it has been suggested that because South Carolina had already embarked on territorial legislation the new legislation here at issue should be considered to have been anticipated. We think this is wrong. Neither the fact of legislation nor its provisions were sufficiently foreseen that any account of them was taken at the previous antitrust review.

With regard to the second criterion, the Department of Justice has persuasively refuted the argument that the Noerr-Pennington [48/] doctrine prevents the Commission's causation finding:

> The only issue at this stage is whether licensees are responsible or answerable under the Atomic Energy Act, not whether they are liable under the Sherman Act. A "significant changes" determination imposes no liability; it merely triggers an antitrust review. [49/]

The role of the Noerr-Pennington doctrine is to assure that there will be no liability or penalty for the exercise of First Amendment rights. Such a penalty could not result from the conduct, as

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48/ Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1960); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

49/ Justice's Response, October 10, 1980 at 10.

opposed to the outcome, of formal antitrust review. Of course the outcome of formal review would necessarily recognize activities protected by Noerr-Pennington are not antitrust violations. Consequently the Noerr-Pennington doctrine could be considered in connection with the third criterion. However, we need not reach that issue in this case.

2. Third Criterion

As indicated, our inquiry here is essentially whether there is sufficient likelihood that the Commission's remedial powers will be exercised so that some purpose would be served by entering on the process of antitrust review.

In its Petition Central summarized the significant changes it believes to have occurred as follows: 50/

> (a) SCEG exercised its monopoly power in the power exchange market by conditioning Santee-Cooper's participation in the Summer Unit in exchange for an elimination of competition [with SCEG by Santee Cooper] at retail and wholesale.
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> (b) Santee-Cooper has changed its competitive role and marketing policy [vis-a-vis Central] and has thereby aligned itself with SCE&G.

50/ Bracketed information within the quotation represents our understanding of Central's meaning based on the entire Petition and other documents submitted to us.

Although one change meeting the first and second criteria is sufficient to permit consideration of the entire competitive structure in evaluating the third criterion, we note that each of Central's seven alleged changes, if it in fact occurred, meets the requirements of the first and second criteria.

(c) SCE&G and Santee-Cooper do not compete for loads of 750 KW or greater outside of the three county area, although both of these utilities have agreed [by agreeing to seek the legislation] to compete with Central's members [member cooperatives] for these loads.

(d) Santee-Cooper has implemented a dual rate policy for large loads [thereby charging higher rates to at least one new purchaser-member of Central].

(e) Santee-Cooper has agreed to restrict its sales in the wholesale market.

(f) Both SCE&G and Santee-Cooper have refused to provide power exchange services and facilities to Central, thereby preventing Central from constructing and operating bulk power facilities.

(g) Santee-Cooper has offered [to Central] to acquire control over Central's bulk power supply function. 51/

The anticompetitive treatment of large loads and wholesale supply complained of in (c) and (e) above must be immediately recognized as not subject to our remedial powers. While Central has framed its assertions in terms of "agreement" between applicants and, consistent with Central's view that Parker v. Brown has no application here, has ignored the role of state legislation, we do not follow Central's lead. As we have explained before, the law seems clear to us that activities conducted pursuant to state statutory regulatory requirements are neither violations of the

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51/ Petition at 49. Central has at various times offered somewhat different formulations of these assertions, as have the applicants and staff. See, e.g., Staff's Response to Amendment Petition of Central, March 19, 1979 at 25. However, we will accept Central's formulation in its Petition as subject for our response.

antitrust laws nor the policies underlying those laws. 52/ In (c) and (e) the activities that are the subject of the alleged "agreement" are required by the state as a part of a state regulatory plan. With respect to them, applicants have no freedom of choice. Thus, they may not be the subject of our license modifications.

Items (b), (d), (g) and part of (f) concern the activities of Santee Cooper. Whatever may have been the status of these allegations before the Agreement between Central and Santee Cooper, 53/ that Agreement has laid them to rest. The Agreement deals in a comprehensive fashion with the relationship between the parties and provides for the furnishing of power and power exchange services. As SCEG, Santee Cooper and staff have pointed out, it is clear that Santee Cooper and Central continue to be aligned and that benefits to Santee Cooper through access to the Summer facility will be available to Central. Apart from the role of

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52/ We reiterate our view that decisions left open to parties under the state regulatory system and thus dictated by business judgment, not regulatory coercion, may be subject to findings of antitrust violations. As we understand it, the reach of Parker v. Brown does not extend beyond what is required for the integrity of the state regulatory plan. In that regard we quoted the language of Philadelphia v. U.S. Bank defining the bounds of federal regulatory exemption vis-a-vis the antitrust laws and adopted as a part of our test that activities at the free choice of parties and not "repugnant" to the state plan would be subject to remedial action where required in the interest of the antitrust laws or the policies underlying those laws.

53/ Our Opinion disposed of (d).

the South Carolina legislation, other allegations of changed roles have been resolved by the Agreement. 54/

We had earlier indicated that the "dual rate" allegations of item (d) seemed to us to be insubstantial because Santee Cooper's charter obliges it to supply power at "cost of service". As a result of the Agreement, we are convinced that nothing survives of this allegation. Regarding item (g), it is unclear whether an "offer" could be construed to be an anticompetitive change; however we need not decide that issue because Central has agreed with Santee Cooper on transmission, as well as generation, planning and operations, retaining distinct ownership of facilities or portions of them.

Viewing allegations (c), (d), (g), and (f), as it pertains to Santee Cooper, in their totality, we have not been persuaded that, reading the South Carolina legislation in tandem with the Agreement, Central's competitive position has deteriorated since the last review of the Attorney General.

There remain the allegations of (a) and the part of (f) dealing with SCEG.

In our Order we adverted to the claim in (a) that SCEG wielded monopoly power to coerce Santee Cooper to seek territorial legislation as the price for access to the Summer facility. We explained

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54/ More detailed discussion of (f) will be presented infra with comments on (f) as it pertains to SCEG.

that even if we found that SCEG had committed a Sherman Act violation here, as alleged, that in itself would not repeal South Carolina's laws and would not remove the Parker v. Brown immunity from actions commanded by state law. This is not to say that were we to find that SCEG had used access to a nuclear facility as a club to coerce behavior we would be powerless to take remedial action. Nonetheless, having reviewed all of Central's statements, we do not find sufficient substance in the papers filed by Central to support this claim. By affidavit we have been informed that "it was common knowledge in early 1973 that [SCEG] was conditioning participation by Santee Cooper in the Summer Unit upon enactment of the territorial law" and that "Electric and Gas representatives at the State House have been telling that [SCEG] is not going to sell the Authority power out of the nuclear plant and then have it compete with Electric and Gas." We do not think that such generalized hearsay would be sufficiently detailed and reliable evidence on which to base our decision. Moreover, the contemporaneous analysis of the events leading to the passage of the legislation which Central presented as support for its view is not internally consistent. That same document states that SCEG could not have coerced Santee Cooper's action because it was common knowledge that the Justice Department would have assured that Santee Cooper got a share of the Summer facility. 55/ 56/

55/ (See following page)

56/ (See following page)

With regard to (f), allegations regarding refusal to provide power exchange services have been of concern to us. Central's Petition stated that it required power exchange services from "either Santee-Cooper or SCE&G" 57/ and had been unable to conclude such arrangements. As we discussed above, the Agreement has altered the situation between Central and Santee Cooper so that our concerns have been alleviated. It is notable that a Constitutional amendment and legislation were apparently required to empower Santee Cooper to own and develop transmission in conjunction with Central. These things have now been accomplished, and in any event this matter has been resolved between Central and Santee Cooper. The resolution substantially reduces and arguably eliminates the importance of SCEG's failure to conclude arrangements to wheel power for Central. Nonetheless, we note that SCEG advised that it has not refused to wheel power, that it will provide ad hoc transmission services, that it continues its negotiations with Central which we must assume are conducted in

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55/ (Continued from previous page)

See Central's Reply Brief, March 19, 1975, Kelly affidavit, ¶ 4, 6 and Attachment "Proposed Senate Bill 389, ¶ 9.

56/ (Continued from previous page)

In the event that negotiations between SCEG and Santee Cooper had not been successfully concluded as had been anticipated, we might have looked favorably on a suggestion that there had been "significant changes" because the anticipated event had not occurred.

57/ Petition at 5.

good faith. Central has offered no facts which dispute this, besides the bare allegation of refusal to deal in the petition. 58/ Moreover, staff states that it knows of no SCEG refusal to provide power services to Central. 59/ Furthermore, we consider SCEG's assertions as having been provided us for the purpose of securing a license with all that that entails. 60/ As such we need not reject them without a more specific and detailed basis than Central has presented. 61/ Thus we accept SCEG's statements as true.

58/ Central has advised that SCEG rejected a proposed general agreement in the nature of license conditions, and has provided that proposal for the record. Reply Brief, Exhibit B. We cannot agree that SCEG's single failure to accept this particular proposal constituted a refusal either to wheel or to negotiate.

59/ Staff stated: "The only refusal which has come to Staff's attention is the refusal of Santee Cooper to build jointly owned transmission lines with Central ...." NRC Staff Response to Amended Petition, March 19, 1979 at 51.

60/ See South Texas, supra, 5 NRC at 1311.

61/ Central's Petition asserts only as follows:

> Central's efforts to secure power exchange services from SCE&G have also been unsuccessful. In the Saluda hydroelectric relicensing proceeding before the Federal Power Commission, Central sought license conditions which would require SCE&G to engage in power exchange transactions. These license conditions were patterned after those used in NRC proceedings. In March 1977, SCE&G refused to engage in the power exchange services requested by Central, except that it did agree to wheel discrete amounts of power between discrete points on a case by case basis. Such a wheeling policy is hardly sufficient and

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Before concluding our analysis we comment on one additional allegation that recurred in Central's presentation. 62/ Central has argued from time to time that Santee Cooper would only permit its participation in the Summer facility on terms with heavy financial penalties. 63/

From all that we can determine the Agreement including the provision for Central's option to purchase a share of Summer was made by the parties in good faith. We understand that the terms stated would, if exercised, require Central to pay its prorated share of actual costs. On its face, such an offer does not seem consistent with "heavy financial penalties" as alleged by Central.

61/ (Continued from preceding page)

would obviously frustrate Central's attempt to enter the bulk power business.

Central did direct further inquiries to SCE&G on wheeling, but SCE&G has yet to make a response. Petition at 46.

62/ Central has made no argument of other unchanged circumstances whose competitive aspect has altered as a result of changes reasonably attributable to applicants.

63/ E.g., Reply Brief at 20.

III. CONCLUSION

For all the foregoing reasons we decline to find that significant changes have occurred in the activities or proposed activities of applicants within the meaning of section 105c(2). We therefore do not request the formal advice of the Attorney General. 64/

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
the 26th day of June, 1981.

64/ All pending motions consistent with this result and those overtaken by time are rendered moot, those inconsistent with this result are denied.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition For Review upon the respondent Federal Nuclear Regulatory Commission and upon the parties admitted to participate In the Matter of South Carolina Electric & Gas Company and South Carolina Public Service Authority's (Virgil C. Summer Nuclear Station Unit No. 1) Docket No. 50-395A by causing copies to be deposited in the United States mail, first class postage prepaid, addressed as set forth below, on this 21st day of August, 1981.

Sean T. Beeny

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