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 No. 1)	)	

RESPONSE OF THE SOUTH CAROLINA PUBLIC SERVICE AUTHORITY TO CENTRAL ELECTRIC POWER COOPERATIVE'S PETITION FOR REHEARING

I. Introduction

This memorandum is the response of the South Carolina Public Service Authority (the "Authority") to the petition of Central Electric Cooperative ("Central") requesting reconsideration of the Commission's Order of June 26, 1981. The Commission's June 26 decision reaffirmed the criteria set forth in its June 30, 1980 Memorandum and Order for the "significant changes" determination, and found that those criteria were not satisfied in this case. Thus, the Commission found that significant changes within the meaning of section 105c(2) have not occurred, that an antitrust review is not required, and that Central's petition shall be dis-

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missed. On July 6 and July 20, 1981 Central filed petitions for reconsideration of the Commission's Order, contending that the Commission erred in its Order dismissing the petition for a finding of significant change.

II. The Commission Did Not Abuse Its Discretion in Denying Central's Petition For A Second Antitrust Review.

The Commission's findings and conclusions, as set forth in its Order of June 26, 1981, are clearly justified and supported by the factual material submitted to the Commission in this proceeding, which is now more than two-and-a-half years old. During that time, Central has been given every opportunity to amend and clarify its ever changing positions and to present factual support for its numerous allegations; the Commission has patiently provided Central with every opportunity to present its case.* Indeed, Central's

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* Central filed its petition for a finding of "significant changes" on December 6, 1978, more than five years after the Authority agreed to acquire an interest in Summer, two years after the filing of the application for an operating license, and more than seven years after the South Carolina legislature granted the Authority an exclusive service area and empowered the Authority to purchase an interest in the Summer Nuclear facility. On January 31, 1979, Central amended its petition, purported to clarify the grounds supporting the requested finding of "significant changes." On March 19, 1979, Central filed an unauthorized pleading and on March 22, 1979 a letter containing additional factual allegations. The pleading and letter were subsequently accepted by the Commission by Order of March 28, 1979; the Commission "decided to overlook any procedural irregularity and to accept these documents in the interest of a complete record." It can hardly be said that the Commission has not provided Central with an opportunity to be heard.

petition, which was untimely by any measure, could have and should have been dismissed on that ground more than two years ago.

Congress intended that a second burdensome antitrust review shall not be undertaken as a matter of course at the operating license stage.* Congress intended that two antitrust reviews for a nuclear facility were to the exception, not the rule, and granted to the Commission the exclusive power to determine whether "significant changes" had occurred since the construction permit antitrust review -- the condition precedent to antitrust review at the operating license stage. The Commission has broad discretion both to define the "significant changes" mandate and to determine whether particular facts presented to it satisfy the requisite standard. See, e.g., Porter County Chapter v. Nuclear Regulatory Commission, 606 F.2d 1363, 1369-70 (D.C. Cir. 1979) (the agency has "substantial discretion" on whether to initiate full-blown proceedings after preliminarily reviewing the basis for a claimed violation of the Atomic Energy Act).

In this case, the Commission has determined, based on a factual record developed over more than four years, that no significant changes have occurred, and the Commission has clearly set forth a reasoned basis for its conclusion. On March 19, 1979 the Commission staff, after a review of

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* See H.R. Rep. 91-1470, 91st Cong., 2nd Sess. 29 (1970) (hereafter "Joint Committee Report").

the briefs of the petitioner and the applicants, and after completing a lengthy investigation that commenced in 1977, concluded that Central's petition for a finding of significant change should be dismissed, and so recommended to the Commission. There is nothing to suggest that the Commission has abused its discretion or acted capriciously in rejecting Central's petition for a second antitrust review. Central now seeks to rehash arguments already heard and resolved, and thus, its petition for reconsideration must also be rejected.

Central's petition for reconsideration lists a number of alleged errors in the Commission's June 26 Decision. These contentions are addressed below in turn.

1. Central takes issue with the Commission's third criterion for the finding of "significant changes," i.e., whether an alleged change "would likely warrant some Commission remedy." Central apparently contends that the Commission must make a finding of significant change whenever there exists only a mere possibility, however remote, that the Commission might fashion a remedy.

Central's approach would defeat the purpose underlying the "significant changes" determination. As the Joint Committee Report on the 1970 amendments to the Act makes clear, "The Committee sees no sense in two such exercises [antitrust reviews] unless there are significant intervening changes." (at 29) Central's broad construction of Section 105c(5) would, as a matter of course, require a second antitrust review in

virtually every case, even where it does not appear that the conduct is inconsistent with the antitrust laws, and even though it appears unlikely that a Commission remedy is either necessary or appropriate. Moreover, to adopt Central's approach would be to render the word "significant" meaningless. Congress obviously intended that alleged changes be carefully evaluated before the Commission ordered a second antitrust review, and the existence of more than a mere remote possibility that the Commission would need to exercise its remedial powers is compelled by the underlying legislative purpose -- to insure that applicants are not required, as a matter of course, to run the antitrust gauntlet more than once.

Nor is there any basis for Central's contention that the Commission's Order must fail because it purportedly invokes a higher standard for the commencement of an antitrust review than the statutory standard required to trigger an antitrust hearing.

Contrary to Central's assertions, an antitrust hearing is not triggered simply because the Attorney General finds that "there may be adverse antitrust aspects." An antitrust hearing may be held only after the Attorney General in addition concludes that a hearing is appropriate or necessary and thereafter "recommends that there be a hearing." The statute requires that the Attorney General find that there "may be" antitrust aspects before a hearing may be recommended,

but that finding alone quite clearly does not trigger a hearing; the Attorney General may or may not thereafter recommend that a hearing be held.* Thus, the statute requires, as does the Commission's third criterion, an assessment by the Attorney General of the practical value of further proceedings, thus reflecting the Congressional purpose to avoid the commencement of unnecessary antitrust proceedings at the operating license stage.

The Commission's third criterion does not require that an antitrust violation be established; instead, it is sufficient that the Commission be satisfied that based on the facts presented to it there exists a sufficient likelihood that the Commission's remedial powers might be exercised. See the discussion of the standard of proof infra at 14-17. Any other criteria would be inconsistent with the Congressional purpose; a purpose so apparent that it cannot responsibly be ignored. See Department of Justice Comments, p. 3, October 10, 1980, cautioning that the Commission must consider "whether an antitrust review would serve no useful purpose."

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* Central cites no authority supporting its contention that the mere "possibility" of an antitrust violation is sufficient to satisfy the statutory standard for a hearing. Analogously, the word "may", which Central claims implies a mere "possibility", is also employed in Section 7 of the Clayton Act, 15 U.S.C. § 18, which proscribes corporate mergers that "may tend substantially to lessen competition". The courts have made clear, however, that Section 7 does not prohibit the mere possibility of competitive injury, but rather that such injury must be "probable". See, e.g., United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622-623 (1974).

We submit the Commission's third criterion represents a reasonable interpretation of its statutory mandate, which the Commission has broad discretion to interpret and apply. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc., 435 U.S. 519 (1978).

2. Central urges that the Commission erred in refusing to accept Central's contention that SCE&G "coerced" Santee Cooper into supporting the 1973 legislation that granted Santee Cooper an exclusive service area. Central's "evidence" on this point, consisting of an ambiguous and internally inconsistent affidavit and documents totally unrelated to any issues in this proceeding, simply has no probative value. Moreover, even if the "historical linkage" of the activities of SCE&G, Carolina Power and Light Company and Duke Power Company during the 1960's -- well prior to the Attorney General's antitrust review at the construction permit stage -- might in a full adversarial proceeding be considered marginally probative of SCE&G's propensity to "coerce" Santee Cooper and others, such circumstantial "evidence" is entitled to absolutely no weight in making the statutorily mandated threshold determination of whether there exists sufficient hard evidence of a changed situation inconsistent with the antitrust laws to warrant a second antitrust review.

The fundamental difficulty with Central's position -- which is itself dispositive of the allegation -- is the fact that uncontroverted contemporaneous evidence compels the conclusion that the Authority had independent business reasons

providing an incentive to obtain legislation which would grant it territorial exclusivity, regardless of the outcome of negotiations with respect to power exchange arrangements or an interest in the Summer Nuclear facility. In 1969 the South Carolina legislature enacted legislation governing the service areas of all other South Carolina electric utilities, and the Authority determined that a haven of territorial exclusivity was in its best interests -- just as the members of Central presumably concluded prior to the 1969 legislation. The Affidavit of Robert S. Davis, Chairman of the Authority's Board of Directors (appended to the Authority's March 7, 1979 Memorandum), states unequivocally that the Authority viewed the territorial legislation as being in its own best interest. Indeed, its underwriters had advised that the territorial exclusivity provisions of the proposed legislation "would be most helpful to the Authority in selling its future bond issues at the lowest reasonable rate." (Letter of May 31, 1973 from George T. Ragsdale to J.B. Thomason, General Manager of the Authority, appended to the Authority's March 7, 1979 Memorandum).

The 1973 legislation -- which did not depart in this respect from the bill supported by the Authority -- granted to the Authority an exclusive service area, defining the Authority's "present service area" as "the area or areas hereinafter described, within which the Public Service Authority shall have the right to furnish electrical power to the exclusion

of other electrical utilities." (Section 58-31-310(2), Code of South Carolina (1976), emphasis added) The definition of electrical utility in Section 58-31-310(1) excludes cooperatives or municipalities, but includes all other sellers of wholesale or retail power. The Authority's service area is defined by Section 58-31-330 to include most of Berkeley, Georgetown, and Horry Counties in South Carolina. In short, after passage of the legislation, neither SCE&G nor any other investor owned utility may compete with the Authority in its service area. Thus, the legislation at issue conferred a substantial competitive benefit on the Authority -- a benefit that the Authority would have sought regardless of the views of SCE&G, the other investor owned utilities, Central or anyone else.

Furthermore, Central's dubious "evidence" of coercion and/or conspiracy is hardly consistent with the Authority's practice, throughout the negotiations with SCE&G, to provide Central with detailed, periodic accounts of the subject matter and status of its negotiations with SCE&G. Typical of the correspondence during this period is Central's response to an update by the Authority in late 1971:

> "We are pleased to learn from your letter that you had included in your negotiations for power, territory, interconnections, etc. with the South Carolina Electric & Gas Company, the matter of acquiring a substantial block of power from the Parr [Summer] Nuclear Station."

(Letter from E.V. Lewis to J.B. Thomason, December 7, 1971, appended to the Authority's March 7, 1979 Memorandum as Exhibit

C). These extensive communications are chronicled in the Authority's March 7, 1979 Memorandum to the Commission (pp. 4-8). The correspondence makes clear that Central was kept fully apprised of negotiations with SCE&G both with respect to territories and with respect to participation by the Authority in SCE&G's nuclear facility. Certainly, the negotiations were in no way covert or purposefully concealed from Central, as Central now suggests. Moreover, the very openness of the negotiations (the Authority also periodically issued press releases explaining the subject matter and status of negotiations with SCE&G) is inconsistent with Central's contentions that the Authority was "coerced" into supporting the territorial legislation.

Although the context in which the negotiations occurred, and the Authority's obvious interest in achieving territorial exclusivity are sufficient alone to justify rejection of Central's claim of coercion, both the Authority and SCE&G have in this proceeding submitted affidavits which unequivocally deny Central's unfounded allegations.* Under these circumstances, it seems abundantly clear that the Commission's refusal to make a finding of significant change on this issue was entirely justified.

Similarly, the CARVA documents lend little support to Central's claims. Even if an understanding had existed

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* See Affidavits of Robert S. Davis and Lucas C. Padgett appended to the Authority's March 7, 1979 Memorandum.

in the late 1960's among the participants in the CARVA pool -- a power exchange agreement terminated in 1970 -- that the Authority should not be granted access to CARVA power so long as it was legally free to compete with the participating utilities in their home territories, such a purported understanding is not probative of Central's allegation that SCE&G extracted a similar condition with regard to participation in the Summer facility pursuant to negotiations that culminated three years after CARVA ceased to exist. Central's unsupported allegation in this regard pales when compared to the direct denials contained in sworn affidavits submitted by the applicants that there was not any condition of this sort placed on participation in Summer. Central's argument also fails to address the fact that the Authority could not have been "coerced" into supporting legislation which it favored anyway.*

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* With respect to the documents that Central contends support its allegations, but which it argues may not be submitted to the Commission because of an order in other litigation, neither this nor any other Commission is required to seek access to documents merely because a petitioner asserts that they are somehow relevant to its claims. In this case, Central has also urged the Commission's staff to request the documents, and the staff has apparently determined that the documents are not worth pursuing. They purportedly relate to the CARVA "episode," the subject of numerous other documents submitted to the Commission. See Central's August 25, 1980 Comments at 14-16. The Commission has broad discretion to determine the point at which it has significant facts to decide the issue of "significant changes," and it clearly did not abuse that discretion in this case. See discussion infra at 14-18.

3. Central argues that the state action doctrine enunciated in Parker v. Brown, 317 U.S. 341 (1943) does not immunize from antitrust challenge that which Central characterizes as the "territorial agreement" between SCE&G and the Authority. This agreement, Central contends, confers upon the Authority the "exclusive right to negotiate with Central for power exchange services and to supply Central with firm bulk power." Apparently, Central now for the first time alleges the existence of a private agreement between SCE&G and the Authority to allocate Central's power exchange and bulk power business to the Authority.

This allegation, if we understand it correctly, has not previously been advanced by Central, and is improperly raised at this point of the proceeding. Nevertheless, the short answer to the allegation is that it has absolutely no basis in fact, and Central offers no specific facts in support of the charge. Central's assertion regarding an alleged unwillingness of SCE&G to propose to Central precisely the type of joint ownership arrangement for generating facilities that Central desired is hardly evidence of a conspiracy to allocate customers. Obviously, a multitude of legitimate business considerations would influence any joint ownership proposal; besides, bulk power sales and joint ownership involve entirely different and unrelated issues. Indeed, Central's discussion of this allegation not only fails to point to specific facts supporting the existence of such an agreement, but fails even

to provide a coherent, believable narrative, whether or not supported by any evidence. The Authority's relationship with Central has been governed by its contracts with Central and only with Central. To the extent that Central is contractually free to do so, it may (and it has in the past) purchased bulk power from SCE&G and others.

4. Central contends that the terms of the Power Coordination Agreement between Central and the Authority are not reasonable, and thus constitute a significant change. This, like the previous contention, is born purely of desperation. If the Authority had not entered into the Power Coordination Agreement with Central, the refusal to do so would, in Central's view, give rise to an antitrust review. Since the Agreement has been executed, Central now urges that an antitrust review is required because the terms of the Agreement, which have been approved by Central's Board of Directors and the REA, impose "financial burdens" on Central.

The Power Coordination Agreement was consummated only after years of good faith negotiations between Central and the Authority; the Agreement was willingly approved by Central's Board of Directors, and the REA, the federal watchdog for the cooperatives' interests. It provides Central with a comprehensive package satisfying its bulk power requirements either by purchases on a cost of service basis from the Authority and/or by ownership of generation facilities alone or in conjunction with the Authority. Central, like the

Authority, has both rights and obligations under the terms of the Agreement, and it is fair to assume that both parties would prefer more rights and fewer obligations than resulted from arms length negotiations.

The Agreement addresses many of the contentions made by Central in its 1978 petition, and in many respects provides Central with far more comprehensive participation in generation and transmission than could be expected from the Commission at the conclusion of an antitrust hearing. The Commission has correctly taken into account the comprehensive terms of the Power Coordination Agreement entered into between Central and the Authority.

5. Central argues that the Commission erred in accepting SCE&G's assurances that it will wheel power for Central.

Central's assertion ignors critical facts. First, Central has not produced any evidence that SCE&G has ever refused a specific request to wheel power for it. Second, the Commission has been informed that negotiations are still continuing regarding the development of a more generalized power service arrangement between the two firms. In these circumstances, it was reasonable for the Commission to conclude that SCE&G's assurances that it will continue to provide ad hoc transmission services to Central should not be rejected as untrustworthy.

In addition, Central's Amended Petition of January 31, 1979 makes a discernable demand for relief in two areas:

it alleges that Central needed to secure an interest in transmission facilities (at 45) and that Central needed to obtain power exchange services from either the Authority or SCE&G (at 5-6). The relief sought has been obtained via the Agreement with the Authority. Thus, in the present circumstances, Central's allegations regarding the need to obtain a commitment from SCE&G for power exchange services has little, if any, competitive significance and certainly does not provide a basis for a licensing remedy.

6. Central contends the Commission erred in denying its request for discovery. It also argues that the Commission required it to satisfy an "inappropriately stringent" standard of proof, a problem it asserts was exacerbated by the denial of discovery.

These assertions of error are without merit. The Commission reasonably determined that a petition for a finding of "significant changes" should only be granted if the changes are "reasonably apparent." In addition, the Commission held that it must be apprised of "specific facts which show that all of the criteria for the significant changes determination are met." This standard is fully consistent with the Congressional purpose to avoid a meaningless second antitrust review proceeding. Again, the Joint Committee Report on the 1970 Amendments to the Atomic Energy Act of 1954 makes clear that: "The Committee sees no sense in two such exercises [antitrust reviews] unless there is significant intervening changes." (at 29)

As we interpret the Commission's standard, a petition for a finding of significant changes must, if it is to prevail, do more than present general allegations based on mere suspicion or flimsy circumstantial evidence. It must show that a reasonable basis exists for believing that significant changes have taken place which satisfy the three criteria for this determination. This standard does not place too high a burden on a petitioner, particularly in light of the ability of the Commission's staff to conduct its own independent investigation as was done in this case. The cases cited by Central regarding the fact that summary disposition of antitrust cases is not favored are inapposite. Until the Commission makes a finding of "significant changes," orders an antitrust review, and based on such review orders that a hearing be held, an antitrust proceeding is not in existence. In addition, Central's claim that the Commission has imposed too high a standard of proof ignores the fact that, as the Commission's June 26 Decision recognizes, there are other antitrust remedies available to a person injured by an antitrust violation. It is clear that the Commission's reasoned interpretation of its statutory mandate is entitled to great deference. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc., 435 U.S. 519, 543-546 (1978).

In an analogous area, review by the Federal Communications Commission of petitions challenging a broadcast license renewal and requesting a hearing, the courts have made clear

that, given the Congressional purpose to avoid meaningless license renewal proceedings, "[t]he decision whether to hold a hearing 'is a matter in which the Commission's discretion . . . is paramount.' Although we must be satisfied that the Commission took a hard look at all the relevant issues, if the Commission's action was not arbitrary, capricious or unreasonable, we must affirm." National Ass'n For Better Broadcasting v. F.C.C., 591 F.2d 812, 816 (D.C. Cir. 1978). A similar standard must be applied to the "significant changes" determination at issue in this proceeding, particularly since Congress has clearly manifested its intention to avoid an unnecessary antitrust review proceeding at the operating permit stage. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc., 435 U.S. 519, 543 (1978) (Administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties"); Porter County Chapter v. Nuclear Regulatory Commission, 606 F.2d 1363, 1369-1370 (D.C. Cir. 1979) ("The agency is not bound to launch full-blown proceedings simply because a violation of the statute is claimed. It may properly undertake preliminary inquiries to determined whether the claim is substantial enough to warrant full proceedings. The appropriate agency official has substantial discretion to decline to initiate proceedings based on this review, at least where, as here, he gives reasons for denying or deferring a hearing.").

Central's assertion that it is entitled to discovery from the applicants ignores the very purpose of the "significant changes" determination -- to avoid unnecessary adjudicatory proceedings. It makes no sense to hold a hearing in order to determine whether a hearing is necessary. Congress determined that discovery, cross-examination and the other elements of or predicates for a hearing, which are inherently costly and time-consuming, should be employed only after the Commission finds that a second antitrust review is required and only then after that review process leads to the conclusion that a hearing is required. Again, the lack of discovery rights for persons wishing to challenge a broadcasting license renewal under Section 309 of the Federal Communications Act of 1934 provides an analogous point of reference. See United States v. F.C.C., 47 R.R.2d 1, 18 (D.C. Cir. 1980) (The decision on whether there was sufficient grounds to hold a hearing must be "made by the Commission -- not by the . . . parties to the proceeding").

7. The Authority has contended that Central has been unreasonably dilatory in filing its petition for a finding of "significant changes." See the Authority's Memorandum filed March 7, 1979 at 10. In fact, Central has known since at least December 1971 that it could take action in this proceeding, yet it took no action until December 1978. As the Commission's June 29 Decision recognizes, Central has admitted in its own comments that at least as early as August 1977 it

was aware of the opportunity to seek a licensing remedy from this Commission. We urge the Commission to reconsider its decision on the timeliness issue and to deny Central's petition on this ground as well.*

8. Central argues that the Commission failed to consider the significance of the Authority's alleged offer to acquire Berkely Cooperative, a member of Central, and to acquire Central's "bulk power supply function." Notwithstanding Central's protestations, such allegations do not "show anticompetitive intent"; under that approach, every offer to purchase a part or all of a competitor's business would raise antitrust issues which, of course, is not the case. The Commission's finding on this issue is clearly reasonable.

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* In addition to the lack of factual support for Central's allegations and its unreasonable delay in filing its petition, we continue to believe that the foundation of Central's claim is legally deficient. As the Commission recognized in its June 30, 1980 Memorandum and Order, the gravamen of Central's complaint centers on the activities of the applicants in obtaining the 1973 territorial legislation -- legislation which itself changed the competitive situation in South Carolina (pp. 24-25). The applicants and the staff have argued that such activities are not subject to antitrust challenge, and thus, may not provide the basis for a finding of "significant changes." See NRC Staff Response to Commission's Order of January 15, 1981 at 10-11. We submit that this fact provides an independent legal ground for the denial of Central's petition. If this essential core of its petition is removed, the remainder of the alleged changes are not even arguably significant.

Conclusion

For the foregoing reasons, Central's petition for reconsideration of the Commission's June 26 Decision should be denied.

Respectfully submitted,

CAHILL GORDON & REINDEL

Hugh P. Morrison, Jr.

M. Rand McQuinn

1990 K Street, N.W.
Washington, D.C. 20006
(202) 862-8900

Counsel for Licensee South Carolina Public Service Authority

Of Counsel:

Charles McGlothlin

Dated: August 4, 1981
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RESPONSE OF THE SOUTH CAROLINA PUBLIC SERVICE AUTHORITY TO CENTRAL ELECTRIC POWER COOPERATIVE'S PETITION FOR REHEARING were mailed this 4th day of August, 1981, by first-class mail, postage prepaid, to the following:

Samuel J. Chilk
Secretary
Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph Rutberg, Esq.
Antitrust Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

Jerome D. Saltzman
Chief
Antitrust and Indemnity Group
Nuclear Reactor Regulation Office
Nuclear Regulatory Commission
Washington, D.C. 20555

Donald Kaplan, Esq.
Robert Fabrikant, Esq.
Department of Justice
P.O. Box 14141
Washington, D.C. 20444

P. T. Allen
Executive Vice President and
General Manager
Central Electric Power Cooperative
P.O. Box 14555
Columbia, South Carolina 29201

Wallace E. Brand, Esq.
Brand & Hall
Suite 200
1523 L Street, N.W.
Washington, D.C. 20005

C. Pinckney Roberts, Esq.
Dial, Jennings, Windham, Thomas
& Roberts
P.O. Box 1792
Columbia, South Carolina 29202

Joseph B. Knotts, Esq.
Debevoise & Liberman
1200 - 17th Street, N.W.
Washington, D.C. 20036

Edward C. Roberts, Esq.
South Carolina Electric & Gas
Company
P.O. Box 764
Columbia, South Carolina 29202

Frederick D. Chanania, Esq.
Office of the Executive Legal
Director
Nuclear Regulatory Commission
Washington, D.C. 20555

Rand McQuinn

Dated: August 4, 1981
Washington, D.C.