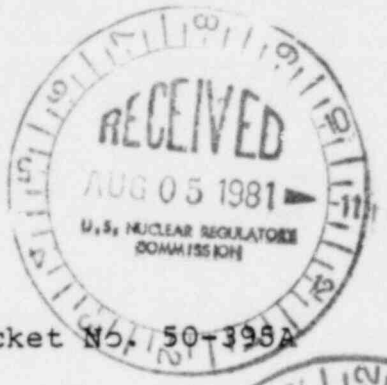
August 4, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



SOUTH CAROLINA ELECTRIC AND GAS COMPANY and	)	
SOUTH CAROLINA PUBLIC SERVICE AUTHORITY	)	Docket No. 50-395A
(Virgil C. Summer Nuclear Station Unit 1)	)	

SOUTH CAROLINA ELECTRIC AND GAS COMPANY'S RESPONSE TO CENTRAL ELECTRIC POWER COOPERATIVE'S AMENDED PETITION FOR REHEARING

South Carolina Electric and Gas Company ("SCE&G") herewith responds to the amended petition for rehearing filed on July 20, 1981 by Central Electric Power Cooperative ("Central").

I. INTRODUCTION

In its original and amended petitions for a finding of significant change (filed December 6, 1978 and January 31, 1979, respectively), Central alleged that SCE&G illegally used access to the Summer Nuclear Station as a club to coerce the behavior of the South Carolina Public Service Authority ("SCPSA" or "the Authority") with respect to South Carolina territorial legislation enacted in 1973. This conduct, the resulting legislation, and the alleged "realignment" of the Authority were said to constitute significant changes such that Central, previously content to be a G & T (i.e., generation and transmission cooperative) in name only, (i.e.,

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a group purchaser for its members, without actually owning and operating generation and transmission facilities of its own), thereafter needed to enter the bulk power supply market. To do this, Central asserted a need to obtain coordination services from either SCE&G or SCPSA. Petition for Finding of Significant Change at 3; Amended Petition for Finding of Significant Change at 5-8.

Once Central's allegations of anticompetitive conduct were found by the Commission to be unsubstantiated (Central having obtained the very relief it sought through a comprehensive agreement with SCPSA), Central changed its tack. Central's new theory is twofold: (1) it now alleges the existence of an agreement between SCPSA and SCE&G constituting a group boycott or horizontal allocation scheme under which Central has been forced to deal exclusively with SCPSA (the alleged boycotters are not named nor are the specific product subjects of the boycott specified); and (2) the interchange and coordination agreement, which Central negotiated and executed with the SCPSA and for which it sought and obtained REA approval, is now alleged to be anticompetitive. Amended Petition for Rehearing at 15-25. In addition, Central presents an extensive analysis attacking the criteria adopted by the Commission in making its decision.

II. SUMMARY OF RESPONSE

Central's new claims are frivolous and its analysis of the proper criteria for a significant change determination is irrelevant. First, there is no support for the new

allegation of any SCPSA/SCE&G exclusive dealing agreement or group boycott. There is ample basis for concluding that no such agreement or boycott exists. Second, the alleged anticompetitive nature of the Central/ SCPSA agreement is said to arise primarily from a pricing arrangement which makes future joint ownership opportunities allegedly unattractive to Central. Close examination reveals that the real basis for Central's assertion is its inability to obtain the voluntary consent of SCPSA to a giveaway of the Authority's contractual ownership rights to the generation and transmission facilities it currently leases from Central.

Central's analysis of the criteria used by the Commission is fatally flawed because it rests entirely on the erroneous assumption that standards applicable to the mandatory construction permit stage antitrust review (in which investigations are made and hearings held on mere allegations) must control the Commission's exercise of discretion with respect to the advisability of a second antitrust review at the operating license stage.

Nothing in Central's petition suggests that the Commission should reconsider its previous determination that there have been no significant changes since the issuance of the Summer construction permit that would make advisable a second antitrust review at the operating license stage.

III. ARGUMENT

SCE&G's response will follow Central's specific numbered arguments.

1. The Commission's "significant change" criteria

Central argues that the Commission's criterion for determining when significant changes have occurred and a second antitrust review becomes advisable is inconsistent with the statutory language. Amended Petition for Rehearing at 1-10. The argument, however, is specious because it rests upon an erroneous assumption that the provisions of Sections 105(c)(1),(4), and (5), which cover the procedures that must be followed with respect to antitrust review at the construction permit stage, are pertinent to the Commission's discretionary decision under Section 105(c)(2).

Central's argument simply ignores the fundamental difference intended under the statutory scheme between the mandatory antitrust review at the construction permit stage and the discretion which the Commission must exercise in deciding whether there should be a second antitrust review at the operating license stage. With respect to this second antitrust review, the statute is explicit. There is not to be any such second review:

> ". . . unless the Commission determines that such review is advisable on the grounds that significant changes in the licensee's activities or proposed activities have occurred subsequent to the

> previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility."1/

This statutory language makes clear that the Commission is given broad discretion to determine whether a second antitrust review "is advisable". In fact, the language of the statute affords the Commission latitude to find that an antitrust review at the operating license stage is not advisable even if significant changes in the licensee's activities or proposed activities have occurred. The statute clearly does not mandate a second antitrust review whenever the Commission has found such significant changes have occurred. On the contrary, the reference to "significant changes" appears in the statute as a limitation on the Commission's ability to initiate a second antitrust review by making a significiant change determination the sole ground upon which the Commission can, if it chooses, find a second antitrust review to be advisable.2/

1/ 42 U.S.C. §2135(c)(2) (emphasis added).

2/ The legislative history also makes clear that the "significant change" requirement was a limitation on the Commission's exercise of discretion and not a mandate requiring the initiation of a second antitrust review. The Joint Committee on Atomic Energy saw significant changes as merely the sole ground upon a which a second antitrust review could be initiated:

> "The Committee sees no sense in two such exercises unless there have been significant intervening changes". House Rep. No. 91-1470, 91st Cong., 2d Sess., [1970] U.S. Code Cong. & Ad. News 5010.

In determining whether a second antitrust review would be "advisable", the Commission began by refusing to engage in a hearing to determine if a hearing should be held. Hence, it adopted the "reasonably apparent" standard for determining whether changes had occurred. CLI-81-14 at 17. Thereafter the Commission's criterion authorizes a threshold look at the likelihood that a second antitrust review would have any practical effect (i.e., whether it is at all likely to produce any remedies) in determining the "significance" of any changes.

The only question presented upon reconsideration is the question whether the Commission by adopting these standards and applying them in this case abused the discretion given it by Congress to determine the advisability of a second antitrust review. The Commission has adopted a practical test that is consistent with the statutory intent that a second antitrust review not be undertaken lightly. The record here (which is adequate to support the Commission's findings) confirms the conclusion that the Commission has reached a very practical result consistent with the statutory purpose and has not abused its discretion.

2. The Commission's rejection of Central's claim of the use of coercion by SCE&G

The Commission (CLI-81-14 at 25) rejected Central's primary allegation that access to the Summer Nuclear Station was used as a club to coerce SCPSA into supporting the ter-

territorial allocation legislation passed by the South Carolina General Assembly in 1973. The Commission found Central's supporting papers to be of insufficient substance, containing only generalized hearsay. In response, Central repeats its allegation, relying entirely on the hearsay statement of Mr. Lucas Padgett, as buttressed by Central's counsel's interpretation of the significance of 1) the timing of the legislation and 2) the historical concern expressed by various entities about territorial integrity. Amended Petition for Rehearing at 10-15.

A careful review of the hearsay statement of Mr. Padgett reveals that it is completely neutral as evidence supporting any coercion. When viewed in the context of other documents of record, any inference of coercion is completely dispelled.

The hearsay statement relied on 3/ conveys no hint of coercion to a neutral observer. If there is any hint of who is insisting on such legislation, it is that the Authority desired passage of the territorial legislation and wanted that matter put to rest before it concluded negotiations with SCE&G on the nuclear plant.

3/ "Mr. Padgett stated that this [territorial] legislation was necessary in order for [the Authority] to conclude its negotiations with SCE&G on the nuclear plant". Affidavit of Kelly Smith at 1-2 (Exhibit A to Reply Brief of Central, etc., dated March 19, 1979).

The lack of any element of coercion on the Authority is established in the very memorandum in which Mr. Smith records his recollection of the statement attributed to Mr. Padgett. Mr. Smith says flatly:

> The Authority will own an undivided share of that plant.
> Electric and Gas has no choice but to sell the Authority a share. The Justice Department will see to that. 4/

Mr. Padgett himself also clearly refutes any connotation of a coerced deal. His affidavit recites:

> At no time has it ever been stated to me by anyone that the Authority's joint ownership of the V. C. Summer Nuclear Station was in exchange for, or depended upon, passage of the legislation concerning the Authority's service area. 5/

The foregoing alone amply demonstrates that Central's allegations of a coerced deal are without substance.

But there is more. Contrary to the view expressed in Central's pleading that the historical background supports an inference of a coerced deal, the documents of record refute any such inference. These documents establish that, wholly apart from access to Summer, SCPSA itself desired passage of the territorial legislation. In an interoffice communication of January 19, 1973, SCPSA's General

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4/ Attachment to affidavit of Kelly Smith, id. at 2.

5/ Affidavit of Lucas C. Padgett at 4 (Attachment J to SCPSA's Reply to Central's Amended Petition for Finding of Significant Change, dated March 7, 1979).

Counsel (now deceased) discusses the advisability of seeking territorial legislation and the content of such legislation. He notes both the lack of enthusiasm for any expansion beyond SCPSA's present three county service area and the desirability of protecting "the integrity of its present retail area from invasion by the private power companies." 6/ This inter-office communication (obviously not made under coercion or with Central's allegations in mind) does not even mention the subject of access to the Summer facility.

SCPSA's Chairman, in addition to denying flatly the existence of any agreement or understanding regarding access to Summer in exchange for the territorial legislation stated in his affidavit that:

> The decision to seek legislation granting the Authority an exclusive service area was made by the Authority's Board of Directors because such was determined by the Board to be in the best interests of the Authority. 7/

Both R. W. Beck and Associates, the Authority's consulting engineers and Lehman Brothers, Inc., the Authority's financial advisers, unequivocally supported the Authority's decision to seek the territorial legislation. 8/

6/ SCPSA Inter-office Communication from Wallace S. Murphy to J. B. Thomason, January 19, 1973, at 1 (Attachment I to SCPSA's Reply, supra, note 5).

7/ Affidavit of Robert S. Davis at 1 (Attachment G to SCPSA's Reply, supra, note 5).

8/ Exhibits I and II to Id.

Despite this, SCPSA's own efforts to achieve territorial integrity for itself are portrayed by Central's counsel as an abandonment of "its trade freedom". Petition for Rehearing at 10; Amended Petition for Rehearing at 21. Central's own attitude toward territorial integrity, however, completely belies its counsel's characterization of territorial allocation legislation as an abandonment of "trade freedom".

Central itself sought and obtained similar abandonment of "trade freedom" (i.e., territorial allocation) in the South Carolina territorial allocation bill of 1969. Central's own clearly expressed policy favors territorial integrity:

> We Believe That
>
> 1. Power supply entities, like other human institutions and like humans themselves, are territorial in nature . . . a power supply entity must have a more or less dependable service territory . . 9/

In short, Central's allegation that SCE&G used access to the Summer Unit as a club to coerce an unwilling SCPSA into giving up its "trade freedom" (i.e., supporting territorial legislation) is nothing more than an unfounded gleam in the eye of one straining facts to fit theory. The

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9/ Central Electric Power Cooperative, "Objectives, Principles, Goals and Policies for Long-Range Consideration" at 4 (August 1976).

For a complete review of the documentary evidence supporting the Authority's independent decision to seek territorial legislation and the reasons why the Authority supported that legislation, see the Authority's Reply to Amended Petition for Finding of Significant Change (March 7, 1979), and attachments.

Commission was correct in rejecting the allegation as unsubstantiated to the point of requiring no further investigation.

3. Applicability of the Parker v. Brown doctrine

In its original and amended petitions for a finding of significant change, Central made no allegations concerning the existence of any agreements to restrict competition, beyond allegations concerning the restrictions inherent in complying with South Carolina law and the manner in which that law was enacted. At most, Central alleged only that the territorial law had the effect of removing the Authority as a competitor of SCE&G for the supply of wholesale customers other than Central." Amended Petition for Finding of Significant Change, at 33 (emphasis added). The clear implication was that SCE&G and the Authority remained competitors for Central's business.

The Commission in its June 26, 1981 decision concluded that Applicants' conduct both in seeking and in complying with the 1973 South Carolina territorial legislation was immunized by the Parker v. Brown state action doctrine. CLI-81-14 at 22-23. Central now seeks to avoid the necessary implications of the state action doctrine by changing its tack and formulating a wholly new allegation. In contravention of the statement in its Amended Petition for Finding of Significant Change implying competition for Central's business, Central now flatly alleges the existence of:

> . . . an agreement between SCPSA and SCE&G that gives SCPSA the exclusive right to negotiate with Central for power exchange services or to supply Central with firm bulk power. (Amended Petition for Rehearing at 15-16) 10/

No details are provided as to when this newly alleged agreement came into existence or what other parties might be involved. As support for this new allegation, Central cites only three items: 1) Minutes of the CARVA Executive Committee meeting of June 20, 1967; 2) Minutes of the VACAR Executive Committee meeting of September 24, 1976; and 3) two letters from P.T. Allen of Central to T.C. Nichols, Jr. of SCE&G. Amended Petition for Rehearing at 16-19. A careful examination of these documents reveals, again, that the alleged "agreement" is totally unsubstantiated.

First, SCPSA was not present at the CARVA meeting in 1967 and, even according to Central, was not then aligned with SCE&G. Nothing revealed in the minutes of that meeting even hints at any agreement between SCPSA and SCE&G. Second, with respect to the minutes of the VACAR Executive Committee Meeting of September 24, 1976, Central alleges only that these minutes show that:

10/ Elsewhere Central expands on this allegation:

> SCPSA has joined a pre-existing scheme to eliminate Central as a competitive factor in the South Carolina market.(Amended Petition for Rehearing at 38).

> 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. 11/

Thereafter, it is only the musings of counsel that, by dint of a logic which would totally escape a neutral observer, find support in the foregoing for an alleged agreement between SCPSA and SCE&G to the effect that only SCPSA will deal with Central.

Third, Central cites correspondence between Mr. Allen and Mr. Nichols as evidence of SCE&G's agreement not to deal with Central. In fact, the correspondence between Mr. Allen and Mr. Nichols supports a willingness on SCE&G'S part to deal with Central. From Central's point of view, the dealings are best summarized by Mr. Allen, Central's General Manager, in the June 19, 1979 letter relied on by Central's counsel:

> Central is currently reviewing its power supply options after 1987 and in this regard, we are currently working with Santee Cooper as well as talking to Carolina Power & Light and you [SCE&G]. 12/

11/ Amended Petition for Rehearing at 16-17. Even this quotation is a misleading characterization of the minutes.

12/ Letter from P.T. Allen to T.C. Nichols, Jr. (June 19, 1979) (Attachment 3 to NRC Staff Response to Commission Request for Comments, August 29, 1980). This was in response to Mr. Nichols' (SCE&G) letter of May 4, 1979 in which Mr. Nichols recites without equivocation that:

It is not at all unusual for parties to be merely talking without yet having firm contractual arrangements for power supply needs six years hence. Central could hardly have obtained power supply contracts from both SCPSA and SCE&G at the same time. Only after its extended negotiations with SCPSA were concluded could Central know the context (i.e., a fully coordinated power supply arrangement with SCPSA as detailed in its recent agreement) in which it would be seeking alternatives. In short, Central's latest allegation, in addition to being untimely, 13/ is completely unsupported.

(footnote continued)

> You [Mr. Allen of Central] stated that presently CEPCO [Central] did not consider joint ownership in an SCE&G fossil-fired plant in the mid 1980's to be economically advantageous.

Letter from T.C. Nichols, Jr. to P.T. Allen (May 4, 1979) (Attachment 3 to NRC Staff Response, etc., id.).

13/ The Commission would certainly be justified in rejecting this new theory of the case, raised on rehearing, as untimely. It would be manifestly unfair to all the parties to permit the introduction at this late stage of matters that could have been raised much earlier. Central has shown no good cause for its untimeliness or any other substantial basis to permit introduction of new allegations.

In fairness, Central hinted at such an allegation in its comments of August 26, 1980 (at 41) and in its comments of January 26, 1981 (at 5) but did not flatly make the allegation of an SCPSA/SCE&G illegal exclusive dealing agreement until after this Commission's June 26, 1981 decision in which Central's analysis of the state action doctrine was rejected.

One additional observation is appropriate here. Negotiations take time and good faith. Central has not concluded a power supply agreement with one potential coordinating entity (SCE&G), while at the same time it successfully concluded an agreement with SCPSA. At Central's option, its Agreement with SCPSA can be the means to meet all of its future power supply needs. These facts simply should not be allowed by this Commission to form the basis of an alleged illegal exclusive dealing agreement. If utilities were required to undergo the time and expense of antitrust reviews (or litigation) on the basis of such flimsy and unsubstantiated allegations, every power supply utility in the country would be subject to such unwarranted litigation at the whim of parties with whom they may be bargaining in good faith.

Central claimed a need to obtain power exchange services from either SCE&G or SCPSA. Amended Petition for Finding of Significant Change at 5. Its continued pursuit of this litigation in the face of an agreement giving it the very relief it sought can only raise the inference that it is Central which is dealing in bad faith - utilizing the club of extended antitrust litigation to enhance its bargaining position. The Commission correctly refused to have its offices abused in this manner.

4. The alleged unreasonable terms and conditions which Central agreed to in its contract with SCPSA

Central alleges that (1) its opportunity to participate in the Summer Unit, and (2) its opportunities to participate in constructing future generation and transmission are "pie-in-the-sky" because of unreasonable terms and conditions insisted upon by SCPSA. Amended Petition for Rehearing at 24. Both claims are frivolous.

Central's opportunity to purchase one third of SCPSA's interest in Summer is alleged to be unreasonable because Central simply does not want to pay the cost which its participation would cause SCPSA to incur. This cost element is not denied by Central.

With respect to opportunities to share in new generation, Central's argument is even more frivolous. As we understand the argument, Central claims that the Authority is being unreasonable in refusing to give away to Central the present generation supply which contractually belongs to SCPSA. Because of this, Central claims that it is in the "unreasonable" position of having to compare the option of joint ownership of new plants with the option of purchasing similar amounts of capacity from SCPSA at lower rates (based upon SCPSA's embedded costs of old and new plants). According to Central, "this comparison will never be favorable" (Amended Petition for Rehearing at 23-24) and it will always be better off making the firm purchase. Joint ownership

opportunities are diminished and this is said to be "anti-competitive", apparently whether or not the joint ownership opportunity makes economic sense.

The logic of this economic theory is not apparent. The choice faced by Central is a choice faced by many potential entrants into the bulk power market - namely the choice of purchasing system capacity from present suppliers or other suppliers based upon mixtures of old and new units, or the choice of joint ownership or other arrangements for purchasing capacity from new units. The economic comparison could not, as alleged by Central, always be unfavorable.14/ If it were, there would almost never be new entrants into the bulk power market. Other proceedings before the NRC demonstrate that there are new entrants. See e.g., the applications for amendment to the construction permit in Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445 and 50-446, filed May 28, 1981.

SCPSA has offered cost-based rates to Central under its Agreement. What Central apparently seeks here

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14/ Central's allegation indicates that it believes that in meeting its future needs it is better off economically in purchasing from SCPSA rather than obtain its needs through , for example, joint ownership of the Summer Nuclear Unit with SCPSA and SCE&G. Amended Petition for Rehearing at 23. This belief, which may well be valid, completely belies Central's assertion, based merely on its failure to conclude a long range power supply arrangement with SCE&G, that SCE&G is refusing to deal. If Central believes (as its pleading indicates) that it is not likely to find an arrangement with SCE&G to be economically attractive, then it is Central which has been toying with SCE&G, knowing full well that its inquiries concerning future power supply joint ventures could not bear fruit.

is to have this Commission conclude that it is anticompetitive for SCPSA to refuse to give away the benefit of the generation it presently owns. 15/ The Commission was clearly correct in concluding that the Central/SCPSA Agreement affords Central all the opportunity it merits to enter the bulk power field and is not anticompetitive. 16/

5. Wheeling services and the alleged group boycott

Central's fifth alleged error mixes its assertion that SCE&G's assurances of wheeling should not be accepted by the Commission (Amended Petition for Rehearing, at 26) with the new assertion that the relevant significant change is 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 (Id. at 28).

As emphasized supra, Central's main contention and relief sought in its original and amended petitions for a significant charge determination involved the requirement that Central be able to obtain coordination services from either SCE&G or SCPSA. SCE&G has never refused a specific wheeling request. SCE&G is aware, as the Commission is aware,

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15/ As a technical matter, some of the Authority's generation will be owned after contractual options are exercised.

16/ With respect to transmission, Central is guaranteed complete access to the transmission facilities of SCPSA - precisely the relief it sought in its original and amended petitions for a significant change determination.

that the assurances it has given in this case constitute information supplied by an applicant and relied upon by the NRC in granting a license. Particularly in view of Central's new agreement with SCPSA under which transmission facilities will be shared, Central has established no basis for any need for wheeling services now or in the future from SCE&G, 17/ and no basis for a belief that when and if such wheeling services are needed or desirable they will not be forthcoming.

To the extent that Central's allegation has now changed from one concerning an alleged territorial agreement as embodied in South Carolina law, to the new allegation of a group boycott or horizontal allocation scheme extending beyond that required by State law, the allegation is unsupported,

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17/ Quite apart from any question of need, Central has indicated a desire on its part to replace SCE&G as the wholesale supplier of the Berkeley Electric Cooperative, one of Central's members. Central would thus become a "middleman", purchasing from the Public Service Authority and reselling to Berkeley. C.f. the recent Appeal Board decision in Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2) ALAB-646, 12 NRC ___, June 30, 1981 Slip Op. at 116-118. Central would make delivery to Berkeley by purchasing transmission services over SCE&G's lines. SCE&G has repeatedly indicated, and now specifically reaffirms, that it sees no reason why such an arrangement cannot be worked out, and assuming mutual cooperation, completed in time for an orderly transition when the current Berkeley/South Carolina Electric & Gas Company contract expires in 1983. SCE&G has advised Central and Berkeley that it is willing to negotiate a mutually agreeable rate for the transmission services in question. In anticipation of a specific proposal and further discussions, SCE&G is currently gathering information on and studying the applicable cost principles endorsed by the FERC for similar transactions, and expects to propose a rate consistent with those principles by the end of 1981.

as discussed supra. In addition, the fact that negotiations between SCE&G and Central have been inconclusive does not support the existence of a boycott. To the contrary, SCE&G's willingness to discuss future joint ownership is established. See NRC Memorandum and Order CLI-80-28 at 31 (June 30, 1980); Letter from T.C. Nichols, Jr. (Vice President, SCE&G) to William M. Zelinsky (Engineer, NRC), dated July 25, 1978; Letter from T.C. Nichols, Jr. to Samuel J. Chilk (NRC Secretary), dated August 25, 1980. Moreover, Central's current arrangement with SCPSA, under which it can meet all of its future power requiremen s by firm bulk power purchases from SCPSA based upon the embedded cost of SCPSA current generation in mixture with future generation, strongly suggests that Central will not be looking to anything that SCE&G could provide it. If, in fact, Central's main allegation in the previous section (that an economic feasibility analysis would always suggest that Central should not engage in future joint ownership arrangements) is correct, then Central would never be looking to sales or purchases from SCE&G. When and if such an arrangement is mutually beneficial, SCE&G has and continues to express its willingness to engage in coordination services with Central. There is simply no factual basis, whatsoever, for Central's new allegation.

6. Further discovery

As noted in section 1 supra, the Commission is given discretion to find whether a second antitrust review is advisable. The Commission properly recognized the

Congressional intent that review not be lightly undertaken and that this intent would be frustrated by conducting a hearing to determine whether to have a hearing. The Commission's decision to rely upon facts reasonably apparent without the benefit of conducting the review itself was therefore appropriate and its denial of discovery requests was not an abuse of discretion.

To the extent that the Commission is at all concerned about allegations of Central's counsel regarding the existence of documents which Central's counsel has been unable to supply to the Commission, such allegations are totally unfounded. The purpose of the protective order sought in an unrelated antitrust proceeding 18/ is to prevent the use by counsel of one litigation as a vehicle for securing material, ostensibly for his client in that case, for another case for a different client. SCE&G refuses to yield to strongarm tactics in violation of this basic tenet of litigation. We are advised that the documents at issue are not in public files of the district court as indicated by counsel for Central (Amended Petition for Rehearing at 39). In fact, we are advised that when these documents subject to the protective order were proferred to the Department of Justice by Central's counsel, they were returned unopened. Allegations by Central's Counsel concerning the content of these documents are

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18/ North Carolina Electric Membership Corp., et al. v. Carolina Power & Light Co., et al. (USDC, Middle District of North Carolina, No. C-77-396G).

completely improper. 19/ Moreover, the subject of transmission services was dealt with by the Commission (CLI-81-14 at 24-27) based on SCE&G's commitments and representations (see also pp. 18-20 supra).

Finally, the attempt to bolster unsupported allegations by reference to documents not before the Commission is untimely. Central has known since August of 1980 that the Commission's decision would be based on the record then before it. Despite its recently professed desire to use documents subject to the motion for protective order, Central made no effort to appear and seek relief from the Court in the proceeding in which the documents were discovered. In a quite similar situation, the Federal Communications Commission concluded that administrative proceedings should not be further delayed by belated efforts to submit information subject to a court protective order at the reconsideration stage. The A. H. Belo Corporation, 46 F.C.C.2d. 1075, reconsideration denied, 48 F.C.C.2d. 669 (1974), aff'd Civic Telecasting Corporation v. F.C.C., 523 F.2d 1185 (D.C. Cir. 1975). Those principles are applicable to the instant proceeding.

19/ Unlike most of Central's earlier pleadings, the original and amended petitions for rehearing include a verification by Central's counsel. The purpose of this verification is rather unclear in view of NRC regulations providing that a mere signature constitutes such a representation. 10 C.F.R. § 2.708(c). If the purpose is to "bootstrap" matters subject to counsel's verification into record "evidence" on review, SCE&G would note that the ABA Code of Professional Responsibility generally prohibits an attorney from serving as an advocate and a witness in the same proceeding. See Ethical Consideration 5-9.

7. The Burden of Proof

Central takes issue with the Commission's requirement that, in order to constitute significant changes for purposes of instituting an antitrust review at the operating license stage, the changes must be "reasonably apparent". Amended Petition for Rehearing at 33-34. In a rehash of its first argument, Central contends that a standard more stringent than that ordinarily associated with summary disposition is not appropriate. Alternatively, Central argues that the Commission erred in applying the standard to the material submitted by Central. Id.

The Commission, of course, made no references to any "burden of proof". The Commission properly recognized that the summary disposition analogy is not appropriate in these circumstances. The legislative history supports the Commission's interpretation that significant changes be reasonably apparent. House Rep. No. 91-1470, supra n.2, at 5009-5010. In essence, the Commission is exercising a form of prosecutorial discretion in deciding whether or not an expensive and time consuming investigation should be imposed for a second time on an applicant. Whatever words are used to describe the standard applied (and we have no quarrel with the Commission's "reasonably apparent" standard), the Commission did not abuse its discretion in finding petitioner's submittals to be insufficient to necessitate a second antitrust review that Congress has decreed should not be undertaken lightly.

Central's other arguments amount to nothing more than a rehash of evidence the Commission has already found to be too insubstantial to trigger an antitrust review at the operating license stage.

8. Central's choice of remedies in August, 1977

Since the NRC held Central's petition to be timely and entertained it (CLI-81-14 at 19), Central's argument No. 8 is irrelevant here.

9. SCPSA's offer

The Commission is clearly correct in questioning whether an offer can constitute anticompetitive conduct. CLI-81-14 at 24. The agreement between SCPSA and Central speaks for itself.

10. The Commission's third criterion

Central offers no basis for reconsidering the Commission's failure to adopt the view of the Department of Justice with respect to its third criterion. Amended Petition for Rehearing at 5-6. The Department's most recent comments (filed in response to the Commission's January 15, 1981 order) reflect a reappraisal of its earlier view and an appreciation of the practicality (if not the precise wording) of the Commission's third criterion. Comments of the Department of Justice, etc., filed Feb. 6, 1981, at 3 n.3.

IV. CONCLUSION

For all the foregoing reasons, Central's Amended Petition for Rehearing should be denied.

Respectfully submitted,

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August 4, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

SOUTH CAROLINA ELECTRIC & GAS COMPANY and	)	
SOUTH CAROLINA PUBLIC SERVICE AUTHORITY	)	Docket No. 50-395A
(Virgil C. Summer Nuclear Station, Unit 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "South Carolina Electric and Gas Company's Response to Central Electric Power Cooperative's Amended Petition for Rehearing" in the above captioned matters, were served upon the following persons by deposit in the United States mail, first class postage prepaid or by hand delivery as indicated by an asterisk this 4th day of August, 1981.

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U.S. Nuclear Regulatory Commission
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