UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
Peter A. Bradford
John F. Ahearne
Thomas M. Roberts

In the Matter of

CENTRAL ELECTRIC POWER COOPERATIVE, INC.

(Virgil C. Summer Nuclear Station, Unit No. 1)

Docket No. 395A

MEMORANDUM AND ORDER

CLI-81-25

On July 6, 1981, Central Electric Power Cooperative, Inc. (Central) petitioned the Commission to reconsider its decision of June 26, 1981. That decision denied Central's petition for an affirmative determination pursuant to Section 105c. of the Atomic Energy Act of 1954, as amended, that significant changes have occurred with respect to the activities or proposed activities of South Carolina Electric & Gas Co., Inc. (SCEG) and South Carolina Public Service Authority ("Authority" or "Santee Cooper") (jointly Applicants) related to the Virgil C. Summer nuclear power facility. On consideration of Central's petition and the responses to it submitted by SCEG, Authority and the NRC Staff, the Commission has decided to deny Central's request and sets forth its reasons below.

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In the interest of brevity we do not again relate the extensive background of this matter. It may be found in our tentative order of June 30, 1980, CLI-80-28, 11 NRC 817, and in our decision of June 26, 1981, CLI-81-14, which Central has asked us to reconsider (June 26 decision). However, before responding individually to Central's enumerated allegations of error, we have some preliminary observations on the nature of the process to arrive at decisions on significant changes pursuant to Section 105c.

I. Preliminary Observations

In the interest of exercising some control over the proliferation of written materials addressed to this matter, the Commission has at various times established schedules for responses. Nothing in those schedules alters the character of this matter as an informal adjudicatory process for the purpose of arriving at a fair and reasoned determination. This is not, nor can it be, a formal adjudicatory proceeding governed by the Commission's rules of practice for such proceedings in 10 CFR Part 2, Subpart G. Even with the modicum of control established by Commission schedules, the Commission has been almost besieged with pleadings, letters containing argument and the like. Petitioner Central, in particular, has taken every possible occasion to reargue and supplement its contentions before us. Even the instant petition has been filed in an initial version on July 6 and

an amended version of July 20, 1981. [1/] Central's creation of what may fairly be termed a "moving target" has made it extremely difficult for the Commission to focus on the changes that Central alleges. Nonetheless, the Commission has seriously endeavored to focus on root elements of Central's petition and provide a correct and reasoned response.

II. Reconsideration

We turn now to the matters which Central urges should cause the Commission to reconsider its June 26 decision. For convenience Central's order of presentation and numeration is retained.

1. The Commission's Significance Criterion

Central contends that the Commission has wrongly adopted a significance criterion that requires a threshold determination that changes in the Applicants' activities "have antitrust implications that would be likely to warrant Commission remedy." It argues further that the Commission erred in elaborating on that standard to require that alleged changes "also be so 'apparent' as to enable a petitioner for review to establish a 'factual basis' or 'specific facts' supporting them without the benefit of discovery." [2/] Central concludes that the significance criterion thus qualified impermissably imposes a substantially greater obstacle to review than Section 105c. interposes to a hearing after review.

1/ This memorandum will respond to the amended petition for reconsideration (hereinafter "Petition").

2/ Petition at 2. Citations omitted.

With regard to the significance criterion alone, we think Central's arguments come too late. In its June 30, 1980 order the Commission set forth the criteria it intended to consider in determining whether significant changes had occurred. The significance criterion appeared there in identical language to that of the June 26, 1981 decision. In the June 30, 1980 order, the Commission specifically stated that it was establishing new criteria and accordingly requested comments from the parties. Central's response to the Commission's request found no fault with the Commission's analysis except in one specific detail not relevant to this question. 3/ Thus we think it is late in the day for Central to present a new and elaborate legal thesis for the proposition that the significance criterion is inconsistent with statutory requirements. Motions to reconsider should be associated with requests for re-evaluation of an order in light of an elaboration upon, or refinement of, arguments previously advanced. See Tennessee Valley Authority (Hartville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1, 2 (1977). They are not the occasion for an "entirely new thesis". Id.

Apart from timeliness, we reject the merits of Central's arguments on this point. As we have explained twice before, the Commission's significance criterion is fully consistent with the statutory intent that antitrust review at the operating license stage be the exception not the rule.

3/ Comments of petitioner Central Electric Power Cooperative, Inc. at 1, August 25, 1980.

Regarding the requirement that there be a factual basis for its determination and that alleged changes be reasonably apparent, the Commission concludes that there is no room for reconsideration. Pursuant to statute it may not conduct a hearing at this stage. Likewise, by statute the determination that it must make to refer the matter to the Attorney General for formal review is that significant changes have occurred. The language is not "are alleged to have occurred' or "may have occurred" but rather "have occurred". Thus the Commission's requirement is a practical interpretation that gives force to the statutory language.

2. SCEG's Use of Coercion Against the Authority

Central alleges error in the Commission's failure to find the record sufficient to support it claim of coercion. In its June 20 decision the Commission found that the factual basis presented in support of this claim contained generalized hearsay and evidence contradicted within the submission in which it was included. 4/ Faced with internally conflicting statements, the Commission found, among other things, that the statement that Santee Cooper knew it need not submit to coercion because the Justice Department would see that it got access to Summer was the more credible one. No cause for reconsideration is presented here.

4/ Compare Central's Petition at 10 with the Commission's decision, CLI-81-14 at 25

3. Retargeting the Group Boycott Toward Central Rather than Santee Cooper

Central alleges that the Commission should have found a situation inconsistent with the antitrust laws in that SCEG and the Authority entered into a private agreement to allocate Central's power exchange and bulk power business to the Authority.

As we noted above, Central's numerous filings have made it difficult for the Commission to focus on the central allegations and grounds for relief. Based on a careful review of all of the proceedings, we understood Central's amended petition for a significant changes finding to assert that Applicants had unlawfully joined to seek territorial legislation and that this agreement offended the antitrust laws. The instant Petition alleges a different agreement in what at least appears to be an effort to escape the implications of the state action doctrine of Parker v. Brown. Central had sufficient opportunity before the June 26 decision to frame its allegation specifically and clearly and to develop this thesis. As we said before, a motion for reconsideration is not the occasion for presenting new arguments. Thus we do not believe that reconsideration is called for.

4. Santee Cooper's Alleged Refusal to Deal with Central on Reasonable and Practicable Terms

Central alleges that the terms of the Power System Agreement (Agreement) negotiated with Santee Cooper are in themselves anticompetitive. Both Central's Board of Director and the REA have approved the Agreement, and in the Commission's

Staff's view the Agreement provides as much as Central could have obtained by way of license conditions had it proved a situation inconsistent with the antitrust laws in a hearing before a Licensing Board. Thus no case for reconsideration may be found here.

5. SCEG's Alleged Refusal to Wheel and to Negotiate Coordinated Development of Generation with Central

Under this heading Central combines its thesis of a group boycott (see section 3 supra) with its earlier assertions of SCEG's refusal to deal to conclude that it requires wheeling from SCEG in order to avoid competitive harm.

Central's amended petition requested as relief wheeling from Santee Cooper or SCEG. The Commission has concluded that such relief is afforded to Central by the Agreement it executed with Santee Cooper. Moreover, the Commission believes that its acceptance of SCEG's assertions that it would provide ad hoc transmission was reasonable under the circumstances. 5/ Nothing presented by Central causes the Commission to reconsider.

6. The Commission's Refusal to Permit Discovery

Central again complains of the Commission's failure to permit discovery (and uses the occasion to characterize what it will find). The Commission has responded to this point.

5/ June 26 Order, CLI-81-14 at 26-27.

In its view discovery is not available because this is not a formal proceeding. 6/ Moreover, discovery is not the only means available to the Commission to obtain the necessary information. The Commission staff routinely conducts its own investigation of each petition. In this case the staff determined after conducting its own investigation that no formal antitrust review was warranted.

7. The Commission's Standard of Proof

Under another heading Central resumes its complaint regarding the Commission's requirement that the factual basis be reasonably apparent (see Discussion of Allegation 1, supra). Central argues that the Commission has applied here too strict a standard of proof.

We believe that our determination that the significant changes must be reasonably apparent is fully in accord with Congressional intent underlying Section 105c.(2), that a second formal antitrust review at the operating license stage be the exception rather than the rule. Moreover, in an analogous area, the courts have made clear that a full-blown formal proceeding need not be launched rolely because some violation is alleged. Porter County Chapter v. NRC, 606 F.2d 1363 (D.C. Cir. 1979).

6/ We would add that there is no statutory right to discovery even in formal adjudicatory proceedings.

8. Allegation of an Unwarranted Commission Inference with Respect to Timeliness

Central complains that the Commission has drawn an unwarranted inference with respect to the date at which Central became aware that it might find in the Commission a forum in which to assert its antitrust claims.

Since the Commission denied Central's petition on other grounds, it abstained from re-evaluating its judgment on timeliness. Central's current explanations are therefore irrelevant. 7/

9. Alleged Error in Failing to Assess the Significance of Santee Cooper's Acquisition Offers

Central argues again that offers to acquire its bulk power supply function and absorb one of its members were anticompetitive in nature.

The Commission is satisfied that the Agreement between Central and Santee Cooper provided a reasonably comprehensive resolution to the relationship between Santee Cooper and Central and to Central's alleged needs for power and transmission insofar as they relate to licensing the Summer facility. Thus the Commission did not need to resolve whether and to what extent a past "offer" would constitute an anticompetitive situation.

7/ Nonetheless, nothing in Mr. Brand's affidavit to which the Commission is referred is necessarily inconsistent with an inference that might be drawn that Central knew of a possible Commission forum considerably before filing its December 1978 petition, even as early as August, 1977. We note further that Central has told the Commission that in 1976 it was in consultation with antitrust counsel for the purposes of investigating its rights with respect to the very matters here at issue.

10. The Commission's Alleged Failure to Consider the Asserted Significant Changes in Their Entirety

Central appears to imply that the Commission examined its allegations in isolation and failed to consider them in their entirety.

In the process of responding to Central's allegations the Commission was required to provide reasonably specific responses. However, it should be clear that the Commission has considered the entire competitive situation. In particular it concurs with Staff's judgment that the situation as changed by Santee Cooper's and Central's Agreement is improved from a competitive standpoint. 8/

11. The Effect of the Agreement on Market Forces

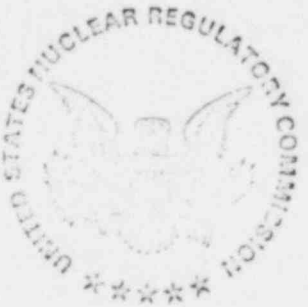
This allegation of error is another attack on the Agreement which Central and Santee Cooper concluded. The Commission views the Agreement as an improvement in the competitive situation which provides in substantial measure the relief requested by Central in its Amended Petition for a significant changes determination. Nothing has been offered to cause the Commission to reconsider this view.

8/ See NRC Staff Response to Commission's Order of June 15, 1981, 11-12, February 10, 1981.

III. Conclusion

For the reasons presented above, [9/] the Commission declines to reconsider its order of June 26, 1980. Accordingly, Central's Petition is denied.

It is so ORDERED.



For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
the 16th day of October, 1981.

9/ The Commission has noted the documents furnished by letter of September 14, 1981 from Central's counsel Wallace Brand. In its view these documents do not materially affect the June 26, 1981 decision and the Commission therefore declines to give them further consideration.