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NUCLEAR REGULATORY COMMISSION
DOCKET NO. 50-416A
MISSISSIPPI POWER AND LIGHT COMPANY AND THE
SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION
NOTICE OF FINDING OF NO SIGNIFICANT ANTITRUST CHANGES
AND TIME FOR FILING OF REQUESTS FOR REEVALUATION

The Director of Nuclear Reactor Regulation has made an initial finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant (antitrust) changes in the licensees' activities or proposed activities have occurred subsequent to the previous construction permit review of Grand Gulf Unit 1 by the Attorney General and the Commission. The finding is as follows:

"Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides for an antitrust review of an application for an operating license if the Commission determines that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous construction permit review. The Commission has delegated the authority to make the 'significant change' to the Director, Office of Nuclear Reactor Regulation. Based upon an examination of the events that have transpired since issuance of the Grand Gulf Unit 1 construction permit, the staffs of the Utility Finance Branch, Office of Nuclear Reactor Regulation and the Antitrust Section of the Office of the Executive Legal Director, hereafter referred to as 'staff,' have jointly concluded, after consultation with the Department of Justice, that the changes that have occurred since the antitrust construction permit review are not of the nature to require a second antitrust review at the operating license stage of the application.

"In reaching this conclusion, the staff considered the structure of the electric utility industry in western Mississippi, the events relevant to the Grand Gulf construction permit review and the events that have occurred subsequent to the construction permit review--including on-going settlement negotiations.

"The conclusion of the staff's analysis is as follows:

'MP&L's exercise of its market power in western Mississippi necessitated instituting license conditions at the CP stage of the Grand Gulf antitrust review. MP&L was continuing to foreclose competitive options to smaller power entities in the area at the time a notice of violation was issued by the NRC in May of 1980. In the notice of violation, the staff concluded that MP&L was not in compliance with its license conditions pertaining to transmission services, wholesale power services, and ownership participation in the Grand Gulf nuclear plant. However, all present indications are that MP&L has reversed its apparent policies that occasioned the notice of violation in May of 1980, has essentially reached a settlement agreement with the complaining parties, and is pursuing acceptance of

rate schedules and agreements before FERC that would bring it into full compliance with its license conditions. In the unlikely event that the settlement negotiations or the rate schedule implementations are unsuccessful, these matters can be resolved before the NRC in the present compliance proceeding which will remain in effect until the matters are satisfactorily resolved.

'No additional remedies will result from a formal operating license antitrust review. Furthermore, a significant change finding is not now warranted under the Commission's criteria as set out in the Summer decision. For the above reasons, staff does not recommend making an affirmative significant change finding regarding the application for an operating license for Grand Gulf Unit No. 1.'

"Based on the staff's analysis, it is my initial determination that an operating license antitrust review of Grand Gulf Nuclear Unit 1 is not required."

Signed on October 9, 1981 by Harold R. Denton, Director Office of Nuclear Reactor Regulation.

Any person whose interest may be affected pursuant to this initial determination may file with full particulars a request for reevaluation with the Director of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555 by (30 days).

FOR THE NUCLEAR REGULATORY COMMISSION

Argil Toalston

Argil Toalston, Acting Chief
Antitrust & Economic Analysis Branch
Division of Engineering
Office of Nuclear Reactor Regulation

GRAND GULF NUCLEAR PLANT, UNIT 1

MISSISSIPPI POWER & LIGHT COMPANY

AND

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION

DOCKET NO. 50-416

FINDING OF NO SIGNIFICANT ANTITRUST CHANGES

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Appendices Continued

Introduction

Unlike the procedure established for review of construction permits, prospective operating licensees are not required to undergo formal antitrust reviews unless the NRC staff has made the determination[1] that there have been "significant changes in the licensee's activities or proposed activities" subsequent to the review by the Attorney General and the Commission at the construction permit stage.[2]

The Commission in its recent Summer[3] decision has established certain standards to be applied by staff in its antitrust review of prospective operating licensees. The Commission's interpretation of Section 105c(2) of the Atomic Energy Act of 1954, as amended,[4] is embodied in the recent Summer decision, and establishes three criteria which must be addressed by staff as a minimum or threshold in making an affirmative significant change determination.

> "The statue contemplates that the change or changes(1) have occurred since the previous antitrust review of the licensee(s); (2) are reasonably attributable to the licensee(s); and (3) have antitrust implications that would most likely warrant some Commission remedy."[5]

Staff, in its review of the Grand Gulf operating license has documented various changes in the licensee's activities that have satisfied the first two criteria, but only partially satisfy the third criterion.

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[1]The Commission at p. 1318 of its South Texas decision, 5 NRC 1303 (1977), raised the possibility of delegating the "significant change" determination to staff. This responsibility was officially delegated to staff in a memorandum dated September 12, 1979 from Chairman Hendrie to the Directors of NRR and NMSS. (See Appendices A and B respectively.)

[2]Section 105c(2) of the Atomic Energy Act of 1954, as amended.

[3]Memorandum and Order, Docket No. 50-395A, Virgil C. Summer Nuclear Station, No. 1, dated 6/30/80. (See Appendix C)

[4]The "significant change" portion of the Act. No OL review is necessary unless licensee's activities or proposed activities have changed since the CP antitrust review. (See Appendix D)

[5]Summer, p. 7.

These changes are the subject of charges of non-compliance with license conditions attached to Mississippi Power & Light Company's (MP&L) Grand Gulf construction permit following the CP antitrust review.

Presently, MP&L and the Municipal Energy Association of Mississippi (MEAM) are involved in negotiations that would bring MP&L into compliance with the CP conditions. Staff anticipates that these negotiations will prove fruitful and remedy the changes that have occurred since the CP review. In the event that negotiations are unsuccessful, staff can take enforcement action to bring about compliance.

By pursuing the compliance procedures established under Commission rules, staff believes, 1) an adequate remedy will obtain, and 2) a duplicative parallel proceeding resulting from an affirmative significant change finding will be averted.

Structure of the Electric Power Industry in Mississippi

In terms of load served and generation and transmission facilities owned or controlled, Mississippi is not unlike the other areas of the electric power industry in the United States, i.e., the larger investor-owned utilities (IOUs) supply the bulk of the power produced and serve the overwhelming majority of customers that purchase power and energy.

Investor-Owned Systems

The IOUs that have been granted certificates of convenience in Mississippi are Mississippi Power & Light Company and Mississippi Power Company. Of these two, Mississippi Power & Light is the larger -- in terms of load served and generation/transmission facilities owned. In 1978, MP&L had a peak load of 1,899 mw, generating capability of 2,789 mw, 3,740 circuit miles of transmission lines and approximately 24,000 pole miles of distribution lines. MP&L serves primarily in the western counties of the state, encompassing an area of 297,000 customers (85% residential).

MP&L is an operating subsidiary of Middle South Utilities, Inc. (MSU), a registered holding company.[6] In 1979, MP&L had total revenues of $400 million and net earnings of $28.8 million.

Mississippi Power Company (MPC), had a peak load of 1,306 mw in 1978, generating capability of 1,966 mw, 2,034 circuit miles of transmission line and approximately 4,500 pole miles of distribution lines. MPC serves approximately 155,000 customers (85% residential) in the southeastern portion of the state.

MPC is an operating subsidiary of the Southern Company (SC), a registered holding company.[7] In 1979, MPC had total revenues of $208 million and net earnings of $16 million.

Municipal and Cooperative Systems

There are many smaller (than the IOU's) municipal and cooperative-owned power systems in the state, however, only a small percentage of them possess generating capability - most are full-requirements customers of the federally-owned Tennessee Valley Authority (TVA),[8] or the two privately-owned utilities mentioned above.

Many of the municipal and cooperative systems that possess generating capability have joined among themselves to form regional associations. Three such associations, doing business primarily in western Mississippi, are: the Municipal Energy Agency of Mississippi (MEAM - municipals); the South Mississippi Electric Power Association (SMEPA - cooperatives); and the Western Mississippi Electric Power Association (WMEPA - cooperatives).

[6]The other operating subsidiaries of MSU are Louisiana Power and Light Company, Arkansas Power and Light Company, New Orleans Public Service Company and the Arkansas-Missouri Power Company.

[7]Other operating subsidiaries of the Southern Company include, Alabama Power Company, Georgia Power Company and Gulf Power Company.

[8]The TVA is limited by federal law to serving existing customers. In Mississippi it serves primarily the northwestern portion of the state.

The Municipal Energy Agency of Mississippi (MEAM) is an organization of eight[9] municipally-owned Mississippi electric systems which was formed in 1978 to help search out ways to reduce the cost of electric power to the citizens of the respective cities. In 1978, the cities had a combined peak load of approximately 116 mw, generating capability of 147 mw and no significant transmission line facilities. Prior to the formation of the joint action group, the smaller members were full-requirements customers of MP&L. Two of the cities, Clarksdale and Greenwood, were self-sufficient in generation while a third, Yazoo, supplied a major portion of its own load while purchasing the remainder from MP&L.

The South Mississippi Electric Power Association (SMEPA) is "an operating public utility engaged exclusively in the generation and transmission of electric energy for seven member Rural Electric Cooperatives in the State of Mississippi."[10] SMEPA (headquartered in Hattiesburg, Miss.) had a peak load of 266 mw in 1978; generating capability of 573 mw; and 1,210 miles of transmission line. The Association had total revenues of approximately $71 million and an excess of revenues over costs[11] of approximately $1.3 million.

The Western Mississippi Electric Power Association (WMEPA) requested Grand Gulf ownership participation in 1972. The group was comprised entirely of electric power cooperatives located primarily in western Mississippi. After negotiations involving WMEPA, SMEPA and MP&L regarding separate ownership shares in Grand Gulf, SMEPA and WMEPA agreed among themselves to share an ownership participation in Grand Gulf of approximately ten percent. These negotitations

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[9]Members include the cities of: Clarksdale, Greenwood, Yazoo, Leland, Kosciusko, Canton, Durant and Itta Bena. Clarksdale and Greenwood are the largest members with peak loads of 34 mw and 28 mw respectively and generating capability of 68 mw and 47 mw respectively. (There are other large municipally-owned systems in the state, which are not members of MEAM, for example Tupelo (93 mw peak), Starkville (45 mw peak) and New Albany (39 mw peak), however, these systems are not located in the western portion of the state -- i.e., the area most relevant to this inquiry.)

[10]SMEPA's "Application for Amendment of Construction Permit Nos. CPPR-118 and CPPR-119-toAddCo-Owner," dated March 31, 1980, at p. 4 (See Appendix E)

[11]The Term "net patronage capital" used by the Coop is analogous to a profit figure for a similarly organized "for profit" corporation.

concluded when "the WMEPA cooperatives decided to join SMEPA as members and by SMEPA agreeing to acquire a ten percent interest in the facility."[12]

Market Power of MP&L

In terms of load served and generating capability owned, MP&L is approximately 5[illegible] greater than the other IOU licensed to serve in the state (MPC) and many times larger than the remaining municipal and cooperative systems serving the state.[13]

Through interconnections with its sister companies and other companies throughout the south, MP&L is able to explore many power supply options which enable it to make efficient use of its system. By virtue of its ownerhsip of the bulk of the transmission facilities in its service area, MP&L is able to control the power supply options of power entities doing business or desiring to do business in the area -- principally those in western Mississippi.

In short, many of the smaller generating entities (notably the municipally-owned facilities) are unable to actively seek out and consummate bulk power agreements without first entering into an interconnection with MP&L and then negotiating a transmission rate with MP&L. This control over market options instills a significant degree of market power to MP&L vis-a-vis other power entities in its service area and to a lesser extent over power entities wishing to enter into transactions with entities in MP&L's service area.

Case Background

In announcing Mississippi's first nuclear project, MP&L in 1972 made public its plans to construct two 1290 MW units to be located in Claiborne County

[12]Stampley letter to Denton dated 6/18/80, p. 6. Closing of the agreement is contingent upon various regulatory approvals and a satisfactory financing commitment from lenders. (See Appendix F)

[13]The privately-owned systems would presumably be significantly larger in the absence of the huge federally-operated Tennessee Valley Authority (TVA) which serves many smaller municipal and cooperative systems in the northeastern portion of the state.

approximately twenty-five miles south of Vicksburg, Mississippi. Initial inquiries regarding some type of access to the plant were received from: (1) South Mississippi Electric Power Association (SMEPA) in February 1972; (2) West Mississippi Electric Power Association (WMEPA) in August 1972; (3) Yazoo City, Mississippi in March 1973; and (4) the City of Greenwood, Mississippi in August 1973.[14]

Prior to and during the period of the antitrust review at the CP stage of the Grand Gulf Nuclear Plant, the City of Clarksdale expressed the desire to become a more active competitor to MP&L in serving electric load growth within the City of Clarksdale. Clarksdale's electric system was dependent upon MP&L for alternative power supply options, and had experienced problems with MP&L in securing power supply alternatives in the past. After 1972, the City and MP&L entered into "an agreement whereby Mississippi Power & Light and the City of Clarksdale could exchange power with each other or with others when either needed it."[15] Any power purchased from others or sold to others by Clarksdale would have to be wheeled by MP&L over its transmission lines or purchased directly from MP&L on its own terms and conditions.

Following negotiations between DOJ and MP&L, MP&L entered into a set of policy commitments in 1973 which basically required MP&L to interconnect with any electric power entity in Western Mississippi, as well as offer ownership in its Grand Gulf Nuclear Plant with accompanying service schedules necessary for meaningful use of Grand Gulf power. As a result of MP&L agreeing to these policy commitments, DOJ issued a no hearing recommendation to NRC re MP&L's CP

[14]SMEPA has recently become a co-owner of the Grand Gulf plant, acquiring a 10% interest from MP&L. MEAM has been offered a 2.48% interest in the plant as part of an outstanding settlement agreement with MP&L. WMEPA, after reviewing the cost data on the plant, declined participation on its own and just recently has merged with SMEPA - thereby participating in SMEPA's 10% share.

[15]Letter dated August 25, 1980, from Newton Dodson, Mayor of Clarksdale, to Thomas Kauper, Assistant Attorney General, Antitrust Division of the Justice Department.

antitrust review in May of 1973. The Grand Gulf CP was subsequently issued in September of 1974 with these policy commitments as license conditions.[16]

Changes Since the Construction Permit Review

As a part of its operating license application for Grand Gulf, MP&L submitted answers in response to Regulatory Guide 9.3 and to other specific questions posed by staff in connection with this operating license review.[17] A number of changes with respect to MP&L's system and operations have occurred since the construction permit review including changes in load, generation, transmission, interconnections, Grand Gulf ownership, rate schedules, wholesale customers, service territory and interconnection agreements which staff does not consider to be "significant changes" in the context of this review. These changes which are not the primary focus of this analysis are discussed in Appendix O.

Over the past six or seven years (1973-80) various municipal and cooperative electric systems in MP&L's service area have been trying to consummate workable transmission and power supply arrangements with MP&L - using the Grand Gulf CP license conditions as a basis for negotiations. These negotiations have led to various allegations and disputes which are the focus of staff's investigation in this review.

The Clarksdale Dispute

The City of Clarksdale has spearheaded the efforts by municipals in western Mississippi to seek out alternative bulk power supply. Clarksdale, independently and as the representative member of MEAM, has arranged to buy approximately

[16]The conditions provide for access to Grand Gulf, reserve sharing, emergency and maintenance power sales, transmission services and the sale of power for resale to entities in Western Mississippi. Generally, the conditions contribute to the opening up of alternative power supply options among electric power entities in Western Mississippi. See Appendix G for a complete listing of the conditions and DOJ's "no hearing" advice letter.

[17]See Appendix H for February 1979 response and Appendix I for April 12, 1979 response.

14 mw of power from the City of Lafayette, Louisiana. To transmit the power from Lafayette to Clarksdale, Clarksdale had to work out a "contract path" over Gulf States Utilities' lines through MP&L's lines to Clarksdale. MP&L initially refused to wheel the power over the GSU interconnection point because the two companies had no formal interconnection agreement.[18] MP&L suggested contracting for the power over the GSU/LP&L (Louisiana Power & Light) interconnection point - primarily because LP&L and GSU had a formal interconnection agreement and accompanying transmission schedules. Clarksdale, not wishing to pay the additional (to MP&L's) wheeling charge required by LP&L, demanded an interconnection agreement with MP&L, as required by the existing Grand Gulf license conditions.

Following curtailments of natural gas in 1976, Clarksdale, whose system is heavily dependent upon gas-fueled peaking units, began to seek new sources of base load generation to replace its gas units. Consequently, Clarksdale (individually, and as a member of MEAM after its formation) formally requested ownership participation in MP&L's Grand Gulf nuclear plant in December of 1976. (This request is currently being negotiated between MEAM and MP&L as discussed below).

Notice of Violation

MEAM and MP&L have been engaged in negotiations primarily regarding access to the Grand Gulf nuclear plant and to MP&L's transmission grid since shortly after MP&L obtained its construction permit in 1974. Negotiations continued until early 1979 when the parties reached a loggerhead. In May of 1979, counsel for MEAM sent a letter to the NRC expressing concern over MP&L's non-compliance with its CP license conditions[19] and requested NRC to take enforcement action against MP&L. (Notably, license conditions: D4(a) re participation in Grand Gulf; D5(a) re transmission services; and D6 re obligation to sell power for resale).

In response to MEAM's request, the NRC staff initiated an investigation into MP&L's alleged failure to abide by its licensing conditions. After contacting

[18] Gulf States Utilities Company was unwilling to transmitt power over this interconnection point for the same reason.

[19] Letter from R. McDiarmid to H. Denton, dated May 29, 1979. (See Appendix J).

the Applicant and various federal agencies,[20] staff concluded that MP&L was not living up to its license conditions and issued a "Notice of Violation" to MP&L on May 29, 1980.[21]

In the Notice of Violation, the staff concluded that:

(1) MP&L has violated and continues to violate Grand Gulf antitrust license condition 4(a) by refusing to offer the City of Clarksdale, MEAM, or the other members of MEAM, the opportunity to participate in Grand Gulf;

(2) MP&L has violated and continues to violate Grand Gulf antitrust license condition 5(a) by not facilitating the transmission of Lafayette, Louisiana power from the MP&L - Gulf States Utilities interconnection near Felps, Louisiana, to the City of Clarksdale; and

(3) MP&L has violated and continues to violate Grand Gulf antitrust license condition 6 by refusing to sell partial requirements power for resale except at incremental costs.

The Notice required MP&L to admit or deny the charges and/or provide NRC staff with justification for its activities and explain what course of action it intends to pursue to correct the violations.

Status of Compliance Proceeding

By letter of June 18, 1980[22] MP&L denied the charges in the Notice, but at the same time offered a settlement proposal which MP&L believes "May be in the

[20]See letter from Conner to Denton, dated June 9, 1979 (Appendix K) and letter from Flexner to Denton, dated November 21, 1979 (Appendix L).

[21]See Appendix M.

[22]Letter from N. Stampley, Vice President of MP&L, to H. Denton, Director of NRR (see Appendix F).

best interests of all the parties." The MP&L proposal, which was proffered to MEAM via letters of June 6 and June 18, 1980, includes the following "general conditions":

1. An offer to MEAM and its members of an undivided membership in the Grand Gulf plant of up to 2.48% (offered on the same terms and conditions by which SMEPA is acquiring a ten percent interest in the plant);

2. MEAM and its members shall have until September 1, 1980[23] to notify MP&L in writing of their intention to participate; subsequently, MEAM will have until January 1, 1981 to secure financing to purchase its share and secure all necessary regulatory approvals for same;

3. MP&L would file with FERC a partial requirements wholesale rate schedule and make same available to any member of MEAM with which MP&L has an interconnection agreement; and

4. Upon acceptance by MEAM of the settlement offer, MP&L (and MSE) is forever released from any claims or future claims "that may be based upon or arise out of any matter upon which the Notice of Violation is based."

According to counsel for both MP&L and MEAM, the settlement negotiations have progressed smoothly over the past year and an agreement on plant access, transmission and a partial requirement wholesale rate has been reached. A final agreement is scheduled to be signed in the next two months.

A temporary transmission rate schedule between MP&L, GSU and MEAM representatives was accepted for filing by the FERC staff on December 31, 1980 and became effective January 29, 1981. This agreement is scheduled to terminate

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[23]This date has subsequently been held in abeyance.

on October 31, 1981 and be superseded by a permanent interconnection agreement between MP&L and GSU which is presently being negotiated. The interconnection agreement and the partial requirement wholesale rate will be subject to approval by FERC. The ownership participation by MEAM in GRAND GULF will be subject to an antitrust and financial qualification review by NRC.

Summary and Conclusion

MP&L's exercise of its market power in western Mississippi necessitated instituting license conditions at the CP stage of the Grand Gulf antitrust review. MP&L was continuing to foreclose competitive options to smaller power entities in the area at the time a notice of violation was issued by the NRC in May of 1980. In the notice of violation, the staff concluded that MP&L was not in compliance with its license conditions pertaining to transmission services, wholesale power services, and ownership participation in the Grand Gulf nuclear plant. However, all present indications are that MP&L has reversed its apparent policies that occasioned the notice of violation in June of 1980, has essentially reached a settlement agreement with the complaining parties, and is pursuing acceptance of rate schedules and agreements before FERC that would bring it into full compliance with its license conditions. In the unlikely event that the settlement negotiations or the rate schedule implementations are unsuccessful, these matters can be resolved before the NRC in the present compliance proceeding which will remain in effect until the matters are satisfactorily resolved.

No additional remedies will result from a formal operating license antitrust review. Furthermore, a significant change finding is not now warranted under the Commission's criteria as set out in the Summer decision. For the above reasons, staff does not recommend making an affirmative significant change finding regarding the application for an operating license for Grand Gulf Unit No. 1.

Appendix A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:
Marcus A. Rowden, Chairman
Victor Gilinsky
Richard T. Kennedy

In the Matter of Docket Nos. 50-498A
50-499A

HOUSTON LIGHTING & POWER COMPANY
THE CITY OF SAN ANTONIO
THE CITY OF AUSTIN and
CENTRAL POWER AND LIGHT COMPANY

(South Texas Project, Unit Nos.
1 and 2) June 15, 1977

Under 10 CFR § 2.758, co-applicant Houston Lighting and Power Company moved the Commission to waive the requirement that initiation of operating license antitrust review procedures await submission of the FSAR, which, by Commission rules, must accompany the filing of an application for an operating license. The Commission, in an opinion delineating its antitrust jurisdiction, authorizes the Director of Nuclear Reactor Regulation to accept the application for the operating license without the FSAR and directs the Nuclear Regulatory Commission staff to seek the Attorney General's advice on whether changed circumstances have occurred within the meaning of Section 105c(2), which would warrant the holding of an operating license antitrust hearing.

ATOMIC ENERGY ACT: ANTITRUST JURISDICTION

Section 105 of the Atomic Energy Act defines the Commission's antitrust responsibilities; the broad powers that the Commission has by virtue of Section 186 to revoke or to modify existing licenses is subordinate in regards to antitrust matters to the regime set out in Section 105.

ATOMIC ENERGY ACT: ANTITRUST JURISDICTION

The Commission's authority to initiate an antitrust review is limited to the scheme of prelicensing antitrust review established by Section 105c. That section

requires all applications for a construction permit to undergo antitrust scrutiny and allows a second review at the operating license stage if in the interim significant changes have occurred in the licensee's proposed activities.

ATOMIC ENERGY ACT: OPERATING LICENSE ANTITRUST REVIEW

In contrast to the more thorough antitrust review at the construction permit stage, the scope of antitrust review at the operating license stage is more limited, focusing on significant changes, if any, that have occurred in the licensee's activities since the construction permit antitrust review; however, in analyzing allegations of significant changes, some account may be taken of the unchanged features of the proposal as a whole.

Mr. J. A. Bouknight, Jr. (with whom **Messrs. Robert Lowenstein, Finis E. Cowan, Charles G. Thrash, Jr., J. Gregory Copeland, R. Gordon Gooch,** and **John P. Mathis** were on the brief) for the Houston Lighting & Power Company.

Mr. Jon C. Wood (with whom **Mr. W. Roger Wilson** was on the brief) for the City of San Antonio.

Mr. George K. Elbrecht (with whom **Messrs. Jerry L. Harris** and **Don R. Butler** were on the brief) for the City of Austin.

Mr. Michael I. Miller (with whom **Messrs. Richard D. Cudahy, Joseph Gallo,** and **Robert F. Loeffler** were on the brief) for the Central Power and Light Company.

Mr. Jay M. Galt for Committee for Power for the Southwest, Inc.

Mr. Raymond W. Phillips (with whom **Mr. John D. Whitler** was on the brief) for the United States Department of Justice.

Mr. Martin G. Malsch (with whom **Messrs. Joseph Rutberg** and **Michael B. Blume** were on the brief) for the Nuclear Regulatory Commission staff.[1]

[1] Pursuant to the Commission's order of April 27, 1977, the parties to certain proceedings involving Florida Power & Light Co. nuclear facilities were granted leave to file amicus curiae briefs and reply briefs in this proceeding. A brief from a group of Florida municipal utilities and reply briefs from the regulatory staff and Florida Power & Light Co. were subsequently received and have been considered in our disposition of this matter.

MEMORANDUM AND ORDER

The Houston Lighting & Power Company (Houston), Central Power and Light Company (Central), and the Cities of San Antonio and Austin, Texas, are joint holders of construction permits for the proposed South Texas Project, Unit Nos. 1 and 2. When the application for construction permits was filed in May 1974, a copy was transmitted to the Attorney General seeking his advice whether a hearing should be held to consider possible antitrust implications, as required by Section 105c(1) of the Atomic Energy Act. By letter of October 22, 1974, the Attorney General responded in the negative. His letter was duly published in the *Federal Register*, with a notice of opportunity for any interested person to file a petition for leave to intervene and to request a hearing on the antitrust aspects of the proposed project. No such petition was filed and, consistent with the Attorney General's advice, no antitrust proceeding was initiated.

During that same period of time, the health, safety and environmental review of the South Texas Project went forward. An initial decision favorable to the applicants was issued in late 1975 (LBP-75-71, 2 NRC 894), construction permits were duly issued, and the Atomic Safety and Licensing Appeal Board affirmed the initial decision in early 1976. ALAB-306, 3 NRC 14. The Commission chose not to review the Appeal Board's decision, and judicial review was not sought within the prescribed time. At that point, the construction permit proceeding, including its antitrust review aspect, had come to an end.

The events recited hereafter are those upon which the parties appear to be in general agreement. In May 1976, following the time when judicial review of the construction permit proceeding might have been sought, Houston broke off interconnections between its distribution system and the systems of certain other utilities, includings its co-licensee here, Central Power and Light. This action occurred after Central had established an interconnection between its distribution facilities and those of certain out-of-state utilities.[1a] Prior to the establishment of this interconnection, the distribution system of which Houston and Central were part had served only Texas intrastate commerce. We understand that, for this reason, Houston and other intrastate Texas utilities have not in the past been, and are not now, regulated by the Federal Power Commission — a situation Houston would apparently prefer to maintain. Central is owned by a parent holding company subject to the Public Utility Holding Company Act of

[1a] "Central's brief indicates that this took place "as a result of interstate transmission of electricity by [West Texas Utilities]," a wholly owned subsidiary of Central's holding company, Central and Southwest Corporation. Brief at p 6.

1935, and the requirements of that Act[2] may have been a factor in Central's apparent decision to enter interstate commerce and thus to subject aspects of its operations to regulation by the Federal Power Commission. Houston casts its disconnection of Central in a defensive mold, as a means of avoiding its being caught in the net of interstate commerce and, thus, Federal regulation.

These apparently interrelated actions have been matched by a complex set of judicial and administrative actions. Houston responded to Central's interstate connection by seeking an order from the Texas Public Utility Commission to require Central to sever that connection. Houston's claim, also made in the judicial action shortly to be described, is that Central is contractually and legally bound to preserve the intrastate character of the "Texas Interconnected System," of which both it and Central are a part and which the South Texas Project was intended to serve. By a submission dated May 4, 1977, Houston has brought to our attention an "interim order" of the Public Utility Commission, issued on May 2, 1977, directing resumption of interconnections between Houston and Central and disconnection by Central of interstate ties.[3] Houston further informs us that "physical reconnection of the Texas Interconnected Systems in accordance with the interim order has been completed." On May 18, 1977, Central requested that the United States District Court for the Western District of Texas declare invalid and set aside the interim order of the Utilities Commission.

Central's interconnections with out-of-state utilities are under scrutiny in a proceeding pending before the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935, involving Central's parent holding company. Houston tells us (Brief p. 26) that the SEC proceeding could moot any NRC antitrust proceeding, but Central disputes this (Brief pp. 21-23). Central's pursuit of interstate regulation[4] had led it, with other subsidiaries in its system, to file a petition with the Federal Power Commission seeking Commission exercise of regulatory authority over it. The results of that proceeding are conjectural at this point, but it appears that one possible result would be to establish FPC jurisdiction over Houston, on account of its interconnections with Central.

In response to Houston's breaking off of interconnections, Central has also filed a civil action in Federal district court in Texas alleging violations of the Sherman Act, and seeking an injunction against interruptions of interconnected service. Houston has counterclaimed in this suit, denying any antitrust violations and seeking an order compelling performance of Central's obligations under its contractual arrangements for the construction of the South Texas Project.

We come now to the proceedings raising these issues before the Commission. The matter first came formally to our attention in June 1976, when Central filed a petition which styled itself a response to the notice of opportunity for antitrust hearing which had been published some 19 months earlier. Central, a co-applicant, had received the earlier notice, but it maintained that "good cause" now existed for allowing it to intervene and obtain an antitrust hearing. It contended that Houston's breaking off of interconnections was a supervening development which warranted the imposition of antitrust conditions. The disposition of that petition is outlined in detail in the Appeal Board's decision in ALAB-381, 5 NRC 582 (March 18, 1977), and need not be restated here. Central prevailed before the licensing board to which its petition had been routinely referred, despite our staff's opposition on jurisdictional grounds – that the construction permit proceeding having been terminated, the antitrust issues associated with it could not be reopened. On appeal by our staff the Appeal Board reversed (ALAB-381), agreeing with the staff that the construction permit proceeding had formally come to an end with the expiration of time to seek judicial review, and that the licensing boards lacked delegated authority to reopen such proceedings.

As matters developed before the Appeal Board, all parties agreed that an antitrust hearing should be held at the earliest opportunity, differing only on the appropriate procedure for accomplishing that objective. Following argument before the Appeal Board, Houston suggested that we permit an early beginning to the statutory antitrust review provided for in certain cases at the operating license stage, by waiving the requirement that initiation of staff operating license review procedures await the applicant's submission of a Final Safety Analysis

[2] The Act, 15 U.S.C. 79 *et seq.*, allows registered holding companies to "continue to control one or more additional integrated public utility systems," in certain circumstances. To be so allowed, the SEC must find that

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
>
> (B) All of such additional systems are located in one state, or in adjoining states, or in a contiguous foreign country; and
>
> (C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

15 U.S.C. 79K.

[3] That order provides in part

> It is therefore the ORDER of this Commission that the parties hereto immediately reestablish the Texas Interconnected System as it existed on May 3, 1976, and as contractually agreed to by such parties and that any and all disconnects which must be made to remove the contract impediments to such reconnection be made immediately.

In late May, the Utility Commission issued a "final order" confirming and approving the above cited interim order.

[4] The facts recited are those upon which the parties appear to be in general agreement. We do not mean to ascribe a motive to this conduct. Central and Houston each aver that its actions are intended to benefit its consumers through obtaining more reliable, lower cost electricity under a more efficient regulatory system. We need not decide at this juncture whether this or some other purpose drives either in the present jurisdictional dispute.

Report (FSAR). This suggestion was placed before us on February 10, 1977, in a formal motion for waiver of Commission rules pursuant to 10 CFR §2.758.[5] Our staff believes that, as a joint licensee, Central's intervention petition may be treated as a request for construction permit amendments, under 10 CFR §50.90, requiring Houston to interconnect with it, and that the Commission may thereupon direct, pursuant to 10 CFR §2.104, that an antitrust hearing be held on the request. The Staff also believes that initiation of a show cause proceeding under 10 CFR §2.202 would be "legally permissible." In February 1977, the first staff suggestion was placed before us in a staff paper which we caused to be served on the participants herein, with an invitation for response. The Department of Justice, which did not appear before the Appeal Board, suggested in a January 25, 1977, letter to the Executive Legal Director that "the Department can see no reason why the hearing should not proceed at this time, rather than awaiting the filing of the application for an operating license," but it proffered no specific legal basis for that view. Finally, the Appeal Board suggested, in *dictum*, in its opinion of March 18, ALAB-381, that the Commission had the authority to order a hearing at this time. Alternatively, the Board believed that the Director of Nuclear Reactor Regulation could order an antitrust hearing through the issuance of an order to show cause under 10 CFR §2.202.

In our order of March 31, 1977, we announced our decision not to review ALAB-381 and our intention to rule on the Houston motion and the staff suggestion following briefing and oral argument, in which we invited the Department of Justice to participate. In declining to review ALAB-381, of course, we are not to be taken as having agreed with everything that the Appeal Board had said in that opinion.

It might appear that a dispute over the procedure to be followed for initiating a hearing, where the parties largely agree that a hearing should be held,[6] should not have major implications for the regulatory process. However, the sharp divergences among the parties over the appropriate legal basis for holding a hearing now have surfaced significant issues for resolution. The legal basis for going forward now will determine the scope of the proceeding – whether the entire proposal will be open to scrutiny *de novo*, as during the construction permit proceeding, or whether it is only the antitrust implicatons of significantly changed circumstances that are relevant. And there may be questions of finality in the event that further changes should occur before operating licenses are ready for issuance. More fundamentally, as developed in our analysis of the statutory language and its legislative history, resolution of this dispute requires a definition of the scope of our responsibility in enforcing the antitrust laws and the policies underlying them in relation to the enforcement responsibilities of other agencies, particularly the Department of Justice. Some of the parties' arguments would assign to us a broad and ongoing antitrust enforcement role; they envision that we would have a continuing policing responsibility over the activities of licensees throughout the lives of operating licenses. As we shall show, we believe that the Congress envisioned a narrower role for this agency, with the responsibility for initiating antitrust review focused at the two-step licensing process.

Section 105 of the Atomic Energy Act, as amended, defines the Commission's antitrust responsibilities. That section, as most recently amended in 1970, establishes a particularized regime for the consideration and accommodation of possible antitrust concerns arising in connection with the licensing of nuclear power plants. The statute contemplates imposition of conditions in connection with our issuance of construction permits and, in some circumstances, at the operating license stage where necessary to remedy situations inconsistent with the antitrust laws.

The section's three subdivisions reflect three distinct forms of Commission responsibility. Thus, subsection (a) provides for enforcement of antitrust judgments reached elsewhere. It expressly confirms that nothing in the Act "shall relieve any person from operation" of the full range of the antitrust laws including the Sherman, Clayton and Federal Trade Commission Acts:

> In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the laws cited above, to have violated any of the provision of such law *in the conduct of the licensed activity*, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act. (Emphasis added.)

Subsection (b) requires the Commission to report promptly to the Attorney

[5] The procedure prescribed by 10 CFR §2.758 for seeking waiver of a Commission rule is by its terms literally applicable to ongoing adjudicatory proceedings, not to a request for waiver for the purpose of facilitating initiation of a proceeding. Nevertheless, we believe that under the circumstances Houston properly invoked this rule and that its request for waiver was properly addressed directly to the Commission. Although requests under the rule are normally addressed to the presiding officer in the ongoing proceeding, such requests must be certified to the Commission for decision if a *prima facie* showing is made. No party objected to Houston's invocation of the 10 CFR §2.758 waiver procedure.

[6] Central, the regulatory staff and the Department of Justice agree that a hearing should be held. In its brief, Houston took the position that it did not object to determining whether there had been a "significant change" in the South Texas proposal since the construction permit review. At oral argument, Houston asked as its first preference that we rule that no hearing would be necessary now or, barring other changes with antitrust implications, at the operating license stage. San Antonio and Austin are opposed to a hearing but agree with Houston that if a hearing is necessary, it should begin now to prevent possible delay in issuance of an operating license.

General any information it may have with respect to any "utilization of special nuclear material or atomic energy which appears to violate or tend toward the violation" of any of the listed antitrust laws, or to restrict free competition in private enterprise, but provides no enforcement or hearing initiation responsibility with respect to this information.

A responsibility for initiating and conducting a hearing process is set out in Section 105. Subsection (c) spells out an intricate procedure by which the Commission solicits the views of the Attorney General on possible antitrust implications of each application for permission to construct a commercial power reactor. Any such license application shall "promptly" be transmitted to the Attorney General who shall, "within a reasonable time, but in no event to exceed 180 days after receiving a copy of such application . . .render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection." Paragraph (5) of subsection (c) requires the Commission to determine, in cases where an antitrust proceeding is held, "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. . . ."

Upon receipt of the Attorney General's advice, the Commission must publish the advice in the *Federal Register*. The Attorney General may advise that there will be adverse antitrust aspects to the licensee's proposal, and recommend a hearing. In such a case, the Attorney General may participate "as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice." Thus, the Act provides for in-depth antitrust review, with the assistance and advice of the Attorney General and the possibility of a full scale adjudicatory hearing at his request or the request of a private party, at the construction permit stage.

For reactors which have undergone subsection (c) antitrust review in connection with a construction permit application, paragraph (c)(2) governs the question of antitrust review at the operating license stage. It requires the Commission to make a threshold determination before the Attorney General's advice concerning a possible second antitrust proceeding can be sought – namely a finding that the licensee's activities have significantly changed subsequent to the construction permit antitrust review. The language of paragraph (c)(2) is explicit:

> . . paragraph (1) [which sets forth construction permit antitrust review procedures] shall not apply to an application for a license to operate a utilization or production facility . . . unless the Commission determines such review is advisable on the ground 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. (Emphasis added.)

No part of the Atomic Energy Act other than Section 105 explicitly deals with antitrust matters. Under Section 186 of the Act, however, the Commission has general authority to revoke licenses for any reason which would have warranted the Commission in refusing to grant a license on an original application. The power to revoke would normally imply the lesser power to modify licenses to incorporate conditions which would have been imposed at the time of initial licensing had subsequently developed circumstances then been known. If this reasoning applies to our antitrust responsibilities, Commission initiated antitrust hearings would be possible beyond the limited circumstances set forth in Section 105. Indeed, all concede that other language in Section 186 gives the Commission authority to initiate a postlicensing enforcement proceeding in the event of violation of a specific antitrust licensing condition.[7] For like reasons, we would not be limited to mere reference to the Attorney General if a license applicant had falsified pertinent antitrust review information or had otherwise obtained an unconditioned license by some sort of fraud or concealment, but no such allegation is contained in the matter before us now. It is the further question whether Section 186 expands the antitrust hearing settings defined in Section 105, however, that drives the current debate. For the reasons that follow, we find that the generality of Section 186 should be treated as subordinate to the specific, limited regime adopted by Congress as recently as the 1970 amendments to the Act.

Houston argues that, with narrow exceptions not relevant here, our authority to initiate antitrust review is limited to the Section 105 licensing context. In the present circumstances they contend that a hearing at this juncture could only be an operating license hearing based on "changed circumstances" and suggest that we waive the FSAR filing requirement for proceeding with such a hearing if we believe a hearing otherwise appropriate. Our staff, Central Power and Light Company, the Department of Justice and the Florida Cities in an amicus filing argue that the Commission is empowered to consider antitrust matters at any time, regardless of the pendency of an operating license or construction permit application, under Section 186 of the Act. The Department also finds authority in Section 161 of the Act, empowering the Commission to "hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter or in the administration or enforcement of this chapter. . ." The Florida Cities amicus filing argues that "the Act nowhere states that Section 105 alone provides the Commission with the means it may use to enforce the procompetitive policies of the Act." Brief amicus curiae of Florida Cities at 34. Finally, we are

[7] The section authorizes initiation of proceedings in several specific circumstances, including a "failure to . . . operate a facility in accordance with the terms of the . . . license."

asked by Central and the staff to construe Central Power and Light Company's antitrust allegations as an application for a "modification" of the construction permits which if granted would "constitute a new or substantially different facility," triggering antitrust review under 10 CFR §50.90.

These are ingenious and in some respects appealing arguments. Especially significant in our view, however, is the extent to which these arguments avoid or strain the language of Section 105.

We find the specificity and completeness of Section 105 striking. The section is comprehensive; it addresses each occasion on which allegations of anticompetitive behavior in the commercial nuclear power industry may be raised, and provides a procedure to be followed in each instance. The Act links Commission antitrust review with the licensing process, demanding a thorough antitrust review at the stage of application for the construction permit and allowing a narrower second review at the operating license stage, if such a review is deemed advisable on the basis that significant changes have occurred in the licensees activities. The clear implication of the "significant change" language is that the holder of a construction permit is not subject to a second antitrust review at the operating license stage unless "significant changes" in the proposed project with antitrust implications have occurred in the interim. Nor can it reasonably be argued that Congress did not foresee that antitrust allegations might be raised outside the license review context. Subsequent allegations that licenses are being used in such a way as to violate the antitrust laws are to be referred to the Department of Justice for investigation and possible enforcement action, and if violations are found by a court, the Commission is given express statutory authority to take such license-related remedial action as is necessary.[8]

This reading of the statute is supported by its legislative history. The present language of Section 105 was fashioned in the 1970 amendments to the Atomic Energy Act. Concern with the competitive aspects of licensing in the nuclear area, however, goes back to the original legislation enacted in 1946; anticipatory antitrust review in the licensing context, coupled with referrals to the Attorney General, began then.[9] In 1954, the Congress rewrote the Atomic Energy Act to provide for domestic development of atomic energy, with a two-stage licensing process for privately owned reactors. Under Section 104(b) of the Act, licenses could be obtained for the construction of reactors involved in the conduct of research and development activities without antitrust review. Not until a demonstration of the "practical value" of such facilities for industrial or commercial use, or in the event of licensing under Section 103 of the Act, would the then-Section 105(c) provisions, requiring antitrust review and possible conditioning of licenses come into play.

Such a "practical value" finding was never made,[10] but in 1970 Congress found nuclear power to have acquired "commercial value," and amended the Act to remove the "anachronism" requiring an AEC finding of commercial value. 116 Cong. Rec. H. 9447 (daily ed., September 30, 1970). Changes in the two-step licensing procedure made clarification of the provisions governing antitrust review necessary. The legislation that emerged was characterized by Senator Pastore, a member of the Joint Committee on Atomic Energy, as a "carefully perfected compromise" and a "balanced, moderate framework for a reasonable licensing review procedure." 116 Cong. Rec. 19253 (daily ed., December 2, 1970).

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[8] It is important to remember that the Atomic Energy Act permits licensing only if specific findings are made that "the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public." Section 181. This standard is unlike one which authorizes licensing (or rate setting) under a broad "public interest" standard. In the latter case, agencies pursuing the objectives of the regulatory statute weigh a multitude of factors, including the effect of the proposed action on competitors and the general competitive situation, *see e.g. McLean Trucking Co.* v. *U.S.*, 321 U.S. 67 (1974). It is not surprising, therefore, that the antitrust jurisdiction of the Commission is specific, rather than general. This reflects the nature of the Commission's other responsibilities with respect to nuclear plants – a responsibility that is not plenary but specific. For example, under Section 271 of the Atomic Energy Act this Commission has no authority to regulate certain economic aspects of nuclear power plants, such as rates. Thus, cases decided in the context of broad regulatory statutes, cited to us primarily by the Florida Cities amicus brief, are less persuasive than might otherwise be the case. See *City of Lafayette* v. *SEC*, 454 F. 2d 941, 948 (D.C. Cir. 1971).

[9] Section 7(c) of the Atomic Energy Act of 1946 provided that

> Where activities under any license might serve to foster the growth of monopoly, restraint of trade, unlawful competition, or other trade position inimical to the entry of new, freely competitive enterprises in the field, the Commission is authorized and directed to refuse to issue such license or to establish such conditions to prevent these results as the Commission, in consultation with the Attorney General, may determine. The Commission shall report promptly to the Attorney General any information which it may have with respect to any utilization of fissionable material or atomic energy which appears to have these results.

[10] *Cities of Statesville* v. *AEC*, 441 F.2d 962 (D.C. Cir., 1969) represents an effort by certain municipalities and others to have the Commission consider, in the context of Section 104(b) public health and safety and national security licensing, whether issuance of the license would violate provisions of the antitrust laws. In an *en banc* decision, the D.C. Circuit found that Congress had not intended that the 105(c) antitrust provisions of the then-Act be injected into 104(b) licensing. Rather, Congress had intended that Section 105(c) be "patently restricted to Section 103 licensing. . . . In effect then, the Commission is barred, with certain exceptions (such as § 103 licensing) from considering *affirmative anticipatory* antitrust sanctions" (emphasis in the original). With respect to 104(b) licenses, the Commission could only suspend, revoke, or take other such action with respect to a license as it deemed necessary after a court finding of monopoly.

It is significant that in discussing the Commission's duties under Section 105(c), the Court several times referred to its duty there to consider "*anticipatory* antitrust impact."

Throughout the hearings and debates runs a consistent thread. What was at stake was "prelicensing" or "anticipatory" antitrust review. This theme was emphasized by Congressman Hosmer, who stated

> By like token, this bill in no way enlarges the substance of the antitrust review in any respect over the provisions of the existing law for commercial licenses. What we are trying to do is clear away procedural uncertainties in the manner in which both the Justice Department and the AEC are to proceed. 116 Cong. Rec. H 9447 (daily ed., September 30, 1970)[11]

On the one hand, the Congress was urged "not to burden nuclear plants with a special prelicensing antitrust review." Testimony of Carl Horn, Jr., for Edison Electric Institute, Hearings on Prelicense Antitrust Review of Nuclear Power Plants before the Joint Committee on Atomic Energy, 91st Cong., 2d Sess., (hereinafter "Hearings") at p. 328. Opponents of any agency antitrust review argued strenuously that applicants for nuclear facility licenses were subject to the antitrust laws "all the time, and if we are violating them in any way, it is not in building any specific plant; it would be in the marketing of our total system power." *Id.*

But even among those who argued in favor of prelicense review, no evidence emerges that anything more than license connected review was considered. There is no hint in the legislative history that anyone – advocate or foe of prelicensing review – anticipated anything more. Indeed, the reasons underlying support for the bill as enacted indicate the importance of *anticipatory* review to its advocates. *See e.g.*, statement of Charles A. Robinson, Jr., Staff Counsel to the General Manager, National Rural Electric Cooperative Association, *Hearings* at 420:

> The big advantage of antitrust review at the prelicensing stage is, in our view, its remedial practicality. Briefly stated, it shifts the procedural burden to the applicant, where it rightfully belongs. He is not stigmatized as a wrongdoer. And he has, during the licensing procedure, a time-related incentive to expedite the entire process and to comply with reasonable antitrust safeguards before any competitor is damaged. Problem areas can be anticipated and avoided with minimum disturbance to all parties.
>
> None of these advantages accrue to the classical, after-the-fact antitrust prosecution, wherein the defendant's interest lies in delay while competitors suffer during years of frequently inconclusive litigation.

[11] Congressman Hosmer took care to emphasize as well that "...this whole antitrust review in the Commission's licensing procedure in no way extends, impairs, amends, or affects any of the antitrust laws or prevents their application. This major point is underwritten by subsection 105(a) of the Atomic Energy Act, which remains unchanged." *Id.*

Similar reasons were cited by the Acting Assistant Attorney General for the Antitrust Division who contrasted prelicensing review with more general antitrust enforcement, stating "facing [these questions] at the outset of the licensing proceeding, and obtaining the Attorney General's advice on the issues, can permit an early and orderly resolution of antitrust problems before much money and time has been spent." Statement of Walker B. Comegys, *Hearings* at 121. And in response to urgings by Congressman Hosmer to employ traditional antitrust remedies in the nuclear field, the Assistant Attorney General stated: "As to those matters which are closed, namely both licenses having been granted, that is the only recourse available to us." *Hearings* at 140. It is difficult to reconcile these statements on the part of the active supporters of prelicensing review with the view that the Congress was considering placing a general antitrust policing authority in the Commission.

An area of special concern during consideration of the 1970 amendments centered on whether antitrust review should take place at both the construction permit and operating license stages. The AEC proposed that review take place at both stages, with a mechanism to "exclude from consideration at the operating license stage cases that had been handled at the construction permit stage to the satisfaction of the Justice Department" at 38.

Chairman Holifield expressed considerable concern about this suggestion (*Hearings* at 37-38):

> I am concerned with the mandatory requirement in the AEC bill review at both the construction and operating license stages. It seems to me that the Joint Committee's bill which requires mandatory review on the antitrust problem at the construction stage is a practical and sound way to approach it. I think if you hold over the head of any investor of $100 million in a plant, let us say, the fact that he builds the plant to channel the power into his own system of distribution, at that point he should be made aware of any diversion from that plant to another source. He should not be put in a position, it seems to me, of double jeopardy in that he is given the construction permit to proceed without antitrust review and then suddenly 6 years later, or 7 years, whenever his plant is finished, he is faced with an intervenor or a legal situation in which he has to go again through the process of antitrust review.
>
> ...here again you have a permissive act on your part, and a benevolent act on your part, or an antagonistic act at this time, 5 or 6 or 7 years later, after the investment has been made and the plans of the utility, regardless of who they might be, were made at the time of construction as to the feed-in of that power into their systems.
>
> Suddenly they are faced with a diversion, let us say, of 25 or 30 or 40 percent of their power into another system. So, it seems to me that the Joint Committee's position of mandatory review before construction as far

as the antitrust problem is concerned ought to be final in fairness to the investors. They go in then with their eyes open and they are treating the problem on the basis of a determined fact which does not damage their prior planning and the reason for investing in the first place.

It seems to me that this should be mandatory rather than depending upon an act of permissiveness or benevolence.

Chairman Holifield's concerns were reflected in the final language of the section, providing for thorough review at the construction permit stage, and a second review only upon the finding of "significant changes." The section-by-section analysis of the bill, presented on the floor of the Congress by Chairman Holified, stated ". .The committee sees no sense in two such [antitrust review] exercises unless there have been significant intervening changes." This limitation on the scope of antitrust review at the operating license stage is inconsistent with the notion of ongoing antitrust enforcement responsibility being lodged in this agency.

Thus, we think Congress contemplated that this Commission would review antitrust allegations primarily, if not exclusively, in the context of licensing, and that such review would take place in a two-step review process, the second such review of a more limited scope than the first.

In addition to the statutory language and its legislative history, such a legislative scheme is most consistent with this Commission's special responsibilities. There are strong policy reasons why this Commission has expansive health and safety jurisdiction, which continues through the lives of outstanding licenses. Nuclear power is an area of considerable technical complexity. Its governance should be entrusted to an agency which embodies that particular expertise. But in the field of antitrust, our expertise is not unique. We merely apply principles, developed by the Antitrust Division, the Federal Trade Commission, and the Federal courts, to a particular industry. Through the licensing process, we can effectuate the special concern of Congress that anticompetitive influences be identified and corrected in their incipiency. No nuclear power can be generated without an NRC license and the licensing process thereby allows us to act in a unique way to fashion remedies, if we find that an applicant's plans may be inconsistent with the antitrust laws or their underlying policies.

But in the postlicensing posture, this Commission's capacity to act is not unique. There is no longer any question of "lock[ing] the barn door before the horse is stolen. . . ." Statement of Sentator Pastore, III Legislative History of the Atomic Energy Act of 1954, at 3107 (1955). When nuclear power plants have been constructed and are operating, anticompetitive behavior can be remedied only by modifying or conditioning existing behavior. Whatever form of remedy the agency can offer is not appreciably different from that which may be fashioned by the traditional antitrust forums. In this posture, we recognize, as did the Congress, that there are more suitable forums for antitrust enforcement.

Nevertheless, relying on dictum from the *Cities of Statesville* case, Central and others argue that we have general antitrust police powers in the nuclear industry pursuant to Section 186 of the Act, and that we may thereby reopen license proceedings for cause in the event that there are allegations that a licensee's activities are anticompetitive.

The *Statesville* case actually held that Congress intended Commission antitrust review only in certain limited circumstances. N. 10, *supra*. In the course of the opinion, however, the Court reviewed briefly the Commission's antitrust responsibilities as they then existed and made the statement relied on here:

> This section [186] invests the Commission with a continuing "police" power over the activity of its licensees and provides it with the ability to take remedial action if a license is being used to restrain trade.

This *dictum* is a weak foundation upon which to build a claim of such wide ranging powers. The statement itself is amenable to another interpretation more consistent with holding of the *Statesville* case itself: The Court of Appeals may have been speaking of this Commission's continuing police power over conditions properly placed on licenses, after 105(c) antitrust review. In any event, the Congressional contemplation of a more restricted antitrust review function reflected in the 1970 amendments is inconsistent with a broad reading of the quoted *Statesville* dictum.

In summary then, we conclude that Congress had no intention of giving this Commission authority which could put utilities under a continuing risk of antitrust review. Had Congress agreed with the proposition that this Commission should have broad antitrust policing powers independent of licensing, the statute that emerged from these discussions would have looked quite different. Little attention would have been paid to defining a two-step review process. The terminology of all participants in the drafting process would not have been focused so directly on "prelicensing" review. And, if a broad, ongoing police power in the antitrust area had been assumed, the language in 105(a) authorizing the Commission to act with respect to licenses already issued, in light of the antitrust findings of courts would have been, if not superfluous, certainly redundant. Consequently, we find that the Commission's antitrust authority is defined not by the broad powers contained in Section 186, but by the more limited scheme set forth in Section 105.[12]

In so concluding it is not necessary for the purposes of this case to go beyond that, once an initial, full antitrust review has been performed, only "significant changes" warrant reopening. In the event a "significant change" were to occur in a licensee's activities before operating license review, this fact

[12] Similar reasons lead us to reject the Department of Justice's suggestion that Section 161 may serve as a source of authority independent of Section 105.

would make some form of antitrust review at the operating license stage probable, absent a settlement agreeable to all parties, the Attorney General and this Commission. The only question then remaining is whether initiation of the second round, "operating license" review must await the filing of the FSAR which, by our rules, must accompany the filing of an application for an operating license.

As a matter of sound practice, such an outcome would be undesirable. Faced with the prospect of an antitrust hearing, we must realistically consider the impact of delay upon the overall licensing process. Antitrust hearings tend typically to be time consuming. Recognizing this, our regulations provide for the early and separate filing of antitrust information, at the construction permit stage, to permit the antitrust review process to be completed concurrently with other licensing reviews. *See* 10 CFR §50.33a and related Statement of Considerations, 38 Fed. Reg. 34394. Similarly here, we think that if antitrust review is found necessary in the period between issuance of a construction permit and application for an operating license, we can fashion remedies to expedite the review. This necessary flexibility can allow us to resolve antitrust allegations in a timely fashion, without unduly delaying the licensing process.

Thus, we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment which would result in a "new or substantially different facility," or where an application for transfer of control of a license has been made, or where "significant changes" occur after an operating license is issued. We note, however, that the report of the Joint Committee explicitly refers to our authority to conduct a review in the first situation, H.R. Rep. No. 91-1470, 91st Cong. 2d Sess., 3 U.S. Code Cong. and Adm. News, 4981, 5010 (1970). Authority in the second situation, not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b). The third situation presents the issues pending in the *Florida Power and Light* proceeding, n. 1 *supra*, which we do not have before us and need not resolve to decide this case. We go no further than to conclude that Section 186 can have at best limited application, in light of the "significant changes" restriction of Section 105(c)(2) and its relation to the overall scheme of Section 105.

The mechanism for making "significant changes" determinations is not spelled out in our rules although an AEC Regulatory Guide, 9.3 (October 1974), sets forth information to be supplied to the staff in connection with its operating license antitrust review. The making of a "significant change" determination triggering a referral to the Attorney General for his advice on its antitrust implications is a function which could and perhaps should be delegated to the regulatory staff.[13] We intend to explore that procedural question further, possibly through rulemaking. For the present, we need only to find that an appropriate means to permit the Commission to reach the signficicant changes question has been suggested by the petition of Houston asking that we waive the requirement that the filing of an application for an operating license be accompanied by the filing of the FSAR. *See* 10 CFR §§50.30(d) and 50.34(b). The FSAR is a technical document which provides information necessary to evaluate the health and safety aspects of a plant in construction. Normally, however, no part of the information contained therein is related to, or sheds light upon, the impact of the operation of the plant on aspects of competition or the competitive conduct of the applicant. Our waiver of the normal requirement that this document accompany the operating license application will have no impact on antitrust review and will facilitate early consideration of the possible antitrust implications of the circumstances that have arisen in this case. Accordingly, the Director of Nuclear Reactor Regulation is authorized to accept an application for an operating license for the South Texas Project without the necessity of filing with it the FSAR described in 10 CFR §50.34(b), and to seek the information outlined in Reg. Guide 9.3.[13a]

In accepting the substantial agreement among the parties that the circumstances which have developed warrant, at the least, seeking the Attorney General's advice, we are making the Section 105(c)(2) "determination" that a further antitrust review is "advisable" because of "significant changes" in the licensee's activities occurring subsequent to the antitrust review previously completed at the construction permit stage. By setting in motion the operating license antitrust review mechanism, we do not mean to imply any judgment on our part as to the necessity for a hearing, let alone any necessity for the imposition of license conditions. That judgment will be deferred as the statute contemplates pending receipt and evaluation of the Attorney General's advice and will then be made in the same manner and following the same procedures as we employed at the construction permit stage.

We decide only that the events detailed above are of such a nature as to convince us that the Attorney General must be consulted. In this regard we are aware that the staff sought the Attorney General's advice on the antitrust significance of the present interconnection dispute and that he responded by letter dated January 25, 1977. Following a summary of the facts of this dispute to that date, the Attorney General summarized the antitrust contentions of the parties as follows:

> Central Power & Light has alleged that this situation substantially impairs its ability to produce competitively priced power and also that its participation

[13] Existing delegations confer authority only with respect to Section 105(c)(8).

[13a] Our finding that the present record shows evidence of significant changes warranting the Attorney General's attention thus is not intended to preclude his consideration of the entire record of events subsequent to the CP antitrust review as this may be developed through the information elicited by the staff in conjunction with the application process.

in the South Texas Project will be jeopardized. Houston Lighting & Power, on the other hand, contends that it acted unilaterally, without anticompetitive purpose, to preserve its status as an intrastate utility not subject to FPC jurisdiction, and that CP&L's participation in the South Texas Project will not be adversely affected.

We need the Attorney General's evaluation of the legal significance of these various facts and contentions to determine whether an antitrust hearing is warranted. Indeed, his letter was specific that no such advice was being provided.[14]

The question upon which we are now seeking advice is why enforcement of a contract right, known to all parties and the Attorney General at the time of construction permit antitrust review, may constitute "changed circumstances," such as may justify the imposition of antitrust conditions. This is particularly critical because among the factors examined at the time the construction permit antitrust review was conducted, as indicated in the Attorney General's letter, was that "none of these utilities operated interconnected with an electric utility outside Texas so as to be subject to the jurisdiction of the Federal Power Commission (FPC), and interconnection contracts with one another were conditioned specifically to preclude interstate connections." In addition, we believe that the Attorney General should provide us with his evaluation of the probable effects of proceedings in other forums, as they have then progressed, in developing his recommendations concerning further antitrust proceedings.

Our determination of changed circumstances foreshadows a series of subsidiary questions which need not be addressed comprehensively at this juncture, but concerning which some Commission guidance is appropriate. The only stated consequence of a Commission determination that "significant changes" have occurred is that paragraph (1) of subsection 105(c) – the paragraph providing for Attorney General review and advice – applies. Paragraph (c)(2) does not explicitly state whether his consideration or any subsequent hearing is to be limited to the subsequently developed circumstances underlying the Commission determination and reference to the Attorney General. While some of the parties before us – notably Central and the Department of Justice[15] – argue against any such limitation, we have concluded that this second look at the operating license stage is to be a restricted one, focusing on the changed circumstances. The reasoning which leads to this conclusion – already suggested by our earlier discussion – is as follows.

First of all, the structure of the complex statutory scheme established by Section 105(c) strongly implies that there is to be a limited review, if any, at the operating license stage. If no "significant changes" in a construction permittee's proposed activities have occurred, then the statute is explicit that there is to be no antitrust review at the operating license stage – the antitrust review procedure "shall not apply to" such a permittee's application for an operating license. As we view it, a full-blown *de novo* antitrust review, with the Commission's "significant changes" determination acting only as a triggering mechanism, would be inconsistent with the statutory scheme of immunity from a second review for unchanged proposals.

Moreover, a limited scope of review at this stage is strongly suggested by the legislative history. In our earlier discussion[16] we noted the Congressional concern with possible unfairness to utilities and their investors should they be required to run the antitrust review gauntlet twice, at both the construction permit and operating license stages. Chairman Holifield expressed the view that the construction permit review should be "final to fairness to the investors." With the results of that review known to them, they could proceed with construction (or not) "with their eyes open . . . on the basis of a determined fact which does not damage their prior planning and the reason for investing in the first place." The legislative history reflects that the compromise version of Section 105(c), as enacted, contemplated limited review at the operating license stage. As Chairman Holifield stated in urging floor approval, "The Committee sees no sense in two such exercises unless there have been significant intervening changes."

Furthermore, a limited review at the operating license stage is consistent with the well established considerations consolidated in the doctrines of res judicata and laches. Although these judicially developed doctrines are not fully applicable in administrative proceedings, particularly where, as here, there was no adjudicatory proceeding at the construction permit stage, the considerations of fairness to parties and conservation of resources embodied in them are relevant here. We see no reason why the Attorney General, our staff, and possibly a hearing board should plow the same ground twice. Nor, in fairness to utilities engaged in long range planning, should a potential petitioner for antitrust intervention be able to stand on the sidelines at the construction permit stage and raise a claim at the operating license stage that could have been raised earlier.

[14] The Attorney General stated that:

> We need not decide the ultimate validity of CP&L's contentions or HL&P's responses to conclude that the present situation in Texas – with restrictions on interutility coordination resulting from the division of the utilities in the state into two groups, premised on intrastate and interstate operation respectively, with TIS eliminated as a coordinating vehicle, and with questions raised as to the viability of planned participation in the nuclear units – warrants an antitrust hearing.

[15] See transcript of oral argument, pp. 34, 54. The staff's position on this point was unclear. Transcript p. 66.

[16] See, pp. 1315-1316, *supra*.

This is not to say that "significant changes" in a licensee's proposal can or should necessarily be viewed in isolation from unchanged features of the proposal. The antitrust implications of a "significant change" may indeed arise from its relationship to unchanged features of the proposal. Obviously, some account will have to be taken of the proposal as a whole, but as the proposal or its impacts have been altered by changed circumstances.

Finally, we think it appropriate to anticipate and say a word about a possible course of events whereby the present controversy may be resolved before an operating license antitrust review would normally occur. Understandably, if there is to be an antitrust proceeding at this point, Houston would prefer that that proceeding go forward expeditiously and that there be no further such proceedings.[17] But as was observed at oral argument, we may have an unfolding sequence of circumstances here, many of which might have to be taken into account before a determination is made on antitrust matters.[18] Knowing that operating license review typically occurs a substantial period of time following construction permit issuance, Congress must have contemplated that we would consider significant changes with possible antitrust implications occurring during that period. In ordering an expedited operating license antitrust review, we are accommodating the parties' desire for an early resolution of the possible antitrust implications of the present interconnection controversy. However, this action is not to prejudice the right of the Commission to consider the antitrust implications of any subsequent developments, including developments possibly unrelated to the present dispute, so long as such consideration would otherwise have been timely under our usual antitrust review procedures. In this regard, should the present dispute be resolved in a hearing, the board would be authorized to reopen the record upon an appropriate and timely showing of further changes.

The Houston request for waiver of the FSAR filing requirement is granted. The regulatory staff is directed to seek the advice of the Attorney General pursuant to Section 105(c)(1). Any further proceedings shall be conducted in accordance with this opinion.

It is so ORDERED.

Samuel J. Chilk
Secretary of the Commission

Dated at Washington, D.C.
the 15th day of June 1977

[17] See transcript of oral argument at pp. 17-20.
[18] *Id.* at p. 19.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:
Marcus A. Rowden, Chairman
Victor Gilinsky
Richard T. Kennedy

In the Matter of

NEW ENGLAND POWER COMPANY, et al (NEP Units 1 and 2)	**Docket Nos. STN 50-568 STN 50-569**
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE	**Docket Nos. 50-443 50-444**
(Seabrook Station, Units 1 and 2)	**June 17, 1977**

The Commission decides not to review ALAB-390 but to consider the questions there raised in a rulemaking context.

MEMORANDUM AND ORDER

The Commission has decided not to review the decisions in ALAB-390. The questions raised there, as the Appeal Board has recognized, are more appropriately addressed through rulemaking, given their complexity, their broad application, and the consistent past interpretation of our present rules. Our staff has underway studies intended to produce proposals for rulemaking dealing with these questions, among others, which will be presented to the Commission shortly. We direct this study to be carried forward as a priority matter, and intend to initiate a rulemaking at an early date.

For the Commission

Samuel J. Chilk
Secretary of the Commission

Dated at Washington, D. C.,
this 17th day of June 1977.

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September 12, 1979

MEMORANDUM FOR: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

William J. Dircks, Director
Office of Nuclear Material Safety and Safeguards

FROM: Joseph M. Hendrie, Chairman

Original signed By
Joseph M. Hendrie
Suzanne Brichard

SUBJECT: DELEGATION OF AUTHORITY TO MAKE "SIGNIFICANT CHANGE" DETERMINATION FOR OPERATING LICENSE ANTITRUST REVIEW

The Commission hereby delegates the authority to make the "significant change" determination under Section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2135c(2), for the purpose of obtaining the Attorney General's advice pursuant to section 105(c)(1) of that Act to either the Director, Office of Nuclear Reactor Regulation (for reactors) or the Director, Nuclear Material Safety and Safeguards (for production facilities), as appropriate. This delegation is made in connection with the revised Operating License Antitrust Review Procedures (attached to this Memorandum) which shall control the method of determining whether there have been "significant changes" in the licensee's activities or proposed activities subsequent to the previous antitrust review by the Attorney General and the Commission in connection with the construction permit.

The above delegations are in accordance with Commission action taken in connection with SECY-79-353 and reflected in the Commission Secretary's Memorandum dated July 26, 1979. This delegation will be appropriately reflected in the NRC Management Directive System.

Enclosure:
As stated

OCM
WMDircks
9/17/79

DEHaasl
9/12/79

Chairman
JMHendrie
9/12/79

Reviewed/OKed
by OGC (HN) 9/12

SECY
WJParry
9/10/79

Concurred in SECY-79-353 9-4-79

OFFICE	OELD	NMSS	NRR	NRR	EDO
SURNAME	JRutberg	WJDircks	EGCase	HDenton	
DATE	9/4/79	9/ /79	9/ /79	9/ /79	9/ /79

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Appendix B

Appendix C

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
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Docketing & Service
Branch

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

JSaltzman
letter ATBalston
MMessier
PNicholson
WLambe
RWood

MEMORANDUM AND ORDER
(CLI-80-28)

Pending before us is a petition of Central Electric Power Cooperative, Inc. (Central) for a "significant changes" determination under section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2135c(2).[1] Central urges that we make a finding that there have been significant changes in the activities and proposed activities of South Carolina Electric and Gas (SCEG) and South Carolina Public Service Authority (Santee Cooper)[2] so as to initiate antitrust review on their application for an operating license (OL) for the Virgil C. Summer facility.[3] SCEG and Santee Cooper

1/ Unless otherwise stated "Petition" refers to the "Amended Petition for a Finding of Significant Change" filed by Central on January 31, 1979, pursuant to the Commission Order of January 2, 1979 and any reference to section 105 is a reference to that section of the Atomic Energy Act.

2/ The South Carolina Public Service Authority derived the name "Santee Cooper" by which it is commonly known from the Santee Cooper hydro facility with which it began operations in 1942.

3/ Central's original petition requested an antitrust hearing as well; however, Central withdrew the request for hearing and only the request for a significant changes finding remains for Commission determination at this time.

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(the Applicants or Licensees), who filed that application in April, 1977, urge us to dismiss the petition or to deny it. The NRC Staff (Staff), also, opposes the petition.

In this memorandum we discuss briefly the elements for the section 105c(2) "significant changes" determination. We then set forth the facts of this case and apply those facts to that standard in order to resolve the issues. As we will explain more fully below, we are requesting the assistance of the Attorney General for the final step in this process and consequently do not today finally determine whether or not there have been significant changes as contemplated by the statute.

I. STANDARD FOR THE "SIGNIFICANT CHANGES" DETERMINATION

On only two previous occasions -- in South Texas and Comanche Peak[4/] -- has the Commission been called upon to make a finding that there have been "significant changes." In both cases there was by the time of Commission involvement substantial agreement that a determination in the affirmative should be made. The South Texas case presented the issue whether or not a second antitrust review might precede an operating license application and provided the occasion for us to explicate how the timing of the antitrust review process was related to the statutory intent. In Comanche Peak we declined an invitation to delegate our authority to make the "significant changes" determination, and in light of the fact there was no opposition

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4/ Houston Lighting & Power Company, et al. (South Texas Project, Units 1 & 2), 5 NRC 1303 (1977) and Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), 7 NRC 950 (1978).

made the determination ourselves "deciding only that the events [which have occurred] were of such a nature as to convince us that the Attorney General must be consulted."[5/] At neither time, therefore, did we discuss explicitly by what yardstick a contested significant changes determination should be measured.

Consideration of Central's request requires us to enunciate the standards for the significant changes decision. A related event makes it especially useful for us to provide additional guidance in this regard. Subsequent to the filing of Central's petition, which was correctly lodged with the Commission, we have delegated to officials of the Staff[6/] authority to make the significant changes decision for the Commission. At that time we approved procedures the Staff will employ in the implementation of our delegation. Our comments here will provide our views on the substance of the significant changes determination.[7/]

ROLE OF THE "SIGNIFICANT CHANGES" DETERMINATION IN THE STATUTORY SCHEME

Because the standards for the "significant changes" determination are essential to that determination's fulfilling the statutory intent, a brief

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5/ Id. at 951, citing South Texas, 5 NRC 1303 at 1319.

6/ To the Director of Nuclear Reactor Regulation (for reactors) or the Director of the Office of Nuclear Material Safety and Safeguards (for production facilities), as appropriate.

7/ While we use this opportunity to issue guidance on the significant changes determination, we do not mean to suggest that the instant case illustrates the typical determination. To the contrary, developments in agency law (see infra n.38) and procedures (see infra n.36) provide assurance that the factual circumstances of this matter will not be repeated. Furthermore, we do not anticipate a repetition of the two tiered decision process involved in today's opinion (see infra p.29). We expect in the future that all of the elements of the determination will be decided at the time of issuance. We take the tiered course on this occasion only because we feel that some response on our part to the parties is past due, and because we wish to provide an opportunity for comment where earlier opportunity did not exist.

recapitulation of the statutory framework and our role in antitrust area is warranted.

In licensing nuclear facilities the Commission has the statutory responsibility to avoid the creation or maintenance of situations "inconsistent with the antitrust laws". It is well established that conditions which run "counter to the policies underlying those laws, even where no actual violation of statute was made out, would warrant remedial license conditions under Section 105c of the Atomic Energy Act." 8/

As we carefully reviewed in our South Texas opinion,9/ section 105c "establishes a particularized regime for the consideration and accommodation of possible antitrust concerns arising in connection with the licensing of nuclear power plants."10/ Provision for Commission and Department of Justice antitrust review

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8/ In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), 6 NRC 892, 908 (1977) citing S. Rep. No. 91-1247 and H.R. Rep. No. 91-1470, 91st Cong., 2nd Sess., 14-16 (1970) Reports of the Joint Committee on Atomic Energy on Amending the Atomic Energy Act of 1954 to Provide for Relicensing Antitrust Review of Production and Utilization Facilities, inter alia.

Our Appeal Board has recently reviewed the antitrust responsibilities of this agency. See In the Matter of Toledo Edison Company (Davis Besse Nuclear Power Station, Units 1, 2 & 3) and the Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-550, 10 NRC 265, 271-273 (1979), (appeal pending in U.S. Court of Appeals for the Third Circuit). With regard to remedial license conditions the Davis Besse opinion concluded as follows:

> If the hearing record demonstrates with "reasonable probability" that an anticompetitive situation within the meaning of section 105c would result from the grant of an application, the Commission may refuse to issue a license or issue one with remedial conditions. Findings of actual Sherman or Clayton Act violations, however, are not necessary. Under section 105c, procompetitive license conditions are also authorized to remedy situations inconsistent with the "policies clearly underlying" the antitrust laws. Midland, supra, ALAB-462, 6 NRC at 907-09 and authorities there cited. See also, South Texas, supra, CLI-73-13, 5 NRC at 1316; Waterford I, supra, CLI-73-25, 6 AEC at 49 (emphasis provided).

9/ Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), CLI-77-13, 5 NRC 1303, 1309-1322 (1977).

10/ Id. at 1309.

is tied to the Commission's two-tier licensing process -- a thorough antitrust review is to occur at the construction permit (CP) stage,[11] a "narrower second review"[12] at the operating license stage, if -- and only if -- in the words of the statute "the Commission determines such review is advisable on the ground 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 ... in connection with the construction permit for the facility."[13]

We said in South Texas, by way of explaining the narrower scope of OL stage antitrust review, that "a full-blown de novo antitrust review, with the Commission's 'significant changes' determination acting only as a triggering mechanism, would be inconsistent with the statutory scheme of

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11/ At the construction permit stage the Commission is obliged by statute promptly to transmit to the Attorney General a copy of the license application. Within 180 days the Attorney General is required to give the Commission "such advice ... as he determines to be appropriate" with regard to the finding the Commission must make on whether or not to conduct an antitrust hearing. If the Attorney General advises that there should be a hearing, a hearing must be held. The statute provides (section 105c(5)) that the Attorney General's advice shall be published in the Federal Register. At the time of publication of the Attorney General's advice letter, if the Attorney General does not himself advise a hearing, the Commission offers an opportunity for any interested party to request a hearing on antitrust matters and to request the right to intervene. It may be seen, therefore, that it is the publication of the advice of the Attorney General that serves notice of the right to request a hearing on antitrust matters. The Commission's determination on whether or not to hold a hearing in response to such a request is determined by the provisions of the Administrative Procedure Act and the Commission's rules on intervention.

12/ 5 NRC at 1312.

13/ The practical import of this provision is that the Commission must determine that there have been significant changes before a formal request may be made for the Attorney General's advice concerning a possible antitrust proceeding. The publication of the Attorney General's advice triggers an opportunity for interested parties to request a hearing at the OL stage.

immunity from a second review for unchanged proposals,"[14] We further found that a full-blown review would be inconsistent with "well established considerations consolidated in the doctrines of res judicata and laches."[15] But, as we also pointed out:

> This is not to say that "significant changes" in a licensee's proposal can or should necessarily be viewed in isolation from unchanged features of the proposal. The antitrust implications of a "significant change" may indeed arise from its relationship to unchanged features of the proposal. Obviously, some account will have to be taken of the proposal as a whole, but as the proposal or its impacts have been altered by changed circumstances. [16]

The limitation on the scope of review at the OL stage does not impose any limitation on the nature of the finding to be made at the conclusion of that review, nor on the remedies then available. While, as we have just discussed, any review at the OL stage would proceed with a more limited scope than would obtain at the CP stage, focussing on changed circumstances, the ultimate question is the same for OL as for CP review. That question is: would the contemplated license create or maintain a situation inconsistent with the antitrust laws? In the event that question is answered in the affirmative, irrespective of the licensing stage, our full remedial authority may be invoked to provide such license modifications as would best serve the policies of the antitrust laws under the circumstances.

Since our full arsenal of antitrust remedies is available when an OL antitrust hearing shows that remedies are warranted and since a determination

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14/ 5 NRC at 1321.

15/ Id.

16/ 5 NRC at 1322.

that there have been "significant changes" is the necessary precedent to an OL antitrust hearing at the OL stage, it follows that the requirement of such a determination establishes a threshold of some importance. The legislative history of the antitrust provisions demonstrates that Congressional attention was focused on whether and under what circumstances antitrust review at the OL stage was desirable. The issue was considered both in hearings and in the Committee report.[17/] The statutory language reveals explicitly and by implication the standards Congress intended be employed by us in making the "significant changes" determination.[18/]

Criteria for the Decision

The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are reasonably attributable to the licensee(s); and (3) have antitrust implications that would likely warrant some Commission remedy. These are explained below:

1. Occurrence since the previous antitrust review.

The statutory language is explicit that the significant changes, if any, need to have occurred "subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the

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17/ See notes 43 and 44 below.

18/ Our recent delegation institutes a procedure by which a record determination *vel non* will be made on the significant changes question in the case of each OL application. Until that delegation the statutory intent that there should be an OL stage antitrust review where significant changes had occurred was fulfilled in the following manner. Staff determined whether or not it in its view significant changes had occurred, and only when a determination of significant changes was recommended was the Commission approached.

construction permit for the facility." That language refers to a formal review process that contemplates at the least the publication of the advice of the Attorney General, as required by section 105c(1), and extends to include a subsequent antitrust hearing conducted by the Commission or its delegees.

2. Reasonably attributable to the licensee(s)

The act explicitly provides that the change or changes be those which occur in the activities or proposed activities of the licensees. The legislative history makes clear an intent to avoid a situation where the applicant will be subjected for a second time to antitrust review because the competitive picture had been altered in ways for which the applicant could not reasonably be held answerable.19/

3. Antitrust implications that would be likely to warrant Commission remedy

With this element of the determination we make explicit the interplay between the requirement that the changes be "significant" and the threshold nature of the determination. Were the significant changes determination to require more than a likelihood that the antitrust implications of changes would warrant Commission remedy -- i.e., that changes had occurred that required Commission remedial action -- it would be bearing an unwarranted freight. This is true because the significant changes determination is provided to trigger an inquiry that would have as its ultimate finding a determination of whether the competitive situation arising from the changes required Commission remedial action. Were it to require less, it would offer scant protection against subjecting the applicant to a second review process, especially given the possibility for a hearing that follows even a no-hearing recommendation by the Attorney General.

19/ See citations infra n.40 and 41.

These matters, whose outline we have sketched in brief, will be further discussed as we evaluate whether the facts of this case warrant an affirmative significant changes determination.

II. STATEMENT OF FACTS AND POSITIONS

SCEG, a public utility, filed as sole applicant its application for a CP for the Virgil C. Summer Nuclear Station (Unit 1) on June 30, 1971. In connection with SCEG's CP application, an antitrust review was conducted by the United States Department of Justice pursuant to section 105c(1) of the Atomic Energy Act. The Justice Department sent the advice letter (Attorney General's letter) to the NRC on March 31, 1972, and the letter was published in the Federal Register on April 12, 1972[20/] pursuant to § 105c(5), 42 U.S. § 2135c(5).

The Attorney General's letter examined the applicant (SCEG), discussed its relations with other utilities, among them Santee-Cooper and Central, and described the overall competitive situation in the relevant area of South Carolina. In that regard, the letter noted:

> In its service area the applicant faces strong competition in bulk power sales, and, until recently, in retail distribution. The principal competitive alternatives for bulk power open to municipals and co-ops in the area are SEPA and Santee-Cooper. 21/

and further,

> In wholesale purchasing, the power output of Santee-Cooper, as supplemented by SEPA and made available by the Central - Santee - Cooper transmission system, provides a competitive alternative to SCEG. 22/

20/ 37 Fed. Reg. 7265.

21/ Id. at 7266, col. 2.

22/ Id. col. 3.

It also noted the 1969 amendments to South Carolina law restricting distribution of electricity by private investor-owned utilities and rural electric cooperatives with a resulting limitation of retail competition.[23/]

The letter described the intertwined power supply relationship between Santee Cooper and Central, both regarding the actual power supply itself and Central's leasing of generation plants and transmission networks to Santee Cooper.[24/]

In concluding, the Justice Department advised that negotiations were proceeding between Santee Cooper and SCEG to enable Santee Cooper's participation in a substantial share of the plant's output. It observed that "Central is definitely interested in obtaining the benefits of a share in the Summer facility, but because of its contractual relations with Santee Cooper is awaiting the outcome of the negotiations between the latter and SCEG." [25/]

In light of all of the foregoing and SCEG's commitment to removing some restrictions in its wholesale contracts that Justice found to be "unnecessarily restrictive",[26/] the Justice Department recommended that no antitrust hearing need be held on the CP application. No one requested a hearing following publication of the advice letter, and none was held. A construction permit for Summer Unit 1 was issued to SCEG on March 21, 1973.

23/ Id., Col. 3.

24/ Id., Col. 2. It should be noted that ultimate ownership of generation and transmission facilities will reside in Santee Cooper. NRC Staff Response to Amended Petition of Central, March 19, 1979, p. 24 and citations therein.

25/ Id., Col. 3.

26/ Id. at 7267, Col. 1.

On July 9, 1973 two enactments of the South Carolina legislature relevant to this matter became effective. One, introduced on February 16, 1973, authorized Santee Cooper to participate as a joint owner in the Virgil Summer nuclear facility. The other, introduced close to the final passage of the joint ownership bill, restricted service territories. That legislation also contained various provisions relating to sales at wholesale and of loads exceeding 750 KWs.

On May 17, 1974, SCEG filed an application to amend its CP to add Santee Cooper as a co-owner and co-licensee, having executed a sale of approximately 1/3 of Summer Unit 1 to Santee Cooper on October 18, 1973. Some antitrust information concerning Santee Cooper was filed along with the amendment application; however, from the submissions of the parties it appears that complete Appendix L [27/] information about Santee Cooper was not sought or supplied.[28/]

On October 17, 1974, a Federal Register notice was published with respect to receipt of SCEG's amendment application.[29/] This notice offered an opportunity for members of the public to request a hearing and to file petitions for leave to intervene.[30/] No petitions were filed and on December 3, 1974, the amendment adding Santee Cooper as a co-licensee was issued.

27/ Appendix L enumerates the information the Attorney General requires for his antitrust review.

28/ See Staff's Attachment 2, SCEG's Amendment 21, May 17, 1974, p. 14.

29/ 39 Fed. Reg. 37088.

30/ No specific mention was made in the notice of rights to an antitrust hearing.

On December 10, 1976, SCEG filed its application for the Summer Unit 1 operating license and contemporaneously submitted additional antitrust information on both itself and Santee Cooper which it expanded in a February 24, 1977 filing. A Federal Register notice concerning receipt of the OL application was published on April 18, 1977.[31/] That notice related exclusively to the health, safety and environmental aspects of the OL application.

The NRC Staff then undertook its own review in order to determine whether or not "significant changes" had occurred. Staff declared that it "was in the final stages of assimilating its information and forming a recommendation as to whether 'significant changes' had occurred"[32/] when Central filed its original petition with the Commission on December 6, 1978.

Central, in its original and amended petition and other correspondence and pleadings,[33/] contends that SCEG illegally wielded monopoly power to condition its sale to Santee Cooper of a share of the Summer facility on Santee Cooper's agreement to join in asking for legislation to divide territories. As a result, Central argues, Santee Cooper is no longer a strong competitor in the South Carolina market. Further, according to Central, Santee Cooper has instituted

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31/ 42 Fed. Reg. 20203.

32/ NRC Staff Response to Amended Petition of Central, March 19, 1979, p. 9.

33/ Because our regulations do not explicate the nature of a significant changes proceeding nor the rules for response and reply, confusion existed among the parties that led to an unusually large number of correspondence and pleadings. Although some pleadings were somewhat repetitive, we decided to accept them all in the interest of having the full facts and claims before us.

an anticompetitive dual rate structure in its supply of power. Central complains also of SCEG's unwillingness to make power transmission arrangements other than on an ad hoc basis and Santee Cooper's refusal to permit Central to share ownership.[34/] As evidence of anticompetitive intent, Central relates a merger offer from Santee Cooper which Central asserts would result in the removal of Central as a market force.[35/]

SCEG and Santee Cooper responded by urging that Central's petition be dismissed as untimely. In the alternative they urged in essence that the changes alleged did not occur in the relevant time period, did not occur at all, or are shielded from our antitrust scrutiny by well accepted exemptions from the operation of the antitrust laws.

Staff takes the position that Central's petition should be allowed, that the changes alleged occurred within the allowable time frame, but that as a matter of law certain changes may not be considered by us and that no changes alleged are "significant" within the meaning of the act.

III. RESOLUTION OF ISSUES

Timeliness

Before attempting to unravel the complexities of the issues before us, we deal with the threshold issue of timeliness.

34/ Central's amended petition, p. 46.

35/ Id. pp. 46-47.

Our regulations do not specify a period during which requests for a significant change will be timely. 36/ SCEG invokes the criteria of 10 CFR 2.714(a)(1); however, those criteria related to a late plea to intervene in a hearing and are not necessarily directly applicable to the threshold determination we have before us.

We have also had our attention directed to the Congressional intent embodied in the legislative history that a potential intervenor not be permitted to stand by and raise at the OL stage matters that could have been brought at the construction stage. However, this objection to Central's alleged "untimeliness" is in our view precluded by the requirement that a "significant change" must be one that has occurred since the antitrust review of the CP stage. We will pursue this matter further below.

The relevant question in determining timeliness is whether Central's request has followed sufficiently promptly the OL application. Our affirmative response rests on two facts. First, the significant changes decision was still pending. By its own admission, Staff had not finally determined the nature of its recommendation regarding the significant change determination. Second, it appears to us that there was not earlier an unambiguous notice of opportunity for antitrust comment. 37/ In consequence, fairness dictates that the Central

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36/ Our new procedures include notification by publication in the Federal Register of an invitation to interested members of the public to comment on antitrust aspects of an OL application. They also provide that in the event there is a determination that there have been no "significant changes", that determination will be published in the Federal Register with notice that any request for re-evaluation of that decision should be made within 60 days.

37/ Federal Register notices invited comment specifically on health and safety issues, and could be therefore read to exclude an opportunity for antitrust comment. Also, we think staff stretches when it characterizes its May 3, 1977 letter to Central's lawyer William Crisp (Attachment 9 to Staff's

(Continued on following page)

petition be considered timely. And, it was useful for Staff to have before it all of Central's comments when reaching its conclusions. It should be recalled that we have said "[i]n dealing with antitrust issues, the NRC's role is something more than that of a neutral forum for economic disputes between private parties." Florida Power and Light Company (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 989 (1978). Paralleling Staff's obligation to present a complete picture of the competitive situation to the Licensing Boards that we described in St. Lucie, Staff has an obligation to comprehend the complete picture when it advises, or now initially determines, whether or not there have been significant changes.

37/ (Continued from preceding page)

March 19, 1979 submission) as an invitation to comment. That letter has one substantive paragraph which states in its entirety:

> To date, the Applicant's antitrust information [at the operating license stage] has been submitted pursuant to Rule 9.3, but the Federal Register notice reflecting that submission has not yet been published. The notice, as I understand it, does not formally invite comments. However, I would imagine that comments would be considered if they were received by our Staff or the Commission's Antitrust and Indemnity Group.

Among the implications a reader might draw from that statement is one that a Federal Register notice on antitrust matters could be expected. We have been referred to none.

Whether the change or changes have occurred since the previous antitrust review of the licensees

The Attorney General's only advice letter concerning licensing of the Summer facility was issued on March 31, 1972. That letter recommended that no hearing was necessary on SCEG's application for a construction permit, and none was held.

All of the changes alleged by Central have occurred or were alleged to have occurred on dates subsequent to March 31, 1972. Therefore, those changes on their face meet the criterion that they have occurred since the previous antitrust review of the licensees unless (1) some later antitrust review than the Attorney General's took place and should be considered the benchmark in this matter, or (2) the alleged changes were anticipated by the Attorney General so that their review was in effect already undertaken and included in the earlier advice.

In our order of January 26, 1979 we solicited assistance from the parties in determining whether or not some date other than the Attorney General's past advice letter should be the operative date and whether the Attorney General's advice anticipated the changes in arriving at a no hearing recommendation.

Both Central and Staff agree that the appropriate date from which to analyze significant changes is March 31, 1972, the date of the Attorney General's letter. We concur, having found no subsequent antitrust review that would authorize a subsequent date nor any indication that the Attorney General anticipated the matters of which Central complains.

SCEG and Santee Cooper would have us look to the date of amending the construction permit to include Santee Cooper as a co-licensee. In considering antitrust matters relative to licensing the Enrico Fermi facility, it was determined in 1978 that the addition of a co-owner as a co-licensee was in effect an initial application of the co-owner and as such required formal antitrust consideration. 38/ That decision was based on the necessity for an in-depth review at the CP stage of all applicants, lest any applicant escape statutory antitrust review. Implementation of Fermi was prospective only. Consequently, Santee Cooper added as a co-licensee by amendment in 1974, avoided the formal antitrust review process. Applicants should not be permitted to bootstrap that omission into a shield from antitrust scrutiny at the OL stage, as they would do if they prevailed in their claim that the operative "previous [antitrust] review" date is the date of the license amendment admitting Santee Cooper. The anomalous nature of the result urged by Applicants is obvious when one considers that they are in effect arguing that the license amendment date is the operative one because there might have been antitrust review even though none took place. Furthermore, the date urged by applicants would not serve the statutory purpose of providing for consideration of any changes not previously considered in depth by the Commission or Department of Justice but not allowing the same ground to be ploughed twice. It would leave the years between the Attorney General's letter in 1972 and the amendment in 1974 unable to be ploughed at all.

Nonetheless, it would be equally inconsistent with the Congressional intent if contemplated changes that had been subject to anticipatory antitrust analysis

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38/ Detroit Edison, et al. (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978), aff'd ALAB-475, 7 NRC 752, 755-56 n.7 (1978).

triggered OL stage antitrust review simply because the actual time of effecting the anticipated changes followed the completion of their antitrust review.

We therefore review the response of the parties to the question whether the Attorney General's advice letter anticipated the changes now alleged by Central. Central complains not of the sale, which was anticipated, but of Santee Cooper's changed competitive role, which was not. Staff agrees with Central that the letter does not contemplate the alleged anticompetitive changes, although Staff believes that some consideration should be given to the "explicit awareness of the Attorney General ... of South Carolina's ongoing legislative plan designed to restrict retail competition among private utilities and electric cooperatives enacted in 1969." 39/

Both SCEG and Santee Cooper also view the Attorney General's consideration of similar prior territorial legislation to be significant, while admitting that it was obvious that the Attorney General could not have had under consideration the 1973 enactments. Santee Cooper notes that the Department of Justice had "actual knowledge" that negotiations between SCEG and itself were underway concerning its participation in the Summer facility and also that "it was a matter of public record that SCEG and the Authority were then negotiating as to service areas as well." Cited for that proposition are a Santee Cooper press release of February 3, 1972 and an article in the Columbia, South Carolina newspaper on February 6, 1972. There is no suggestion that the Justice Department was advised or had knowledge of either the release or article at the time of writing the advice letter issued on March 31 of that year.

39/ NRC Staff Response, p. 13-14.

The point is made that the Department of Justice discussed and accepted anticompetitive aspects of the 1969 amendments similar to the 1973 amendments. Whether the Department of Justice will view the 1973 enactments, their effects and the resultant relationships among the parties substantially as it viewed the 1969 enactments or in any manner that would imply that there had been no significant changes in the competitive picture is a matter that is relevant to a significant changes determination. But any purported similarity between the 1969 and 1973 legislation is not relevant to the standard that alleged changes must have occurred since the previous antitrust review.

We can find no evidence that suggests the Department of Justice contemplated the changes alleged by Central at the time it issued the advice letter.

In light of the foregoing we find that the changes alleged by Central have occurred since the last antitrust review.

Whether the Change or Changes Are Reasonably Attributable to the Applicants

While there were changes alleged by Central that have no obvious relationship to the 1973 enactments of the South Carolina legislature and for which at least one of the Applicants could be held clearly to be answerable, 40/ an issue has arisen of whether for 105c purposes the applicants may be reasonably held responsible for changes resulting from the South Carolina legislation. Resolution of this issue is of utmost importance because it seems to be generally conceded

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40/ Whether we ultimately determine that the allegations of dual rates or refusal to share transmission ownership or to make ongoing transmission arrangements have any significance, there is no suggestion that neither applicant is to be held responsible or answerable for the factual situation that exists.

by all parties that the legislation establishing territorial limitations and the activities stemming from that legislation resulted in substantial changes in the competitive situation in South Carolina, and that those changes are at the heart of Central's complaints.

There appears to be no dispute of fact among the parties that the territorial legislation was in the main [41/] presented and actively sought by the applicants.[42/] The question is whether this kind of involvement on the part of applicants is sufficient to satisfy the legislative intent of 105c(2) that second antitrust review should occur only when the changes are reasonably attributable to the applicants. We find that it is.

In enacting Section 105c(2), Congress steered a careful course between the alternatives of antitrust review only at the CP stage and automatic antitrust review at both the CP stage and the OL stage. Given the NRC's mission to assure that use of nuclear power would be consistent with the procompetitive policies underlying the antitrust laws, it would not have been unreasonable to require in all cases a second look at the total competitive picture within the relevant

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41/ An amendment to the legislation as originally submitted was apparently requested by Central, although this fact did not come to light in Central's petition.

42/ There is dispute whether Santee Cooper freely joined SCEG in seeking the legislation or whether SCEG used its monopoly position to require Santee Cooper to join in the quest for territorial limitations in return for an ownership share in the Summer facility. Our decision here does not depend on a resolution of that matter. It is a fact that the South Carolina legislature considered and passed the legislation and the parties are entitled, as we shall develop more fully below, to conform their behavior to it. Proof establishing that one of the parties committed an antitrust violation in preparing to petition for the legislation would not serve to repeal that legislation.

markets at the time of granting an operating license. On the other hand the disadvantages of such a regime were obvious -- both in terms of wasted time and resources and in the element of unfairly creating uncertainty in the planning of licensees. The course chosen eschewed both alternatives and resolved the problem by providing for OL antitrust review only when significant changes had occurred in "the activities or proposed activities of the licensees."

The report of the Joint Committee clarifies the intent by stating as follows:

> The term "significant changes" refers to the licensee's activities or proposed activities; the committee considers that it would be unfair to penalize a licensee for significant changes not caused by the licensee or for which the licensee could not reasonably be held responsible or answerable. 43/

The expectation was that licensees would maintain the situation that existed at the time of the grant of the construction permit. 44/ If they did not, they were to be subject to additional scrutiny at the operating license stage, providing other conditions were met. The Joint Committee considered that fairness dictated where there had been changes, otherwise significant, they should not trigger antitrust review when the changes occurred independent of the action of the license applicant.

43/ 3 U.S. Code, Congressional and Administrative News, 91st Cong., 2d Sess., 4981, 5010 (1970).

44/ See the colloquy between AEC General Counsel Joseph F. Hennessey, Chairman Holifield and Representative Hosmer, Hearings before the Joint Committee on Atomic Energy on Prelicensing Antitrust Review and Nuclear Power Plants, 1st Sess., 1969, pp. 72-73.

The language of the report, "changes ... for which the licensee could not reasonably be held responsible or answerable", provides the latitude for a common sense determination of when it is or is not fair to subject particular licensees to a second review. We judge that here Applicants' involvement in securing the changes was sufficient to make it fair to consider how those changes affect the competitive situation. We thus find this criterion is met. This can not be an instance where the licensees are caught off guard by figuring in an anticompetitive situation, if one is found to exist, which has been thrust upon them unknowingly. Santee Cooper and SCEG actively and successfully sought to change the situation that existed at the time of the earlier antitrust review.

We note in passing that the Noerr-Pennington [45/] doctrine does not govern our limited causation-type determination here. The Noerr-Pennington doctrine stands for the principle that the antitrust laws' prohibitions of combination in restraint of trade do not intend to catch in their net combinations that seek government action even though the action sought be anticompetitive in intent or effect. Noerr-Pennington does not address problems of causation; in finding that the changes from the state legislation may reasonably be attributed to applicants we find no antitrust violation.

45/ The Noerr-Pennington doctrine results from a line of cases, of which the principal case is Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L.Ed.2d 464 (1961), holding combinations to urge legislation that will have the effect of restraining trade are not combinations in restraint of trade under the Sherman Act. And accord, United Mine Workers of America v. Pennington, 381 U.S. 667, 14 L.Ed. 626 (1965), holding in this regard, a concerted effort to influence public officials is shielded by the Sherman Act regardless of antitrust intent or purpose.

Our determination that the changes resulting in this instance from state legislation are reasonably attributable to the licensee should not be read as comment on the cause, purpose or independence of the South Carolina legislature in enacting that legislation. Our result is limited to a view that the applicants' independence of the changes legislated by the state was insufficient to excuse them from additional antitrust review on the grounds that the "reasonably attributable" criterion had not been met.

Whether the changes have antitrust implications that would be likely to warrant Commission remedy

This criterion focuses on the meaning of the word "significant"; it fleshes out the statutory provision that only the Commission's determination that "significant changes have occurred" shall initiate antitrust review at the OL stage. As we explained above [46/] our understanding of the meaning of "significant" in the 105c(2) context comprehends the threshold nature of the determination and the nature of the inquiry that such a determination initiates. In brief, it is our view that this criterion requires us to take a sufficiently hard look at the same matters that would be addressed after an affirmative significant changes decision in order to make a preliminary judgment whether there is a genuine likelihood that the outcome of antitrust review, were it to occur, would be a greater than inconsequential alteration or adjustment in furtherance of the policies underlying the antitrust laws. Otherwise stated, we

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46/ See supra p. 8.

believe it was intended that we not undertake the process without an expectation that it would have greater than de minimis results.

Like other threshold tests that require a prediction of outcome, this criterion requires us to take an early look at both the facts and the law. We address two distinct questions (a) whether an antitrust review would be likely to conclude that the situation as changed has negative antitrust implications, and (b) whether the Commission has available remedies.

To review the background:

Central alleges significant changes in the activities and projected activities of the Applicants under the Summer license.[47/] Central discusses the authorization by state law of Santee Cooper's purchase of a share of Summer and addition as a co-licensee as a major change since the last antitrust review. Yet, it is clear to us that this change is not in itself the subject of Central's concern. Central, as well as the Department of Justice, was aware of negotiations toward that end, and such a result appeared to be satisfactory to Central when Central perceived itself as strongly aligned with Santee Cooper and saw Santee Cooper as a strong competitive force in the market. The gist of Central's complaint is Santee Cooper's subsequent realignment with SCEG and termination of its role as a strong competitor vis-a-vis SCEG in the market. Central objects to territorial limitations on the operations of each of the Applicants that were enacted by the State, and attests to an attempt

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47/ In footnote 42, supra, we have disposed for the purpose of this determination of Central's allegation of a Sherman Act section 2 violation by SCEG in allegedly using its monopoly position to coerce Santee Cooper into joining its effort to secure territorial limitations.

by Santee Cooper to remove Central by merger or absorption from its role as an active participant in the power marketplace.

Also, as we have noted earlier, Central complains of an inability to make satisfactory arrangements for power transmissions and of an application by Santee Cooper of dual rates for bulk power supply to Central. These complaints are made independently of the realignment complaint, but are consistent with and support that complaint.

Central has made several assertions regarding power exchange services. The gist of the matter is that Central, following its perception of a realignment of competitive interest, proceeded to seek bulk power supply alternatives; however, as Central points out, the key to participation in the bulk power market is access to power exchange services and facilities. Central alleges that it therefore sought ownership interest in transmission from Santee Cooper and power exchange agreements from SCEG. It alleges that Santee Cooper has refused to permit it to share ownership and that SCEG has agreed only to wheel discrete amounts of power between discrete points on a case-to-case basis. While there is disagreement about the implications, the parties do not dispute either Santee Cooper's refusal to share ownership or SCEG's unwillingness to contract other than on a case-to-case basis.

Regarding Central's allegation that "dual rates" have been imposed by Santee Cooper, it appears to cite only one instance to support this allegation -- the so-called Pee Dee contract contained in an amendment to Central's and Santee Cooper's contract for power to be supplied by Santee Cooper. While the contract provision is not in itself in dispute, the interpretation to be put

upon it is. Other facts that bear on the issue are that Santee Cooper operates pursuant to a State mandate to provide power at "cost of service;" and Central's requirements contract enables it currently to receive power at a fixed price even though that price may be less than cost.

"State action doctrine"

The facts reveal that state action since the last Attorney General's letter is a significant ingredient of the mix that makes up the competitive situation in South Carolina as it currently exists. And we have found that a determination on both the issues we address in this section -- negative antitrust implications and available remedies -- involves an understanding of the nature and extent of the role of the "state action doctrine"[48/] in the Commission's performance of its antitrust functions. Therefore, we turn our attention to this subject.

There can be no doubt that the Commission takes the antitrust laws as it finds them. "The Commission must 'apply principles developed by the Antitrust Division, the Federal Trade Commission, and the Federal Courts, to [the nuclear] industry.' Houston Lighting & Power Co. (South Texas Project, Units 1 & 2, supra, CLI-77-13, 5 NRC at 1316." Davis Besse, supra, 10 NRC at 272.

48/ The "state action doctrine" is otherwise known as the Parker v. Brown doctrine, Parker v. Brown, 317 U.S. 341 (1943), which held immune from Sherman Act prohibitions California's regulatory scheme to control the supply of raisins in order to enhance prices. The process of carving out the limitations of that immunity is a continuing one. In California Retail Liquor Dealer's Association v. Midcal Aluminum, Inc., ___ U.S. ___, 48 U.S.L.W. 4238 (March 3, 1980) the Court built upon the Parker analysis to deny state action immunity to a California program of resale price maintenance and price posting statutes for the wine business. In that case a state regulatory scheme failed to meet the second of two essential requirements. While (1) it was clearly and affirmatively articulated, the policy was not (2) actively supervised by the state itself.

Just as it gives full force to the antitrust laws and to the policies underlying those laws in order to assure the maintenance of competition, it must equally credit the exemptions and immunities specifically established by legislation or carved out by the judicial process. Where there is an overall plan of state regulation the state plan is exempt as are the activities of those conforming to that plan. Parker v. Brown, supra. Conversely the antitrust laws are not displaced where there is no overall plan of economic regulation,[49] where the state has no discernible legitimate interest,[50] or where the actions taken are unsupervised actions.[51] When there is immunity for state action and activities of private parties pursuant to state requirement, the antitrust laws are displaced only insofar as necessary to make the state scheme work. Lafayette v. Louisiana Power and Light, 435 U.S. 389 (1978). Conduct that occurs beyond the requirements of a regulatory arrangement established by the state continues to be subject to the antitrust laws. St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531.

Thus it is clear that the mere existence of state regulation of the electric utility industry, by itself, is not sufficient to displace NRC's statutory antitrust responsibilities. The antitrust laws give way only if there is found to be a "plain repugnancy between the antitrust and regulation provisions." United States v. Philadelphia National Bank, 374 U.S. 321, 351 (1963). Were no antitrust considerations able by law to survive the establishment of a state regulatory scheme, our construction permit stage review would in many states be futile and meaningless. But on the contrary, by statute, we review each CP application to

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49/ See, e.g., St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1979).

50/ Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

51/ Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951).

ensure that insofar as possible activities under the license will be consistent with antitrust laws and the policies underlying them. What this means is that the Commission with the aid of the Department of Justice must choose the course of accommodation. Respect must be shown for a state's regulatory plan where it exists; however, procompetitive policies must be furthered when they are not in conflict with the state plan.

Although determinations of the extent to which the antitrust laws may be accommodated by state regulation must be made with sensitivity on a case-to-case basis, certain questions will serve as a litmus paper test in many situations. In evaluating whether activities or proposed activities conflict with the antitrust laws, the following tests are relevant. Has the licensee a free choice with respect to the activity in question, in the sense that the state is neutral with regard to the course chosen? Does the chosen course follow so naturally from activities required by the state that to apply an antitrust standard would work an unfairness on the licensee? In deciding whether a proposed procompetitive license modification is repugnant to the state scheme, variations of the preceding questions should be asked: Could the licensee properly choose this course of action without conflicting with the state regulatory scheme? Would the modification if required be so unnatural in the regulatory setting as to work an unfairness on the licensee?

With this view of the law and the tests for applying it, we return to the issues before us.

a. Whether an antitrust review would be likely to conclude that the situation as changed has negative antitrust implications

Having determined that changes occurred within the relevant time and were sufficiently causally linked to Applicants to satisfy the causation criteria;

we must make a threshold analysis of the competitive situation. In order to predict the outcome of review, we look to the same factors that would be analyzed during a full scale review after a significant changes determination had been affirmatively made.

In this posture, we seek the comment of the Department of Justice whether its threshold analysis of this matter leads it to believe that it would recommend a hearing were it to conduct a statutory OL Summer license review. We note that the legislative history reflects the Congressional intent that we consult with the Department of Justice [52/] in reaching our significant changes determination. We think Justice's proper role in the threshold process parallels what its role will be in the review process when a review is held. In the review process the analysis and recommendation of the Attorney General are critical to the decision of whether to hold a hearing and weigh heavily in the Commission's determination of what license conditions may be warranted. We ask the Attorney General, on the basis of our memorandum and order and the record in this matter that we forward herewith, to provide us with his tentative views on whether a hearing would be required. We request this advice by 60 days from the date of this order.

In turning to Justice for its assistance, the Commission expresses the following views on the merits. It is beyond cavil that South Carolina has adopted a regulatory scheme in the power supply market, and that the Parker v.

52/ Report of Joint Committee, supra, p. 29.

Brown doctrine is properly invoked.[53/] On the other hand, Applicants seem to possess considerable freedom of choice under the state regulation. They may choose whether to allow Central to participate in the facility itself and such a choice appears to have a neutral effect on the state plan. Similarly, Applicants seem to have considerable freedom in arriving at terms for transmission services.[54/] Using our test, we find then that were activities in these areas to have anticompetitive implications, they could be properly considered by us and would require a determination as to whether the Commission has available remedies that it could require as license modifications were careful analysis to reveal that procompetitive policies would be aided thereby.

b. Are there available remedies?

As we have indicated earlier in this memorandum, we believe that the Congress did not intend for us to go forward with OL stage antitrust review without the likelihood that it would result in greater than de minimis license modifications. Consequently an inquiry must be directed toward resolving the

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53/ An issue was raised by Central whether the state's "authorization" of Santee Cooper's purchase of an interest was sufficient to invoke Parker v. Brown immunity in light of authorities holding that state command is essential. Where, as here, a public utility responsive only to direct legislative enactment is authorized to take action by the State legislature, that authorization is tantamount to command. Cf. Princeton Community Phone Book v. Bate, 582 F.2d 706 (3d Cir. 1978). However, since no claim appears to be made that the purchase of a share is in itself an anticompetitive act, this determination is not essential to our conclusions.

54/ Based on the information before us we tentatively conclude that Central's dual rate claim is not meritorious, and that State requirements appear to preclude Santee Cooper's setting rates higher than their actual cost of service, so that no anticompetitive activity may be found here.

question whether activities with anticompetitive implications that are revealed are susceptible to our remedy. In the case of any significant changes determination such an inquiry is required; however, in most cases it is to be presumed that the Commission will be able to tailor some relief. See, e.g., Davis Besse, supra. Where there is a state regulatory plan, Parker considerations require us to inquire whether the relief we would provide would be repugnant to the state plan or would be so unnatural under the plan as to work some other unfairness. If it would, it must be considered to be unavailable.

For the present, suffice it to say that the parties' representations that there have been negotiations for arrangements regarding participation in the facility and power transmission facilities are strong indications that there is sufficient flexibility in the overall plan to accommodate at least some significant remedial modifications that the Commission might consider implementing were they determined to be warranted.

State of the Record

In referring these matters, by way of consultation, to the Department of Justice, we are aware that the record is stale. Most particularly because of Staff's and the Applicant's repeated reliance on assertions that good faith negotiation was proceeding and that offers were anticipated, we invite the parties to provide information with regard to any new developments to us and to the Department of Justice.

Furthermore, because we have established the criteria for a significant changes decision in our analysis of the instant matter, we request that the

parties and the Attorney General provide us with any comment they might have on those criteria and how we have applied them in this memorandum. Comments should be filed within 30 days from the date of this order. We will consider such comments as well as the Department of Justice predictive comments on the merits before reaching a final decision.

Commissioner Gilinsky abstained from this memorandum and order.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 30th day of June, 1980.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
SOUTH CAROLINA ELECTRIC AND GAS COMPANY, ET AL.	)	Docket No.(s) 50-395A
	)	
(Virgil C. Summer Nuclear Station)	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
21st day of June 1972.

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Appendix D

of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

Antitrust provisions. 42 U.S.C. sec. 2135.

"SEC. 105. ANTITRUST PROVISIONS.—

"a. Nothing contained in this Act [9] shall relieve any person from the operation of the following Acts, as amended, 'An Act to protect trade and commerce against unlawful restraints and monopolies' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved August twenty-seven, eighteen hundred and ninety-four; 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes' approved October fifteen, nineteen hundred and fourteen; and 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes' approved September twenty-six, nineteen hundred and fourteen. In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the laws cited above, to have violated any of the provisions of such laws in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act.

26 Stat. 209. 15 U.S.C. 1–7.

28 Stat. 570. 15 U.S.C. 8–11. 38 Stat. 730. 15 U.S.C. 12–27, 44; 18 U.S.C. 402. 29 U.S.C. 52, 53; 38 Stat. 717, 15 U.S.C. 41–49.

"b. The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization or special nuclear material or atomic energy which appears to violate or to tend toward the violation of any of the foregoing Acts, or to restrict free competition in private enterprise.

"c. (1) The Commission shall promptly transmit to the Attorney General a copy of any license application provided for in paragraph (2) of this subsection, and a copy of any written request provided for in paragraph (3) of this subsection; and the Attorney General shall, within a reasonable time, but in no event to exceed 180 days after receiving a copy of such application or written request, render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection. Such advice shall include an explanatory statement as to the reasons or basis therefor.

"(2) Paragraph (1) of this subsection shall apply to an application for a license to construct or operate a utilization or production facility under section 103: *Provided, however*, That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground 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.

[9] Public Law 88-489 (78 Stat. 602) (1964), sec. 11 deleted the phrase "including the provisions which vest title to all special nuclear material [illegible] for the said Act".

"(3) With respect to any Commission permit for the construction of a utilization or production facility issued pursuant to subsection 104 b. prior to the enactment into law of this subsection, any person who intervened or who sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdiction basis for such determination shall have the right, upon a written request to the Commission, to obtain an antitrust review under this section of the application for an operating license. Such written request shall be made within 25 days after the date of initial Commission publication in the Federal Register of notice of the filing of an application for an operating license for the facility or the date of enactment into law of this subsection, whichever is later.

"(4) Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate for the advice called for in paragraph (1) of this subsection.

"(5) Promptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register. Where the Attorney General advises that there may be adverse antitrust aspects and recommends that there be a hearing, the Attorney General or his designee may participate as a party in the proceedings thereafter held by the Commission on such licensing matter in connection with the subject matter of his advice. The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceedings in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a.

"(6) In the event the commission's finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public

interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.

"(7) The Commission, with the approval of the Attorney General, may except from any of the requirements of this subsection such classes or types of licenses as the Commission may determine would not significantly affect the applicant's activities under the antitrust laws as specified in subsection 105a.

"(8) With respect to any application for a construction permit on file at the time of enactment into law of this subsection, which permit would be for issuance under section 103, and with respect to any application for an operating license in connection with which a written request for an antitrust review is made as provided for in paragraph (3), the Commission, after consultation with the Attorney General, may, upon determination that such action is necessary in the public interest to avoid unnecessary delay, establish by rule or order periods for Commission notification and receipt of advice differing from those set forth above and may issue a construction permit or operating license in advance of consideration of and findings with respect to the matters covered in this subsection: *Provided*, That any construction permit or operating license so issued shall contain such conditions as the Commission deems appropriate to assure that any subsequent findings and orders of the Commission with respect to such matters will be given full force and effect.[78]

Classes of facilities. 42 U.S.C. sec. 2136.

"Sec. 106. Classes of Facilities.—The Commission may—

"a. group the facilities licensed either under section 103 or under section 104 into classes which may include either production or utilization facilities or both, upon the basis of the similarity of operating and technical characteristics of the facilities;

"b. define the various activities to be carried on at each such class of facility; and

[78] Public Law 91-560 (84 Stat. 1472) (1970), sec. 6, amended subsec. 105c. Before amendment it read as follows:

"c. Whenever the Commission proposes to issue any license to any persons under section 103, it shall notify the Attorney General of the proposed license and the proposed terms and conditions thereof, except such classes or type of licenses, as the Commission, with the approval of the Attorney General, may determine would not significantly affect the licensee's activities under the antitrust laws as specified in subsection 105a. Within a reasonable time, in no event to exceed 90 days after receiving such notification, the Attorney General shall advise the Commission whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws, and such advice shall be published in the Federal Register. Upon the request of the Attorney General, the Commission shall furnish or cause to be furnished such information as the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section."

"c. designate the amounts of special nuclear material available for use by each such facility.

Operators' licenses. 42 U.S.C. sec. 2137.

"Sec. 107. Operators' Licenses.—The Commission shall—

"a. prescribe uniform conditions for licensing individuals as operators of any of the various classes of production and utilization facilities licensed in this Act;

"b. determine the qualifications of such individuals;

"c. issue licenses to such individuals in such form as the Commission may prescribe; and

"d. suspend such licenses for violations of any provision of this Act or any rule or regulation issued thereunder whenever the Commission deems such action desirable.

War or national emergency. 42 U.S.C. sec. 2138.

"Sec. 108. War or National Emergency.—Whenever the Congress declares that a state of war or national emergency exists, the Commission is authorized to suspend any licenses granted under this Act if in its judgment such action is necessary to the common defense and security. The Commission is authorized during such period, if the Commission finds it necessary to the common defense and security, to order the recapture of any special nuclear material[79] or to order the operation of any facility licensed under section 103 or 104, and is authorized to order the entry into any plant or facility in order to recapture such material, or to operate such facility. Just compensation shall be paid for any damages caused by the recapture of any special nuclear material or by the operation of any such facility.

Domestic activities licenses, issuance, authorization. 42 U.S.C. 2139.

"Sec. 109. Component and Other Parts of Facilities.—

"a. With respect to those utilization and production facilities which are so determined by the Commission pursuant to subsection 11 v. (2) or 11 cc. (2) the Commission may issue general licenses for domestic activities required to be licensed under section 101, if the Commission determines in writing that such general licensing will not constitute an unreasonable risk to the common defense and security.

Export licenses.

"b. After consulting with the Secretaries of State, Energy, and Commerce and the Director, the Commission is authorized and directed to determine which component parts as defined in subsection 11 v. (2) or 11 cc. (2) and which other items or substances are especially relevant from the standpoint of export control because of their significance for nuclear explosive purposes. Except as provided in section 126 b. (2), no such component, sub-

Ante, P. 131.

[79] Public Law 86-373 (73 Stat. 688) (1959), sec. 2, amended sec. 108 by deleting the phrase "distributed under the provisions of subsection 53 a.," after the words "special nuclear material" in the second sentence.

Appendix E