

NUCLEAR REGULATORY COMMISSION
DOCKET NO. 50-352A
PHILADELPHIA ELECTRIC COMPANY
NOTICE OF FINDING OF NO SIGNIFICANT ANTITRUST CHANGES
AND TIME FOR FILING 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 licensee's activities or proposed activities have occurred subsequent to the previous construction permit review of Unit 1 of the Limerick Generating Station 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" determination to the Director, Office of Nuclear Reactor Regulation. Based upon an examination of the events since issuance of the Limerick 1 construction permit to the Philadelphia Electric Company, the staffs of the Antitrust and Economic Analysis Section of the Site Analysis Branch, Office of Nuclear Reactor Regulation and the Antitrust Section of the Office of 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 construction permit (CP) antitrust review are not of the nature to require a second antitrust review at the operating license (OL) stage of the application.

"In reaching this conclusion, the staff considered the structure of the electric utility industry in Pennsylvania, the events relevant to the Limerick 1 construction permit review and the events that have occurred subsequent to the construction permit review.

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

'Philadelphia Electric Company (PEC) has applied for a license to operate the Limerick Generating Station, Unit 1 (Limerick 1). Staff has examined the activities and proposed activities of PEC since the Limerick 1 construction permit (CP) antitrust review was completed in 1971 to determine if any "significant changes" of an antitrust nature have occurred. In its analysis, staff has considered changes by PEC with respect to its participation in the Pennsylvania, New Jersey, Maryland (P-J-M) power pool and its coordination and wholesale arrangements outside of the pool. None of these changes appear to be of a "significant" antitrust nature.

'Staff has further considered PEC's activities with regard to the Fulton Generating Station (Fulton) nuclear plant application, the outcome of the Fulton CP antitrust review and the subsequent conduct of PEC that is pertinent to that review. As a result of the Fulton CP review, PEC obligated itself to provide transmission services to the Borough of Lansdale (Lansdale). The commitment to the Department of Justice (Justice) was conditioned on a recommendation of "no hearing" by Justice to the Commission with regard to the Fulton CP antitrust review. Justice, in fact, did so advise the Commission and the

Justice advice letter was published in the Federal Register. Subsequently, PEC refused a wheeling request from Lansdale, and Lansdale brought an antitrust action in the U.S. District Court against PEC based on its refusal to wheel. After a trial on the merits the Court found for PEC and dismissed Lansdale's complaint. On appeal, the U.S. Court of Appeals for the Third Circuit also decided in favor of PEC and dismissed Lansdale's appeal.

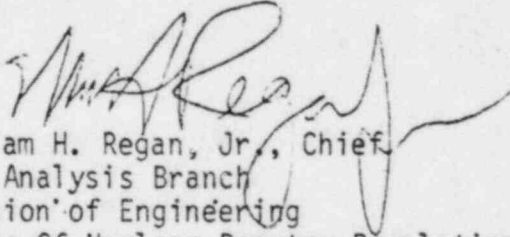
'In view of the advice letter by the Department of Justice to the Commission in connection with the Fulton facility, the staff believed that the refusal to wheel wholesale power represented a change in the activities of PEC during the period subsequent to the Limerick CP antitrust review. However, staff has found that the refusal does not have significant antitrust implications. This finding is based on an analysis by the staff of the options still available to Lansdale to receive wholesale power, and is supported by decisions of the U.S. District Court and the U.S. Court of Appeals regarding this same matter.

'From the foregoing, staff does not believe the changes in the activities of Philadelphia Electric Company since the CP antitrust review for Limerick 1 represent a "significant change" under the Commission's criteria.'

"Based on the staff's analysis, it is my finding that a formal operating license antitrust review of the Limerick Nuclear Station, Unit 1 is not required."

Signed on July 11, 1984 by Harold R. Denton, Director of Office of Nuclear Reactor Regulation.

Any person whose interest may be affected by this finding may file with full particulars a request for reevaluation with the Director of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 within 30 days after the date of this publication. Requests for a reevaluation of the no significant change determination shall be accepted after the date when the Director's finding becomes final but before the issuance of the OL only if they contain new information, such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.



William H. Regan, Jr., Chief
Site Analysis Branch
Division of Engineering
Office Of Nuclear Reactor Regulation

SUMMARY STATEMENT

DIRECTOR'S FINDING- The Director of Nuclear Reactor Regulation has made an initial finding of "no significant change" regarding the antitrust aspects of the Licensee's application in Docket No. 50-432A. Requests for reevaluation are due thirty days from date of publication in the Federal Register.

Limerick Generating Station
Unit 1
Significant Change Analyses

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- B. Participation in the P-J-M Power Pool

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LIMERICK GENERATING STATION
UNIT 1
SIGNIFICANT CHANGE ANALYSIS

I. INTRODUCTION

Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides for an antitrust review of an operating license (OL) application if significant changes in the licensee's activities or proposed activities have occurred since the construction permit. Authority to make the significant change determination has been delegated to the Director, Office of Nuclear Reactor Regulation (NRR) (for reactors) and to the Director, Office of Nuclear Material Safety and Safeguards (NMSS) (for production facilities), as appropriate. The Nuclear Regulatory Commission (Commission) in a Memorandum and Order (CLI-80-28) dated June 30, 1981¹, set forth three criteria upon which to base a "significant change" determination as follows:

- (1) the change or changes must have occurred since the previous construction permit review,
- (2) the change or changes must be attributable to activities or proposed activities of the licensee, and
- (3) the changed situation must have antitrust implications which would likely warrant a Commission remedy.

¹ 11 NRC 817, 824 (1980). See also 13 NRC 862 (1981).

In connection with the Limerick 1 operating license application² the staff³ has reviewed the activities and proposed activities of the applicant, Philadelphia Electric Company (PEC), that have transpired since the previous construction permit review. It is the staff's conclusion that no "significant change" has occurred subsequent to the CP review.

II. BACKGROUND

A thorough assessment of the antitrust significance of changes in the activities (and proposed activities) of Philadelphia Electric Company (PEC) since the construction permit antitrust review of Limerick quite naturally requires first understanding the specific situation existing at the time the CP review of Limerick was conducted. To some degree, this situation is revealed by examining the antitrust review conducted by the Department of Justice at the construction permit stage. Staff has supplemented this examination with an analysis of the Pennsylvania-New Jersey-Maryland (P-J-M) power pool, in which PEC participates.

² Although the OL submittal refers to the two-unit Limerick Generating Station, this analysis applies solely to Limerick 1, with an expected OL issuance in 1985. Limerick 2 is not expected to receive its OL until 1988. In cases where a second unit is not expected to be licensed prior to 18 months after the first unit, the staff's procedure is to conduct a second and separate review at the OL stage for the second unit.

³ The Site Analysis Branch, Office of Nuclear Reactor Regulation and the Antitrust Counsel of the Office of the Executive Legal Director.

A. Construction Permit Antitrust Review of Limerick 1 and 2

PEC tendered the Limerick construction permit application to the Atomic Energy Commission in early 1971. The antitrust information included as part of the CP application indicated that PEC controlled approximately 5400 MW of capacity and served a peak load of 4700 MW.⁴ Over the next 10 years PEC expected to more than double its generating capacity to serve a correspondingly increased load. Apart from Limerick 1 and 2, the capacity additions were expected to include shares in four nuclear units, Peach Bottom 2 & 3 and Salem 1 & 2.

Although PEC identified seven smaller utilities which were serving loads at wholesale or retail in areas adjacent to areas served by PEC, four of the seven systems were full members of the P-J-M power pool.⁵ Two of the seven systems, Delmarva Power and Light Company (Delmarva) and Atlantic City Electric Company (Atlantic City), had partial representation through PEC in the P-J-M pool. The remaining system, the Borough of Lansdale, Pennsylvania, was partially served at wholesale. Lansdale's total peak load was 24 MW, 8 MW of which was supplied by PEC.

Apart from its participation in the P-J-M pool, subsequently discussed, infra, pp. 6-8, PEC had entered into several bulk power coordination and

⁴ Limerick Generating Station License Application, Exhibit D (hereafter referred to as Exhibit D), response to Question 1.

⁵ Exhibit D, responses to Questions 4 and 9.

interconnection arrangements with several investor-owned utilities with which it was directly or indirectly interconnected. For example, two such agreements dealt with facilities for interconnecting at 132 kV and 220 kV with Public Service Electric and Gas Company (PSEG).⁶ These agreements essentially permitted services to be exchanged over the interconnections as were contemplated in other agreements between PEC and PSEG. Similarly, a 220 kV interconnection agreement with Baltimore Gas and Electric Company (BGE) provided for the rendering of services called for in the P-J-M power pool.⁷

PEC further was a party to several ownership arrangements involving generation and transmission with other investor-owned utilities.⁸ Together with PSEG, Atlantic City, and Delmarva, PEC owned the proposed Peach Bottom 2 and 3 and Salem 1 and 2 nuclear units. These utilities along with BGE, Pennsylvania Power and Light Company (PPL) and Jersey Central Power and Light Company (JCPL) also owned the Keystone Electric Generating Station. At the time of the Limerick CP application, PEC had further agreed with Atlantic City, Delmarva, JCPL and PSEG on the planning, design, and construction of the Lower Delaware Valley 500 kV transmission system.

⁶ Federal Energy Regulatory Commission (FERC) rate schedule (R/S) filings Nos. 20 and 25 of PEC, noted as PEC FERC R/S Nos. 20 and 25.

⁷ PEC FERC R/S No. 22.

⁸ Exhibit D-1 of License Application.

The foregoing information was available to the Department of Justice (Justice) during the CP review. In its advice letter, Justice noted the absence of antitrust problems and advised the Commission that an antitrust hearing would be unnecessary with respect to Limerick.⁹ Thus the Limerick CP antitrust review was completed in the Fall of 1971, although the construction permit itself was not issued until June 19, 1974.

⁹ Letter from Richard McLaren, Assistant Attorney General, U.S. Department of Justice to Bertram Schur, Associate General Counsel, U.S. Atomic Energy Commission, August 16, 1971.

B. Participation in the P-J-M Power Pool

The other key feature of the bulk power supply framework in which PEC operates is its participation in the Pennsylvania-New Jersey-Maryland (P-J-M) interconnection agreement.¹⁰ PEC, PPL, and PSEG had formed a pool in 1927 principally to exchange capacity arising from seasonal load diversities, but in 1931 began operating on a single-system basis and soon found that the greatest savings occurred through the central economic dispatch of generation. With the addition of BGE and the four subsidiaries of GPU, the basic P-J-M agreement was executed in September, 1956. Potomac Electric Power Company joined in 1965. DPL, ACE, and UGI also participated in P-J-M through separate agreements with a P-J-M member but had no voting power in decision-making. In 1980, P-J-M's peak load of 34,400 MW was served with 45,000 MW of generation capacity and nearly 6000 circuit miles of 230 kV, or greater, transmission lines, including 1500 miles of 500 kV transmission. The pool has 55 intrapool interconnections among the members and 27 interpool ties. In 1979 participation in P-J-M saved in the aggregate over \$400 million above costs that would have been incurred in individual system operation.

¹⁰ PEC FERC R/S No. 21. The discussion of this agreement is based on an examination of the rate schedule and on two publications by the FERC, Power Pooling in the United States, December 1981, and Power Pooling in the Northeast Region, February, 1981, and a publication by the Economic Regulatory Administration Power Pooling: Issues and Approaches, January, 1980. With the exception described at pp. 16-18, this discussion does not distinguish between the agreement as it existed at the time of the Limerick CP review and the amendments made since then.

P-J-M operates as a single control area with free-flowing ties among members. Generation and transmission are centrally dispatched to meet overall pool requirements according to economic and reliability criteria, regardless of ownership. The planned outages of generation and transmission facilities of individual members are coordinated and determined by the pool. The pool further determines the pool's capacity responsibility and allocates it among the members, based largely, but not wholly, on peak load. Other factors considered are unit size and the forced outage rate of a member's generation capacity relative to the average forced outage rate of all pool units. A member can meet its capacity obligation through its own units, from purchases from other members or non-members, or by paying a pool-established capacity-deficiency charge.

The P-J-M agreement does not define any specific access rights to transmission facilities, though members are obligated to make available to the pool transmission capacity excess to the member's needs. Yet, the use of central dispatch and operation of free-flowing ties guarantees in effect all members access to transmission to meet short-term power needs through economy interchange, emergency service, and short-term capacity purchases to meet capacity deficiencies in the short run. No transmission charge is assessed for these transactions. Likewise, the pool agreement does not specifically address long-term transmission needs. However, most major transmission facilities are built to transfer power from major generating projects. Transmission expansion, ownership and cost allocation are determined through separate agreements among the members.

III. CHANGES SINCE THE LIMERICK CONSTRUCTION PERMIT ANTITRUST REVIEW

In the period since the Limerick CP review was completed, PEC has increased its generation capacity by over 40 percent to approximately 7800 MW. With almost 900 miles of transmission lines, PEC serves a peak load of 5700 MW. PEC remains a participant in the P-J-M interconnection agreement. As at the construction permit stage, PEC provides firm wholesale power to only one other utility, the Borough of Lansdale, a full-requirements customer with a peak load of 27 MW in 1982.¹¹

Several changes in the activities and proposed activities of PEC have occurred during the period following the Limerick CP antitrust review. Among these were PEC's planned participation in the Fulton Generating Station and PEC's activities with regard to wheeling and changes in coordination and wholesale arrangements between PEC and other utilities. The antitrust significance of these changes is considered below.

¹¹ Electrical World Directory, 1982-83, Electrical World, 1982.

A. Fulton Construction Permit Antitrust Review

In November, 1973, PEC applied to the Commission to construct and operate two additional nuclear generating units known as the Fulton Generating Station. Justice's advice letter with respect to Fulton noted the extensive current and planned participation of PEC in nine operating and planned nuclear units.¹² It additionally reviewed the high degree of coordination PEC enjoyed through membership in the P-J-M power pool and through bilateral or multilateral arrangements with other systems.

Justice's study of the Fulton CP application revealed antitrust problems only with respect to the relationships of PEC with the Borough of Lansdale, Pennsylvania (Lansdale). Lansdale alleged that PEC was attempting to force certain rates on it. Prior to 1971, Lansdale had purchased partial requirements service from PEC. In 1971 Lansdale decided to shut down its own generating plant and to seek wholesale power to serve all of its needs. It opted to receive full-requirements service from PEC for five years at fixed rates, beginning in November, 1971. In May, 1972, PEC filed at the Federal Power Commission (FPC) for an increase in rates. PEC had not filed the November 1971 contract at the FPC, and, consequently, was ultimately permitted by the FPC to put its filed May, 1972 rates into effect.

¹² Letter from Thomas Kauper, Assistant Attorney General, U.S. Department of Justice to Howard Shapar, Associate General Counsel, U.S. Atomic Energy Commission, May 20, 1974.

Lansdale raised these activities to Justice during the course of the Fulton CP review but in March, 1974, the U.S. Court of Appeals ordered PEC to file the November, 1971 contract with the FPC and held that the 1971 rates were presently effective. Thus, Lansdale's concerns in this regard were alleviated.

Lansdale also had raised to PEC, by letter dated September 26, 1973, the possibilities of purchasing power from Fulton and of obtaining wheeling services from PEC. Ultimately, PEC responded to these requests both by letter to Lansdale and by agreement with Justice as to proposed license conditions. PEC agreed to offer participation in Fulton to Lansdale, to wheel power between Lansdale and other electric utilities and to permit these two conditions to be included in the Fulton construction permit.

Coincident with, and attached to, the Fulton advice letter from Justice to the Commission was a statement of corporate policy of PEC reflecting the commitment to wheel power to and from Lansdale and to offer participation in Fulton.¹³ The commitment to wheel power appeared to be general with respect to the type of bulk power, stating: "Company shall

¹³ Letter from Edward Bauer, Vice President and General Counsel, Philadelphia Electric Company to Thomas Kauper, Assistant Attorney General, U.S. Department of Justice, May 20, 1974.

facilitate the transmission of bulk power over its transmission facilities between the Borough of Lansdale and any other bulk power entity, provided that (1) permission to utilize the transmission lines of other electric power systems necessary to the effectuation of the transaction has been obtained, and (2) the arrangements can reasonably be accommodated from a functional and technical standpoint." PEC offered this statement of corporate policy with "the understanding that the Department of Justice would recommend to the Atomic Energy Commission that no antitrust hearing would be required [for Fulton]". Justice did, in fact, make such a recommendation and, thus, PEC's conditional statement of corporate policy became effective.

Further, PEC agreed in the letter to Justice, that the commitments contained in the statement of corporate policy could be included as conditions to the AEC construction permit and operating licenses for the Fulton Generating Station. This agreement, to include the commitments as license conditions, became moot when PEC cancelled its plans for the Fulton station in 1980.¹⁴

¹⁴ PEC sought to withdraw the CP application in December 1980, without a CP having been issued. Subsequently, in February 1981, an ASLB dismissed the proceeding with prejudice, but the ALAB overruled the ASLB in November 1981, and remanded the matter to the ASLB to have a hearing on whether the proceeding should be terminated with prejudice or without prejudice. In February 1984, the ASLB conducted a conference with the applicant, staff and intervenor. A decision by the ASLB is expected soon.

B. Alleged Refusal to Wheel

1. Antitrust Litigation: Lansdale versus PEC

In July, 1978, Lansdale filed a civil antitrust suit against PEC alleging that PEC had monopolized or attempted to monopolize wholesale and retail electric power markets in violation of Section 2 of the Sherman Act. The primary allegation made was that PEC had exercised its monopoly power in the wholesale market by refusing to wheel power.¹⁵

In anticipation of the end of its fixed-rate five year wholesale contract with PEC, Lansdale began to search for other possible wholesale power supplies. Apparently, it had reached tentative agreement with PASNY to supply preference hydro power and with Pennsylvania Power and Light Company (PPL) to supply wholesale power. However, it was alleged that PEC refused to wheel the firm wholesale power.

¹⁵ Lansdale also alleged that a price-squeeze had occurred. Given that FERC and the courts both consider the price-squeeze issue and that FERC and the State Public Utility Commission have the jurisdiction to order the obvious remedy, i.e., adjusting rates, the price-squeeze allegation is not addressed in this analysis.

At trial, PEC offered as defense for its refusal to wheel wholesale power that the individual PEC official who drafted the letter to Lansdale agreeing to wheel mistakenly failed to indicate in the letter that the wheeling applied only to participation by unit power or ownership in the generation of other utilities.

At trial, Lansdale attempted to show that the relevant market for wholesale power was PEC's service area, that PEC possessed monopoly power in the market, and that PEC had exercised its monopoly power by refusing to wheel. PEC countered that the relevant market included an area encompassing several utilities and that in this market PEC had a low market share and otherwise possessed no monopoly power. Further, Lansdale needed only to construct three miles of transmission lines to connect to PPL and therefore really did not need wheeling from PEC. Finally PEC stated it had refused to wheel only firm power and was willing to wheel unit power or ownership shares of generation. In response, Lansdale argued that environmental constraints would hinder the construction of transmission and that, in any event, PEC's letters to Lansdale in 1974

committed PEC to wheeling without regard to the type of power being wheeled.

The case was tried before a jury which was asked to answer a series of interrogatories. However, unless the jury answered affirmatively to the interrogatory dealing with the possession of monopoly power in the relevant market, there would be no need to answer the other interrogatories. In fact, the jury responded that PEC did not possess monopoly power in the relevant market.

Lansdale asked the District Court judge to set aside the verdict, but was refused, whereupon Lansdale appealed to the Circuit Court of Appeals. The Appeals Court upheld the jury verdict, agreeing with PEC that a broad wholesale market existed and that PEC lacked monopoly power in that market.¹⁶ Even accepting Lansdale's definition of a narrower market, the Appeals Court concluded that Lansdale could have built a line to PPL and thus the jury was reasonable in finding that PEC lacked monopoly power in this market.

2. Significance of the Refusal to Wheel

The factual situation involved here appears relatively clear and may be corroborated by correspondence between Lansdale and PEC

¹⁶ 692 F. 2d 307

and by a review of the transcript in the antitrust proceeding and the Fulton advice letter. It is clear that during this time period PEC had made a commitment to provide some type of wheeling to Lansdale and that there was a misunderstanding between them as to the exact type of service that was to be performed. Ultimately, PEC made clear what type of service it was willing to provide. However, in view of the advice letter provided to the Commission in connection with the Fulton facility, the staff believes the refusal to wheel wholesale power represents a change in the activities of PEC during the period subsequent to the Limerick CP review. However, the Commission's criteria for a significant change determination requires that the change has antitrust implications that would likely warrant a Commission remedy. In this instance, the staff does not find any significant antitrust implications. In addition to the District Court and Appeals Court findings that PEC lacks monopoly power in the relevant market, staff notes that PEC has not refused to provide wholesale service to Lansdale at rates subject to FERC jurisdiction. Although PEC's rates may be higher than those of PPL, Lansdale has the option of building about three miles of transmission to connect with PPL. The annual cost associated with such an effort would be small compared to Lansdale's annual revenues. If the building of the transmission were not permitted because of regulatory restraints *, Lansdale still has the option of participating in other generating units by using PEC's transmission for delivery

*In a telephone conversation on May 15, 1984 with Mr. E. W. Olander, Superintendent, Lansdale Electric Department, staff learned that Lansdale has received approval and will construct a transmission connection to PPL.

of the power. In summary, although Lansdale may be marginally disadvantaged by PEC's refusal to transmit certain types of power, this disadvantage is not, in staff's estimate, sufficient to significantly affect competition. Therefore, staff does not believe that this refusal has antitrust implications that would likely warrant a Commission remedy.

C. Changes in Coordination and Wholesale Arrangements

1. Amendments to the P-J-M Interconnection Agreement

PEC has participated continuously in the P-J-M power pool since its formal organization in 1956. The members of P-J-M have amended the original agreement over 80 times since 1956 and on almost 40 occasions since the Limerick construction permit review was completed in September, 1971.¹⁷ A substantial revision occurring in 1974 served to strengthen the coordination of planning and operation among P-J-M companies by refining the determination of capacity requirements for the pool and individual members and of the methods and terms by which members can meet their capacity requirements.¹⁸ Among other modifications, it also set forth the allocation within P-J-M of payments to or receipts from other systems outside of P-J-M with respect to certain capacity and transmission services transactions. A second major revision occurred in 1977 and further refined and amended the rights and obligations of P-J-M members with respect to coordinating the installation and operation

¹⁷ The staff has reviewed all of the amendments and has chosen to specifically comment only on the ones discussed below. Those not specifically receiving comment were found to pose no significant antitrust consequences.

¹⁸ PEC FERC R/S No. 21, Supplement No. 48

of generation capacity and transmission facilities.¹⁹ Provisions for sharing the costs and benefits of coordinated operations were also modified. Staff's review of both major revisions in 1974 and 1977 has revealed no significant changes of an antitrust nature in the activities of PEC in this regard.

In March, 1981, DPL and ACE were permitted to join as full participants in P-J-M.²⁰ On this same occasion, the P-J-M agreement was modified so as to set forth, for the first time, membership requirements for joining the pool. To qualify, an entity must be (1) engaged primarily in the generation and sale of electric energy either directly or indirectly, for the use of the general public; (2) directly interconnected with a member of P-J-M; and (3) accept the concepts and obligations embodied in the agreement. The procedures for seeking membership were also defined. In view that the P-J-M agreement previously stated no explicit requirements for membership, the addition of a specific membership provision serves to better inform all other interested utilities what is required if they are contemplating joining P-J-M. Staff recognizes that the membership provision still prevents partial-requirements and full-requirements wholesale customers from joining in the pool. On the other hand, the P-J-M agreement appears specifically

¹⁹ PEC FERC R/S No. 21, Supplement No. 52.

²⁰ PEC FERC R/S No. 21, Supplement No. 62. Previously, DPL and ACE indirectly participated in P-J-M through a current member.

structured for self-sufficient utilities. Should a utility which is presently a wholesale customer of a current P-J-M member ultimately become self-sufficient, the utility will be able to join P-J-M, if it wishes, regardless of the ownership type of the utility. One other interesting change contained in the amendment adding DPL and ACE to the pool is that unanimous consent is required to effect a change to the agreement, including the creation of a new service schedule. Only changes to existing service schedules requiring less than a stated level of investment or annual operating expenses would be permitted with less than unanimous consent. In staff's opinion none of the changes in PEC's activities with respect to the membership provisions or unanimity of agreement on changes to the agreement are "significant" in an antitrust context.

2. Other Coordination Arrangements

As indicated earlier, the P-J-M power pool agreement does not establish terms and conditions for long-term access to generation and transmission. Instead, coordination of new generation and transmission by P-J-M utilities has primarily been dealt with in separate agreements. Staff's discussion of these separate agreements below does not suggest that the activities of PEC in participating in such new arrangements since the Limerick CP review are "significant" in an antitrust sense.

In 1967 and 1970 PEC and several other P-J-M members had joined together to construct and operate the Keystone - Conemaugh (K-C)

500 kV transmission system.²¹ This agreement and its amendment permitted the delivery of output from the large-scale Keystone and Conemaugh generating plants to the owners. In 1976, PEC and other members of P-J-M augmented the K-C agreement by agreeing to develop the Susquehanna - Eastern (S-E) 500 KV transmission system.²² Besides supporting the K-C system, the S-E transmission facilities would permit Metropolitan Edison Company (ME) to deliver the output of Three Mile Island 2 into the ME loads. The S-E agreement also set forth the terms and conditions, and charges for use of the facilities by the individual P-J-M members which would exceed the members' use entitlement.

In 1977, PEC, ACE, DPL, JCPL, and PSEG entered into the Lower Delaware Valley Transmission System (LDVT) agreement.²³ The LDVT system would interconnect the Salem and Peach Bottom nuclear plants, owned by ACE, DPL, PSEG, and PEC, with the Forked River 1 nuclear unit owned by JCPL. As with the S-E agreements, the utilities are permitted to use the system beyond their relative entitlements in the system, subject to certain terms, conditions, and charges.

²¹ PEC FERC R/S No. 30

²² PEC FERC R/S No. 43

²³ PEC FERC R/S No. 45

In 1979 PEC agreed to sell energy to JCPL from its share of the Salem 2 nuclear unit being built by PSEG. This transaction permitted JCPL to substitute a lower cost supply for part of its economy energy purchases from the P-J-M pool.²⁴

In the staff's view, none of the foregoing arrangements reflect a "significant change" in the activities of PEC since the construction permit review was completed in 1971.

3. Changes in Wholesale Arrangements

Since 1956 the Borough of Lansdale has been served at wholesale by PEC. At the time of the Limerick CP review in 1971, PEC was providing partial-requirements services, but shortly thereafter in November, 1971, entered into a five year full-requirements, fixed-rate wholesale contract with Lansdale.²⁵ Under the contract PEC upgraded and raised the capacity of the interconnection between the two systems. As discussed earlier, PEC failed to file the 1971 contract at the Federal Power Commission (FPC) and in May, 1972, filed a new contract at the FPC reflecting an increase in rates. Ultimately the Court of Appeals held the original 1971 contract to be valid and PEC was prevented from raising its rates and changing contract terms prior to the end of the contract.

²⁴ PEC FERC R/S No. 46

²⁵ Since staff has not yet obtained a copy of the contract for review, these comments are based primarily on a discussion contained in the Appeals Court decision relating to the Borough of Lansdale versus Philadelphia Electric Company, 692 F. 2d 307 (1982).

Subsequent to the end of the 1971 contract PEC filed two successive wholesale rate increase requests with the Federal Energy Regulatory Commission (FERC). These filings included a 40 percent ratchet and 60-day cancellation notice on Lansdale's part. PEC also added an auxiliary service provision under which PEC would be compensated if Lansdale obtained an alternative power source. Lansdale contested the auxiliary service provision as well as the proposed rates, which Lansdale alleged were discriminatory and created a price-squeeze. A FERC administrative law judge disapproved of the auxiliary service provision but approved the rate increases. In recent years PEC has sought and obtained in part several rate increases at FERC.

With regard to the price-squeeze allegations, the staff has long taken the position that the determination of whether a price-squeeze exists is a matter best resolved by FERC, which has jurisdiction in aspects of rate-making. The obvious remedy to price-squeeze is the adjustment of wholesale rates relative to retail rates. As for other terms and conditions of the wholesale contracts the staff recognizes that FERC has reviewed such terms and conditions for reasonableness and ultimately approved or disapproved of the terms and conditions. Thus, staff does not view changes in the rates and terms of the wholesale contracts and amendments thereto as "significant" in an antitrust context.

IV. CONCLUSION

Philadelphia Electric Company (PEC) has applied for a license to operate the Limerick Generating Station, Unit 1 (Limerick 1). Staff has examined the activities and proposed activities of PEC since the Limerick 1 construction permit (CP) antitrust review was completed in 1971 to determine if any "significant changes" of an antitrust nature have occurred. In its analysis, staff has considered changes by PEC with respect to its participation in the Pennsylvania, New Jersey, Maryland (P-J-M) power pool and its coordination and wholesale arrangements outside of the pool. None of these changes appear to be a "significant" antitrust nature.

Staff has further considered PEC's activities with regard to the Fulton Generating Station nuclear plant application, the outcome of the Fulton CP antitrust review and the subsequent conduct of PEC that is pertinent to that review. As a result of the Fulton CP review, PEC obligated itself to provide transmission services to the Borough of Lansdale (Lansdale). The commitment to the Department of Justice (Justice) was conditioned on a recommendation of "no hearing" by Justice to the Commission with regard to the Fulton CP antitrust review. Justice, in fact did so advise the Commission and the Justice advice letter was published in the Federal Register. Subsequently, PEC refused a wheeling request from Lansdale, and Lansdale brought an antitrust action in the U.S District Court against PEC based on its refusal to wheel. After a trial on the merits the Court found for PEC and dismissed Lansdale's complaint. On appeal, the U.S. Court of Appeals for the Third Circuit also decided in favor of PEC and dismissed Lansdale's appeal.

In view of the advice letter by the Department of Justice to the Commission in connection with the Fulton facility, the staff believed that the refusal to wheel wholesale power represented a change in the activities of PEC during the period subsequent to the Limerick CP antitrust review. However, staff has found that the refusal does not have significant antitrust implications. This finding is based on an analysis by the staff of the options still available to Lansdale to receive wholesale power, and is supported by decisions of the U.S. District Court and the U.S. Court of Appeals regarding the same matter.

From the foregoing, staff does not believe the changes in the activities of Philadelphia Electric Company since the CP antitrust review for Limerick 1 represent a "significant change" under the Commission's criteria.