UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of	)	
	)	
TEXAS UTILITIES GENERATING COMPANY	)	Docket Nos. 50-445A
	)	50-446A
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

ANSWER OF TEXAS UTILITIES GENERATING COMPANY
TO TEX-LA PETITION TO INTERVENE

A petition for leave to intervene in the captioned matter pursuant to the Nuclear Regulatory Commission's "Notice of Receipt of Attorney General's Advice and Time for Filing of Petitions to Intervene on Antitrust Matters" (43 Fed. Reg. 34850, August 7, 1978) was filed September 20, 1978 on behalf of Tex-La Electric Cooperative, Incorporated ("Tex-La").[1] Applicant Texas Utilities Generating Company ("TUGCO") submits its answer to the petition as follows.

I. STANDARD FOR INTERVENTION

Any petition to intervene must set forth petitioners' interest and how that interest will be affected by the proceeding.[2] In other words, an injury in fact to a protected right[3] (one within

---

1/ Petitions were due by September 6, 1978. However, in response to Tex-La's request, an enlargement of time was granted to Tex-La by Order of September 19, 1978. The instant petition has been filed within the time allowed by that Order.

2/ 10 C.F.R. §2.714(a)(2).

3/ Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

the "zone of interests"[4]) must be alleged. An antitrust petition by the proponent of license conditions normally would bring a petitioner into the "zone of interests" if it alleged that the petitioner is in competition with the license applicant to a significant degree in one or more markets, and claimed injury to that competition[5] arising from a situation inconsistent with the antitrust laws. Of course, the situation alleged must have the requisite jurisdictional nexus to the activities under the license (and hence to the limited scope of subsection 105.c).[6] In an operating license antitrust proceeding, allegations to be within the scope of the proceeding must include and be premised on significant changes in the licensee's activities.[7]

4/ Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976).

5/ See, for example, the discussion of petitioner cooperative's allegations of competition and effect of refusal to wheel "supplemental power" on its ability to compete with Applicant in Kansas Gas and Electric (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 567 (1975).

6/ Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973).

7/ "[W]e have concluded that this second look at the operating license stage is to be a restricted one, focusing on the changed circumstances. *** 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. *** 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. *** [A] potential petitioner for antitrust intervention should be able to stand on the sidelines and raise a claim at the operating license stage that could have been raised earlier." Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1321 (1977).

Further, there must be a request for specific relief[8] which will remedy the situation complained of (i.e., there must be a logical connection between the injury relied on for standing and the relief requested, and the relief must not be speculative or moot.)[9]

Finally, the petition must contain at least one valid contention which is to be submitted not later than 15 days prior to the special (or if none, the first) prehearing conference.[10]

II. TEX-LA FAILS TO DEMONSTRATE INTEREST

Viewed against these standards for intervention, the Tex-La petition is deficient and must fail. It remains to be seen whether Tex-La may raise a valid and timely contention.

Tex-La has described facts sufficient to show that 14 of the 17 member cooperatives which operate in the state of Texas, and on whose behalf they seek intervention, receive power from Texas Power and Light Company ("TP&L"), one of the operating subsidiaries of the Texas Utilities Company System. Tex-La asserts that their interest to be protected "is to ensure that Tex-La and its members are not restricted in any way from access to bulk power supplies from interstate or intrastate sources". (Petition at 4). Tex-La also asserts that it has an interest in participating in the Comanche Peak units.

8/ Wolf Creek, supra, 1 NRC at 575.

9/ Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

10/ 10 C.F.R. §2.714(b), as amended, provides in pertinent part: "A petitioner who fails to file such a supplement which satisfies the requirements of this paragraph with respect to at least one contention will not be permitted to participate as a party."

Tex-La's allegation of interest falls short of satisfying the zone of interests test set forth in, inter alia, the decision of the Commission in Pebble Springs.[11/] The fundamental shortcomings of the petition in this regard are that (a) it fails to allege that the members of Tex-La are in competition with TP&L (and thus are persons with a stake in the outcome of this antitrust proceeding) and (b) it fails to allege intent to monopolize or actual competitive injury to them in a specific relevant market or markets. Thus, this petitioner has failed to satisfy the requirement laid down in Wolf Creek[12/] to describe a situation inconsistent with the antitrust laws. Further, it fails to describe the requisite "nexus" to the Commission's limited jurisdiction. In other words, petitioner has failed to allege competition or anticompetitive intent and, except in conclusory terms or by implication, competitive injury or "nexus".

Tex-La apparently argues that it has an interest which is affected because it (or its members) is a party to contracts (from which it quotes) with the Southwestern Power Administration ("SPA") (a component of the Department of Energy of the United States Government) and with TP&L. The quoted passages provide in essence notice that the United States or TP&L may suspend

---

11/ Supra, 4 NRC 610 (1976).

12/ Supra, 1 NRC 559 (1975).

the sale and delivery of power and energy if Tex-La fails to assure that power and energy received from TP&L remain within the State of Texas. Tex-La leaps from the foregoing recital to the assertion that the continuation "of this policy of interstate restraint with respect to the Comanche Peak units" may be in violation of specified antitrust laws, and adds (presumably as to effect on its interest) "[s]uch a policy precludes utilities from acquiring and marketing electric power and energy available from all sources."

It is axiomatic that the scope of this hearing may not be enlarged by granting a petition to intervene (10 C.F.R. §2.714(h)). The Commission made clear in South Texas that the scope of a hearing such as this one is confined to "significant changes" since the construction permit review. (See note 7, supra). In that regard, Tex-La's invocation of the contract between its members and TP&L, between TP&L and SPA, and between itself and SPA, is misplaced. The very contract provisions mentioned were included in the Applicant's submittal of "Information Requested by the Attorney General for Antitrust Review" at the construction permit stage. (See question 14 and response, especially p. 14-2; the contract between TP&L and Houston County Cooperative, Inc. in Appendix A to that submittal, Volume II, at tab 13; the contract between TP&L and SPA in Appendix A, Volume III, at tab 20; and the contract between SPA and Tex-La, Appendix A, Volume III, at tab 21.)

Since these very contracts were the subject of the construction permit review, they should not be a basis for any

inquiry at the operating license stage. At the very least, it would be incumbent upon Tex-La to allege some significant change involving these contracts.

It is of no help to Tex-La in this regard that the Department has alleged in its advice letters in South Texas and Comanche Peak significant changes which in their view warrant a hearing. The Department is a statutory party in an NRC antitrust proceeding under subsection 105.c of the Atomic Energy Act. Conversely, Tex-La is entitled to intervene only if, inter alia, it alleges significant changes since the construction permit review which, if proven, would warrant the conclusion that further conditions are necessary in order to prevent the creation or maintenance of a situation inconsistent with the antitrust laws by the activities under the operating license.

Nor is it any help to Tex-La that the Department and NRC refrained from either endorsing or challenging the intrastate operations practices of the Applicant in the negotiated conditions set forth in the construction permit. This is not the place to discuss the proper interpretation of that reservation as it applies to the "governmental agencies involved in the Licensing process". However, as to Tex-La, it is clear that whatever the condition means, it does not purport to extend to persons other than the reviewing agencies. In other words, the principles of res judicata and laches adverted to by the Commission in South Texas (note 7, supra) are fully applicable to Tex-La, because it had its opportunity at the construction permit stage of review to challenge, in an NRC forum under subsection 105.c, the

propriety of Applicant's intrastate operations practices. Tex-La having not pursued (and thus having waived) that opportunity, it would not be consistent with the Congressional intent regarding the administration of subsection 105.c to permit Tex-La now to have "a second bite at the apple". The Congressional intent in this regard is discussed at some length in the Commission's South Texas[13/] and Florida Power and Light[14/] decisions. Insofar as is relevant here, the Congressional intent is that a licensee is entitled to be free from the risk of antitrust review against the broad standards reflected in subsection 105.c once a construction permit is issued, in the absence of some significant changes in the licensee's conduct or in situations for which it is clearly responsible (that is, as opposed to changes in prevailing market conditions for which the licensee is not responsible).

Accordingly, Tex-La has failed to frame its petition in a manner to bring it within a limited scope of this operating license proceeding and for this reason, among others, it should be denied.

III. THE REQUESTED RELIEF IS INAPPROPRIATE

As relief, Tex-La requests the Commission to condition the operating licenses for Comanche Peak to allow for both interstate and intrastate access to the output of these units and second,

---

13/ Supra, 5 NRC at 1312-1317.

14/ Florida Power & Light Co. (St. Lucie Plant, Unit 2) Memorandum and Order of the Commission, June 21, 1978, Slip Op. at 8-10.

to provide Tex-La the opportunity to participate (apparently as owners) in the Comanche Peak units on fair and reasonable terms.

Tex-La's desire to obtain access to both interstate and intrastate sources of power, even if unfulfilled, is not self-evidently even an injury, much less one which requires remedy under subsection 105.c. Tex-La's petition (and Appendix A thereto) shows that at least some of its members already have access to both interstate and intrastate power. See the listings for Houston County Electric Cooperative, Jasper-Newton Electric Cooperative and Sam Houston Electric Cooperative. In each case it is indicated that the cooperative is served by both Gulf States Utilities (which the Board may officially notice is an interstate entity) and TP&L.

Moreover, insofar as the petition and the relief requested demand access to ownership participation of Comanche Peak as a matter of right, such request is moot. The conditions contained in the Comanche Peak construction permits provide that timely requests for ownership participation were due by December 1, 1973. Tex-La could have requested ownership participation in Comanche Peak during the construction permit antitrust review, but did not do so. In these circumstances, to entertain any issue with regard to ownership participation in Comanche Peak would be to reopen matters already resolved at the construction permit stage, and thus exceed the proper scope of this operating license proceeding.

CONCLUSION

The Board should deny the petition on the basis of lack of interest (without reaching the question of whether there is at least one well-pleaded contention). In any event, we urge that the Board confine any contentions accepted to issues which are proper in this operating license stage antitrust proceeding and which do not purport to reopen issues resolved at the construction permit stage, including ownership participation in Comanche Peak. Of course, we intend to respond to any supplemental contentions that may be filed by Tex-La.

Respectfully submitted,

Joseph B. Knotts, Jr.
Nicholas S. Reynolds
DEBEVOISE & LIBERMAN

Jos. Irion Worsham
M.D. Sampels
Spencer C. Relyea
WORSHAM, FORSYTHE & SAMPELS

Counsel for
TEXAS UTILITIES GENERATING
COMPANY, et al.

Date: October 4, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:	)	
	)	
TEXAS UTILITIES GENERATING CO.	)	
	)	Docket Nos. 50-445A
(Comanche Peak Steam	)	50-446A
Electric Station,	)	
Units Nos. 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Answer of Texas Utilities Generating Company to Tex-La Petition to Intervene" in the captioned matter were served upon the following persons by deposit in the United States mail, first class postage prepaid, this 4th day of October, 1978.

Marshall E. Miller, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael L. Glaser, Esq.
1150 17th Street, N.W.
Washington, D.C. 20036

Sheldon J. Wolfe, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chase R. Stephens
Docketing and Service Branch
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

J. Irion Worsham, Esq.
Merlyn D. Sampels, Esq.
Spencer C. Relyea, Esq.
Worsham, Forsythe & Sampels
2001 Bryan Tower, Suite 2500
Dallas, Texas 75201

Roy P. Lessy, Jr., Esq.
Michael B. Blume, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Perry G. Brittain
President
Texas Utilities Generating Company
2001 Bryan Tower
Dallas, Texas 75201

Richard D. Cudahy, Esq.
Joseph Gallo, Esq.
Robert H. Leoffler, Esq.
Isham, Lincoln & Beale
1050 17th Street, N.W. Suite 701
Washington, D.C. 20036

John D. Whitler, Esq.
U.S. Department of Justice
Antitrust Division
Washington, D.C. 20530

Michael I. Miller, Esq.
Richard E. Powell, Esq.
David M. Stahl, Esq.
Thomas G. Ryan, Esq.
Isham, Lincoln & Beale
One First National Plaza
Chicago, Illinois 60603

Ronald Clark, Esq.
Energy Section
U.S. Department of Justice
P.O. Box 14141
Washington, D.C. 20044

Linda L. Aaker, Esq.
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Frederick H. Ritts, Esq.
Northcutt Ely
Watergate 600 Building
Washington, D.C. 20037

Joseph B. Knotts, Jr.