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May 27, 1986

Mr. Ben Vogler
U.S. Nuclear Regulatory Commission
Maryland National Bank Building
7735 Old Georgetown Road
Bethesda, Maryland 20014

Dear Mr. Vogler:

On March 17, 1986, the Illinois Municipal Electric Agency ("IMEA") submitted its comments as to alleged significant changes in Commonwealth Edison Company's ("Edison") activities subsequent to the antitrust review conducted in connection with the construction permit application for Edison's Byron and Braidwood nuclear stations. IMEA concluded that "significant changes have occurred," and alleged that since the previous review Edison has engaged in a number of activities which IMEA contends have "antitrust implications" that "are likely to warrant NRC remedy." Edison hereby responds to IMEA's comments.

IMEA's comments misstate the facts and the antitrust implications of the facts as stated. Moreover, under well-established NRC precedent, no antitrust proceedings would be appropriate in connection with the Byron Unit 2 and Braidwood Station operating license ("OL") proceedings. (NRC Docket Nos. 50-454, 455, 456, 457).

Background

By letter dated March 4, 1974, the U.S. Department of Justice ("DOJ") rendered to the A.E.C. its antitrust advice concerning Edison's construction permit applications for the Byron and Braidwood stations. In sum, the DOJ concluded that an antitrust hearing would not be necessary in view of Edison's willingness to (1) offer its municipal wholesale customers "access" to Edison's LaSalle nuclear units and (2) eliminate from its wholesale tariff a "freeze" provision which limited wholesale sales to customers presently receiving such service from Edison. The DOJ noted that a

third issue had surfaced in connection with, but was not resolved in, the LaSalle antitrust review, namely, allegations by wholesale customers of a "price squeeze" between wholesale and retail rates which allegedly restrained competition by the municipal systems in attracting large industrial customers. The DOJ letter concluded that these "price squeeze" allegations did not warrant an antitrust hearing in connection with the Byron/Braidwood construction permit applications in view of Edison's willingness to permit access to LaSalle (which the DOJ thought "should go far toward invigorating the competitive situation and offsetting any possible adverse effects of the alleged 'price squeeze'") and in view of the fact that the Federal Power Commission's jurisdiction over "price squeeze" issues had not yet been determined.*/

As will be shown below, none of IMEA's allegations of anti-competitive behavior by Edison suggest that Edison has violated in any way the commitments made in connection with the Byron and Braidwood construction permit reviews.

1. Discussion of IMEA'S Allegations.

IMEA argues that Edison has engaged in discriminatory pricing, has refused to sell power to IMEA for use by IMEA's members located in Edison's service territory; and has "effectively" denied transmission services to IMEA's member customers of Edison. (IMEA comments, p. 1). None of these allegations has any merit.

(A) "Discriminatory" Pricing.

The "discriminatory pricing" claim is apparently based on the fact that the cities of Geneva and Rock Falls pay Edison more for full requirements services than three other cities that accepted Edison's proposal. (This no longer applies to Geneva, which on May 1, 1986 began receiving its power and energy needs from Wisconsin Electric

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*/ At that time, the FPC was disclaiming jurisdiction over price squeeze issues, and that matter had not been resolved by the courts. Had it then been acknowledged, as it is today, that the FPC had an obligation to consider price squeeze issues, presumably DOJ's conclusion that no antitrust hearing before the NRC was then warranted on this issue would have been strengthened.

Power Company.) Edison offered the same terms and prices for service to all of its full requirements customers, including Geneva and Rock Falls, at the same time. This lower rate was a competitive response by Edison to market conditions. Geneva was, and Rock Falls is, paying more only because, as they admit, they rejected Edison's offer, having made arrangements with another supplier. Geneva and Rock Falls did not avail themselves of the lower rate simply because they did not want to commit themselves to take power and energy from Edison for the time period which was required under the lower rate accepted by the three other municipal customers. The tariff embodying this rate has been approved by the Federal Energy Regulatory Commission. Geneva and Rock Falls have not, as they contend, been "penalized" in any way by Edison.

(B) "Refusal" to Deal

The basis for the alleged refusal to sell power to IMEA is even less clear. Edison has never refused to, or even suggested that it would not, sell power to IMEA. In fact, at no time did IMEA request that Edison quote it a rate for a specific amount of power or energy it desired to purchase. Indeed, IMEA's comments state only that, while Edison was negotiating supply arrangements with its IMEA member customers, "IMEA expressed its interest in becoming a customer of Edison." None of Edison's customers had ever suggested that Edison negotiate with IMEA, and when Edison asked its customers whether it should be negotiating with IMEA instead of with its customers directly, it was advised by these customers that negotiations should be held with them directly. Mr. Scholz' May 20 letter (attached as Exhibit 8 to the IMEA comments) clearly states that if other municipalities which IMEA represents were interested in the proposals under discussion, Edison would discuss that interest with IMEA. IMEA never responded to that invitation and on June 18, 1985 Edison, concluding that IMEA had no further interest, withdrew its offer to provide service under the proposals which had been forwarded by the May 20 letter. Mr. Rifakes' June 18 letter in no way stated or implied that Edison would not deal with IMEA; indeed the first sentence of that letter states that Edison "extended to you the opportunity to offer [the proposed rates] to selected members of your association as you saw fit." (Emphasis added).

IMEA did not, inexplicably, attach the letter from Edison's Mr. Scholz to IMEA, dated February 21, 1986 (nearly a month before the IMEA comments), in which Edison reaffirmed its willingness to work with IMEA. As stated by Mr. Scholz in that letter (attached hereto), "[l]et me dispel any impression that we are unwilling to negotiate with IMEA."

There is simply no basis on which to conclude that Edison has refused to deal with IMEA.

(C) "Denial" of Transmission Services.

IMEA's final allegation focuses on Edison's alleged "effective" denial of transmission services to Geneva and Rock Falls. Edison has not, however, refused to provide transmission services to Geneva or Rock Falls, and is not using any alleged "monopoly over the transmission of power in its service area to foreclose competition." (IMEA comments, p. 7). Indeed, as noted earlier, Geneva is now receiving power and energy from Wisconsin Electric Power Company, power and energy which is being wheeled by Edison.

As the IMEA comments note, Edison filed with the Federal Energy Regulatory Commission a tariff for transmission services to Geneva and Rock Falls. The FERC did reject that tariff (incorrectly, in Edison's view) and ordered Edison to file a new tariff, with rates based on embedded costs and without a standby charge. Edison has filed a new tariff in accordance with that directive. Geneva and Rock Falls have objected to that tariff, principally because Edison has not guaranteed either that Geneva and Rock Falls will be afforded the same priority of curtailment that Edison provides its native load customers, or that it will without proper compensation construct additional transmission facilities to account for the future power needs of Geneva and Rock Falls. The issue raised by the cities is largely a theoretical one, since Edison currently owns and operates sufficient transmission capability to serve, without likely interruption, the loads of Geneva and Rock Falls that can reasonably be anticipated during the next few years.

Moreover, the antitrust laws have never been interpreted to require that a public utility - even one with monopoly power (which Edison does not concede it possesses here) - make its investment capital available to fund expansion of transmission facilities for the benefit of entities

in the position of Geneva and Rock Falls. At most, the antitrust laws require only that capacity in existing facilities not needed to provide adequate service to native load customers be made available at compensatory rates and on terms and conditions filed with, and subject to review by, the FERC. Otter Tail Power Co. v. United States, 410 U.S. 366, 375 (1973). In Otter Tail, the Court interpreted the lower court's order requiring wheeling as being subject to the condition that the transmission ordered not impair the wheeling utility's ability to render adequate service to its own customers. Id. at 381-82. See also, Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977) (antitrust laws do not require even an "essential facility" to be shared if such sharing would inhibit the owner's ability to serve its customers adequately); South Texas Project and Comanche Peak License Conditions, described in the following paragraph.*/ In any event, there is no question as to Edison's willingness to offer same priority transmission service and to build additional transmission facilities when needed to serve Geneva and Rock Falls. The only question is one of proper compensation for the service and any required new facilities.

Finally, of course, IMEA, Geneva and Rock Falls will be entitled to a full hearing at the FERC on the issues they have raised in connection with Edison's filing. The FERC is fully capable of exploring and resolving issues such as the quality of service to which wheeling customers are entitled under an embedded cost rate. Issues relating to rates for and reliability of transmission services are uniquely within the expertise of the FERC, as both the NRC and the Department of Justice have long recognized. For example, the License Conditions applicable to the South Texas Project and the Comanche Peak Station, negotiated in

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*/ Those License Conditions recognize that the required transmission services must be reasonably available from a technical standpoint, and are not required where they might unreasonably impair system reliability. Likewise, any facilities needed to meet the future needs of wheeling customers must be paid for by those customers, and need not be constructed where such construction is infeasible or might unreasonably impair system reliability or emergency transmission capacity. See, STP License Conditions I.B.(4); Comanche Peak License Conditions 3.D.(2)(j)(a).

the context of an extensive OL antitrust review with the participation of both the NRC Staff and the Department of Justice, provide that the rates to be charged for transmission services required under the License Conditions shall be subject to the regulatory agency(ies) having jurisdiction thereof, i.e., the FERC and/or the appropriate state agency. See, South Texas Project License Conditions, I.B.(3) (NRC Dkt. Nos. 50-498A, 499A); Comanche Peak Station License Conditions, 3.D.(2)(i) (NRC Dkt. Nos. 50-445A, 446A). Consequently, for the NRC to hold a hearing on such issues would be fruitless and needlessly duplicative of proceedings already underway at the FERC.

(D) Conclusion.

The facts surrounding IMEA's allegations compel the conclusion that Edison has not acted in contravention of the antitrust laws or the policies underlying those laws. Edison has not discriminated against Geneva or Rock Falls, but has offered to deal with them on the same terms as its other municipal customers. Edison has not refused to sell power to IMEA but has consistently stated its willingness to negotiate with IMEA. Negotiations with individual IMEA members were conducted at the request of those members. Edison has filed an embedded cost transmission services tariff with the FERC, and that agency is conducting proceedings to determine the terms and conditions under which Edison must provide transmission services to Geneva and Rock Falls. Consequently, an antitrust review by the NRC in connection with the Byron and Braidwood OL proceedings is not warranted, since Edison has not acted in an anti-competitive manner.

2. IMEA has not Demonstrated any Nexus Between its Antitrust Allegations and Operation of Byron and Braidwood

Even if the facts supported an indication of anti-competitive behavior, no antitrust hearing would be appropriate in connection with the Byron-2 and Braidwood OL proceedings because there is no "nexus" between operation of either station and the antitrust allegations made by IMEA. Under Section 105(c)(5) of the Atomic Energy Act, 42 U.S.C. §2135(c)(5), it is incumbent upon a party seeking an OL antitrust review to establish how "the activities under the license would create or maintain a situation inconsistent with the antitrust laws." (Emphasis added). The Commission has long recognized that the Atomic Energy Act "does not

authorize an unlimited inquiry into all alleged anti-competitive activities in the utility industry," and that the underscored words represent the "inherent boundaries" within which Congress intended to circumscribe OL antitrust reviews. Louisiana Power and Light Company (Waterford Unit 3), CL1-73-25, 6 AEC 619, 620 (1973). In Waterford, the Commission, reviewing petitions to intervene filed with a Licensing Board, concluded that "alleged anti-competitive practices - however serious - which have no substantial connection with the nuclear facility, are beyond the scope of antitrust review under the Atomic Energy Act." (Id. at 621). Unless the "overriding requirement" that a showing of "reasonable nexus between the alleged anti-competitive practices and the activities under the . . . license" is met, "all or part of the proceeding should be summarily disposed of." (Id.) In a passage directly relevant to IMEA's principal allegation relating to wheeling, the Commission further concluded that under the "substantial connection" standard,

> Denial of access to transmission systems would be more appropriate for consideration where the systems were built in connection with a nuclear unit than where the systems solely linked non-nuclear facilities and had been constructed long before application for an AEC license.

(Id.) In this case, the transmission facilities which Geneva and Rock Falls allege are necessary to provide wheeling and to which they allege (incorrectly, as we have shown) they have effectively been denied access, were not constructed in connection with the Byron or Braidwood Stations.

The Act's strict "nexus" requirement has been consistently adhered to since Waterford, and was most recently reaffirmed by an Appeal Board panel in Florida Power & Light Company (St. Lucie-2), ALAB-665, 15 NRC 22 (1982). In that case, the Appeal Board specifically rejected the argument, similar to that made by IMEA, that the Commission "can take the licensing of [a nuclear] plant as the occasion for remedying the anticompetitive situation, despite the fact that the nuclear power plant has no influence on that situation." 15 NRC at 34. In St. Lucie, the Appeal Board affirmed a Licensing Board's denial of a petition to intervene in a construction permit antitrust review proceeding, on the grounds that the petitioner had failed to explain "how the activities under the . . . license will have an

anti-competitive effect on [petitioner's] electric generating facility." (Id. at 24). The petitioner had alleged that, through a prior settlement agreement with other parties, Florida Power & Light Co. ("FPL") had reserved to itself "excessive discretionary latitude" to deny petitioner (and others similarly situated) "access to FPL's transmission grid," and that this adversely affected petitioner's ability to compete with FPL in the sale of electric power. (Id. at 26).

The Appeal Board reviewed Commission and Appeal Board precedent on the purpose of the limitations on antitrust reviews contained in Section 105(c)(5), noting that in Detroit Edison Co. (Fermi-2)*/ it concluded that "the Commission's writ to enforce the antitrust laws does not run to the electric utility industry generally," and that "the preservation and encouragement of competition in the electric power industry through 'fair access to nuclear power' is the principal motivating consideration underlying Section 105c . . ." (Id. at 28-29). With that background, the Appeal Board concluded that lacking from petitioner's allegation of denial of access to FPL's transmission system was the "overriding requirement" of a "meaningful tie between the activities under the license (here, operation of St. Lucie 2) and the anti-competitive situation (in this case, FPL's allegedly monopolistic control over the transmission of electric power in southern and eastern Florida)." (Id. at 31).

Moreover, the Appeal Board rejected as unpersuasive the argument that Section 105c does not require a nexus with the facility, but only with the license under which the facility will operate, and the "license takes into account FPL's entire transmission grid." The Appeal Board concluded instead that "the licensed activities must play some active role in creating or maintaining the anti-competitive situation . . . . [T]he nuclear power plant must be an actor, an influence, on the anti-competitive scene." (Id. at 32). The proper focus must be, the Appeal Board ruled, "on what way [petitioner] claims operation of St. Lucie 2 will harm it competitively, not whether access to FPL's grid is an appropriate form of relief to remedy a Sherman Act, Section 2, violation." (Id. at 33, emphasis added). The defect in the position of petitioner in St.

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*/ ALAB-475, 7 NRC 752 (1978).

Lucie, as is also the case with IMEA's position here, is that "[t]here is simply no explanation by [petitioner] of how FPL's bringing on line St. Lucie 2 will act to maintain or entrench FPL's alleged transmission monopoly." (Id.)

Concluding, the Appeal Board stated:

> In essence, P&W's argument reduces to the proposition that, where an applicant for a nuclear power plant enjoys a monopoly position, this Commission can take the licensing of the plant as the occasion for remedying the anticompetitive situation, despite the fact that the nuclear power plant has no influence on that situation. That position reads out the nexus requirement of Section 105c(5) in its entirety. Whatever may be the merits, as a matter of antitrust policy, of P&W's position that this Commission should exercise such wide-ranging antitrust authority, Congress has not seen fit to extend NRC's antitrust jurisdiction that far. (Id. at 33-34).

3. IMEA Has Not Demonstrated the Requisite "Changed Circumstances."

Finally, even if the facts supported an indication of anti-competitive behavior having a "nexus" with the Byron or Braidwood Stations, no OL antitrust review would be appropriate since there has been no change in relevant circumstances since the construction permit review. It is well-established that the NRC does not have an unlimited mandate to enforce the antitrust laws in OL proceedings. In the South Texas Project*/ proceeding, having reviewed both the statutory language and the legislative history of Section 105, and the Commission's view of its own "special responsibilities," the Commission concluded that the "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," and that an OL review is of a "more limited scope" than a construction permit review.

As the Commission initially recognized in South Texas, Section 105(c)(2) of the Atomic Energy Act, 42 U.S.C. §2135(c)(2), governs the question of antitrust review at the

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*/ Houston Lighting & Power Co., et al., CLI-77-13, 5 NRC 1303 (June 15, 1977).

OL stage for those reactors which, like Byron and Braidwood, have undergone antitrust review in connection with a construction permit application. Specifically, Section 105(c)(2) "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." 5 NRC at 1310 (emphasis added). As the Commission elaborated in the Virgil C. Summer proceeding,*/the holder of a construction permit is not subject to a second antitrust review at the operating license stage unless each of the following three conditions are met. First, "significant changes" must have occurred since the construction permit antitrust review. Second, these changes must be causally attributable to the activities or proposed activities of the licensee. Third, the changes must have antitrust implications that would be likely to warrant Commission remedy. 13 NRC at 871, 872.

IMEA has failed to demonstrate any way in which Edison's position with respect to either wholesale service, transmission services to Geneva or Rock Falls, or the Byron and/or Braidwood projects, has significantly changed since 1974. Thus, the second element of the Summer test, that the change must have been caused by the licensee, has not been demonstrated. In fact, Edison's position has not altered. Edison was not providing transmission services for either Geneva or Rock Falls in 1974 or at any time thereafter, since it had not been requested to provide such services. Nor, as demonstrated earlier, is Edison in violation of the commitments made in connection with the construction permit antitrust review. It is not sufficient, under Section 105(c)(2), to conclude simply that circumstances or conditions unrelated to the activities of the licensee have significantly changed since the construction permit review. It follows that changed conditions or circumstances brought about by a third party's desire to change its manner of doing business is likewise not sufficient to constitute a "significant changes" finding. Instead, the statute specifically requires, and the Commission has recognized, that the "significant changes" must be those which have occurred

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*/ South Carolina Electric & Gas Company and South Carolina Public Service Authority (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

in the licensee's activities or proposed activities. In South Texas, for instance, the license applicant was alleged to have disconnected its facilities from other systems with which it had been interconnected at the time of the construction permit review, and for many years prior thereto. Similarly, in Summer, the license applicants had presented and actively sought a change in territorial legislation. Here, no comparable change in activities by the license applicant is alleged, and the statutory precondition for seeking the Attorney General's advice and conducting an OL review is not met.

Conclusion

It is apparent that Edison has not engaged in any anti-competitive activity to the injury of Geneva, Rock Falls, IMEA or any other IMEA member. None of the acts of which IMEA complains would be proper subjects of inquiry by the NRC in connection with the OL proceedings regarding Byron or Braidwood. Any relief to which IMEA may be entitled is readily available from the FERC. Accordingly it would be inappropriate to conduct an OL antitrust review, and unnecessary to request the advice of the Attorney General.

Very truly yours,

David M. Stahl

DMST:hr
Enclosure

BY FEDERAL EXPRESS

cc: Mr. M. S. Lieberman

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February 21, 1986

Mr. Gary L. Zimmerman
General Manager
Illinois Municipal Electric Agency
108 Wilmot Road
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Deerfield, Illinois 60015

Dear Mr. Zimmerman:

This is in response to your letter of February 7, 1986. Let me dispel any impression that we are unwilling to negotiate with IMEA. We have never conveyed, nor intended to convey, to any of your members any reluctance to negotiate with you should that be their choice. In fact, Commonwealth Edison Company is very much interested in working with IMEA if there is a basis for doing so. With respect to your members who are our customers, we have been dealing with them directly by mutual agreement. Thus, we have not been aware of any role for IMEA in these negotiations. On the other hand, we have had no dealings with your other members, and should you wish to work with us on their behalf, please let me know so that we may arrange a time to meet.

Sincerely,

David Scholz

David A. Scholz
Manager of Corporate Planning