

SEP 17 1986

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

FROM: Jesse L. Funches, Director
Planning and Program Analysis Staff
Office of Nuclear Reactor Regulation

SUBJECT: OPERATING LICENSE ANTITRUST ANALYSIS OF THE
BYRON STATION, UNIT 2

Enclosed for your signature is a finding of no significant changes pursuant to the operating license antitrust review of Unit 2 of the Byron Station. This finding is based upon an analysis by the antitrust staffs of PPAS and OGC (after consultation with the Department of Justice), which concludes that a "no significant change" finding is warranted. The staff analysis is enclosed as background information.

This is an initial finding which will be noticed in the Federal Register, thereby providing the public the opportunity to request a reevaluation of your finding. If there are no requests for reevaluation, the finding will become final, and the operating license antitrust review of Unit 2 of the Byron Station will have been completed.

Jesse L. Funches, Director
Planning and Program Analysis Staff
Office of Nuclear Reactor Regulation

Enclosure:
As stated

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BYRON STATION, UNIT 2
OPERATING LICENSE ANTITRUST REVIEW
FINDING OF NO SIGNIFICANT CHANGE

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 the issuance of the Byron construction permits to Commonwealth Edison Company (CECO), the staffs of the Planning and Resource Analysis Branch, Office of Nuclear Reactor Regulation and the Office of the General Counsel, 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 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 Illinois, as well as events relevant to the Byron construction permit review and subsequent antitrust reviews of additional nuclear units owned by Commonwealth Edison Company. In addition, the staff has considered comments from interested parties in the state of Illinois and CECO concerning CECO's business relations with its customers and competitors.

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

"Commonwealth Edison Company (CECO) has undergone an antitrust review for each of its four nuclear plant applications. In 1976, staff reviewed CECO's CP application for the Carroll County plant and the significant change review associated with the LaSalle OL application. The significant change evaluations associated with the 1983 Byron No. 1, OL application, and the 1984 Braidwood No. 1, OL application are the most recent staff reviews. The Byron No. 1, OL review concluded that no significant changes had occurred in the applicant's activities except that the City of Winnetka had petitioned the U.S. Court of Appeals for the District of Columbia for the review of a FERC opinion. Since that review, the FERC has approved the settlement agreement between Winnetka and CECO, resolving all outstanding disputes. The Braidwood significant change review, covering changes in CECO's activities since the Byron No. 1, OL review, found no changes in the applicant's activities or proposed activities which could be considered significant from an antitrust standpoint and, therefore, did not recommend a formal antitrust review.

"Staff has not identified any significant negative competitive activities by CECO since the Byron No. 1 construction permit review that would warrant remedy by the NRC. Consequently, staff recommends that a no significant change determination be made pursuant to the application for an operating license for Unit 2 of the Byron Station."

Based upon the staff's analysis, it is my finding that there have been no "significant changes" in the licensee's activities or proposed activities since the completion of the previous antitrust review in connection with the construction permit.

Original Signed by
H. R. Denton

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

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BYRON STATION, UNIT NO. 2
COMMONWEALTH EDISON COMPANY

DOCKET NO. 50-455A

FINDING OF NO SIGNIFICANT ANTITRUST CHANGES

BYRON STATION, UNIT NO.2
OPERATING LICENSE SIGNIFICANT CHANGE ANALYSIS

A. Introduction

Section 105c(2) of the Atomic Energy Act of 1954 (the Act) as amended, provides for an antitrust review of an applicant for an operating license if significant changes in the applicant's activities have occurred since the antitrust review performed at the construction permit stage. Authority to make significant change determinations has been delegated to the Director, Office of Nuclear Reactor Regulation (NRR).

The Nuclear Regulatory Commission (NRC) in a Memorandum and Order (CLI-80-28) dated June 30, 1980,* set forth three criteria requisite to the determination of a "significant change." These criteria are:

1. the change or changes must have occurred since the 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.

In connection with the Byron No. 2 (Byron) operating license (OL) application, the staff** has reviewed the activities and proposed activities of the applicant, Commonwealth Edison Co. (CECO), since the most recent review in connection with the operating license for Braidwood Unit No. 1, Docket No. 50-456A. It is staff's conclusion that no "significant changes" have occurred since that review.

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

** The Planning and Resource Analysis Branch, Planning and Program Analysis Staff, Office of Nuclear Reactor Regulation and the Office of the General Counsel, in consultation with the U.S. Department of Justice.

B. Background

On February 23, 1973, CECO submitted to the Atomic Energy Commission (the NRC's predecessor agency) its application to construct four nuclear units, one two-unit plant near Byron, Illinois and one two-unit plant near the Town of Braidwood, Illinois. Prior to the Byron-Braidwood application, CECO received construction permits for the LaSalle County Units Nos. 1 and 2, the Dresden Units Nos. 1, 2 and 3, the Quad Cities Units Nos. 1 and 2, and the Zion Units Nos. 1 and 2. Only the LaSalle units were subject to a construction permit (CP) antitrust review under Section 50.33a of the Act. The other three plants were licensed prior to the promulgation of the Act's antitrust provision and were exempted from retrospective review.*

Subsequent to the staff's CP antitrust review for the Byron and Braidwood units, the staff conducted an additional antitrust review and three "significant change" analyses. The antitrust review was triggered by CECO's construction permit application for the Carroll County Nuclear Plant. The significant change analyses were conducted in response to applicant's requests for operating licenses (OL) for the LaSalle Units, Byron Unit No. 1 and Braidwood Units Nos. 1 and 2.

The results of staff's prior reviews are summarized below.

C. Prior Reviews

On November 3, 1970, CECO filed an application with the Atomic Energy Commission requesting permission to construct the LaSalle Nuclear Plant. This facility consisted of two nuclear generating units located near Seneca, Illinois. On December 27, 1971, the Attorney General rendered interim advice with respect to the LaSalle application. This advice

* In December of 1970, the Act was amended to require an antitrust review of applicants for construction permits.

stated that CECO's activities under the proposed license would raise "certain questions" with respect to the antitrust laws. These questions related to three practices in which CECO was allegedly engaged:

1. "Price squeeze" or maintaining a discriminatory differential between wholesale and retail rates,
2. "wholesale freeze" or deliberately restricting sales of electric power, at wholesale rates, to customers already under contract to CECO, and
3. refusal to allow municipal systems the opportunity to participate in the ownership of the LaSalle facility.

The Attorney General's letter concluded that efforts then being made to resolve such questions could preclude the need for an antitrust hearing.

On December 20, 1972, the Attorney General formally advised the Commission that an antitrust hearing would not be necessary if CECO agreed to certain commitments (license conditions)* designed to eliminate specific provisions in existing rate schedules. These provisions** had the effect of restraining retail competition in the area and impeding the efforts of wholesale customers to secure alternate sources of bulk power. However, the commitments did not extend to the issues of "price squeeze"

* The license conditions were identified in a letter dated October 6, 1972 from Hubert Nexon, Vice President of CECO, to Joseph Saunders of the Justice Department and were subsequently attached to each construction permit.

** CECO's wholesale rate schedule No. 78 restricted the territory in which municipalities could serve, prevented partial requirements customers from crediting owned generating facilities against monthly billing demand and arbitrarily limited increases in the municipals' customer demand. Riders Nos. 5 and 12 to the rate schedule prohibited customers from operating power production facilities in parallel with CECO and prohibited reselling wholesale power to third party distributors.

and "wholesale freeze." With reference to these additional areas of anticompetitive behavior, the Attorney General stated:

"We [the Justice Department] do not believe that either of these questions would warrant an antitrust hearing at this time. The facts relevant to the "price squeeze" allegation have been put before the FPC [Federal Power Commission, predecessor agency to the Federal Energy Regulatory Commission], and it is, at least, arguable that the Commission has sufficient authority to remedy any demonstrated injury resulting from price squeeze.* The applicant's announced policy of not taking on additional wholesale customers does not appear to have had any practical impact [upon municipalities interested in establishing a distribution system]."

The Attorney General's advice letter also addressed the issue of municipal participation in the LaSalle Units and concluded that CECO's willingness to negotiate in "good faith" for partial ownership with interested parties, coupled with the likelihood of CECO's future application for licenses for additional nuclear facilities (and the renewed antitrust scrutiny attending the Commission's licensing reviews) obviated the need for an antitrust hearing in the LaSalle application.

The Cities of Batavia, Geneva, Naperville, Rock Falls and St. Charles, Illinois (the Cities) requested permission to intervene in the LaSalle CP antitrust review. The municipalities sought commitments beyond those provided in the proposed license conditions, i.e., the Cities requested that the license commitments directly address the issues of unit participation and "price squeeze."

The Commission issued construction permits for the LaSalle units; however, in light of the ongoing antitrust hearing the following caveat was appended:

* CECO's municipal wholesale customers (the Cities, the Village of Winnetta, and the City of Rochelle) had raised these issues in a proceeding on a proposed increase in a second intervention that was initiated when CECO filed for a second increase in August 1974.

"...the granting of this permit is without prejudice to any subsequent licensing action, including imposition of appropriate conditions, which may be taken by the Commission as a result of the outcome of an antitrust hearing."

While the LaSalle antitrust review was underway, the staff initiated a second antitrust review which was triggered by CECO's February 23, 1973 application for construction permits for the proposed Byron and Braidwood Nuclear plants. This second review produced commitments from CECO which, in the view of the Attorney General, precluded the need for an antitrust hearing.

The Department of Justice noted in its March 4, 1974 advice letter that the issues of "price squeeze", "wholesale squeeze", and unit participation were issues of continuing antitrust significance.

However, at the time, the FPC had not rendered a decision on the issue of "price squeeze".* As for the other two issues of concern, CECO (1) agreed to eliminate the restrictive provisions in its wholesale tariff which perpetuated the "wholesale freeze" and (2) agreed to accept a condition on the Byron/Braidwood licenses which extended the opportunity to participate in the LaSalle units to those municipals systems which had indicated an interest in participating. Based on CECO's Byron commitments and the Cities' generalized allegations in the LaSalle proceeding, the Atomic Safety and Licensing Board (ASLB) denied the LaSalle intervention petition. A subsequent amended petition submitted by Cities was also denied.**

* The FPC subsequently ruled that it lacked the jurisdiction to consider the "price squeeze" issue. This ruling was overturned by the Supreme Court's Conway decision, which remanded the issue to the FPC for resolution of the "price-squeeze" issue.

** In November of 1976, the cities filed a formal antitrust complaint against CECO in the U.S. District Court for Northern Illinois.

CECO later filed, under a joint venture agreement, an application for a construction permit for the Carroll County Station Units 1 and 2. On July 28, 1976, the Attorney General advised the Commission that licensing the Carroll County Units would not create a situation inconsistent with the antitrust laws. The Attorney General's advice letter was published in the Federal Register on August 9, 1976. The results of the previous antitrust reviews related to construction of LaSalle and Byron/Braidwood were described (including CECO's agreement to abandon certain practices) earlier in this analysis. No petitions for leave to intervene were received.

Although the antitrust review of the Carroll County facility was completed, to date, no construction permit has been issued. The commercial operating date for Carroll County has been postponed to the 1993-1994 timeframe.* Because of this slippage in service date, CECO will necessarily be required to undergo a new CP antitrust review.

On August 31, 1976, CECO tendered its application for an operating license for LaSalle. This filing triggered the staff's significant change review of the Applicant's activities since issuance of the LaSalle construction permit. The results of the staff's analysis were presented in a memorandum dated September 1, 1978.

The analysis identified several changes which had occurred in CECO activities since the issuance of the CP license. The activities, which were identified earlier in this analysis, were highlighted. The LaSalle report concluded that none of the changes were inconsistent with the antitrust laws. The report further concluded that the changes, which were

* Letter from T.R. Tram, (CECO), to J. Saltzman (NRC) dated December 1, 1980.

most salient, were initiated in accordance with the antitrust license conditions affixed to the LaSalle and Byron/Braidwood CP's.

It was noted that, in complying with the LaSalle CP commitments, CECO had revised certain provisions of its wholesale "Rate Schedule No. 78," had entered into new wholesale contracts with existing customers and had offered to provide firm power service to two smaller utilities. The LaSalle "significant change" analysis concluded that the changes which had occurred did not suggest the need for a second review.

On January 13, 1984, the Commission published its significant change analysis with respect to CECO's application for an operating license for Byron Unit No. 1. This analysis reiterated the issues raised during the LaSalle CP and OL reviews and Carroll County and Byron CP reviews. Also identified and reviewed were issues raised and litigated in the U.S. District Court and before the FERC. The analysis concluded that "... since the completion of the Byron No. 1 construction permit antitrust review..." the changes in CECO's activities "...do not represent significant changes of an antitrust nature..." and, therefore, do not warrant a formal antitrust review.

Staff's significant change analysis in Braidwood identified several changes since the CP review; however, staff has concluded that none of these changes would warrant a remedy by the NRC. These changes are summarized below.

In compliance with a July 12, 1985 order of the Illinois Commerce Commission, CECO modified its residential rate schedule to provide rates which more closely reflect the actual cost of service. One result of this modification has been to eliminate special end-use rates such as those charged to residences with solar assisted electrical devices. Also, the differential between non-summer and summer rates was increased. Commercial and industrial schedules likewise have been altered in order to better reflect the cost of services.

The Braidwood OL review also updated the status of the Cities' suit against CECO before the FERC regarding the CECO requested increases for wholesale service under Rate 78. Most of the issues of concern to the Cities and Rochelle, Illinois were settled on October 2, 1984, when the FERC accepted a joint agreement between the Cities and CECO. This settlement resulted in the applicant's refunding to the Cities a portion of the revenues charged under Rate 78 which had become effective, subject to refund, on October 31, 1983.

An ongoing dispute between CECO and the Village of Winnetka regarding concerns similar to those of the Cities was settled on June 20, 1985 when CECO filed with the FERC, a proposed agreement with Winnetka. That agreement is currently under review by FERC and, upon approval, will resolve all outstanding disputes between CECO and Winnetka. The Braidwood review concluded that of the changes which had occurred since the Byron No. 1 OL review, none appear to be "significant changes" (in an antitrust context) and, therefore, no formal antitrust review was recommended.

D. Changes Since The Braidwood No. 1 Review

The staff's analysis of changes since the Braidwood significant change review has disclosed no changes that would suggest anticompetitive behavior by CECO.

E. Summary and Conclusion

Commonwealth Edison Company (CECO) has undergone an antitrust review for each of its four nuclear plant applications. In 1976, staff reviewed CECO's CP application for the Carroll County plant and the significant change review associated with the LaSalle OL application. The significant change evaluations associated with the 1983 Byron No. 1 OL application,

and the 1984 Braidwood No. 1, OL application are the most recent staff reviews. The Byron No. 1, OL review concluded that no significant changes had occurred in the applicant's activities except that the City of Winnetka had petitioned the U.S. Court of Appeals for the District of Columbia for the review of a FERC opinion. Since that review, the FERC has approved the settlement agreement between Winnetka and CECO, resolving all outstanding disputes. The Braidwood significant change review, covering changes in CECO's activities since the Byron No. 1 OL review, found no changes in the applicant's activities or proposed activities which could be considered significant from an antitrust standpoint and, therefore, did not recommend a formal antitrust review.

Staff has not identified any significant negative competitive activities by CECO since the Byron No. 1 construction permit review that would warrant remedy by the NRC. Consequently, staff recommends that a no significant change determination be made pursuant to the application for an operating license for Unit 2 of the Byron Station.