In the Matter of Consumers Power: Applying the Antitrust Laws to the Nuclear Electric Utility Industry

Andrew Popper

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev

Part of the Antitrust and Trade Regulation Commons, Energy and Utilities Law Commons, and the Environmental Law Commons
In the Matter of Consumers Power: Applying the Antitrust Laws to the Nuclear Electric Utility Industry*

ANDREW FREDERIC POPPER**

I. INTRODUCTION

On July 18, 1975, the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission rendered the first decision pursuant to Section 105(c) of the Atomic Energy Act of 1954, as amended in 1970.\(^1\) This section is unique in that it requires that every applicant for a license or permit to construct or operate any nuclear power facility undergo pre-licensing antitrust review. This review is intended to ascertain whether the granting of the requested license or permit will create or maintain a situation which is inconsistent with the antitrust laws. Accordingly, the United States Nuclear Regulatory Commission Antitrust Counsel, the Department of Justice Antitrust Division Chief in charge of Regulated Industries, and the public were invited to file petitions if those parties believe that the granting of such license or permit will create inconsistencies with the antitrust laws.

The July 18th decision came as a result of petitions filed with the Nuclear Regulatory Commission [hereinafter N.R.C.] by the Staff Counsel, the Department of Justice, and twenty-nine utilities [hereinafter “intervenors”] all alleging that the granting of the requested permit would create inconsistencies with the antitrust laws. The last of these petitions was filed in October of 1971. Hundreds of thousands of pages of documents were exchanged in the discovery process, and almost 15,000 pages of testimony were recorded at the hearings. The case actually began in early 1969, when Consumers Power Company, the applicant, filed application for permits to construct and operate two nuclear units, known as Midland I and II, with the combined generating capacity of over 1,300 megawatts (MW).

\(*\) Much of the research and writing in this article was prepared by Professor Popper in his master's program at George Washington University, National Law Center, and was in part presented in his thesis study, “The Competitive Implications of Section 105(c) of the Atomic Energy Act — In the Matter of Consumers Power,” May 10, 1976, George Washington University, Washington, D.C.

**Motor Carrier Lawyers Association Chair in Transportation Law, University of Denver; Assistant Professor of Law, University of Denver; B.A., Baldwin Wallace College (1970); J.D., DePaul University School of Law (1973); LL.M., George Washington University National Law Center (1976).

As the case developed, and continues to develop, the parties divided into two groups, with the applicant utility on one side, and the N.R.C., Department of Justice, and intervenors on the other.

This article discusses *In the Matter of Consumers Power Co., Midland Plant, Units I and II* in a historical sense, from an overall statutory standpoint, a technical standpoint, and a legal perspective. No attempt is made to cover all the ramifications of the decision. Indeed it may take years to ascertain what the ramifications are as a result of this decision.

The decision is a landmark one, for it sets out for the first time standards to be applied in an administrative-regulatory pre-licensing antitrust review. Such reviews may soon be commonplace in many federal agencies, as they provide an excellent opportunity to arrest in their incipiency anticompetitive practices which will later become, or already are, injurious to the economy and the public interest.

II. STATEMENT OF THEORY

The economic market structure of the electric utility industry reflects a two-fold pattern: a trend toward increased concentration and increased intersystem coordination, and increased problems in the maintenance of organizational diversity. Meaningful competition can exist if both of these patterns are maintained and controlled. Increased concentration will place demands on the competitive structure and destroy that structure if there is no effective enforcement of the

---

2. N.R.C. Doc. 50-329A and 50-330A; LBP; NRCI 75-7 at 29 (1975).

3. I appeared as co-counsel for the Atomic Energy Commission in the *Consumers* proceeding. (The Atomic Energy Commission ceased to exist as a regulatory agency in 1974. The regulatory responsibilities were assumed in that year by the Nuclear Regulatory Commission pursuant to the Energy Reorganization Act of 1974 (40 F.R. 8774, March 3, 1975)).

A considerable portion of the strategy, trial work, and brief writing was done by Mr. Robert Verdisco, N.R.C. Staff Counsel, Antitrust Section. His ideas and leadership were an inspiration. Extensive reference is made to pleadings prepared by the N.R.C. staff, by the Staff of the Public Counsel Section of the Department of Justice, and by the intervenors in the *Consumers* case. I extend my deepest appreciation to the various individuals who, with Mr. Verdisco and me, filed the hundreds of pages of pleadings and memoranda which were used in the case and in this article.

It should be noted at the outset that this document is by no means an endorsement or criticism of nuclear power as a safe means of generation. I am neither qualified nor in a position where I can assess safety, reliability, or other health hazards which may be related to nuclear power electric generation. For the purposes of this article, nuclear power is viewed as "special," not because it is environmentally sound or ecologically advisable, but because it represents the most modern and most expensive component in the United States arsenal of electric power generation.

Any criticism of any individuals is intended in a purely professional or academic sense. While I am highly critical of the decision in the *Consumers* case, such evaluations are in no way intended as personal condemnations of individuals or of the Consumers Power Company. Indeed, the Federal Administrative Law Judges who wrote the opinion faced an almost impossible task with dignity and tremendous energy.

I am solely responsible for the contents of this article. The opinions are mine, and not those of the Nuclear Regulatory Commission, or any of its staff. I take full responsibility for all statements herein.
antitrust laws. This enforcement should not be directed at the prevention of concentration, for concentrated and coordinated systems are essential to maintain the necessary economies which make large unit power generation possible. Rather, the enforcement should be directed toward preserving a diverse organizational structure which in turn will guarantee yardstick competition, and actual competition in the wholesale bulk power market. The decision in In the Matter of Consumers Power, Midland Units I and II\textsuperscript{a} is a step away from the concepts enumerated above, is inconsistent with the ends of a competitive market, and has the potential of legitimating non-competitive oligopoly for various regulated industries.

III. HISTORICAL ANALYSIS

On July 18, 1975, the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission decided In the Matter of Consumers Power Co.,\textsuperscript{1} a monumental antitrust decision which is discussed at length in the following sections. Briefly, the Board held that a dominant entity in a given geographic market which controls a scarce and unique coordinating medium (all high voltage transmission facilities in lower Michigan) has no obligation to participate in coordinated operation with dependent smaller entities which rely on such coordination for their continued survival.\textsuperscript{2} The Board also held that such coordination could not be directed, without taking into account the net benefits which could be derived by the dominant entity.\textsuperscript{3} Further, the Atomic Safety and Licensing Board found that a nexus had to be established between activities sought to be licensed (meaning the operating or generating facility) and the alleged inconsistencies with the antitrust laws, before any relief could be considered. The question which must be discussed is whether these formulations are consistent with established law and principle.

The promise of the antitrust laws has always been open to public question.\textsuperscript{4} The very earliest criticism of the application of those laws came from the muckrakers who sold their "sordid stories [not] just for their shock value, but that they would be filled with the desire to do something about corrupt bosses, sweated labor, civic decay, monopolistic extortion."\textsuperscript{5} Men like Walter Lippman voiced realistic criticism of those charged with enforcement of the antitrust laws:

They [the trustbusters] would make impossible any deliberate and constructive use of our natural resources, they would thwart any effort to form great industries into coordinated services, they would ... lay a premium on the strategy of industrial war.\textsuperscript{6}

\textsuperscript{a} N.R.C. Doc. 50-329A and 50-330A; LBP; NRCI 75-7 at 29 (1975).
1. N.R.C. Doc. 50-329 and 50-330A; LBP-75-39; NRCI 75-7 (1975).
2. \textit{Id.} at 112-14.
3. \textit{Id.}
4. \textit{WILSON'S PUBLIC PAPERS,} Inaugural Address of March 4, 1913.
The era of the 1890's was one of Progressivism in a very narrow sense. However, the compelling political reality was well recognized. It involved "the fear that great business combinations, being the only centers of wealth and power, would be able to 'Lord it over' all other interests and thus . . . put an end to traditional American democracy."

The resentment of the trusts was greatest at the level of the small entrepreneur, who was plagued by the realization that these trusts effectively destroyed any potential of growth beyond the single level of retail, wholesale, or general distribution. Such concerns were half-heartedly taken up as a campaign issue by President Woodrow Wilson in 1912, who declared a soft war on the trusts by announcing "a crusade against powers that have governed us—that have limited our development—that have determined our lives—that have set us in a straitjacket to do as they please. . . . This is the second struggle for emancipation. . . . If America is not to have free enterprise, then she can have freedom of no sort whatsoever."

President Wilson was not particularly successful in his efforts. Indeed, there is reasoned speculation that the market crash of 1929 was in part a result of that failure to enforce the antitrust laws and insure actual competition.

To understand the market philosophy in the Consumers Power case, it is instructive to review American business psychology in the period between 1910 and 1929. "Historically, individual enterprise has been at a premium. For the many tasks that cannot be handled by individuals, Americans have preferred to found voluntary group associations." Likewise, local governments have been preferred over the federal government for control purposes. This same fear of size and authority in government was evident regarding "big business."

Such fears were not without some statistical basis. A large eastern railroad corporation had Boston offices which employed 18,000 people and paid top employees in excess of $35,000, while the whole of the Commonwealth of Massachusetts employed less than 7,000 people, and had a salary ceiling of $6,500. Gross receipts for the Commonwealth were 18% of those of the railway.

These statistics were easily understood by the voting population, and the desire for controlling dominant corporate entities in various markets became a common political rallying cry. Senator Robert La Follette carefully established the political hazards of dominance alone along with the negative economic consequences, a novel theory in this period.

10. R. Hofsteader, Age of Reform 229; see also, 42 Cong. Rec. 3450 (1908).
11. Id.
12. C.W. Elliot, American Contributions to Civilization 85-87 (1907).
A congressional investigation found, for example, that the Morgan Investment Corporation controlled 341 directorships in 112 major corporations, and had direct influence over $22,245,000,000 in aggregate corporate assets. This was three times the assessed value of all real and personal property in New England, or more than the total value of all property in the twenty-two states west of the Mississippi River. “[W]idespread and urgent fear of business consolidation and private business authority” resulted in a series of rulings by courts which were designed to check dominance, concentration, and oligopoly.

The decision in Consumers Power constitutes a variation from this history. It affirms the concept that efficiency which results in cost savings to the “public at large” by virtue of scaled economics is the primary goal of regulation, notwithstanding the impact that the efficient entity has had on competing entities within the same market. This was not the law in 1912, and it is not the law today.

Impact analysis of dominance does not, however, follow from the enforcement of the early antitrust laws. President Woodrow Wilson had “fabricated the New Freedom program . . . largely out of promises to destroy monopoly and restore free competition.” However, early politics of his administration prevented effective legislation, as was required to carry out such a promise. In late 1913, a coalition of progressive Republicans and later-day granger Democrats began a move toward the creation of an independent and forceful trade commission which would have rule-making and quasi-judicial powers, and which would be free to define and regulate restraints of trade outside of the Sherman Act. Congressmen toiled at length over the question of whether to define all restraints, or to generally outline the parameters of unlawful dominance. While President Wilson favored an exceedingly detailed act, such was wisely avoided and section five of the Federal Trade Commission Act (15 U.S.C. § 45(1)(a)) simply condemned all unfair methods of competition. Parenthetically, the most serious challenge to the bill was not by the vested trust interests, but rather from Samuel Gompers and the forces of organized labor. Gompers was appeased when a proposed amendment was introduced which read: “The labor of human beings is not a commodity or article of commerce. . . .”

15. R. Hofstader, Age of Reform 232-34; see also, supra note 13.
17. See Memorandum of J.F. Davis to Wilson, Dec. 27, 1913, Wilson’s Public Papers; Memorandum of Recommendations as to Trust Legislation by Joseph E. Davies, Commissioner of Corporations, Link, supra note 16.
19. It is well known, however, that the finest finance minds, among them Samuel Utermeyer, rushed to Washington to privately lobby against the bill. Link, supra note 16.
21. See Labor is Not a Commodity, 9 New Republic 112 (1916).
With the Federal Trade Commission Act, a new era of administrative decisional responsibility began. *Consumers Power* marks a deviation from this responsibility, notwithstanding specific legislative direction to the various atomic safety and licensing boards to follow section five of the Act.\(^{22}\)

Parenthetically, it is a minor historical aberration that Wilson signed the Federal Trade Commission Act. Indeed, "[h]ow the President was won over to the idea of a strong trade commission is nowhere evident."\(^{23}\) In its early years, the FTC was shown to be a toothless tiger "with soft gums, a plaintive mew, and an anemic appearance."\(^{24}\)

President Wilson was later evaluated as weak and uncommitted to the competitive model,\(^{25}\) and it was speculated that an inner distrust of free enterprise provoked him to sign a measure which had the potential to be meaningless.\(^{26}\) It is equally possible that President Wilson was frightened from his posture of economic reform by a depression that began in 1913 and continued through the 1916 election.\(^{27}\)

Regardless of why President Wilson signed the Act, and how the Commission gradually gained power, it is now history as well as legal precedent, that a dominant entity which refuses to participate in coordinated operations and refuses to allow access to a scarce resource, thus maintaining its dominance, has acted in a manner inconsistent with section five of the Federal Trade Commission Act. Until the *Consumers Power* decision, such conduct was sanctioned by courts or administrative bodies.

The desire to control single business dominance neither began nor ended with President Wilson. As the president who signed the Federal Trade Commission Act, he merits mention, since the *Consumers Power* decision is in many ways a section five case, as well as a §105(c) licensing hearing.\(^{28}\) Twenty years prior to the Federal Trade Commission Act, Governor Knute Nelson of North Dakota, began a campaign to revitalize, redefine, and supplement the then four-year-old Sherman Act.\(^{29}\) His cause was taken up by the Progressive Party, and particularly Henry Demarest Lloyd and David Waite.\(^{30}\)

Their purpose was to insure that the "new industrialism" would become an asset, creating new opportunity, or at a minimum, not destroying existing competitive markets. However, it would be naive to

\(^{23}\) *LINK*, supra, note 16, at 72.
\(^{24}\) N.Y. Times, Sept. 29, 1914.
\(^{25}\) *LINK*, supra note 16, at 74.
\(^{26}\) W.C. REDFIELD, WOODROW WILSON: AN APPRECIATION (Baker Collection, Library of Congress).
\(^{27}\) *LINK*, supra note 16, at 75.
\(^{28}\) 42 U.S.C. § 2135 (c).
argue that the "unifying theme of American history between 1885 and 1914... was a popular attack against corporate wealth." The social and political motivations of the drafters of the antitrust system involved controlled expansion, not suppression, of corporate power. Antitrust laws were as much a reaction to the urban-rural conflict as to the pure economic fears of Senator Clayton. Industrialism brought with it mass change, displacement, loss of familiar surroundings, and the antitrust laws were and are an attempt to regulate and control this inevitable growth. Accordingly, a factor that enters every antitrust decision must be: Will the challenged activity, practice, or situation alter economic trends in favor of a single entity at the expense of others who provide a buffer for the maintenance of an existing market? If so, then the activity requires a direct remedy.

The 1914 antitrust attitude of controlled expansion waddled through the 1920's growing slowly in definition of "unfair practice" and the "per se" doctrine. The 1930's and the New Deal brought out public sentiment regarding the necessity of regulation to create markets, rather than allowing natural forces the time to create competition and cost-efficiency. Historian A. A. Berle, Jr. stated the theory of increased regulation, including antitrust enforcement at the administrative level, thusly:

Only after the entire industry has been bankrupt, do inefficient plants actually begin to go out of business. This process may take fifteen or twenty years, during which time the capital, the labor, the customers, and the industry generally suffer from the effects of a disorganized and unsound condition.

The old economic forces still work and they produce a balance after a while. But they take so long to do it they crush so many men in the process that the strain on the social system becomes intolerable. Leaving economic forces to work themselves out as they now stand will produce an economic balance, but in the course of it you may have half of the entire country begging in the streets or starving to death.

The New Deal may be said to be merely a recognition of the fact that human beings cannot indefinitely be sacrificed by millions to the operation of economic forces accentuated by this factor of organization.

This sentiment was followed by the courts, though the historical perspective on the antitrust system remained constant. By 1939, the war economy had become vested, and more concern could be given to actual prosecution.

32. Id.
33. See, e.g., American Column & Lumber v. United States, 257 U.S. 377 (1921) and the following cases through 273 U.S. 392 (1927).
A series of protracted hearings in the early 1950's resulted in hundreds of section five decisions through the middle sixties. Since that time, no change in basic philosophy regarding expansion control and oligopoly has occurred. Entities which participate in maintenance of their oligopolistic position by denial of access to unique or scarce resources are generally prosecuted. It is only with the Consumers Power decision that a change may have taken place.

IV. THE REGULATORY SCHEME

A. Applicability of the Antitrust Laws

In the Matter of Consumers Power Company, Midland I and IIP was decided by a licensing board comprised of two federal administrative law judges, Hugh Clark, chairman, and J. Venn Leeds, Jr., member. The review took place pursuant to the Atomic Energy Act of 1954, which was amended in 1970. Section 105(a) specifically sets to rest any idea that those applying for an operating license, or those actually operating a facility are exempt from any antitrust laws:

§ 105(a) Nothing contained in this Act shall relieve any person from the operation of the following Acts, as amended, "An Act to protect trade and commerce against unlawful restraints and monopolies"; An Act to reduce taxation, to provide revenue for the Government, and for other purposes"; "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes"; and "An Act to create a Federal Trade Commission to define its powers and duties, and for other purposes." In the event a licensee is found by a court of competent jurisdiction . . . to have violated any of the provisions of such laws in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of the Act. [Citations omitted.]

This section eliminates the possibility of antitrust immunity which may have come up by virtue of the "regulated" status of a license applicant. While Parker v. Brown arguments regarding exemptions have surfaced in Consumers and other cases based on the degree of regulation which occurs at the state level, such arguments do not apply to the interstate wholesale power exchange market. This is particularly true in light of Federal Power Commission v. Southern California Edison Co. which forbids single state regulation of regional power

37. Supra note 6.
38. The panel which heard the case was comprised of three members, but in late 1974, the original Board Chairman Jerome Garfinkel was tragically killed in an automobile accident.
40. Id.
41. 317 U.S. 341 (1943).
43. 376 U.S. 205 (1964).

By enacting section 105, Congress determined that any entity which seeks to become involved in nuclear power generation in the United States will have to undergo a pre-licensing antitrust review. Such mandate is not unreasonable, particularly since Congress has in effect given the private concerns billions of dollars in publicly funded research and development assets.\footnote{See generally, U.S. Atomic Energy Legislation through the 92d Cong., 2d Sess., Joint Committee Report, 9 PO 5270-01753 at 101-203.}

Our reading of the legislative history of the antitrust provisions of the Act convinces us that the primary impetus for the injection of antitrust considerations into the nuclear licensing process was the deeply held concern of Congress that the huge public investment in the research and development of nuclear reactor technology should not be utilized by a few leading private firms to entrench themselves in an anticompetitive market position.\footnote{Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), AFC Doc. Nos. 50-348 A and 50-364 A, Memorandum and Order, 14-16 (Feb. 9, 1973).}

Apart from the rationale which dictates that public assets should not be used for the competitive benefits of private investor owned utilities, there is strong legal precedent which requires the application of the antitrust laws to a number of regulated industries.\footnote{United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); California v. FPC, 369 U.S. 482 (1962); United States v. Radio Corp. of America, 358 U.S. 334 (1959); Georgia v. Pennsylvania R.R. Co. of America, 324 U.S. 439 (1945); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).} Moreover, there have been specific applications to the electric utility industry in \textit{Otter Tail Power Co. v. United States}\footnote{410 U.S. 366, 372-73 (1973) [hereinafter \textit{Otter Tail}].} which involved an unlawful denial of coordination much like that in \textit{Consumers}.

\subsection*{B. The Standards for Prosecution — General}

Section 105(c) is the heart of the legislation since it establishes a standard and a procedure to be used in administrative antitrust reviews. It is comprised of eight subparts which establish the relationship between the Antitrust Division at the Department of Justice and the Nuclear Regulatory Commission Antitrust Staff. The relationship with the United States Attorney General is set out in subpart 1:

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

The receipt of a letter of advice of the Attorney General is the beginning of actual prosecution for the Nuclear Regulatory Commission.  

Subparts two and three set up two exceptions to pre-licensing review.  

(2) Paragraph (1) of this subsection shall apply to an application for a license to construct or operate a utilization or production facility under section 103 [103 facilities are pure research institutes] Provided, however, That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

* * *  

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

50. 42 U.S.C. § 2135(c).  
51. For the 70 applications that have been received, license conditions have been required, through hearing or settlement, in well over half of the cases, to remedy a situation inconsistent with the antitrust laws.  
52. The date of the amendment was December 19, 1970. Thus, all permit or license applications filed before that date are considered "grandfathered," or exempt from prelicensing review, but subject to post licensing review. This is expanded in Subpart 8:

"(8) With respect to any application for a construction permit on file at the time of enactment into law of this subsection, which permit would be for issuance under section 103, and with respect to any application for an operating license in connection with which a written request of an antitrust review is made as provided for in paragraph (3), the Commission, after consultation with the Attorney General, may, upon determination that such action is necessary in the
Subpart 4 obligates the N.R.C. to turn over to the Department of Justice relevant antitrust information to assist them in rendering their advice. Subpart 7 allows the N.R.C. and the Department of Justice to collectively agree that an inconsistency alleged is so insignificant that no action need be taken.

Subparts 5 and 6 have been the basis of all the litigation to date regarding section 105. The following phrase has been particularly troublesome: “whether the activities under the license would create or maintain a situation . . . inconsistent with the antitrust laws as specified in subsection 105a.” It has raised questions of the legal meaning of “activity under the license,” “situations inconsistent” as opposed to the traditional violation standard, and “antitrust laws” which clearly refers to the laws, and the policies underlying those laws. The legislation has also raised questions regarding the degree of nexus which must be shown between the situation which has been alleged to be inconsistent with the antitrust laws and the “activities under the license.”

1. “Situations Inconsistent with the Antitrust Laws”

The 1970 amendments to the Atomic Energy Act prohibit the licensing of facilities where such licensing would create or maintain a situation which is inconsistent with, though not necessarily in violation

public interest to avoid unnecessary delay, establish by rule or order periods for Commission notification and receipt of advice differing from those set forth above and may issue a construction permit or operating license in advance of consideration of and findings with respect to the matters covered in this subsection: Provided, that any construction permit or operating license so issued shall contain such conditions as the Commission deems appropriate to assure that any subsequent findings and orders of the Commission with respect to such matters will be given full force and effect.

At the heart of 105(c), however, is subpart 5 and 6.

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

(6) In the event the Commission’s finding under paragraph (5) is in the affirmative, the Commission shall also consider, in determining whether the license should be issued or continued, such other factors, including the need for power in the affected area, as the Commission in its judgment deems necessary to protect the public interest. On the basis of its findings, the Commission shall have the authority to issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.” [Emphasis added.]

53. The question of policy underlying the laws is clarified in the legislative history. 54. See Commissioners Memoranda and Order of Oct. 1, 1973 and Feb. 23, 1973, In re Louisiana Power and Light, Waterford Units 50-382 A.
of the antitrust laws. In *Northern Pacific Railroad v. United States* the Court redefined the scope of the Sherman Act:

The Sherman Act was designed to be a competitive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "... Every contract, combination ... or conspiracy in restraint of trade or commerce among the several States."

This is basic to the antitrust laws, and was recently reaffirmed in *United States v. Topco Associates, Inc.* There are then basic policies which can be relied upon to determine "inconsistencies." Beyond those policies, there is a very direct portion of the legislative history regarding what constitutes an inconsistency:

Of course, the committee is intensely aware that around the subject of prelicensing review and the provisions of subsection 105c., hover opinions and emotions ranging from one extreme to the other pole. At one extremity is the view that no prelicensing antitrust review is either necessary or advisable and that the first two subsections of section 105 concerned with violation of the antitrust laws and the information which the Commission is obliged to report to the Attorney General are wholly adequate to deal with antitrust considerations. Additionally, there are those who point out that it is unreasonable and unwise to inflict on the construction or operation of nuclear powerplants and the AFC licensing process any antitrust review mechanism that is not required in connection with other types of generating facilities. At the opposite pole is the view that the licensing process should be used not only to nip in the bud any incipient antitrust situation but also to further such competitive postures, outside of the ambit of the provisions and established policies of the antitrust laws, as the Commission might consider beneficial to the free enterprise system. The Joint Committee does not favor, and the bill does not satisfy, either extreme view.

It was thus apparent that the Joint Committee understood exactly the conflict between "violation" and inconsistency and the problems of proof regarding the new procedure. Their decision heavily leans toward Clayton Act insipciency and reasonable probability standards:

The legislation proposed by the committee provides for a finding by the Commission "as to whether the activities under the license would

---

55. *See S. REP. No. 1247, 91st Cong., 2d Sess. (1970).*
56. *356 U.S. 1, 4 (1958).*
57. *405 U.S. 596, 610 (1972) stating:*

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."
create or maintain a situation inconsistent with the antitrust laws as
specified in subsection 105a." The concept of certainty of contravention
of the antitrust laws or the policies clearly underlying these laws is not
intended to be implicit in this standard; nor is mere possibility of
inconsistency. It is intended that the finding be based on reasonable
probability of contravention of the antitrust laws or the policies clearly
underlying these laws. It is intended that, in effect, the Commission
will conclude whether, in its judgment, it is reasonably probable that
the activities under the license would, when the license is issued or
thereafter, be inconsistent with any of the antitrust laws or the policies
clearly underlying these laws.

It is important to note that the antitrust laws within the ambit of
subsection 105c. of the bill are all the laws specified in subsection 105a.
These include the statutory provisions pertaining to the Federal Trade
Commission, which normally are not identified as antitrust law.
Accordingly, the focus for the Commission's finding will, for example,
include consideration of the admonition in section 5 of the Federal
Trade Commission Act, as amended, that "Unfair methods of compe-
tition in commerce, and unfair and deceptive acts in commerce, are
declared unlawful."59

The Committee is well aware of the phrases "may be" and "tend to"
in the Clayton Act, and of the meaning they have been given by virtue
of decisions of the Supreme Court and the will of Congress—namely,
reasonable probability. The Committee has—very deliberately—also
chosen the touchstone of reasonable probability for the standard to be
considered by the Commission under the revised subsection 105 c. of the
bill.

The Committee did not deem it advisable to extend the boundaries
of the considerations to be taken into account by the Commission
beyond the antitrust laws and the policies clearly underlying these
laws. The situation is different in respect to AEC's developmental
regime; here Government funds are extensively devoted to the research
and development aspects of atomic energy and the Commission has the
duty not only to see to it that the funds are employed to best advantage
in relation to the specific statutory missions involved but to be mindful
of the general objective of strengthening free competition in private
enterprise. The absence of specific, guiding criteria toward this
objective, where the expense of the activity is borne by the Government,
does not amount to an intolerably gross and unfair inflication on
private enterprise of the convictions of a Federal agency, though these
may often be based on generally debatable philosophical principles.
Here, too, the committee, in its authorization process and in its
"watchdog" role, is in a position to react with respect to any particular
Commission measure relative to the objective of strengthening free
competition in private enterprise which the committee may believe to
be insupportable or unwise; the committee could not so effectively react
in context of a licensing matter. The committee recognizes that there is
not a clear boundary between antitrust considerations in relation to the
strengthening of free competition in free enterprise and measures to
accomplish such objective for reasons other than the antitrust laws or

59. Id.
underlying antitrust policy; the Commission will have to exercise discretion and judgment.60

Inconsistency then, relates to the dictionary definition of "not in agreement, harmony, or accord... not always holding to the same principle or practice..."61 Thus it is apparent that almost anything under any of the antitrust laws which has been determined to be unlawful in the past will suffice. To initiate prosecution, the Clayton Act standard of reasonable probability is (or should be) used because of its ready adaptability into the kind of market structures involved in the wholesale bulk power area.

For example, Brown Shoe Co. v. United States62 allows for relief when there is a tendency toward concentration, in its earliest—or incipient—stage. Likewise, in the Philadelphia National Bank Case63 the Court found that mere dominance and increased concentration by an entity creates a situation in which competition is so likely to be reduced that that concentration can be enjoined. The breadth of Philadelphia National Bank is applicable to 105(c) cases.64 Concentration when increased by the slightest quantum (e.g., 1.3% in ALCOA)65 has been found to be inconsistent with the antitrust laws.

All monopolization cases, all Sherman I and Sherman II cases, where the challenge to activity, structure, or conduct has succeeded, constitute reasonable standards for "inconsistencies with the antitrust laws." Cases such as Otter Tail66 form particularly relevant examples of "inconsistencies" since Otter Tail involves an electric utilities refusal to deal, a common allegation in N.R.C. proceedings. Likewise, refusals to wheel (transmission of wholesale bulk power over third party systems by a party who is neither a buyer nor seller of the power), refusals to sell unit power, and general refusals to participate in coordinated planning and development or in coordinated operation are classic electric utility "inconsistencies with the antitrust laws."67 It should be noted that under a statute as broad as section 105(c) these inconsistencies may be derived from any antitrust law, and may relate to injury to competition and competitors.68 The law is further clear that an "inconsistency" may be established by combining a series of acts, which taken individually are lawful, but as a group constitute an injury to competition.69

Equally relevant is the question of dominance by a single utility, which is lawful, but which then is combined with the most minor

60. Id.
61. WEBSTERS NEW WORLD DICTIONARY 712 (2d ed.)
68. 42 U.S.C. §§ 2135 (a) and (c).
conduct to create an exclusion. Such activity is "inconsistent" with the antitrust laws and must be read into section 105 as prohibited conduct. The classic opinion of Judge Hand in \textit{ALCOA} is fully descriptive:

This increase and this continued and undisturbed control did not fall undesigned into "Alcoa's" lap; obviously it could not have done so. It could only have resulted, as it did result, from a persistent determination to maintain the control, with which it found itself vested in 1912. There were at least one or two abortive attempts to enter the industry, but "Alcoa" effectively anticipated and forestalled all competition, and succeeded in holding the field alone. . . . We need charge it with no moral derelictions after 1912; we may assume that all it claims for itself is true. The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that that question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret "exclusion" as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act; would permit just consolidations as it was designed to prevent.\footnote{United States v. Aluminum Co. of America, 148 F.2d 416, 430-31 (2d Cir. 1945).} [Emphasis added.]

Likewise, Judge Wyzanski established for monopolization, and for § 105 cases, the highly unnecessary nature of extensive proof of intent:

So far, nothing in this opinion has been said of defendant's intent in regard to its power and practices in the shoe machinery market. This point can be readily disposed of by reference once more to \textit{Aluminum}, 148 F.2d at pages 431-432. Defendant intended to engage in the leasing practices and pricing policies which maintained its market power. That is all the intent which the law requires when both the complaint and the judgment rest on a charge of "monopolizing," not merely "attempting to monopolize." \textit{Defendant having willed the means, has willed the end.}\footnote{United Shoe Machinery Corp. v. United States, 110 F. Supp. 295, 346 (D. Mass. 1953).} [Emphasis added.]

Beyond monopoly related offenses, situations inconsistent with the antitrust laws can include refusals to deal, as in \textit{Eastman Kodak v. Southern Photo Materials}.\footnote{See, e.g., Eastman Kodak v. Southern Photo Materials, 273 U.S. 359 (1927).} In that case Kodak had achieved dominance in the wholesale film development exchange market, and was left with only one competitor (Southern) in the relevant geographic area.
The refusal to deal at wholesale rates with the competitor was inconsistent with the antitrust laws, much the same as a dominant utility's refusal to coordinate in various generation services can constitute an inconsistency with the antitrust laws.\footnote{73}

Among the most apparent "inconsistencies" is the so-called "bottleneck" cases. These situations involve the refusal by an entity which controls a scarce or unique resource to allow a competitor's participation in that resource. It is particularly relevant with regard to a nuclear power plant because nuclear energy generation is invariably a scarce resource and must be interconnected with a high voltage transmission network, which is equally unique. These items have become scarce because of general regulations prohibiting unnecessary unit duplication, environmental considerations, and the unit power cost phenomenon, which effectively excludes all but the largest private investor owned utilities from participation in nuclear power.\footnote{74}

A classic bottleneck case which parallels a nuclear unit "refusal to deal" situation is \textit{United States v. Terminal Railroad Association}.\footnote{75} \textit{Terminal Railroad} is one of the earliest cases that deals with a single firm exclusion by indirection, \textit{e.g.}, a blanket refusal to participate with any party regarding a controlling entity's scarce resources.\footnote{76} There, refusal by an association to allow competing entities access to a bridge and ferry system created a service "bottleneck" and required the court to remedy the situation. That situation was quite similar to a situation where a nuclear power applicant dominates high voltage transmission, needed for the plant and for system wide operation. The applicant who denies access to this system (which cannot be duplicated) has involved itself in a \textit{Terminal Railroad} inconsistency.

It should be noted that creating a "bottleneck" or refusing to deal is an inconsistency despite the fact that it can be the result of single firm activity, as opposed to conspiratorial conduct.\footnote{77} In \textit{Gamco, Inc. v. Providence Fruit & Produce, Inc.},\footnote{78} a single firm's refusal to grant access to a unique resource to a competitor constituted the basis for a finding against the firm. \textit{Gamco} was another case which closely parallels situations in the electric utility industry where an operator of a facility will refuse to grant lesser entities access to it, and thereby effectively precludes surrounding firms from the nuclear power supply option.\footnote{79}

\footnote{73. See Packaged Programs, Inc. v. Westinghouse Broadcasting, Inc., 255 F.2d 708 (3d Cir. 1958).}
\footnote{74. Supra note 67.}
\footnote{75. 224 U.S. 383 (1912).}
\footnote{76. It should be noted that \textit{Terminal R.R.} and its progeny no longer required a concerted refusal to one party; if there is sufficient reason to believe that the transaction will be refused, no refusal need in fact occur.}
\footnote{78. 194 F.2d 484 (1st Cir.), cert. denied 344 U.S. 817 (1952).}
\footnote{79. See Associated Press v. United States, 326 U.S. 1 (1945); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Fashion Originators Guild of America v. FTC, 312 U.S. 457 (1941), for situations where refusals to deal or single firm denials have been found to be inconsistent with antitrust laws.}
Otter Tail\textsuperscript{80} is the most recent extrapolation of "bottleneck" in the antitrust field, and certainly serves as a basis for numerous "inconsistencies."\textsuperscript{81}

2. "Meaningful Nexus"

The primary inquiry under section 105 is whether the activities under the license create or maintain a situation inconsistent with the antitrust laws. The "situation" can be almost any facts or circumstances that the applicant is involved in which are arguably unlawful, or "inconsistent." However, it is quite untrue that all inconsistencies are within the ambit of agency review.\textsuperscript{82} There is a jurisdictional requirement,\textsuperscript{83} or "nexus," which seeks to insure that only those situations which are legitimately connected to activities under the license will come under agency review.

There is a dual standard utilized in the evaluation of the nexus, one part relating to the factual connection and a second tier analysis going to the legal requirements of nexus. Very simply, the licensed activity must create or maintain the "situation" alleged to be inconsistent with the antitrust laws. For example, where a facility applicant has monopolized the bulk power supply and controls high voltage transmission, the addition of the nuclear power will add to that monopoly and control. Any denial of access to bulk power or refusal to deal on the transmission system would subject the applicant to review because the facility will aid in maintaining existing dominance. Factually, nexus would also be satisfied. Clearly, any "situations" which are unaffected by or unrelated to any licensed activity are outside the scope of review.\textsuperscript{84}

In the \textit{In the matter of Louisiana Power and Light Co.} decision, the Atomic Energy Commission recognized the necessity of "a meaningful nexus [being] . . . established between the situation and the 'activities under the license.' "\textsuperscript{85} The Atomic Energy Commission noted that this meant the agency was empowered to review all situations which could be shown to be reasonably related to the licensed facility, but not the entire system of the applicant. The mere fact that nuclear power "will be comingled [sic] with the power from other . . . generating facilities" will not be enough to show nexus.\textsuperscript{86} The physical relationship of the

\begin{itemize}
\item \textsuperscript{80} \textit{Supra} note 66.
\item \textsuperscript{81} See \textit{Klors v. Broadway-Hale Stores, Inc.}, 359 U.S. 207 (1959), for an example of unlawful group boycott, which could apply under § 105.
\item \textsuperscript{82} \textit{Supra} note 54.
\item \textsuperscript{83} It should be noted that \textit{Consumers} considers nexus in a substantive light, and is inconsistent with the following materials, since it has become apparent that the question of nexus is procedural, \textit{i.e.}, it should be resolved prior to a hearing on the substantive merits.
\item \textsuperscript{84} The requirement of pleading and proving a meaningful nexus has been contested in every litigated case since 1973, thus defeating any simplistic approach.
\item \textsuperscript{86} \textit{Id.} Decision of February 23, 1973 at 6.
\end{itemize}
applicant's generation system can be evaluated vis-à-vis the proposed facility to determine the nature of the connection.

It is apparent that power generated from a nuclear facility will enable an applicant to increase system generating capacity, reserves, bulk power sales, overall firm power reliability, capacity and energy available for sale to others, and the firm-non-firm power ratio.\textsuperscript{87} Likewise, an efficient nuclear unit will decrease fossil fuel costs, reduce environmental compliance costs, and reduce operating and spinning reserve requirements.\textsuperscript{88}

These assets can be quantified, and can involve the entire system of the applicant. They become open for review to determine whether: (1) the alleged situational inconsistency relates to one of these assets, and (2) these assets are in fact enhanced, maintained and/or created, by the addition of the unit.\textsuperscript{89} The legal problems with "nexus" have become increasingly complex, however, since no major applicant can operate in isolation,\textsuperscript{90} many of the benefits mentioned flow directly to other utilities which are interconnected, thus complicating the nexus question. Subtle inconsistencies, for example, a refusal to invite smaller utilities to participate in coordinated planning, are difficult to connect to "activities under the license" when nexus is narrowly construed. Thus, the legal meaning of nexus must be established: the term "nexus" refers to a "connection, tie, or link. . . ."\textsuperscript{91} In the legal sense, nexus problems invariably refer to the degree or extent of a connection, rather than the physical existence of a relationship. Within the last fifty years, courts have turned away from the concept of physical connection and physical presence looking rather to the impact or effect of a connection.\textsuperscript{92}

In \textit{Municipal Electric Association v. Securities Exchange Commission}, the district court was petitioned to evaluate an order of the United States Securities and Exchange Commission which approved the joint acquisition of stock in two nuclear power plants.\textsuperscript{93} The petitioners had alleged that the stock acquisition would lead to exaggerated concentration in the bulk power exchange market, and would effectively preclude the municipal systems from competing. No direct violation of the antitrust laws was alleged, but rather, it was argued that the conduct involved (i.e., increased private investor owned utility genera-

\textsuperscript{87} See generally, \textsc{Phillips, The Economics of Regulation} 537-94 (1969); \textit{Coordination, Competition, and Regulation in the Electric Power Industry}, supra, note 67.
\textsuperscript{88} Id.
\textsuperscript{89} So as not to lose perspective, the \textit{Consumers} decisions utilizes a framework not unlike this one, but requires positive proof of the inconsistency (which the Board calls "unsure") rather than mere allegation of the inconsistency.
\textsuperscript{90} 1 \textsc{National Power Survey} Ch. 2 (1970) (F.P.C. 1970) at 1-4.
\textsuperscript{91} \textsc{Webster's New World Survey}, supra note 60.
\textsuperscript{93} 413 P.2d 1052 (D.C. Cir. 1969).
tional dominance) was sufficiently connected to the governmental action (i.e., approval of the merger-acquisition plan) to allow full review of the conduct. Naturally, the municipalities saw a foreclosure of coordinated developmental possibilities, and an attempt to prevent it.

The court found that since it was reasonably probable that the sponsors of the unit were "obtaining a monopoly ... over electric generation through systematic exclusion of municipals and other small electric distributors from participating in or purchase of power from nuclear generators in New England" there was a sufficiently pleaded "situation." Next, they sought to determine if this situation was sufficiently connected to the activities (i.e., approval of the stock acquisition). The court considered, as factors of nexus, the interconnection of the plant with the New England Power Grid, prior denial of low cost or wholesale-for-resale bulk power to smaller entities, regional power exchange history, and patterns of increased concentration. Such criteria are suitable in a section 105 proceeding. Simple exclusion from a "coordinating council" alone may be sufficient.95

Likewise, discriminatory interchange agreements96 and general refusal of coordination in wheeling services,97 are situations already found to be "tied" to all generation points on a system, for purposes of antitrust review. Each instance of agency evaluation of nexus creates the necessity of new assessment regarding "connection" or relationship. As the district court stated in Gulf States Utilities v. Federal Power Commission: "the requirement of reasonable nexus... is fairly implied in the jurisprudence. Development of the requirement must await consideration in the first instance by the agency involved, and on analysis of the factual context."98

The "factual" contexts mentioned above are generally not as problematic as the legal definitions of nexus which are established in almost every case. One aspect which is particularly difficult to comprehend is the supposed interplay which exists between the nexus concept and the spurious "immunity based on regulated status" argument mentioned earlier.99 The difficulty lies in the prior immunity which was afforded to utilities regarding certain monopolistic practices, e.g., territorial allocation, competitor conference rights and the like.100 These islands of immunity fall by the wayside in two respects

94. Id. at 1059.
99. It is patently incorrect to declare, as does the Board in Consumers, that activities which are "otherwise regulated" are not sufficiently connected (nexus factor) and thus immune. See discussion of nexus, as delimited by the Board, infra; see also, F.P.C. v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961).
when a utility applies for a license to operate a power plant.\footnote{101} First, courts have mandated antitrust review in similar situations.\footnote{102} Second, the legislature, in directing the Atomic Energy Commission to grant licenses to private entities for utilization of nuclear power, made very specific its desire not to have these licenses facilitate the advancement of previously sanctioned monopolistic endeavors. The Joint Committee Report on Atomic Energy of the 91st Congress\footnote{103} includes statements by Senator Hart, stating:

Under no circumstances would the Commission be relieved of its responsibility to require applicants for licenses to conform to the antitrust provisions . . . and the antitrust laws generally. . . .

* * *

It would be a distressing development if nuclear power were allowed to grow—but brought with it monopolistic practices which had the effect of limiting the supply of power to some energy companies. . . .\footnote{104}

The Atomic Energy Commission has seen fit to seek to enforce these laws. In the most recent decision of the Atomic Safety and Licensing Appeals Board (the body which will hear the appeal in Consumers),\footnote{105} the Atomic Energy Commission indicated an unwillingness to back step on the nexus-immunity question. In the Wolf Creek\footnote{106} decision, the Board found that the applicant (Kansas Gas and Electric) had improperly placed its focus on "activities under the license" to determine nexus, and had focused on the plant and activities physically tied to the plant.\footnote{107} The Board found that review can extend to all situations where there is a reasonable probability that the situation will be maintained or enhanced by the granting of the license.

Accordingly, we [the Board] conclude that the legislative history of Section 105(c) does not support the applicant's argument that the Commission must consider the operations of each nuclear plant in isolation when making its prelicensing antitrust review. On the contrary, the Commission's statutory obligation is to weigh the anticompetitive situation—\textit{which to us means that operations in any 'airtight chamber' were not intended}. . . . It was a key purpose of the prelicense review to ' . . . nip in the bud any incipient antitrust situation.' \textit{We can therefore perceive no valid reason why the Commis-}
sion should wear blinders when confronted by such matters. No statute should be construed to render it ineffective. . . ."

* * *

The words of the statute upon which the applicant relies direct the Commission to consider not only whether granting a license would "create" an anticompetitive situation but also whether it would "maintain" one. Thus, to the extent the applicant's argument suggests that the Commission's cognizance under Section 105c is limited to anticompetitive consequences directly attributable to applicant's use of the nuclear power plant and its output, it makes no sense. As the staff points out, for activities under a license to "maintain" a pre-existing situation inconsistent with the antitrust laws, some conduct of the applicant apart from its license activities must have been the "cause" for bringing about those anticompetitive conditions. Nothing in Section 105c suggests that Congress wanted the Commission to focus on an applicant's extra-license conduct when determining whether an anticompetitive situation would be "maintained," but to close its eyes to that conduct in deciding whether such a situation would be "created." Indeed, were we to accept the dichotomy inherent in the applicant's position, we would be at a loss to perceive how a licensing board should proceed when it is alleged — as it is in this case — that granting a construction permit would both create and maintain an anticompetitive situation. There is, of course, a settled presumption against imputing to Congress an intent to achieve an irrational result. We are particularly disinclined to go against that presumption where another, more sensible reading of the provision in question is suggested by its legislative history.108 [Emphasis added.]

Thus, nexus should not serve as a bar to review of coordination patterns, regional generation systems with which the applicant is interconnected, or general transmission networks where service of any kind has been denied. Naturally, such review will "extend only to anticompetitive situations intertwined with or exacerbated by the award of a license to construct or operate a nuclear facility."109 Wheeling denials on the transmission system of the applicant over high voltage lines not integrally related to the proposed facility are to be included in the review, if the above condition of exacerbation or enhancement is met. In denying the request of the applicant to "wear blinders" and "operate in an airtight chamber," the Wolf Creek Board went beyond the Waterford110 decision in delineating a broad review potential, rather than structuring a system where items would be eliminated from review because of the absence of a "physical interface."

It should be noted that Wolf Creek deals with the alleged denial of access to supplemental power arrangements, not direct access to a unit or to transmission service.111 Since supplemental power (a form of non-firm standby power needed to allow for wholesale transactions, not to be

108. Wolf Creek, supra note 106 at 19-23.
109. Id.
110. Waterford Units, Louisiana Power and Light Co., supra note 84.
111. Supra note 105, at 1-10.
confused with spinning or operating reserves) is by physical definition several steps removed from direct generation and transmission, Wolf Creek takes on even greater significance in the nexus debate.

It would seem, after Wolf Creek, that micro-economics will play an equal role in the nexus assessment process. A review of the “integrated system” of the applicant (that being the thrust of Wolf Creek), requires a multilevel inquiry via a traditional market analysis, i.e., who are the buyers and sellers of wholesale power, unit power, wholesale for resale power, firm, non-firm, and bulk power? What transmission services have been offered or refused? What is the production or differentiation, the nature of the organizational diversity? What are the barriers to entry and have they been or will they be modified by the unit? What cost structures have become evident, and what are the competitive consequences thereof? What degree of vertical and horizontal integration is extant, and what degree of conglomerateness exists?

Such inquiries will result in a structural assessment of an applicants system, as opposed to a conduct-intent related inquiry. Additionally, they will lead to formulations of contentions which are easily approached in an administrative antitrust hearing. The following issues were derived from several draft contentions which were used (though in different form) in the Consumers case:

1. a. Whether applicant alone or together with others has the ability to hinder or prevent:
   (1) smaller electric entities from achieving access to the benefits of coordinated operation (reserve sharing, emergency power exchanges, deficiency power sales and other coordination of existing facilities) either among themselves or with applicant or other electric utilities;
   (2) smaller electric entities from achieving access to the benefits of economy of size of large electric generating units by coordinated development (joint planning and investment, staggered investment and joint investment in new plants to achieve economies of scale) either among themselves or with applicant or other electric utilities.

b. Whether a situation or situations inconsistent with the antitrust laws or the policies clearly underlying these laws has resulted or will result from the exercise of such ability.

114. F. SCHERE, INDUSTRIAL MARKET STRUCTURES AND ECONOMIC PERFORMANCE 5-16 (1971).
2. Whether applicant's policy not to sell unit power or ownership shares in the nuclear facility being licensed deprives smaller electric utilities that are connected or could be connected with applicant, of the benefit of power from the licensed facility and thereby results in a situation inconsistent with the antitrust laws or the policies clearly underlying these laws.

B. The nexus question then becomes what is the relationship between the proposed facility and the applicant's system?

1. The addition of the nuclear facility does not exist in isolation; the power is more than commingled with other power on the system. For example, the plant enables the system to increase:
   a. system generating capacity,
   b. system generating reserves,
   c. system reliability,
   d. capacity and energy available for sale to the applicant's customers,
   e. capacity and energy available for sale to other facilities,
   f. capacity and energy available for emergency support to other electrical systems,
   g. energy available for pumping at pumped storage hydro plants
      (1) enables the nuclear facility to be utilized on a full time basis which makes the most economical use of the facility
      (2) removes necessity of new coal-fired generation.

2. In addition, the nuclear facility reduces the need for certain very costly additions for the system:
   a. the need to build fossil-fired steam generating units, gas turbines and internal combustion generating units,
   b. the amount of oil, coal and natural gas required,
   c. particulate and sulfur dioxide emissions,
   d. noise pollution.

3. The nuclear plant also causes functional changes to take place by modifying:
   a. generation scheduling and dispatch,
   b. interconnection flows,
   c. stability limits,
   d. system frequency response,
   e. spinning and operating reserves requirements.

4. Physical connections to the system must also exist before the functional changes can take place:
   a. connection to the transmission grid and to
   b. load centers
   c. other generating units
   d. the pumped storage hydro plant
   e. spinning and operating reserves requirements.

Thus, it would seem that the nexus requirement will be eventually a question of systemic evaluation, followed by a pleading
of situations inconsistent with the antitrust laws. The ultimate question for nexus will or should be:

Are the situations, if taken as true, in any way related to that portion of the applicant's systemic production-distribution program which is involved with the proposed nuclear unit?

3. "Activities Under the License"

The process of licensing review does not focus exclusively on the specific conduct or activity which is licensed. Subparts one and two supra indicate that a review must be made of situations which are connected to "activities under a license." Few successful attorneys in the area of administrative antitrust can avoid the necessity of learning about the technology of the area in which they practice. In nuclear energy, there are no "basic primers" in thermo-dynamic nuclear physics or in the economics of high voltage transmission. The most one can do is get a feeling for the vocabulary and trends in an industry and then grow into the sophisticated technological nuances of nuclear power.

Legally, the phrase "activities under the license" has come to be used to describe the relevant geographic and product markets.\textsuperscript{116} It is perhaps wise to make such an analogy, since the systemic integration of nuclear power within the interconnected grid of an applicant is the rule, not the exception.\textsuperscript{117} In legal terms, the relevant market of a nuclear unit is no different than the product market for any other industry. In \textit{Brown Shoe Co. v. United States}\textsuperscript{118} the Supreme Court found that a geographic market must "correspond to the commercial realities of the industry and must be economically significant."\textsuperscript{119} There are six regions in the United States which form one basis for geographic determination of relevant market for regional power and service exchanges.\textsuperscript{120} There are thirteen major power pools, which are privately established coordinating groups which can also form the basis for market area.\textsuperscript{121}

Within these regions, all private utilities, municipalities, rural electrical cooperatives, public utilities, or other bulk power purchasers (generally industrial users) operate in a theoretically coordinated manner. Today, no one major region operates in isolation.

Courts have sought to confine relevant markets\textsuperscript{122} to "the area of effective competition in the known line of commerce . . . [where] the seller operates, and to which the purchaser can practicably turn for

\textsuperscript{118} 370 U.S. 294 (1962).
\textsuperscript{119} Id. at 366.
\textsuperscript{120} 1 NATIONAL POWER SURVEY, F.P.C. (1967).
\textsuperscript{121} 1 PREVENTION OF POWER FAILURES 36, F.P.C. (1967).
\textsuperscript{122} For N.R.C. discussion of relevant markets, see \textit{In re Cleveland Electric Illuminating Co., Davis Besse Facility}, 50-346A, N.P.C. 1974 et. seq.
supplies and services."\textsuperscript{123} [Emphasis supplied.] Frequently state franchise laws\textsuperscript{124} and the high cost of new high voltage transmission facilities (including the necessary incorporeal hereditaments) will form natural market limitations. Thus, a third term, "service area," is frequently used in describing the total activities of a single entity.\textsuperscript{125} However, "physical activity" is too confining when broad competitive implications are involved.\textsuperscript{126} It is logical in section 105(c) cases to extend the market to areas of actual competition, and areas in which service can be feasibly extended.\textsuperscript{127}

Further, the law will often extend a market to areas where there is a "reasonable interchangeability of use of cross-elasticity of demand by the product itself and substitutes for it . . . ."\textsuperscript{128} In addition, the market or "activity under the license" in the overwhelming majority of cases will include diverse receptor areas, \textit{i.e.}, areas where wholly different services or products are involved, all of which emanate from or are related to the nuclear unit.

In addition, it is necessary to look at the specific products involved. The basic "products" for this analysis are listed below:\textsuperscript{129}

a. \textit{Sales of bulk power or energy at wholesale for resale}: Bulk power is comprised of firm power "where the seller stands ready at all times to have available and deliver the firm power capacity in kilowatts specified in the contract,"\textsuperscript{130} and non-firm power. Non-firm power is power sold in bulk to industries or utilities which do not require a continuous flow or have sufficient storage or self generation facilities to offset a power loss.

b. \textit{Sale of Surplus Economy Energy}: Energy produced at (i) lower than normal system wide cost and thus sold as unit power (the cost per unit of power generated at the particular utility) and (ii) a rate of generation which is unpredictable or not firm. This energy is normally sold above and beyond all contracts, and can be highly profitable for a system which has better than average generating capacity and substantial numbers of industrial customers.

c. \textit{Dump Energy Sale}: Energy produced above all contracts, predictions, and surplus, which will go to waste if purchasers are not found shortly. This is the least expensive of the non-firm

\textsuperscript{126} \textit{Phillips}, supra note 87, at Chapter 15.
\textsuperscript{127} \textit{Supra} note 116, at 30. (Brief of N.R.C. Staff).
\textsuperscript{129} The following materials are complex, but vital to understanding the competitive structure. For a detailed description of the products, \textit{see} the Edison Electric Institute Work, \textit{supra} note 125.
\textsuperscript{130} \textit{Glossary of Electric Terms and Comprehensive Analysis of the Electric Utility Industry}, Edison Electric Institute at 27 (1947).
power, and is usually sold by large private investor-owned entities or by any utility which experiences excess generation.

d. **Emergency, Breakdown, and Standby Power Sales:** This is power which a generator agrees will be available to supply all or part of the requirements of another in emergency situations. It is paid for whether used or not, and is not to be confused with reserve power.

e. **Reserve Power Exchanges:** A nuclear unit, because of the relatively modern technology involved, does not usually enhance a major private investor utility systems supply of bulk-firm power. It has massive impact on reserve power, however, since the Federal Power Commission reliability quotient for establishing reserves does not require constant power flows. This is important to keep in mind, since systems which are denied reserve sharing with nuclear participants are denied a substantial benefit of atomic energy. While a reserve ratio is always system wide for any given utility, it can be calculated by establishing the size of the largest unit on the system, and projecting the consequences which would result if that unit were inoperable. Smaller systems which are effectively prohibited from ownership participation in nuclear power require reserve sharing with nuclear powered systems to compete effectively. Reserve is best described as follows:

The power plants must have reserve or standby capacity to enable the system to carry the load in case of failure of any one unit. As a practical matter, the reserve capacity must be at least equal to the capacity of the largest unit serving the system because this unit might fail. If the reserve unit is in operation (i.e. spinning at full speed) it is called a spinning reserve. A machine so operating can take load almost instantaneously. Such a spinning reserve is taking steam and therefore fuel only in amounts sufficient to overcome such losses as are caused by friction. Such a machine can be spinning at full speed and yet be carrying no load. At times a boiler is kept hot in readiness to operate a turbine whereas the turbine may not be spinning. This is called a hot reserve. A turbo-generator, or power plant, that is kept as reserve with no heat under the boiler and not in operation is called a cold reserve. It may take an hour or more to bring the machine from a cold reserve to a spinning reserve, or to a condition where it can carry load.

f. **Transmission Services, Including Wheeling:** Transmission of wholesale or bulk power by a dominant entity which controls high voltage transmission is a critical factor in

---

131. Excess generation is most common with hydro-electric systems, when power supply and cost ratios may parallel the weather cycle.
133. 1 NATIONAL POWER SURVEY (1970).
134. There are numerous other formulas for computation of the reserve requirement, *supra* note 120.
assuring organizational diversity and competition. Denial of transmission, which is as vital to a nuclear unit as it is to competing systems, is denial of the essential coordinating medium, and is a refusal to deal in a classical sense. Transmission is the theoretical transfer of an assigned quantum of energy from one point on an interconnected system to a second point. "Transmission line capacity [is] the maximum continuous rating of a transmission line. The ratings may be limited by thermal considerations, capacity of associated equipment, voltage regulation, system stability or other factors. Transmission system [is] an interconnected group of electric transmission lines and associated equipment for the movement or transfer of electric energy in bulk..." Transmission occurs when one utility generates power which is transmitted (wheeled) by a second utility to and for the benefit of a third utility.\footnote{137}

\textbf{Coordinated Operation} is the general term used to describe the operating and transmission systems of two or more distinct entities on a cooperative basis, either as a single line system, or as individual participants. A failure to allow access to a nuclear unit by ownership (if stock is available), by unit power purchases (power purchased with the cost based on only the nuclear unit), or denials to participate in requested transmission or reserve arrangements is a denial of coordinated operation.\footnote{139}

\textbf{Coordinated Planning} refers to cooperative projection of load growth, demand, service needs, generation capacity and the like done by more than one entity. Coordinating councils are established for this purpose, or power pools. Exclusion by a nuclear participant of another entity in the given geographic market which assists the participant in maintaining a posture of dominance or preserving a tightly knit oligopoly is an inconsistency with section 105 of the Atomic Energy Act.\footnote{140}

The above services or operations form the product market, and should be considered "activities under the license." Grouping of all bulk power services within the "product market" simplifies the task of the adjudicatory body\footnote{141} in its search to connect allegedly inconsistent situations with the activities being licensed. This position is also

\footnotesize\textit{139.} See, PHILLIPS, supra note 87; "Findings of Fact", supra note 115; and Coordination, Competition and Regulation in the Electric Utility Industry, supra note 67 at 28-41.
\footnotesize\textit{140.} Supra note 14. [Note: This position is the conclusion of the N.R.C. Staff, but has not been supported or condemned by any legislative or adjudicative body.]
\footnotesize\textit{141.} N.R.C. Staff and applicants seem to agree that the resultant product market, as it relates to "activities under the license" is broad. Consumer Power Co., Midland Units, 50-329A, 50-330A, Prepared Testimony of Dr. Joseph Pace, N.E.P.A., (for the applicants) at 31-34; Applicants Pre-Trial Brief, at 105-106.
supported by the Federal Power Commission's National Power Survey in 1970.142

In the Consumers case, the Department of Justice viewed activities under the license as the "integration of . . . megawatts of nuclear power into [an] Applicant's system for marketing . . ."143 The Department took into account alternative fuel sources in projecting that nuclear generated power will be low in unit cost. Accordingly, the Department stated that "the advantage of integrating low cost nuclear generation into a multiple plant, multiple fuel, electric utility operation is obvious. Average cost is reduced. To the extent that the applicant is able to reduce its average cost while preventing its competitors from doing so, improves its competitive position."144 The Department of Justice went on to note that by combining the non-firm nuclear generator power with other firm and non-firm power which runs through the applicant's high voltage transmission system, firm power is in effect "created". If the system of the applicant was one in "isolation", i.e., not interconnected, only fifty percent of the unit power of the nuclear facility could be marketed as firm.145 Therefore, the interconnection system with other utilities, and the entire transmission network of an applicant could fall within the review powers of a section 105 hearing and be considered "activities under the license."

V. MAJOR STRUCTURAL INDUSTRY TRENDS

A. Nuclear Generated Power Market Structure

The nuclear power-electric generation industry is one of the most sophisticated of all our industries because decision making by involved generating entities must take into account domestic economic policy,146 domestic environmental policies,147 foreign policy vis-à-vis energy product and nuclear power,148 not to mention investor reaction, market fluctuations,149 long range government spending and public sentiment.150

142. See generally, 1 NATIONAL POWER SURVEY 2-23 (1970).
144. Id. at 69.
145. Id.
In the last decade, there has been tremendous pressure on all utilities to consolidate in an effort to maximize the economies of scale which exist in the industry. This is true for the entire electric utility industry, and not only for nuclear power operators. There are approximately 3,500 "systems" in the United States, though over 2,000 are relatively small distribution systems, i.e., systems which are not involved in generation or wholesale bulk power sales. In generation, there are 200 firms controlling 75-80% of all generation, and of these almost all are horizontally integrated via power pool arrangements with other major generators or by means of holding companies.

One distressing industry trend has been the tendency of the giant private investor owned systems [hereinafter P.I.O.S.] to coordinate with contiguous P.I.O.S., leaving "several smaller private cooperative and municipal systems existing as islands within the larger system's sphere of operation...." The consequences of such isolation, when combined with P.I.O.S. refusals to wheel is deadly: the smaller system, unable to coordinate generation and transmission with other non-contiguous systems and unable to build new generation due to scale economics, is forced to sell out, die out and be overtaken, or purchase wholesale power from the P.I.O.S. at almost retail cost. The result is a tendency toward a cessation of organizational diversity and a loss of yardstick competition. Sixty percent of all power generated is by a pool arrangement.

Financial benefits are often realized from staggered construction of large generating units, short term capacity transaction, and exchanges of economy energy. Reduction of installed reserve capacity is made possible by mutual emergency assistance arrangements and associated coordinated transmission planning. Bulk power supply reliability is enhanced by interconnection agreements covering spinning reserves, reactive kilovolt-ampere requirements, emergency service, coordination of day to day service and coordination of maintenance schedules.

As new technology produced larger units, hope of smaller systems becoming fully independent owners of nuclear power generation virtually vanished. Without intersystem coordination, the smaller systems are excluded from nuclear power and theoretically condemned to extinction. This exclusion was felt to be of such magnitude that it

153. Id. at 2-4.
154. Supra note 149, at 69.
156. Supra note 151.
157. Supra note 155, at 1-17-1.
158. Supra note 155, at 1-17-27.
159. Supra note 155, at 1-17-28.
was a primary impetus for the passage of the Section 105 amendments to the Atomic Energy Act in 1970.160

While coordination may seem to create antitrust problems, e.g., price discussion through combinations of competitors, it appears that exactly the opposite is the case. It is only through coordination that a mix, or variety in participants in the electric utility industry can be sustained.161 The 1964 National Power Survey details the various factors of organizational diversity, finding general "benefits of the existing pluralistic institutional structure if all segments of the industry, and all the individual systems within each segment, would realize that their ideological differences are no bar to working together in establishing stronger regional and interregional power pools. . . . What is required is a good faith effort by all segments of the industry to coordinate their efforts for mutual benefit.162 Six years later, the 1970 National Power Survey came to the same conclusion:

The electric utility industry can achieve full coordination, without altering its pluralistic character, by coordinating the planning, construction, and operating activities of all utility groups in areas with loads of sufficient size to realize all the potential benefits of modern technology, and by strengthening generation and transmission facilities as necessary for assuring adequacy and reliability of power supply. Certainly, from both the resource conservation and economy of service viewpoints, coordination among all of the utilities within the respective regions should be a major objective.163

That the utility industry is at a point of great technological change is a historical fact. With the unsuitability of fossil fuels, power supply options, including nuclear, have become essential to all participants in the utility industry.164 This is particularly true since the sites were hydro-electric power can be generated are, for the most part, in full use. Furthermore fossil fuel plant fuel cost and air quality problems relating to fossil fuel render these plants impracticable. Finally the present cost per thermal unit of nuclear fuels is lower than that of fossil fuels.165 Nuclear units, capable of generating over 3000 megawatts (MW) are under construction, while no such fossil fuel plants are even considered.166 The largest fossil plants are 1,000-1,500 MW, after which the economies of scale cease and a price benefit inversion occurs.167

This "size" development in nuclear generated power is matched by technological increases in capacity ratings for high voltage transmission needed to transmit such massive amounts of power. In 1960, the

162. 1 NATIONAL POWER SURVEY, F.P.C. at 4-5 (1964).
163. Supra note 90, at 1-17-29.
164. Supra note 90, at 1-6-1.
165. Id.
167. NUCLEAR POWER SURVEY, supra note 90 at IV-1-3 (1970).
largest high voltage system was rated at 345 kilovolts, while a decade later that amount was doubled.\textsuperscript{168} With these advances have come increased systemic reliability as well as substantially larger system economies.\textsuperscript{169} It is unfortunately apparent, however, that the economies of scale are being denied to many hundreds of smaller systems which cannot participate in nuclear power or high voltage transmission interchange because of the barriers to entry mentioned earlier. It should be noted that the projected cost of a light water reactor, the most common type today, is approximately seven-hundred million dollars for a 1000 MW rated facility.\textsuperscript{170} The price of filing an application and legal fees is projected at forty-five million dollars, and interest during the construction period at eighty-nine million dollars!\textsuperscript{171} It is thus no mystery that a rural electric cooperative which serves 10,000 farms in Iowa and has a maximum load of four MW is not going to be capable of becoming directly involved in nuclear power.\textsuperscript{172} It is only when enforcement of section 105 results in coordination that the benefits of the one hundred billion dollar public investment in nuclear power will accrue to that system. This access is particularly important in view of the fact that nuclear plants are expected to constitute 44\% of all additions to generating capacity in the 1970's and 81\% in the 1990's.\textsuperscript{173}

Finally, the degree which nuclear power assists cost efficiency in a system or interconnected systems cannot be underestimated. A system with 400 MW of fossil generated power has four times the reserve obligations as a system with 800 MW of nuclear power — and if that 800 MW system is interconnected with other nuclear systems, the reserve requirement declines geometrically, thus geometrically increasing the quantity of power that can be sold as firm.\textsuperscript{174} With smaller systems excluded by being priced out of the market, thus ending yardstick competition and organizational diversity, the retail cost of firm power will rise in a dizzying spiral that has no limit.

B. The Competitive Aspects of the Electric Utility Industry

As noted earlier, there is a trend toward consolidation in nuclear applications which benefits the interconnected applicants greatly, and bodes very poorly for those denied access to the interconnected nuclear systems. This is the public position of the National Power Survey\textsuperscript{175} of the Federal Power Commission, the Antitrust Division, Department of Justice, and the Antitrust Section of the Office of the Executive Legal

\textsuperscript{168} Id. at 1-13-7.
\textsuperscript{169} Id. at 1-13-8.
\textsuperscript{171} Id.
\textsuperscript{172} It should be recalled that a nuclear plant is not economically viable unless it is rated at 500 MW or better, supra note 135.
\textsuperscript{174} Supra note 90, at 11-1-56.
\textsuperscript{175} Supra note 116, and 141.
Director (formerly Office of the General Counsel) of the Nuclear Regulatory Commission (formerly the Atomic Energy Commission).\textsuperscript{176} It is safe to say that these agencies reflect the "federal government position." Opponents of oligopoly and concentration are presently popular figures, and the Industrial Reorganization Act\textsuperscript{177} (the Hart Bill proposed by United States Senator Philip A. Hart), if passed, would place total prohibitions on any form of major industry dominance and fully regulate oligopoly. The Hart Bill seeks to establish a new commission to assist the U.S. Department of Justice, the Nuclear Energy Commission, Antitrust Division, the Federal Trade Commission, and the Federal Power Commission, Antitrust Section, not to mention various state antitrust enforcement agencies.\textsuperscript{178} Duplication in the review process of this nature is unnecessary.

The Hart Bill would give top priority to energy, and six other major industries,\textsuperscript{179} and would initiate remediation proceedings if one of three conditions occurred. There would be a rebuttable presumption of unlawful monopoly if: (1) the average rate of return is in excess of 15% of net worth over the past five years; or (2) there has been no substantial price competition between two or more principle participants over a three year period, or (3) there are four or fewer entities controlling 50% or more of any given line of commerce.\textsuperscript{180} The Hart Bill is designed to placate those advocates of total deconcentration and vigorous antitrust enforcement. If enacted as proposed it could bring on an unparalleled rush of confusion and could possibly destroy the electric utility industry, and certainly the nuclear power industry.

It would be unrealistic to posit that the overwhelming majority of authority favors such complete decentralization and deconcentration. However, a number of decisions have suggested that these are, in themselves, evils to be avoided. In United States v. United Can Co.\textsuperscript{181} a federal district court found that mere excessive size (referred to herein as dominance) may be sufficient to create a violation of the antitrust laws, when coupled with any overt conduct. Though the court decided not to find against the American Can Company, the language of the opinion is instructive:

\textbf{[O]ne of the designs of the framers of the Anti-Trust Act was to prevent the concentration in a few hands of control over great industries. They [the framers] preferred a social and industrial state in which there should be many independent producers. Size and power are themselves facts some of whose consequences do not depend upon the way in which they are created or in which they are used.\textsuperscript{182}}

\textsuperscript{176} Supra note 90.
\textsuperscript{177} Industrial Reorganization Act, S. 1167, 93d Cong., 1st Sess. (1973); [1973] 5 TRADE REG. REP. (CCH) 50,116.
\textsuperscript{178} In re Cleveland Electrical Illuminating Co., Davis Besse supra note 122, all of these agencies filed petitions at various points in the process of licensing the nuclear facility, though not all before the same agency.
\textsuperscript{179} Supra note 177.
\textsuperscript{180} Id. at § 101(b).
\textsuperscript{181} 230 F. 859 (4th Cir. 1916).
\textsuperscript{182} Id. at 901.
In *United States v. Alcoa*, Judge Learned Hand restated this position: "It is possible because of indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few." This picture of independence, designed to nurture competition, is fatal to an industry which requires coordination. Realistic appraisal of Justice Hand's commentary suggests the impracticality of such competition, for, as one commentator noted, there has not been a full dissolution since *United States v. Corn Products Refining Co.* Strict enforcement of the antitrust laws may in fact lead to inflation, not competition. Conversely, failure to enforce the antitrust laws in a regulated industry can also lead to inflation. Whether the regulatory agencies can enforce the law so that only the "proper" result (sustained organizational diversity and yardstick competition) occurs is open to question.

The Division Chief of the Antitrust Division of the Justice Department has stated that regulatory agencies often "pursued the common goals of restricting competition by means of price regulation, entry regulations, technology control and service quality limitations. . . . [W]e can no longer afford such wasteful government practices. . . ." One year earlier, the Nuclear Regulatory Commission Antitrust Section Chief stated that continued regulation, via the antitrust laws was in fact necessary to maintain competition. It is possible, as Victor Kramer (Director of the Institute for Public Representation) suggests, that the ideals of the antitrust laws (lower prices and greater competition) do not result when the laws are enforced by the government, and there should be a "public counsel" who should join the other seven agencies already directed by Congress to aid in the antitrust enforcement process.

The best indicator of what will achieve the desired ends, or ideals, may be found by examining the fears of the private power systems. They stand to gain a great deal by concentration, so long as they may remain exclusive in power pooling. Their fears involve being judged (yardstick competition) against lesser sized systems who, due to government subsidy, efficiency, realistic planning, low profit margin requirements (particularly the public systems), and the ability to purchase "unbundled" bulk power, may do better than the large

185. *Id.* at 180.
186. See Part A of this section.
189. Supra note 184, at 180.
190. Unbundled power refers to power of a single generating facility on a large system. A nuclear unit produces power more economically than a fossil unit; the ability to purchase unit power, rather than having to pay at system wide allocated cost, would be a positive result of section 105 enforcement. Large systems refer to this concept as "cream skimming" and are highly critical of it.
systems. They also fear continued diverse ownership patterns (organizational diversity), as they present opportunities for growth and advances in technology (due to lower initial capitalization costs) which the large systems may not be able to match.

Companies are perhaps the most fearful of this kind of competition because it may have the greatest impact upon regulatory control. Today, with the growing interdependence of systems and with many of them purchasing their power needs, the yardstick concept may have lost much of its usefulness unless the utility has access to economically-priced power, either by membership in a power pool or as a result of competition in the sale of wholesale power.

* * *

To illustrate, assume that a municipal system is buying all or most of its power from a neighboring private system. There exists between the two an indirect, but very real competition to serve their respective areas since the state commission or voting public might well decide to allow the system that furnished the cheapest power to serve both areas. Unless the municipality has access to alternative sources of economical power, either by joining a pool to build large, efficient generating plants or by having access to alternative wholesale sources, the neighboring system can virtually control the performance of the municipal system through its control over the wholesale price of power. Of course, the Federal Power Commission can regulate the wholesale rate to eliminate this control, but to say that such regulation is sufficient is either to reject the yardstick concept or to argue in a circle since a regulated price cannot be used as a yardstick to measure the effectiveness of regulation. Such control by selling systems is probably very common and very effective, primarily because of the almost universal control over transmission by the dominant selling system in the area. This kind of 'unfair' competition is usually directed at municipals and cooperatives but also occasionally at small private systems, particularly when the seller is seeking to absorb the smaller system by merger.

Yardstick competition takes on added importance as a rationale for prohibiting such anticompetitive behavior when it is remembered that the economies of scale at the distribution level result primarily from density of service in a particular territory rather than from territorial expansion. This somewhat blunts the argument in favor of formal integration of neighboring distribution systems, except where the system or systems are so small that they cannot efficiently perform maintenance, billing, and other administrative functions.

Yardstick competition is not easily identified with the economist's model of a competitive market. There is no direct confrontation in an attempt to attract the consumer, unless the franchising authority is regarded as the consumer. There is only indirect competition arising out of comparison. Nevertheless, this form of competition can serve a very valuable function in the regulatory process, and should therefore be encouraged by prohibiting structure or conduct that makes such comparisons unrealistic or impossible.192

191. Supra note 67, at 41-42.
192. Supra note 87, at 78.
Similarly, one recognizes necessity for balance in the types of business organizations involved in power production. A nation of regional power pools, open to any entity involved in transmission, distribution or generation of power is an ideal — but a regulatory antitrust ideal, achieved by administrative enforcement and not by public prosecution for antitrust violations. This is, in a sense, actual competition, though not as it is normally envisioned. In the case of nuclear power, and the electric utility industry, to “combine and conspire” may be the only means to facilitate competition.

The Lustgarten-Brozen study, “Industrial Concentration and Inflation” partially supports this contention:

Both theoretical and empirical evidence relating industrial concentration to inflation have been examined. The theoretical arguments were that concentration promotes inflation because it allows sellers to maintain prices when demands decline, to pass on inflationary wage increase, and avoid competitive pressures to reduce costs. These arguments were found to be inconsistent with the evidence, which showed that prices and unit labor costs have increased more slowly in concentrated industries than in other industries. The main reason for superior performance of firms in concentrated industries has been their greater gains in productivity. This finding suggests that managers in these firms have been more successful in instituting cost saving techniques of production.

Thus, the regulatory scheme must acknowledge the necessity of concentration and maintain or develop new competitive arenas.

In the early 1900's direct competition in the electric utility industry was disastrous. It led to excessive duplication, massive waste, excessive rates, and deterioration of investor confidence. Regulation substitutes for direct competition in a way that is designed to avoid such results. It seeks to maintain limited retail load competition (borderline competition), wholesale load competition, yardstick competition, bulk power supply competition, and interfuel competition.

Retail load competition is the least common form of regulation substitute with the smallest impact of any of the above. In only one of the seventy section 105 cases has there been an antitrust inconsistency.

193. Supra note 87, at 592.
194. Id.
195. Naturally, criminal violations of 15 U.S.C. §1 must be prosecuted. However, since combination is essential to competition, views will have to be modified as to what constitutes a “violation” and what constitutes an inconsistency.
197. Id. at 36.
198. Supra note 67, at 13.
200. Supra note 67, at 14-27.
alleged regarding retail load.201 Indeed, the duplication of facilities and related environmental and cost factors suggest that retail competition may have only negative effects.202

*Borderline competition* is a form of retail competition which exists within fringe areas of a service area, e.g., electrical service for a new industrial or residential development.203 This competition, like that which occurs when an industry locates in a new region and seeks bids for retail supply, is only "one time" in nature, though worthy of protection, since it creates a laboratory for cost studies which can determine if yardstick competition is achieving its objective. Care must be taken in regulation to ensure that price reductions which may result when entities competing for new retail loads are not paid for through direct price increases on existing customers.

*Wholesale load competition* refers to the practice of sales of wholesale power and energy components which are purchased for resale in bulk, as opposed to retail distribution. Purchasers of such power must have options in generation sources and open opportunities for transmission services (wheeling). Thus, vital to wholesale load competition is complete coordination at the operational and planning level. When a moderately sized municipal electric company has the opportunity to purchase power from two or more larger generating systems, there can be actual competition. The municipality can bargain for unit power cost, reserve benefits, emergency services, or many other factors which the supplier systems can offer. However, should an encircling generation and transmission system refuse to wheel power, the competition ends.204 It is tragic that the vertical structure of the large investor owned systems, which do in fact refuse to wheel, has resulted in the demise of a number of smaller systems. Typically, the refusal will entail a denial to wheel or form generating or distributing entities outside the service area of the larger system.205

*Yardstick competition*, discussed earlier, is equally dependent on coordination.206 The internal and external comparisons, reflecting relative success of production, marketing, and all aspects of operations can be made on the basis of geography, type of ownership, decision-making principles, size, or other systemic characterizations. The maintenance of this delicate and easily misunderstood form of competition should be a primary regulatory goal.

*Bulk power supply competition* refers to the competition among the suppliers of bulk power components.207 Assuming continued organiza-

201. In re Cleveland Electric Illuminating Co., Davis Besse, supra note 122.
205. Id.; U.S.N.R.C. Doc. 75/061 supra note 67, at 18-20.
206. Id. at 20-22.
207. Id.
tional diversity, there will remain a "market" of suppliers who compete
with each other, not only for sales to other systems (wholesale
competition), but in a broad sense of industrial competition e.g.,
competition to reduce generation costs thereby maximizing profits and
attracting investors, or attracting industrial loads. Additional bulk
power is sold "packaged"; the contents of the package varies depending
on the intensity and effectiveness of the competition. Thus, one major
utility selling firm power in one hundred MW blocks may offer it in
bulk, and add to the package various other service components (surplus
power, emergency service, transmission and interconnection servicing)
while another may offer a different package altogether. This process
stimulates the most efficient allocation of resources and has a ceiling
effect on cost.208

*Interfuel competition*[209] again refers to the suppliers of bulk power,
and particularly to their resource management. It urges the utilization
unit cost quotients for oil, gas, coal, and nuclear power, and is
considered to be relatively successful in causing technological advances
in fuel supply.

These five forms of competition are considered to be effective, when
they are combined with appropriate regulation resulting in coordi-
nation. "Although the uncertainties of competitive rivalry may present
a barrier to coordination, industry regulators with adequate infor-
mation can help the industry achieve a combination of competition and
coordination that benefits both industry and society."210 Nonetheless, it
is acknowledged that total coordination may bring complacency and
stagnation. Should that occur, the government is confident that
"regulation must be used to adjust the market ethos so that it once again
allows a competitive intensity sufficient to secure the desired
results."211 Because of the compatibility of coordination and competition in terms of
results, it is projected that they can exist simultaneously, and success-
fully.

VI. IN THE MATTER OF CONSUMERS POWER COMPANY,
MIDLAND UNITS I AND II

A. Corporate History of Applicant and Its Market Position.

On January 13, 1969, the Consumers Power Company, a private
investor-owned utility operating a wholly integrated generation, trans-
mission, and distribution system in Michigan's lower peninsula filed an
application to operate two nuclear power plants, known as Midland,
Unit I and Midland Unit II on a site owned by the company in the
Tittabawassee River basin in Midland County.212 Section 105(c) had not

208. *Id.*
209. *Id.* at 25.
210. *Id.* at 42.
211. *Id.*
212. *In re* Consumers Power Co., Midland Units I & II, 50-329A, 50-330A
[hereinafter cited as "Consumers"]. Documents available in the Public Documents Room
of the Nuclear Regulatory Commission, Washington, D.C.
yet been passed by Congress, and so pursuant to Section 105(c)(8) of the Atomic Energy Act, the construction permit was issued to allow construction to begin, though it was clear that the permit was subject to any antitrust conditions found by hearings and settlement between the Atomic Energy Commission [hereinafter A.E.C.] and Consumers.

Consumers Power Company is one of five investor-owned utilities in Michigan's lower peninsula. Consumers services a 27,000 square mile area, with 1,110,000 customers and a peak load of 4,000,000 kilowatts. Consumers operates a fully interconnected system with Detroit Edison, (a private investor-owned system) by utilization of four extra high voltage transmission lines, and participates in coordinated planning and operation with Detroit Edison. Detroit Edison, the largest utility in Michigan, has generating capacity of over 6000 MW and nuclear generation, via the Greenwood Units\textsuperscript{214} and the Enrico Fermi Electric Power Plant.\textsuperscript{215}

The early history of Consumers Power Company (circa, 1910) reveals control and part ownership by one W.A. Foote, at which time the company was called Commonwealth Power, Railway and Light Company. Foote was a central figure in Michigan politics at the time, and was influential in granting preferred utilities perpetual franchises in various service areas. Consumers has fifty-three such Foote Act Franchises, 961 thirty-year franchises and four open franchises.\textsuperscript{217}

In the period from 1910-1919, Consumers sought to achieve control over hydro generation in the Michigan Lower Peninsula, and achieved 73% control by 1919. This pattern continued through 1950 and beyond, and in the 1950's, control was wrested from the Michigan Public Service Company, thus acquiring the service rights to Chebovgan, Gaylord, Ludington, Montague, Traverse City, and about 100 other relatively small municipal cities, including White Cloud, Bellaire, and Kalamazoo.\textsuperscript{219}

To service these systems, Consumers presently has a generating capacity of 4,321 MW, a figure which will be increased by 25% when the two Midland Units go into full service. In addition to generation, the company controls

nearly all the extra high-voltage (345 KW and above) and nearly all the high voltage (44-345 KW) transmission in its service area. Since the system is fully coordinated there is access to the benefits of other systems, particularly in terms of reserves. These systems include the massive Detroit Edison Corporation; Ontario Hydro-Electric Co-op, the Indiana-Michigan Electric Company, Commonwealth Edison of Illinois, and the Northern Indiana Public Service Company.\textsuperscript{220}

216. Supra note 143, at 19.
217. Supra note 143, at 34.
218. Supra note 143, at 20.
219. Id.
220. Id. at 23.
One of the benefits of this intersystem coordination is a tremendous savings in reserve requirements. While Lansing Electric Company, a competitor of Consumers which is not granted the benefits of coordination by Consumers, must carry reserves of 39% of system generating capacity, Consumers needs are set at 17%. This 17% amount is a direct result of Consumers membership in the Michigan Pool[hereinafter MP] along with Detroit Edison.

The smaller systems in Consumers service area also formed a pool, Michigan Municipal Cooperative Power Pool [hereinafter MMCPP]. Comprised of members of smaller systems, the MMCPP alleged that it had been unable to achieve satisfactory intersystem coordination with Consumers. The largest pool member, Lansing, has generating capacity of 320 MW while the next eight systems have the capacity and need to generate an average of 35 MW (compared to 4,321 MW of Consumers). These systems, including Holland, Grand Haven, Traverse City, Coldwater, Zeeland, Hart, Lowell, Hillsdale and others, are organizationally diverse, enjoy different benefits in operation, and, if interconnected, may insure yardstick competition in the area. However, for the last twenty-five years, the government has claimed that Consumers has resisted most efforts at achieving coordinated planning and coordinated operation. The majority of requests to negotiate have allegedly been denied by Consumers, and where coordination agreements have occurred, they have been allegedly weak and one-sided.

While Consumers allegedly refuses to coordinate in almost every method described infra, (Part VI) it does supply and sell wholesale bulk power to municipal systems. These arrangements apply to perhaps 70% of the systems within the applicant's service area.

The addition of the Midland Unit units is vital to Consumers Power Company, but also forms a difficult competitive barrier to the systems who are not part of the Michigan Pool, if those systems are not granted access to the units for economic and environmental reasons. With hydro-electric sites exhausted, and gas and oil scarce, the remaining new generating options for Consumers are coal or nuclear. These are regional considerations, for each region of this country, in the future will be allowed to generate only such power as it needs. Additionally, the prospects of large scale coal generation in the Lower Peninsula are

---

222. For example, in 1963 and 1964, Consumers refused to negotiate an emergency power contract with Wolverine and Northern Michigan, almost causing their corporate demise, supra note 143, at 91.
223. Under the Lansing, Holland Agreement, Consumers need only supply power if it has excess on hand. Id.
224. Supra note 212.
225. See, e.g., Environmental Effects of Producing Electric Power, supra note 147 (Testimony of Dr. Merril Cisebud at 1397).
226. 1 NATIONAL POWER SURVEY, supra note 90.
bleak. The Supplemental Environmental Report of Consumers Power Co., states the coal problem thusly:

The ash collected from a coal fired plant... would amount to about one-half million tons per year. The problems of disposing of this quantity of ash in an environmental [sic] acceptable way are naturally formidable... Sulfur dioxide would also be emitted in large quantities from a coal-fired installation... There would also be emissions of other contaminants such as nitrogen oxides and trace elements that... represent atmospheric contamination that would not exist with a nuclear plant.... With the impact of environmental considerations and new Federal, state and local standards for industry emissions, coal faces further market uncertainty.227

These projections, if true, bode poorly for the municipals as well as for Consumers, absent full nuclear coordination. The sale of wholesale power for retail use is a non-market factor—and that was the extent of the power exchange as of the filing of the application. Alleged refusals to sell unit power, to grant access to the unit, and to sell wholesale bulk power for resale has effectively prohibited area wide competition. Blocked in by traditional barriers to entry, transmission refusals to wheel, and a lack of self generation for environmental and economic reasons, Consumers seems destined to continue its pattern of acquisition until its present dominance becomes a complete monopoly.

The existing competition must contend with Consumers stated expansion desires:

The plan is simply the extension of a long-standing endeavor on the part of both Detroit Edison and Consumers Power to achieve the lowest possible operating and capital costs. ... Broadly, purposes of the plan are:

.To perpetuate economy and dependability in production and transmission of electric power
.To facilitate supplying emergency power as needed in cases of storm damage or other disruption
.To advance the art and science of interconnection through further integration of the existing Michigan state-wide electric transmission network.228

While MMCPP struggled for survival, Consumers enhanced its position by becoming a member of the East Central Reliability Coordination Agreements [hereinafter ECAR], which is a regional coordinating group established to insure and encourage intersystem reliability and coordinated planning and operation on a massive level.229

227. S.E.R. Consumer Power Co. at 5.2 (1)-8; supra note 212.
Because of Consumers alleged refusal to grant access to the vital coordinating media, high voltage transmission and nuclear unit generated power, MMCPP has been unable to participate in ECAR.

The present position of the applicant, Consumers, is one of dominance. The issues in the antitrust hearing did not go to whether the applicant possessed a monopoly, as that was assumed by the parties and acknowledged by the Licensing Board. Consumers share of the wholesale bulk power market is 85%, its share of the retail market is 84%, leaving no doubt that in generation, the applicant possesses monopoly power by sheer size. Consumers also possesses a 9000 mile transmission system including 1400 miles of integrated and interconnected higher voltage transmission. The coordination with Indiana-Michigan Cooperative and with Detroit Edison, Inc. saves Consumers millions of dollars annually. Thus with control of over 98% of high voltage transmission and 100% of extra high voltage (needed for nuclear power plants electric generation), Consumers possesses a monopoly in transmission. The impact of such monopoly is massive, but not per se unlawful, unless such power is used to maintain the monopoly—conduct which would be inconsistent with the antitrust laws. Indeed, there are those who argue that monopoly power plus normal business practices which enhance that power or maintain it is a violation of the law.


The record supports the claim that Consumers Power Company possessed a virtual monopoly in its service area. It also suggests that over the past fifteen years, this monopoly power has had a highly detrimental effect on the other participants in the market place. While the parties in the antitrust hearing were restricted to going back no earlier than 1960, there is authority to suggest that such a limitation was unwarranted.

After an initial investigation, the Department of Justice issued an "advice letter" on June 28, 1971, pursuant to section 105(c) of the Atomic

232. Brief In Support of the Exceptions of the Department of Justice, In re Consumers Power Co., Midland Units I & II; supra note 212 at 59.
233. Supra note 223 (for percentages) and note 231 (for conceptual conclusion).
*Consumer Power Company did prevail in the case under discussion. Therefore, any conclusions or assertions made in this article must be viewed as academic in nature, presented purely to stimulate scholarly discourse and further study. The decision in question has been appealed to the United States Regulatory Commission Appeals Board, where the factual data discussed in this article may be reviewed de novo.
Energy Act, as amended, wherein it was stated "we believe that granting the license sought herein may maintain a situation inconsistent with the antitrust laws." Four years of intensive discovery, initiated by publication of a "notice of antitrust hearing" published in the Federal Register resulted in a protracted licensing hearing, wherein the issue was whether the granting of an unconditioned license would maintain a situation inconsistent with antitrust laws. Petitions were filed by the N.R.C. Staff, the Department of Justice, and a group of intervenors comprised of representatives from Cold Water, Grand Haven, Holland, Traverse City, Zeeland, the Northern Michigan Electric Cooperative, the Wolverine Electric Cooperative, and the MMCPP. The petitioners argued that the granting of an unconditional license would maintain a situation inconsistent with the antitrust laws.

It should be noted that the remedy sought in this proceeding was a license condition, i.e., a detailed directive requiring Consumers to coordinate. These proceedings were not antitrust "trials" wherein dissolution, divestiture, or criminal sanctions are pursued. In such proceedings, the traditional quantum of proof required to prove a "violation" of the law is not needed. Rather, proof of an "inconsistency" — a far less stringent standard — is required. This requirement may be likened to the proof requirement in section five of the Federal Trade Commission Act as described in the Cement Institute and F.T.C. v. Motion Picture Advertising Service Co., Inc. cases.

It was in the context of a licensing hearing for a license to operate the Midland Units I and II that the allegations of Consumers monopolistic abuses became matters of public record. Initial testimony by the Chairman of the Northern Michigan Cooperative, who was also spokesman for the MC pool pointed to the consequences of small electric entities being isolated from the regional power exchange market:

Q. Are there any impediments, or have there been any impediments to programs of coordinated operation and planning by the Municipal Cooperative Pool?

A. Yes, very serious impediments. I'm sure you all are aware of the geography of northern Michigan, where the area in which northern Michigan and the pool group operate, we are isolated to the east and west by water which is a very effective barrier to relationships, power supply — power relationships with systems to the east or west.

Q. Do you have any opportunities for coordination other than — or opportunities which do not require cooperation of Consumers Power Company? . . .

237. Supra note 230.
239. For reasons not readily ascertainable, the Department of Justice determined that this would be a "maintain" case, and not a "create and maintain" case, See 42 U.S.C. § 2135.
240. See generally, N.R.C. Brief in Support of Exceptions, In re Consumers Power Co., Midland Units I & II, supra note 212 and 221 at 81 et seq.
A. Well, our problem there is one of economic feasibility to reach the system of the affiliate of the American Electric Power Company, which has facilities in the southwest part of the lower peninsula, and to move substantial quantities of power would require very heavy investments in transmission facilities. That's likewise true with access to the facilities of the Detroit Edison Company operating in the southeast and eastern portion of the state.

Our access to other power suppliers, our economic access to other major suppliers must be via the facilities of the Applicant.243 [Emphasis added.]

This testimony was later corroborated by that of John Keen, Manager of Wolverine Electric Cooperative:

Q. Now, why do you feel that access to wheeling services from the Consumers Power Company is necessary to your system — and when I say "your system," I refer to the Wolverine Electric System, sir?

A. For several reasons: one is to eliminate wherever possible duplication of transmission facilities.

Number two, to be able to make purchase and sale arrangements, economy power, and so forth, with other utilities, other than Wolverine itself and Consumers Power, itself, perhaps.

Q. Is access to Consumers Power wheeling service an important element of either present-day or future coordination attempts by your system?

A. Very much so.

Q. Could you explain that, sir?

A. Yes . . . We could not make arrangements with other utilities such as Indiana and Michigan Electric Cooperative, Detroit Edison, or the City of Lansing . . . without wheeling arrangements.244

On the subject of being denied access to coordination, further testimony revealed that "[t]he primary problem for small utilities . . . is the lack of any transmission facilities available to us in order to actually move blocks of power around so we can coordinate."245 The witness testifying went on to note that with these services "we [the smaller systems] could go to Detroit Edison, I & M, anybody . . . for wholesale power."246 Thus, absent the services there is no actual or "yardstick" competition, no internal evaluations or external assessments, in other words, perfectly suppressed competition by denial of access to transmission.247 This refusal to coordinate transmission services is done at the expense of yardstick competition and at a massive financial loss to

244. Id. at 4511-12.
245. Id. at 4330-31, (Testimony of Stephen Fletcher, Alpena Power Co.,).
246. Id. at 4333-34.
247. See Part VI supra.
the smaller entities, thus jeopardizing organizational diversity. Direct testimony revealed that if the smaller systems could purchase wholesale bulk power elsewhere (other than from Consumers) even paying the maximum wheeling charge, smaller systems would still experience great savings.\textsuperscript{248}

The transmission monopoly then coupled with the refusals to grant access to it, has led to injury to competition, and thus would seem to create an inconsistency with section five of the Federal Trade Commission Act.\textsuperscript{249} Moreover, it has forced utilities to ignore the nuclear power supply option. For example utility executive Earl Brush of Lansing, Michigan in answer to a question involving the use of nuclear powered generation, testified as follows:

A.\textit{ If the City of Lansing is to ever participate in nuclear power we are going to have to have the benefits of wheeling.}

The municipals — We are too small, as an individual municipal system, to build a nuclear plant. Our information is that 500 m.w. and up, or maybe 500 m.w. is the smallest size that is economical to consider. With our load we could not afford to build, or justify building that large a unit.

Our effort in the nuclear field is to work with some presumably investor-owned utility to own a share; and we have so asked Consumers to consider us in their Quanicassee plant, in writing. Part of that request was wheeling, part of the request was an operating agreement covering the jointly owned facilities. So we, as well as the rest of the municipals, to ever participate in nuclear power, are going to have to have wheeling arrangements. Otherwise it's going to pass us by ([TR] 2292-2293).

* * *

Q. Mr. Brush, does the [Stanley Engineers] study include purchases from parties other than Consumers as an alternative?

A. No, sir, it does not, because we have no contractual arrangements with anyone else.

Q. Why didn't you have any contractual arrangements with anyone else?

A. Well, we butt up against Consumers Power in our service area —

. . . . The nearest transmission line to us of another generating utility is some 15 miles due west of us. It's the Wolverine G & T. And Detroit Edison is a considerable distance from us, and we have no wheeling capacity at the present time to interconnect with anybody else.\textsuperscript{250}

\textsuperscript{248} Supra note 243, at 4074, (Testimony of Harold Munn, Goldwater Bd. of P.U.C.).
\textsuperscript{250} Supra note 243, at 2333-34.
Thus, not only have the municipals been denied transmission, but this denial has severely restricted their power supply options.251

In the prepared testimony of Dr. Harold Wein, an economist who testified for the Department of Justice at the hearing, the plight of the municipals is succinctly stated:

The consequences for small electric utilities are not difficult to see. If they cannot engage in the bulk energy exchange market — if, in short, access to pools and coordination is denied them on equal and equitable terms, they will fall further behind in the competitive struggle. . . . The gap between their costs and those of the larger companies will grow.252

What Dr. Wein's testimony reveals is a party, who has apparently chosen to exercise the most efficient means of maintaining its dominance. One of the rewards of such dominance has been a decline in the number and variation of systems in the lower peninsula, i.e., a decline in organizational diversity.

C. The Monopoly Power Exercised.

Consumers' refusal to coordinate is a matter of public record.253 The Board found Consumers to be consistent, or rather "not inconsistent" with the antitrust laws because the management of the applicant had collectively determined that such coordination would not result in a net benefit to the applicant; although, as part "B" supra reveals, these policies had a decidedly anticompetitive effect on the competition of the applicant. Moreover, the applicant had an avowed purpose in its plans: "the first goal of the company's marketing activity or program concerning other utility systems in its service area is, of course, to acquire these systems."254 At the hearing, there were attempts to deny that this was a "serious" statement of policy. However the Board's refusal to allow an attempt to introduce a "New Policy of Consumers Power."255

The position which the Board accepted indicated how the company might prevent the dependent municipal systems from achieving "a

---

251. Id. at 1726-28, where utility executive Joseph Wolfe of Traverse City testifies: A. Any viable or any reasonable way of delivering this power to Traverse City from a remote source would have to come over somebody else's transmission system. The transmission system of the cooperatives might have been useful for this purpose, but only insofar as it was capable of handling these power deliveries, and its system was not designed during that period of time to handle any larger power transfers than what it probably... would reasonably need for itself. So that would mean that either very large transmission facilities would be involved to upgrade the cooperative's transmission system of the transmission system of Consumers Power Company would have to be utilized. And this did not appear to be a method which could be accomplished due to the expressed attitude of Consumers Power Company during negotiations and discussions that were held with them (Transcript 1726-1728). [Emphasis added].


253. Supra note 230, at 71-83, Initial Decision.


255. Supra note 230, at 91.
completely independent power source.” Five years after the presentation had been made, the vice president for Marketing restated the policy of the company. Mr. B. G. Campbell allegedly stated that “hopefully [Consumers] would eliminate future increased penetration or influence of a public power group in the Applicant's service area.”

These policies were not idle threats of a stumbling giant but were accurate embodiments of a pattern of conduct which had an apparently negative effect on competition.

Specifically, investigation revealed Consumers apparent refusal to coordinate in 1963 and 1964 with the Northern Michigan and Wolverine Cooperatives. The cooperatives had sought a coordination agreement, but Consumers had allegedly refused, offering only the sale of wholesale power for retail distribution. This alleged refusal effectively prevented the cooperatives from entering the regional power exchange. Consumers' refusal was phrased thusly:

*It continues to be obvious to me that both Northern Michigan and Wolverine have a strong desire to interconnect and pool with Consumers Power Company. This desire seems to preclude realistic consideration of other power supply proposals that can and should be used by both of these G&Ts to provide them with their future growth requirements. As indicated in my letter to Mr. Lee [of the Rural Electrification Administration], any interconnection and pooling arrangement should create similar benefits for both parties. After careful and considered review, we conclude there are insufficient benefits for Consumers Power Company through such an arrangement to adequately protect the best interests of our stockholders and existing regular customers. We are still of the opinion that the revised proposed [wholesale firm power] contract offers the best short- and long-range solution to the cooperative power supply requirements.*

The records reveal other refusals to coordinate by the applicant with Northern Michigan in 1967. In 1968 when the MMCPP was formed with the express purpose of achieving coordinated operation with major systems, the MMCPP sought out the transmission services of Consumers. It took over five years for any agreement to be worked out; however, when completed the agreement was alleged to be unsatisfactory and one-sided.

In that same period, 1966-1973, Consumers allegedly refused to enter into coordination agreements with Traverse City and Edison Sault Electric Company. Perhaps more significantly, Consumers officially adopted a policy whereby all “undesirable” third parties

---

256. *Supra note 230.*
257. *Prehearing Brief of the Department of Justice, supra note 143, at 42.*
258. *Department of Justice Exhibit No. 32; see Consumers Power Co., supra note 231.*
259. *Id., exhibit No. 41.*
260. *Transcript at 1182-84 (Testimony of A. Steinbrecker).*
261. *Supra note 232, at 101-06.*
262. *Id. at 110-13.*
would be forever barred from the Michigan Pool (Consumers and Detroit Edison). This was a conscious policy which stated *inter alia*, that the MMCPP members and the MMCPP itself were undesirable. By excluding these parties Consumers effectively prevented MMCPP members access to nuclear power and to the vital coordinating medium of transmission.

Additionally, the agreements which were signed were no great aid to the competing systems, *e.g.*, the Holland-Consumers interconnection agreement is silent as to reserve responsibilities for Consumers. By this omission, Consumers achieved its purpose of acquiring a bulk power purchaser, while not enhancing the purchasers position in the bulk power market. Such a policy, coupled with a consistent series of refusals to wheel power, results in Consumers' ability to maintain customers, while denying bulk power supply options to customers, restricting competition, and in general improperly utilizing their dominance over transmission.

Another alleged abuse by Consumers involved its denial to grant direct access to the nuclear units for which it sought a license. Northern Michigan Electric, Traverse City, Alpena Power, Grand Haven, Coldwater and others had sought direct access via ownership shares, or other alternative means. The denials by Consumers came as quickly as the offers were received. These denials were based on (1) a lack of timeliness of the requests, (2) a lack of necessity of direct access, (in the opinion of Consumers); or (3) the fact that Consumers believed access unnecessary since Consumers served to supply wholesale bulk power needs. Consumers' rationale that the municipals could build their own plant is untenable since (1) the construction of the Midland, Greenwood, and Fermi Units was already underway; (2) there was no other essential high voltage transmission made available; and (3) there were numerous economic and environmental reasons against such construction.

The agreements of wholesale bulk power, as mentioned earlier, were fraught with problems for smaller utilities. One of the worst was the power sale restriction which Consumers placed on many systems with which it had been interconnected. An example of such an agreement is informative:

Connections: It is agreed that the electric energy to be supplied by Consumer's Power to Holland hereunder shall be used *solely to meet*

---

263. *Id.*
265. See Department Exhibits Nos. 27, 24, 122, and Transcript 4141-42, 4350, Consumers Power Co., *supra* note 212.
266. *Supra* note 232, at 133.
268. *Id.* at 1613-14 (Testimony of Mr. Wolfe).
269. *Id.* at 2808, 2558 (Expert testimony of Mayben); Wash. 117-73, at 5-7; 22 Appendix E; Transcript at 6351, 1550, 4431 (all regarding the inadvisability of construction at less than 500 m.w.).
a part of the requirements of Holland in the operation of its electrical system located in the State of Michigan. It is further agreed that without the written consent of Consumer's Power, Holland shall make no interconnection with any person, firm, corporation, government agency or other entity which might result in either party hereto becoming engaged, directly or indirectly, in a transmission or sale at wholesale of electric energy in interstate commerce. If Holland makes such an interconnection without such written consent, Consumer's Power may, at its option, terminate this agreement forthwith by giving written notice of its intention to do so.270 [Emphasis added.]

Such a provision makes it a breach of contract for the captive systems to participate in the regional power exchange market with any entity other than Consumers.271

The hearing revealed a great deal of evidence suggesting an extensive system of territorial allocation among major systems to the exclusion of minor systems.272 These arrangements were developed in a series of "gentlemen's agreements," and had an inhibiting effect on smaller systems. Of equal significance is the preemptive coordination exclusions which Consumers allegedly undertook over the past decade. Preemptive exclusions involve

a situation where a utility system with generation requests coordinating services, particularly a reserve-sharing arrangement, but instead is offered and is forced to accept a wholesale for resale contract. This conduct is equally effective as preemptive coordination in forestalling the formation and evolution of an independent power exchange.273

These exclusions or refusals were a part of Consumers' policy, and are indicative of their quest to maintain dominance.274

Based on these alleged abuses of established monopoly power, it would seem only logical that a licensing board would be compelled to find that the activities under the license would maintain a series of situations inconsistent with the antitrust laws. However, such was not the case.

Upon a close reading of the decision,275 analysis suggests that while the Board knew that the factual situation was "inconsistent with the antitrust laws," a misunderstanding of the factual nexus issue forced

270. Department of Justice Exhibit No. 100, supra note 212.
271. Supra note 232, at 144. Some of the involved systems are listed below. The "DJ" designation refers to the exhibit number of the Department of Justice in their § 105(c) proceeding. The systems are: Northern Michigan (1967 contract; DJ No. 64), Edison Sault Electric Company (1966 contract; DJ No. 800), City of Lansing (1964 contract; DJ No. 91), Southeastern Michigan Rural Electric Cooperative (1967 contract; DJ No. 98).
272. Department of Justice Exhibit No. 128, supra note 212.
273. Department of Justice Brief in Support of Exceptions, supra note 232, at 162.
274. See Department of Justice Exhibit Nos. 7, 148, 145; Transcript at 1237.
275. Supra note 290.
the Board to conclude that these inconsistencies were not sufficiently related to the nuclear unit to allow for a finding against the applicant. However, the record reveals a direct relationship between every one of the inconsistencies alleged and the nuclear unit. In terms of system generating capacity, system reserves, system reliability, capacity and energy for sale to Consumers' customers and other utilities, there was sufficient proof of a systemic effect. An increase of 25% generating capacity is systemic and affects an entire system.

In terms of the "factual nexus," the record reveals the following:

(A) A nuclear generating plant is not an independent part of most systems, and certainly not an independent part of Consumers' system.276

(B) Since a new large unit on a system of smaller units may dramatically increase reserve requirements, intrasystem and intersystem coordination is needed to maximize benefits from the facility.277

(C) Absent mass intersystem coordination the 1300 MW Midland Units would be impracticable.278

Nonetheless, the Board did not find a sufficient factual nexus. This was based on the Board's rather substantial confusion in terminology. There was an apparent assumption by the Board that the element of nexus, when proved, must include a substantive finding of "misuse." This of course is incorrect.279

D. The Initial Decision

On July 18, 1975, the Atomic Safety and Licensing Board rendered its initial decision in *In the Matter of Consumers Power*, LPB 75-79, Midland Units I and II, N.R.C. Doc. 50-329A and 50-330A.280 As mentioned earlier, the decision appears erroneous in its factual determinations and legal analyses. First, *Consumers* is the first administrative antitrust decision pursuant to section 105(c) of the Atomic Energy Act. Accordingly, there are few precedents that can be considered binding. Much that the Board wrote in its decision which is deemed in this article as erroneous is a matter of opinion. Although there was a large body of secondary authority for the Board to consult, it seems that the decision runs contrary to such sources. Second, the tragic death of Jerome Garfinkel, Chairman of the Consumers Licensing Board must have had a substantial impact on the other two sitting judges.281

276. See *supra* note 212 (Prepared Testimony of Helfman at 34).
277. Transcript at 1635, 5529 (Testimony of Wolf and Rogers).
278. Transcript at 5544, 64 (Testimony of Rogers and Wein).
279. See *Initial Decision, supra* note 230, at 50-55.
281. Chairman Garfinkel was actively involved at every step of the case, participating in the hearings and guiding the proceedings in an expert and professional manner. His death was, as the Board notes, at 115 of the *Initial Decision*, a tragic loss to those who knew him, and to the legal profession. It is particularly noteworthy that he was the
Consumers holds that the granting or issuing of the permit to construct the Midland facility would not create or maintain a situation inconsistent with the antitrust laws. The decision was limited to the "maintain" aspect, since it was agreed by the parties that "create" aspects would not be litigated at the time of the hearing.

Essentially, Consumers holds that an electrical system which is dominant and has monopoly power may exercise that power to maintain its position. The Board determined a broad relevant market in a geographical sense, but held that the product market related solely to coordination between the Consumers and the smaller systems. Further, the Board concluded that the "regional power exchange" market was outside the relevant product market. In terms of legal application, the decision gives primary emphasis to the Sherman Act Standard, and does not utilize the Federal Trade Commission Act as a primary legal principle. The Board found further that an applicant, who has 85% control over generation and 100% control over extra-high voltage transmission, does not have the power to deny coordination among the Intervenors. Additionally, the decision applies a "misuse-immunity" standard regarding the critical question of applicability of the antitrust laws to a regulated industry. This segment of the opinion states that a licensee can be acting inconsistently with the antitrust laws pursuant to section 105 of the Atomic Energy Act only when the applicant misuses the activities under the license, i.e., the nuclear reactor, in an anticompetitive manner. The Board held:

(a) Nexus exists between otherwise lawful activities under a proposed license and a situation inconsistent with the antitrust laws, if, and only if, the said activities are misused so as to be a material element and a substantial factor in a scheme or conspiracy the purpose or effect of which is to cause the creation or maintenance of said situation.

(b) Activities under a license issued by the Commission pursuant to statute per se cannot create or maintain a situation inconsistent with the antitrust laws.

(c) Activities under a license issued by the Commission pursuant to statute, can create or maintain a situation inconsistent with the antitrust laws if, and only if, such activities constitute a material element and a substantial factor in a scheme or conspiracy the purpose or
effect of which is to cause the creation of maintenance of a situation inconsistent with the antitrust laws.\textsuperscript{288} [Emphasis added.]

This interplay between nexus and "misuse," and the addition of "scheme or conspiracy" and "purpose and effect" are new additions to the law, if indeed they survive the appeal of the decision. Part C supra, regarding what constitutes a situation inconsistent with the antitrust laws, fairly well excludes Federal Trade Commission § 5 "reasonable probability of inconsistency" and "incipiency" concepts, all mandated in the legislative history.\textsuperscript{289} The finding that activities under the license means "within the nuclear plant" is equally novel. It is here that immunity arises, \textit{i.e.}, a licensed activity cannot be a violation of law per se.\textsuperscript{290}

Regarding the requirement to coordinate, the Board found that such requirement would be tempered if both parties received a benefit from the coordination. This finding, when applied to Consumers, reveals that with regard to a scarce resource a dominant entity may refuse to deal with others, so long as no net benefit can be shown.\textsuperscript{291} Regarding refusals to wheel or grant access to nuclear facilities, the \textit{Consumers} holding provides that these too can be justified, so long as the refusal was not part of a \textit{scheme or conspiracy} whose \textit{purpose} or \textit{effect} is to attain or maintain monopoly position, or so long as the refusal can be justified by a showing that the coordination could result in no benefit to the applicant.\textsuperscript{292}

Factually, the Board found that 85% control of generation and 100% control of transmission did not create a bottleneck,\textsuperscript{293} that offering bulk power at wholesale for retail was sufficient from a competitive standpoint,\textsuperscript{294} and that a restrictive coordination covenant which prevented third party dealings was not inconsistent with section 105(c).\textsuperscript{295} Exclusions from the Michigan Pool, conspiracies to limit competition\textsuperscript{296} (as described \textit{supra} regarding the R. L. Paul Memorandum), and even attempts to monopolize were all found to be consistent with the antitrust laws. These were justified based on "moral" duties to shareholders,\textsuperscript{297} and the lack of sufficient power to actually achieve monopoly.\textsuperscript{298} Regarding access, the Board found that a denial of access to 500 MW or greater units was not factually problematic since the smaller utilities could construct one or many smaller nuclear units of seventy-five MW or less.\textsuperscript{299}

\textsuperscript{288} \textit{Id.} at 61.

\textsuperscript{289} \textit{Supra} note 160.

\textsuperscript{290} Initial Decision, \textit{supra} note 230, at 40-60.

\textsuperscript{291} \textit{Id.} at 61-66.

\textsuperscript{292} \textit{Id.} at 70-83.

\textsuperscript{293} \textit{Id.}

\textsuperscript{294} \textit{Id.} at 111-12.

\textsuperscript{295} \textit{Id.} at 92-95. \textit{See} part C of this section on exercise of monopoly power.

\textsuperscript{296} \textit{Supra} note 251 and accompanying text.

\textsuperscript{297} Initial Decision, \textit{supra} note 230, at 64-66.

\textsuperscript{298} \textit{Id.} at 102-03.

\textsuperscript{299} \textit{Id.} at 110-11.
By minimizing the obligation to coordinate and making pre-licensing review almost an impossibility, the Consumers decision stands as an anachronism in the antitrust field.

E. Critique of the Consumers Decision

1. "Net Benefit" Problems

Perhaps the greatest problem of the Consumers decision lies in the fact that the overall concepts of regional coordinated planning and coordinated development (Part V of this article) are given a secondary position to the so-called "moral right" of an individual business entity to prosper and benefit from each transaction that it undertakes. The Consumers rationale is as if the decision in United States v. Otter Tail Power Co. had never been written. Likewise, the Wolf Creek Commission opinion, which by law sets precedent for licensing boards, was ignored in terms of its nexus analysis. The Consumers decision overlooks legislative history, judicial precedent, and at times common logic in seeking to protect the ability of private enterprise to maximize investment.

The decision is plagued by a pro-private investor bias. For example, the Board held that where an applicant for a license seeks to have that license issued with no "antitrust conditions," the burden of proof rests on the government to prove violations, not on the applicant to prove consistency with the antitrust laws. This is at odds with the Commission's own rules, and with case law which holds that a proponent of an order has the burden of persuasion in a case such as this. While this point will probably not stir any changes in precedent, a bias does appear to permeate the opinion.

2. "Relevant Market"

Regarding the relevant product market, the Board excluded the entire product which related to the intervenors desire to coordinate with other electric utility systems which were contiguous to and interconnected with Consumers Power Company. This critical omission, which is inconsistent with the record, excludes actual competition

\[\begin{align*}
300. & \quad \text{Id. at 77.} \\
301. & \quad \text{The misuse theory seems to require a license which is then misused [granted to the applicant] prior to nexus being found. Thus, since prelicensing review is done before a license issues, the review has lost all meaning if this decision stands.} \\
302. & \quad 410 \text{ U.S. 366 (1973).} \\
303. & \quad \text{Supra note 106, at 92-95. See part C of this section on exercise of monopoly.} \\
304. & \quad \text{Id. at 45.} \\
305. & \quad 10 \text{ C.F.R.} \ § 2.732 (1970). \\
307. & \quad \text{Initial Decision, supra note 230.} \\
308. & \quad \text{Transcript at 59.}
\end{align*}\]
which would occur but for the unwillingness of Consumers to wheel power. In the hearing, the Board Chairman stated: "[W]e are here to show . . . whether the applicant has the power to prevent or influence coordination. . . ." A refusal to wheel power from a third party to one of the intervenors is clearly a "prevention of coordination," yet this was deemed not within the relevant "matters in controversy."

As stated in part D supra, the Board did not utilize section 5 of the Federal Trade Commission Act as the primary statutory authority. This error was perhaps caused by the fact that the Department of Justice appeared to be proving a Section II violation of the Sherman Act, in presenting "unlawful use of monopoly power" evidence. Since the standard of "violation" is not applicable to a section 105 hearing, proof of an inconsistency with any antitrust law is sufficient. Assuming the Department failed to prove a "violation" of Section II of the Sherman Act, and assuming the board believed that to be the proper standard, the error can be understood. The legislative history suggests that Federal Trade Commission Act § 5 forms the broadest standard, and as such, the most applicable antitrust provision, since violations of the Clayton or Sherman Acts are violations of the Federal Trade Commission Act. In F.T.C. v. Motion Picture Service Advertising Co. it was held that "Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate the antitrust laws . . . as well as to condemn as 'unfair methods of competition' existing violations of them."

Under the Federal Trade Commission Act, market foreclosures, e.g., a denial of pre-emptive coordination or a refusal to participate in third party wheeling, constitute antitrust violations. The Act was designed to cover that conduct which, while not a violation of the Sherman or Clayton Acts, runs contrary to the public policy underlying the antitrust laws. Such a standard is exactly the standard suggested for section 105(c) cases, and is the standard which is rejected in Consumers. Concepts, which plague Clayton Section 7 and Sherman Section II of monopolization and conspiracy are unnecessary with the Federal Trade Commission Act § 5, and it can therefore be suggested that the Board's most visual error (the utilization of "combination

309. Id. at 74.
310. Id. at 3986-87.
311. Id. at 44-46.
312. Supra note 232.
313. Supra note 160, at 81-156.
315. F.T.C. v. Motion Picture, supra note 314, at 394-95.
or conspiracy," and "scheme" and the "misuse" doctrine) could have been avoided by application of Federal Trade Commission Act § 5.

3. "Situation Inconsistent with the Antitrust Laws"

Regarding the situation inconsistent with the antitrust laws, the Board held:

In summary, we conclude as a matter of law that "situation inconsistent with the antitrust laws" means anticompetitive conduct, which term includes both violations of the antitrust laws and practices determined to be unfair by the use of the criteria quoted in Heater v. FTC supra. In determining the existence of anticompetitive conduct, each of the following criteria should be considered: (a) conduct which is a violation of the antitrust laws enumerated in Section 105a of the Atomic Energy Act, including conduct heretofore determined to be unfair by the FTC pursuant to Section 5 of the FTC Act; and (b) conduct, without necessarily having been previously considered unlawful, (1) which offend public policy as it has been established by statutes, the common law, or otherwise, or, in other words, is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) which is immoral, unethical, oppressive or unscrupulous; and (3) which causes substantial injury to consumers or competitors or other businessmen.319

This description brings into play a number of basic errors, not the least of which is the Board's confinement of situational inconsistency to "anticompetitive conduct." This eliminates the structural approach suggested by the courts,320 the legislature,321 and the Nuclear Regulatory Commission Staff.322 It would have greatly simplified the Consumers case had the Board determined that a structural approach could be utilized, e.g., dominance (monopoly power) plus any conduct which maintains the dominance. By controlling the regional power exchange, the coordinating medium of high voltage transmission, and access to nuclear power, the applicant Consumers Power maintains monopoly power. By allegedly refusing to wheel power, coordinate, or grant access, it acts in a manner designed to maintain its power. To find that such conduct is not inconsistent with the antitrust laws is a mistake. According to the precedent in Alcoa,323 Philadelphia National Bank,324 American Tobacco,325 and many more cases it is indisputable that the applicant had monopoly power based simply on control percentages. It is equally clear that Consumers' alleged refusals to coordinate regarding transmission, or otherwise wheel power, should have been condemned under the antitrust laws.326

319. Initial Decision, supra note 230, at 50.
320. Supra notes 183, 184; American Tobacco Co. v. United States, 328 U.S. 781 (1946); E. Rostow, A NATIONAL POLICY FOR THE OIL INDUSTRY 13 (1948).
321. Supra note 160.
322. Supra note 221.
323. Supra note 183.
324. Supra note 48.
325. Supra note 320.
The Department of Justice introduced a simple guide into the *Consumers* proceeding to clarify its position:

**SITUATION INCONSISTENT WITH THE ANTITRUST LAWS**

NUCLEAR POWER IS ECONOMICALLY FEASIBLE ONLY WHEN MARKETED FROM LARGE UNITS—500 TO 800 MW. NUCLEAR POWER IS CHEAPER NOW THAN ANY OTHER KIND OF AVAILABLE POWER TO MEET GROWING LOADS.

LARGE UNITS ARE ECONOMIC ONLY IF TIED BY HIGH-VOLTAGE TRANSMISSION TO THE REGIONAL POWER EXCHANGE. WHEN SO TIED THEY ARE MUCH MORE ECONOMIC THAN SMALL UNITS.

APPLICANT CONTROLS THE REGIONAL POWER EXCHANGE AND REFUSES ACCESS TO OTHERS SO THAT OTHERS ARE PRECLUDED FROM INSTALLING LARGE UNITS.

APPLICANT IS THE SOLE SOURCE OF LARGE UNIT POWER AND HENCE OF NUCLEAR POWER IN THE RELEVANT MARKET. ITS EXCLUSION OF OTHER POTENTIAL LICENSEES FROM THE REGIONAL POWER EXCHANGE ENABLES IT TO MONOPOLIZE THE WHOLESALE FOR RESALE FIRM POWER MARKET.327

Quite simply, the Board excluded that which should have been included in describing what constitutes an "inconsistency." Under the Board ruling, market structure and performance, ease of entry, nature of oligopoly, nature of supply and demand curves, strength and organizational diversity of competitors, and scarcity of resources may be excluded. This is, in and of itself, inconsistent with the antitrust laws.328

By eliminating market structure analysis and effectively preempting the use of section 5 of the Federal Trade Commission Act the Board eliminated some exceedingly viable precedent for determining "reasonable probability of an inconsistency."329 This is unfortunate as well as inconsistent with the legislative history of section 105.

It is intended that, in effect, the Commission will conclude whether, in its judgment, it is reasonably probable that the activities under the license would, when the license is issued or thereafter, be inconsistent with any of the antitrust laws or the policies clearly underlying these laws.330 [Emphasis added.]

---

327. *Supra* note 212.
Thus, it appears that *Consumers* leaves in its wake only the direct monopolization and conspiracy in restraint of trade cases, *e.g.*, *Kodak*, *Alcoa*, *Lorain Journal*, and *Otter Tail*. What may be excluded are the section 5 materials and even the bottleneck cases, *e.g.*, *Associated Press v. United States*, *Terminal Railroad*, *Gamco* and others mentioned in IV(B)1 *supra*.

4. "Nexus"

Regarding nexus, the Board held that

[n]exus exists between otherwise lawful activities under a license or proposed license and a situation inconsistent with the antitrust laws if, and only if, the said activities are misused so as to be a material element and a substantial factor in a scheme or conspiracy, the purpose or effect of which is to cause the creation or maintenance of said situation.\(^3\)

The Board has created an unworkable test, since there is no easily shown relationship between a nuclear facility operated in an unlawful or anticompetitive manner, and some other situation, which the Board never really explains. The Board's discussion of nexus omits *Wolf Creek* and *Louisiana Power and Light*, two precedents on point.\(^3\)

In *Consumers* the Board sought to utilize nexus in a substantive issue instead of a jurisdictional one. The "activities under the license" are clearly the operation of the nuclear facility. It is not possible to evaluate whether those activities will be misused prior to the issuance of a license. Further, logic dictates that after the issuance of a license, the activities no longer can be evaluated in a prelicensing antitrust review, as the statute requires.\(^3\) Even if the misuse concept was applied, to complicate it with a requirement of proving a scheme or conspiracy is absolutely not required under any interpretation of the cases or materials related to section 105 of the Atomic Energy Act.

The requirement of nexus was established to protect a utility's conduct which, while possibly unlawful, was simply so distant from the licensed activities that review of that activity had no place in a licensing hearing.\(^3\) It was shown earlier that a system which dominates generation and transmission, and which suddenly adds 25% generating capacity experiences a system-wide effect. This effect is pervasive in most cases and some would argue that all "system wide" situations become reviewable.\(^3\) In Consumers' case, the operation of Midland Units and the marketing of power in the regional power exchange will further Consumers' dominance in the bulk power market, thus main-

334. Part V(B)2 of this article sets out the proper nexus standard, and little would be accomplished by restating it here.
335. *Supra* note 39.
337. See Brief of Intervenors, filed November 13, 1975; *supra* note 212, at 39-45.
taining and exacerbating the numerous inconsistencies with the antitrust laws. The Department of Justice viewed the nexus question as follows:

This is the nexus required by the plain language of Section 105c(5). It is not necessary that the license activities themselves be inconsistent with the antitrust laws or their policies. It is not necessary that the license activities create a situation inconsistent with the antitrust laws where none was present before. It is not necessary that the effect of the license activities on the existing situation be an effect peculiar to nuclear power, or an effect which only the advent of nuclear power could bring about. It is not necessary that the license activities be the sole cause of maintaining a situation inconsistent with the antitrust laws. The only thing necessary is that the license activities be found to contribute in a significant manner to the maintenance of a situation inconsistent with the antitrust laws or their underlying policies. [Footnotes omitted.]

The nexus portion of the opinion disregards factual realities. Consumers can only build these units by being tied into the regional power exchange market. That fact alone, coupled with Consumers' refusal to allow participation in that market by its captive wholesale customers satisfies nexus for refusal to wheel, grant access or otherwise coordinate. Placed in proper perspective, nexus once again becomes a normal, causal relationship, whose presence or absence is easily ascertained. Placed in the Board's ruling, nexus is an unwieldy, illogical legal problem with no resolution.

5. "Activities Under the License"

In Consumers, the Board described activities under a license, not in terms of unit activity versus system wide conduct, but rather in terms of the use or misuse of a licensed activity. It is in this area that it becomes clear that the Board was intent on using "a more mature branch of the law . . ." for analogy to section 105. The Board selected patent law precedent, and the comparative model utilized is the patent antitrust system. Briefly, that system deals with the assessments made by courts on how patentee's use their patents (or licenses). This analogy is completely inappropriate since antitrust review of patents is post-license, post-issuance, while nuclear power antitrust review is pre-license by legislative mandate. In one case, the government grant of immunity must be alleged to be misused, while in another there is no grant or immunity to be misused. This raises the question of nuclear licensee antitrust immunity, as discussed earlier.

It is clear from the Atomic Energy Act that after a license or permit is issued, no immunity attaches. Section 105(b) of the Atomic Energy

338. Supra note 232, at 176.
339. Initial Decision, supra note 230, at 55.
340. Supra note 160.
341. Supra note 47.
Act\textsuperscript{342} requires continued surveillance of licenses, including the reporting of any post licensing violations to the Attorney General. In one sense, this 105(b) review is similar to patent law in that 35 U.S.C. § 154\textsuperscript{343} and attendant case law prohibit the patentee from utilizing the patent in a manner which is inconsistent with the public interest.\textsuperscript{344} What is critical is that the pre-issuance review of a patent includes checks for novelty, utility, and nonobviousness,\textsuperscript{345} while section 105(c) pre-licensing review seeks to determine whether the granting of the license will create or maintain a situation inconsistent with the antitrust laws. Accordingly, the analogy created by the Board is inappropriate.

The Board makes no other attempt to define what constitutes an "activity under the license." It is axiomatic, however, that the following must be included in any definition of "activity under the license."

1. Construction and operation of the two nuclear generating units.
2. Marketing the power of the units in the wholesale for resale firm power market.
3. Recognition and inclusion of additional transactions between applicants and other systems, based on the fact that the successful marketing of the power depends entirely on the reliability and economies which result from integration of applicants' coordinated system into the regional power exchange market.\textsuperscript{346}

F. Remaining Arguments

As discussed earlier the Consumers Power Company dominates high voltage transmission and generation in its service area. It was also established that the company had a "bottleneck" over these services, and has used this feature to its advantages. Consumers failure to deal at cost with smaller systems seeking access to transmission or nuclear generation is inconsistent with the antitrust laws, without a showing of unreasonableness or intent as required by \textit{Alcoa}\textsuperscript{347} and \textit{United Shoe}.\textsuperscript{348} More directly, \textit{United States v. Otter Tail}\textsuperscript{349} conclusively established the obligation of a dominant entity to participate in wheeling, thereby freeing up the "bottlenecked" resources.

\textit{Otter Tail} involved a major utility which had the power to block smaller entities from alternative bulk power supplies. The Otter Tail Company was accused of preventing the Elbow Lake Electric Cooperative from receiving bulk power for retail distribution or

\begin{footnotes}
\footnote{346.} From \textit{Trial Aid} introduced by the Department of Justice in the Consumer Proceeding, \textit{supra} note 212.
\footnote{347.} United States v. ALCOA, 148 F.2d 416 (2d Cir. 1945).
\footnote{349.} 410 U.S. 366 (1973).}

wholesale power for resale by refusing to wheel power from third party generating entities contiguous to the Otter Tail Company. Such facts directly parallel the relationship between Consumers Power and many members of the MMCPP. This denial to grant access to transmission was defended by the Otter Tail Company on the grounds that there was no specific congressional directive to wheel and even if there had been, the wheeling would not have resulted in a net benefit to Otter Tail. Identical arguments were made in Consumers.

The district court in Otter Tail dispensed with these arguments thusly:

Here Otter Tail refuses to sell power to municipalities which would thereby take retail power business from defendant and refuses to wheel power for others willing to sell to these municipalities. Because of its dominant position Otter Tail is able to deprive towns of the benefits of competition which would result from municipally owned facilities.350

The district court characterized this situation as a classic bottleneck, referring to a single firm's foreclosure of others from a scarce or unique resource. The Supreme Court affirmed the decision, specifically preventing the utility from refusing to "wheel" electric power over the lines from the electric power supplies to existing or proposed municipal systems in the area, from entering into or enforcing any contract which prohibits use of Otter Tail's lines to "wheel" electric power to municipal electric power systems, or from entering into or enforcing any contract which limits the customers to whom and areas in which Otter Tail or any other electric power company may sell electric power.351

Thus, it is axiomatic that dominance and control of a vital area in commerce by a single entity results in a concomitant obligation to grant access to that service or product, if the failure to do so would result in an extension or maintenance of monopoly power. Thus, Consumers' refusals to grant access would seem to be in direct contravention to Otter Tail and are most assuredly inconsistent with the antitrust laws.

The bottleneck theory does not have an attendant "net benefits" defense, as the Board implied.352 The Board, in explaining net benefits, found that a corporation "cannot divert its property by gift or by indirect means without a consideration or benefit to the corporation, and such acts cannot be ratified by the board of directors."353 Regarding electric utility coordination agreements, the Board specified that dominant entities, specifically Consumers Power, "do not have an obligation to enter into alleged coordination agreements from which no net benefit results."354

352. Initial Decision, supra note 230, at 64-66.
353. Id. at 65, citing In re John Rich Ent., Inc., 481 F.2d 211, 214 (10th Cir. 1973).
354. Id. at 66.
The law is quite clear that the presence or absence of a business reason does not justify anticompetitive conduct.\textsuperscript{355}

The fact that there were business reasons which made the arrangements desirable to the appellees . . . or the fact that from other points of view the arrangements might be deemed to have desirable consequences would be no more a legal justification for price-fixing [or other antitrust violations or inconsistencies] than were the "competitive evils" in the Socony-Vacuum Oil case.\textsuperscript{356}

The fact is, anticompetitive practices will not be sustained merely because, by some other evaluative system, the practices enhance competition.\textsuperscript{357} This concept includes the discrediting of the argument that economic injury to the monopolist must be considered. As the court stated in \textit{F.T.C. v. Proctor and Gamble:}\textsuperscript{358} "Possible economics cannot be used as a defense to illegality."

\textit{Otter Tail} does provide one exception to this formulation. If the coordination "would impair [the utilities] ability to render adequate service to its customers . . . ." then the obligations of being a public service corporation may overtake the obligations of the corporation to act in a manner consistent with the antitrust laws.\textsuperscript{359} That limitation, however, is remedial. It relates to judicially imposed coordination, which wrests the net benefits question away from the utilities internal decision making process, and places it with the courts. Additionally, in the \textit{Consumers} case the record is void of any evidence that the participation by Consumers in any of the requested forms of coordination would have resulted in an inability on Consumers part to continue to meet its customer demands.

It is apparent that a bottleneck monopolist may not refuse to deal in a unique service or resource.\textsuperscript{360} Thus, the applicability of this theory to the electric utility industry should be a foregone conclusion.\textsuperscript{361} The failure of the Board to apply the principle, and particularly to deem \textit{Otter Tail} inapplicable is an error.\textsuperscript{362} To argue, as does the Board, that these situations apply only to conspiracy cases is simply incorrect, as \textit{Otter Tail} vividly points out. Of equal importance is the fact that this "conspiracy" limitation, which is at the heart of the Board's definition of inconsistency,\textsuperscript{363} ignores an entire branch of law referred to as "single


\textsuperscript{356} United States v. Masonite Corp., 316 U.S. at 276.


\textsuperscript{358} 386 U.S. 568, 580 (1967).

\textsuperscript{359} 410 U.S. 366, 381 (1973).


\textsuperscript{362} Initial Decision, \textit{supra} note 230, at 95.

\textsuperscript{363} \textit{Id.} at 47-50.
firm monopolization,"364 and unnecessarily limits section 105(c) proceedings to the inconsistencies found in joint applications thus frustrating an entire legislative scheme,365 and ignoring a substantial body of case law.366

Quite simply, a monopolist may not use his monopoly position in any manner which extends that monopoly position.367 This is as true for single firm monopolization as it is in conspiracy cases. “Refusal to sell on the part of a [single] producer having monopoly control in order to influence prices or maintain or extend its effective market control is illegal, as is any other device designed to accomplish these ends.”368 This applies to refusals to transmit third party power (wheel), refusals to coordinate generation, and refusals to grant unit access.

The intervenors made several arguments to further support this position which bear repeating.369 First, the Board propounded the theory that if Consumers Power was to interconnect and coordinate as requested, it would be “saving a drowning man,”370 and there is no duty to save a drowning man. This is incorrect when placed in the context of public utilities, who, as the possessors of government grants, do have an obligation to coordinate where it is in the public interest.371 Second, apart from the public utility in the public domain argument, there are obligations placed upon dominant utilities to act within the bounds of antitrust laws and assist other entities despite their obligation to shareholders to maximize profits.372 Finally, and most important, when Consumers Power Company joined the Michigan Pool with Detroit Edison, it became involved in a series of agreements and arrangements which, but for Federal Power Commission exemptions, would be deemed violations of the antitrust laws as conspiracies. The quid pro quo of such exemptions has always been the obligation to maintain an open door and not refuse to deal.373 This price Consumers was unwilling to pay.

One last point must be considered. The Consumers decision holds that the facilities involved are not unique, and thus regardless of what the bottleneck law is or is not, there has been no denial of a unique

365. Supra note 160.
366. Supra note 328.
367. 334 U.S. 100 (1948).
370. Initial Decision, supra note 230, at 78.
resource. This is so, the decision maintains, since the MMCPP and other utilities, which appear to be adversely affected by the denial of access to nuclear power and the denial of transmission services, can easily build their own smaller units or purchase wholesale power from Consumers.

This "non-uniqueness" theory is factually unsubstantiated. Apart from the economic and environmental factors, which make construction of similar facilities virtually impossible, the postulation ignores one important aspect of the antitrust law, namely the obligation of the monopolist not to destroy alternatives which could make lesser entities competitive. Moreover, even if such units could be built, the dominance by Consumers over high voltage transmission and future transmission rights of way would effectively preclude optimal use of such units. The excess power which must be sold would "die" on line due to the denial of entry by Consumers to the regional power exchange markets.

G. Relief

The question of relief or remedy was not considered in the initial Consumers decision because of the holding in favor of the company. Nonetheless, the record does reveal that Consumers Power fully understands its dominance. A Consumers executive recognized that if Consumers' customers have no alternative source of low cost bulk power, they will continue to be forced to purchase from Consumers, regardless of the power package offered by the Company. Conversely, ownership of a percentage of the Midland Nuclear Plant, and/or the ability to purchase bulk power and make coordination agreements elsewhere, would allow the MMCPP membership to compete, or at least reduce costs in their various bulk power dealings. Further, access to Consumers high voltage system would greatly increase the bargaining position and power supply options available to the municipal systems.

If such access appears to be a great deal to ask of a dominant entity, it should be noted that such arrangements exist in almost every state and involve the majority of private and public systems. For example, the Western Energy Supply and Transmission Associates (WEST) has

374. Initial Decision, supra note 230.
375. Id.
376. Transcript at 2558-2560, 6645, 2808, 2292, 4431, 4333, which reflects testimony of the parties, including the President of Consumers Power that indicates that these facilities are unique and cannot be constructed in any practical sense by the smaller systems.
378. See Transcript at 4664:29 and 5090:14-16 (Prepared testimony of Dr. Gutman and Engineer Chayavadhanangkur).
379. Transcript at 8231.
380. Transcript at 4348-4350 (Testimony of Fletcher).
381. Id. at 4334.
twenty-three utilities in nine southwestern states, comprised of twelve private investor-owned systems, five municipal systems, three generation and transmission cooperatives, two irrigation districts, and one state electric authority. The New England Power Pool Agreement (NEPOOL) is open to all systems in New England and collectively owns and operates a nuclear generation system. NEPOOL is itself interconnected with the Pennsylvania, New Jersey, and Maryland Interconnection System (PJM). These groups, along with the Northwest Powers Pool (NWPP), Washington Public Power Supply System (WPPSS), Bonneville Power Administration (BPA) and many others, are large, coordinated, open power pools. They all operate on the principle that an open, interconnected system will result in the opportunity for maximum efficiency, profit, and least cost. It is likewise true that such systems maximize competitive opportunities.

Thus the request for access to generation or transmission is neither novel, nor does it require a charitable heart of Consumers, as the Board seems to imply. Rather, it is the normal course of business for many electric systems. In Michigan, it is a different story than for NEPOOL, PJM, WEST, or other coordinated systems. Requests for emergency power go unanswered, (Lansing's request-Consumers denial). Small systems are compelled to sign bulk power contracts and to adhere to clauses which limit the size of new generating units they can build and which deny them the opportunity to purchase wholesale power from third parties, (Consumer and Coldwater, Holland).

Accordingly, broad relief provisions would be in order, should the Consumers decision be reversed. The necessity that these be imposed by the Nuclear Regulatory Commission is clear. While the Consumers board suggests that the Federal Power Commission would be a more appropriate forum for some of these matters, the jurisdiction of the Federal Power Commission is generally limited to rates, and in any event, it is clear that they cannot order "system interconnection for the purposes of coordinated operation or require systems to engage in coordinated development for purposes of economy and efficiency." Likewise, the record shows that Federal Power Commission regulation cannot assure logical dissemination of advanced electrical and nuclear technology in Michigan.

384. Id. at 137.
385. Id. at 138-43.
386. Initial Decision, supra note 230.
387. Supra note 383, at 144.
388. Id.; see also, supra note 212 (Prepared Testimony of Chayavadhanangkur at 21).
390. Transcript at 4205-37 (Testimony of Dr. Wein).
Additionally, the proposed broad-based relief has been imposed in the past in 19 separate instances by settlement agreements. The relief is designed to "pry open to competition a market that has been closed by defendant's illegal restraints." Indeed, the Nuclear Regulatory Commission would be required (in the event of a reversal of Consumers) to restore competition, as opposed to merely returning the market to the status quo. The Commission may have a broad choice in determining remedies, since inconsistencies which can be found to violate section 5 of the Federal Trade Commission Act can be remedied in any manner which will revive competition. Additionally, it is presumed that the remedy selected would be chosen after an expert evaluation of the problem by the Nuclear Regulatory Commission, an administrative agency which has jurisdiction over the particular activity, and that the choice would not be disturbed by the courts.

VII. CONCLUSION

The progression of the antitrust enforcement system from its economically naive inception to the present reveals one of the more successful programs in Twentieth Century governmental economic regulation. It is only a highly sophisticated antitrust system which can allow the growth of concentration as an economic necessity and still preserve competition by enforcing laws, such as section 105(c), which maintain coordinated activities thus insuring yardstick competition and wholesale bulk power competition.

At first gloss, coordination and concentration would seem antithetical to the concept of pure competition, if indeed "pure competition" was economically practicable. However, the nature of the electric utility industry is such that actual competition exists at a level which is not easily understood, e.g., the concept of yardstick competition and third party wheeling which allows wholesale bulk power exchanges in a very competitive manner. These competitive formulations do achieve the traditional goals of efficiency and minimum cost, but even these goals are difficult to assess in a setting as complex as the electric generating, producing, and distribution markets.

Two things are quite clear, however. First, the addition of 1300 MW of nuclear generated power to one system is a very real competitive advantage over competing systems which do not or cannot participate directly in nuclear generation. Second, monopoly control of 100% of high voltage transmission is an awesome and impregnable barrier to entry in the regional power exchange markets. These two realities, if

unchecked, spell almost certain doom for systems which do not have access to nuclear power or high voltage transmission. With demise of these systems follows the demise of organizational diversity and the demise of regional bulk power sale's direct competition.

Control over nuclear power and high voltage transmission by a single dominant entity does create an inconsistency with the antitrust laws and must not be sanctioned by virtue of an unconditioned government license to operate such facilities. The failure of the Consumers Board to so condition the licenses represents critical errors in legal analysis, an improper assessment of national economic policies, theoretical confusion, and a general disregard of the history of the economics of antitrust enforcement over the last three quarters of a century.