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August 4, 1994

VIA FEDERAL EXPRESS

50-458

Mr. Ron Garvin, Clerk  
United States Court of Appeals for  
the District of Columbia Circuit  
333 Constitution Avenue, N.W.  
Washington, D.C. 20001

RE: Cities of Benton, North Little Rock, Osceola, Prescott, Arkansas, The  
Conway Corporation, West Memphis Utilities Commission And The  
Farmers Electric Cooperative Corporation v. Nuclear Regulatory  
Commission, Docket No. \_\_\_\_\_

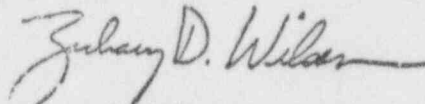
Dear Mr. Garvin:

Enclosed for filing are the original and five copies of Petition For Review of  
the Cities of Benton, North Little Rock, Osceola, Prescott, Arkansas, the Conway  
Corporation, West Memphis Utilities Commission, and the Farmers Electric  
Cooperative Corporation. Also enclosed is my check in the amount of \$100.00 to  
cover the filing fee.

Please return to me one file-marked copy in the enclosed, self-addressed,  
stamped envelope.

Thank you for your assistance in this matter.

Very truly yours,



Zachary D. Wilson

ZDW/jc  
Enclosures  
cc: Service List  
Clients

100061

Add: William Lambe  
011 D-23

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UNITED STATES COURT OF APPEALS  
FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

CITIES OF BENTON, NORTH LITTLE ROCK,  
OSCEOLA, PRESCOTT, ARKANSAS, THE CONWAY  
CORPORATION, WEST MEMPHIS UTILITIES  
COMMISSION, AND THE FARMERS ELECTRIC  
COOPERATIVE CORPORATION

PETITIONERS

VS.

DOCKET NO. \_\_\_\_\_

NUCLEAR REGULATORY COMMISSION

RESPONDENT

PETITION FOR REVIEW

Pursuant to § 189 of the Atomic Energy Act of 1954, as amended,  
42 U.S.C. § 2239 and Rule 15 (a) of the Federal Rules of Appellate  
Procedure and the Rules of this Court, the Cities of Benton, North Little  
Rock, Osceola, and Prescott, Arkansas, the Conway Corporation (City of  
Conway, Arkansas), the West Memphis Utilities Commission (City of  
West Memphis, Arkansas) and the Farmers Electric Cooperative  
Corporation (collectively, Arkansas Cities and Cooperative), hereby  
petition this Court for review of the following order issued by the Nuclear  
Regulatory Commission:

Gulf States Utilities Company and Cajun Electric Power Cooperative, Inc., "River Bend Station, Unit 1: Reevaluation and Affirmation of Finding of No Significant Antitrust Changes," Docket No. 50-458, dated May 30, 1995.

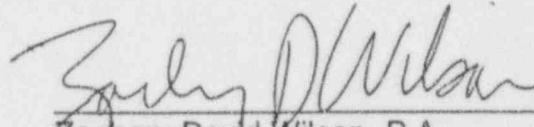
For purposes of Rule 26.1 of the United States Court of Appeals for the District of Columbia Circuit, Arkansas Cities and Cooperative state that Arkansas Cities are Municipal Corporations of the First Class organized under the laws of the State of Arkansas (Cities of Benton, North Little Rock, Osceola and Prescott), a political subdivision of the State of Arkansas (West Memphis Utilities Commission), an Arkansas Not-For-Profit corporation (Conway Corporation), which do not issue shares or debt securities to the public other than general obligation and revenue bonds authorized under the laws of the State of Arkansas. Arkansas Cities do not have any parent companies, subsidiaries, or affiliates that issue shares or debt securities to the public within the meaning of this Court's rules.

Cooperative is a Federal Rural Electrification Administration financed not-for-profit Electric Cooperative Corporation organized under the laws of the State of Arkansas which exists for the purpose of distribution of electric power to cooperative customers and does not issue shares or debt securities to the public. It does not have any parent

companies, subsidiaries, or affiliates that issue shares or debt securities to the public.

Petitioners state that Arkansas Cities and Cooperative are customers and competitors of Arkansas Power & Light Company (AP&L), one of Entergy's Operating Company Subsidiaries. Arkansas Cities and Cooperative are dependent upon AP&L for access to the national power transmission grid and were parties of record in the proceeding below. They, thus, have a substantial interest in this matter and were aggrieved by the Respondent's ruling in the subject orders.

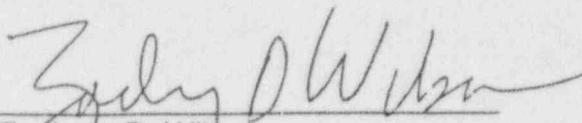
Respectfully submitted,

  
\_\_\_\_\_  
Zachary David Wilson, P.A.  
Attorney for Arkansas Cities and  
Cooperative

321 Maple Street  
P.O. Box 5578  
North Little Rock, AR 72219  
(501) 376-4090  
Bar No. 73130

CERTIFICATE OF SERVICE

I, Zachary D. Wilson, Attorney for Arkansas Cities, do hereby certify that I have this 4th day of August , 1995, served a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

  
\_\_\_\_\_  
Zachary D. Wilson





UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

June 6, 1995

Brian C. Donahue, Esq.  
Zachary D. Wilson, P.A.  
321 Maple Street  
P.O. Box 5578  
North Little Rock, AR 72219

SUBJECT: RIVER BEND STATION, UNIT 1: REEVALUATION OF NO SIGNIFICANT  
ANTITRUST CHANGE FINDING

Dear Mr. Donahue:

On May 10, 1995, on behalf of the Arkansas Cities of Benton, Conway, North Little Rock, Oslelola, Prescott, and West Memphis, as well as the Farmers Electric Cooperation Corporation, you requested the Director of the Office of Nuclear Reactor Regulation to reevaluate his finding in the captioned proceeding. The Director has reevaluated his finding and has decided not to change his "Finding of No Significant Antitrust Changes."

A copy of the notice that is being transmitted to the Federal Register and a copy of the Director's reevaluation finding are enclosed for your information.

Sincerely,

A handwritten signature in cursive script, reading "William M. Lambe", is written over the typed name.

William M. Lambe  
Antitrust Policy Analyst  
License Renewal and Environmental Review  
Project Directorate  
Associate Director for Advanced Reactors  
and License Renewal  
Office of Nuclear Reactor Regulation

Docket No. 50-158

Enclosures:  
As stated

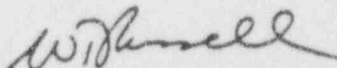
UNITED STATES NUCLEAR REGULATORY COMMISSIONDOCKET NO. 50-458GULF STATES UTILITIES COMPANY AND  
CAJUN ELECTRIC POWER COOPERATIVE, INC.RIVER BEND STATION, UNIT 1REEVALUATION OF ANTITRUST FINDING

Notice is hereby given that counsel for Cajun Electric Power Cooperative, Inc., and the Arkansas Cities of Benton, Conway, North Little Rock, Osceola, Prescott, and West Memphis as well as Farmer's Electric Cooperative Corporation have requested a reevaluation by the Director of the Office of Nuclear Reactor Regulation of the "Finding of No Significant Antitrust Changes" pursuant to the antitrust review of the captioned nuclear unit. After further review, I have decided not to change my finding.

A copy of my finding, the requests for reevaluation, and my reevaluation are available for public examination and copying, for a fee, at the Commission's Public Document Room, 2120 L Street, N.W., Washington, DC 20555.

Dated at Rockville, Maryland, this ~~30th~~ day of May 1995.

FOR THE NUCLEAR REGULATORY COMMISSION



William T. Russell, Director  
Office of Nuclear Reactor Regulation

REEVALUATION AND AFFIRMATION OF  
FINDING OF NO SIGNIFICANT ANTITRUST CHANGES  
RIVER BEND STATION, UNIT 1

By filings dated May 10, 1995, from Cajun Electric Power Cooperative, Inc. ("Cajun") and Cities Of Benton, Conway, North Little Rock, Osceola, Prescott, and West Memphis, Arkansas And The Farmers Electrical Cooperative Corporation (Collectively ACC), I have been requested to reevaluate my Finding of No Significant Antitrust Changes ("Finding") pursuant to the anticipated ownership transfer in the River Bend Station, Unit 1 (River Bend) and operation of River Bend by EOI resulting from the proposed merger of Gulf States Utilities Company (GSU) and Entergy Corporation (Entergy). This Finding was published in the Federal Register on April 10, 1995, (60 Fed. Reg. 1815 (1995)). For the reasons set forth below, I have decided not to change my River Bend finding of no significant antitrust changes.

I. BACKGROUND

A. NRC Antitrust Review

The NRC has established procedures by which prospective licensees of nuclear production facilities are reviewed during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. Although Section 105 of the Atomic Energy Act of 1954, as amended (AEA), 42 U.S.C. § 2135, does not specifically address the addition of new owners or operators after the initial licensing process, the NRC has, in analyzing situations where new ownership occurs after issuance of an operating license, applied the



standards set forth by the Commission in its Summer<sup>1</sup> decision to determine whether an antitrust review is required. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests -- the subject of the instant reevaluation requests.

The NRC has adopted a review process for post-operating license changes in plant ownership patterned after the operating license review associated with initial applicants. Receipt of the application to add a new owner to the facility after the operating license has been issued is noticed in the Federal Register with the opportunity extended to the public to express views relating to any antitrust issues raised by the application. The notice states that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensee's activities or proposed activities have occurred since the completion of the previous antitrust review.

With the benefit of public comment and consultation with the Department of Justice ("DOJ"), the NRC Staff ("staff") makes a determination whether the changes in question will require a further antitrust review in order to determine whether the issuance of the license amendment will create or maintain a situation inconsistent with the antitrust laws. If the Director of NRR finds a "significant change," the matter is referred to the Attorney General for advice pursuant to Section 105(c) of the AEA. If the Director of NRR finds no significant change, the finding is published in the Federal

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<sup>1</sup> South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980).

Register with an opportunity for the public to request reevaluation of the finding. The requests to reevaluate the Director's Finding noted above are the subject of this reevaluation finding.

The Commission delegated its authority to make significant change findings to the staff and in its Summer order, established a set of criteria the staff must follow in making the determination whether a significant change has occurred:

The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are reasonably attributable to the licensee(s); and (3) have antitrust implications that would likely warrant some Commission remedy.<sup>2</sup>

Significant change reviews are not intended to be hearings, with discovery and examination and cross examination of witnesses, to determine if there should be a further proceeding. Rather, the staff reviews alleged alterations in the competitive structure based on submittal and other information available to it. It is within this framework established by the Commission that I made my Finding of No Significant Antitrust Changes on April 5, 1995, and it is within this framework that I have analyzed each of the requests to reevaluate my Finding.

#### B. Factual Background

Nuclear Regulatory Commission ("NRC" or "Commission") License No. NPF-47 authorizes GSU and Cajun to possess River Bend and further authorizes GSU to act as agent for Cajun with exclusive responsibility and control over the physical construction, operation, and maintenance of River Bend.<sup>3</sup> By letter

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<sup>2</sup> See supra, note 1.

<sup>3</sup> Gulf States Utilities Company has a 70 percent undivided ownership interest in River Bend Station, Unit 1, and Cajun Electric Power Cooperative has the remaining 30 percent undivided ownership interest.

dated January 13, 1993, the staff received an application from GSU for Commission consent, pursuant to 10 CFR § 50.80, for GSU to transfer control of River Bend to a newly formed holding company to be called Entergy Corporation.<sup>4</sup> By separate letter dated January 13, 1993, the staff also received an application from GSU, submitted on behalf of itself and Cajun, to transfer operating responsibility and management of River Bend from GSU to Entergy Operations, Inc ("EOI").<sup>5</sup>

The NRC conducted a review of GSU's competitive activities in 1974 in conjunction with the River Bend construction permit ("CP") application. As part of the CP review, GSU entered into a set of policy commitments with DOJ regarding access, interconnection and reserve sharing, wheeling, and exchange of bulk power. Although DOJ identified several instances of alleged abuse of market power by GSU, DOJ concluded that if certain policy commitments made by GSU were imposed as conditions on the River Bend license, an antitrust hearing would be unnecessary. These commitments were imposed as antitrust license conditions in the River Bend construction permit and provided a broad array of access to bulk power and coordinated bulk power services including wholesale

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<sup>4</sup> Entergy Corporation currently exists as a public utility holding company organized under the laws of the State of Florida, and, through its operating companies, engages principally in the generation, transmission, distribution and sale of electricity in Arkansas, Louisiana, and Mississippi. The Entergy operating companies include: Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service, Inc. Under the proposed plan to combine the business of GSU with Entergy, a series of mergers will result in the termination of the existing Entergy Corporation and the renaming of the surviving corporation as Entergy Corporation with GSU as a wholly owned subsidiary of the new Entergy Corporation.

<sup>5</sup> Entergy Operations, Inc. (EOI) is a subsidiary of Entergy which is licensed by the NRC as a non-owner operator of the four nuclear units of the Entergy system (Arkansas Nuclear One, Units 1 and 2; Grand Gulf Nuclear Station, Unit 1; and Waterford Steam Generating Station, Unit No. 3).

power for resale, transmission, interconnections, reserve sharing and other services to primarily smaller power entities in and adjacent to GSU's service area.

In 1985, pursuant to section 105c(2) of the Act, the NRC conducted a "significant changes" review of GSU's competitive activities prior to issuance of the River Bend operating license. One area of concern identified during this review was GSU's refusal to provide transmission services to non-generating power entities. The staff concluded after review of the relevant data that the affected non-generating entities in GSU's service area could receive transmission service through interconnection agreements with Cajun Electric Power Cooperative, Inc. and the Louisiana Energy and Power Authority as well as through a Power Delivery Agreement proposed by GSU. Based on the CP antitrust license conditions and the origination of power delivery agreements that made transmission access available to non-generating entities, the staff made a "no significant changes" determination and declined to conduct a fresh antitrust review for the River Bend operating license.

On October 20, 1993, the NRC published in the Federal Register a No Significant Changes Finding relating to the anticipated transfer of ownership and control of River Bend as a result of the Entergy/GSU merger. 58 Fed. Reg. 16246 (1993). The staff concluded that the comments received concerning this Finding consisted predominantly of allegations of non-compliance with existing antitrust license conditions. Staff distinguished between allegations of non-conformance with license conditions which, if substantiated, are dealt with by enforcing the existing license conditions and "significant changes," as that term has been defined by the Commission in

its Summer decision, which leads to a proceeding, and perhaps a hearing, to determine what remedy would be appropriate to address their anticompetitive implications.

By filings dated November 19, 1993, from Cajun Electric Power Cooperative, Inc., Lafayette, Louisiana (Lafayette), Louisiana Energy and Power Authority (LEPA) and Terrebonne Parish Consolidated Government (Terrebonne), commenters requested reevaluation of the Finding of No Significant Changes. The principal argument contained in each of these requests was that the staff, in evaluating the competitive effects of the proposed GSU/Entergy merger upon relevant bulk power markets, relied exclusively and improperly upon the competitive analyses conducted by the Federal Energy Regulatory Commission (FERC).

*where  
is ACC*

The Director, NRR, denied the requests for reevaluation, concluding that the requesters were incorrect in their assumption that the staff had simply adopted the findings and conclusions of the FERC pertaining to competitive issues raised by the proposed merger. The Director noted that:

the FERC findings in both the proposed GSU/Entergy merger proceeding and the Entergy open access transmission proceeding were considered by the staff and were helpful to the staff in its analysis. However, the staff has determined, based on its analysis of the reasonably apparent changes, that the primary concerns raised by Requesters before the NRC pertain to issues and allegations that are more germane in the context of a petition pursuant to 10 CFR § 2.206 seeking initiation of an enforcement proceeding not a significant change licensing proceeding as envisioned by Requesters. Thus, the staff has not abdicated its review responsibility to the FERC in this proceeding. 58 Fed. Reg. 65200 (1993)

In its request for reevaluation Cajun also suggested that the staff misinterpreted the comments pertaining to competition and requests for transmission service. Cajun alleged that the merger would adversely impact



its access to GSU/Entergy transmission facilities and nullify existing contractual rights. The Director noted in his Finding that the transmission access issues raised by Cajun appeared to have their genesis in long-standing relationships between Cajun, GSU and Entergy and were addressed by the staff at the construction permit and operating licensing stages of River Bend (as well as other Entergy plants, Grand Gulf and Waterford). The requesters' assertion that specific license conditions already in existence give them access rights which a post merger Entergy may be able to frustrate is properly an enforcement issue, the Director concluded.

Cajun also requested that the Director reevaluate his finding that there were no significant (competitive) changes involved in the transfer of operation of River Bend from GSU to non-owner operator EOI. The Director declined, relying on the staff determination that no further antitrust review was required because the River Bend license would be conditioned to prohibit EOI from marketing or brokering power or energy while holding GSU accountable for any actions that contravened any antitrust license conditions. This conclusion was consistent with the Commission's guidance regarding such transfers involving non-owner operators in which the facility license in question is so conditioned.

On February 14, 1994, Cajun filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit challenging the River Bend amendments. In other petitions for review before the court, Cajun challenged an SEC decision and two FERC orders relating to the Entergy/GSU merger. The D.C. Circuit remanded all three of these petitions to the agencies after issuing a full opinion granting the petition for review in the first FERC case (Cajun Electric Power Cooperative, Inc. v. FERC, 28 F.3d 173

(D.C. Cir. 1994). On March 14, 1995, the D.C. Circuit ordered that the NRC orders under review also be remanded to the NRC. In addition, the court, on its own motion, vacated the NRC order because they were based on a "flawed" FERC decision. The court remanded the case to the NRC for further proceedings in light of Cajun Electric.

C. Cajun Electric Power Cooperative, Inc. v. FERC, 28 F. 3d 173 (D.C. Cir. 1994)

In Cajun Electric v. FERC, the D.C. Circuit had before it a challenge to electric power tariffs filed by Entergy before the FERC and approved by the FERC without holding hearings.<sup>6</sup> Two of these tariffs provided for the sale of wholesale power by Entergy at negotiated, market-based rates, as opposed to cost-based rates. A third tariff was intended to mitigate Entergy's market power by providing open access to its transmission system.<sup>7</sup> Together, "these tariffs were designed to permit Entergy, a monopolist of transmission services in the relevant market, to engage in market-based pricing while introducing competition to that market through the unbundling of generation sales from transmission services." Cajun Electric, 28 F.3d at 175.

The Court found that the FERC's "failure to conduct an evidentiary hearing [regarding the mitigation of Entergy's market power] was arbitrary and

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<sup>6</sup> The underlying FERC record and analysis in approving these tariffs is what the NRC found "helpful" in conducting its antitrust review of the proposed merger between Entergy and GSU.

<sup>7</sup> This transmission service tariff (TST) provided that any eligible electric utility could purchase transmission service over Entergy's lines at cost-based rates. It also included a provision under which Entergy could recover its stranded investment costs, i.e., costs due to a surplus in generation (or other) facilities resulting from the introduction of open access to its transmission services.

capricious," and that its substantive decision was flawed in that the Commission "failed to adequately explain its approval of the stranded investment provision, among others." Id. at 180.

Central to Cajun Electric v. FERC was Entergy's move from regulated to market pricing for its wholesale sale of electric power in combination with its bottleneck monopoly over transmission services. This combination gave rise to "a classic tying problem" because "Entergy could use its monopoly power over transmission services to eliminate competition in the market for generation services." Id. at 176. FERC had determined that by granting competitors access to Entergy's transmission services, the Transmission Service Tariff ("TST") (as modified by the FERC)<sup>8</sup> would mitigate production-related market power and provide sufficient assurance that Entergy would not exercise market power under the new tariffs. Id.

In remanding the case to the FERC, the court found that Cajun had raised serious doubts that FERC had not addressed concerning the TST's mitigation of Entergy's market power. The "most problematic" of these was the stranded investment provision which the court viewed as a tying arrangement. Id. at 177. Other provisions of the TST found by the court to potentially lessen the mitigating effect of the TST of Entergy's market power included (1) Entergy's retention of sole discretion to determine the amount of transmission capability available for its competitors' use, (2) the point-to-point service

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<sup>8</sup> The FERC modified the tariff by requiring Entergy to (1) file all transmission service requests with FERC, (2) to maintain an electronic bulletin board of available transmission capacity and requests for transmission service, and (3) submit an updated market analysis every 3 years. The FERC also permitted customers to file complaints under section 206 of the Federal Power Act if they believed Entergy was exercising market power and required that any stranded investment costs levied against users of Entergy's transmission grid be legitimate and verifiable.

limitation, (3) the failure to impose reasonable time limits on Entergy's response to requests for transmission service, and (4) Entergy's reservation of the right to cancel service in certain instances, even where a customer has paid for transmission system modifications. Id. at 179-80.

D. New Entergy Tariffs

In response to Cajun Electric v. FERC, Entergy filed a revised Transmission Service Tariff ("revised TST") and Network Service Tariff ("NST") with the FERC. These tariffs address, point by point, the criticism of Cajun Electric v. FERC. The stranded investment provision, the subject of the court's major criticism, has been eliminated from the revised TST. Entergy's sole discretion to determine the amount and timing of transmission capability available for competitors use is replaced by a provision specifying how Entergy will evaluate transfer capability. A point-to-point service limitation is replaced by the NST. The time periods for different steps in responding to requests for service have been clarified and the right to cancel service even where the customer has paid for transmission system modifications has been eliminated.

The FERC has allowed these tariffs to go into effect pending a hearing. Entergy Services, Inc., 70 FERC ¶ 61,006, 61012 (1995).

E. NRC New Finding of No Significant Changes

In response to the D.C. Circuit's March 14, 1995, order vacating the River Bend license amendments, the Commission initiated a new inquiry to determine whether it could approve the two license amendments requested by GSU in light of Cajun Electric v. FERC. The staff reviewed its prior findings regarding this matter, information submitted by commenters on the original "significant change" inquiry, and information provided to other governmental

agencies. On April 5, 1995, the Director of NRR, made a new finding that no significant changes in the licensee's activities had occurred subsequent to the previous antitrust review of River Bend. This finding was based upon the staff's view that the concerns raised by the commenters were covered by existing license conditions and remedies, if appropriate, through enforcement of those conditions.

1. Change in Ownership

In its analysis supporting the Director's April 5, 1995, Finding, the staff viewed Commenters' submissions as essentially raising issues relating to four subjects: (1) transmission access, (2) stranded investment, (3) elimination of GSU as a competitor, and (4) market allocation. The staff viewed the transmission access issue as an enforcement issue because it was addressed in a previous licensing proceeding and represents alleged violation of license conditions. The staff indicated in its recommendation of no significant changes that any discussions pertaining to quantifying stranded costs should be addressed at the FERC, and any interpretation of license conditions that may conceivably contain provisions for stranded costs should be addressed in an enforcement proceeding, not a licensing proceeding.

The staff had concerns that the merger would eliminate a viable competitor in the relevant geographic areas under review and requested additional data from the nine commenters regarding the elimination of GSU as a competitor. From the additional data gathered from the commenters, the staff was able to determine that although GSU represented an actual and potential competitor in several wholesale markets in the south central region of the country, it was also apparent that the power systems competing with GSU, notably Arkansas Cities and Farmers Electric Cooperative, had other meaningful



power supply options from which to choose. GSU did not represent the Arkansas Cities' and Farmers Electric Cooperative's only power supply source either directly or indirectly through Arkansas Power & Light Company. Consequently, the staff concluded, independently of the FERC, that Arkansas Cities and Farmers Electric Cooperative would not be significantly disadvantaged in the relevant bulk power services markets because of the elimination of GSU as an independent competitor.

The staff did not believe that there was an attempt by GSU, Entergy and Texas Utilities Electric Company to allocate geographic markets within the state of Texas and did not view the stipulation entered into by the above three power systems before the Texas Public Utility Commission to maintain their existing facilities as presently configured in the same manner after the merger as an allocation of markets for competitive reasons. The staff determined that this stipulation was entered into for the sole purpose of maintaining the relevant facilities as non-jurisdictional under the Federal Power Act.

## 2. Change in Operator

The staff based its no significant changes finding relating to the transfer of operation of River Bend from GSU to Entergy Operations, Inc. (EOI) on the fact that EOI would not be involved in the marketing or brokering of power generated at River Bend. The staff had been concerned with the competitive impact that a new non-owner operator might have on decisions pertaining to marketing or brokering of power or energy produced and distributed from the plant. As a result, the staff imposed a license condition that prohibits the new plant operator, EOI, from engaging in any competitive activities, i.e., marketing or brokering of power or energy,

associated with the plant was developed and made a part of the license. The license condition also obligated GSU to be responsible for the actions of the new owner to the extent the new owner was involved in violations of this license condition or any other antitrust license conditions that were a part of the River Bend license. Based on these license conditions, the staff determined that any additional antitrust review regarding changed circumstances would be unnecessary because the new operator would have no way of impacting the relevant bulk power services market.

## II. DISCUSSION

Commission regulations providing for public requests for reconsideration of a Director's finding of no significant antitrust changes (10 CFR § 2.101(e)(2)) are intended to give the public the opportunity to present new data or highlight data overlooked by the staff in the deliberative process leading up to the Director's finding. The staff received comments from two entities, Cajun Electric Power Cooperative, Inc. ("Cajun") and the cities of Benton, Conway, North Little Rock, Osceola, Prescott, and West Memphis, Arkansas and the Farmers Electric Cooperative Corporation ("ACC").

I note at the outset the requirement of a factual basis for allegations of significant antitrust changes. As the Commission noted in Summer:

we understand Congress's meaning to be that changes in order to be significant must also be reasonably apparent. They must be alterations in the competitive structure or the activities of the licensees discernable from applicants' required submittals, from staff's investigations, or from papers that are filed. In particular when petitioners request a significant changes determination we expect that the changes which have taken place will be known to them so that they can inform us of them with the factual basis underlying their allegations. If that, together with the staff's investigation, does not enable us to determine that significant changes have occurred, then the petition must be denied.

This result is consistent with Congress's expressed intent not casually to burden applicants with a second antitrust review after an extensive antitrust review at the construction license stage.

Summer at 873. The Commission continued in a footnote, "[p]arties may be reminded that other forums exist in which to try allegations of antitrust violations. Furthermore, we are bound to transmit to Justice such allegations as are made to us." Id. at note 45 citing section 105a of the Atomic Energy Act. It is against this backdrop that I conduct this review.

A. Cajun's Comments

Cajun argues that the staff arrived at its no significant antitrust changes finding using stale data and did not consider changes since the staff's original no significant change finding in December 1993. Changes identified by Cajun relate to Cajun Electric v. FERC and Entergy's submittal of revised transmission tariffs before the FERC. But the staff is aware of these developments. Although the court in remanding the NRC case apparently understood the NRC to have relied on a "flawed" FERC decision in making its December 1993 no significant changes finding,<sup>9</sup> the staff has now looked at the issue and reiterates its no significant changes finding without reliance on the "flawed" FERC decision and without reliance on the new Entergy tariffs filed with FERC. Therefore, these developments have no material effect upon the staff's licensing decision involving the GSU/Entergy merger.

Cajun asserts that the Commission "must fashion a remedy in this proceeding" because the staff has not identified (1) transmission issues that have been raised and addressed in previous cases, (2) which license conditions remedy these specific unidentified issues, or (3) which entity the license

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<sup>9</sup> There was substantial mention of the FERC proceeding in the NRC's discussion of the 1993 no significant changes decision. This perhaps led the court of appeals to believe that the NRC decision rested on the FERC decision.

conditions apply to. Cajun Request at 16-17. Transmission access issues involving GSU have concerned the staff since GSU originally applied for its River Bend license in the early 1970's. The Department of Justice advice letter to the Atomic Energy Commission staff dated March 25, 1974, highlighted GSU's competitive activity in Louisiana and Texas and alleged that several smaller power systems were being denied access to various bulk power services. The advice letter stated that,

Within the past year or so, Applicant [Gulf States Utilities Co.] has evidenced a constructive attitude in its relations with the smaller systems in Louisiana. In the course of our antitrust review of the instant license application, Applicant has discussed with the Department its future policies in this regard. While not conceding that any of its prior conduct may have been anticompetitive, Applicant has indicated in the attached letter to the Department the policies which it will follow with respect to such aspects of its operations in Louisiana as access to nuclear units, interconnection and reserve sharing, wheeling, and exchanges of bulk power. Similar policies will be followed by Applicant in connection with its operations in Texas . . . . (Department of Justice advice letter dated March 25, 1974)

As a result of the construction permit review conducted by the Department of Justice and the Atomic Energy Commission staffs, license conditions were attached to the River Bend construction permit to remedy any alleged abuses of market power by GSU. Of particular interest to the instant licensing action, are license condition D.(10) which requires GSU to "facilitate the exchange of bulk power by transmission over its transmission facilities. . . ." and license condition D.(11) which requires GSU to "include in its planning and construction program sufficient transmission capacity as required for the transactions referred to in paragraph (10). . . ."

Moreover, during the operating license review of the River Bend facility in the early 1980's various allegations of anticompetitive conduct surfaced which required the staff to revisit GSU's conduct regarding access to its

transmission system. The staff determined that the refusal by Gulf States to provide transmission services to non-generating power entities was a change in Gulf States' conduct and could represent a significant change since the CP review. The staff indicated that:

If any relief was warranted, it would come in the form of an operating license antitrust review, not from an enforcement proceeding.

See NRC staff "Finding of No Significant Antitrust Changes", May 1985, p. 40. Ultimately, GSU's policy change was resolved and did not require the staff to issue a positive significant change finding. In the instant matter, the alleged changed activity does not represent actual changed company policy or behavior, but rather policies that were addressed by the NRC staff in prior matters which were appropriately mitigated by issuance of antitrust license conditions.


There also exist license conditions which require several Entergy operating subsidiaries to make transmission services available to power systems within the Entergy service area. Both System Energy Resources, Inc. and Mississippi Power & Light Company are obligated to provide transmission services under license conditions issued pursuant to the Grand Gulf Nuclear Station antitrust licensing review. Louisiana Power & Light Company is also required to provide transmission services to electric systems pursuant to the Waterford Nuclear Unit 3 antitrust licensing review. There are procedures and policies in place to remedy non-compliance with these license conditions.

Cajun repeats its concerns regarding stranded investment and the elimination of GSU as a bulk power services competitor. At page 19 of its Comments, Cajun raises new issues pursuant to the viability of Cajun as a bulk



power competitor and the "de facto" allocation of markets in the south central and southeastern states among Entergy, Southern Companies and ERCOT utilities. Cajun Request at 18.

Stranded investment issues are rate-related issues within FERC's primary jurisdiction. The NRC historically has not addressed rate questions, instead deferring to FERC or State rate-setting agencies. It is possible here that "stranded investment" or "opportunity cost" questions could relate to claims of denial of access to transmission lines, but that is a matter for enforcement proceedings, not licensing proceedings. In this case, in any event, issues relating to stranded investment appear to be moot because of Entergy's elimination of the provision for recovery of stranded investment in its newly filed tariffs at FERC.

The staff believes the elimination of GSU as a competitor in the bulk power services market will not significantly impact the south central bulk power services market. Cajun argues that the staff's analysis "assumes that other entities have the ability to effectively use transmission service from Entergy." Cajun Request at 18. What Cajun overlooks is that Entergy is bound by existing River Bend license conditions that protect access to Entergy's transmission grid. Claims of denial of this access can and should be raised in the context of an enforcement proceeding. 

With regard to Cajun's bankruptcy filing, the staff has no data indicating, 1) whether Cajun's filing was precipitated by the proposed merger of GSU and Entergy, or 2) what effect, if any, said filing has on the bulk power services market served by GSU/Entergy. Nor does the staff have any reason to examine the bulk power markets served by Entergy, Southern Companies or the ERCOT utilities outside of any licensing or enforcement related

matters. The fact that there are few competitors in a particular geographic area does not necessarily indicate illegal allocation of economic markets. No evidence has been provided to indicate that these power companies have conspired to restrict markets. With the exception of Occidental Chemical Corporation's allegations of market allocation in the state of Texas during the 1993 staff reevaluation review and those of Cajun in the instant matter, the staff has received no other allegations pursuant to market allocations and any possible anticompetitive effects associated with such allocations. Should Cajun have any evidence of market allocation, it should be made available to the Department of Justice.

Cajun asserts that the Staff Recommendation contains only a passing reference to the revised Entergy tariffs but reflects no analysis of these tariffs. Cajun Request at 4. But the NRC need not analyze the FERC tariffs in detail, as our no significant changes finding rests on the protection of existing NRC license conditions, not on the FERC tariffs. We note, however, that the new FERC tariffs appear to address, point by point, the criticisms of Cajun Electric v. FERC and offer more protection for competition than the original FERC tariffs. For example, the stranded investment provision has been eliminated from the new tariffs and a point-to-point service limitation in the previous tariffs is replaced by a network service tariff. I see nothing in the current FERC tariffs, which FERC itself has allowed to take effect pending further proceedings, that detracts from the NRC's no significant antitrust changes finding.

#### B. ACC's Comments

ACC adopted and realleged "all of their previous Comments and statements to NRC." (ACC Comments, p. 2) In 1989, the staff conducted a licensing

review of Entergy's transfer of system operations from System Energy Resources, Inc. (an Entergy subsidiary company) to Entergy Operations, Inc. (EOI). As a part of this review, the staff sought and received comments from interested parties concerned with the potential competitive effects associated with this change. ACC submitted comments in the 1989 licensing review indicating that the decision by the FERC to allocate the costs of Grand Gulf Unit 1 among all of the Entergy operating companies represented a significant change and requested that antitrust license conditions be extended to all of Entergy's operating service companies. Generally, ACC contended that license conditions are necessary because their existing wholesale power contracts do not contain the type of terms and conditions that are included in contracts resulting from antitrust reviews associated with other nuclear facilities.

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In its April 23, 1993, comments and request for reevaluation, and by adoption, in its May 10, 1995, comments and request for reevaluation, ACC again argues for imposition of extensive license conditions on all of the Entergy operating companies. The staff dismissed ACC's arguments made in 1989 regarding cost allocations attributable to Grand Gulf as not representing a "significant change". (See Safety Evaluation by the Office of Nuclear Reactor Regulation dated December 14, 1989, pursuant to Amendment No. 102 to the Arkansas Nuclear One, Unit 2 facility operating license no. NPF-6.) Similarly, the staff dismissed ACC's allegations made in 1993 regarding the elimination of GSU as a bulk power competitor. In neither instance was there evidence to suggest that the staff should make a positive significant change finding. The staff has thoroughly explained its position regarding the elimination of GSU as a competitor and sees no reason to add license

conditions to Entergy operating companies for the sake of continuity. Each Entergy plant has undergone distinctly separate antitrust reviews and has its own set of license conditions.

ACC also suggests (as does Cajun) that the D.C. Circuit's order vacating the NRC orders and remanding the case to the NRC "for further proceedings" in light of Cajun Electric requires the NRC to conduct an evidentiary hearing on antitrust issues. Cajun Request at 15; ACC Request at 8. This reading of the court's order is wrong and ignores the NRC's longstanding antitrust review procedures. Nothing in the court's order remanding the case to the NRC for "further proceedings" requires the NRC to conduct a hearing or prevents the NRC from engaging in its usual no significant change process.

As explained in section I.B., supra, under section 105 of the Atomic Energy Act, 42 U.S.C. § 2135, the NRC analyzes situations where new ownership occurs after issuance of an operating license applying the standards set forth in its Summer decision to determine whether an antitrust review is required. The NRC has adopted a review process for post-operating license changes in plant ownership patterned after the operating license review associated with initial applicants. Receipt of the application to add a new owner to the facility after the operating license has been issued is noticed in the Federal Register with the opportunity extended to the public to express views relating to any antitrust issues raised by the application. The notice states that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensee's activities or proposed activities have occurred since the completion of the previous antitrust review.

With the benefit of public comment and consultation with the Department of Justice, the staff makes a determination whether the changes in question will require a further antitrust review in order to determine whether the issuance of the license amendment will create or maintain a situation inconsistent with the antitrust laws. If the Director of NRR finds a "significant change," the matter is referred to the Attorney General for a formal antitrust review pursuant to Section 105(c) of the AEA. If the Director of NRR finds no significant change, the finding is published in the Federal Register with an opportunity for the public to request reevaluation of the finding.

In South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CL.I-81-14, 13 NRC 862 (1980) the Commission explains how this procedure is consistent with its statutory mandate:

A finding that significant changes have occurred must precede a formal request for the Attorney General's advice in any statutory antitrust review. Congress made it abundantly clear that absent such a finding there is to be no antitrust review [hearing] at the operating license stage. That Congressional directive may not be circumvented by expanding a petition for significant changes into a proceeding with all the attributes of a full-fledged hearing.

Id. at E73.

ACC charges that the NRC is somehow seeking "approval of the 1995 Finding on rehearing" and that this "process would violate Rule 40 of the Federal Rules of Appellate Procedure." ACC Request at 8. ACC entirely misses the point of this proceeding. The NRC has not sought rehearing of the court's vacatur order. To the contrary, the NRC is following the direction laid down by the court by conducting further proceedings in light of Cajun Electric.

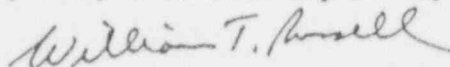


ACC describes a March 19, 1995, FERC Notice of Proposed Rulemaking (Transmission NOPR) and asserts that this transmission NOPR will allow Entergy to recover monopoly profits. These objections are not properly placed before the NRC. ACC may wish to comment in the FERC rulemaking and avail itself of other legal remedies. However, ACC's comments have no bearing on the NRC's no significant change finding.

III. Conclusion

Requesters ask that I reverse my finding of no significant antitrust changes dated April 5, 1995. I have elaborated on and attempted to clarify the issues raised by the requesters but am denying their requests for reevaluation.

Dated at Rockville, Maryland, this 30th day of May 1995.



William T. Russell, Director  
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