Department of Justice
Washington, D.C. 20530

APPENDIX 5

JUL 12 1971

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Associate General Counsel
United States Atomic Energy
Commission
Washington, D. C. 20545

Re: Southern California Edison Company
and San Diego Gas & Electric Company,
San Onofre Nuclear Generating Station
Units 2 and 3, AEC Docket Nos. 50-361-A
and 50-362-A

Dear Mr. Schur:

You have requested our advice pursuant to the provisions of Section 105 of the Atomic Energy Act of 1954, as amended by P.L. 91-560, in regard to the above cited application.

1. The Applicant

The San Onofre Nuclear Generating Station, Units 2 and 3, will consist of two 1,140 mw units located at Camp Pendleton, four miles south of San Clemente, California. The plant will be owned jointly by two investor owned utilities: Southern California Edison Company (80%) and San Diego Gas and Electric Company (20%). The original estimated cost of the units at completion was $436,960,000; we are informed by the applicants that because of various factors, including the possibility of more stringent seismic safety requirements, current cost estimates are well in excess of this figure. Unit 2 is scheduled to go into operation June of 1976, and Unit 3, one year later. Southern California Edison Company will have complete responsibility for construction and operation of the units.

Southern California Edison Company ("Edison") is a privately owned integrated electric utility which serves a 50,000 square mile area in Southern California with approximately 7.2 million customers. Edison presently supplies the full bulk power requirements of six municipalities as well as one rural electric cooperative. In 1969, Edison's

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total operating revenues were in excess of $642 million. Edison's major interconnections are with Pacific Gas & Electric Company to the north, Arizona Public Service Company to the east, San Diego Gas & Electric Company to the south and the City of Los Angeles. It is also interconnected with the Bureau of Reclamation, the Metropolitan Water District, Imperial Irrigation District, and other smaller utilities engaging in self generation in adjacent areas.

San Diego Gas & Electric Company ("San Diego") is also a privately owned integrated electric utility which serves south of the service area of Edison. San Diego does not have any wholesale customers. In 1969, San Diego's electric operating revenue was $99,487,000.

2. Relations with Other Utilities

Edison and San Diego are both members of the California Power Pool. The third and final member is Pacific Gas & Electric Company ("PG&E"). All members are interconnected, directly or indirectly, and exchange surplus energy and provide emergency service; at this time, the members do not share installed or spinning reserves although they expect to commence reserve sharing in 1974. The California Power Pool was established in 1964 under an agreement which contains no provision which would allow other qualified utilities to become pool members. Such utilities may participate in the benefits of the pool only through association with one of the three members. The pool agreement also established installed and spinning reserve requirements for members and for third parties with which the members are interconnected. The effect of these requirements is to limit severely the degree to which a pool member may interconnect and coordinate with a wholesale customer which is just beginning to generate a part of its requirements. One other provision which should be noted sets forth limitations with respect to standby service to non-members of the pool. A pool member may draw on spinning reserve capacity for two hours but a non-member may draw on such reserves for only one-half hour.

At present, San Diego does not sell bulk power at wholesale to any non-generating utility. Imperial Irrigation District, the only utility other than Edison with which San Diego is interconnected, has satisfactory alternative sources of bulk power supply and high voltage transmission and has not expressed any interest in participating in this project.

All of Edison's interconnection partners which are engaged in generation have alternative power supply and transmission

sources and [illegible] interest in the [illegible] facilities which [illegible] subject of this application. Six municipalities 1/ and one cooperative which are [illegible] requirements wholesale customers of Edison, three municipalities have sought intervention to protect this application, and an additional city and the cooperative have expressed the view that they have been disadvantaged by Edison's prior course of conduct. In the case of all of these customers, Edison represents the single available source of bulk power supply and high voltage transmission.

In this context it should be noted that Edison has pursued a policy of acquiring the systems of its competitors and customers. In the last ten years, it has acquired four electric utility systems, two of which were all-requirements wholesale customers, and made offers to or indicated interest in purchasing the systems of two additional all-requirements wholesale customers.

Edison has in the past acted to block efforts of its all-requirements wholesale customers to receive bulk power from alternative sources through wheeling over Edison's transmission facilities. Anza Electric Cooperative is an all-requirements wholesale customer of Edison with annual load growth of approximately 37%. At various times, Anza has applied for and received allocations of federal power, but Edison has denied requests to wheel this power to Anza. In 1967, Edison renewed for a 25-year term an agreement with Imperial Irrigation District which provided, in part, that the District would not sell or wheel power to Edison's wholesale customers. The District's service area borders on that of Anza. It has adhered to its agreement with Edison and refused to wheel power to Anza.

The City of Colton, an all-requirements wholesale customer of Edison with an estimated annual load growth of 20%, indicated that Edison has similarly refused to wheel federal power to its system.

The largest intervenors, the cities of Anaheim and Riverside, have been engaged for the last decade in attempts to secure Edison's cooperation with or acquiesence in the cities' acquisition of lower cost alternative sources of bulk power supply. In 1957, Edison raised its rate for electric service to municipal customers above its rate for service to large industrial customers, thereby placing the municipal

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1/ The cities are Anaheim, Azusa, Banning, Colton, Riverside and Vernon.

customers at a severe disadvantage in competition with Edison to attract large industrial loads to their service areas. In 1961, Anaheim, Riverside and Colton joined together to consider possible alternatives to their remaining wholesale full requirements customers of Edison. In November 1962, an engineering consulting firm submitted a report, recommending that the cities explore several such alternatives, including self-gereration, peak-shaving generation, and access to capacity from the projected Northwest-Southwest Intertie. After receipt of the report, the cities engaged in negotiations with Edison which ultimately resulted in a 5% rate reduction.

In July of 1963, virtually every resale city signed a ten year all-requirements contract reflecting this 5% rate reduction. In addition to requiring the purchase of all power requirements from Edison and restricting disposition of the power purchased to use or resale within the city limits, these contracts prohibit the purchaser from operating any generating facilities in parallel with those of Edison. That is, any generation owned by a city must be isolated; it cannot be integrated into the electric network supplied by Edison.

Sometime during the 1963-64 period, representatives of Riverside met with officials of Edison to discuss the possibility of the city's developing peak-shaving generation. Edison was allegedly extremely firm in its stand that it would not allow its resale customers to develop their own generation.

Early in 1964, Riverside and Anaheim met with officials of Bonneville Power Administration regarding allocation to the cities of a block of power from the Northwest-Southwest Intertie. When Edison was asked to wheel this power to the cities, it stated that it felt that the Intertie concept was "economically unfeasible" and would never come to fruition. The attempts to obtain Intertie power were effectively precluded from success by existence of the all-requirements contracts.

In February of 1964, after lengthy negotiations Edison's municipal customers received an additional 2% rate reduction.

In February of 1967, Edison attempted to get Riverside to commit itself to a new ten year all-requirements contract based on Edison's installation of new transmission facilities. Edison followed a similar course of action with respect to Anaheim beginning in April of 1968. Neither city entered the new contract and negotiations were terminated in December of 1968.

On April 1, 1969, [illegible] received another consul[illegible] engineers' report on future bulk power supply. The [illegible] set forth four possible alternative sources of bulk po[illegible] at reduced cost: (1) high voltage delivery from Edi[illegible], (2) peak-shaving, (3) independent self generation, (4) participation generation. The last alternative was based upon the assumption that Anaheim might participate as a joint owner of coal-fired or nuclear facilities in Arizona or nuclear facilities in California, with city-owned gas turbine generation used for peak-shaving and standby reserve. No specific projects were mentioned.

Upon receipt of the report, Anaheim began to explore all of the alternatives. The details of its efforts are set forth, together with supporting documentation, in the cities' "Petition to Intervene, Request for Hearing, and Request for Submission of Views to the Attorney General for Antitrust Review" which was filed with the Commission on April 21, 1971. A brief summary of these activities is helpful here.

After Anaheim had indicated interest in participating in the Navajo-Four Corners multiparty coal-fired generation project, Edison wrote to Anaheim and presented the city with a choice: Anaheim could continue to receive service at 66 kv or it could receive 220 kv service at a lower rate under a new ten year all-requirements contract. Edison set a time limit for Anaheim's answer which would not allow the city to ascertain whether it could economically participate in Navajo-Four Corners. Nonetheless, Anaheim decided to become a study participant in Navajo-Four Corners in April 1969. On May 15, Edison withdrew from the project. Ultimately, Anaheim also withdrew since it was without transmission facilities to transport power west of the Colorado River.

On May 19, Anaheim responded to Edison's request by not electing either of Edison's alternatives but rather by making a counterproposal that it join with Edison in the construction and operation of future generating facilities. On May 28, Edison replied that such a proposal was beyond the scope of the subject under discussion.

On August 13, Anaheim requested that Edison wheel certain federal power from the system of the City of Los Angeles to Anaheim's system. Edison refused to do so.

In September 1970, Anaheim made two requests. The first was for an allotment of capacity from Edison's planned addition to its Huntington Beach generating plant. This project

encountered environmental problems and seemed to be applied; the city did not follow up its initial request. The second request was for terms and conditions under which Edison would provide partial requirements and standby service in the event Anaheim installed peak-shaving generation. Edison met on several occasions with representatives of Anaheim to explore the feasibility of a rate form which would permit peak-shaving generation by the city. On May 13, 1971, Edison informed Anaheim that since the city had intervened in Edison's rate proceeding before the Federal Power Commission and in the instant proceeding before this Commission, the company was suspending consideration of such a rate.

On February 2, 1971, thirteen months after the applicants' plans for San Onofre Units 2 and 3 became public knowledge, Anaheim and Riverside requested participation in these units. San Diego responded that due to the lateness of the cities' requests, it was no longer possible to alter the sizing of the units and that any attempt to reduce the amount of capacity for which it had contracted would jeopardize San Diego's system reliability. Edison indicated willingness to discuss the cities' request. Edison, Anaheim and Riverside held five meetings during March and April; Banning was represented at two of these. While Edison repeatedly stated that it would consider any specific proposals the cities wished to make, it emphasized that it would be extremely difficult for the cities to make a feasible proposal. On April 19, Edison wrote to the cities reiterating this view and setting forth four general criteria which any proposal by Anaheim and Riverside would have to meet to be acceptable to Edison:

> These criteria are that the arrangement makes good business sense and is mutually advantageous to Edison and the other generating agency. In addition, such arrangement must not result in unreasonable discrimination against or burden Edison's customers, and must not impair Edison's ability to render adequate service to its customers.

In May, the cities responded that they saw little sense in attempting to formulate a specific proposal which would meet a variety of specific criteria when Edison might reject it on the basis of its four general criteria. On June 30, Edison replied reiterating its willingness to consider a specific proposal and again outlining its four basic criteria.

3. Competitive Implications

As we have indicated, there are few small utilities adjacent to the San Diego service area, and it has no all-requirements wholesale customers; this antitrust review has thus focused primarily upon the effect which the granting of this application would have upon Edison's relationship to its present wholesale all-requirements customers.

Edison provides electric service throughout a wide area to millions of customers. In order to operate efficiently and reliably on this scale, Edison has established an extensive integrated high voltage transmission network connecting its various generating resources with its load centers. The Los Angeles Department of Water and Power also operates an extensive transmission system in southern California. There are, however, many areas within the bounds of the Edison's system including the areas of the intervenors and other wholesale all-requirements customers where Edison's control of the only available high voltage transmission facilities amounts to a monopoly. Practically all of the alternatives which the cities have considered for acquiring their own generation or other alternative source of bulk power supply would be dependent upon their obtaining access to the Edison transmission system.

Even though its internal generating resources and transmission network are very large, Edison has obtained important benefits in bulk power production by joining with other utilities in cooperative ventures. Since the generating and transmission elements of a bulk power supply system are subject to forced outages, it is necessary to provide against this risk. The California Power Pool, though less tightly knit than some power pools in other areas, affords Edison the economic advantages of dealing with this risk collectively. At the same time, its participation in joint generation and transmission projects have enabled Edison to take greater advantage of the economies of scale associated with large generating units and high-voltage transmission. Thus, Edison has joined with other utilities in such major projects as the Northwest-Southwest Intertie, the Four Corners project in New Mexico, the Mohave project in Arizona, and the subject of immediate concern here, the San Onofre nuclear plant.

Edison's ability to participate in major joint projects throughout a wide geographic area is facilitated by its extensive transmission system; in those instances, such as Four Corners, in which it has participated in projects well

outside the bounds of its transmission system, it has been able to arrange for the use of transmission lines owned by other participating utilities.

In our previous antitrust review letters we have pointed out that there can be, and often is, substantial competition among electric utilities. We would expect to find that there is significant competition here between Edison and its major resale customers, particularly in the efforts to attract large industrial users of electric power to locate new facilities within the service area of a particular supplier. But we do not believe that the existence or extent of such retail competition is a central antitrust issue with respect to these applications.

We have outlined in part 2 of this letter an extensive history of efforts by Edison's municipal wholesale customers to alter their status as all-requirements purchasers from Edison and to assume some measure of responsibility for their own bulk power supply. The alternatives which they explored generally involve their acquiring the ownership of generating facilities or their purchasing generating capacity from entities other than Edison; to the extent they are implemented they would reduce the role of Edison as a supplier of generating capacity to the municipalities. Regardless of whether there exists significant competition at retail between Edison and the municipal systems which now purchase at wholesale from it, substantial antitrust issues are raised in the light of the evidence, outlined above, suggesting that Edison may have attempted to foreclose the possibility of any of its wholesale customers becoming generating entities. Principles which have evolved under the antitrust laws place distinct limits upon a supplier's exercise of monopoly power to prevent its customers from developing alternative sources of supply. Section 2 of the Sherman Act is particularly relevant to this situation. As the Supreme Court stated, "The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen or historic accident." United States v. Grinnell Corporation, 384 U.S. 563, 571 (1966). No proof of specific intent to violate the antitrust laws is required in a Section 2 monopolization case. See United States v. Griffith, 334 U.S. 100, 105 (1948); United States v. Grinnell, 236 F. Supp. 244, 248 (D. R.I. 1964), affirmed 384 U.S. 563. Rather the question is whether a person who maintains a monopoly has separately, or with others, carried out business

policies which raise unnecessary "barriers to competition." United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 344, 345 (D. Mass., 1953), affirmed per curiam 347 U.S. 521.

Established antitrust principles are also relevant in evaluating the reasonableness of the exclusion of prospective entrants into electric power generation from access to jointly controlled facilities. Generally the antitrust laws require that when business entities jointly control an essential resource, they must grant access to it, on equal and non-discriminatory terms, to all those engaged in the given business. This principle has been widely applied to a variety of business organizations -- including terminal railways, United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912); national securities markets, Silver v. New York Stock Exchange, 373 U.S. 341 (1963); dominant news gathering organization, Associated Press v. United States, 326 U.S. 1 (1945). The reason for the rule is to prevent those holding a unique monopoly position from using that lawful monopoly to foreclose competition in related activities which should be competitive. This is also closely related to the antitrust rule which denies to the individual firm in a monopoly position the usual right to select the persons with which it will deal. See United States v. Colgate and Co., 250 U.S. 300, 307, (1919).

In rendering our antitrust advice, we have found it necessary to consider the totality of Edison's conduct in relation to its wholesale customers during the period examined in Part 2 of this letter. A number of the actions taken and positions asserted by Edison during this past period appear, on the basis of present information, to have had the effect of unreasonably foreclosing its wholesale customers from bulk power supply alternatives. We note first that upon a number of occasions Edison appears to have refused flatly to provide available transmission capacity for the wheeling of power from other generating entities to its wholesale customers. Secondly, we note that Edison has renewed the provision in a contract with Imperial Irrigation District which precludes Imperial from providing such a wheeling service to Edison's wholesale customers. Third, we note the allegation of Riverside that in the 1963-1964 period Edison refused to consider the development of a wholesale rate schedule which would permit the municipality to supply part of its requirements with its own generation.

More recently, Edison has engaged in some discussion with Anaheim about the possibility of a wholesale rate schedule which would permit installation of peak-shaving equipment,

but we note that recently Edison terminated such discussions because of the municipality's participation in this proceeding and opposition to Edison's wholesale rate increase in the FPC. Fourth, we have noted that throughout the period Edison has maintained provisions in its full-requirements contracts with wholesale customers which appear unnecessarily to restrict those customers' access to alternative bulk power supplies. We refer in particular to the provisions forbidding the operation of any electric generation on the customer's system in parallel with Edison's and the provisions precluding the resale or use outside of the customers's system of the purchased power. Finally, we have noted that Edison, together with San Diego and PG&E, has established the California Pool on terms which appear not to contemplate the admission of smaller generating entities and which appear to impose unnecessary barriers to the interconnection and coordination of a pool member's system with the system of a non-member. In addition, there is some indication that Edison has insisted upon terms comparable to the California Pool requirements as a condition to any interconnection agreement with smaller generating entities.

While we believe that the municipal wholesale customers' request for participation in the San Onofre units must be considered in the context of the total history of the relationships discussed above, we do not think it is possible at this time to reach any definitive conclusion as to the appropriateness of now requiring such participation. We note first that the municipal customers initially indicated that they wished to participate in these units some thirteen months after the plans were publicly announced. It is not clear to what degree this delay would make it impractical to arrange their participation. It is similarly unclear whether -- assuming participation is available on reasonable terms -- the cities are either willing or able to make definite commitments for participation within the time frame required for an orderly development of the project. It is not uncommon for utilities engaging in joint generation projects to spend several years hammering out the details of participation. At this point, Edison has not flatly refused to allow the cities to participate and, in the normal course of things, it would seem unreasonable to expect the parties to have reached an agreement after the limited time for discussions available here.

Nevertheless there is presently some reason for concern whether the general criteria which Edison has established for evaluating any specific request for participation by the cities are consistent with the obligation to afford reasonable access

on reasonable terms, which may well be found to be reasonable in the premises. One of the general criteria would require that the transaction accord significant benefits to Edison, and Edison has made clear that its weighing of the benefits will take into account the economic detriment to it from the loss of a full-requirements wholesale customer. This may make it just about impossible for such a customer to submit a proposal which would satisfy the criterion. Furthermore, it appears unlikely that a municipal wholesale customer could submit any workable offer of participation in these units without some substantial modification of the reserve requirements to which the major California utilities have adhered to in dealing among themselves and with the small utilities. Considering all of these circumstances, we do not believe that the question of access here can be left totally to the results of the present discussions among the parties.

4. Conclusion

Based on the evidence and information currently available, it is impossible for us to state that Edison has refused to consider participation by the intervenors in San Onofre. At the same time, consideration of the totality of Edison's conduct makes it equally impossible to conclude that the applicant's activities under this license, if granted, would not maintain a situation inconsistent with the antitrust laws. The issues here are so complex and clouded that there is no alternative but for the Department to request a hearing on this application.

Sincerely yours,

Walker B. Comegys

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