

November 22, 1985

Docket No.: 50-414A

Robert Guild, Esq.
Counsel for Palmetto Alliance, Inc.
P.O. Box 12097
Charlston, SC 29412

Dear Mr. Guild:

RE: CATAWBA NUCLEAR POWER STATION, UNIT 2, OPERATING LICENSE ANTITRUST ANALYSIS

The Director of the Office of Nuclear Reactor Regulation has made a finding of no significant antitrust changes pursuant to the operating license antitrust analysis of the captioned nuclear unit. This finding will be published in the Federal Register and if no requests for reevaluation are received from the public, the initial finding will become final.

Because of the interest you have previously expressed in the antitrust review of this project, I am forwarding you a copy of the Federal Register notice and the staff analysis upon which the finding was based.

Sincerely,

Donald P. Cleary, Acting Chief
Site Analysis Branch
Division of Engineering
Office of Nuclear Reactor Regulation

Enclosures:

1. Federal Register Notice
2. Staff Analysis

Distribution:

Docket Files 50-414A	W. Johnston
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NUCLEAR REGULATORY COMMISSIONDOCKET NO 50-414ADUKE POWER COMPANY, NORTH CAROLINA MUNICIPAL POWER AGENCY 1,AND PIEDMONT POWER AGENCYNOTICE OF FINDING OF NO SIGNIFICANT ANTITRUST CHANGESAND TIME FOR FILING REQUESTS FOR REEVALUATION

The Director of Nuclear Reactor Regulation has made an initial finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant (antitrust) changes in the licensee's activities or proposed activities have occurred subsequent to the previous construction permit review of Unit 2 of the Catawba Nuclear Power Station by the Attorney General and the Commission. The finding is as follows:

"Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides for an antitrust review of an application for an operating license if the Commission determines that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous construction permit review. The Commission has delegated the authority to make the "significant change" determination to the Director, Office of Nuclear Reactor Regulation. Based upon an examination of the events since issuance of the Catawba 2 construction permit to the Duke Power Company, et al., the staffs of the Antitrust and Economic Analysis Section of the Site Analysis Branch, Office of Nuclear Reactor Regulation and the Antitrust Section of the Office of the Executive Legal Director, hereafter referred to as "staff", have jointly concluded, after consultation with the Department of Justice, that the changes that have occurred since the antitrust construction permit review are not of the nature to require a second antitrust review at the operating license stage of the application.

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"In reaching this conclusion, the staff considered the structure of the electric utility industry in the Piedmont Carolinas, the events relevant to the Catawba 2 construction permit reviews and the events that have occurred subsequent to the construction permit reviews.

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

'During the construction permit antitrust reviews of Duke Power Company's (Duke's) nuclear plant applications, the Attorney General and the petitioners for antitrust hearings were primarily concerned with Duke's dominance in the relevant market. The thrust of the review centered upon any increase in that dominance that would occur by the addition of the Oconee, McGuire and Catawba nuclear units to Duke's integrated electrical system, and Duke's refusal to allow smaller electrical systems in the area where Duke serves to share in the ownership of the nuclear units or to interconnect with Duke and coordinate power supply services. Following negotiations, Duke agreed to a set of antitrust commitments which were to be attached as antitrust license conditions to its nuclear plant construction permits and operating licenses. These license conditions required Duke to interconnect and provide power supply services to smaller electric utilities in the area where it serves, including notification of plans to construct future nuclear units, but did not specifically require Duke to provide ownership access to the Oconee, McGuire or Catawba nuclear units.

'Subsequently, Duke entered into agreements with municipal and cooperative power agencies in both North Carolina and South Carolina, providing these agencies with ownership interests in Catawba Units 1 and 2, and with ancillary services to make this ownership economical. Specifically, the North Carolina Electric Membership Corporation and the Saluda River Cooperative, Inc. have been provided an ownership interest in Catawba 1. Similarly, the North Carolina Municipal Power Agency 1 and the Piedmont Municipal

Power Agency have been provided an ownership interest in Catawba 2. The ownership agreements have been supplemented by interconnection agreements which provide (1) interim power supply from Duke's other nuclear units prior to commercial operation of the Catawba units (2) emergency backup power among the nuclear units whereby each nuclear unit is supported by the others, (3) a buy-back arrangement by Duke to allow the municipals and cooperatives to gradually increase their capacity allotments, (4) transmission services, and (5) supplemental purchases and sales by Duke to permit the municipals and cooperatives to match their energy requirements from hour to hour.

'The NRC staff believes that the above changes are consistent with the commitments made by Duke during the construction permit antitrust negotiations and are consistent with the Department of Justice and Nuclear Regulatory Commission desires to enhance the competitive process in bulk power supply markets. Staff's investigations and analysis have disclosed no anticompetitive connection between the activities of the applicants and the changes that have occurred since the construction permit application reviews for Catawba 2. The changes that have occurred in rate schedules, inquiries regarding power purchases and sales, and changes in membership and nuclear plant ownership shares of the municipal and cooperative organizations have had negligible competitive impact upon the bulk power supply in the Piedmont Carolinas. Accordingly, the NRC staff is not recommending a "significant change" finding with respect to the Catawba 2 operating license application.'

"Based on the staff's analysis, it is my finding that a formal operating license antitrust review of the Catawba Nuclear Power Station, Unit 2 is not required."

Signed on November 19, 1985 by Harold R. Denton, Director of Office of Nuclear Reactor Regulation.

Any person whose interest may be affected by this finding may file with full particulars a request for reevaluation with the Director of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555 for 30 days from the date of publication of this Federal Register notice. Requests for a reevaluation of the no significant change determination shall be accepted after the date when the Directors' finding becomes final but before the issuance of the OL only if they contain new information, such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

FOR THE NUCLEAR REGULATORY COMMISSION

Donald P. Cleary

Donald P. Cleary, Acting Chief
Site Analysis Branch
Division of Engineering
Office of Nuclear Reactor Regulation

CATAWBA NUCLEAR STATION, UNIT 2
DUKE POWER COMPANY, NORTH CAROLINA MUNICIPAL POWER AGENCY 1
AND
PIEDMONT MUNICIPAL POWER AGENCY
DOCKET NO. 50-414A

SIGNIFICANT CHANGE ANALYSIS

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CONTENTS

I. INTRODUCTION

II. BACKGROUND

1. Electric Utility Systems
2. Catawba Construction Permit Antitrust Reviews
 - a. Duke Power Company
 - b. North Carolina Municipal Power Agency 1
 - c. North Carolina Electric Membership Corporation and Saluda River Electric Cooperative, Inc.
 - d. Piedmont Municipal Power Agency
3. Catawba Unit 1 Operating License Antitrust Analysis

III. CHANGES SINCE THE CONSTRUCTION PERMIT REVIEW

1. Duke Power Company
2. North Carolina Municipal Power Agency
3. Piedmont Municipal Power Agency

IV. ANALYSIS OF CHANGES

V. SUMMARY AND CONCLUSIONS

CATAWBA NUCLEAR STATION, UNIT 2
SIGNIFICANT CHANGE ANALYSIS

I. INTRODUCTION

Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides for an antitrust review of an operating license application if significant changes in the licensee's activities or proposed activities have occurred since the construction permit (CP) antitrust review. Authority to make the significant change determination was delegated to the Director, Office of Nuclear Reactor Regulation (NRR) for reactors. The Nuclear Regulatory Commission (Commission) in a Memorandum and Order (CLI-80-28) dated June 30, 1981 set forth three criteria upon which to base a "significant change" determination. These criteria are as follows:

1. The change or changes must have occurred since the previous construction permit review;
2. The change or changes must be attributable to activities or proposed activities of the licensee; and
3. The changed situation must have antitrust implications which would likely warrant a Commission remedy.

In connection with the Catawba Nuclear Station, Unit 2 (Catawba 2) operating license application, the staff* has reviewed the post construction permit activities and proposed activities of the applicants, the Duke Power Company (Duke), the North Carolina Municipal Power Agency 1 (NCMPA 1) and the Piedmont Municipal Power Agency (PMPA). It is the staff's conclusion that no "significant changes" have occurred subsequent to the CP antitrust reviews for the three applicants.

* The Site Analysis Branch, Division of Engineering, Office of Nuclear Reactor Regulation and the Antitrust Counsel of the Office of the Executive Legal Director in consultation with the U.S. Department of Justice.

II. BACKGROUND

In order to analyze the significance of the changes that have occurred since the CP antitrust reviews, a general knowledge is required of the electric utility systems that operate in proximity to the applicants' service areas. Also, the results of the CP antitrust reviews are fundamental in establishing a baseline for determining the changes that have occurred subsequent to those reviews. This background is discussed below.

1. Electric Utility Systems

Duke is a member of the Virginia-Carolina Subregion (VACAR) of the Southeastern Electric Reliability Council (SERC). There are six other electric utilities in VACAR; Carolina Power and Light Company (CPL), South Carolina Electric and Gas, South Carolina Public Service Authority, Southeastern Power Administration, Virginia Electric and Power Company (VEPCO), and Yadkin Inc. These utilities are strongly interconnected with each other and with surrounding utilities in the other SERC subregions and the East Central Area Reliability Council (ECAR).

The Southeastern Power Administration serves no retail customers but generates electric power solely for sale to other electric utilities. Yadkin serves one industrial customer only, Alcoa. The other five utilities of VACAR are fully integrated utilities having generation, transmission and distribution facilities for service at wholesale and retail. The South Carolina Public Service Authority is a state agency, whereas the other four are investor owned utilities. As measured by peak load, Duke is the largest having a peak in excess of 10,000 MW in 1983. Duke is headquartered in Charlotte, North Carolina and serves approximately 20,000 square miles of territory in North Carolina and South Carolina.

In May 1975, joint action legislation was passed by the North Carolina General Assembly allowing municipal electric systems in the state to jointly plan, develop, construct and operate generation and transmission facilities. In 1977, an amendment to the Constitution of North Carolina permitted joint power agencies to participate as joint owners with private utilities and rural electric cooperatives. Three joint municipal power agencies were formed, North Carolina Municipal Power Agencies Numbers 1, 2, and 3. As of September 1984, Power Agency No. 1 (NCMPA 1) was composed of 19 municipalities which purchased wholesale power from Duke. Power Agencies 2 and 3 purchase power from Virginia Electric and Power Company and Carolina Power and Light Company, respectively. NCMPA 1 is projecting a peak annual load of 615 MW for 1985.

Legislation, similar to that described above for North Carolina, was also enacted in South Carolina. As an outgrowth of that legislation, PMPA was formed. PMPA presently represents 10 municipalities in the Duke service area in South Carolina. PMPA is projecting a peak load of 257 MW for 1985.

The North Carolina Electric Membership Corporation (NCEMC) is a cooperative non-profit electric membership corporation incorporated under North Carolina Statutes on January 20, 1949. NCEMC has 27 member cooperatives served at wholesale by the following neighboring utilities: Duke, CPL, VEPCO and Nantahala Power and Light Company (Nantahala). In addition, NCEMC receives a small allotment of hydroelectric power from the Southeastern Power Administration; power wheeled to NCEMC members by the neighboring utilities. NCEMC has an annual peak demand of approximately 2000 MW.

Ten (10) of NCEMC's members are served by Duke, six (6) by VEPCO, seventeen (17) by CPL and one (1) by Nantahala. This totals to more than 27 because six (6) members are served by more than one utility.

Until recently, NCEMC only administered the wholesale contracts between its members and the neighboring utilities. It had no generation or transmission facilities of its own. However, it has now entered into arrangements with Duke to purchase a 56.25% ownership share in the Catawba Nuclear Station, Unit 1. Under the arrangement, NCEMC will contractually supply the total power requirements of those members electrically connected with Duke. Contractual delivery of the power will be over Duke's transmission system. Power will also be contractually delivered over VEPCO's transmission system to those NCEMC members electrically connected to VEPCO. Negotiations for contractual delivery of power from NCEMC to its members presently served by CPL have not been successful as of September 5, 1984.*

Saluda River Electric Cooperative, Inc. (Saluda River) is an electric cooperative which was incorporated under the laws of South Carolina on November 21, 1958. Saluda River (headquartered in Laurens, South Carolina) is composed of five member cooperatives, all of whom receive power and energy from Duke through wholesale power contracts. Essentially, Saluda River members represent all of Duke's rural electric cooperative customers located in South Carolina. The combined peak demand of Saluda River's member coops amounted to approximately 236 MW in 1979.

Saluda River does not own any generation or transmission facilities and is a "paper" G & T at present. Once Catawba becomes operational, Saluda River will own almost 19% (215 MW) of the nuclear unit and will become a wholesale supplier to its member cooperatives.

* Telephone contact with John Romano, Director of Rates for NCEMC, September 5, 1984.

2. Catawba Construction Permit Antitrust Reviews

a. Duke Power Company

Duke Power Company applied for a construction permit for the Catawba Station in July 1972. At the time Duke tendered its CP application for Catawba, it had two applications pending before the Commission: an application for an operating license for the Oconee Station, Units 1, 2 and 3; and a CP application for the McGuire Station, Units 1 and 2.* The Department of Justice reviewed both applications and advised the Commission to hold an antitrust hearing to determine whether or not Duke was engaged in activities that may create or maintain a situation inconsistent with the antitrust laws. After reviewing the antitrust information submitted by Duke in connection with the Catawba Station, the Assistant Attorney General rendered antitrust advice by letter of May 1, 1973.** The advice letter referred to the previous advice letters on Oconee and McGuire, stating that the facts had not changed. While still recommending a hearing, the letter suggested that the proceedings for the three applications (Oconee, McGuire and Catawba) could be consolidated under the Commission's Rule of Practice.

* Although both the CP and OL applications for Oconee were submitted to the Commission prior to the 1970 amendment requiring antitrust review, Section 105c(3) of the amendment provides for an antitrust review when "any person who intervened or who sought by timely written notice to the Commission to intervene." This Section was invoked in Oconee and as a result the Department of Justice issued an advice letter to the Commission on August 2, 1971.

** Thomas E. Kauper, Assistant Attorney General, Antitrust Division, Department of Justice to Marcus A. Rowden, Esquire, Associate General Counsel, U.S. Atomic Energy Commission.

The picture portrayed by DOJ was that of Duke as a large vertically integrated power supplier doing business primarily in the "Piedmont Carolinas," with significant market power in the generation and transmission of power and energy throughout the region. According to the advice letters, Duke apparently abused its market power in its dealings with or lack of dealings with smaller power entities in its marketing area. The Department's list of charges included:

- a) territorial market allocations by Duke and a neighboring power entity, which allocated larger customers to Duke;
- b) refusals to deal, coordinate services and interconnect with neighboring entities;
- c) development of restrictive rate schedules containing demand ratchets that could "serve effectively to discourage installation of thermal generating capacity by its wholesale customers;"
- d) lack of any provision for reserve sharing, thereby possibly discouraging entry into self-generation;
- e) refusals to share ownership or other types of participation in Duke's nuclear facilities; and
- f) the use of political and regulatory arenas in an attempt to prohibit the formation of proposed municipal and cooperative ventures into the electric power industry.

During the review process associated with all three of Duke's applications, the Commission received petitions to intervene in each case.

During the Catawba CP proceeding, there were two petitions to intervene both dated June 7, 1973, one by a group of Duke's wholesale municipal customers in North Carolina* and the other, a joint petition by Duke's wholesale cooperative customers in North Carolina represented by the North Carolina Electric Membership Corporation.**

All of the municipal intervenors "are captive wholesale customers of applicant Duke" and the cooperative intervenors "depend totally, preponderantly or substantially upon Duke for its wholesale supply."*** Generally, both sets of petitioners sought alternative means of supplying their power requirements in an effort to lessen the market dominance of their principal supplier, Duke Power Co. Each requested that Duke's license to construct Catawba

"be denied or conditioned upon provision to petitioners of opportunity to purchase a fair share of these facilities and to be afforded such other rights as may be necessary to prevent monopolization."****

After extensive negotiations involving the applicant, DOJ and the Commission staff, Duke agreed to a set of licensing commitments

* Comprised of the Cities of High Point, Lexington, Monroe, Shelby, Albemarle and the towns of Landis and Lincolnton, North Carolina.

** Comprising all but one of Duke's North Carolina Coop customers.

*** "Municipal" Petition to Intervene, p. 3 and "Cooperative" Petition to Intervene, p. 2, both dated June 7, 1973.

**** Ibid, p. 5 and p. 6, respectively.

that effectively resolved the concerns of anticompetitive conduct expressed by DOJ in all three advice letters pertaining to Duke Power Co.*

The "commitments" provided by Duke addressing various competitive concerns of the Department of Justice and the Commission staff were made formal license conditions and attached to the McGuire and Catawba construction permits and the Oconee operating licenses. Generally, the license conditions provided the smaller power entities in Duke's marketing area with viable alternatives in power supply selection. For example, the following types of power and services were to be made available to all neighboring entities:

- a) notification of future plans to construct nuclear units,
- b) coordination of reserves and interconnections,
- c) emergency service and/or scheduled maintenance service,
- d) partial requirements firm power and energy, and
- e) transmission services.

As a result of the negotiated license conditions, the Department of Justice withdrew its advice letters in all three cases and recommended terminating the antitrust proceedings.

* Letter from William H. Grigg, Vice President, Duke Power to Thomas E. Kauper, Assistant Attorney General, dated April 26, 1974.

b. North Carolina Municipal Power Agency 1

By letter* of May 8, 1978, Duke advised the NRC that Duke and NCMPA 1 had reached agreement for the purchase by NCMPA 1 of a 75% undivided ownership interest in Catawba 2 and a 37.5% undivided interest in the support facilities for Catawba. Included was the information requested by the Attorney General for antitrust review (Appendix L of 10 CFR 50). After review, the Assistant Attorney General advised the NRC that their review had disclosed no antitrust problems attending the NCMPA 1 participation in Catawba.** Specifically, the advice letter discussed the interconnection agreement associated with the ownership participation and noted the following:

"In our view, the interconnection agreement should afford Power Agency access to significant forms of coordinated operation and development, and thereby enhance its ability to compete effectively in the electric power markets."

The advice letter was published in the Federal Register on September 1, 1978. There were no petitions for intervention received in response to the Federal Register notice.

Included with the antitrust information submittal of May 8, 1978, was a description of the Catawba 2 ownership arrangements that

* William L. Porter, Associated General Counsel, Duke Power Company, May 8, 1978, to Mr. Edson G. Case, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission.

** John H. Shenefield, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, August 25, 1978, to Howard K. Shapar, Executive Legal Director, U.S. Nuclear Regulatory Commission.

were yet to be finalized between Duke and NCMPA 1 and between NCMPA 1 and its members who wished to participate in the project. Three agreements between Duke and NCMPA 1 were yet to be finalized. These were:

1. The Purchase, Construction and Ownership Agreement,
2. The Interconnection Agreement, and
3. The Operating and Fuel Agreement.

The May 8, 1978 information submittal noted that NCMPA 1's ownership interest was in excess of its nuclear base load requirements during the initial years of Catawba 2 operation. The interconnection agreement would therefore contain a provision whereby Duke would purchase (buy-back) a portion of NCMPA 1's capacity and energy entitlement during the initial years of operation on a declining basis for 15 years. The interconnection agreement would also contain an exchange arrangement between the two McGuire and the two Catawba units, respectively, which were intended to serve two purposes:

1. Allow NCMPA 1 to obtain base load energy from Duke's other nuclear units prior to commercial operation of Catawba 2, and
2. Allow Duke, NCMPA 1 and the other participants to jointly share energy among the nuclear units to lessen the impact of any one unit being out of service.

Provisions would also be included in the interconnection agreement to provide the balance of NCMPA 1 capacity and energy requirements and to deliver the power to its member participants.

The arrangements between NCMPA 1 and its participant members were to be structured through two power sales contracts. These were:

1. The Project Power Sales Agreement, and
2. The Supplemental Power Sales Agreements.

These power sales agreements would obligate NCMPA 1 to supply all the requirements for its participant members, except for that supplied by the Southeastern Power Administration. The participant members in turn would be obligated to enter into long term contracts to take and/or pay for the power allocated to them.

As of May 8, 1978, twenty of Duke's twenty-three North Carolina municipal wholesale customers were members of NCMPA 1. The other three (Dallas, Forest City and Kings Mountain) were also invited to participate in the Catawba project. Subsequently, nineteen of twenty NCMPA 1 members decided to participate in the project. This is discussed subsequently in Section III.2 of this analysis.

c. North Carolina Electric Membership Corporation and Saluda River Electric Cooperative, Inc.

By letter* of July 1, 1980, Duke advised the NRC that it had reached agreement in principal with the North Carolina Electric Membership Corporation (NCEMC) and the Saluda River Electric Cooperative, Inc. (Saluda River) to sell NCEMC a 56.25% undivided ownership in Catawba 1 and a 28.125% interest in the support facilities, and to

* Porter, Op. cit., July 1, 1980

sell to Saluda River an 18.75% undivided ownership interest in Catawba 1 and a 9.375% interest in the support facilities. Included was the information requested by the Attorney General for antitrust review. After review, the Assistant Attorney General advised the NRC that in their view no antitrust hearing was necessary with respect to the transfer of ownership interests to NCEMC and Saluda River.* In particular, the advice letter noted the following:

"Because Duke was willing to have certain conditions attached to its license for the Catawba plant, the Department recommended that the antitrust proceeding it had initiated be terminated. The sale of 75% ownership in Unit 1 (56.25% to NCEMC, and 18.75% to Saluda River) was the result of discussions between Duke and the cooperative systems in its service area that occurred after the cessation of those proceedings."

The advice letter was published in the Federal Register on November 14, 1980. No petitions for intervention were received in response to the Federal Register notice.

d. Piedmont Municipal Power Agency

By letter** of April 8, 1981, Duke advised the NRC that Duke and Piedmont Municipal Power Agency (PMPA) had executed agreements

* Sanford M. Litvack, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, October 29, 1980, to Howard K. Shapar.

** Porter, Op. cit., April 8, 1981

for the purchase by PMPA of a 25% undivided ownership interest in Catawba 2. Included was the information requested by the Attorney General for antitrust review. After review of the information, the Attorney General furnished an advice letter to the NRC recommending that no antitrust hearing was necessary. The advice letter for PMPA was similar to that furnished for NCMPA 1 as described in Section II.2.b of this analysis. The advice letter was published in the Federal Register on September 2, 1981. No petitions for an antitrust hearing were received by the NRC.

Included with the antitrust information submitted to the NRC on April 8, 1981, was a description of the Catawba 2 ownership arrangements that were to be implemented between Duke and PMPA and between PMPA and its members. These consisted of the same named agreements with essentially the same provisions as discussed in Section II.2.b of this analysis for NCMPA 1.

The April 8, 1981, information submittal noted that ten out of eleven of PMPA member cities (all except Seneca) had voted to become participants in the Catawba 2 project.

3. Catawba Unit 1, Operating License Antitrust Analysis

Staff conducted an antitrust analysis for Unit 1 of the Catawba Station in 1984. The 1984 analysis of Catawba 1 considered the activities of the Saluda River Electric Cooperative, Inc., the North Carolina Electric Membership Corporation, and Duke up to that time. Since NCMPA 1 and PMPA held no ownership interests in Catawba 1, they were not reviewed. Based on the 1984 analysis by the staff, the Director of Nuclear Reactor Regulation made a "no significant" change finding for Catawba Unit 1.

The finding was published in the Federal Register on March 6, 1984. In response to that notice, Mr. Robert Guild, representing Palmetto Alliance, Inc., requested a reevaluation of the finding.* Mr. Guild's concerns were with respect to PMPA's participation in the Catawba 2 unit. Since the request for reevaluation was with respect to PMPA, and PMPA was not owner of Catawba 1, the NRC staff declined to review the merits of the case at that time, noting that the request was premature, and inviting Mr. Guild to resubmit his concerns at the time of the Catawba 2 evaluation.**

The request for reevaluation alleged that the purchase of an ownership interest in Catawba 2 by PMPA would be to the economic detriment of the participating member cities, as compared to Duke, thus negatively impacting the economic viability of the smaller municipal and cooperative systems in the area. In support of the allegation, the reevaluation request was accompanied by testimony of Richard A. Rosen.*** The testimony took issue with a study made by R.W. Beck which showed a positive benefit to PMPA through PMPA's 25% participation in Catawba 2.

Staff's analysis of the relevancy of the above information to a "significant change" determination is discussed subsequently in Section IV of this analysis.

*Robert Guild, Attorney at Law, Charleston, South Carolina, to Harold R. Denton, Director, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission.

**Harold R. Denton, May 23, 1984, to Robert Guild.

***Testimony of Richard A. Rosen on behalf of Palmetto Alliance, Inc., Docket No. 82-352-E, June 21, 1983.

Since the Saluda River Electric Cooperative, Inc. and the North Carolina Electric Membership Corporation have already been reviewed with respect to Catawba 1 and are not owners of Catawba 2, the following discussion centers on the changes that have occurred with NCMPA 1 and PMPA since the previous construction permit antitrust reviews of those applicants, and on the changes with respect to Duke since the 1984 operating license review for Catawba 1. These changes were described in Duke's submittal of information by letter of April 19, 1985, in response to NRC's Regulatory Guide 9.3.*

III. CHANGES SINCE THE CONSTRUCTION PERMIT REVIEW

I. Duke Power Company

Subsequent to the construction permit application by Duke, there has been a decrease in the rate of load growth, a delay in generating capacity additions, and sales by Duke of generating capacity to other entities. In particular, Duke has sold 75% of Catawba Unit No. 1 to the electric cooperative agencies in the area, and 100% of Catawba Unit No. 2 to the municipal agencies in the area (75% to NCMPA 1 and 25% to PMPA). In connection with these sales, Duke has entered into transmission and coordination service arrangements with the municipal and cooperative agencies as needed to deliver the power and to provide back-up services. Simultaneously, Duke has cancelled its previous wholesale for resale rate schedules with the cooperatives and municipalities since these schedules are no longer required under the new arrangements.

* Hal B. Tucker, Vice President, Nuclear Production, Duke Power Company, to Mr. Harold R. Denton, Director, Office of Nuclear Reactor Regulation.

Duke has also added rate schedules for cogeneration consistent with the Public Utility Regulatory Policies Act (PURPA) and has changed rate structures consistent with conservation policies and regulatory requirements of the public utility commissions.

Finally, Duke has had inquiries:

1. by the Randolph Electric Membership Corporation (Randolph) for an interconnection outside of Duke's wholesale service area,
2. by the French Broad Electric Membership Corporation (French Broad), which is presently served by Carolina Power and Light Company, for bulk power supply, and
3. by Mitex, Inc. for purchase by Duke of power from their Cannelton Hydroelectric Project on the Ohio River on the Indiana Kentucky border.

Duke has indicated that it has no interest in the above ventures because the economics are not favorable to Duke.

With respect to Randolph, Duke notes that Randolph is totally outside Duke's area of planning for wholesale loads and that Duke has not been in a position to agree to an extension of its present area of service because of increasing costs of construction along with environmental and regulatory requirements.

With respect to French Broad, Duke notes that it has so far declined to sell bulk power (presumably for the same reasons as those described for Randolph) but is discussing the possible joint ownership of a new generating plant.

With respect to the hydroelectric project, Duke gave a negative response because (1) it would not need additional power until the late 1990's, (2) complex wheeling arrangements would be involved, and (3) costs would not be favorable.

Staff's further inquiry regarding the Randolph matter disclosed a disagreement with the reasons given by Duke for refusing to provide the requested wholesale service.* The General Manager of Randolph noted that Duke would have excess capacity for several years and that no financing would be required by Duke because Randolph was prepared to construct its own transmission line.

The antitrust significance of the above changes are described in Section IV of this analysis.

2. North Carolina Municipal Power Agency 1

By letter of December 11, 1978, Duke advised the NRC of the closing of the sale of interest in Catawba 2 to NCMPA 1. Included with the letter were the executed copies of the five sales and operating agreements which had not yet been executed at the time of the construction permit antitrust review, but which had been described in information submitted by Duke for the construction permit antitrust review (see Section II.2.b of this analysis). Staff's review of the documents indicates that they are essentially as described in connection with construction permit antitrust review.

Subsequent to the construction permit antitrust review of NCMPA 1 in 1978, NCMPA 1 has, similar to ~~Catawba~~, experienced a decrease in the growth

* Telephone contact, May 16, 1985, Bob L. McDuffie, General Manager, Randolph Electric Membership Corporation.

rate of its annual peak load. However, NCMPA 1 does not expect an energy surplus because its interconnection agreement with Duke provides that Duke will purchase any surplus energy which NCMPA 1 has from its retained capacity. NCMPA 1 retains only a portion of the capacity of its ownership interest in Catawba 2 during the initial years of Catawba 2's operation because Duke has agreed to purchase excess capacity on a declining schedule for 15 years after commercial operation of each Catawba unit.

The interconnection agreement between Duke and NCMPA 1 has a provision permitting NCMPA 1 to acquire capacity and energy from the McGuire station prior to commercial operation of Catawba 2. This option, referred to as the McGuire Reliability Exchange, was implemented by NCMPA 1 on July 1, 1983. Under this arrangement, Duke delivers NCMPA 1's share of the McGuire Nuclear Station's energy plus supplemental energy purchases plus an allotment of power from the Southeastern Power Administration to the NCMPA 1 participant's delivery points. This arrangement has permitted NCMPA 1 to become the all-requirements power supplier to its 19 NCMPA 1 participants. Prior to July 1, 1983, Duke was the all-requirements power supplier to the participants. During the construction permit antitrust review of NCMPA 1, it was noted that all of NCMPA 1's members except one, the City of Concord, had already decided to participate in the Catawba project. Concord, based on a majority vote of its Board members, decided not to participate. Staff's inquiry regarding the matter disclosed that the decision was based on the Utility Board's judgment of the merits of participating in the nuclear project.

NCMPA 1, similar to Duke, received an inquiry on February 11, 1985 from Mitex Inc. regarding NCMPA 1's interest in purchasing power from

* Telephone contact, May 16, 1985, D. T. Howell, Director of Utilities, Concord Board of Light and Water.

a proposed hydroelectric project on the Kentucky-Indiana border. NCMPA 1 is presently reviewing the information. Also, in December 1984, Shelby, a participant of NCMPA 1, verbally informed NCMPA 1 that they were considering conducting a study to determine the feasibility of a small-scale hydroelectric project. NCMPA 1 had furnished Shelby information concerning bringing on a new resource under the interconnection agreement, but had received no further word from Shelby concerning the project. Staff's further inquiry regarding the matter disclosed that Shelby is planning to hire a consultant to study the feasibility of the project.* There were no suggestions that NCMPA 1 was in any way attempting to discourage the project.

3. Piedmont Municipal Power Agency

Subsequent to the construction permit antitrust review of PMPA in 1981, PMPA has pursued its purchase of a 25% ownership interest in Catawba 2 by entering into a (1) Purchase, Construction and Ownership Agreement; (2) Operating and Fuel Agreement; and (3) Interconnection Agreement with Duke. These agreements set the terms and conditions of PMPA's participation in Catawba 2. Similar to the NCMPA 1 agreements, the PMPA agreements provide for a gradual increase in PMPA's retained capacity in Catawba 2 over the first 15 years of operations. The agreements also provide for reliability exchange provisions among the Catawba and McGuire nuclear units such that PMPA may share in the output of the McGuire units and Catawba 1 even though it has ownership participation only in Catawba 2. The agreements also provide for purchase and sale arrangements between Duke and PMPA to insure that the

* Telephone contact, May 16, 1985, R. S. Gidney, Jr., Director of Utilities, Shelby Utility Department.

relatively low cost energy of Catawba 2 is effectively utilized at all times and that the load needs of PMPA members will be met at all times. In accordance with the reliability exchange agreements, deliveries to PMPA members are to begin with the commercial operation of Catawba 1, or on June 21, 1985, whichever comes first.

The City of Senaca, one of PMPA's members in 1981, did not approve participation in the Catawba project. As a result, the agreements entered into between Duke and PMPA resulted in the cessation of membership by the City of Senaca in PMPA.

Staff's further inquiry regarding Senaca's decision not to participate disclosed the decision was based on the judgment of the Utility Board members.* The inquiry also disclosed that Senaca could become a member of PMPA if it chose to do so, but that there would be no particular advantage in such participation unless and until PMPA entered into another power supply project in which Senaca wished to participate. Since Senaca is a full requirement customer of Duke and receives no power from PMPA, there would be no particular advantage for Senaca to join PMPA.

IV. ANALYSIS OF CHANGES

The changes that have occurred since the Catawba 2 construction permit application antitrust reviews can be grouped as follows:

1. changes in the projected annual peak growth rate and corresponding delay in generating additions;
2. transfer in ownership interests in Catawba 2 from Duke to NCMPA 1 and PMPA, and the corresponding interconnection agreements entered into for the effective utilization of Catawba 2 and for supplemental and backup power to Catawba 2;

* Telephone contact, May 16, 1985, Mr. J. Balding, Director, Senaca Light and Water Department.

3. transfer of wholesale service for NCMPA 1 and PMPA members from Duke to NCMPA 1 and PMPA, respectively;
4. decision by former NCMPA 1 and PMPA members not to participate in Catawba 2;
5. changes in Duke's rate schedules; and
6. inquiries regarding electric power purchases and sales.

Staff views Item 1, changes in load growth and generation, as a natural result following the oil embargo of 1973 and rapidly rising power supply costs. These changes are not attributable to the applicants.

Staff believes that Item 2, transfers in ownership and accompanying arrangements, are consistent with Duke's antitrust license conditions and the desire of the Department of Justice and the NRC to promote the competitive process in the bulk power supply markets of the Piedmont Carolinas. Staff does not see any need for it to analyze the relative economic impacts of the transfers. Staff's investigations have disclosed that the participants were free to reach their own conclusions regarding the economics of their actions as indicated by the fact that some of the municipals decided not to participate. Even if the ownership transfers result in less favorable economic circumstances for the participants than would otherwise result, staff sees no antitrust implications in the ownership transfers. Also, there were no changed circumstances since the construction permit reviews. The proposed ownership transfers and accompanying contractual arrangements for NCMPA 1 and PMPA were known at the time of the construction permit reviews and received antitrust clearance at that time.

Staff views Items 3 and 4 as a direct result of Item 2, with no significant competitive consequences resulting from the transfers; negligible antitrust significance; and Item 5 is a natural result of increasing energy prices and conservation policies, also with no significant competitive consequences accompanying the change in rate schedules.

In item 6, pursuant to inquiries for wholesale power, staff initially expressed some concern regarding Duke's reasons given for its refusal to provide wholesale service to Randolph and French Broad. If Duke has excess capacity as it claims to have until the late 1990's, then it would appear to be to Duke's economic advantage to utilize that capacity, at least on a short term basis. However, Duke may be concerned that a commitment to provide wholesale service on a short term basis would lock it into a continuing requirement. Also, staff can appreciate that it is to Duke's economic advantage, at least on a short term basis, to sell its high incremental cost capacity outright, rather than by wholesale sales which generally reflect the average cost of service rather than the incremental cost of service. Such outright sales of capacity is consistent with Duke's policy in selling excess capacity from its Catawba nuclear units. For the above reasons, staff concludes that Duke has an economic and business justification for declining to expand its wholesale service obligations. Also, staff notes that Randolph and French Broad are not without a supplier. They are presently supplied wholesale service by Carolina Power and Light Company. Further, once arrangements are completed between Carolina Power and Light Company (CPL) and the North Carolina Electric Membership Corporation (NCEMC) for wheeling power by CPL to NCEMC's members, Randolph and French Broad will presumably have the option of obtaining their wholesale power requirements from NCEMC. Although these wheeling arrangements have not been completed, staff feels that CPL, as a licensee in Shearon Harris nuclear plant, is required to provide such wheeling services under the antitrust license conditions attached to the Shearon Harris construction permit.

Staff accepts Duke's reasons given for its lack of interest in purchasing power from the proposed Cannelton Hydroelectric Project as a purely business decision having no antitrust implications. Duke already has excess capacity and the proposed plant is remote from Duke's service area.

V. SUMMARY AND CONCLUSION

During the construction permit antitrust reviews of Duke Power Company's (Duke's) nuclear plant applications, the Attorney General and the petitioners for antitrust hearings were primarily concerned with Duke's dominance in the relevant market. The thrust of the review centered upon any increase in that dominance that would occur by the addition of the Oconee, McGuire and Catawba nuclear units to Duke's integrated electrical system, and Duke's refusal to allow smaller electrical systems in the area where Duke serves to share in the ownership of the nuclear units or to interconnect with Duke and coordinate power supply services. Following negotiations, Duke agreed to a set of antitrust commitments which were to be attached as antitrust license conditions to its nuclear plant construction permits and operating licenses. These license conditions required Duke to interconnect and provide power supply services to smaller electric utilities in the area where it serves, including notification of plans to construct future nuclear units, but did not specifically require Duke to provide ownership access to the Oconee, McGuire or Catawba nuclear units.

Subsequently, Duke entered into agreements with municipal and cooperative power agencies in both North Carolina and South Carolina, providing these agencies with ownership interests in Catawba Units 1 and 2, and with ancillary services to make this ownership economical. Specifically, the North Carolina Electric Membership Corporation and the Saluda River Cooperative, Inc. have been provided an ownership interest in Catawba 1. Similarly, the North Carolina Municipal Power Agency 1 and the Piedmont Municipal Power Agency have been provided an ownership interest in Catawba 2. The ownership agreements have been supplemented by interconnection agreements which provide (1) interim power supply from Duke's other nuclear units prior to commercial operation of the Catawba units, (2) emergency

backup power among the nuclear units whereby each nuclear unit is supported by the others, (3) a buy-back arrangement by Duke to allow the municipals and cooperatives to gradually increase their capacity allotments, (4) transmission services, and (5) supplemental purchases and sales by Duke to permit the municipals and cooperatives to match their energy requirements from hour to hour.

The NRC staff believes that the above changes are consistent with the commitments made by Duke during the construction permit antitrust negotiations and are consistent with the Department of Justice and Nuclear Regulatory Commission desires to enhance the competitive process in bulk power supply markets. Staff's investigations and analysis have disclosed no anticompetitive connection between the activities of the applicants and the changes that have occurred since the construction permit application reviews for Catawba 2. The changes that have occurred in rate schedules, inquiries regarding power purchases and sales, and changes in membership and nuclear plant ownership shares of the municipal and cooperative organizations have had negligible competitive impact upon the bulk power supply in the Piedmont Carolinas. Accordingly, the NRC staff is not recommending a "significant change" finding with respect to the Catawba 2 operating license application.