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Adjudicatory Session 78-1

DISCUSSION OF ANTITRUST DECISION IN MIDLAND (ALAB-452)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Public Session
Adjudicatory Session 78-1

DISCUSSION OF ANTITRUST DECISION IN MIDLAND (ALAB-452)

Room 1130
1717 H Street NW
Washington, D.C.

Wednesday, 11 January 1978

Hearing in the above-entitled matter was convened according to notice, at 2:20 p.m., JOSEPH HENDRIE, Chairman, presiding.

PRESENT:

JOSEPH HENDRIE, CHAIRMAN
RICHARD KENNEDY, COMMISSIONER
VICTOR GILINSKY, COMMISSIONER
PETER BRADFORD, COMMISSIONER

J. Kelley
R. Bell
K. Pedersen
J. Nelson
S. Chilk

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P R O C E E D I N G S

CHAIRMAN HENDRIE: Why don't we go ahead.

Commissioner Gilinsky called and said he was sorry he was late, and for us to please go ahead.

The subject this afternoon for this section of the Commission meetings is a discussion of the antitrust decision in the Midland case, ALAB-452. Jim Kelley is going to give us something less than that full report, but rather a background summary of where we stand, the recommendation on what the Commission ought to do I guess in a procedural sense, rather than with regard to the merits of the case.

MR.KELLEY: Exactly. What we want to hopefully get moving on today is how and in what fashion and when to review this.

We don't have, given the length and complexity of this decision, even any preliminary view on the merits of these issues one way or another. I did think to set it in context would be helpful if Ruth could give you a general layout of what the issues were and what happened and where it stands.

And then we might move on to a discussion of procedural options.

CHAIRMAN HENDRIE: Please do.

MS. BELL: The Appeal Board covered a lot of legal and factual material in this, and I am only going to skim the cream and touch the high points of their opinion.

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1 First, I want to state that the application for a
2 construction permit was requested in 1969 by Consumers.

3 Under the 1970 Amendments to the act, unresolved
4 antitrust issues can hold up the issuance of a construction per-
5 mit. But this application fell into the exception recognized by
6 the Congress in 105(C)(8), in which an antitrust review can
7 proceed without -- and the CP could issue without resolution of
8 the antitrust issues.

9 The Attorney General's letter here recommended a
10 hearing, and the hearing was held with the Attorney General as
11 a participant; and two generation and transmission coops,
12 Northern Michigan and Wolverine Electric, which were themselves
13 formed by seven distribution coops; and then several municipalities;
14 and the Michigan Municipal Electrical Association.

15 I won't summarize the Licensing Board opinion, I
16 will only summarize the Appeal Board decision.

17 The antitrust analysis was intended to discover whether
18 the entity in question here, Consumers, had monopoly power in the
19 relevant markets, and whether Consumers had exercised that power.

20 The first thing that the Appeal Board concentrated on
21 was the market definition. The importance of market definition
22 is obvious in that it sets in context the actors in the arena in
23 which they act. For example, if one were discussing an entity
24 that manufactures shoes, it would be important to know whether
25 you were discussing shoes in general, women's shoes, women's

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1 fashion shoes, women's dress shoes, or something like that.

2 And the smaller or larger the definition of the
3 market, you can see where that leads in terms of analyzing the
4 actors who act in that market.

5 The Appeal Board looked at markets in two ways; the
6 geographic market in which Consumers operates, and the product
7 market. They found here three product markets. The first they
8 found was one for coordination services. This was the interchange
9 of power and joint planning of additional generation to achieve
10 the economic benefits that are not attainable to one who acts
11 alone.

12 The coordination allows utilities to spread among
13 themselves, necessary reserve generating capacities so that each
14 relies in part on the reserves of others and the ability to
15 coordinate that way provides substantial benefits in terms of
16 their -- each individual not having to build a reserve margin
17 of as great a size as it would if it had to act alone. If it
18 acts together, the reserve margin is reduced and they can rely
19 on reserve margins of others.

20 COMMISSIONER BRADFORD: Is this plant wholly owned
21 by Consumers?

22 MS. BELL: Yes, it is.

23 COMMISSIONER BRADFORD: And are the municipals
24 within Consumers' overall territory?

25 Or, are they both inside and outside?

1 MS. BELL: They are largely inside, I believe.

2 MR. KELLEY: In and on the edge.

3 MS. BELL: In and on the edge, I guess.

4 COMMISSIONER KENNEDY: I didn't hear you.

5 MS. BELL: Largely in, and on the edge.

6 Closely tied to the coordination services, an element
7 of coordination services the Appeal Board found to be the wheeling
8 or transmission services. That is, to make coordination meaningful,
9 transmission isn't necessary, and later on in the discussion the
10 Appeal Board discussed the control that Consumers had over
11 transmission in that area.

12 The second market that the Appeal Board found was
13 that for retail services.

14 In this analysis, the Appeal Board followed the leading
15 Supreme Court case in this area, which is Otter Tail, focusing
16 not on door-to-door competition of which there is some, but very
17 little; but on potential competition that exists through the
18 letting of franchises.

19 That is, retail customers, while normally not able
20 to decide themselves between one company and another company
21 that might provide them this service, can decide through their
22 municipal governments periodically whether to renew franchises
23 with existing utilities or whether to let the franchise to a
24 different utility, or whether to go into business for themselves.

25 And that, the Appeal Board found consistent with the

1 Supreme Court case to be an element of retail competition and
2 a way of analyzing the provision of retail services.

3 COMMISSIONER BRADFORD: In Michigan is this a -- it
4 would be a state-granted franchise?

5 MS. BELL: To some extent there are, and to some
6 extent there is not. There was a short-lived law which allowed
7 franchises to be let without consent or control of the individual
8 municipalities. That law terminated after only a few years, and
9 a certain number of franchises are let by the municipalities
10 themselves.

11 And the third market that the Appeal Board found was
12 that for wholesale services, which is the provision of bulk
13 power.

14 Next, the analysis asked whether Consumers had
15 monopoly power, that is the power to exclude competition or con-
16 trol prices. In the coordination services area they found
17 this power to exist, through the control of the transmission
18 network. That is, the transmission network provided access to
19 coordination services, and Consumers Power had control over the
20 significant transmission facilities.

21 In the retail market, Consumers was found to have
22 an 84 percent market share. And in the wholesale market, an
23 85 percent market share.

24 Last, the Appeal Board examined whether Consumers
25 had exercised its power to foreclose competition.

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The Appeal Board found evidence of exclusionary conduct, which had the effect of maintaining its monopoly position. And I won't detail those, but largely they consisted of acquisition of other utilities, refusal to wheel for neighboring large utilities, coordination practices which included refusal to coordinate with the generation and transmission coops, and refusals to share reserves on an equalized percentage basis with the smaller utilities.

And finally, the Appeal Board discussed the relationship between these findings and the application for the license to build the Midland plant, saying;

"Having held that Consumers has previously used the opportunity for abuse that its size affords, we cannot turn a blind eye to the further opportunity it will have to do so through its activities under the Midland license."

That is, it found that the activities under the Midland license would allow it to maintain and reinforce its monopoly position that it found it to hold.

That, basically, summarizes very briefly what they said.

COMMISSIONER BRADFORD: But they said nothing as to remedy?

MS. BELL: No. They sent that phase back to the Licensee -- to a Licensee.

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1 COMMISSIONER BRADFORD: With what kind of instruction?

2 MS. BELL: Well, with very general instructions.

3 They did say that they didn't discuss relief exactly. They
4 did say:

5 "In fashioning a remedy, we offer the Licensing
6 Board one further caution. We believe that no type
7 of license condition, be it a requirement for wheeling,
8 coordination, unit power access, or sale of an
9 interest in the plant itself is necessary foreclosed
10 as a possible form of relief."

11 But beyond that they didn't really go into much
12 detail about --

13 COMMISSIONER BRADFORD: Had the Licensing Board
14 originally held that there was no antitrust problem?

15 MS. BELL: That's a correct.

16 COMMISSIONER BRADFORD: So it is a reversal.

17 MS. BELL: That's correct.

18 MR. KELLEY: That's why there were no conditions on
19 this permit, and hence the need to remand it.

20 CHAIRMAN HENDRIE: What seemed to be the key
21 difference in perception of the Appeal Board -- by the Appeal
22 Board versus the Licensing Board?

23 MS. BELL: Well, the --

24 CHAIRMAN HENDRIE: Or, is that more complex than
25 my lay mind is likely to be able to assimilate?

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1 MS. BELL: Well, their differences are pretty
2 substantial. The whole analysis -- the Appeal Board felt
3 compelled to really start the analysis from point one and move
4 it all through because they disagreed almost entirely with the
5 analysis -- (Inaudible.)

6 COMMISSIONER KENNEDY: At what point did any of these
7 other parties assert their interest in the Midland plant or
8 a portion thereof or rights to its power, or parts of it --
9 (Inaudible.)

10 MS. BELL: Well apparently they must have done it
11 quite early because the Attorney General's letter itself
12 recommended a hearing which is normally the case when there is
13 some evidence disclosed by the application and responses to
14 the application that problems exist.

15 And then in response to -- the Attorney General's
16 advice is normally published in the Federal Register with a
17 call for interested persons to intervene or come before the
18 Board with their views. And there were interventions by these
19 parties at that stage.

20 MR. KELLEY: There is no question of timeliness in
21 this decision as I recall it.

22 MS. BELL: No.

23 CHAIRMAN HENDRIE: Okay.

24 As to procedural matters and where we might go and
25 in what fashion we might start there.

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1 MR. KELLEY: Well, under the rules as they are
2 written in the normal course of events, we would be at this
3 stage where parties could seek Commission review by filing a
4 petition under our rules adopted last summer.

5 We had before the Commission a motion from Consumers
6 Power Company asking for two things. Normally you have got to
7 file in jargon, a cert petition(?), 15 days after the opinion
8 is served, which is like in a couple more days, and they are
9 limited to ten pages.

10 Now in a case like this with a decision like that --
11 (Indicating) -- Consumers says, and frankly we agree and I
12 think all the parties do, that the normal time and page limits
13 are too tight. And they have asked in their motion for an
14 additional 30 days within which to file petitions for Commission
15 review and for a 30-page limit instead of 10, in order to state
16 their positions.

17 Their motion recites that none of the other counsel
18 for the other parties object to this. So that is a request that
19 stands submitted before the Commission.

20 It seems to us that that relief, or some similar
21 form of relief is clearly called for. The question we raise,
22 suggestion we make in our paper to the Commission is that there
23 does appear to be another way in which the Commission might go
24 about this, and we tend to think that that is the preferred
25 course of action; namely that the Commission simply issue an

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1 order saying that it is going to defer its review of this entire
2 matter until after the remand hearing has been completed and
3 the following Appeal Board consideration of whatever emerges
4 from that.

5 Our feeling is that since there wasn't any relief
6 ordered by the Licensing Board, nobody knows yet what kinds of
7 conditions might be appropriate here. The relief is a very
8 critical part of the whole picture.

9 And if you undertake to review it in the abstract
10 without reference to conditions that a record might support, it
11 has a tendency towards piecemeal review. You tend to decide an
12 issue somewhat in the abstract.

13 We think a concrete setting with a conditioned
14 license is a better setting in which to look at this. Whether
15 that would expedite matters in the long run is a very speculative
16 exercise.

17 COMMISSIONER KENNEDY: It seems to me, Jim -- could
18 you explain that, because it seemed to me almost prima facie
19 it would expedite it. It seems to me, otherwise, we do it
20 twice.

21 MR. KELLEY: Well, here is why I think it is a little
22 speculative. The utility might feel strongly that this Appeal
23 Board decision is just wrong, that they are not monopolists
24 and they can come up here and convince you and it is going to
25 be all over with, and that would take six months.

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1 On the other hand, if you let the hearing run its
2 course, that is going to take an additional increment of time.

3 It gets further speculative, though, if the Commission
4 at this point reviews and decides that there does have to be a
5 hearing. Then you have built in X months of Commission review
6 before you even start the hearings. So the time element, I
7 think, is somewhat speculative and it can go either way.

8 The Commission can, I think, quite properly take
9 into account its own priorities in the coming months, as to
10 whether it wants to tackle this issue now or later. It is such
11 a big case, and it is going to take a fair amount of time in any
12 event, that it also occurred to us that it might be appropriate
13 on a fairly quick turnaround, to simply ask the parties what
14 they thought of the idea of deferring Commission review. We
15 could get views back, I think, in a week or two, and then come
16 back with a firm recommendation in light of whatever the parties
17 had to say.

18 COMMISSIONER BRADFORD: Outside of the conduct of
19 this case, aren't there two or three others of these pending?

20 MR. KELLEY: That's right.

21 COMMISSIONER BRADFORD: What is the effect on those
22 of deferring review here.

23 MR. KELLEY: I would say zero.

24 You would make it clear, you could in your order, you
25 are not intimating any views on the merits one way or the other.

mm 1 And -- well, this now was precedent within the Commission. The
2 Commission is not saying yea or nay, it is just saying we are
3 going to wait.

4 So I would assume that Licensing Boards with ongoing
5 are simply are going to follow that decision, that's one effect.

6 COMMISSIONER BRADFORD: But if we modify that in any
7 way, then those other proceedings that will have gone on
8 without that modification, will have to back up and consider it.

9 MR. KELLEY: I guess, I myself would have to stop and
10 say I know there are other cases in the works. In order to make
11 a fallout assessment of the kind of question you are raising, I
12 guess I would have to know more than I know. Whether some
13 particular hearing board is right on the edge of some inquiry
14 that the Commission might decide is irrelevant -- it is probably
15 pretty hard to assess. But I know there are other cases fairly
16 close down the pike.

17 Now another reason it seems to me why the Commission
18 doesn't risk its reasonable opportunity to address these issues,
19 you are going to get very similar legal issues and contentions
20 in other cases that will be up here soon. Midland might dis-
21 appear. Maybe they will settle, and that would be the end of
22 this case in terms of actual relief.

23 That isn't to say that if you wanted to, even after
24 a settlement, you couldn't speak to this Appeal Board decision
25 if you disagreed with some of the principles that are stated

mm 1 in that decision.

2 I think you can keep options open, is what I'm saying.

3 COMMISSIONER BRADFORD: It certainly is true that if
4 in the end we more or less accept that decision, then the most
5 efficient way of handling it is probably wait.

6 But to the extent that we change it in any way, if
7 there are two or three other proceedings of that size that are
8 also coming along, then I would think that it might wind up
9 losing more time than it gained if each of those then had to
10 come back and take into account what we had done on this one.

11 MR. KELLEY: Yes, I think that is a serious practical
12 consideration.

13 One of the things I think we might get from asking
14 the parties what shall we do, shall we go down that road,
15 particularly the Regulatory Staff could give us a better feel
16 for how many cases might be affected. At least they are the
17 best people to ask.

18 I think it is a hard question to answer, but --

19 COMMISSIONER KENNEDY: Can we ask them?

20 MR. KELLEY: They would be in a good position to
21 advise us.

22 COMMISSIONER KENNEDY: Since they are here, why don't
23 we ask them?

24 MR. KELLEY: I think it would be a more orderly
25 procedure -- time is not of the essence. We have got them here,

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1 but we have got other people here, too. And I think that it
2 would be a little more orderly to ask them to just put it on a
3 piece of paper.

4 CHAIRMAN HENDRIE: Give all parties a chance.

5 COMMISSIONER KENNEDY: Oh, I would assume you would
6 want to do that. I meant ask them if there were any more cases
7 of this kind, which could be affected by all this.

8 MR. KELLEY: Yes. We could certainly put in an order
9 extending review for now, the time for now, and say let's hear
10 from the parties; what practical impact on pending cases is
11 there likely to be, by Commission review now as opposed to
12 later? And they could give their best shot.

13 CHAIRMAN HENDRIE: Does that seem reasonable?

14 COMMISSIONER KENNEDY: Reasonable to me.

15 COMMISSIONER GILINSKY: (Nodding affirmatively.)

16 COMMISSIONER BRADFORD: (Nodding affirmatively.)

17 CHAIRMAN HENDRIE: We seem to be in agreement.

18 I would then ask for your affirmative handraise to go ahead
19 with the recommendation here.

20 (All Commissioners raise hands.)

21 CHAIRMAN HENDRIE: There is a draft order which you
22 will --

23 MR. KELLEY: Which we will modify along the lines
24 and circulate to your offices. But the operative part would be
25 deferred pending receipt of the views of the parties on how to
do it.

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1 CHAIRMAN HENDRIE: Yes. And asking the views, including
2 effects on other cases, which the Staff presumably, as you say
3 may have assembled.

4 COMMISSIONER BRADFORD: One quick question about
5 the order.

6 It does not move one way or the other on Consumers'
7 petition?

8 MR. KELLEY: It defers, I think, the last line or
9 two -- our ruling on the motion is deferred, pending receipt
10 of the views of the parties. That is what it would do. The
11 motion is still alive. It just doesn't roll.

12 COMMISSIONER BRADFORD: Does it do any -- what would
13 happen if we just granted the motion?

14 MR. KELLEY: Well, it seems to me that the next step
15 is to get these views. And one could just grant that motion
16 fairly easily. Once you get the views -- if you get the views
17 and decide this deferral idea is a bad idea, you can grant the
18 motion.

19 By granting it right now, I --

20 COMMISSIONER BRADFORD: We are in a posture in which
21 under no circumstances are we likely to deny it.

22 MR. KELLEY: If you decide to review it now, you are
23 going to grant some such motion, I would think.

24 And if you don't decide for another couple of weeks --
25 suppose in two weeks you decide not to defer review. Maybe they

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1 will need 30 days from that date.

2 COMMISSIONER BRADFORD: I am just thinking, as far
3 as allowing them to relax about the deadline, since there
4 isn't any possibility of their being held to it.

5 MR. KELLEY: In revising this order, we could make
6 that clear, that the Commission realizes they are going to
7 need time, since it is going to be reviewed. I think we can
8 sharpen that.

9 CHAIRMAN HENDRIE: Yes, I think it would be useful to
10 do that.

11 Let's see. I don't know. You have got the 20th
12 in there. You may want --

13 MR. NELSON: If we are going to hear from people,
14 what about the impact of all this on the ratepayer, if it has
15 any. And that is, the proceeding goes on, which costs a
16 certain amount of money, which ultimately gets passed on to the
17 ratepayer, which proceeding may turn out not to be necessary.
18 You have to factor that in there. Like the time probability
19 that will be unnecessary in matters of that nature.

20 You don't want to really set in motion a chain
21 of chain of events that commits everybody to use this proceeding.

22 All I know about this case is what I heard in this
23 room.

24 (Laughter.)

25 But, it could be a hypothesis that you go through

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1 and find out that the first board was correct, there aren't
2 any antitrust violations, go home. And if that happens, but in
3 the meantime there has been six months of proceedings, somebody
4 has got to pay for it.

5 MR. KELLEY: That's right.

6 MR. NELSON: So that is a factor that maybe you will
7 be considering in getting comments from people. That is all I'm
8 suggesting.

9 MR. KELLEY: We can do that, too.

10 CHAIRMAN HENDRIE: It is one of the aspects to be
11 considered.

12 I was just going to say, Jim, that you have got
13 January 20th as a date to get views in. You may want to take a
14 look at that against the time it takes to amend the draft,
15 circulate to the Commissioners and so on. Give people a
16 reasonable cut at it, I would think.

17 MR. KELLEY: All right.

18 CHAIRMAN HENDRIE: We are agreed then that this is a
19 reasonable way to go?

20 (All Commissioners nodding affirmatively.)

21 CHAIRMAN HENDRIE: So ordered.

22 Let's see, when is the deadline for the Commission's
23 time to say what it wants to say here runs out the end of the
24 the month, is that the way I read this?

25 MR. KELLEY: Yes. I think we extended that, too --

mm 1 yes, that's a good point, it is a good fix. We will extend
2 sui sponte review time also. We will keep that option open.
3 That can be built into the order.

4 CHAIRMAN HENDRIE: Yes.

5 Nevertheless, let me ask my colleagues not to take
6 solace from the fact that, you know, the time limit runs out,
7 don't feel a need, please, to delay and polish this order beyond
8 practicable reasonable point.

9 I think that takes care of the matters on ALAB-452
10 at the moment.

11 Doesn't it?

12 MR. KELLEY: Yes.

13 CHAIRMAN HENDRIE: In which case, the Commission
14 will recess.

15 (Whereupon, at 2:45 p.m., the hearing in the above-
16 entitled matter was adjourned.)

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