



DEPARTMENT OF JUSTICE
Antitrust Division

ANNE K. BINGAMAN
Assistant Attorney General

Main Justice Building
10th & Constitution Ave., N.W.
Washington, D.C. 20530
(202) 514-2401 / (202) 616-2645 (f)
antitrust@justice.usdoj.gov (internet)
<http://www.usdoj.gov> (World Wide Web)

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Michael G. Small, Esquire
Wright & Talisman, P.C.
Suite 600
1200 G Street, N.W.
Washington, D.C. 20005-3802

Dear Mr. Small:

This is in response to the request of the Southwest Power Pool, Inc. ("SPP") for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department of Justice's antitrust enforcement intentions with respect to SPP's proposal to establish a computerized trading system that would enable its members to buy and sell next-hour electric power to and from each other on a real-time basis.

SPP, established in 1941, is one of the nine Regional Reliability Councils within the U.S. dedicated to facilitating coordination among electric power firms as a means of promoting the efficiency and reliability of electric service. SPP membership is open to any electric utility, Federal Power marketing agency, transmission service provider, and any generator of electric power located in or serving Arkansas, Kansas, Louisiana, Oklahoma, Mississippi, Missouri, Texas or New Mexico. As of October 1, 1995, its 53 members consisted of 18 investor-owned utilities, 10 cooperatives, 9 municipalities, 3 state agencies, 1 federal agency, 3 wholesale generators and 9 marketers.

You indicated that in recent years there has been an increased interest in short-term electric power trading as a means of increasing efficiency and lowering costs in the electric power industry. To facilitate such trading, SPP proposes to establish a computerized system that would enable users to sell or buy electric power and the transmission thereof on a next-hour basis. The system would be known as the Next-Hour Energy Exchange ("NHEE"). Under the NHEE, sellers of energy would post the quantity they are willing to offer at a specified price.

Sellers of transmission service would post their interface capabilities and price. As a result, potential purchasers of next-hour energy would be able to compute the delivered cost to them of specific quantities based on the price quotes of potential sellers of power and transmission. Conversely, posted quotes by potential purchasers would enable potential sellers of next-hour energy to locate selling opportunities.

All prices offered will be subject to the Western System Power Pool ("WSPP") tariff agreement that has been approved by the FERC. That tariff agreement imposes maximum rates, but allows flexible (market-based) pricing below the regulatory maximums. NHEE utilization of the WSPP tariff has the concomitant effect of limiting the use of NHEE to those SPP members who also are members of the WSPP. The business review request asserts that it is relatively easy to qualify for WSPP membership; to date no application for membership has been denied. It is expected that most, if not all, SPP members would be able to qualify for WSPP membership.

Members of the NHEE will remain free to buy and sell next-hour electric power outside of the NHEE system. They will also retain the right to transact such business with non-SPP members.

On the basis of the information and assurances provided by SPP, particularly as to the openness of the NHEE and the freedom of its members to deal off the system, the Department of Justice has no current intent to challenge the proposed creation and operation of a computerized system that facilitates the real-time trading of next-hour energy. Making real-time quotes available to those in a position to buy or sell the posted next-hour energy would not be likely to foster price collusion or otherwise impede competition.¹ Moreover, the fact that members of the NHEE would remain free to trade outside of the system with members and non-members of SWPP and on other electronic trading systems, lessens the likelihood that the NHEE will have any anticompetitive effect.²

¹ Contrary to the suggestion in your letter, the fact that rates posted on the NHEE would be subject to the maximum rates approved by the FERC under applicable tariffs would not lessen any antitrust concern about pricing collusion at below-maximum rate levels. Any such collusion between or amongst private rivals would violate the antitrust law, notwithstanding the fact that maximum rate tariffs place some limit on the amount of harm that could be imposed on consumers.

² Section 15.3.2 of NHEE's Operational Procedures, if applied literally, would allow members a broad right to restrict the availability of transmission services to other members. The denial of transmission services under some circumstances could be anticompetitive in intent or effect, but SPP has advised us that this provision was only intended to allow refusals of transmission where two members were legally prohibited from dealing with each other. This affirmative business review letter is predicated on your representation as to the intended narrow scope of Section 15.3.2.

It is possible that the proposed computerized real-time trading of next-hour electric power will have procompetitive effects. To the extent that such trading allows more efficient producers to sell more of their output to willing buyers, pricing rivalry based on efficiency would be heightened, to the benefit of consumers.

This letter expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring any enforcement action in the future if the actual operation of any aspect of the proposed creation or operation of the SPP computerized trading system proves to be anticompetitive in any purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

/s/

Anne K. Bingaman
Assistant Attorney General