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USNRC

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January 3, 2000

OFFICE
ADJUTANT

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

DOCKET NUMBER
PROPOSED RULE **PR 2+50**
(64FR59671)

Re: **Comments on Proposed Rule
Clarifying Antitrust Review Authority**

Dear Sir:

Pursuant to the Nuclear Regulatory Commission's ("NRC") Federal Register Notice (64 Fed. Reg. 59671 (Nov. 3, 1999)), we are pleased to submit the following comments on behalf of Western Resources, Inc., Kansas Gas and Electric Company, Wisconsin Electric Power Company, Public Service Electric and Gas Company, and Rochester Gas and Electric Corporation ("the Utilities") in support of the NRC's proposed rule clarifying the Commission's antitrust review authority. The Utilities urge the Commission to adopt the revisions to its regulations as set forth in the proposed rule to reflect the fact that the Commission is not authorized to conduct antitrust reviews of post-operating license transfer applications.

As set forth below, the Utilities believe that there are both legal and policy justifications for the NRC to eliminate antitrust reviews in license transfer proceedings. By its express terms, section 105 of the Atomic Energy Act ("Act") -- which is the sole source of the Commission's jurisdiction over antitrust issues -- requires the Commission to perform antitrust reviews at two, and only two, stages of the licensing process: first, when an application is submitted for a license to construct a nuclear plant; and second, when an application is submitted for a license to operate a nuclear plant. Section 105 does not contemplate Commission review of antitrust issues upon a license transfer after the initial operating license is issued. As the Commission correctly found in Kansas Gas and Electric Company, (Wolf Creek Generating Station, Unit 1)¹, Commission and court precedent -- as well as Section 105 and its legislative history -- unequivocally support a legal finding that the Commission is not authorized to conduct antitrust reviews of post-operating license transfer applications.

There also are compelling policy reasons why the Commission should not perform antitrust reviews of license transfers. The NRC's primary mission is to protect the public health and safety, not to economically regulate utilities. Other governmental agencies -- such as the Federal Energy Regulatory Commission, state public service commissions, the Federal Trade

¹ CLI 99-19, 49 NRC 441 (1999).

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Commission and the Department of Justice -- have jurisdiction over, and the expertise necessary to evaluate, antitrust implications of transactions that result in license transfers of nuclear power plants. Thus, performing an antitrust review of post-operating license transfers would be an inefficient and unnecessary use of the NRC's limited resources, especially where there is no statutory imperative requiring such consideration.

The Utilities recognize that the Commission Staff until recently performed reviews of license transfers under section 105 c. to determine whether significant changes have occurred subsequent to the Commission's last antitrust review. This practice should not deter the Commission from eliminating such reviews for the future. Agencies are free to change their policies, practices and statutory interpretations where, as in the Proposed Rule, such a change is supported by a reasoned basis.

I. DISCUSSION

A. The Atomic Energy Act Does Not Authorize The Commission To Perform Antitrust Reviews of License Transfer Applications.

Section 105 of the Act defines the Commission's antitrust jurisdiction. Under section 105 c.(1), which specifically sets forth the Commission's authority to perform antitrust reviews, when a party files with the Commission an application seeking a license to construct a commercial nuclear power plant under section 103, the Commission must obtain the Attorney General's advice concerning whether the application raises adverse antitrust concerns.² The Commission is required to publish the Attorney General's advice in the Federal Register and to give due consideration to that advice and evidence provided in subsequent proceedings.³ The Commission must then "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. . . ."⁴ The Act, therefore, provides for a detailed antitrust review by the Commission at the construction permit stage of a license application.

The Act also provides for a potentially less detailed antitrust review by the Commission upon application for a license to operate a nuclear plant. Upon receiving an operating license

² § 105 c.(1) & (5); 42 U.S.C. 2135(c)(1) & (5).

³ § 105 c.(5); 42 U.S.C. 2135(c)(5).

⁴ Id.

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application, the Commission must determine whether "significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous [antitrust] review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility."⁵ Only if the Commission finds that such significant changes exist, is the full antitrust review process set forth in section 105 c.(1) triggered.⁶

The filing of construction permit and initial operating license applications are the only two licensing actions for which the Commission is authorized by statute to perform an antitrust review. Section 105 c. does not grant the Commission antitrust jurisdiction over license transfers, nor does any other subpart of section 105.⁷ Moreover, section 105 is the only section of the Act which addresses the Commission's statutory jurisdiction to review the antitrust implications of a license application. As the NRC has stated, "[n]o part of the Atomic Energy Act other than Section 105 explicitly deals with antitrust matters."⁸ In fact, in South Texas, the Commission rejected arguments that other sections of the Act -- such as section 186 and section 161 -- provide the Commission with the general authority to conduct antitrust reviews:

We find the specificity and completeness of Section 105 striking. The section is comprehensive; it addresses each occasion on which allegations of anticompetitive behavior in the commercial nuclear power industry may be raised, and provides a procedure to be followed in each instance.⁹

⁵ § 105 c.(2); 42 U.S.C. 2135(c)(2).

⁶ *Id.*

⁷ Section 105 a. states that nothing in the Act shall relieve any person from operation of the full range of antitrust laws and authorizes the Commission to suspend, revoke, or take other action against any licensee who has been found by a court of competent jurisdiction to have violated such law "in the conduct of the licensed activity." 42 U.S.C. 2135(a). Section 105 b. requires the Commission to report to the Attorney General "any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or tend toward violation of" the antitrust laws. 42 U.S.C. 2135(b). Neither section 105 a. nor b. authorizes NRC antitrust review of a license transfer.

⁸ Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1311 (1977).

⁹ *Id.* at 1312.

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The Commission added that its “antitrust authority is defined not by the broad powers contained in Section 186, but by the more limited scheme set forth in Section 105.”¹⁰ Likewise, the Commission rejected the “suggestion that Section 161 may serve as a source of [antitrust] authority independent of Section 105.”¹¹

As the Commission states in the Proposed Rule, the Act’s legislative history and Commission cases interpreting that history make it clear that section 105 c. was intended to provide the Commission with the authority to conduct only prelicensing reviews of antitrust issues. The Commission has recognized that there is a “consistent thread” running through the legislative hearings and debates regarding section 105 c. which demonstrates that section 105 c. was designed to address “‘prelicensing’ or ‘anticipatory’ antitrust review.”¹² For example, as the Proposed Rule points out, the Joint Committee on Atomic Energy stated that section 105 c. was intended to apply only to initial license applications:

The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant’s standpoint, it ultimately ripens into the application for an operating license. The phrases ‘any license application,’ ‘an application for a license,’ and ‘any application’ as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for an operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for purposes of triggering subsection 105 c., other applications which may be filed during the licensing process.¹³

¹⁰ *Id.* at 1317 (footnote omitted).

¹¹ *Id.* at 1317 n. 12.

¹² *Id.* at 1314.

¹³ Atomic Energy-Utilization for Industrial or Commercial Purposes, H. R. Rep. No. 91-1470 at 5010 (1970) (emphasis added).

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Limiting the scope of antitrust review to the construction permit and initial operating license stages as set forth in the Proposed Rule also is consistent with the purpose of section 105 c. When it was considering the enactment of section 105 c., Congress heard concerns that access to low-cost nuclear power would significantly increase a utility's competitive advantage.¹⁴ Congress concluded that the appropriate time to address this concern would be at the construction stage, in order to ensure that the antitrust review would be completed before investors took on the risk of building a nuclear power plant. Various parties participating in the legislative hearings emphasized this point. For example, the head of the Justice Department's Antitrust Division pointed out that "applying antitrust policies when new production facilities are licensed facilitates effective implementation of these policies in a fashion minimizing uncertainty and risk for the private companies involved."¹⁵ He added that addressing antitrust questions "at the outset of the licensing proceeding, and obtaining the Attorney General's advice on the issues, can permit an early and orderly resolution of antitrust problems before much money and time has been spent."¹⁶ The Director of Policy Planning for the Department of Justice's Antitrust Division similarly stated "the procedure [for applying antitrust policies to uses of nuclear fuels] enables companies to be advised at an early stage in the planning of projects concerning any inconsistency between their plans and competitive policies. Thus, we should be able to minimize the number of times plans are thrown into uncertainty after significant time and resources have been committed to them."¹⁷

The Commission itself has recognized on prior occasions that Congress did not intend section 105 c. to apply beyond initial plant licensing. In South Texas, the Commission stated that Congress did not give the Commission the authority to place nuclear utilities "under a continuing

¹⁴ See, e.g., Prelicensing Antitrust Review of Nuclear Power Plants: Hearings before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess. (1969), (comments of Walter B. Comegys, Acting Assistant Attorney General, Antitrust Division, Department of Justice: "We do think that adequate access implies the same opportunity to receive low-cost power for the same uses as those who have the unique low-cost facility.") at 128. See also id. at 75, Comments of Joseph F. Hennessy, AEC General Counsel: "The problem centers on the very large plants that do provide the most economical source of energy . . . and an opportunity for the small publicly owned utilities to have access to that newly available cheap source of power."

¹⁵ Id. at 120.

¹⁶ Id. at 121.

¹⁷ Id. at 7.

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risk of antitrust review.”¹⁸ The Commission in that case rejected claims that it had the power to review antitrust concerns beyond initial licensing, stating:

Had Congress agreed with the proposition that this Commission should have broad antitrust policing powers independent of licensing, the statute that emerged from these discussions would have looked quite different. Little attention would have been paid to defining a two-step review process. The terminology of all participants in the drafting process would not have been focused so directly on ‘prelicensing’ review.¹⁹

The U.S. Court of Appeals for the D.C. Circuit likewise has found that section 105 c. is applicable only at the initial construction permit and operating license stages. In American Public Power Association v. NRC,²⁰ the Court of Appeals upheld a Commission determination that its rules governing the renewal of nuclear power plant operating licenses need not require an antitrust review for renewal applications. The NRC had found that section 105 c. did not require antitrust review of a license renewal application because such an application would not be an “initial application” or an application for a “new or substantially different facility.”²¹ The Court of Appeals upheld the Commission’s conclusion, stating that “[s]ection 105’s provisions are triggered only by an ‘application for a license’”, as that term was understood by Congress when it enacted section 105 c. and interpreted by the Commission in adopting the license renewal rules.²² Accordingly, because a license renewal application was not an initial application for a construction permit, an operating license, or a new or substantially different facility, the Court of Appeals found that section 105 c. did not require the Commission to perform antitrust reviews of nuclear plant license renewal applications. This analysis applies equally to license transfer requests.

The plain language of section 105 c., its legislative history, Commission decisions, and court precedent uniformly support the conclusion that section 105 c. gives the Commission jurisdiction to perform antitrust reviews relating to nuclear plants only at the construction permit

¹⁸ South Texas, 5 NRC at 1317.

¹⁹ Id.

²⁰ 990 F.2d 1309 (D.C. Cir. 1993).

²¹ Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,969 (1991).

²² American Pub. Power Ass’n, 990 F.2d at 1311-12; See 56 Fed. Reg. at 64,969-71.

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and initial operating license stages. As the Commission recognized in Wolf Creek, antitrust review of a license transfer is not authorized by statute, nor would such a review be consistent with the purpose of section 105 c. For these reasons, it is proper for the Commission, through the Proposed Rule, to revise its regulations to expressly limit its antitrust reviews to the facility's construction permit and initial operating license stages.

B. The Commission's Adjudicatory Decisions Have Not Directly Addressed Whether Antitrust Review Of License Transfer Applications Is Required.

Although there is no statutory basis for Commission jurisdiction to perform antitrust reviews of a license transfer after the initial operating license has been issued, other commenters may oppose the Proposed Rule on the grounds that prior Commission decisions support a conclusion that the Commission has such authority. While the Commission has held that its antitrust review authority is a "prelicensing" authority,²³ the Commission has not directly ruled on whether antitrust review is authorized by statute at the license transfer stage.²⁴ Its case law, therefore, does not support antitrust review of license transfers.

In Florida Power and Light Company (St. Lucie Plant, Unit No. 1),²⁵ for example, the Atomic Safety and Licensing Appeal Board cited with approval the Commission's holding in South Texas that, "in no uncertain terms . . . the NRC's supervisory antitrust jurisdiction over a nuclear reactor license does not extend over the full 40-year term but ends at its inception."²⁶ In a footnote, the Appeal Board added "[e]xcept perhaps as necessary . . . where a plant is sold. . . ."²⁷ The Appeal Board's speculation in a footnote that there might be some type of post-licensing review of antitrust issues upon the sale of a plant is hardly a binding Commission determination.

In Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2),²⁸ an Atomic Safety and Licensing Board found that, where new or additional co-owners were added to a

²³ South Texas, 5 NRC at 1314.

²⁴ In South Texas, the Commission stated that antitrust authority over license transfers "could" be drawn from section 50.80 (b).

²⁵ ALAB-428, 6 NRC 221 (1997).

²⁶ St. Lucie, 6 NRC at 226 (footnote omitted).

²⁷ Id. at 226 n. 12 (emphasis added).

²⁸ LBP-78-13, 7 NRC 583 (1978), aff'd, ALAB-475, 7 NRC 752, 757 (1978).

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construction permit, a 105 c. antitrust review may be conducted after the initial issuance of that permit. In affirming the Licensing Board's decision, the Appeal Board stated in a footnote that "an amendment of an existing license to add new owners was 'an initial application' insofar as [the Licensing Board was] concerned; hence, preclicensing antitrust review was required"²⁹ This statement should not be used to support a finding that license transfers are akin to an initial application. Fermi involved amendments to construction permits that took place prior to issuance of an operating license, i.e., in the time period during which antitrust reviews are authorized under section 105 c. The Fermi case does not hold that the Commission has antitrust jurisdiction over operating licenses that have already been issued, which is the question at issue in the Proposed Rule.

Fermi was cited with approval in South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1).³⁰ Like Fermi, Summer authorized Commission antitrust review of a construction permit amendment that added a new co-owner before the operating license was issued.³¹ Summer did not address whether an antitrust review should be conducted after an initial operating license is issued. For these reasons, the revisions to Commission's regulations set forth in the Proposed Rule do not conflict with prior Commission findings.

**C. Performing Anti-Trust Reviews Of License Transfers
Would Be An Inefficient, Unnecessary And Duplicative
Use Of The Commission's Resources.**

The NRC's primary mission is to protect the public health and safety. Jurisdiction over health and safety issues, "which continues through the lives of outstanding licenses," is properly entrusted to the NRC because it has the necessary technical expertise.³² The Commission has acknowledged, however, that its expertise in the field of antitrust "is not unique," and that it merely applies antitrust principles developed by other bodies.³³ In fact, the Commission has stated that only at the initial licensing stage is it in a unique position to address Congress'

²⁹ Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC at 756, n. 7.

³⁰ CLI-80-28, 11 NRC 817, 830-31 (1980).

³¹ Id. at 827.

³² South Texas, 5 NRC at 1316.

³³ Id. at 1316.

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concerns regarding competition.³⁴ As the Commission has recognized, the situation is quite different, however, once the plant has begun operating:

When nuclear power plants have been constructed and are operating, anticompetitive behavior can be remedied only by modifying or conditioning existing behavior. Whatever form of remedy the agency can offer is not appreciably different from that which may be fashioned by the traditional antitrust forums. In this posture, we recognize, as did the Congress, that there are more suitable forums for antitrust enforcement.³⁵

As this passage indicates, the anticompetitive effects of post-operating license transfers will not go unreviewed. To the contrary, numerous other governmental bodies which are charged with and have the necessary expertise to perform economic regulation, will analyze the competitive effects of transactions which result in license transfers.

For example, the Federal Energy Regulatory Commission has broad authority to review the competitive consequences resulting from the sale of facilities subject to its jurisdiction that may also involve nuclear plant license transfers. According to its Merger Policy Statement, "the [FERC], in applying the Federal Power Act standard that mergers must be consistent with the public interest, must account for changing market structures and pay close attention to the possible effect of a merger on competitive bulk power markets and the consequent effects on ratepayers."³⁶ Thus, when called upon to analyze proposed mergers of the FERC will take into account three factors, "the effect on competition, the effect on rates and the effect on regulation."³⁷ In order to evaluate the effect on competition, the FERC applies the DOJ/FTC Merger Guidelines, including the Guidelines' five-step process for analyzing mergers, which would fully identify if there are valid antitrust concerns raised by the transaction.³⁸ In addition,

³⁴ According to the Commission, "[n]o nuclear power can be generated without an NRC license and the licensing process thereby allows us to act in a unique way to fashion remedies, if we find that an applicant's plans may be inconsistent with the antitrust laws or their underlying policies." *Id.*

³⁵ *Id.* at 1316-17.

³⁶ Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, III FERC Stats. & Regs., Regulations Preambles ¶ 31,044, 30,111, 61 Fed. Reg. 68,595 (1996).

³⁷ *Id.*

³⁸ Under these five steps:

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there are other federal agencies with jurisdiction over utility plant sales. For example, the parties to such a transaction may be required to make a pre-merger filing with DOJ and the FTC under the Hart-Scott-Rodino Antitrust Improvements Act,³⁹ and one of these agencies would review the competitive effects of such a transaction under section 7 of the Clayton Act.⁴⁰ Moreover, state public utility commissions also perform antitrust reviews resulting from the sale of utility plants.

As the Commission has recognized, after the construction permit and operating license stages, antitrust review of nuclear licensees should be left in the hands of forums that are better suited to address such issues. It would be an unnecessary and inefficient use of the Commission's resources to perform antitrust reviews of license transfers where other state and federal governmental bodies will be performing their own comprehensive antitrust reviews. Accordingly, the Commission should adopt the revisions to its antitrust regulations that are set forth in the Proposed Rule.

D. The Commission Staff's Past Practice Of Performing Significant Changes Reviews Of License Transfers Applications Is Not Controlling.

Despite the fact that neither section 105 c. nor Commission case law supports a finding that the Commission has jurisdiction to review the antitrust implications of a license transfer, the NRC Staff has conducted antitrust reviews of certain license transfers. The procedures followed

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First, the Agency [i.e., FERC] assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured. Second, the Agency assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects. Third, the Agency assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern. Fourth, the Agency assesses any efficiency gains that reasonably cannot be achieved by the parties through other means. Finally, the Agency assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market. *Id.* at 30,111.

See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992).

³⁹ 15 U.S.C. § 18.

⁴⁰ 15 U.S.C. § 18a.

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by the Staff are described in NUREG-1574, Standard Review Plan on Antitrust Reviews (Dec. 1997).⁴¹ This past practice should not, however, deter the Commission from clarifying its regulations to reflect the fact that the Commission does not have statutory authority to perform antitrust reviews of a post-operating license transfer.⁴² On the contrary, as the Commission recognized in Wolf Creek,⁴³ the agency remains free to change the Staff's policies, practices and statutory interpretations, so long as there is a reasoned basis for the change and the agency remains faithful to the requirements of the controlling statute.⁴⁴

In particular, an agency may change its licensing process to eliminate certain issues from consideration and to reduce the amount of information that the applicant must submit.⁴⁵ The Staff's prior practice of conducting license transfer antitrust reviews does not bind the Commission or preclude it from adopting a different policy.⁴⁶ Accordingly, the Commission is free to dispense with Staff antitrust reviews of post-operating license transfers. It is well established that administrative agencies have broad discretion to address particular issues "through the process of rulemaking, individual adjudication, or a combination of the two procedures."⁴⁷

Applicants seeking to transfer operating licenses issued under section 103 are currently required by 10 C.F.R. § 50.80(b) to submit antitrust information with their applications.⁴⁸ The

⁴¹ A summary of the Staff's antitrust reviews is presented in NUREG/CR-6558, NRC Antitrust Licensing Actions, 1978-1996, at Table 3.3 (Sept. 1997).

⁴² Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863 (1984).

⁴³ CLI 99-19, 49 NRC at 460.

⁴⁴ See Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1734 (1996); Center for Science in the Pub. Interest v. Department of the Treasury, 797 F.2d 995, 999 (D.C. Cir. 1986).

⁴⁵ Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (D.C. Cir. 1983), cert. denied, 467 U.S. 1255 (1984).

⁴⁶ Porter County Chapter of the Izaak Walton League, Inc. v. AEC, 533 F.2d 1011, 1016 (7th Cir.) (Staff working papers and Regulatory Guides not binding on NRC), cert. denied, 429 U.S. 945 (1976); see Smiley, 116 S. Ct. at 1734 (opinion of agency Deputy Chief Counsel not binding on agency).

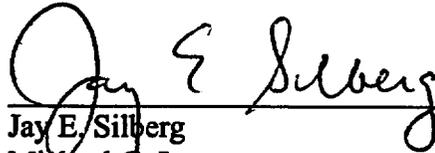
⁴⁷ NAACP v. FPC, 425 U.S. 662, 668 (1976).

⁴⁸ In South Texas, the Commission stated that antitrust authority over license transfers "could be drawn as an implication from our regulations. 10 C.F.R. § 50.80 (b)." South Texas, 5 NRC at 1318 (emphasis added). The Commission expressly stated in that case, however, that it was not deciding the issue of whether it had antitrust jurisdiction over license transfers, and noted that such jurisdiction is "not explicitly referred to in the statute or its history." Id.

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Utilities, therefore, recognize the need for the Commission to revise its regulations consistent with its findings in Wolf Creek. For the reasons explained above, the Utilities urges the Commission to adopt the revisions set forth in the Proposed Rule, because those revisions are consistent with its statutory authority and sound public policy.

Respectfully submitted



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