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BEFORE THE
UNITED STATES NUCLEAR REGULATORY COMMISSION

Antitrust Review Authority: Clarification

Docket No. RIN 3150-AG38

**REQUEST OF AMERICAN PUBLIC POWER ASSOCIATION,
THE CITY OF CLEVELAND, OHIO, THE FLORIDA MUNICIPAL
POWER AGENCY, THE CITY OF GAINESVILLE, FLORIDA,
PUBLIC CITIZEN, AND THE AMERICAN ANTITRUST
INSTITUTE TO SUBSTITUTE COMMENTS**

The American Public Power Association *et al.* respectfully requests that the NRC permit the substitution of the attached comments for the comments filed electronically on February 15, 2000. The purpose of the substitution is to add Public Citizen as a commenter; no substantive changes to the comments have been made.

Respectfully submitted,



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February 16, 2000

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BEFORE THE
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| Docket No. RIN 3150-AG38

**COMMENTS OF AMERICAN PUBLIC POWER
ASSOCIATION, THE CITY OF CLEVELAND,
OHIO, THE FLORIDA MUNICIPAL POWER
AGENCY, THE CITY OF GAINESVILLE, FLORIDA,
PUBLIC CITIZEN, AND THE AMERICAN
ANTITRUST INSTITUTE**

These comments are submitted pursuant to the invitation extended by the Commission in its Notice of Proposed Rule, published at 64 Fed. Reg. 59,671 (1999), as amended at 65 Fed. Reg. 3394 (2000). They are submitted on behalf of the American Public Power Association (“APPA”),¹ the City of Cleveland, Ohio,² the Florida Municipal Power Agency,³ the City of Gainesville, Florida,⁴ Public Citizen,⁵ and the American Antitrust Institute⁶ (collectively, “APPA”).⁷

¹ The American Public Power Association (“APPA”) is the national service organization representing the interests of the nation’s approximately 2,000 municipal and other state and local government-owned utilities throughout the United States. Approximately 1,870 of these systems are cities and municipal governments that currently own and control the day-to-day operations of their electric utility systems. APPA members include state public power agencies and serve many of the nation’s largest cities. Collectively, APPA members make 15 percent of all kilowatt-hour sales delivered to 40 million Americans.

² Cleveland is a beneficiary of the license conditions for Davis-Besse Unit 1. On several occasions the Federal Energy Regulatory Commission, at Cleveland’s behest, has ordered Cleveland Electric Illuminating Company to conform its tariffs to these license conditions. *E.g., Cleveland Elec. Illuminating Co.*, 11 F.E.R.C. ¶ 61,114 (1980). Cleveland is dependant upon NRC ordered antitrust conditions to protect its ability to provide competitive, economic power to the public. Cleveland successfully opposed a recent attempt by CEI to have these license conditions removed. *Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1)*, LBP-92-32, 36 N.R.C. 269 (1992), *aff’d sub nom. City of Cleveland v. USNRC*, 68 F.3d 1361 (D.C. Cir. 1995).

³ Florida Municipal Power Agency is a nonprofit joint-action agency formed by municipal electric utilities. The Agency enables municipal electric utilities to work together for mutual advantage on joint projects, such as power supply resources, fuel supplies and transmission facilities. Twenty-seven municipal electric systems, serving some 650,000 customer accounts, are members of FMPA. On behalf of certain members, it owns an interest in St. Lucie Unit No. 2. It has relied upon NRC antitrust conditions to obtain network transmission to be able to plan and operate power supply for requesting member cities. *See Florida*

I. SUMMARY

APPA respectfully submits that the Commission plainly erred by eliminating antitrust information filing requirements for license transfer proceedings without giving any consideration to the forgone benefits associated with such filings. In last year's *Wolf Creek* order, the Commission noted that antitrust data presently required to be filed with license transfers may be useful in determining the proper disposition of existing antitrust license conditions affected by the transfer. The proposed rule, which would eliminate the filing requirements in all circumstances, lacks any reasoned basis in the context of a license transfer that will impact existing antitrust conditions. It is well-established that a request by a licensee to be relieved of antitrust license conditions is an amendment request that triggers hearing rights under the Atomic Energy Act. A substantial number of license transfers may raise such issues, and elimination of informational filing requirements in such circumstances is wholly unwarranted.

Municipal Power Agency v. Florida Power & Light Co., __ F. Supp. 2d __ (M.D. Fla. 1999).

⁴ Gainesville is a beneficiary of the antitrust conditions contained in Florida Power & Light's St. Lucie Unit 2 and Florida Power Corporation's Crystal River Unit 3, which Gainesville co-owns. It was the plaintiff in *Gainesville Public Utilities v. FPC*, 402 U.S. 515 (1971), in which the Supreme Court upheld a Federal Power Commission order requiring Florida Power Corp. to interconnect with Gainesville.

⁵ Public Citizen was founded in 1971 to protect the rights of consumers and to give them an effective voice before regulatory commissions and government in general. Public Citizen's Critical Mass Energy Project (CMEP), founded in 1974, has acted to protect America's natural resources by promoting renewable and energy efficient technologies, advancing nuclear safety, protecting against unsafe disposal of radioactive waste, ensuring that environmental and consumer interests are protected as the electric utility industry deregulates, and improving transportation policy. Information about CMEP is available at <<http://www.citizen.org/CMEP/>>. Public Citizen and the interests that it represents have a strong interest in preserving access to basic information that will permit the Commission to comply with its statutory obligations and will permit the public to inform the Commission's judgment concerning problems that might otherwise go unconsidered.

⁶ The American Antitrust Institute is an independent, non-profit organization established in 1998 to promote a more competitive economy. Its Advisory Board consists of many of the nation's leading antitrust experts. Information about AAI is available at <http://www.antitrustinstitute.org>.

⁷ APPA reserves the right to seek to supplement this pleading. Other parties have expressed interest in supporting it, but could not do so due to time constraints.

Moreover, APPA respectfully submits that the Commission's determination in *Wolf Creek* that antitrust reviews under section 105c of the Atomic Energy Act either are not authorized in conjunction with operating license transfers or, if authorized, are discretionary and may be dispensed with under present circumstances, merits reconsideration. The Commission's statutory and policy analysis in *Wolf Creek* is at odds with *Fermi*, a decision that the Commission continues to endorse, which holds that antitrust review is *required* when an applicant is added to a construction permit. By departing from its *Fermi* analysis without explanation, the Commission also fails to construe the Atomic Energy Act in light of the express statutory purpose of promoting competition.

Even if the language of section 105c is deemed to be sufficiently ambiguous to allow for more than one interpretation, the Commission erred by positing that the Federal Energy Regulatory Commission's restructuring initiatives and the Hart-Scott-Rodino amendment to the Clayton Act have rendered this Commission's antitrust review authority superfluous. To the contrary, the need for effective antitrust regulation is heightened by recent developments in the industry. These developments weaken traditional rate regulation in reliance on market forces, thereby increasing the need for antitrust protection against market power abuse. There is no adequate substitute under present conditions for this Commission's authority under section 105c of the Atomic Energy Act to scrutinize and ameliorate the anticompetitive impacts of some nuclear plant transfers.

II. INTRODUCTION

The proposed rule would eliminate the requirement that applicants submit any antitrust information in connection with license transfers after the Commission has issued

an initial operating license. The Commission states that the main justification for this change in the information required to be provided is to “bring the regulations into conformance with the Commission’s limited statutory authority to conduct antitrust reviews.” NOPR, 64 Fed. Reg. at 59,671. As the Commission further stated:

The proposed clarifications make clear that, consistent with the decision of the *Wolf Creek* case, no antitrust information is required to be submitted as part of any application for Commission approval of a post-operating license transfer. Because the current regulations do not clearly specify which types of applications are not subject to antitrust review, these proposed clarifying amendments will bring the regulations into conformance with the Commission’s limited statutory authority to conduct antitrust reviews and its decision that such reviews are post-operating license transfer applications and not authorized or, if authorized, are not required and not warranted.

Id. at 59,674.

APPA takes issue with the Commission’s proposed rule in two respects. First, the proposed rule changes are inappropriate even under *Wolf Creek*⁸ to the extent that they eliminate submission of antitrust information in connection with applications to transfer licenses which contain existing antitrust conditions. Second, the Commission erred in its *Wolf Creek* decision in determining that a transfer of an operating license can never be an occasion for an antitrust review under section 105c of the Atomic Energy Act, 42 U.S.C. § 2135(c).

As a preliminary matter, APPA believes that it is important to clarify the nature of this rulemaking proceeding. Despite the caption of the proceeding, the sole question at

⁸ *Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1)*, CLI-99-19, 49 N.R.C. 441, 64 Fed. Reg. 33,916 (1999).

stake is what information should be submitted to the Commission in connection with an application for transfer of a nuclear plant operating license. As stated in the NOPR, “[t]he proposed clarifications make clear that, consistent with the decision in the Wolf Creek case, no antitrust information is required to be submitted as part of any application for Commission approval of a post-operating license transfer.” 64 Fed. Reg. at 59,674. The Commission is not proposing here to issue an interpretive rule on its authority to undertake section 105c antitrust reviews in connection with license transfers. The Commission expressly decided in *Wolf Creek* that it would *not* undertake any such rulemaking. 49 N.R.C. at 467.⁹ And in no event does the Commission in this NOPR purport to question or re-examine, much less reverse, its clearly correct determination in *Wolf Creek, id.* at 466 & n.23, that the Commission has the authority, in connection with a license transfer application, to continue any existing antitrust conditions, and that it may consider modification of those conditions as may be appropriate in view of the transfer. Accordingly, it would be improper for the Commission to issue a final rule in this docket, which purports either to codify its *Wolf Creek* policy on antitrust review in operating license transfer proceedings or to extend that policy by proposing to eliminate antitrust review in connection with construction permit transfers or to eliminate review of existing antitrust conditions in licenses being transferred.

⁹ Even if the Commission were issuing an interpretive rule in this proceeding, such a rule would not likely be found to be ripe for judicial review outside the context of a particular adjudication. *E.g., Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998); *ACLU v. FCC*, 823 F.2d 1554, 1575-79 (D.C. Cir. 1987).

III. COMMENTS

A. *The Commission Should Retain Informational Filing Requirements To Support Reviews Of Existing Antitrust License Conditions Pursuant to Wolf Creek*

In *Wolf Creek* the Commission stated:

[T]here will need to be some means provided for consideration of the matter [appropriate treatment of existing antitrust conditions] in connection with transfers of licenses with existing antitrust conditions. In such cases, the Commission will entertain submissions by licensees, applicants and others with the requisite antitrust standing that proposed appropriate disposition of existing antitrust license conditions.

49 N.R.C. at 466. The Commission further recognized that the information specified in Appendix L for antitrust review “could be useful, for example, in determining the fate of any existing antitrust license conditions relative to the transferred license.” *Id.* at 462, *quoted in* NOPR, 64 Fed. Reg. at 59,673. Despite the recognition of the usefulness of the information to a recognized continuing statutorily required function of this Commission, there is no mention in the proposed rule of any positive function for the information previously submitted which the proposed rule would eliminate. The proposed rule is fatally flawed for proposing to eliminate the informational filing requirement for *all* license transfers, as no reason has been supplied for eliminating an informational filing requirement that is concededly beneficial in the context of applications to transfer licenses containing existing antitrust conditions.

As appears from the discussion quoted above, the Commission apparently intends to rely on submissions by persons “with the requisite antitrust standing” when deciding

what to do with existing license conditions.¹⁰ In the *Wolf Creek* case, these were relatively brief submissions (15 pages or less). 49 N.R.C. at 466. Moreover, the *Wolf Creek* order made no provision for intervenors to respond to any proposal by the licensee to relax existing antitrust conditions, even though such a proposal would amount to a license amendment application that gives rise to hearing rights under Section 189a of the Act, 42 U.S.C. § 2239(a). See *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 N.R.C. 47, 53 (1992), *petition for review dismissed sub nom. City of Cleveland v. USNRC*, 68 F.3d 1361 (D.C. Cir. 1995). Perhaps the abbreviated procedure employed in *Wolf Creek* reflected the fact that the licensees in that proceeding *were not* seeking any relaxation of the antitrust conditions in their license. In any event, it is quite unreasonable to require intervenors with antitrust standing to make a case for the proper disposition of existing antitrust license conditions without meaningful access to relevant data.

The elimination of informational filing requirements in this context would be *particularly* problematic were the Commission to take the position that license transfers that implicate existing antitrust license conditions are subject to the streamlined hearing procedures of 10 C.F.R. Part 2 Subpart M, which do not allow for discovery or cross-examination. In promulgating those regulations, the Commission emphasized that they did *not* cover requests for license amendments “that involve changes in actual operations.” *Streamlined Hearing Process for NRC Approval of License Transfers*, 63 Fed. Reg. 66,721, 66,728 (NRC 1998). A license transfer that affects antitrust conditions,

¹⁰ APPA has concerns about the limited standing that the Commission conferred in *Wolf Creek*. As part of the reconsideration of *Wolf Creek* that we urge herein, an expansion of standing should be considered, because in today’s markets the impact of nuclear plant operations can be far-reaching.

and certainly a license transfer in which the applicants propose to modify or eliminate antitrust conditions, would meet this description, and therefore should not be within the scope of Subpart M. As the Commission noted in promulgating the Subpart M regulations, those regulations are appropriate to amendments which are “essentially administrative in nature.” 63 Fed. Reg. at 66,727. In addition, APPA notes that the Subpart M regulations allow for the use of additional procedures when appropriate. 10 C.F.R. § 2.1322(d) (1999). If it is the Commission’s intention to deal with the disposition of antitrust license conditions in connection with license transfers in a Subpart M hearing, then the Commission’s elimination of informational filing requirements would exacerbate the unfairness of an already thoroughly unsatisfactory procedure. There was no discussion in the order promulgating Subpart M of a situation where a license transfer would affect existing antitrust conditions, so it seems plain that these new regulations were not intended to govern in that context.

The problems with elimination of the informational filing requirement go beyond due process concerns of intervenors, however. To repeat what has become an axiom of administrative law, the Commission’s role is not “to act as an umpire blandly calling balls and strikes”; rather, the Commission “has an affirmative duty to inquire and consider all relevant facts” and to that end “must see to it that the record is complete.” *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965). By eliminating access to information, the Commission would disarm itself from the ability to acquire information necessary to perform its statutory function.

APPA further notes that antitrust license conditions have been judicially held to constitute third party beneficiary contracts. *United States v. Pacific Gas and Elec. Co.*,

714 F. Supp. 1039 (N.D. Ca. 1989); *Florida Municipal Power Agency v. Florida Power & Light Co.*, No. 92-35-Civ-Orl-22C, 1999 U.S. Dist. LEXIS 15789 (M.D. Fla. Aug. 18, 1999), *reconsideration denied*, 1999 U.S. Dist. LEXIS 15788 (M.D. Fla. Oct. 7, 1999).

This recognizes the strong interest many parties have in the continued effectiveness of the conditions. Surely the Commission must continue to play a vigorous informed role when there is an application to transfer a nuclear license containing antitrust conditions. The matter should not be left entirely to private parties or to Commission determinations that are formed without being able to be educated by relevant data necessary to its own and party analysis.

Transfer of a nuclear license could make less valuable or meaningless existing antitrust license conditions. *See* Affidavit of David Penn. For example, many such conditions provide neighboring entities with power purchase, coordination, transmission and other rights. Some of these are provided in conjunction with granting neighboring entities ownership interest in nuclear plants. In many cases, these provisions in the license have been relied upon as the legal framework upon which contractual relationships have been constructed. If as a result of a merger or a sale to a third party, the market—including the use of transmission, coordinated power sales, etc.—will function differently, license conditions may have to be modified to maintain neighboring entities' rights. If major utilities combine their transmission systems and generating plants, it does smaller systems currently protected by nuclear license antitrust conditions little good to be entitled to transmission only over the pre-merger system, but not over the totality of the combined new larger network. Otherwise, the licensee may be able to reach markets over the combined system, but the neighboring entity's rights may be relatively

circumscribed and the value of its plant ownership may be reduced. This issue could have arisen in *Wolf Creek*, but was preempted because there the applicants agreed that all applicable antitrust conditions should be re-interpreted to apply to the entire merged company.

Many entities have made extensive investments, including in nuclear plants, and forgone litigation in reliance on the continued effectiveness on the conditions. As noted in the accompanying affidavit of David W. Penn at ¶ 10, third-parties have made decisions with respect to acquiring or declining to acquire nuclear investments in the context of the assured availability of supplemental power supply, power coordination and transmission. Some have not invested in nuclear facilities directly based on the availability of alternatives that are guaranteed by antitrust license conditions.

The Commission has long recognized, for example in *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 N.R.C. 559, 566-68 (1975), and in *Louisiana Power & Light Co.* (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 A.E.C. 619, 621 (1973), that nuclear plants are owned and operated within a commercial context that includes use of and the need for transmission and integrated power supply (*e.g.*, including “coordination”). Where license conditions have made transmission, power sales, and coordination, among other things, available to prevent threats of monopolization or other anticompetitive conduct, a licensee, for example, who proposes to sell a nuclear plant facility, but retain ownership of transmission and other generation, would still have the obligation to and means to ensure compliance with transmission, power sales and coordination conditions. Certainly, if existing and vested rights are to be maintained, a selling licensee must be required to

assure that the obligations that ran with the license as to its transmission and other generation assets are transferred to another form of enforceable obligations applicable to the same assets before it can be relieved of its obligations by passing a nuclear plant on to a third party with no control over those non-nuclear assets previously bound by the license. The transferor cannot relieve itself of license obligations by merely transferring the plant anymore than a homeowner (absent other considerations) can relieve itself of its mortgage obligations by simply selling a house.

By the same token, a transferee of the license, who presumably will control the plant, would likewise have the obligation to ensure compliance with the nuclear and other conditions functionally related to the assets it acquires.

Of course, subject to other contract obligations and commitments, a licensee can seek to change or amend the conditions in light of changed circumstances, but in doing so, as the Commission has suggested, it would be subjecting itself to antitrust scrutiny in light of claimed needs and current conditions. *Perry*, 36 N.R.C. at 58 n.39.

There are likely to be situations in which the seller of the nuclear plant now subject to antitrust conditions must remain subject to those conditions, even though it is no longer the owner of a nuclear plant. If coordination power, for example, is necessary to continue the competitive market created by the license conditions, that power should still be available to neighboring entities after the transfer of the license. This could be accomplished either by conditioning transfer upon the transferees' acceptance of the continued applicability of the condition or by requiring the original owner to remain as a nominal licensee. There are many other possible situations in which it will be necessary to modify the existing license conditions in order to provide the same degree of

protection to neighboring entities as currently provided to them by the existing license conditions. APPA respectfully suggests that these questions be considered in concrete situations in the future. However, for the reasons stated above, the Commission should not truncate its role by depriving itself of the information currently required.

When a court issues a consent decree to resolve an antitrust complaint, it possesses continuing jurisdiction to assure that the objectives of that decree are achieved. *See, e.g., United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 250-52 (1968); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967-69 (2d Cir. 1983). The Commission held in *Houston Lighting & Power Co. (South Texas Project, Units 1 and 2)*, CLI-77-13, 5 N.R.C. 1303, 1309-12 (1977) that it does not have this sort of continuing antitrust jurisdiction under Section 105c of the Act, but rather that the Commission's continuing oversight jurisdiction is primarily rooted in Sections 105a and 105b except in circumstances where existing conditions are being violated or a license was procured by fraud. [cite] However, a license transfer proceeding is more like *Perry* than *South Texas*, because it is a proceeding initiated by the *applicants* to do something that will almost inevitably impact existing conditions in their license. There is no question of Commission jurisdiction in an amendment proceeding, and the Commission accordingly should take the occasion to examine the efficacy of the original license conditions.¹¹ It is simply nonsensical that the Commission should eliminate all informational requirements bearing on that aspect of a license transfer application.

¹¹ *See Perry*, 36 N.R.C. at 58 n.39, finding that consideration of additional antitrust conditions in a proceeding initiated by a licensee seeking to amend or eliminate existing conditions "could be sound policy" in light of the fact that "the policy of insulating the licensee from continuing antitrust proceedings may not have ... any ... force" in such a proceeding.

It's not just the Commission that needs the information. The neighboring utilities who are protected by existing license conditions need to be able to determine whether the license transfer will continue to protect the interests for which the original license conditions were imposed and, in many cases, negotiated and acquiesced to. Further, if a court is required to review the reasonableness of the Commission's transfer of a license, it needs to determine the factual basis upon which the Commission has made its decision.

APPA recognizes that it may be rational in some circumstances to modify or even eliminate a requirement for the filing of beneficial information, if the provision of such information is overly burdensome compared with the need and the rights and interests that are at stake. However, there is no mention in the NOPR of any burden relating to the provision of the information required by Appendix L of 10 C.F.R. Part 50. To the contrary, the Commission assumed in *Wolf Creek* that all license transfers would be subject to Hart-Scott-Rodino screening under 15 U.S.C. § 18a. 49 N.R.C. at 465 & n.20. Extensive information relating to competition must be submitted in connection with Hart-Scott-Rodino screening. If there were a concern on the part of the NRC about undue burden on licensees in complying with Appendix L, it could plainly be remedied by giving license transfer applicants the option of providing to the NRC, and making available to interested parties, their Hart-Scott-Rodino informational filings and other filings containing antitrust information (such as any filings made pursuant to Section 203 of the Federal Power Act) in lieu of the information set forth in Appendix L.

The second situation, in which Hart-Scott-Rodino screening may or may not apply depending on the market value of the plant in question, is what now appears to be the more common situation, in which a utility licensee transfers the nuclear unit to a third

party which operates, not as a utility, but as an independent power producer, dependent upon the market price available for its output. In these cases, it is clear that simply having license conditions related to transmission or non-nuclear generation follow the unit to a new licensee may render them meaningless, and permits the original licensee to escape its obligations.

Additionally, licensees and proposed licensees should clearly state (1) how they will ensure enforcement of existing antitrust conditions or (2) whether they seek amendment of existing antitrust conditions and the basis therefor. They should also state how the transfer may impact on existing conditions.

In conclusion, the NRC has provided *no* rational reason in its NOPR for elimination of a requirement for the filing of information that will concededly be useful to the Commission in determining the proper disposition of existing antitrust conditions in operating licenses for nuclear power plants which are being transferred. Therefore, the filing requirements should be maintained, or modified to address any issue of undue burden while still providing the Commission and other interested parties with sufficient information to properly address the appropriate disposition of such antitrust conditions.

B. The Proposed Elimination Of Informational Filing Requirements Is Inconsistent With The Atomic Energy Act's Provision For Antitrust Review In Connection With The Transfer Of An Operating License To A New Entity

The above concerns regarding the proposed clarifications are written from the perspective of the *Wolf Creek* decision. However, APPA opposes the proposed clarifications not only because they failed to reflect the *Wolf Creek* decision's recognition that consideration of antitrust information may be relevant in connection with license transfers, but also because they implement a ruling that is clearly erroneous—that the

Atomic Energy Act neither requires nor authorizes an antitrust review in connection with the transfer of a nuclear plant license, and that even if reviews were authorized they should not be conducted. APPA submits that an antitrust review of the transfer of a nuclear plant operating license is not only authorized, but required in some circumstances, and that conducting such review *is* sound policy.

In terms of the construction of the statutory language of Section 105c, section 105c(1) requires the Commission to submit to the Attorney General a copy of any license application provided for in section 105c(2). That section, which is the critical one, provides:

Paragraph (1) of this subsection shall apply to an application for a license to construct or operate a utilization or production facility under section 103: *Provided, however,* That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

42 U.S.C. § 2135(c)(2).

The heart of the Commission's analysis of this provision in *Wolf Creek*, and the heart of its error, was framed as follows:

The only conceivable way to interpret Section 105c to require some form of antitrust review of applications to transfer an existing operating license is to construe the application to transfer as an application for an operating license. But if it is so construed, Section 105c(2) brings our antitrust review responsibility into play only if there is a "significant changes" finding made in accordance with the process described in that section. The mandated significant

changes process, however, does not lend itself to reviews of post-operating license transfer applications.

To trigger the Commission's duty to conduct an antitrust review of an operating license application, there must be "significant changes" in the licensee's activities that "have occurred subsequent to the previous review by the Attorney General and the Commission ... *in connection with the construction permit for the facility.*" Section 105c(2). It is immediately obvious from this language that the statutory "significant changes" inquiry is not compatible with antitrust reviews of post-operating license transfers, for the statutory baseline from which to measure "significant changes" is the facility's construction permit, whereas at the time of post-operating license transfers the facility already would have received its operating license, and undergone a previous "significant changes" review. It would be absurd for the Commission to look back again to the original construction permit and make the "significant changes" inquiry anew.

49 N.R.C. at 454-55 (footnote omitted). The Commission is correct that there is a difficulty in interpreting the statute to require a "significant changes" review, but it errs by stopping its analysis at that point.

It is obvious that there can be no "significant changes" review of the activities of a transferee that is new to an operating license, because there was no prior review against which to measure changes. With respect to a transfer of a license to a new entity, the Commission rejects a forced interpretation of the statute as require a significant changes review and concludes that therefore no antitrust review is called for. This is not reasonable. Rather, with respect to a new licensee, the application for transfer is properly viewed as not falling within the proviso of Section 105c(2) *at all*. That is, such a transfer application is *not* an application for a license to operate a facility for which a construction permit was issued, because the applicant in question was never issued a construction permit.

This construction of section 105c(2) as focusing on the *applicant* rather than the *facility* eliminates the difficulty that was fastened upon by the Commission in *Wolf Creek*. Importantly, this is a well-established, longstanding construction of the statute, as it was the basis for the ruling in *Detroit Edison Company* (Enrico Fermi Atomic Power Plant, Unit No. 2), LBP-78-13, 7 N.R.C. 583, *aff'd*, ALAB-475, 7 N.R.C. 752 (1978). As the Commission stated in *Wolf Creek*, with an approving cite to *Fermi*, license transfers that occur *before* issuance of an initial operating license “unquestionably fall within the scope of section 105c.” 49 N.R.C. at 462 n.15. In *Fermi*, the applicants for a partial transfer of a construction permit had argued that there should be no antitrust review of the transfer application, but only a significant changes review in connection with a subsequent operating license application. The licensing board in *Fermi* reasoned that the application before it should be viewed as the *initial application* on the part of the transferee, and therefore that an antitrust review was mandatory. 7 N.R.C. at 587-89. The appeals board concurred. 7 N.R.C. at 755-56 n.7.

By the logic of *Fermi*, then, a transfer of an operating license to an entity that was not previously a licensee is an *initial* application for an operating license not preceded by a construction permit, and therefore an antitrust review is necessary. This avoids the linguistic difficulties that the Commission noted in *Wolf Creek*, because there is no post-licensing *significant changes* review with respect to such a transferee that refers back to the construction permit. The NOPR reflects the Commission’s continuing endorsement of *Fermi*: “Direct transfers of facility licenses which are proposed *prior* to the issuance of the initial operating license for the facility, however, are and continue to be subject to the Commission’s antitrust review.” 64 Fed. Reg. at 59,674. Had the NOPR provided the

statutory basis for *this* proposition, the error of the Commission’s *Wolf Creek* analysis regarding antitrust review of *operating license* transfers would have been made manifest.

In sum, if the Atomic Energy Act requires antitrust review of pre-operation license transfers, as the Commission concedes, then it also requires antitrust review of post-operation license transfers where the transferee was not previously a licensee. Indeed, *Wolf Creek*’s analysis of the Commission’s antitrust review authority is arbitrary and capricious on account of its unexplained inconsistency with *Fermi*. Abandoning the rationale requires clear explanation and none is provided. *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).¹²

However, even if this analysis were rejected, and the Commission were to deem the proviso of Section 105c(2), with its significant changes analysis, to apply to license transfers, a transfer of ownership would nearly always be significant to antitrust analysis, which looks at the economic power and conduct of market participants. *See, e.g., Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB–452, 6 N.R.C. 892, 912-14 (1977). Section 105c(2) clearly presumes some subsequent antitrust reviews. The Commission’s reading of the clause “subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility” to preclude all review where there had been no previous review would make meaningless the clause “unless the Commission determines such review is advisable on the ground that significant changes in the licensee’s activities or proposed activities,” an absurd result in view of the Commission’s Congressionally mandated

¹² The suggestion that other bodies have antitrust enforcement authority is inadequate. These bodies cannot be expected to and do not exercise the same authority as the NRC, which is given express antitrust authority. Affidavit of David Penn. *Consumers Power Co.* (Midland Plant, Units 1 and 2), 6 N.R.C. at 897).

antitrust role and one that negates the importance that Congress gave to the NRC antitrust review of nuclear facilities.

While APPA considers the statute to be clear in mandating, or at least allowing for, Section 105c antitrust review in connection with license transfers, the same result should obtain under a *Chevron* Step 2 analysis, that is, in a consideration of whether the Commission has adopted a reasonable policy in an area where Congress did not speak clearly but may be understood to have left matters to agency discretion. In *Fermi*, the licensing board found it to be clearly inconsistent with statutory intent that a utility should hold a construction permit until the operating license stage without any antitrust review. 7 N.R.C. at 588. How much more offensive to this statutory scheme, then, to allow a utility to hold an operating license indefinitely without any antitrust review.

The Commission's contrary view must stem from its belief that antitrust review under section 105c is no longer useful and should be abolished outright, as is acknowledged in Section 1.1 of Draft NUREG-1574 (presently posted on an NRC website at http://ruleforum.llnl.gov/cgi-bin/downloader/ARA_PRULE_lib/657-0003.htm). All of the developments that the Commission cites in its policy analysis—the EPAct amendments to the Federal Power Act, the issuance of Order No. 888, the Hart-Scott-Rodino Amendment—postdate the 1970 amendments to the Atomic Energy Act, and cannot logically support the view that antitrust review was not contemplated in connection with license transfers. It is noteworthy in this regard that the licensing board in *Fermi* reviewed the same legislative history as did the Commission in *Wolf Creek* and came to the exact opposite conclusion. Significantly, the Commission's antitrust authority has always been parallel with other agency and judicial authority, but nuclear power

plants had sufficient economic significance to the electric power industry that *Congress* determined that this Commission should have independent and additional antitrust authority. *Cf. Gulf States Utils. Co. v. FPC*, 411 U.S. 747 (1973) (Federal Power Commission must consider antitrust impacts, even where no express authority is given). Thus, this Commission has recognized the importance of its antitrust functions and that these conditions cannot be subordinated because of Justice Department or other agency remedial authority.

None of the post-1970 changes to the law justifies the NRC's reversals of its past positions and well-established law. With respect to the FERC, its new authority to order provision of transmission service has no specific bearing on antitrust review of license transfers. Congress did not repeal Section 105c when it enacted EAct in 1992, so there is no rational basis for the NRC to invoke EAct in support of a restrictive application of the antitrust review requirement. Likewise, the fact that the Hart-Scott-Rodino amendment to the Clayton Act, 15 U.S.C. § 18a, offers an *opportunity* for antitrust review of assets acquisitions by the DOJ and the FTC does not support elimination of *mandatory* antitrust review of a transfer of an operating license when the Commission concedes that the Atomic Energy act still requires Section 105c review of construction permit transfers in connection with the sale of nearly-completed plants. Moreover, as Principal Deputy Assistant Attorney General A. Douglas Melamed testified before Congress last year, “[t]he authority of the Department of Justice to enforce the antitrust laws with respect to the electric power industry does not sufficiently address the ability of electric utilities to exercise market power that can thwart free competition within the industry.” *Electricity Competition: Market Power, Mergers, and PUHCA: Hearings*

Before the Subcomm. on Energy and Power of the House Committee on Commerce, 106th Cong. (May 6, 1999) (prepared statement posted at <http://www.usdoj.gov/atr/public/testimony/2421.htm>). Accordingly, this Commission’s license conditioning authority under Section 105c remains a very powerful and valuable tool in the federal government’s antitrust arsenal.

Unless and until the Atomic Energy Act is amended, such as via the so-called “Nuclear Regulatory Commission Authorization and Improvements Act” introduced recently by Senator Domenici as S. 2016, the Act must be administered in accordance with the policies that it embodies, and antitrust review is one of these policies. *See, e.g., Environmental Action v. FERC*, 939 F.2d 1057, 1062 (D.C. Cir. 1991) (agency’s action amounting to an administrative repeal of a congressional choice is by definition not in the public interest); *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 233-34 (1994) (agency may not depart from legislative scheme to implement its own policy choices); *AT&T v. FCC*, 978 F.2d 727, 736 (D.C. Cir. 1992) (agency’s desired policy change requires legislative sanction); *FPC v. Texaco Inc.*, 417 U.S. 380, 400-01 (1974) (court will not “overturn congressional assumptions embedded into the framework of regulation established by the [Natural Gas] Act” by approving market-based rates, as this would be “a proper task for the Legislature.”). At present, the strengthening of competition is one of the core purposes of the Atomic Energy Act, and must serve as a guideline in the Commission’s discretionary actions. *Nuclear Data, Inc. v. AEC*, 364 F. Supp. 423 (N.D. Ill. 1973), *citing* section 1(b) of the Act, 42 U.S.C. § 2011(b).

The Commission went too far in *Wolf Creek* when it attempted to infer from an earlier decision the proposition that “absent section 105, the Commission would have no

antitrust authority.” *Wolf Creek*, 49 N.R.C. at 448, discussing *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), CLI-77-13, 5 N.R.C. 1303 (1977). Nothing in that decision calls into question *Midland’s* acceptance of the proposition that federal agencies must take anticompetitive consequences of their actions into account even in the absence of *any* express statutory obligation. 6 N.R.C. at 897 & n.3. Rather, the NRC concluded in *South Texas* that the *completeness* of Section 105 argued against the adoption of somewhat appealing arguments for a liberal construction of Sections 161 and 186 as supplying independent sources of antitrust power. *South Texas*, 6 N.R.C. at 1312-17. The Commission in *South Texas* also stressed the *anticipatory* nature of pre-licensing antitrust review under Section 105c, as distinguished from the Commission’s *ongoing* jurisdiction under Sections 105a and 105b. *Id.* Conducting an *anticipatory* antitrust review under Section 105c in connection with a license transfer would be completely consistent with the analysis in *South Texas*, although, since that question was not then before the Commission, it was left unresolved at that time. 6 N.R.C. at 1318.

As explained in the attached affidavit of David W. Penn, the present transition to competition in the electric utility industry serves to *heighten*, not reduce, the importance of antitrust review. Joel Klein, chief of the Antitrust Division, recently remarked in a speech before the FERC that precisely because conditions are changing rapidly it is difficult for the Justice Department to construct a strong evidentiary case against a merger under the Clayton Act that will stand up in court, a fact which may have the effect of encouraging anticompetitive mergers during a relatively brief “window of opportunity.” *Making the Transition from Regulation to Competition: Thinking About Merger Policy During the Process [of] Electric Power Restructuring* (Jan. 21, 1998)

(posted on the DoJ web site at <http://www.usdoj.gov/atr/public/speeches/1332.htm>). It is difficult, then, to think of a less opportune time for this Commission to reverse its historical practice of performing antitrust reviews in conjunction with transfers of nuclear plant licenses.

Accordingly, APPA respectfully requests that the NRC repudiate its *Wolf Creek* analysis and terminate the instant rulemaking without making any changes to its existing regulations, or that the changes be limited to situations where transfer of an operating

license does not serve to add to the license a new licensee that was not previously subjected to antitrust review.

Respectfully submitted,



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