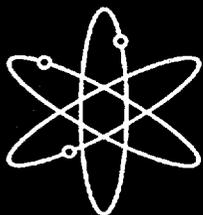
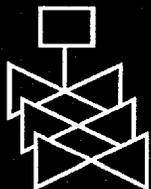


# Standard Review Plan on Antitrust Reviews



Draft Report for Comment



U.S. Nuclear Regulatory Commission  
Office of Nuclear Reactor Regulation  
Washington, DC 20555-0001



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# Standard Review Plan on Antitrust Reviews

Draft Report for Comment

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Manuscript Completed: October 1999  
Date Published: October 1999

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**Division of Regulatory Improvement Programs  
Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001**



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## DRAFT STANDARD REVIEW PLAN FOR ANTITRUST REVIEWS

### ABSTRACT

This standard review plan describes the procedures used by the NRC staff to implement the antitrust review and enforcement provisions in Sections 105 and 186 of the Atomic Energy Act of 1954, as amended (the Act), and replaces NUREG-1574, published in December 1997. These procedures are principally derived from the Commission's Rules and Regulations in 10 CFR 2.101, 2.102, Part 2-Appendix A, Section X; 10 CFR 50.33a, 50.80, 50.90; Appendix L to Part 50; and 10 CFR 52.77. These procedures set forth the steps and criteria the staff uses in antitrust reviews of construction permit (CP) applications, initial operating license (OL) applications, combined construction permit/operating license (COL) applications, and applications for approval of the transfer of CPs, initial OLs, and COLs. In addition, the procedures describe how the staff enforces compliance with antitrust conditions appended to licenses.

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## EXECUTIVE SUMMARY

The NRC's antitrust responsibilities are set forth in Section 105 of the Atomic Energy Act of 1954, as amended (the Act). This Standard Review Plan (SRP) describes the procedures and guidelines used by the NRC staff in carrying out the NRC's antitrust review and enforcement responsibilities under the Act. Although this report may be informative to the general public, it is primarily intended for current and prospective licensees and NRC staff members concerned with antitrust matters.

Section 1 of the SRP identifies the staff responsible for conducting antitrust reviews and provides an overview of staff procedures associated with the Commission's three broad categories of antitrust concern: (1) construction permit (CP)/initial operating license (OL) applications, (2) transfer applications before completion of initial licensing, and (3) enforcement authority over antitrust license conditions.

Section 2 describes the NRC staff's antitrust procedures for reviewing an application for a CP, an initial OL, or a combined construction permit/operating license (COL) and the advisory role played by the Department of Justice (DOJ) at this stage of review. The antitrust staff of the NRC, with the DOJ, conducts a prelicensing review, as required by Section 105c of the Act.

Pursuant to Section 105c, the Attorney General advises the NRC concerning a CP, an initial OL, or a COL application. In the past, the Attorney General has advised either that (1) no hearing was required by the NRC, (2) the NRC hold hearings, or (3) no hearing was necessary because the applicant had agreed to remedy any apparent inconsistencies with the antitrust laws. The Commission shall consider the Attorney General's advice and evidence provided during proceedings concerning such advice and shall make a finding as to whether activities under the license "would create or maintain a situation inconsistent with the antitrust laws." (The criteria and economic theory used in determining whether to grant licenses or impose antitrust license conditions are discussed as they pertain to specific cases that have already been litigated before Commission adjudicatory panels.)

Section 3 addresses the Commission's antitrust review procedures for initial OL applications following a CP antitrust review and for applications for changes in control of licenses. A significant change review using the criteria set forth by the Commission in its *Summer* decision is performed before issuance of a Class 103 initial OL under Part 50. A full antitrust review of an initial OL application is required only if the Director of the Office of Nuclear Reactor Regulation (NRR) determines that significant changes (1) have occurred since the previous antitrust review, (2) are attributable to the applicant, and (3) have anticompetitive implications warranting remedy by the Commission. If a significant change finding is made, a second antitrust review is conducted following the same procedures set forth in Section 105c(1). For license transfers, the Atomic Energy Act does not require or authorize antitrust reviews of post-operating license transfer applications [See *Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station Unit 1)*, CLI-99-19, June 18, 1999]. Therefore, no antitrust review is required or authorized for license transfer applications after issuance of the initial unit OL.

Section 4 discusses the Commission's antitrust enforcement responsibilities. In fulfilling such responsibilities, the Commission may (1) suspend or revoke a license or take other actions deemed necessary in the event a licensee is found by a court of competent jurisdiction, or any Government agency having jurisdiction, to have violated the antitrust laws (Section 105a of the Act); (2) report to the Attorney General any information indicating that a licensee appears to have violated the antitrust laws (Section 105b of the Act); and (3) enforce Commission license conditions (Section 186a of the Act). In addition, 10 CFR 2.206 provides a mechanism for parties to bring formal complaints to the attention of the Director of the Office of NRR when the parties believe that licensees are not complying with license conditions.

In summary, this SRP (1) guides the Commission's antitrust staff in carrying out the Commission's antitrust responsibilities under the Act and (2) explains how antitrust considerations fit into the overall licensing process.

#### ABBREVIATIONS

Act	Atomic Energy Act of 1954, as amended
CFR	<u>Code of Federal Regulations</u>
COL	combined construction permit/operating license
CP	construction permit
DOJ	Department of Justice
DPR	Demonstration Power Reactor
EIA	Energy Information Agency
FERC	Federal Energy Regulatory Commission
FP&L	Florida Power & Light Company
NARUC	National Association of Regulatory Utility Commissioners
NRC	Nuclear Regulatory Commission
NRR	Office of Nuclear Reactor Regulation
OGC	Office of the General Counsel
OL	operating license
RG	regulatory guide
SEC	Securities and Exchange Commission
SRP	Standard Review Plan

## DRAFT STANDARD REVIEW PLAN FOR ANTITRUST REVIEWS

### 1 INTRODUCTION

#### 1.1 Purpose

The Atomic Energy Act of 1954, as amended (the Act), declared that "the development, use, and control of atomic energy shall be directed so as to... strengthen free competition in private enterprise." In 1970, antitrust amendments to Section 105c of the Act were enacted requiring the Commission to conduct antitrust reviews of applications for construction permits (CPs) and initial operating licenses (OLs) under Section 103 of the Act, with certain limitations.

This standard review plan (SRP) describes the procedures by which the NRC staff judges the antitrust implications associated with the construction and initial operation of nuclear power plants. This SRP also outlines procedures for reviewing new joint owners, transfers to new owners or operators before initial operation, and requests for the enforcement of NRC antitrust license conditions.

The NRC has begun to work with the Federal Energy Regulatory Commission (FERC), the Securities and Exchange Commission (SEC), and the Department of Justice (DOJ) to develop methods by which the NRC can minimize the duplication of effort on antitrust issues and still carry out its statutory responsibilities. For the same reason (to minimize duplication), the NRC is also pursuing legislation to eliminate its review mandate.

The Office of Nuclear Reactor Regulation (NRR), with the advice of the Office of the General Counsel (OGC), is responsible for conducting the antitrust reviews.

The Act requires the Commission to conduct antitrust reviews of all applicants for initial OLs under Section 103 that have submitted nuclear power plant CP applications after Section 105 was enacted. Plants that received a CP (or in some cases, had filed an application for a CP) before Section 105 was enacted in December 1970 were grandfathered. The staff has also determined that no antitrust review is required for license renewals, unless there are plant modifications that would constitute a new or a substantially different facility. The NRC does not expect that any plants will have to make such modifications as a prerequisite for approval of license renewal. Thus, antitrust review of the renewal of an OL is unlikely. Also, the Act does not require or authorize antitrust reviews of post-operating license transfer applications, Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station, Unit 1), CLI-99-19, June 18, 1999.

The following power reactors were licensed under Section 104b (DPR [demonstration power reactor] licenses): Arkansas 1, Beaver Valley 1, Big Rock Point, Brown's Ferry 1, 2, & 3, Brunswick 1 & 2, Calvert Cliffs 1 & 2, Cook 1 & 2, Cooper, Crystal River, Diablo Canyon 1 & 2 (which have antitrust license conditions), Dresden 2 & 3, Duane Arnold, FitzPatrick, Fort Calhoun, Ginna, Haddam Neck, Hatch 1, Indian Point 2 & 3, Kewaunee, Maine Yankee, Millstone 1 & 2, Monticello, Nine Mile 1, Oconee 1, 2, & 3, Oyster Creek, Palisades, Peach Bottom 2 & 3, Pilgrim, Point Beach 1 & 2, Prairie Island 1 & 2, Quad Cities 1 & 2, Salem 1 & 2, Sequoyah 1 & 2, Saint Lucie 1, Surry 1 & 2, Three Mile Island 1, Turkey Point 3 & 4, Vermont Yankee, and Zion 1 & 2.

#### 1.2 Standards of Review

Although the electric power industry has changed considerably since Section 105 was enacted and since the Atomic Energy Commission began providing regulatory guidance in the early 1970s, the basic tenets and standards of review have not changed. Nuclear power production applicants and licensees are subject to review in order to determine whether activities under a license will create or maintain a situation inconsistent with the antitrust laws. The standards for reviewing licenses are embodied in the language of the Act itself and clarified in Regulatory Guides (Rgs) 9.1, 9.2, and 9.3 and have been applied to various licensing actions over the years, producing some case law to which applicants and the staff may refer in assessing future antitrust licensing activities before the NRC.

##### 1.2.1 Section 105 of the Act

Section 105 provides that nothing in the Act will relieve any person from abiding by the antitrust laws. Moreover, Section 105c(5) requires the NRC to make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. The Act does not require the NRC to identify activities that constitute violations of the antitrust laws but to examine situations that appear to be "inconsistent" with the antitrust laws.

##### 1.2.2 Regulatory Guide 9.1

Although RG 9.1, "Regulatory Staff Position Statement on Antitrust Matters," was published in 1973, shortly after the enactment of Section 105, the scope and standards of competitive review employed by the regulatory staff remain the same:

the Regulatory staff views activities under the license to embrace the planning, building, and operation of a nuclear facility as well as the integration of such a facility into an

effective bulk power supply system. Meaningful review requires consideration of the applicant's activities to be licensed in the context of the bulk power supply system within which it operates.

In dealing with situations that may warrant NRC remedy,

the staff will seek to avoid determining the specifics of a coordination agreement, the details of unit participation, and the like. In general, reliance will be placed on the exercise of Federal Power Commission [now Federal Energy Regulatory Commission] and State agency jurisdiction regarding the specific terms and conditions of the sale of power, rates for transmission services and such other matters as may be within the scope of their jurisdiction.

### 1.2.3 Regulatory Guide 9.2

RG 9.2, "Information Needed by the AEC Regulatory Staff in Connection With Its Antitrust Review of Construction Permit Applications for Nuclear Power Plants," informs the applicant of what information the Attorney General and the NRC regulatory staff need to determine whether the applicant is abiding by the antitrust laws. This information request applies to both Part 50 and Part 52 license applications.

### 1.2.4 Regulatory Guide 9.3

RG 9.3, "Information Needed by the NRC Regulatory Staff in Connection With Its Antitrust Review of Initial Operating License Applications for Nuclear Power Plants," identifies the types of information that the regulatory staff needs to decide whether a second antitrust review is required at the initial OL stage in connection with Part 50 applications. The staff is not now required to conduct antitrust reviews after issuance of a COL under Part 52.

### 1.2.5 *Summer* Decision

The Commission's decision in *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-14, 13 NRC 862 (1981) (*Summer*) involved an OL review under the Part 50 licensing process and established criteria the staff must follow in assessing anticompetitive implications during licensing reviews after issuance of a CP.

## 1.3 Owners and Operators

Each proposed owner or operator of a nuclear facility licensed under Section 103 of the Act must undergo a full antitrust review in connection with an application for a CP or a COL, and if an affirmative significant changes finding is made under *Summer*, applications for an initial OL under Part 50. Proposed transferees that become owners or operators before initial operation are subject to at least significant changes antitrust reviews. Small electric systems may be exempted from some antitrust review requirements. Facilities that are licensed under Section 104b of the Act (DPR licensees) and that have not had antitrust license conditions added to their licenses are exempt from all further antitrust review.

## 1.4 COL Applications

Generally, for 10 CFR Part 50 applications for new power production facilities, the NRC conducts a prelicensing antitrust review at the CP stage and a significant changes review at the initial OL stage. In 1993, the NRC, under 10 CFR Part 52, introduced an alternative application process combining the CP and initial OL reviews in a single COL review. The COL antitrust review process is now a one-time antitrust review, with no significant changes review after construction but before operation under the COL.

The Part 50 CP review and the Part 52 COL review processes are identical. The Commission sends the Attorney General a copy of the antitrust part of the license application. Within 180 days of transmittal, the Attorney General must advise the Commission as to whether activities under the license would create or maintain a situation inconsistent with the antitrust laws. In connection with such advice in the past, the Attorney General has advised that (1) no antitrust hearing needed to be held, (2) a hearing was necessary, or (3) a hearing was unnecessary if the applicant took certain actions or if certain conditions were attached to the license. In practice, the Commission staff and the DOJ staff confer extensively on these matters.

In RG 9.1, the Commission provided guidance to applicants on how the staff views the various issues regarding access to nuclear power and related services. RG 9.1 describes the staff's criteria for determining whether a situation inconsistent with the antitrust laws may be either created or maintained by an unconditioned license and how the staff would remedy such a situation.

## 1.5 Transfer Reviews

For license transfers, the Act does not require or authorize antitrust reviews of post-operating license transfer applications [see *Kansas Gas & Electric Co., et al.* (Wolf Creek Generating Station, Unit 1), CLI-

99-19, June 18, 1999]. Therefore, no antitrust review is required or authorized for license transfer applications after issuance of the initial unit operating license.

In connection with 10 CFR 50.80 and Section 184 of the Act, the staff has imposed certain antitrust review requirements on applicants requesting approval to acquire an ownership interest in or to become operators of a nuclear power production facility before issuance of an initial OL. The staff uses the *Summer* decision to determine whether a new owner or operator before issuance of an initial OL would warrant a full OL antitrust review. Also, the Act does not require or authorize antitrust reviews of post-operating license transfer applications, [see Kansas Gas & Electric Co., et al.(Wolf Creek Generating Station, Unit 1), CLI-99-19, June 18, 1999].

#### 1.6 Enforcement

Section 105a of the Act gives the Commission the power to suspend or revoke a license or to take other actions if a licensee is found by a court of competent jurisdiction to have violated the antitrust laws. Section 105b requires the Commission to report to the Attorney General any information it has that a utilization of special nuclear material or atomic energy appears to violate the antitrust laws. Under Section 186, the Commission is granted authority to revoke licenses for noncompliance with the terms and conditions of CPs, OLs, and COLs.

## 2 REVIEW OF CONSTRUCTION PERMIT/INITIAL OPERATING LICENSE APPLICATIONS

### 2.1 Overview

By virtue of Section 105c of the Act, NRC, with the advice of the DOJ, must conduct a *prelicensing* antitrust review of applications to construct nuclear power plants. Section 105c requires the Attorney General to provide advice to the Commission, as appropriate, within 180 days after the NRC has docketed and transmitted the application to the Attorney General. The Attorney General's advice assists the Commission in determining whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. In addition to the application, the NRC staff must promptly furnish background information to the Attorney General. The applicant furnishes this information pursuant to Appendix L to 10 CFR Part 50 and 10 CFR Part 52.

After investigating, the Attorney General generally will advise the Commission that (1) no antitrust hearing is necessary, (2) a hearing is necessary, or (3) no hearing is necessary if certain actions are taken by the applicant or if certain conditions are attached to the license. The Attorney General's advice is published in the *Federal Register* and the public is offered an opportunity to request a hearing pursuant to Section 105 of the Act, or to participate in a hearing if the Attorney General recommends one to the Commission.<sup>1</sup>

If a hearing is held, the Commission must make a finding as to whether activities under the license "would create or maintain a situation inconsistent with the antitrust laws" (Section 105c(5), 42 U.S.C. 2135). In making that determination, the Commission must consider the Attorney General's advice and any other information it deems necessary. On the basis of its findings, the Commission has the authority to (1) issue or continue a license, (2) refuse to issue a license, (3) rescind or amend a license, or (4) issue a license with the conditions it deems appropriate.

In the past, when license conditions have been negotiated early in the review process, the Attorney General has advised the NRC that no hearing is necessary if the conditions are made a part of any license issued in connection with the application. However, pursuant to Section 105, if a settlement is not reached and the Attorney General recommends a hearing or an intervention petition is granted, a hearing must be held.

### 2.2 Required Information

#### 2.2.1 10 CFR Information

In accordance with 10 CFR 2.101 and 50.33a of the Commission's rules, the information required by the Attorney General is submitted separately at least 9 months, but not more than 36 months, before any other part of the license application.

The complete information described in Appendix L to 10 CFR Part 50 is generally required only for applicants whose generating capacity exceeds 1,400 MW. Applicants with 1,400 MW or less of generating capacity may file an affidavit setting forth the facts about their generating capacity. Then, unless otherwise requested, applicants with a capacity of 200 to 1,400 MW need only respond to item 9 of Appendix L; applicants with less than 200 MW of capacity (*de minimis* applicants) need not respond to any of the questions unless specifically requested to do so by the staff.

#### 2.2.2 Regulatory Guide 9.2

In addition to the information requested by the Attorney General, the NRC staff collects information pursuant to RG 9.2, "Information Needed by the NRC Staff in Connection With Its Antitrust Review of Construction Permit Applications for Nuclear Power Plants."

#### 2.2.3 Response to Inquiries From the Attorney General

The Attorney General will normally request "third party" information from municipal electric utilities, rural electric cooperatives, and other utilities located in or near the applicant's service area about their competitive relationships with the applicant. The applicant identifies these utilities in response to item 9 of the Appendix L information it provides. Copies of the responses to these inquiries by the Attorney General should be obtained and used as part of the NRC review.

#### 2.2.4 Published Information

To evaluate the applicant's market power, the reviewer will use information from (1) Forms 1 and 12, collected by the FERC, (2) the Energy Information Agency of the Department of Energy, and (3) other sources

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<sup>1</sup> When the Attorney General recommends no hearing or no hearing with conditions, a member of the public or the NRC staff may still request that a hearing be held. If a member of the public petitions for an antitrust hearing, a special three-member board is convened to rule on the petition (cf. 10 CFR Part 2, Appendix A, Section X).

such as the *Directory of Electric Utilities* and *Moody's Public Utility Manual*, thereby obtaining information on the applicant's generating capacity and the transmission lines it owns within its service area and on its plans to increase its generating capacity and add transmission lines. It may also be necessary for the reviewer to survey the smaller electric utilities in the relevant areas by telephone, by mail, or in person, since statistics about such utilities may not be available in public sources.

#### 2.2.5 Field Review

After examining the Appendix L submittal and other relevant information, the reviewer may contact individuals in or near the area the applicant serves to substantiate the responses and documents already examined. The reviewer may interview system planners and other officials affiliated with the applicant. In addition, officials from various municipal, cooperative, and privately owned utilities in or adjoining the applicant's service or planning area may be interviewed.

The interviews will focus on the interutility relationships among the various utilities in order to determine the competitive situation and whether the issuance of a license will create or maintain a situation inconsistent with the antitrust laws. The reviewer will be interested in how the utilities plan for their generation and transmission requirements, how and to what degree they coordinate, and how they plan to integrate the power from the nuclear facility to meet the electrical demands of their customers.

To determine if the applicant has abused its market power, the reviewer will ascertain whether the applicant has attempted to fix prices or exclude competition in its geographic and product market.

#### 2.2.6 Applicant's Service Contracts and Agreements

The reviewer will analyze the applicant's service contracts and agreements for unnecessarily restrictive provisions. Such restrictive provisions, while not limited to the following examples, may (1) limit customers from selling surplus power other than to the applicant, (2) include ratchet provisions (which require a customer to keep paying a higher charge for electric power and energy beyond the amount delivered), (3) limit the sale of power at wholesale to certain customers, or (4) prevent certain electric utilities from membership or participation in planning and coordinating groups. In addition, any pattern of applicant refusals to serve will be evaluated.

### 2.3 Acceptance Review and Notice of Receipt of Antitrust Information

Before the Appendix L information is sent to the Attorney General, the reviewer makes certain that the information is complete and therefore acceptable for docketing. If the application is acceptable, the reviewer will ask the licensing project manager to publish a notice in the *Federal Register* and in trade journals informing the public that the antitrust information has been received and is available for inspection in the NRC Public Document Room in Washington, D.C., and in local public document rooms. The notice invites interested parties to express their views within 60 days of the date of publication. All responses to this notice will be sent to the Attorney General. The reviewer will also notify OGC that the application has been accepted for docketing. The information is then submitted to the Attorney General with a request for antitrust advice.

### 2.4 Staff Review

While the Attorney General's review is in progress, the NRC reviewer should prepare a preliminary analysis. This analysis will be the basis of the staff's position. The staff may support the views of the DOJ on whether a hearing is necessary, or the staff may disagree with the DOJ or independently derive its own position. Similarly, when the DOJ advises that a hearing is needed, the staff will participate in any hearing and will determine independently what issues to press in the hearings.

#### 2.4.1 Criteria for Review

The proper scope of antitrust review depends upon the circumstances of each case. The reviewer should employ market analyses focusing on the area served by the applicant. From the nature of the electric bulk power supply industry itself, the reviewer will have a general idea of the types of products and services supplied by the applicant. Products relevant to each individual case (e.g., baseload power, transmission access, reserve sharing, coordination planning) will vary depending on the extent of competition in the area and the needs of surrounding entities engaged in the bulk power services market.

Depending on the availability of various products and services within the relevant geographic area (i.e., depending on whether there are entry barriers), the reviewer will analyze the geographic market to determine what the relevant market is for review purposes. The relationship of the nuclear facility to the applicant's total system or power pool should be evaluated in every case. The reviewer can then assess whether the applicant has market power and, if so, whether it has abused its market power.

#### 2.4.2 Analysis of Market Power

The reviewer must determine whether the applicant has the market power to withhold access to nuclear power or to abuse its market power in other ways and thereby maintain or create a competitive advantage through use of the nuclear facility. In determining whether the applicant has market power, the reviewer must ascertain how much control the applicant has over certain services in a specific geographic area. Although the reviewer must consider each application on its own merits and take circumstances into account, the reviewer may use the following cases as guides in determining what markets are relevant and should be analyzed:

- *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892 (1977)
- *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646, 13 NRC 1027 (1981)
- *Toledo Edison Co., et al.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-560, 10 NRC 265 (1979)
- *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP-77-24 (5 NRC 804 (1977), and LBP-77-41, 5 NRC 1482 (1977)

In analyzing antitrust implications, the reviewer should consider, among other things, the applicant's relevant market strengths and weaknesses, transmission access and availability, and the system's capacity for change. (Detailed issues for study can be found in *Farley*, LBP-77-24, 5 NRC 804.

#### 2.4.3 Analysis of Anticompetitive Behavior

The fact that an applicant has market power does not necessarily mean that the applicant's conduct is inconsistent with the antitrust laws or that the applicant will abuse its market power. To assess the probability that the applicant will abuse its market power, the reviewer must examine the applicant's behavior in the relevant market and compare it with competitors' behavior in the same market. In other words, the reviewer must determine if it appears reasonably probable that the activities under the license would create or maintain a situation inconsistent with the antitrust laws. Case examples the reviewer can refer to include *Midland* and *Davis-Besse*. In *Midland*, the Appeal Board found that the applicant's refusals to wheel power, or to coordinate with smaller utilities, and its exclusion of utilities from the Michigan power pool to be anticompetitive conduct and abuses of market power. In *Davis-Besse*, practices such as territorial allocations, attempts to fix prices, refusals to deal, and group boycotts were considered practices that increased the applicant's dominance and violated the antitrust laws.

#### 2.4.4 Nexus

Proof of a situation inconsistent with antitrust laws or policies is only one of the prerequisites for relief under Section 105c of the Act. The second is a demonstration that the activities under the license would create or maintain the anticompetitive situation. Thus, a nexus, or connection, between an applicant's activities under the license and the anticompetitive situation is required. The *Farley* and *Davis-Besse* decisions show the reviewer what to consider in ascertaining whether a sufficient nexus exists between the activities under the license and an anticompetitive situation.

#### 2.4.5 Settlement of Antitrust Issues

Section 2.759 of the Commission's Rules of Practice states that the public interest may be served through settlement of particular issues in a proceeding or through settlement of an entire proceeding. Settlement, by way of agreement on antitrust license conditions, may be negotiated at any step in the review process. The negotiations may involve the DOJ, the NRC staff, applicants, and in some cases, members of the public, and smaller electric systems as intervenors or potential intervenors.

Negotiations with the applicant begin before the Attorney General issues an advice letter. The DOJ usually invites the NRC staff to join the negotiations in the beginning and invites other interested parties, such as potential intervenors, later. If the negotiations are successful, the Attorney General will advise the Commission that no hearing is necessary if certain conditions, which have been agreed to by the applicant, are attached to the license. If a settlement is not reached before the Attorney General's advice is rendered, negotiations are encouraged during the prehearing stages and even after the hearing has begun.

### 3 REVIEW OF DIRECT TRANSFER APPLICATIONS SEEKING APPROVAL OF NEW OWNERS OR OPERATORS AND INDIRECT TRANSFER APPLICATIONS BEFORE ISSUANCE OF THE INITIAL OPERATING LICENSE

#### 3.1 Overview

As set forth in the Commission's decision in Wolf Creek, the Act does not require or authorize antitrust reviews of post-OL transfer applications. Therefore, this section addresses antitrust reviews for transfers that may occur before the issuance of a facility's initial OL, but after issuance of the CP (which is the license to be transferred).

If the application involves an indirect transfer of the license through transfer of control of the existing licensee to another entity, where the existing licensee remains the licensee, no antitrust review is conducted since there is no effective application for an OL.

If the application involves a direct transfer of the license, a significant changes review will be conducted for any licensee that was subject to a full antitrust review at the CP stage and which will remain a licensee, and a full antitrust review will be conducted for any proposed transferee that did not previously undergo any antitrust review.

#### 3.2 Types of Transfers and General Antitrust Review Requirements

Transfers may involve (1) purchasing a share or all of a nuclear facility, (2) purchasing a major share of stock in the existing licensee, (3) acquiring or merging with a licensee, (4) corporate restructurings, or (5) the sale/leaseback of a facility. If the transaction is deemed to be an indirect transfer, with no new licensee added to the license, a Section 105 antitrust review (including a significant changes review) is not required or authorized by the Act. In a direct transfer of the entire interest in a facility from the existing CP holder to a new applicant, the staff would perform a full antitrust review of the new applicant (since it did not have a previous CP review). In a direct transfer of a partial interest in the facility from the existing CP holder to a new co-applicant, the staff would apply the *Summer* criteria discussed below on significant changes for the original CP holder to determine whether the original CP holder would undergo a second full review. The new co-applicant would undergo a full antitrust review, since it was not subject to a CP antitrust review.

Generally, applicants that apply to become new owners through the sale and leaseback of a nuclear facility are subject to the same antitrust requirements as any new licensee. However, the Commission has determined that sale-and-leaseback agreements involving new equity investors that have not taken an active role in the control (or future operation) of the nuclear facility involved in the sale do not require an antitrust review [see letter from C.R. Thomas to W.L. Stewart (December 8, 1995), forwarding Amendments 91 to NPF-51 and 74 to NPF-74 for the Palo Verde Nuclear Generating Station Units 2 and 3]. For these situations, the staff has developed a generic license condition. The license condition ensures the passive role of any new equity investor by prohibiting the new owner from exercising control over the lessee, the facility, or the power and energy to be produced by the facility. If the new equity investor takes an active role, the new investor would be subject to an antitrust review like any other new owner.

For review purposes, new operators of licensed power reactors that become licensees through corporate reorganizations, acquisitions, or the formation of nuclear operating service companies are treated by the staff much like new owner licensees. However, if a new operator is in fact only a plant operator and has no identifiable competitive impact on the bulk power services market in which the licensee operates, there is no basis to attribute market power or its abuse, as defined by Section 105, to the new operator.

If a license condition appended in the OL prohibits the new operator (or owner in the case of a sale-and-leaseback agreement) from marketing or brokering power and energy produced by the facility and holds the existing owners responsible and accountable for the actions of the operator, then the staff normally will not conduct an antitrust review.

##### 3.2.1 De Minimis Applicants

An applicant owning less than 200 MW of total generating capacity is considered a *de minimis* applicant. Such applicants are generally too small to exercise any substantial degree of market power. Therefore, they are normally exempted from supplying Appendix L information, as discussed in Section 2 herein, and no notice of receipt of information from a *de minimis* applicant is published in the *Federal Register* (see 3.4). Further, if the *de minimis* applicant is a subsequent applicant, the DOJ is simply notified about the existence of an additional *de minimis* owner, and antitrust advice about the applicant is not requested from the Attorney General unless the staff has information suggesting that such advice should be sought. This NRC staff procedure does not preempt the Attorney General from offering advice or requesting additional information.

#### 3.3 Required Information for Transfer Applications

All applicants for construction permits or initial operating licenses pursuant to 10 CFR 50.80 are to submit the information required by 10 CFR 50.33a. In making any significant changes antitrust determination, the

staff shall make use of all available public information and any records from other related proceedings. The information required by RG 9.3, "Information Needed for an Antitrust Review of Initial Operating License Applications for Nuclear Power Plants," concerns changes in licensee activities and will be considered by the staff.

### 3.3.1 Federal Energy Regulatory Commission Files

The docket files at the FERC generally contain information about the applicant's activities in the bulk power services market and relative materials should be reviewed by the staff as appropriate.

### 3.3.2 Field Investigation

In addition to obtaining information from the applicant, the NRC staff may contact selected nonapplicants concerning competitive relationships with the applicant.

### 3.4 Notice of Receipt of Antitrust Information

The staff will publish in the *Federal Register* notice of receipt of antitrust information or of the proposed transfer application when adequate antitrust information is included with the application. The notice shall provide for a period of public comment of 30 days from publication of the notice in the *Federal Register*.

To be accepted by the staff, public comments must address the antitrust aspects of the application. The staff uses the comments to determine whether the proposed transfer may create or maintain a situation inconsistent with the antitrust laws.

### 3.5 Significant Changes Analyses Involving Direct Transfers of Partial Interests

In reviewing direct transfers of partial interests in a facility, the staff will consider the criteria established by the Commission in its *Summer* decision (CLI-81-14, 13 NRC 862) to the extent applicable. The staff must follow these criteria at the initial OL stage when deciding whether there have been significant changes in the licensee's activities or proposed activities since issuance of the CP and the completion of an antitrust review at the CP stage. If so, a second full antitrust review is undertaken at the initial OL stage.

The issues addressed in *Summer* concerned activities of the *Summer* licensee since the completion of the *Summer* antitrust CP review. To initiate a full-scale antitrust review in accordance with the procedures set forth in Section 2 herein, the activities under scrutiny by the staff must (1) have occurred since the previous antitrust review of the licensee, (2) be reasonably attributable to the licensee, and (3) have antitrust implications that would likely warrant some Commission remedy. These changes must be reasonably apparent and must be discernible from the applicant's submittals, from the staff's investigations, or from papers that have been filed.

#### 3.5.1 Draft Significant Changes Analysis

The reviewer, along with OGC, prepares a written draft significant changes analysis of the competitive situation. This analysis will consider, among other things, the extent to which potential changes in the relevant markets are attributable to the existing CP holder that previously was subject to an antitrust review, the antitrust implications of the changes, and whether they would likely warrant a Commission remedy.

This draft significant changes analysis is then forwarded to the DOJ for review and comment. Although there is no statutory limitation on the period in which DOJ's comments may be provided to the staff (such as during the CP review phase), the reviewer should try to ensure that the DOJ renders its advice in a timely manner. Upon receipt and review of DOJ's comments, a final significant changes antitrust finding is prepared for signature by the Director of NRR.

#### 3.5.2 Director's Finding

If the significant changes antitrust analysis by the Director of NRR results in a Finding of Significant Change, the staff will forward the finding to the Attorney General and request advice as to whether an antitrust hearing should be held as a result of the finding. When the staff receives the Attorney General's advice, the staff will request publication of the Attorney General's advice in the *Federal Register* to give interested parties an opportunity to intervene or request a hearing.

If the Director of NRR makes a Finding of No Significant Changes, the finding is published in the *Federal Register* with a statement that any request for reevaluation of the finding shall be submitted within 30 days of the publication of the notice. Copies of the finding are also sent to the Commission, the applicant, and any person who submitted comments in response to the notice of receipt of antitrust information in the *Federal Register*. Normally, if no requests for reevaluation are received within the 30-day period, the finding becomes the NRC's final determination. Requests for reevaluation of the Finding of No Significant Changes may be accepted after the date when the Director's Finding becomes final but

before the transfer application is approved only if they contain new facts or information about events of antitrust significance that have occurred since the Director's Finding or information that could not reasonably have been submitted before then.

The staff will review all requests for reevaluation and make a determination about whether the events described in the request represent new information that would affect the initial Director's Finding. If the staff finds that the request contains new information that was not considered in the initial Director's Finding, the Director will reevaluate the initial finding.

If, after reevaluating the finding, the staff determines that there has been no significant change, the Director of NRR will deny the request and publish a notice reaffirming the Finding of No Significant Changes in the *Federal Register*. Copies of the reaffirmation finding are also sent to the requestor, the applicant, and the Commission. The finding becomes the final NRC decision 30 days after publication in the *Federal Register* unless the Commission exercises its right to conduct a *sua sponte* review.

## 4 ANTITRUST ENFORCEMENT

### 4.1 Overview

Section 105 of the Act assigns to the NRC the responsibility for ensuring that applicants and licensees of nuclear facilities conduct their activities in conformance with the antitrust laws. The authority to enforce this responsibility includes the ability or duty to (1) suspend or revoke a license or take other actions deemed necessary if a licensee is found by a court of competent jurisdiction, or any Government agency having jurisdiction, to have violated the antitrust laws (Section 105a of the Act); (2) report to the Attorney General any information indicating that a licensee appears to have violated the antitrust laws (Section 105b of the Act); (3) enforce Commission license conditions (Sections 161 and 186a of the Act); and (4) impose civil penalties (Section 234 of the Act). In addition, 10 CFR 2.206 provides a formal mechanism for any person to request the Director of NRR to take appropriate enforcement action on antitrust matters.

### 4.2 Enforcement Under Sections 105a, 105b, and 186a of the Act

#### 4.2.1 Section 105a

Section 105a identifies relevant statutes and provides for appropriate enforcement. Only one Section 105a enforcement case has come before the Commission. On May 31, 1978, counsel for several Florida cities submitted a petition for a Section 105c hearing and advised the Commission of a decision by the Court of Appeals in the Fifth Circuit [*Gainesville Utilities Department v. Florida Power & Light Company*, 573 F. 2d 292, 294 (5th Circ.), cert denied, 439 U.S. 966 (1978)], which held that Florida Power & Light Company (FP&L) had conspired to divide the market for electric service in violation of Section 1 of the Sherman Act. The Court of Appeals remanded the case to the District Court for further findings and determination of appropriate relief. The petition for a Section 105a proceeding was withdrawn after the cities and FP&L settled their differences.

To date, the Commission has not delegated authority to the staff or to licensing boards to take action with respect to Section 105a matters. Thus, for the present, the staff has an advisory role, calling the Commission's attention to possible Section 105a situations. In performing this role, the staff treats the phrase "in the conduct of the licensed activity" as synonymous with the phrase cited in Section 105c, "activities under the license" (described in Section 2 herein).

Both phrases encompass the planning, building, and operation of nuclear power reactors and their integration in effective bulk power supply systems.

#### 4.2.2 Section 105b

Section 105b requires the Commission to report apparent violations to the Attorney General. Only one Section 105b case has come before the Commission. By motion of August 6, 1976, a group of Florida cities petitioned under Section 186a of the Act for an antitrust hearing with respect to FP&L's Turkey Point Units 3 and 4 and St. Lucie Unit 1 nuclear power plants. The Atomic Safety and Licensing Board denied the cities' petition. In *Florida Power & Light Co.* (St. Lucie Plant Unit 1, Turkey Point Plant, Units 3 and 4), ALAB-428, 6 NRC 221 (1977), the Appeal Board affirmed the decision of the Licensing Board, and the Commission declined to review the Appeal Board's decision. [*Florida Power & Light Co.*, CLI-77-26, 6 NRC 538 (1977)]. However, the Commission ordered the staff to promptly refer to the Attorney General the allegations of the Florida cities, as well as any related information it had suggesting that the licensee had violated or tended to violate the antitrust laws in utilizing special nuclear material or atomic energy. In accordance with this Order, the staff will, in similar situations in the future, refer such matters, with an account of the circumstances, to the Attorney General, emphasizing that the staff has not determined whether the actions of the licensee (or applicant) are inconsistent with the antitrust laws.

#### 4.2.3 Section 186a

Section 186a gives the Commission authority to revoke licenses. In its Memorandum and Order of June 15, 1977, concerning the South Texas Project, the Commission referred to Section 186 of the Act as follows:

Section 186 gives the Commission authority to initiate a post-licensing enforcement proceeding in the event of violation of a specific antitrust licensing condition. For like reasons we would not be limited to mere reference to the Attorney General if a license applicant has falsified pertinent antitrust review information or had otherwise obtained an unconditioned license by some sort of fraud or concealment...

[*Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303 (1977).]

No further guidelines have been established for enforcing antitrust license conditions. The staff follows the actual wording of the license conditions in enforcing such conditions. If a license has been obtained on the basis of false information, the staff will take appropriate action to correct the situation; to make restoration (as far as possible) to those that may have been harmed because of the false information; and, when appropriate, to impose civil penalties on the licensee or to issue orders to modify, suspend, or revoke the license in question.

### 4.3 Enforcement of Antitrust License Conditions

#### 4.3.1 Section 10 CFR 2.206 Petitions

A petition can be submitted in accordance with 10 CFR 2.206. The petitioner must specify the action requested and set forth the facts or conditions that constitute the basis for the request. Upon receipt of the petition, the reviewer will coordinate with OGC in preparing the following within 30 days:

- (1) a *Federal Register* notice to be signed by the Director of NRR;
- (2) a written acknowledgment to the petitioner, including a copy of the *Federal Register* notice;
- (3) a letter to the licensee or licensees against which the petition is filed, including a copy of the petition and a copy of the *Federal Register* notice; and
- (4) a letter to the Attorney General, including a copy of the petition and a copy of the *Federal Register* notice.

In addition, the reviewer will begin an investigation of the petition. The licensee may be required to respond to the petition pursuant to 10 CFR 50.54(f) and Section 182 of the Act. In response to the petition, the licensee may also voluntarily submit additional information that the reviewer should consider. The Director of NRR will inform the petitioner within a reasonable time whether the petition is granted or denied.

#### 4.3.2 Compliance Investigations

Most compliance activities center on whether the applicant has refused in some way to share the output of its nuclear facility and/or to provide certain types of power supply services prescribed by the antitrust license conditions.

A reviewer conducting a Section 2.206 compliance investigation ordinarily uses written questionnaires, telephone contacts, and field surveys to determine the following:

- (1) which antitrust laws (for Sections 105a or 105b matters) and which antitrust conditions are involved;
- (2) the extent to which the alleged violation depends on the interpretation of the antitrust laws or antitrust license conditions;
- (3) the effect of and the reasons for the alleged violation;
- (4) whether the alleged violation was willful; and
- (5) what remedial actions must be taken.

On the basis of the investigation, the staff will recommend (1) that the complaint or allegation has merit, (2) that a Notice of Violation be issued, or (3) that negotiations be pursued, followed by a Notice of Violation if the negotiations are unsuccessful.

#### 4.3.3 Denial of Petition

If the staff investigation determines that a petition received under 10 CFR 2.206 is without merit, a Director's Decision and a *Federal Register* notice to that effect will be prepared and issued by the Director of NRR. The Office of the Secretary of the Commission, the licensee against which the complaint was lodged, and the petitioner will be provided a copy of the Director's Decision. The Director's Decision is subject to the Commission's review on its own motion under 10 CFR 2.206(c).

#### 4.3.4 Notice of Violation

If the staff's investigation determines that a violation has occurred, a Notice of Violation and a Director's Decision in accordance with 10 CFR 2.201 will be prepared by the reviewer in conjunction with OGC and issued by the Director of NRR. The notice and decision will be sent to the licensee and the petitioner. Imposition of civil penalties may be considered in accordance with 10 CFR 2.205 and Section 234 of the Act.

#### The Response

The licensee's response to the Notice of Violation determines the course of the subsequent proceedings. If the licensee agrees to take the necessary steps to comply with its license requirements, the staff will ensure that the compliance steps are carried out expeditiously. If the licensee does not agree to take the steps the staff considers necessary to resolve the matter, or if the licensee unreasonably delays implementing such actions, the staff may move to issue an Order to modify, suspend, or revoke the license. The staff may also impose civil penalties in accordance with 10 CFR 2.205 and Section 234 of the Act.

#### 4.3.5 Order To Modify, Suspend, or Revoke a License

An Order is prepared by the reviewer in conjunction with OGC, and issued by the Director of NRR in accordance with 10 CFR 2.202. The Order states the following:

- (1) the violations with which the licensee is charged or other conditions warranting an Order,
- (2) the action proposed by the Order, and
- (3) the licensee's requirements and procedural rights in responding to the Order.

The Order is published in the *Federal Register*, and copies are mailed to the licensee and other affected parties.

#### The Response

If the licensee demands a hearing, the hearing process is initiated.<sup>2</sup> If the licensee consents to the entry of an Order in substantially the form proposed in the Order, the Order is issued by the Director of NRR. If the licensee consents to the Order To Modify a License or does not respond within the time allotted, the license is amended as indicated. Thereafter, the reviewer simply monitors the licensee's compliance with the Order.

#### 4.3.6 Civil Penalties

The Director of NRR can propose imposition of a civil penalty by issuing a Notice of Violation and Proposed Imposition of Civil Penalty prepared by the reviewer in consultation with OGC, as required by 10 CFR 2.205. The Notice of Violation specifies the date (or dates) and the nature of the alleged act or omission with which the licensee is charged; describes the circumstances; states the facts; cites the particular provision or provisions of the Act, license, regulations, or Order allegedly violated; and gives the amount of each penalty the Director of NRR proposes to impose. Within the period prescribed in the notice, the licensee may either pay the proposed penalty or answer the notice. If the licensee requests remission or mitigation of the proposed penalty, the staff will consider the reasons proffered and will either withdraw the proposed penalty or issue an Order imposing the civil penalty as originally proposed or in a mitigated amount. If the licensee fails to respond to the notice, the reviewer will prepare and the Director of NRR will issue an Order imposing the civil penalty as proposed. The licensee may pay the penalty or may request a hearing on the Order imposing a civil penalty within the period prescribed in the Order.

If the licensee fails to pay the penalty or demands a hearing within the prescribed period, the Commission may refer the matter to the Attorney General for collection. Continuing violations could subject the licensee to further civil penalties or to other sanctions, such as suspension or revocation of its license.

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<sup>2</sup> The hearing could result in a decision by the Atomic Safety and Licensing Board or an Administrative Law Judge to absolve the licensee of charges or to order the licensee to take the actions prescribed. An Order is appealable.

**BIBLIOGRAPHIC DATA SHEET**

(See instructions on the reverse)

1. REPORT NUMBER  
(Assigned by NRC, Add Vol., Supp., Rev.,  
and Addendum Numbers, if any.)

NUREG-1574, Rev. 1

2. TITLE AND SUBTITLE

Standard Review Plan on Antitrust Reviews

Draft Report for Comment

3. DATE REPORT PUBLISHED

MONTH	YEAR
October	1999

4. FIN OR GRANT NUMBER

5. AUTHOR(S)

M.J. Davis

6. TYPE OF REPORT

Technical

7. PERIOD COVERED (Inclusive Dates)

8. PERFORMING ORGANIZATION - NAME AND ADDRESS (If NRC, provide Division, Office or Region, U.S. Nuclear Regulatory Commission, and mailing address; if contractor, provide name and mailing address.)

Division of Regulatory Improvement Programs  
Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

9. SPONSORING ORGANIZATION - NAME AND ADDRESS (If NRC, type "Same as above"; if contractor, provide NRC Division, Office or Region, U.S. Nuclear Regulatory Commission, and mailing address.)

Same as 8. above.

10. SUPPLEMENTARY NOTES

11. ABSTRACT (200 words or less)

The Nuclear Regulatory Commission is issuing this draft revision to the standard review plan on antitrust reviews to describe the procedure used to implement the antitrust review and enforcement process prescribed in Sections 105 and 186 of the Atomic Energy Act of 1954, as amended. This draft SRP revision reflects the recent policy change to discontinue antitrust reviews of license transfer applications.

12. KEY WORDS/DESCRIPTORS (List words or phrases that will assist researchers in locating the report.)

Standard Review Plan  
Antitrust

13. AVAILABILITY STATEMENT

unlimited

14. SECURITY CLASSIFICATION

(This Page)

unclassified

(This Report)

unclassified

15. NUMBER OF PAGES

16. PRICE



Federal Recycling Program

**NUREG-1574, Rev. 1**  
**DRAFT**

**STANDARD REVIEW PLAN ON ANTITRUST REVIEWS**

**OCTOBER 1999**

**UNITED STATES**  
**NUCLEAR REGULATORY COMMISSION**  
WASHINGTON, DC 20555-0001

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