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U.S. ATOMIC ENERGY COMMISSION

REGULATORY GUIDE

DIRECTORATE OF REGULATORY STANDARDS

REGULATORY GUIDE 9.1

REGULATORY STAFF POSITION STATEMENT ON ANTITRUST MATTERS

A. INTRODUCTION

In December of 1970 Congress passed an amendment to the Atomic Energy Act which required prelicensing antitrust review by the Commission, in conjunction with the Department of Justice, of commercial nuclear power plant license applications.[1] With regard to those applications for which an antitrust hearing is required, the Atomic Energy Commission, with the advice of the Department of Justice, is directed to "make a finding as to whether activities under the license would create or maintain a situation inconsistent with the antitrust laws...." Since the passage of this statute, 48 applications filed with the AEC have either undergone antitrust review or are currently being reviewed. In the next two years at least 35 additional applications are expected. To facilitate review of these applications the Commission has issued Appendix L to 10 CFR Part 50 relating to information requested by the Attorney General.

B. DISCUSSION

To promote orderly and timely consideration of relevant issues in any administrative proceeding involving antitrust questions, the Regulatory staff is issuing this guide setting forth its present position with respect to section 105c as it relates to nuclear power plant license applications.

This guide seeks to clarify points of issue which are relevant to all prospective applications. The first issue relates to the appropriate scope of review under section 105c. The second relates to activities or practices which may be considered inconsistent with the antitrust laws as denoted in section 105a. In addition to announcing views on these issues, the Regulatory staff wishes to identify the frame of reference within which proposed remedies are to be designed when dealing with situations inconsistent with the antitrust laws. Key issues are addressed so that the industry in its planning may take into consideration the views of the staff as expressed in this regulatory guide. It is recognized that this guide will not resolve all antitrust issues which may arise in connection with an application, particularly those which do not involve a claimed denial of access to the nuclear unit. However, until additional experience is gained in the regulatory process, such other antitrust issues, as they may arise, will be addressed on a case-by-case basis.

C. STANDARDS OF REVIEW

Activities Under the License

With regard to scope, 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. Economically, a nuclear generating facility cannot be installed as an isolated producing unit. It is practical only as a part of an integrated and coordinated bulk power supply system. Economic utilization of nuclear power requires a ready and continuous market for the unit's output. The lumpiness of additions to generating capacity can create temporary conditions of surplus. Access to reserves is needed for backup when the unit is out of service. For some, coordination to facilitate the introduction of nuclear generation capacity has been implemented in the context of formal power pools; for others, it has been done in the context of bilateral agreements. In effect, direct access to nuclear generation is available only to those who have access to reserve sharing, intersystem coordination, and power exchange arrangements. "Activities under the license" is not meaningful, from an

[1] Section 105c of the Atomic Energy Act of 1954, 68 Stat. 938, 42 USC 2135 as amended by P.L. 91-560 (Dec. 19, 1970, 84 Stat. 1473, 42 USC 2135).

USAEC REGULATORY GUIDES

Regulatory Guides are issued to describe and make available to the public methods acceptable to the AEC Regulatory staff of implementing specific parts of the Commission's regulations, to delineate techniques used by the staff in evaluating specific problems or postulated accidents, or to provide guidance to applicants. Regulatory Guides are not substitutes for regulations and compliance with them is not required. Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission.

Published guides will be revised periodically, as appropriate, to accommodate comments and to reflect new information or experience.

Copies of published guides may be obtained by request indicating the divisions desired to the U.S. Atomic Energy Commission, Washington, D.C. 20545, Attention: Director of Regulatory Standards. Comments and suggestions for improvements in these guides are encouraged and should be sent to the Secretary of the Commission, U.S. Atomic Energy Commission, Washington, D.C. 20545, Attention: Chief, Public Proceedings Staff.

The guides are issued in the following ten broad divisions:

1. Power Reactors
2. Research and Test Reactors
3. Fuels and Materials Facilities
4. Environmental and Siting
5. Materials and Plant Protection
6. Products
7. Transportation
8. Occupational Health
9. Antitrust Review
10. General

antitrust standpoint, if attention is focused solely on the nuclear facility. 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.

Standard of Liability

A nuclear license applicant should not refuse to grant reasonable access to the nuclear facility to smaller electric utilities which might not otherwise have the opportunity to participate in the development of nuclear power. Access should be by joint ownership, unit purchase or other mutually acceptable arrangements. An applicant should provide in association with access to the nuclear plant, transmission services and opportunities to coordinate, pool and share reserves. Without such ancillary arrangements, access to the nuclear facility may well be neither meaningful nor effective. Such ancillary arrangements, including transmission services and reserve sharing practices used by electric utilities in the area, will generally be acceptable to the staff provided they do not embody restrictive provisions and do not place an unreasonable and disproportionate burden on smaller electric utilities. Where applicants are restrictive in granting access to the nuclear unit or where types of access are differentiated, an applicant will have the burden of justifying its conduct. In addition, given the fact that applicants obtain benefits in connection with the nuclear facility by exchanging power with some, coordinating with some, providing transmission services for some and engaging in pooling and system reserve sharing with some, applicants should be prepared to deal with smaller electric utilities on a basis that will provide similar results for smaller electric utilities. It is the position of the Regulatory staff that unreasonable restrictions and/or apparent discriminations are symptomatic of the situation which is inconsistent with the antitrust laws or the policies underlying those laws. The continuance of such practices in connection with access to the nuclear facility would maintain such a situation. In short, the Regulatory staff seeks to promote access to the nuclear facility in its fullest sense where such access is technically feasible. In that regard the burden will be on the applicant to demonstrate what technical restrictions, if any, are appropriate and in the public interest.

Remedies

Alleviation of undesirable antitrust situations in connection with the applicant's activities under the license requires affirmative dealing between applicant and various potentially disadvantaged parties. Such dealing would result not only in unit access but also system coordination so that all utilities have opportunities to share in the development of nuclear bulk power supply. In promoting these ends the Regulatory staff will seek, where necessary, to develop general rather than specific remedies. 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 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.

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Although this represents the basic Regulatory staff position as it seeks to fulfill its responsibilities under section 105c of the Atomic Energy Act, specific circumstances may require departures in individual cases. In such instances, the staff will propose such additional action as it deems necessary.