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PROPOSED RULE PR-2,50(43FR 17830)

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

Attention: Docketing and Service Branch

Re: Proposed Amendments to 10 C.F.R. §§ 2.101, 50.33a

Dear Sir:

On April 26, 1978, the Commission published for comment proposed amendments to 10 C.F.R. §§ 2.101 and 50.33a. 43 Fed. Reg. 17,830 (1978). Those amendments would reduce, if not eliminate, the information required to be submitted by certain applicants for construction permits and operating licenses incident to the Attorney General's review of such applications as required by § 105 of the Atomic Energy Act. As attorneys for several companies affected by the proposed amendments, we submit herewith the following comments.

In general, we endorse the Commission's effort to reduce the scope of the antitrust information that must be submitted to the Commission by smaller size entities. This step is especially timely in light of recent decisions that have significantly enlarged the Commission's antitrust jurisdiction.

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As the Commission is aware, multiple ownership of nuclear generating units is becoming increasingly common. In many instances, ownership arrangements are structured so that smaller entities, who may own only a minor interest in a facility, are entitled to a corresponding small percentage of the unit's output. Generally, these minority owners have no responsibility for the construction or operation of the plant. The Appeal Board's recent decision in Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC ____ (February 16, 1978) (slip op. at 36-42) made clear, however, that such minority participants -- even though merely co-owners of the facility -- nonetheless must be applicants for licenses.1/ As applicants, these minority ownership entities must submit the antitrust information required pursuant to 10 C.F.R. § 50.33a and 10 C.F.R. Part 50, Appendix L.

This expansion of antitrust jurisdiction was furthered by the Licensing Board's decision in The Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), LBP-78-____, 7 NRC ____ (April 7, 1978) (slip op. at 3-7), aff'd, ALAB-475, 7 NRC ___ (May 9, 1978) (slip op. at 5, n. 7) which upheld the appropriateness of an antitrust review in connection with an application to amend a previously issued construction permit to reflect the minority ownership interests of two generation and transmission cooperatives in the facility. Despite the imminence of an operating license proceeding, the Licensing Board considered that as to the cooperatives, the construction permit amendment application "constitute[d] their 'initial application for a construction permit'" justifying an antitrust review. Slip op. at 6 (emphasis in original). Thus, in the wake of Marble Hill and Fermi 2, smaller entities who will own portions of nuclear facilities from the outset, or who subsequently purchase such interests, will be subjected to antitrust scrutiny.

As the Commission recognized in its notice accompanying the proposed amendments, owners of fractional interests in nuclear power plants are often small entities lacking "a significant competitive impact in their area." 43 Fed. Reg. 17,830. We submit that such entities should be completely exempt from antitrust review rather than merely from the

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1/ This decision effectively overruled a prior Licensing Board opinion to the contrary. Omaha Public Power District (Ft. Calhoun Station, Unit 2), LBP-77-5, 5 NRC 437 (1977). A petition to review ALAB-459 was denied by the Commission.

burdens of submitting Appendix L information.

First, the Commission clearly has the power to develop such an exemption. Section 105(c)(7) of the Atomic Energy Act, 42 U.S.C. § 2135(c)(7)(Supp. V 1975) provides that

> The Commission, with the approval of the Attorney General, may except from any of the requirements of this subsection [requiring the antitrust review] such classes or types of licenses as the Commission may determine would not significantly affect the applicant's activities under the antitrust laws as specified in subsection [105a]. . . .

The Commission's notice implies that generally, there will be no antitrust issues whatsoever for entities other than the 200 largest utilities in the United States, and only a low probability of such an issue arising for entities other than the 100 largest utilities. Similar size-defined thresholds could be established to exempt such entities from any antitrust review altogether.

Second, antitrust review is required only for "application[s] for a license to construct or operate" a facility. Atomic Energy Act, § 105(c)(2) (emphasis added). However, many small entities have undertaken no construction or operation responsibility for the unit in question. As to such entities, the activity which is licensed by the Commission is mere ownership. See Atomic Energy Act, § 101; Marble Hill, supra. Thus, an application from such entity could well be construed as one seeking authorization for ownership -- not construction or operation -- and therefore outside the scope of § 105(c)(2).

Finally, we submit that developing a complete exemption from review for such de minimis entities is a more logical approach than simply eliminating the requirement for submitting information. Without the information required by Appendix L, there is really nothing for the Attorney General to review. Thus, the proposed rule would -- quite properly -- eliminate review of such small entities as a practical matter. The Commission should accomplish that end directly rather than indirectly.

Whether the Commission establishes an exemption from review or merely an exemption from filing, the exemption

should be based on the size of the entity, not the size of the interest to be purchased. The Commission has apparently selected the 20 and 80 MW(e) purchase thresholds because of their relationship to the size of the entity involved. We submit that such an approach is at best indirect. Instead, we urge that the Commission establish thresholds based directly on a more relevant diagnostic factor -- the size of the entity making the purchase. The Commission recognizes that entities below a certain size "generally would have a negligible effect on competition." 43 Fed. Reg. 17,830. The size-of-the-entity approach focuses at the outset on this concern and, we suggest, is more useful in determining monopoly power.

Under the proposed regulation, an entity with no present generating capacity seeking to own eight percent of a new 1200 MW(e) nuclear plant (96 MW(e)) would be subject to full antitrust review. On the other hand, a larger entity presently owning 96 MW(e) of generating capacity could purchase 18 MW(e) of a new nuclear unit and be exempt from submitting any Appendix L information. These examples confirm that the scope of antitrust review should be tailored to the size of the applicant rather than the amount of nuclear capacity to be acquired.

The Commission has indicated that its purpose is wholly to exempt from the filing requirements all but the Nation's 200 largest utilities and largely to exempt all but the 100 largest utilities. We understand that each of the 200 largest utilities has installed generating capacity in excess of 244 MW(e), and that each of the 100 largest utilities has installed generating capacity in excess of 1,430 MW(e).2/ We therefore suggest that proposed § 50.33a (a) (1)-(3) be revised to refer to "an applicant for a construction permit for a nuclear power reactor, whose installed generating capacity at the time the application is

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2/ At our request, the Division of Coal and Power Statistics, Energy Information Administration, Department of Energy, prepared a document entitled "Report of Electric Utility Capacity". This report ranked each electric utility in the United States by installed capacity from 1 (TVA--27,021.4 MW(e)) to 1,022 (Pinedale Power & Light Co.--.06 MW(e)) and included federal and state entities, investor-owned utilities, cooperatives, power districts, and municipals. Specifically, the report indicates that the 200th largest electric utility is the City of Burbank (capacity of 244.3 MW(e)) and that the 100th largest utility is The Montana Power Co. (capacity of 1,430.4 MW(e)).

filed does not exceed 200 MW(e)"3/ to define either an exemption from filing or, preferably, an exemption from review altogether. As the Commission has proposed, limited exemptions could apply to those approximately 100 entities "whose installed generating capacity at the time of application exceeds 200 MW(e), but does not exceed 1,400 MW(e)."4/

Finally, because the Commission is proposing changes in 10 C.F.R. § 50.33a, which is referred to in Appendix L, minor drafting changes in the latter may be necessary. For example, should the Commission adopt § 50.33a as proposed, then the definition of "applicant" in Appendix L, sec. I, ¶ 1 should be amended to recognize that "[w]here application is made by two or more electric utilities not under common ownership or control, each utility, subject to the applicable exclusions contained in § 50.33a, should set forth separate responses to each item herein." (Additional language underscored.)

Respectfully submitted,

Le Boeuf, Lamb, Leiby & MacRae

3/ We propose the 200 MW(e) for ease in computation. According to the Report of Electric Utility Capacity, this threshold would actually include the 213 largest utilities and terminate with Yadkin, Inc. (capacity of 201 MW(e)).

4/ As was the case with the 200 MW(e) threshold, we propose the 1,400 MW(e) limit for ease in computation. According to the Report of Electric Utility Capacity, this latter threshold would actually include the 102 largest utilities and terminate with the City of Austin, Texas (capacity of 1,405 MW(e)).