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**NRC ANTITRUST REVIEW AUTHORITY AS APPLICABLE TO
A PEBBLE BED MODULAR REACTOR (PBMR) FACILITY**

I. ISSUE:

Section 105 of the Atomic Energy Act (AEA) requires that the NRC conduct an antitrust review, seek the advice of the Attorney General, and if necessary conduct a hearing on antitrust matters in connection with applications for a construction permit (CP) or combined operating license (COL) for a nuclear power reactor. NRC's implementing regulations in 10 CFR § 50.33a provide that applicants for such licenses are required to submit to the NRC detailed transmission, distribution, and business planning information that will allow the Attorney General of the United States and NRC staff to conduct an antitrust review of the proposed project.

Pursuant to Section 105(c)(7) of the AEA, NRC has the authority, with the approval of the Attorney General, to determine that issuance of certain classes of licenses would not significantly affect the licensees' activities under the antitrust laws, and therefore except such applicants from NRC antitrust review under Section 105. Recognizing the current status of competition in the electric utility industry and the fundamental competitive realities surrounding the operation of any new merchant nuclear project, the NRC should make a determination under Section 105(c)(7) that applicants that will operate their plants as merchant plants are excepted from NRC antitrust review.

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II. EXELON'S PROPOSAL:

- 1) The NRC should initiate a proceeding, and seek the approval of the Attorney General, to determine that the issuance of licenses to merchant plant applicants will not significantly affect such applicants' activities under the antitrust laws. NRC should make a determination pursuant to Section 105(c)(7) that merchant plant applicants are excepted from antitrust review. Any such determination should also provide appropriate criteria for determining whether an applicant qualifies as a merchant plant operator.
- 2) The NRC should also initiate a rulemaking to clarify that its rules do not require that a merchant plant applicant submit the antitrust information identified in 10 CFR § 50.33a. The rule should state that an applicant need only provide information sufficient for the NRC to make a determination as to whether the applicant qualifies as a member of the excepted class. This model is consistent with the approach pursued by NRC when it made its determination that it would not conduct antitrust reviews in connection with license transfers.¹

III. ANALYSIS:

Section 105, the "Antitrust Provisions" of the AEA, requires NRC to conduct an antitrust review in consultation with the Attorney General, prior to issuing a license under Section 103 for a nuclear generating facility. In particular, Section 105 of the AEA requires the NRC to determine whether activities under the license would create or maintain a situation "inconsistent with the antitrust laws." NRC has traditionally

exercised this authority by conducting antitrust reviews and, if necessary, hearings. In some instances, these reviews and hearings have resulted in NRC imposing various antitrust conditions in the license. These conditions have often involved access to transmission.

The regulations implementing Section 105 are contained in 10 CFR Part 50. Section 50.33a, "Information requested by the Attorney General for antitrust review," states that nine months prior to submitting its application, an applicant for a construction permit for a nuclear power reactor shall submit the information requested by the Attorney General as described in Appendix L, if the applicant has more than 200 MWe of generating capacity. Appendix L, Section II, "Required Information," lists 20 separate issues that must be addressed by the applicant in the antitrust submittal.

The antitrust review provisions of Section 105 have limited applicability to the modern electric industry, and they serve no useful purpose with respect to proposed operation of a nuclear reactor on a merchant plant basis. Changes in the electric industry – including the emergence of a competitive wholesale electric market and mandated open access to the transmission system – reduce, if not eliminate, the incremental protection of competition that the NRC provides through its antitrust review for license applications for merchant plants.

Section 105(c)(7) empowers NRC to except a class of licenses from antitrust review "as the Commission may determine would not significantly affect the applicant's

¹ See *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI- 99-19, 49 NRC 441 (1999); Final Rule, "Antitrust Review Authority: Clarification," 65 Fed. Reg. 44,649 (July 19, 2000).

activities under the antitrust laws.² NRC should use its existing authority under Section 105(c)(7) to provide an exception from antitrust review for merchant plant applicants that meet certain criteria, e.g., Exempt Wholesale Generators (EWGs) or generators authorized to sell power at wholesale at market based rates. By definition, such merchant plants operate in a competitive environment. Additionally, EWGs do not control transmission systems. Furthermore, Federal Energy Regulatory Commission (FERC) Order 888 obligates transmission providers to file open access transmission tariffs. Additionally, there are a large number of different generating companies owning and operating merchant plants and competing in the generation market, and the construction of new generation (increasing supply) is pro-competitive. Therefore, the licensing of a merchant plant will not create any situation inconsistent with the antitrust laws.

NRC could take action to create an excepted class of licenses by order, policy statement, or rulemaking. Exelon suggests that NRC follow an approach akin to the one it took in *Wolf Creek*, wherein NRC would issue a *Federal Register* notice and solicit public comments regarding whether it should determine that the issuance of licenses to applicants who qualify as merchant plant operators would not significantly affect such applicants' activities under the antitrust laws, and therefore except such applicants from NRC antitrust review under Section 105. Upon issuance of such a

² Section 106 of the Atomic Energy Act states the Commission may group facility licenses into classes "upon the basis of similarity of operating and technical characteristics of the facilities," and may define the various activities to be carried out at each class of facility and the amounts of special nuclear material available for use by each facility. There does not appear to be a connection between the term "class of facilities" as used in Section 106 and the term "class or types of licenses" as used in Section 105(c)(7). These sections were enacted more than 15 years apart, and neither Section 105(c)(7) nor its legislative history refers to Section 106. Furthermore, the language in Section 106 (which refers to "operating and technical characteristics") is simply inapposite to the type of antitrust issues addressed in Section 105.

determination, NRC could then initiate a rulemaking to clarify that its rules do not require that a merchant plant applicant submit the antitrust information identified in 10 CFR § 50.33a. The rule should state that such an applicant need only provide information sufficient for the NRC to make a determination as to whether the applicant qualifies as a member of the excepted class.

Exelon has been working with the Nuclear Energy Institute (NEI) to support the creation of the excepted class for merchant plants. We urge NRC to make such a determination prior to the end of this year, pursuant to the authority granted in Section 105(c)(7) of the AEA. If NRC does not reach a decision by the end of this year, Exelon will need to provide the required antitrust information or request an exemption from § 50.33a which will permit Exelon to defer filing of antitrust information until after NRC makes a decision on whether it will except merchant plant operators from antitrust review.