



NUCLEAR ENERGY INSTITUTE

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(1)

Ellen C. Ginsberg  
Vice President, General Counsel  
and Secretary

July 9, 2007

Mr. Michael Lesar  
Chief, Rulemaking, Directives, and Editing Branch  
Office of Administration  
U.S. Nuclear Regulatory Commission  
Mail Stop T6-D59  
Washington, DC 20555-0001

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Re: Draft NUREG-1574, Revision 2, "Standard Review Plan on Transfer and Amendment of Antitrust License Conditions and Antitrust Enforcement" (72 Fed. Reg. 31626; June 7, 2007)

Dear Mr. Lesar:

Pursuant to the above-referenced notice published in the Federal Register on June 7, 2007, the Nuclear Energy Institute (NEI)<sup>1</sup> submits the following comments on behalf of the commercial nuclear energy industry on the interim Standard Review Plan on Transfer and Amendment of Antitrust License Conditions and Antitrust Enforcement (SRP). This SRP is to be used by the staff as "a basis for considering the appropriate disposition of antitrust license conditions when reviewing direct license transfers, for reviewing antitrust license amendment applications, and for implementing the Nuclear Regulatory Commission's (NRC's) antitrust enforcement responsibilities."

The industry believes the SRP accurately sets forth the state of the law as it applies to NRC licensees and provides practical guidance for the staff to follow as it carries out the agency's more limited responsibility to conduct antitrust reviews and exercise enforcement of its authority. The bases for our conclusions are provided below.

A. Elimination of the NRC's Antitrust Review for New Licenses

At the outset, the SRP appropriately reflects the NRC's more limited authority under Section 105, *Antitrust Provisions*, of the Atomic Energy Act of 1954, as amended, (AEA) following enactment of the Energy Policy Act of 2005. That legislation removed from the NRC the responsibility to perform antitrust reviews for applications for licenses under AEA Sections 103 and 104.b. The SRP, therefore, properly states that the agency "no longer conducts antitrust reviews and thus will have no occasion to impose any new antitrust conditions."<sup>2</sup>

<sup>1</sup> The Nuclear Energy Institute (NEI) is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including regulatory, financial, technical and legislative issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

<sup>2</sup> SRP at 1 (footnote omitted).

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add = Steven Horn (SRH)  
C. Pittiglio (CLP)

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B. License Transfer Issues

The SRP also states, pursuant to the holding in *Kansas Gas and Electric Co., et al.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999), that the Atomic Energy Act neither requires nor authorizes the agency to conduct antitrust reviews of post-operating license transfer applications. While the Commission can no longer impose new antitrust license conditions when approving direct license transfers, the SRP addresses how the agency will handle transfers when previously imposed antitrust license conditions remain. Per CLI 99-19, when a plant is sold or transferred to a new licensee, existing antitrust license conditions may be retained as is, removed, or modified and retained. The SRP explains that, because antitrust conditions are licensee-specific, no one approach or result will be correct for all cases. Thus, the SRP appropriately directs the staff to make its decisions on existing antitrust license conditions on a case-by-case basis. Further, the SRP sets forth reasonable factors for staff consideration in reviewing a request that existing conditions be modified or deleted as part of a license transfer application.

C. License Amendments

Although the industry has long held the view that Section 105 applies only to license applications, the SRP reflects the NRC's interpretation that its authority applies to antitrust license amendment requests as well. To the extent that the NRC continues to conduct these reviews, the SRP properly focuses them on "all of the relevant facts and circumstances," including whether there have been regulatory developments to promote competition since the imposition of the original conditions, how long ago the conditions were imposed and the record or lack of a record of anticompetitive behavior, as well as any comments by the Department of Justice, members of the public and competitors of the licensee. These considerations are appropriately focused on matters that will allow the NRC to reach an informed conclusion on the amendment request.

D. Enforcement

Pursuant to its authority under AEA Section 105a, the Commission is authorized to take action if a court of competent jurisdiction finds a licensee to have violated the antitrust laws in the conduct of licensed activity. However, because the Commission is not the principal agency responsible for antitrust enforcement and Section 105a matters will have already been adjudicated by the courts, the agency expects to infrequently exercise its authority in response to a 105a petition or request.

AEA Section 105b provides that "[t]he Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or to tend toward the violation of any of the foregoing Acts, or to restrict free competition and private enterprise." Although the United States Attorney General, not the NRC, has and should have the primary responsibility to enforce the antitrust laws, Section 105b's reporting obligation continues to serve a valid public purpose.

In conclusion, the interim SRP updates the agency's direction to the staff with respect to how to carry out the NRC's remaining antitrust-related responsibilities. As noted herein, the SRP correctly focuses the staff's evaluation of antitrust issues as it conducts limited reviews of existing license conditions in the context of certain license transfers and amendment requests related to antitrust license conditions.

We appreciate the opportunity to provide these comments.

*Ellen P. Hingsberg*