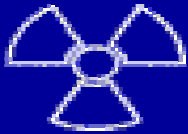
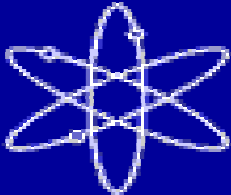




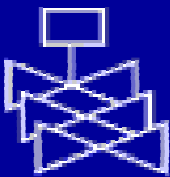
# **Standard Review Plan on Transfer and Amendment of Antitrust License Conditions and Antitrust Enforcement**



**Final Report**



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



# **Standard Review Plan on Transfer and Amendment of Antitrust License Conditions and Antitrust Enforcement**

## **Final Report**

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## Abstract

Beginning in 1970, section 105.c of the Atomic Energy Act of 1954, as amended (AEA), required that the U.S. Nuclear Regulatory Commission (NRC or Commission) conduct antitrust reviews of applications to construct or operate facilities licensed under section 103 of the AEA. These reviews led to the imposition of antitrust license conditions in about one-quarter of current operating licenses. The Energy Policy Act of 2005 eliminated the NRC's antitrust review mandate, so no new antitrust conditions will be imposed in new licenses. However, existing antitrust license conditions were not affected and thus remain in place, subject to enforcement, amendments, and license transfers.

In connection with license transfers, the staff's former practice of conducting "significant changes" antitrust reviews was eliminated under the Commission's *Wolf Creek* decision in 1999. However, the disposition of existing antitrust license conditions during license transfers remains an ongoing issue. *Wolf Creek* provided some guidance as to the appropriate disposition of antitrust license conditions when a facility license containing such conditions is transferred.

Outside of the context of license transfers, changed circumstances of law or fact may provide the bases to grant an application to amend antitrust license conditions. Such applications should be considered by reviewers on a case-by-case basis, with past antitrust license amendment safety evaluations as guidance. Particular attention should be paid to whether there have been regulatory developments to promote competition in the relevant market since the antitrust conditions were first imposed. Also, any comments of the Antitrust Division of the U.S. Department of Justice should be carefully considered. Furthermore, the views of the public, especially competitors of the licensee, should normally be given some weight.

The Commission has certain antitrust enforcement responsibilities and authority. If a court of competent jurisdiction finds that a licensee has violated the antitrust laws, the NRC may suspend or revoke the license or take other action. In addition, the Commission is to report to the Attorney General when it appears that any utilization of special nuclear material or atomic energy violates the antitrust laws. Furthermore, the Commission may enforce antitrust license conditions or revoke the license for a licensee's noncompliance with the conditions, as well as impose civil monetary penalties. Under 10 CFR 2.206, the Commission may take appropriate enforcement action in response to a petition filed under that section alleging a licensee's noncompliance with its antitrust license conditions.

## Paperwork Reduction Act Statement

This Standard Review Plan does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 USC 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, approval number 3150-0011.



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## A. INTRODUCTION

### 1. Purpose

This Standard Review Plan (SRP) describes the processes used by the U.S. Nuclear Regulatory Commission (NRC or Commission) to carry out the NRC's limited antitrust responsibilities. This SRP is to be used 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 NRC's antitrust enforcement responsibilities.

### 2. Background

Beginning in December 1970, section 105.c of the Atomic Energy Act of 1954, as amended (AEA), required that the Commission conduct antitrust reviews of applications for construction permits and operating licenses to be issued under section 103 of the AEA.<sup>1</sup> As a result of these antitrust reviews, about one quarter of all operating licenses now contain antitrust license conditions to address the antitrust review findings made by the Commission.

In 2005, Congress passed the Energy Policy Act of 2005 (EPAct), which removed the antitrust review authority contained in section 105.c of the AEA regarding license applications for production or utilization facilities submitted under sections 103 or 104.b of the AEA after the date of enactment of the EPAct. Accordingly, the NRC no longer conducts antitrust reviews and thus will have no occasion to impose any new antitrust license conditions.<sup>2</sup>

<sup>1</sup>In very limited circumstances, certain operating licenses to be issued under section 104.b of the AEA could have been subject to antitrust reviews. *See* section 105.c(3). The AEA did not and does not require an antitrust review in connection with an application to renew a facility operating license. *See* Nuclear Power Plant License Renewal, Final Rule, 56 Fed. Reg. 64,943, 64,969-71 (Dec. 13, 1991).

<sup>2</sup>Regulatory Guide 9.1, "Regulatory Staff Position Statement On Antitrust Matters," Regulatory Guide 9.2, Rev. 1, "Information Needed By The NRC Staff In Connection With Its Antitrust Review of Construction Permit Applications for Nuclear Power Plants," and Regulatory Guide 9.3, "Information Needed By The AEC Regulatory Staff In Connection With Its Antitrust Review Of Operating License Applications For Nuclear Power Plants," were issued in connection with the staff's antitrust review responsibilities under section 105.c of the AEA prior to the EPAct. In light of the discontinuation of antitrust reviews following the EPAct, these Regulatory Guides are no longer relevant or applicable and have been withdrawn.

Under section 184 of the AEA, no license shall be transferred unless the NRC gives prior consent in writing. With respect to a license to be transferred that may currently contain antitrust license conditions, the NRC must decide whether or not such conditions should be included as part of the transferred license, deleted from the transferred license, or modified in some fashion at the time of the transfer of the license.

Section 105.a of the AEA gives the NRC the power to suspend or revoke a license or take other actions deemed necessary if a licensee is found by a court of competent jurisdiction to have violated the antitrust laws (listed in this section of the AEA).

Section 105.b of the AEA requires that the Commission report to the Attorney General of the United States any information the Commission has that a utilization of special nuclear material or atomic energy appears to violate the antitrust laws.

Pursuant to 10 CFR 2.202, the Commission may issue an order to modify, suspend, or revoke a license or take other action such as issuing a cease and desist order for a licensee's noncompliance with the terms of its antitrust license conditions. Also, under 10 CFR 2.205, the Commission may institute an action to assess civil penalties for such noncompliance.

## **B. LICENSE TRANSFERS**

### **1. "Significant Changes" Reviews No Longer Conducted**

In *Kansas Gas and Electric Co., et al.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999), the Commission determined that the AEA does not require or authorize antitrust reviews of post-operating license transfer applications. Previously, the staff had performed an analysis in connection with license transfers (a staff-created variation of the "significant changes" review referred to in section 105.c(2) of the AEA) to determine whether a transferee should be subject to a full antitrust review. In light of the *Wolf Creek* decision, no such analysis or antitrust review is undertaken when there is a license transfer application, regardless of whether it involves a direct or indirect license transfer. However, if antitrust license conditions already exist in a license to be transferred, the staff must determine the appropriate disposition of such conditions when the license is transferred to a new licensee.

## 2. Disposition of Existing Antitrust License Conditions When Approving Direct License Transfers<sup>3</sup>

As discussed earlier, certain licenses contain antitrust license conditions that were imposed before the enactment of the EPAct. If a plant operating under one of these licenses is sold or transferred to a new licensee (a direct license transfer action, which would require NRC prior approval under 10 CFR 50.80), the disposition of the existing antitrust license conditions will need to be addressed when the license is amended as part of the license transfer action to reflect the new licensee.

It should not be assumed that the existing antitrust conditions should automatically continue in the license and apply to the new licensee. The reason is that antitrust conditions were put in place to address the prior actual or alleged anticompetitive conduct of the licensee that was subject to an antitrust review or negotiated settlement. Accordingly, antitrust conditions are licensee specific, rather than plant specific.

In *Wolf Creek*, a direct license transfer case that involved existing antitrust conditions, the Commission explained that there are alternative courses of action in dealing with existing antitrust license conditions in direct license transfers:

Theoretically, at least, three possibilities exist: (1) the existing license conditions should be attached verbatim to the transferred license, (2) the existing conditions should be rescinded or eliminated in their entirety, or (3) the existing conditions should be modified and attached as modified to the transferred license.

<sup>3</sup>The transfer of operating authority to a non-owner operating company is a form of a direct license transfer. However, there are normally no requests in such applications to transfer, delete, or modify existing antitrust conditions applicable to the existing owner/operator licensee. Prior to *Wolf Creek*, the staff usually added a special antitrust license condition applicable to the new operating licensee to preclude the new licensee from marketing or brokering power. This was done in lieu of performing a variation of a "significant changes" antitrust review, which once was the staff's practice for license transfers, as mentioned earlier. Since post-operating antitrust reviews are not required or authorized under *Wolf Creek*, the staff no longer considers new antitrust license conditions for new non-owner operators. See, e.g., Order Approving Transfer of Operating Authority and Conforming Amendments (Dec. 20, 2001) for McGuire Nuclear Station, Units 1 and 2. (Agencywide Documents and Access Management System (ADAMS) Accession No. ML013520127). If an existing non-owner operating licensee is transferring its authority and is being deleted from the license, any antitrust conditions applicable only to such licensee should be deleted.



The Commission went on to say that it did not believe it is possible to have any one course of action for all cases:

The license conditions on their face, the nature of the license transfer, and perhaps the competitive situation as well, would need to be considered to determine what action[s] were warranted in a given case. (For example, and without regard to the competitive situation, (1) it might be appropriate to retain the existing conditions where they apply only to a particular co-owner or co-operator that will remain a licensee under the transferred license, (2) it might be appropriate to remove the conditions where they apply to only one of several licensees and that one will no longer be a licensee after the transfer, and (3) it might be appropriate to remove existing conditions or modify references to licensees in the conditions when existing licensees to whom the conditions apply merge among themselves or with other entities and new corporate licensees will result).

As reflected in *Wolf Creek*, the decision on what to do with existing antitrust license conditions must be made on a case-by-case basis.

The starting consideration for the staff is the proposed treatment of the substantive aspects of the conditions by the applicant for the license transfer. An applicant may request that the conditions be deleted in their entirety, be modified, or be left unmodified in the license.

Unless other reasons exist to deny the request, if the applicant proposes that the conditions remain in the transferred license unmodified and will thus become applicable to the new owner/licensee, the staff should normally grant the request.<sup>4</sup>

<sup>4</sup>In some cases, the new proposed licensee may not be able to physically comply with antitrust conditions transferred intact. For example, antitrust conditions may have provisions requiring the licensee to wheel power over its transmission lines, but not all new licensees may own or control transmission facilities. In these situations, the staff should still grant a request to transfer all of the conditions because to attempt to modify the conditions during the license transfer raises issues that go beyond the basic conforming license amendment process for license transfers, where the former licensee is simply deleted from the license and the new licensee is added to the license, with no substantive modifications to the provisions of the license. A licensee, once it becomes the licensee, may always file an amendment request later to modify those provisions that no longer make practical sense or delete them from its transferred antitrust license conditions.

If the application proposes modifying the existing conditions or deleting them from the license, the staff should consider several items.

First, the staff should consider whether the proposed new licensee following a direct license transfer has or will have any corporate relationship at all with the transferor. For example, in the Clinton transfer approved in 1999, Illinois Power, which held the license, had no prior or existing relationship with the buyer, AmerGen Energy Co. LLC, a newly-formed entity with no prior record of anticompetitive conduct owned by a Pennsylvania electric utility and a British company. Both of these entities were clearly outside of Illinois Power's geographic market. The staff approved the applicant's request to delete the antitrust conditions (ADAMS Accession No. ML993500275). On the other hand, in the Perry license transfer approved in 2005 (ADAMS Accession No. ML053460182), the transferee FirstEnergy Generation Corp. was an affiliate of the transferors, all of which were subsidiaries within the FirstEnergy Corporation organization. The staff approved the applicant's request to make no changes to the antitrust license conditions and to maintain them as part of the licenses, notwithstanding that the new licensee did not possess transmission assets and thus could not wheel power as required by some of the conditions. (In such a case, the affected conditions could always be amended later to reflect these circumstances. *See note 4 supra.*) In the Waterford transfer approved in 2005 (ADAMS Accession No. ML053400304), the transferee was, in essence, the transferor that was converted to a limited liability company in a neighboring state. In those cases where there is an affiliation, the staff should determine whether the transfer is designed merely to evade the existing antitrust conditions, if the application requests the deletion of the conditions or a significant modification of them making them less restrictive. The staff should normally assume that a transfer is not so designed if applicable state law to promote competition requires a licensee to transfer generation assets to an affiliate.

The staff should also consider whether the transferee has the physical assets to comply with the antitrust conditions. For example, most existing antitrust conditions contain wheeling requirements, which presume that the licensee owns or controls a transmission system over which it can transmit power. Indeed, licensees that had wheeling conditions become part of their licenses were traditional integrated electric utilities with generation, transmission, and distributions assets. Many transferees in recent years are generation companies only, with no transmission facilities. Therefore, subjecting them to conditions that

contain wheeling provisions normally would not make practical sense. In the Clinton license transfer to AmerGen, the staff noted that AmerGen did not have transmission facilities, and therefore could not comply with the wheeling provisions. This fact formed part of the basis to delete the conditions during the license transfer.

In addition, the staff should inform and consider the views of the Antitrust Division of the Department of Justice (DOJ), if any, where the applicant proposes to delete or modify the existing antitrust license conditions, unless it is clear that the transferee is not affiliated in any way with the transferor. Where it is not clear, the projects staff should send a copy of the application to the DOJ, with the concurrence of the Office of Nuclear Reactor Regulation's Division of Policy and Rulemaking (DPR) and the Office of the General Counsel (OGC). The cover letter should request that if the DOJ has any comments on the application, including the proposed disposition of the existing antitrust conditions, such comments be provided to the NRC by the close of the hearing opportunity period set forth in the *Federal Register* notice of the transfer application. The staff should carefully consider any comments by the DOJ, because of the DOJ's expertise in antitrust matters and the fact that it played a primary role, as provided in section 105.c of the AEA, in the initial antitrust review and imposition of the antitrust conditions.

Finally, the staff should take into consideration any written comments filed by members of the public, particularly competitors of the proposed transferee. If any hearing requests are filed, the staff should consider arguments set forth in any contentions regarding the appropriate disposition of the antitrust conditions. (The staff is expected to promptly issue its decision on license transfer requests notwithstanding the pendency of a hearing). The staff may consider the absence of written comments or hearing requests on the disposition of the existing antitrust conditions to be an indication that such measures are not necessary today in the particular relevant market, at least regarding the proposed transferee.

### **C. LICENSE AMENDMENT APPLICATIONS OUTSIDE OF LICENSE TRANSFERS**

Changed circumstances of law or fact may provide the bases to grant a request to amend or delete entirely existing antitrust license conditions. An antitrust review of the nature of those that were performed under section 105.c of the AEA before passage of the EPAct is not required to enable the staff to act on an amendment request. The decision whether to grant or deny an antitrust amendment request is to be based on all of the relevant facts and circumstances, and is made on a case-by-base basis.

For some background, the staff should refer to the most recent antitrust amendment actions involving Diablo Canyon (2006) (ADAMS Accession No. ML062280659), South Texas Project (2003) (ADAMS Accession No. ML033080427), Wolf Creek (2002) (ADAMS Accession No. ML022520270), and Comanche Peak (2002) (ADAMS Accession No. ML020030021). Also, the staff should refer to the request involving the Perry and Davis Besse plants to suspend the antitrust conditions in the licenses, which was the subject of litigation. *See, e.g., Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-32, 36 NRC 269 (1992). Particular attention should be paid to whether there have been regulatory developments to promote competition in the relevant market since the original imposition of the antitrust conditions, such as nondiscriminatory open access to transmission and mandated separation of generation and transmission facilities. The staff also should consider the age of the conditions, since historical anticompetitive behavior does not necessarily mean that such behavior will continue long after, particularly when the Federal Trade Commission and the DOJ continue their primary antitrust enforcement roles.

When the amendment application is noticed in the *Federal Register*, the staff should send a copy of the application to the DOJ and request the DOJ's comments, if any, by the close of the hearing opportunity period as set forth in the *Federal Register* notice. The staff should consider the DOJ's comments or the lack thereof in deciding whether to grant the amendment request.

Finally, the staff should take into consideration relevant written comments filed by members of the public, particularly competitors of the proposed transferee. If any hearing requests are filed, the staff should consider arguments set forth in any contentions regarding whether to grant the proposed amendments to the antitrust conditions. The staff may consider the absence of written comments or hearing

requests on the proposed amendment of the existing antitrust conditions to be an indication that the proposed amendments would not adversely affect competition in the particular relevant market.

## **D. ANTITRUST ENFORCEMENT**

### **1. Overview**

The Commission has certain authority or responsibilities with respect to a licensee's violation of the antitrust laws or violation of applicable antitrust license conditions. The Commission may suspend or revoke a license or take other actions deemed necessary if a licensee is found by a court of competent jurisdiction to have violated the antitrust laws in the conduct of licensed activity (section 105.a of the AEA); shall report to the Attorney General any information indicating that a licensee's use of atomic energy appears to have violated the antitrust laws (section 105.b of the AEA); may modify, suspend, or revoke a license for a licensee's failure to comply with antitrust license conditions (10 CFR 2.202 and section 186.a of the AEA); and may impose civil penalties for a failure to comply with such conditions (10 CFR 2.205 and section 234 of the AEA). In addition, 10 CFR 2.206 provides a formal mechanism for any person to request the Executive Director for Operations to take appropriate enforcement action relating to a licensee's noncompliance with its antitrust conditions.

### **2. Sections 105.a and 105.b of the AEA**

#### **2.1. Section 105.a**

Section 105.a identifies specific relevant antitrust statutes and authorizes the Commission to take appropriate enforcement action should a licensee be found by a court to have violated such statutes. In practice, the Commission has not established any program to monitor court actions involving licensees' violations of antitrust laws. Rather, the Commission may respond to petitions or requests in exercising authority under section 105.a.

Only one section 105.a enforcement case has come before the Commission thus far. On May 31, 1978, counsel for several Florida cities submitted a petition for a hearing and advised the Commission of a decision by the United States Court of Appeals for the Fifth Circuit (*Gainesville Utilities Department v. Florida Power and Light Company*, 573 F. 2d 292 (5th Cir. 1978), *cert. denied*, 439 U.S. 966

(1978)), which held that Florida Power and 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 105.a 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 105.a matters. Thus, the staff has an advisory role. In performing this role, the staff considers the phrase "in the conduct of the licensed activity" appearing in section 105.a as synonymous with the phrase appearing in section 105.c, "activities under the license." Both phrases encompass the planning, building, and operation of nuclear power reactors and their integration in effective bulk power supply systems.

Given that section 105.a matters stem from actions already before the courts, and that the NRC is not a principal antitrust enforcement agency, it is expected that specific petitions or requests in regard to section 105.a will rarely be filed with the NRC.

## **2.2. Section 105.b**

Section 105.b requires the Commission to report apparent violations of the antitrust laws through the use of special nuclear material or atomic energy to the Attorney General. In fulfilling this responsibility, the Commission will order the staff to refer to the Attorney General such apparent violations when they are presented to the Commission.

As an illustration, in an August 6, 1976 filing, a group of Florida cities petitioned the Commission for an antitrust hearing with respect to Florida Power and Light Company's Turkey Point Units 3 & 4 and St. Lucie Unit 1 nuclear power plants. The Atomic Safety and Licensing Board (Licensing Board) denied the cities' petition. In *Florida Power and Light Co.* (St. Lucie Plant, Unit No. 1; Turkey Point Plant, Units No. 3 and 4), ALAB-428, 6 NRC 221 (1977), the Atomic Safety and Licensing Appeal Board (Appeal Board) affirmed the decision of the Licensing Board, and the Commission declined to review the Appeal Board's decision. *Florida Power and 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 has violated or tended to violate the antitrust laws in utilizing special nuclear material or atomic energy.

### **3. Enforcement of Antitrust License Conditions**

#### **3.1. 2.206 Petitions**

Any person may file a petition under 10 CFR 2.206 to institute a proceeding to modify, suspend, or revoke a license, or for any other action as may be proper, such as the issuance of a cease and desist order, based on alleged violations by a licensee of its antitrust license conditions. The petitioner must specify the action requested and set forth the facts or conditions that constitute the basis for the request.

If a petition is filed, the reviewer should determine the following:

- (1) which antitrust condition(s) may be involved;
- (2) the extent to which the alleged violation(s) depends on an interpretation of antitrust law and/or the relevant antitrust license condition(s);
- (3) the effect of and the reasons for the alleged violation;
- (4) whether the alleged violation was willful; and
- (5) what remedial actions should be taken.

The staff should consult with OGC regarding any necessary interpretations of antitrust law and/or the antitrust condition(s) at issue.

The use of consultants or contractors may be necessary and appropriate if the issues raised by the petition are complex.

If the staff determines that a petition received under 10 CFR 2.206 is without merit, a "Director's Decision" and *Federal Register* notice to that effect will be prepared and issued by the Office of Nuclear Reactor Regulation. A Director's Decision that no action will be taken is subject to the Commission's review on its own motion under 10 CFR 2.206(c).

If the staff determines that a violation has occurred, a Notice of Violation and a Director's Decision in accordance with 10 CFR 2.201 may be prepared by the reviewer in conjunction with OGC and issued by the Director of the Office of Nuclear Reactor Regulation. The notice and decision will be sent to the licensee and the petitioner.

The licensee's response to the Notice of Violation determines the course of subsequent actions. If the licensee agrees to take the necessary steps to comply

with its license conditions, 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 a cease and desist or other order to the licensee.

### **3.2. Orders**

If a licensee is found to be violating its antitrust license conditions, the staff would typically consider the issuance of an order to cease and desist. An order to suspend or revoke the license may not be the most appropriate remedy because of the impact on the overall electricity market, among other things. The reviewer should seek the advice of the DOJ and state regulators, as well as OGC, when fashioning an order.

An order should state 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.

If the licensee demands a hearing in response to the order, the hearing process is initiated. 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 the Office of Nuclear Reactor Regulation. If the licensee consents to the order or does not respond within the time allotted, the order will become final. Thereafter, the reviewer monitors the licensee's compliance with the order.

### **3.3. Civil Penalties**

In addition to issuing an order to cease and desist or other order, the staff may also take action to impose civil penalties in accordance with 10 CFR 2.205 and section 234 of the AEA for violations of antitrust license conditions.

The notice of violation proposing civil penalties should specify the dates and the nature of the alleged act or omission with which the licensee is charged, describe the circumstances, state the facts, cite the particular provisions of the license



conditions allegedly violated, and give the amount of each penalty the Director of the Office of Nuclear Reactor Regulation 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 the Office of Nuclear Reactor Regulation 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 the civil penalty within the period prescribed in the order.

If the licensee fails to pay the penalty or fails to demand 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 other sanctions, such as suspension or revocation of its license.

## **E. References**

1. Atomic Energy Act of 1954, as amended, section 105, 42 USC 2135.
2. *Kansas Gas and Electric Co., et al.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999).
3. Energy Policy Act of 2005, Public Law 109-58, section 625.