

March 22, 2011

Mr. Ashok S. Bhatnagar
Senior Vice President
Nuclear Generation Development
and Construction
Tennessee Valley Authority
6A Lookout Place
1101 Market Street
Chattanooga, TN 37402-2801

SUBJECT: WATTS BAR NUCLEAR PLANT, UNIT 2 – NOTICE OF NO SIGNIFICANT
ANTITRUST CHANGES AND TIME FOR FILING REQUESTS FOR
REEVALUATION (TAC NO. ME0853)

Dear Mr. Bhatnagar:

By letter dated May 13, 2010, as supplemented on July 29, 2010, and February 22, 2011, the Tennessee Valley Authority submitted antitrust information to the U.S. Nuclear Regulatory Commission in conjunction with its updated application for an operating license for Watts Bar Nuclear Plant (WBN) Unit 2.

Pursuant to the antitrust review of the information for WBN Unit 2, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust construction permit review.

A copy of the notice that was transmitted to the *Federal Register* and a copy of the Director's Decision and Staff Review for WBN Unit 2 are enclosed for your information. This finding is subject to reevaluation if a member of the public requests a reevaluation in response to publication of the finding in the *Federal Register*.

Sincerely,

/RA/

Stephen J. Campbell, Chief
Watts Bar Special Projects Branch
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation

Docket No. 50-391

Enclosures:

1. Notice
2. Director's Decision
3. Staff Review

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OFFICIAL AGENCY RECORD

STAFF REVIEW AND RECOMMENDATION
RELATED TO THE FINDING OF NO SIGNIFICANT ANTITRUST CHANGES
TENNESSEE VALLEY AUTHORITY
WATTS BAR NUCLEAR PLANT UNIT 2
DOCKET NO. 50-391

1. INTRODUCTION

An applicant for an operating license is not required to undergo a formal antitrust review unless the U.S. Nuclear Regulatory Commission (NRC or Commission) determines that there have been "significant changes" in the applicant's activities or proposed activities subsequent to the review by the U.S. Attorney General and the Commission at the construction permit (CP) stage.¹ In conducting this review, the NRC concentrates on changes in the applicant's activities since the previous antitrust review and focuses its review on areas of possible competitive conflict heretofore not analyzed by the Attorney General or the Commission.

In its Summer decision,² the Commission provided the staff with a set of criteria to be used in making the significant change determination for operating license (OL) applicants:

The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are reasonably attributable to the licensee(s); and (3) have antitrust implications that would most likely warrant some Commission remedy.³

To warrant a significant change finding (i.e., to trigger a formal OL antitrust review), the particular change(s) must meet all three of these criteria.

On May 24, 1971, the Tennessee Valley Authority (TVA) filed its application for construction permits for Watts Bar Nuclear Plant (WBN), Units 1 and 2. As required by Section 105c of the Atomic Energy Act of 1954, the Atomic Energy Commission (AEC; predecessor to the NRC) requested the advice of the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice (DOJ) as to whether: (1) no antitrust hearing was needed, (2) a hearing was necessary, or (3) no hearing was necessary if the applicant took certain actions or if certain

¹ The Commission has delegated the responsibility to make a significant changes determination to the Director of the Office of Nuclear Reactor Regulation.

² South Carolina Electric & Gas Co. and South Carolina Public Service Authority (Virgil C. Summer Nuclear Station Unit No. 1). CLI-80-28 11 NRC 817, 824 (1980).

³ Id.

conditions were attached to the CP. In its advice letter dated December 11, 1972, the Assistant Attorney General forwarded a decision recommending that no hearing be held.

In a letter dated December 5, 1989, TVA provided NRC with an "Updated Regulatory Guide 9.3 Information Pursuant to the Commission's Operating License Antitrust Review," for WBN Unit 1. By letter dated September 20, 1991, the NRC staff concluded that there was no new information that would suggest changes to the 'no significant change' finding for WBN Unit 1.

In a letter dated May 13, 2010, as supplemented on July 29, 2010, and February 22, 2011, TVA provided updated antitrust information pursuant to 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," with respect to WBN Unit 2. The information provided by TVA addressed changes in the antitrust information from that submitted on December 5, 1989, to the present.

In its review, the NRC staff considered the question of any significant changes since the 1989 Updated Regulatory Guide 9.3 submission by TVA and the 1991 OL reviews. Although TVA submitted the 1989 antitrust information in connection with the license review for WBN Unit 1, that information was not specific to Unit 1. Rather, it largely related to all of TVA's market activities. Therefore, the staff believes it is reasonable to rely on this information in evaluating whether significant changes have occurred in TVA's market activities for the staff's antitrust review of WBN Unit 2. Because a substantial amount of time has passed since the prior reviews, the NRC must assure itself that no change has taken place in TVA's activities that would warrant a significant change finding. Should NRC determine that "significant changes" have occurred since the previous antitrust review, the prospective OL application would require a formal antitrust review.

In conducting this review, the NRC staff was assisted by its contractor, ICF International, who analyzed detailed material on competitive activities provided by TVA to the NRC, including responses to requests for additional information on possible anticompetitive issues, and conducted other broad-based research. In addition, the NRC published a request for public comments on the WBN Unit 2 licensing issues in the *Federal Register* (75 FR 39285, dated July 8, 2010) and in various utility industry periodicals. In response to this notice, three comments were received, one from Senator Ken Yager (a Tennessee State Senator supporting the construction), and two other comments expressing concern about construction, health, and safety impacts but no concern for antitrust implications.

2. APPLICANT'S SYSTEM AND COMPETITIVE ISSUES REGARDING CONSUMERS

a. Description of TVA System

TVA is a bulk power generating and transmission company serving most of Tennessee and parts of northern Mississippi, northern Alabama, northwest Georgia, western North Carolina, southwest Virginia, and southern Kentucky. TVA serves 155 municipal utilities and cooperatives, a small number of large industrial customers at transmission voltage, and a small number of federal agencies.

By virtue of its incorporation under the TVA Act, TVA operates under certain restrictions that are not found among most other utilities. From the perspective of antitrust, the key restriction is found in Section 15d(a) of the TVA Act. This restriction reads as follows:

Unless otherwise specifically authorized by Act of Congress, the Corporation (i.e., TVA) shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or in directly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area exceeding not more than five miles around the periphery of such area may be necessary to care for the growth of the Corporation and its distributors within said area.

TVA can, however, engage in power exchanges with organizations, with which TVA had such an exchange arrangement on July 1, 1957.

As a practical matter, Section 15d(a) permits TVA to serve distributors (municipals and cooperatives) in its original service area but does not permit neighboring distributors to obtain power from TVA. Further, in a 1997 settlement agreement with Alabama Power Company, et al.,⁴ TVA reaffirmed that its policy and practice will be to confine its area of retail and wholesale electric service to the boundary as fixed by Section 15d(a) of the TVA Act. There is, however, no prohibition on customers in TVA's service area from obtaining less costly power from other utilities. The possible loss of customers in the TVA service area to neighboring utilities is discussed in Section II.b, "Customers," below.

b. Customers

TVA faces competitive pressure for its municipal and industrial customers. Among its municipal customers, there is increasing interest in obtaining bids from neighboring utilities. Among industrial customers, there is substantial pressure on TVA to hold the line on rates or lose the load to other suppliers. The U.S. Department of Energy (DOE) would also like to see lower rates to restore TVA's competitive position as a supplier of power to DOE. These three customer classes are described in general below.

Municipal customers and rural electric cooperatives account for the bulk of TVA's load. Revenues from distributor customers accounted for 85 percent of TVA's total operating revenues in 2010. TVA stated that, as of September 30, 2010, it had wholesale power contracts with 155 municipalities and cooperatives. Each of these contracts requires distributor customers to purchase from TVA all of their electric power and energy used within the TVA service area.

Contract Arrangements	Number of Distributor Customers	Percentage of Total Operating Revenues in 2010
15-year termination notice	5	0.9%
10-year termination notice	47	28.4%
5-year termination notice	103	55.6%

⁴ Alabama Power Co., et al., and Tennessee Valley Authority, CV-97-C-0885-S (July 21, 1997).

TVA stated that all distributor customers purchase power under one of three basic termination notice arrangements as described above. TVA's two largest distributor customers (Memphis Light, Gas and Water Division and Nashville Electric Service) have contracts with 5-year and 10-year termination notice periods, respectively, and accounted in 2010, for 9 percent and 8 percent, respectively, of TVA's total operating revenues. No single customer accounted for 10 percent or more of TVA's total operating revenues in 2010.

Memphis (and other municipalities) are not statutorily compelled to obtain power from TVA. Memphis and similarly situated customers are free to select other suppliers once their long-term contracts expire. There have been no allegations of anticompetitive actions by TVA in attempting to force municipalities to sign long-term contracts.

At the industrial level, revenues that TVA received from the industrial customers directly served accounted for 12 percent of TVA's total operating revenues in 2010. In 2010, contracts for customers directly served were generally for terms ranging from 5 to 10 years. These contracts are subject to termination by TVA or the customer upon a minimum notice period that varies according to the customer's contract demand and the period of time service has been provided.

The possibility of the outmigration of existing large customers and the expansion of multi-area industrial customers outside the TVA area remains an issue. TVA takes this issue seriously because it has a significant number of very large industrial consumers who have flexibility to leave the TVA area, expand in non-TVA areas, and use self-generation or cogeneration. TVA is vigorously attempting to retain its price-sensitive industrial load. There have been no allegations of anticompetitive actions by TVA in attempting to force industrial customers to sign long-term contracts.

The United States Enrichment Corporation (USEC) is TVA's largest directly-served industrial customer. Sales to USEC for its Paducah, Kentucky facility represented about 5 percent of TVA's total operating revenues in 2010. TVA stated that its current power supply contract with USEC expires on May 31, 2012. In January 2004, USEC announced its decision to construct a new commercial centrifuge facility in Piketon, Ohio, which is outside TVA's service area. TVA stated that it believes that if the facility is constructed, USEC would reduce its electricity purchases at the Paducah, Kentucky facility from about 2000 megawatts (MW) at its peak to less than 50 MW. USEC and TVA are involved in contract discussions that may result in a contract modification to reflect USEC's potential need for power beyond May 31, 2012. Although the actual effect of these discussions is not yet known, TVA indicated that any termination of the USEC contract would result in lower demand that could allow for a more economical dispatch of power to its remaining customers if some modifications were made to the transmission system.

3. PREVIOUS ANTITRUST REVIEWS

TVA's application for CPs and OLs for the WBN Units 1 and 2 has been the subject of four previous antitrust reviews. In connection with the CP review in 1972, the Acting Assistant Attorney General for Antitrust of the DOJ found no antitrust problems that would require a hearing. In subsequent OL reviews in 1979, 1983, and 1991 the staff found "no significant changes" that would warrant an OL antitrust review.

a. Construction Permit Review

On August 23, 1971, the AEC requested the DOJ to conduct an antitrust review of TVA's application for a construction permit for WBN. In responding to the AEC's request, the DOJ in its 1972 advice letter emphasized two limitations imposed by section 15d(a) of the TVA Act on TVA's ability to compete: (1) the limitation on the "...geographic areas in which TVA could market bulk power supply" and (2) the prohibition on "TVA's interconnection and coordination with adjacent bulk power suppliers except those with which it was interconnected as of July 1957."

In addition, although the antitrust review by the DOJ described TVA as the "...sole bulk power supply [in Tennessee]... except for Kingsport Power Company..." no anticompetitive activity was noted. Only with respect to coordination arrangements with the other electric utility systems did the DOJ indicate a caution. The letters from DOJ first explained that "it is not presently clear the extent to which amended section 15d(a) of the TVA Act restricts TVA in its ability to enter into coordination arrangements with other electric utility systems." DOJ then cautioned that "the statute would not justify TVA in discriminating in the establishment or operation of coordination arrangements among similarly situated electric systems." No discrimination was noted. Thus, the antitrust review by the DOJ found no anticompetitive problems.

b. Operating License Reviews

In looking specifically at coordination arrangements, the NRC staff's 1979 review found that only two actions of TVA suggested a "...possible anticompetitive effect: refusal to engage in diversity interchange with the city of Clarksdale, Mississippi and refusal to wheel (transfer) power for Big Rivers Electric Corporation and Jackson Purchase RECC."

Staff concluded, however, that "each of the above refusals were seemingly justified on the basis that such actions could be illegal or at least inconsistent with section 15d(a) of the Tennessee Valley Authority Act." As noted earlier, the overall conclusion of the NRC staff's 1979 review was that "...no significant changes of an antitrust nature have occurred that would warrant an operating license antitrust review."

In 1983 the NRC staff followed up on its 1979 review by contacting the three utilities noted above and reported that satisfactory arrangements between TVA and these utilities had been concluded. The staff described these arrangements as follows:

Big Rivers now has an additional interconnection and a wheeling agreement with TVA, which permits it to wheel power through the TVA and Mississippi Power and Light Company systems to Clarksdale, Mississippi and to and from the Cajun Electric Cooperative. The Jackson Purchase Electric Cooperative does not deal directly with TVA but obtains indirect benefits by working through Big Rivers. Similarly, Clarksdale does not deal directly with TVA but obtains indirect benefits by working through the Mississippi Power and Light. While Clarksdale, Big Rivers and Jackson Purchase would each like to buy power from TVA, they recognize that TVA is restricted by law from selling power external to its established borders.

In addition to the above descriptions, staff noted that "...no one has come forward with any antitrust allegations regarding TVA since our 1979 review." Subsequent to these discussions, the staff, in its 1983 review concluded that no new information has surfaced that would suggest a change in the original [1979] no significant change finding. Moreover, no additional comments from Big Rivers or Clarksdale were received.

Finally, in another follow-up review dated September 20, 1991, the staff wanted to assure itself that no changes have taken place in the licensee activities that would warrant a significant change finding since the 1979 and 1983 OL reviews. The staff reviewed TVA activities in relation to constructing new generation and transmission capacity, including cancellation of planned capacity and responses to requests from approximately 35 utilities that indicated no anticompetitive activities that would warrant a finding of significant changes. The requests included: (1) offers to purchase power from or sell power to TVA; (2) offers to purchase, lease, or jointly build generating capacity; and (3) requests to wheel or interchange power. Agreements satisfactory to TVA and the requesting utilities were reached in many cases and, in the other cases, no utilities alleged anticompetitive conduct by TVA.

c. Other TVA Antitrust Licensing Reviews

Within four years after being requested by the AEC to advise on TVA's construction permit application for WBN, the staff requested DOJ's advice pursuant to three additional construction permit applications by TVA. The first of these advice letters, dated December 17, 1975, pertained to the now deferred Bellefonte Nuclear Plant. The second letter, dated March 24, 1975, pertained to the now-canceled Hartsville Plant. The third letter, dated April 30, 1976, pertained to the now-canceled, but then unnamed, nuclear units X-24 and X-25 (subsequently named Yellow Creek).

In each of these letters, relying heavily on its recently completed WBN review, DOJ concluded that "...there are no antitrust problems which would require a hearing by the Commission on the instant application."

4. CHANGES SINCE THE 1991 OPERATING LICENSE REVIEWS BY STAFF

This section reviews changes to TVA's system since TVA's submission from December 5, 1989. These changes are primarily based on TVA's updates of May 13 and July 29, 2010, pursuant to Regulatory Guide 9.3.

a. Generation Excess/Shortage

At the construction permit stage, WBN Unit 1 was scheduled for commercial operation in May 1977. WBN Unit 2 was scheduled for commercial operation in February 1978. At the time, TVA estimated a capacity deficit of 1803 MW for the winter of 1979-89 and a surplus of 477 MW for the summer of 1980.

TVA conducts an annual capacity planning study to identify resource needs. Based on the study performed during FY2009 using expected values for forecasted demand and resource availability, and assuming that WBN Unit 2 would be online by summer 2013, the table below contains the projected capacity position at the time of the summer peak:

<u>Year</u>	<u>Summer Peak Surplus/(Deficit) in MW</u>
2010	347
2011	(505)
2012	(1,371)
2013	(2,309)
2014	(3,953)
2015	(4,654)
2016	(5,300)
2017	(5,570)

Below is the forecasted demand that does not include capacity from WBN Unit 2:

<u>Year</u>	<u>Summer Peak Surplus/(Deficit) in MW</u>
2010	347
2011	(505)
2012	(1,371)
2013	(3,459)
2014	(5,103)
2015	(5,804)
2016	(6,450)
2017	(6,720)

TVA intends to meet the capacity shortfall using market power purchases (both long and short term) supplemented with additional combustion turbine units in the 2014-2017 period as part of its most recent 20-year resource plan. The annual planning process continues to evaluate possible changes in the underlying assumptions and likely resource options over the study horizon, and TVA may recommend changes to the plan. The lack of TVA surplus capacity is consistent with the lack of allegations of anticompetitive behavior.

b. Transmission

Since TVA's December 5, 1989, antitrust submittal, the only change to the 500-kilovolt (kV) system in the WBN area has been a reconfiguration of the 500-kV switchyard at WBN. Previously, the switchyard was electrically split and operated as two separate 500-kV buses. The switchyard began operating with the two 500-kV buses tied together in 1997. The switchyard is presently being upgraded to a double-breaker configuration, with the completion scheduled prior to September 30, 2012. There have not been any new interconnections or connections to wholesale customers added to the 500-kV system in the WBN service area.

Since TVA's December 5, 1989, submittal, the following intersections have been established:

- Marshall – McCracken 161-kV (Big Rivers Electric Cooperative)
- Marshall – Livingston 161-kV (Big Rivers Electric Cooperative)
- Tiptonville – New Madrid 161- kV (Associated Electric Cooperative, Inc.)
- Batesville – LS Power Batesville #1 161-kV (LS Power)
- Batesville – LS Power Batesville #2 161-kV (LS Power)
- Loopers Farm 230-kV (Southern Company)
- Southaven 230-kV (Electric Company)
- Sebastopol – Homewood 161-kV (South Mississippi Electric Power Association)
- Fontana – Nantahala 161-kV (Duke Energy)

Since TVA's December 5, 1989, submittal, the following 500-kV retail customers have been added (all 500kV):

- Nucor Steel – Decatur, L.L.C.
- Nucor Steel Memphis, Inc.

Since 1989, TVA has not been a member of any formal or informal power pool or coordinating group.

None of these developments are atypical of a large utility, and none raise significant antitrust issues.

c. Rate Schedules

TVA changes its rates on its own to recover its cost of service. There is no state or federal regulatory commission review. Since TVA's December 5, 1989, submittal, TVA changed its rate schedules in May 1992 and again in October 2003. In addition, in December 2003, TVA expanded the availability of the manufacturing rates implemented by the 2003 Rate Change to include higher load factor data centers and similar loads expected to produce benefits to all power consumers. TVA's Direct Service Manufacturing rates have been revised to reflect this change in availability and it is available for implementation by distributors of TVA power.

There have been no new wholesale customers since 1989, one wholesaler left the service area, but returned as a wholesaler in January 2008. There have been no changes in TVA's service area or in licensee acquisitions or mergers since 1989.

None of these developments are atypical of a large utility and none raise significant antitrust issues.

d. Capacity Additions

TVA anticipates additional generation capacity will be brought on the line at approximately the same time as WBN Unit 2 becomes operational. The additional capacity will take the form of a natural gas combined cycle gas turbine facility at the John Sevier site near Rogersville, Tennessee. Approximate maximum capacity of the plant is 933 MW. It is anticipated that this facility will be wholly owned by TVA and 100 percent of its output will be included as part of

TVA's economic dispatch, and used to serve its customers, including distributor and direct served industries.

There have been no changes in the ownership or contractual allocation of WBN.

None of these developments are atypical of a large utility and none raise significant antitrust issues.

e. Requests to TVA for Electric Service Cooperative Ventures or Studies

(1) 1997 Settlement Agreement

TVA reported that it no longer maintains the same type of detailed information with respect to power transfers that was provided in the 1989 Antitrust Response because these types of requests to purchase TVA power basically stopped after TVA entered into a Settlement Agreement in 1997 of the *Alabama Power Company, et al. v. Tennessee Valley Authority* litigation. The Settlement Agreement clearly defines the counterparties and arrangements under which TVA can make exchange power arrangements with other power generating companies consistent with the provisions of the TVA Act. Section 2.05 of the Settlement Agreement describes the method by which TVA will make publically available information concerning Authorized Exchange Power Companies.

Section 2.06 of the Settlement Agreement also includes information regarding a TVA Board Policy Statement describing how the provisions of Section 15d(a) of the TVA Act are to be applied regarding the availability of TVA power. The region in which TVA can supply and sell power remains the area as defined by Section 15d(a) of the TVA Act, which was included in an amendment enacted in 1959. Specifically, "TVA will only engage in the construction of such generating capacity or the purchase of generating capacity as it needs to supply power demands in its own service area." Finally, "TVA will not knowingly exchange power if the purchaser is procuring that power for the purpose of reselling such power at wholesale to any third party not authorized to exchange power with the TVA."

(2) Litigation

The most recent litigation, *McCarthy v. Middle Tennessee Electric Membership Corporation* (2006), which cites both *Webster County Coal v. TVA* (1984) and *The City of Loudon v. TVA* (1979) found that TVA is not subject to the Sherman Antitrust Act. The court noted that "TVA is authorized to enter into contracts for the purpose of 'promot[ing] the wider and better use of electric power for agricultural and domestic use or for small or local industrials.'" Because "TVA's primary concern is to provide services, concerns about competition would conflict with the fulfillment of TVA's purpose." Thus, if TVA engages in legitimate governmental behavior in a legal manner, it would seem that it is exempt from antitrust.

(3) Congressional Hearings

Despite the 1997 settlement, antitrust hearings involving TVA and neighboring electric suppliers were held in the U.S. Congress. The hearings focused on the application of Sherman Antitrust Act and its application specifically to TVA. A 1999 hearing before the Committee on Environment and Public Works of the U.S. Senate explored the right of TVA

to establish its own rates and TVA's exemption from antitrust penalties. Although the hearing focused on penalties if TVA made antitrust violations, the hearing did not find that TVA was making antitrust violations.

4. SUMMARY AND CONCLUSION

In this report, the NRC staff examined TVA's activities to determine if a formal antitrust review is necessary prior to issuing an OL for WBN Unit 2. A 1989 review by the NRC staff found "no significant change" that would warrant a review. The purpose of the current report is to determine if significant changes have occurred since the previous report that would require a formal antitrust review under Section 105(c) of the Atomic Energy Act of 1954 as amended.

A review of TVA activities since 1989 in constructing new generation and transmission capacity including cancellation of planned capacity, showed normal engineering and economic actions for a utility of TVA's class and no apparent anticompetitive efforts. Additionally, TVA appears to be vigorously working to retain its existing customers, including its nominally captive customers, rather than limiting competition for its customers or potential customers. A 1997 Settlement Agreement resolved pending antitrust issues related to requests to purchase power from TVA and exchange power arrangements. Subsequent Congressional Hearings in 1999 did not find that TVA was engaging in anticompetitive conduct.

Based upon the examination of the events since 1989, the staff concludes that no significant changes have occurred that would require an antitrust review.

Dated: March 22, 2011