

May 24, 1979

ATTACHMENT C

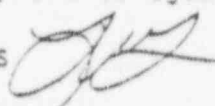
SECY-79-353

COMMISSIONER ACTION

For: The Commissioners

From: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

William J. Dircks, Director
Office of Nuclear Material Safety and Safeguards

Thru: Executive Director for Operations 

Subject: ANTITRUST REVIEW PROCESS FOR OPERATING
LICENSE APPLICATIONS

Purpose: 1) To obtain Commission approval of a delegation of authority for determination of "significant changes" at the operating license antitrust review stage, and 2) to inform the Commission of revised antitrust review procedures for operating license applications implementing the proposed delegation, including provisions for notifying the Commission as to all Staff determinations of whether "significant changes" have occurred.

Category: This paper covers a minor policy matter. Resource estimates are Category I.

Issue: Whether the Commission should delegate to the Staff the authority to determine whether "significant changes" in a licensee's activities have occurred subsequent to the previous antitrust review by the Attorney General and the Commission. A determination that "significant changes" had occurred would initiate another review by the Attorney General in connection with the operating license application.

Contact:
Robert S. Wood
492-8336

8103 040 162

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Discussion:

A. Delegation of Authority for Determining "Significant Changes"

Section 105c of the Atomic Energy Act of 1954, as amended, provides for a two-stage antitrust review by the NRC. The first stage is conducted as part of the NRC's review of an application for a construction permit. This initial stage involves the principal NRC antitrust review and serves to identify any antitrust problems early in the licensing process. During this initial stage, the Attorney General is consulted and renders advice as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws.

In connection with operating license applications that have had such an antitrust review at the construction permit stage, Section 105(c)(2) of the Atomic Energy Act of 1954, as amended, provides for a second, limited antitrust review by the Attorney General in those cases in which the Commission determines that "significant changes" have occurred subsequent to the previous review by the Attorney General and the Commission.

The NRC Staff is seeking Commission approval to modify current internal procedures with regard to the making of a decision on whether "significant changes" have occurred. Currently, an outside party, an applicant, or the NRC Staff may request the Commission to make the "significant changes" determination. See Houston Lighting & Power Co. (South Texas Project, Unit Nos. 1 and 2), Docket Nos. 50-498A and 50-499A, 5 NRC 1303, 1318-1319 (1977); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2) Docket Nos. 50-445A and 50-446A, 7 NRC 950 (1978). If this determination is made, the Staff then requests advice from the Attorney General pursuant to Section 105(c)(1) of the Atomic Energy Act of 1954, as amended. The Staff proposes that the Commission delegate the authority to make "significant changes" determinations to the Staff.

The pros and cons of this proposed delegation are as follows:

Pros:

1. The proposed change follows the Commission's suggestion in South Texas, supra at 1318, where the Commission stated: "The making of a 'significant change' determination triggering a referral to the Attorney General for his advice on its antitrust implications is a function which could and perhaps should be delegated to the regulatory staff."
2. A "significant changes" determination is a threshold determination which would trigger seeking formal advice from the Attorney General. It is not a final determination that an NRC antitrust hearing must be held. That decision is made by the Commission after receipt of the Attorney General's advice. Thus, the Commission, while removing itself from making the "significant changes" finding, would not be removed from subsequent consideration of an operating license antitrust review and, possibly, a hearing.

The Commission, which may ultimately adjudicate an appeal pertaining to the antitrust operating license review, would also be relieved from having to make a finding of "significant changes" early in an operating license proceeding. This would insure that the Commission would hear the appeal without any predisposition toward the activities under scrutiny.
3. The Staff's initial review and its informal contacts with the Department of Justice provide it with the factual basis to make a "significant changes" determination. Any determination by the Commission has been and would continue to be based to some extent on the Staff's recommendation.
4. In effect, the Staff already makes a determination in those cases where it believes "significant changes" have not occurred, by not requesting from the Commission "significant changes" determinations. The proposed delegation gives the Staff the authority to determine

that "significant changes" have occurred. Concomitantly, the revised OL review procedures provide for notifying the Commission whenever any determination on "significant changes" is made, including the situation where a request for a determination is made of the Staff by a third party.

5. The proposed change would make NRC operating license antitrust review procedures parallel to the construction permit antitrust review procedures, particularly as to the Staff itself requesting advice from the Attorney General.

Cons:

1. The proposed action would delegate authority for determining "significant changes" to the Staff. As stated above, the Commission would retain the same authority over the OL review that it has for the CP review, but would be delegating the triggering determination to request the Attorney General's advice.

2. In Comanche Peak Steam Electric Station, supra, the Commission decided to make the "significant changes" determination itself. There, the Commission reasoned that this would "...[expedite] the hearing process in order to reduce as far as possible any delay in the licensing of the Comanche Peak facilities."

3. The Staff would be a party to any operating license antitrust hearing in the event that such a hearing was deemed necessary. Thus, it might be argued that the Staff's neutrality in making the prior "significant changes" determination would be affected.

B. Proposed Operating License Antitrust Review Procedures

Currently, the Staff has informal internal procedures which provide it with information to aid in determining whether "significant changes" in a licensee's activities have occurred. The primary process for

gathering information for the preliminary NRC operating license antitrust review and for making such a determination is the review of the submittal by the applicant of information specified in Regulatory Guide 9.3. Although applicants have voluntarily provided the information specified in Regulatory Guide 9.3, submittal of such information is optional.^{1/}

Notice of receipt of this operating license antitrust information is not published in the Federal Register, nor is there any reference to antitrust matters in the published notice of receipt of an operating license application covering health, safety and environmental matters. The NRC learns of potential antitrust problems at the operating license stage through its analysis of Regulatory Guide 9.3 information submitted by the applicant, through its informal contacts with the Federal Energy Regulatory Commission (FERC), through intentional or fortuitous relay of information to NRC Staff from outside sources, or through reports in trade publications or news media.

To increase the probability of receiving full and reliable information germane to NRC's operating license antitrust review, to provide a formal and consistent mechanism for obtaining comments from interested parties during the operating license review, and to foster the Commission's general policy of encouraging greater public participation in the licensing process, the Staff has revised and proposes to implement procedures for operating license antitrust reviews. The revised procedures are parallel to procedures currently used for construction permit antitrust reviews. These revised procedures provide for the publication in the Federal Register and appropriate trade publications of a separate "Notice of Receipt of Antitrust Information." This notice will invite interested persons to submit

^{1/} The question of whether the specified information in Regulatory Guide 9.3 should be incorporated explicitly in NRC regulations is being examined by the Staff.

comments concerning antitrust matters to the NRC within 30 days of publication. Any such comments will be considered by NRC Staff during its conduct of the antitrust review. The revised procedures also include provisions for Staff determinations of "significant changes" and for notification of the Commission and other appropriate parties, depending on the nature of the Staff's determination.

This action involves no new resource requirements.

Recommendation:

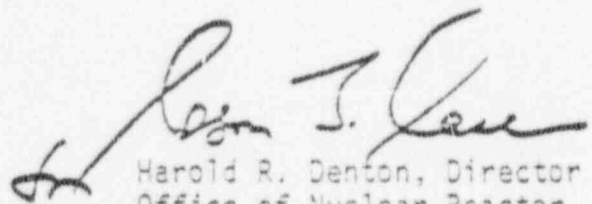
That the Commission approve the delegation of authority to the Staff (the Director, Office of Nuclear Reactor Regulation for reactors and the Director, Office of Nuclear Material Safety and Safeguards for production facilities) for determination of "significant changes" during operating license antitrust reviews as indicated in draft in Enclosure II.

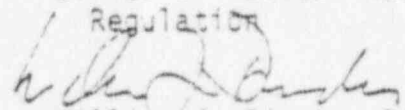
Note that Staff will initiate augmented antitrust operating license review procedures as described in Enclosure I when and if the Commission approves the proposed delegation of authority.

Note that no rulemaking is contemplated for this action at this time. However, in the near future conforming changes will be made to the regulations in 10 CFR Part 1, "Statement of Organization and General Information."

Coordination:

The Office of the Executive Legal Director concurs with this paper.


Harold R. Denton, Director
Office of Nuclear Reactor
Regulation


William J. Dircks, Director
Office of Nuclear Material
Safety & Safeguards

Enclosures: I. Operating License Antitrust Review Procedures
II. Draft Delegation of Authority

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Friday, June 8, 1979.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT June 4, 1979, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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ENCLOSURE I

OPERATING LICENSE ANTITRUST REVIEW PROCEDURES

1. Upon docketing of an application for a facility operating license, the Office of Nuclear Reactor Regulation (NRR) or the Office of Nuclear Material Safety and Safeguards (NMSS), as appropriate, will cause to be published a "Notice of Receipt of Operating License Application and Request for Antitrust Information" in the Federal Register and in appropriate trade journals. This Notice would invite the submittal to the NRC of comments or information concerning the antitrust aspects of the application to assist the NRC Staff in determining whether significant changes in the licensee's activities or proposed activities had occurred since the completion of the antitrust review at the construction permit stage, pursuant to Section 105c of the Atomic Energy Act of 1954, as amended.

2. Copies of the facility operating license application, including the antitrust information provided by the applicant under Regulatory Guide 9.3, will be transmitted to both the Office of the Executive Legal Director (OELD) and to the Antitrust and Indemnity Group of NRR (AIG) for review to determine whether there have been any significant changes since the completion of the antitrust review at the construction permit stage. Each of these reviews will take into account comments or information received in response to the published Notice and also any information regarding the applicant obtained informally from the Department of Justice.

3. Upon completion of its review, AIG will transmit the results to OELD together with a recommendation as to whether or not there have been significant changes. OELD will then complete its own review.

4. If, as a result of their reviews, it is concluded that there have been no significant changes since the completion of the antitrust review at the construction permit stage, a document in the form of a finding will be prepared jointly by OELD and AIG for the signature of the appropriate Office Director (NRR or NMSS). This document will set forth the bases for the finding. Copies of this document will be sent to the Commission and to the NRR or NMSS licensing project manager for the facility involved. Copies of this document will also be sent to those persons providing comments or information in response to the Notice, and to the Washington and local public document rooms.

5. If, as a result of their reviews, it is concluded that significant changes have occurred since the completion of the antitrust review at the construction permit stage, a document in the form of a finding will be prepared jointly by AIG and OELD for the signature of the appropriate Office Director (NRR or NMSS). This document will set forth the bases for the finding. This document together with a copy of the application and the information submitted under Regulatory Guide 9.3 will be transmitted to the Attorney General by

OELD with a formal request for antitrust advice, pursuant to Section 105c(1) and (2) of the Act. Copies of the Office Director's finding and the request addressed to the Attorney General will be transmitted to the Commission, the NRR or NMSS licensing project manager, those persons providing comments or information in response to the Notice, and to the Washington and local public document rooms.

6. If a finding is made by an Office Director that there have been no significant changes since the completion of the antitrust review at the construction permit stage and there is a subsequent request from a member of the public for a determination that significant changes have occurred, then the finding will be reevaluated by OELD and AIG in light of any new information contained in the request. If, as a result of the reevaluation, it is determined that there is no reasonable basis for changing the Office Director's finding, then the Office Director shall deny the request, stating the reasons for the denial, and will so notify both the Commission and the requesting party. Copies of the notification shall also be transmitted to the NRR or NMSS licensing project manager, and to the Washington and local public document rooms.

If, however, as a result of the reevaluation, it is determined that there is a reasonable basis for changing the Office Director's

finding in light of the new information contained in the request, OELD shall so inform the Attorney General and formally request his antitrust advice, pursuant to Section 105c(1) and (2) of the Act. Copies of the revised Office Director's finding along with copies of the license application, the information submitted under Regulatory Guide 9.3, and the information and request received from the member of the public shall be transmitted to the Attorney General. Copies of the revised Office Director's finding and the request for advice addressed to the Attorney General will be transmitted to the Commission, the NRR or NMSS licensing project manager, the requesting member of the public, and to the Washington and local public document rooms.

ENCLOSURE II

MEMORANDUM FOR: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

William J. Dircks, Director
Office of Nuclear Material Safety and
Safeguards

FROM: Joseph M. Hendrie, Chairman

SUBJECT: DELEGATION OF AUTHORITY TO MAKE "SIGNIFICANT CHANGES"
DETERMINATION FOR OPERATING LICENSE ANTITRUST REVIEW

The Commission hereby delegates the authority to make the "significant changes" determination under Section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2135c(2), for the purpose of obtaining the Attorney General's advice pursuant to Section 105(c)(1) of that Act to either the Director, Office of Nuclear Reactor Regulation (for reactors) or the Director, Nuclear Material Safety and Safeguards (for production facilities), as appropriate. This delegation is made in connection with the revised Operating License Antitrust Review Procedures (attached to this Memorandum) which shall control the method of determining whether there have been "significant changes" in the licensee's activities or proposed activities subsequent to the previous antitrust review by the Attorney General and the Commission in connection with the construction permit.

Joseph M. Hendrie

ATTACHMENT C