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October 27, 1989

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Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Joe:

As you know, the NRC is currently reviewing license amendment applications from System Energy Resources, Inc. (SERI), Louisiana Power and Light Company (LP&L), and Arkansas Power and Light Company (AP&L) that seek NRC authorizations for a new Entergy subsidiary -- Entergy Operations, Inc. (EOI) -- to assume responsibility for operation of Grand Gulf Unit 1, Waterford 3, and Arkansas Nuclear One, Units 1 and 2. EOI would also assume responsibility for design and construction of Grand Gulf Unit 2.

These consolidation license amendment applications have raised three legal issues related to the antitrust aspects of the NRC's review. These issues are:

- o whether statutory antitrust review by the NRC is required;
- o whether actions by officers of EOI that implicate compliance with the current antitrust license conditions may be imputed to the licensees that remain subject to those conditions (that is, without making EOI subject to the antitrust conditions); and
- o whether licensee commitments pertaining to antitrust issues are enforceable.

Our client, SERI, has requested that we address these issues and provide our conclusions to you. For convenient reference I have also attached a copy of the licensees' supplemental information filed today with the Office of Nuclear Reactor Regulation.

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As discussed in more detail below, we have concluded first, as a threshold matter, that the present operating license amendment applications are not of a type subject to full antitrust review under Section 105 of the Atomic Energy Act, 42 U.S.C. § 2135, because the amendments involve no changes in plant ownership or in the terms of the existing antitrust conditions. Second, under NRC's statutory antitrust enforcement authority, if existing antitrust license conditions are not met, the NRC is empowered to take enforcement action against the licensees subject to those conditions, regardless of whether the action complained of is that of the licensee or its agent, EOI. Finally, it is legally unnecessary to make EOI subject to the present antitrust conditions to enforce the licensees' commitments in this area. A licensee's docketed commitments with respect to antitrust considerations are enforceable by the NRC if those commitments have been determined by the Staff to be a necessary consideration in its licensing decision.

Addressing the first point, it seems well-settled that the NRC's jurisdiction to impose new antitrust conditions is tied to the agency's two-step licensing process. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303, 1311-12 (1977); accord Florida Power and Light Company (St. Lucie Plant, Unit 2), CLI-78-12, 7 NRC 939, 945 (1978). Section 105 of the Act on its face requires antitrust reviews only for construction permit applications and, in some more narrowly defined cases, operating license applications. The statutory scheme does not explicitly contemplate an antitrust review of license transfers or operating license amendments to add new licensees. See 42 U.S.C. § 2135. Commission precedent acknowledges that antitrust review is necessary for certain amendments involving changes in ownership of the facility. Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-13, 7 NRC 583, 588, aff'd, ALAB-475, 7 NRC 752 (1978). The principle that ownership changes require antitrust review was subsequently adopted by the Commission itself in South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 830-31 (1980). Authority for review in these cases is drawn from the "intent and purpose" of Section 105c of the Act; namely, that no owner escape antitrust review simply by "coming in later by way of amendment." Id. However, the present amendments do not involve any change in ownership and do not involve any change in the entities entitled to benefit from the power produced by the plant. Likewise, the amendments do not propose to relax any existing antitrust conditions. These, therefore, are not amendments falling within the scope of the Fermi decision that require statutory antitrust review.

1/ See South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980).

Beyond the threshold question, however, there is an issue as to whether it is even necessary from a legal perspective to add EOI as a licensee subject to the antitrust conditions, so long as the other licensees remain subject to those conditions. Those licensees will be specifically, in this case, principals in an agency relationship with EOI under an operating agreement. We conclude that, in these circumstances, it would not be necessary to add EOI to enforce the conditions based on EOI's actions.

The Commission's antitrust enforcement authority is defined by Sections 105 and 186 of the Act and has been discussed at length in South Texas, CLI-77-13, 5 NRC 1303. Of most direct relevance to the present issue, that decision teaches that Section 186 clearly gives the NRC authority to initiate a post-licensing enforcement proceeding in the event of a violation of a specific antitrust license condition. Specifically, Section 186 authorizes enforcement action under circumstances including a "failure to . . . operate a facility in accordance with the terms of the . . . license." This power is in no way limited or reduced by Section 105. See South Texas, CLI-77-13, 5 NRC at 1311.

NRC antitrust license conditions are fashioned and imposed under Sections 105c.(5) and 105c.(6) of the Act. An antitrust condition may be broadly drawn "to rectify anticompetitive situations" created by the nuclear power plant and "need not be confined in its application to activities under the license." Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646, 13 NRC 1027, 1099-1100 (1981), aff'd, 692 F.2d 1362 (11th Cir. 1983) (citing Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892, 1099-1100 (1977)). Therefore, the scope of the conditions placed on the licensees may be broad and may implicate all aspects of that licensees'

2/ Section 105 does limit certain NRC enforcement options otherwise available under Section 186. For example, Section 186 would allow the NRC to modify a license (for example, by adding new license conditions) at any time subsequent to initial licensing, if new circumstances warrant. The Commission decided, however, that the "generality of Section 186 should be treated as subordinate to the specific, limited regime" of Section 105. South Texas, CLI-77-13, 5 NRC at 1311. Section 105 limits antitrust review to the "licensing context," i.e., to specific construction permit and operating license applications, and certain amendments, as discussed above. Therefore, the NRC cannot add new conditions any time it deems conditions appropriate. The NRC does not have plenary jurisdiction to enforce the antitrust laws. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582, 592-93 (1977).

operations, clearly including marketing, brokering, and sales of power produced from the plant. The present antitrust conditions placed on Grand Gulf and Waterford 3 apply to a wide range of licensee activities as allowed by the Farley precedent.

Based on the foregoing, we conclude that EOI does not need to become subject to antitrust conditions in order for the NRC to enforce the existing antitrust license conditions so as to remedy a violation of those conditions. Assuming that EOI³ was capable of affecting compliance with antitrust conditions, and specific actions by EOI were alleged to violate a licensee's -- its principal's -- antitrust conditions, an enforcement action could be taken by the NRC against the licensee subject to those conditions. This would follow in appropriate circumstances from the agency relationship regardless of responsibility or fault of that licensee. Pittsburgh-Des Moines Steel Company, ALJ-78-3, 8 NRC 649, 651 (1978). As discussed in Farley, ALAB-646, 13 NRC 1027, antitrust license conditions are drawn broadly to rectify anticompetitive situations and can implicate all aspects of a licensee's operations. EOI will not be responsible in the Middle South Electric System for marketing or brokering power and energy; but even if it were somehow capable of becoming independently involved in an action in a marketing or brokering context, and such an action is alleged to violate Grand Gulf or Waterford 3 antitrust conditions, that action could be imputed to EOI's principal, the owner, the licensee subject to those antitrust conditions. The NRC could therefore take enforcement action against that licensee.

Finally, regardless of antitrust license conditions, the licensees subject to antitrust conditions have made enforceable commitments in the licensing context. These commitments will prevent EOI from owning the plants or owning power or entitlements to power produced by the plants. Overall, the Middle South Electric System's method for making and implementing decisions regarding marketing and power sales will be unchanged by creation of EOI. It is on this basis that the proposed amendments do not involve any change in the economics of bulk power planning or transactions in the Middle South Electric System.

Licensee commitments that are part of the licensing basis of a plant are legally enforceable without a license condition. Long Island Lighting Company (Shoreham Nuclear Power Station,

3/ Given the circumscribed organizational authorities and capabilities of EOI, we do not concede that EOI is capable, as a practical matter, of taking actions alone that would cause a non-compliance with an antitrust license condition. We make the assumption here simply to address a hypothetical concern raised by the NRC Staff.

Unit 1), ALAB-788, 20 NRC 1102, 1124-26 (1984); see also 10 C.F.R. Part 2, Appendix C, § IV.E. Licensing basis commitments are those licensee commitments that are relied upon by the NRC Staff to determine that an application is in compliance with applicable rules, regulations and orders of the NRC. The substantive enforceability of these commitments flows from their tie to the legally binding rules, regulations, and orders of the agency. Enforceability also may flow from a licensee's obligations to provide the NRC with complete and accurate information in the licensing context. A licensee that fails to meet a commitment impacting the NRC's antitrust review therefore has implicitly violated the terms of the amendment order and has potentially committed a "material false statement" (or a violation of 10 C.F.R. § 50.9).

This point is made clear in the antitrust context in South Carolina Electric and Gas Company (Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981). In that case, the Commission's denial of a petition for an affirmative "significant changes" determination under Section 105.c(2) of the Act was denied in part based on the licensee's representations and commitments that it had not refused to provide power services to the petitioner and that it would provide ad hoc transmission services in the future. The Commission accepted these assertions and did not feel the need to initiate a new antitrust review and impose the commitments in license conditions. The Commission noted that it would "consider [the licensee's] assertions as having been provided us

4/ Rules, regulations and orders are an agency's sole legally binding "requirements." Pacific Gas and Electric Company v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). These are the obligations which have been promulgated in conformance with the Administrative Procedure Act and therefore have the direct force of law. Commitments necessary to meet these requirements draw their legal effect from the underlying requirements and are enforceable on that basis. For example, a licensee that commits to implement an emergency plan, but fails to meet that commitment, has violated 10 C.F.R. § 50.47 (and potentially 10 C.F.R. § 50.9). Licensees retain certain freedom to argue that a commitment is unnecessary to comply with applicable legal requirements, and that literal compliance with the commitment is therefore unnecessary. However, where the NRC Staff has documented a contrary view in a safety evaluation report or in a finding which provides a basis for an amendment order (e.g., the Staff has explicitly relied upon the commitment as providing the necessary margin of safety), the licensee would need to overcome that Staff interpretation in opposing any enforcement action taken based on the commitment. (In the context of antitrust commitments, the terms of 10 C.F.R. § 50.59 would not appear to have any direct relevance or applicability.)

Joseph Rutberg, Esq.

October 26, 1989

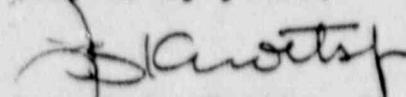
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for the purpose of securing a license with all that that entails." Id. at 278. The Commission cited its ruling in South Texas, CLY-77-13, 5 NRC 1303 at 1311, where it had noted that under its antitrust enforcement authority it "would not be limited to mere reference to the Attorney General if a license applicant had falsified pertinent antitrust review information or had otherwise obtained an unconditioned license [or by implication, license amendment] by some sort of fraud or concealment" Commitments in the antitrust licensing context are therefore clearly enforceable.

In sum, a licensee, as both a practical and legal matter, is not free to unilaterally change, reduce, or eliminate antitrust review commitments without the potential for an NRC enforcement action. Therefore, the amendments for Grand Gulf Unit 1 and Unit 2, Waterford 3, and Arkansas Nuclear One Unit 1 and Unit 2 need not include new antitrust conditions applicable to EOI.

If you would like to discuss any of these issues further, I would be available at your convenience.

Very truly yours,



Joseph B. Knotts, Jr.