

REEVALUATION AND AFFIRMATION OF
NO SIGNIFICANT CHANGE FINDING PURSUANT TO
RIVER BEND STATION, UNIT 1
POST OPERATING LICENSE ANTITRUST REVIEW

By filings dated November 19, 1993, from Cajun Electric Power Cooperative, Inc. (Cajun), Lafayette, Louisiana (Lafayette), Louisiana Energy and Power Authority (LEPA) and Terrebonne Parish Consolidated Government (Terrebonne)¹ (collectively, Requesters), I have been requested to reevaluate my Finding of No Significant Changes (Finding) pursuant to the anticipated ownership transfer in the River Bend Station, Unit 1 (River Bend) resulting from the proposed merger of Gulf States Utilities Company (GSU) and Entergy Corporation (Entergy). Of the entities requesting reevaluation, Cajun is the only entity that specifically requests that I reevaluate both the transfer of ownership control in River Bend from GSU to Entergy and the transfer of operation of River Bend from GSU to Entergy Operations, Inc. (EOI). This Finding was published in the Federal Register on October 20, 1993, (58 Fed. Reg. 54176). For the reasons set forth below, I have decided not to change my River Bend finding of no significant changes.

¹ Terrebonne, at page 11 of its request, indicates that Terrebonne has been authorized to state that Brazos Electric Power Cooperative, Inc. also seeks reevaluation of my Finding; however, Brazos has not submitted any such request to the Commission nor has Terrebonne elaborated on the nature of such a request, consequently, the staff comments cited herein reflect only those requests cited above.

BACKGROUND

As indicated in the Staff Recommendation, the Nuclear Regulatory Commission (NRC or Commission) has established procedures by which prospective licensees of nuclear production facilities are reviewed during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. Although section 105 of the Atomic Energy Act of 1954, as amended (AEA), 42 U.S.C. § 2135, does not specifically address the addition of new owners or operators after the initial licensing process, the NRC staff (staff) has, in analyzing situations where new ownership occurs after issuance of an operating license, applied the standards set forth by the Commission in its Summer order to determine whether an antitrust review is required.² Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests -- the subject of the instant reevaluation requests.

² South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980). The order was issued in response to a petition requesting the Commission to determine, pursuant to section 105c(2) of the Atomic Energy Act, as amended, that significant changes in the licensee's activities had occurred subsequent to the construction permit antitrust review. The Commission enunciated the criteria to be used in making the decision but deferred the actual decision pending assistance from the Department of Justice. In a subsequent decision, the Commission affirmed the criteria set out in the order and denied the petition. See South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

Although the actions taken by the staff, when faced with operating license amendments that request the addition of a new owner or placing a non-owner operator on a license, have been tailored to each particular amendment request, post-operating license amendment applications involving change in ownership have been subjected to a staff review, in conjunction with consultation with the Attorney General, to determine whether there has been a significant change. The review by the staff focuses on changes in the market(s) in question caused by the proposed change in ownership since the most recent antitrust review of the facility in question. Where appropriate, the staff review takes into account related proceedings and reviews in other federal agencies.

The staff has adopted a review process for post-operating license changes in plant ownership patterned after the operating license review associated with initial applicants. Receipt of the application to add a new owner to the facility after the operating license has been issued is noticed in the Federal Register with the opportunity extended to the public to express views relating to any antitrust issues raised by the application. The notice states that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensee's activities or proposed activities have occurred since the completion of the previous antitrust review. In the instant proceeding, the notice also recognized the existence of a related

federal agency review and the staff's intention to consider the related proceeding.

With the benefit of public comment and consultation with the Department of Justice, the staff makes a determination whether the changes in question will require a further antitrust review in order to determine whether the issuance of the license amendment will create or maintain a situation inconsistent with the antitrust laws. If the Director of NRR finds a "significant change," the matter is referred to the Attorney General for a formal antitrust review pursuant to Section 105(c) of the AEA. If the Director of NRR finds no significant change, the finding is published in the Federal Register with an opportunity for the public to request reevaluation of the finding. The requests to reevaluate the Director's Finding noted above are the subject of this reevaluation finding.

DISCUSSION

The Commission delegated its authority to make significant change findings to the staff and in its Summer order, established a set of criteria the staff must follow in making the determination whether a significant change has occurred:

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 likely warrant some Commission remedy.³

It is within this framework established by the Commission that I made my initial Finding of No Significant Changes on October 15, 1993, and it is within this framework that I have analyzed each of the requests to reevaluate my Finding.

Commission regulations providing for public requests for reconsideration of a Director's finding of no significant antitrust changes (10 C.F.R. § 2.101(e)(2)) are intended to provide the public the opportunity to present new data or highlight data overlooked by the staff in the deliberative process leading up to the Director's finding. Requests for reevaluation are not intended to provide entities the opportunity to reiterate old arguments. The issues raised by Cajun, Lafayette, LEPA and Terrebonne in their requests for reevaluation were raised in their original comments during the amendment application process. Requesters raise no issues which were not appropriately addressed in the post operating license significant change review. Thus, the staff has already considered the merits of Requesters' arguments in its review process. The staff has determined that the issues raised by Requesters that fall within the jurisdiction of the NRC appear to be more in the nature of enforcement issues, not licensing issues, that should be raised and addressed in the context of an enforcement or compliance proceeding, not a significant change

³ CLI-80-28, supra, 11 NRC at 824.

antitrust licensing proceeding. Although no new arguments have been raised by Requesters, I believe elaboration on the issues again raised by Requesters may clarify the staff's findings in this proceeding.

The common thread running throughout each of the requests for reevaluation is the assumption that the staff, in evaluating the competitive effects of the proposed GSU/Entergy merger upon relevant bulk power markets, relied exclusively upon the competitive analyses conducted by the Federal Energy Regulatory Commission (FERC) in arriving at its no significant change finding. Each of the Requesters indicates that the staff, by relying so heavily on the findings to date at the FERC, is abdicating a statutory responsibility imposed upon the Commission in section 105c of the AEA. I would like to address this argument first as it does pertain to all of the Requesters and then address specific arguments raised by each of the Requesters.

The Requesters are incorrect in their assumption that the staff adopted the findings and conclusions of the FERC pertaining to competitive issues raised by the proposed merger. The FERC findings in both the proposed GSU/Entergy merger proceeding and the Entergy open access transmission proceeding were considered by the staff and were helpful to the staff in its analysis. However, the staff has determined, based on its analysis of the reasonably apparent changes, that the primary concerns raised by Requesters

before the NRC pertain to issues and allegations that are more germane in the context of a petition pursuant to 10 C.F.R. § 2.206 seeking initiation of an enforcement proceeding not a significant change licensing proceeding as envisioned by Requesters.⁴ Thus, the staff has not abdicated its review responsibility to the FERC in this proceeding.

At the outset, it is important to restate that the significant change review by the staff is performed using the criteria which were discussed by the Commission in its Summer order⁵ and affirmed and further explained in its subsequent Summer decision.⁶ As the Commission explained in the Summer decision, "changes in order to be significant must also be reasonably apparent."⁷ Significant

⁴ As further clarification of the distinction between the Commission's licensing and enforcement responsibilities, I refer Requesters to a reevaluation finding I made in 1989 pursuant to a request by Cap Rock Electric Power Cooperative, Inc. (Cap Rock) to reevaluate my no significant change finding associated with the operating license review of Unit 1 of the Comanche Peak Steam Electric Station (Comanche Peak). In the Comanche Peak proceeding, Cap Rock alleged that the licensee, Texas Utilities Electric Company, refused to provide certain transmission services that would enable Cap Rock to better compete in the wholesale bulk power market in north central Texas. In the Comanche Peak proceeding, as in the instant proceeding, I determined that the allegations of changed activity were issues that were more germane to an enforcement proceeding and should not be addressed in the context of a significant change licensing proceeding. See "Reevaluation and Affirmation of No Significant Change Finding Pursuant to Comanche Peak Steam Electric Station, Unit 1 Operating License Antitrust Review"; Docket No. 50-445A, dated August 29, 1989.

⁵ CLI-80-28, supra, 11 NRC 817.

⁶ CLI-81-14, supra, 13 NRC 862.

⁷ Id. at 872.

change reviews are not intended to be proceedings, with discovery and examination and cross examination of witnesses, to determine if there should be a further proceeding. Rather, the staff reviews alleged alterations in the competitive structure based on submittals and other information available to it.⁸

Within this framework for its review, the staff, in its analysis of the change in ownership, considered all the information available to it, including the assertions of the applicant and the commenters, and the decision reached by a sister federal agency regarding the effects of the proposed merger on competition. Consideration of the FERC decision in this context, was not, as Requesters assert, an improper reliance on the FERC decision. Further, the nature of an NRC significant change review, as structured by the Commission, does not provide for the conduct of a proceeding "with all the attributes of a full-fledged hearing" to determine if there should be an antitrust hearing.⁹ For these reasons, the staff did not improperly rely on the FERC decision nor does section 105 of the AEA, as understood by the Commission, require initiation of an antitrust hearing without first reaching the threshold showing of a significant change that is also reasonably apparent.¹⁰

⁸ See Id.

⁹ Id.

¹⁰ For these same reasons, Cajun's argument that the Director's Finding errs in not requiring a hearing is without
(continued...)

Cajun

The concerns raised by Cajun in its original comments and in its request for reevaluation that are not within the staff's jurisdictional purview relate to Cajun's rights under existing contracts with GSU (c.f., pp. 3,4,35,39 and 42 of Cajun's request for reevaluation). Cajun states, at page 42 of its reevaluation request, that:

The impact of the proposed merger on the PIA [Power Integration Agreement] and its attendant service schedules, on Service Schedule CTOC and on the ITS must be analyzed by this Commission. [Brackets added.]

I disagree. The extent to which the proposed merger affects existing wholesale power contracts is not in the purview of this Commission, but under the jurisdiction of the FERC. The FERC's mandate deals specifically with reliable operation of the electric

¹⁰ (...continued)
merit. Cajun at 9-20. Cajun would have the Commission conduct a full hearing for the purpose of determining whether the application should be forwarded to the Attorney General for her advice regarding whether a hearing is required on the antitrust issues. I also note that Cajun asserts, in support of its argument for a full hearing to review significant change, that the Commission could only exercise the licensing action authorized in section 105a of the AEA with benefit of first having conducted a hearing. Cajun at 9. However, in quoting section 105a, Cajun omits the first part of the sentence quoted, which states:

In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the laws cited above, to have violated any of the provisions of such laws in the conduct of the licensed activity, the Commission may suspend, revoke

42 U.S.C. § 2135(a).

utility industry and mediation over contractual obligations therein.¹¹ The FERC has indicated in its findings in the proposed GSU/Entergy merger proceeding that specific contractual disputes involving Entergy's open access transmission tariff will be resolved by the FERC when specific rate cases or service agreements are filed with the FERC.¹² I see no reason for the NRC staff also to review contract disputes.¹³

Cajun suggests that the staff misinterpreted the comments of all of the petitioners in this proceeding regarding the issues pertaining

¹¹ The Federal Energy Regulatory Commission (FERC) administers the Federal Power Act, 16 U.S.C. 824 et seq., which deals with, among other things, the wholesale interstate sale and distribution of electricity.

¹² Entergy Services, Inc., 63 FERC ¶ 61,025, slip op. at 42-48 (April 5, 1993).

¹³ Cajun argues that the Commission may not issue a license amendment "where harm to the public interest or to the efficient operation of the interconnected public utility system results." Cajun at 37. Cajun offers no authority for this proposition. The Commission clearly has jurisdiction over health and safety issues, but other nonsafety issues such as the public interest in the efficient operation of a utility are dealt with in more suitable forums. See Houston Lighting & Power Co., (South Texas Project), CLI-77-13, 5 NRC 1303, 1316-17 (1977).

Cajun has characterized these issues as "operational issues" which, in Cajun's view, have been ignored by the Director and argued by the staff as antitrust matters before the Atomic Safety and Licensing Board (Board) established to rule on the health and safety issues associated with the proposed ownership transfer. Cajun asserts that the issues must either be before the Board or before the Director in his antitrust review of significant change. Cajun at 37-38. Cajun omits a third possibility, that the issues may be matters not within the scope of either the antitrust or the health and safety province of the NRC. The staff has evaluated the issues as contractual matters not within the scope of an NRC significant change review. Whether the issues have health or safety implications is matter currently before the Licensing Board.

to competition and requests for transmission service as related almost exclusively to alleged violations of existing license conditions.¹⁴ Cajun alleges that the merger will adversely impact its access to GSU/Entergy transmission facilities and nullify or emasculate existing contractual rights.¹⁵

The transmission access issues raised by Cajun and the other Requesters, appear to have their genesis in long-standing relationships between Requesters, GSU and Entergy which were addressed by the staff at the construction permit and operating licensing stages of River Bend (as well as Entergy plants, Grand Gulf and Waterford). The Requesters assert that specific license conditions for these plants give them access rights which a post merger Entergy may be able to frustrate. For this reason, the issues raised by the Requesters that fall within the NRC's jurisdictional purview in this proceeding generally pertain to possible violations of antitrust license conditions.

Without agreeing or disagreeing with the manner in which FERC arrived at its findings in the Entergy open access transmission tariff or the findings themselves, it is apparent from the record developed at the FERC that provisions have been made by the FERC to accommodate any specific inadequacies, to the extent any exist, in the open access tariff. The FERC stated that the open access

¹⁴ Cajun at 35-37.

¹⁵ Cajun at 37-42.

transmission tariff agreed to by Entergy mitigated any market power resulting from the proposed merger.¹⁶ Moreover, the FERC indicated that if any of the parties believed that they had greater rights than provided by the open access agreement, they could file a specific service agreement upon which the FERC would rule.¹⁷ The issues that were identified, therefore, were allegations that non-compliance with antitrust license conditions might result. Given this situation, the staff determined that there was no factual basis to find changes in the licensee's proposed activities since the previous antitrust review of River Bend that would support a significant change finding resulting from the proposed merger.

Cajun also requests that I reevaluate my finding that there are no significant (competitive) changes involved in the transfer of operation of River Bend from GSU to non-owner operator EOI.¹⁸ The staff determined that no further antitrust review is required because the River Bend license will be conditioned to prohibit EOI from marketing or brokering power or energy while holding GSU accountable for any actions that contravene any antitrust license conditions.¹⁹ My finding follows the Commission's guidance

¹⁶ Entergy Services, Inc. and Gulf States Utilities Co., 62 FERC ¶ 61,073, slip op. at 106-07 (January 28, 1993).

¹⁷ Entergy Services, Inc., 63 FERC ¶ 61,025, slip op. at 36-37 (April 5, 1993).

¹⁸ Cajun at 4.

¹⁹ See Staff Recommendation at 23-25.

regarding such transfers involving non-owner operators in which the facility license in question is so conditioned.²⁰

Terrebonne/LEPA

Terrebonne and LEPA reiterate Cajun's arguments that the staff has abdicated its statutory responsibility by relying on the FERC findings regarding competitive effects of the proposed merger between GSU and Entergy. I have addressed this issue supra. Terrebonne and LEPA also have asked me to explain why the alleged changes do not meet the third Summer order criterion. The staff has adequately explained why the changes do not meet the third Summer order criterion and I have reiterated the rationale herein. The criterion in dispute, the third, requires that the change or changes "have antitrust implications that would likely warrant some Commission remedy."²¹ The issues raised by Requesters are speculative, in that they will arise only if a FERC approved service agreement involving a particular licensee appears to violate an NRC license condition applicable to that licensee. As I noted in my discussion of the Cajun Request for Reevaluation, this type of issue falls short of a "reasonably apparent" significant change. Further, the changed activity that the Requesters assert may remain after the open access transmission issues have been addressed by the FERC are enforcement issues.

²⁰ See Staff Recommendation at 6, note 10.

²¹ CLI-80-28, supra, 11 NRC at 824.

Enforcement or compliance issues are not considered changed activity within the guidance established by the Commission in the Summer order and Summer decision and are not remedied in the context of the significant change review process.

The staff noted the existence of the differing jurisdictional areas of review between the FERC and the Commission. In addressing the open access transmission issues, the FERC is amenable to review of problems associated with the tariff on a case specific (service agreement) basis. Also, the issues addressed by the staff are enforcement issues apparently beyond the reach of the FERC. Therefore, the staff determined that the jurisdictional review differences in this particular proceeding would not have significantly altered my decision to issue a no significant change finding.

Lafayette

In its request for reevaluation, Lafayette, like the other Requesters, reiterates its original arguments against the proposed merger. The staff has addressed these arguments in the Staff Recommendation, which is the basis for my Finding, and I have tried to clarify them herein.

Lafayette also argues that the post merger Entergy companies will operate as one company and that this is a significant change in

that the license conditions were "applied" by the Commission to the individual companies and do not take into account that the various companies will now operate as a single entity. Lafayette looks to the Waterford license condition which includes a provision to prevent multiple transmission charges for transmission of a contracted transmission entitlement among a coordinating group of two or more entities, as an example of the Commission acting to ensure that utilities did not unfairly price transmission service.²²

The license condition used as an example by Lafayette is unique to the Waterford plant and was accepted by the licensee to settle a pending hearing.²³ The prohibition on multiple transmission charges in the Waterford license condition does not appear in the license conditions of the other plants. Until industry-wide terms and conditions associated with network transmission service are generally accepted and considered by the FERC, e.g., in the context of developing regional transmission groups or agreements throughout the country or various regional pooling arrangements which address transmission access issues, the staff will review relevant allegations involving network versus point-to-point transmission service on a case-by-case approach considering all relevant

²² Lafayette at 3.

²³ See Louisiana Power And Light Company, (Waterford Steam Generating Station, Unit No. 3), LBP-74-78, 8 AEC 718 (1974) and Louisiana Power And Light Company, (Waterford Steam Generating Station, Unit No. 3), ALAB-258, 1 NRC 45 (1975).

arguments.²⁴ In the case of Waterford, its license conditions would be relevant in the context of a 10 C.F.R. § 2.206 petition seeking initiation of an enforcement proceeding.

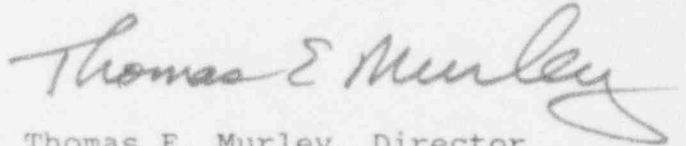
Additionally, at page 5 of its request, Lafayette makes the distinction between stranded investments costs for wholesale power customers and stranded investment costs for transmission only customers. Lafayette takes issue with the staff's interpretation of stranded investment costs and the degree to which the Waterford, Grand Gulf and River Bend license conditions address opportunity costs or stranded investment costs. The degree to which these costs have been (conceptually) excluded from transmission rates by the license conditions in the above plants would have to be determined in the context of an enforcement proceeding for a specific plant and factual situation. The staff has not set any predetermined parameters for the scope of any enforcement proceeding that might take place.

SUMMARY

Requesters ask that I reverse my finding of no significant changes regarding the proposed GSU/Entergy merger. Although Requesters present no new data to the staff and revisit the same arguments as in their original comments to the staff, I have attempted to

²⁴ Staff Recommendation at 28-29.

clarify the staff's position in this significant change proceeding.
For the reasons stated herein, I have decided not to change my
Finding.

A handwritten signature in cursive script that reads "Thomas E. Murley". The signature is written in dark ink and is positioned above the typed name and title.

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation