UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

January 16, 1991

Docket Nos. 50-346
and 50-440

MEMORANDUM FOR: Files

FROM: William M. Lambe, Antitrust Policy Analyst
Policy Development and Technical Support Branch
Program Management, Policy Development and Analysis Staff
Office of Nuclear Reactor Regulation

SUBJECT: LICENSE AMENDMENT APPLICATIONS (DATED JULY 17, 1990) TO ADD CENTERIOR SERVICE COMPANY AS A LICENSEE TO THE DAVIS-BESSE AND PERRY OPERATING LICENSES: ANTITRUST REVIEW(S)

The Projects staff completed the review of the captioned amendment requests on December 31, 1990. I feel the manner in which the antitrust review was conducted was not consistent with regulatory staff policy or the intent of Section 105 of the Atomic Energy Act of 1954. Although the antitrust license conditions that were developed and attached to the respective licenses appear to divorce the new operators from competitive control over Perry and Davis-Besse, I believe the procedures employed in arriving at these license conditions were not in the best interests of the concerned public and if followed in the future, may set an undesirable precedent.

BACKGROUND

In April of 1990, Centerior Energy Corporation (Centerior) informed the staff of a reorganization plan for itself and its subsidiaries (Cleveland Electric Illuminating Co., (CEI), Toledo Edison Co. (TE) and Centerior Service Co.). According to Centerior, the CEI and TE nuclear organizations will now report to Centerior Service Co. In order to consummate this plan, Centerior had to amend both the Perry and Davis-Besse operating licenses to reflect the change in operators and add Centerior Service Co. as a licensee to each facility. By separate letters dated July 17, 1990, CEI and TE filed applications to amend the Perry and Davis-Besse operating licenses by changing the operators from CEI and TE respectively to Centerior Service Co.

The Policy Development and Technical Support Branch (PTSB), the branch responsible for providing the staff's antitrust input to the licensing review process, was initially informed of this amendment request October 4, 1990, when PTSB was asked to concur in the SER accompanying the Davis-Besse license change -- a similar SER for Perry followed shortly thereafter. Projects also

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informed PTSB at this time that they wanted to complete the staff review prior to the end of 1990. The Projects staff provided the antitrust input to the SER by essentially agreeing with the applicant's decision that an antitrust review was unnecessary to consummate the proposed change. The SER contained the licensee's own words, indicating that,

> . . . because there is no change in plant ownership or entitlement to power, there are no significant changed circumstances warranting antitrust review.

Mr. D. Nash, my Section Chief, informed the Davis-Besse project manager, Tony Hsia, on October 4, 1990 (when Mr. Nash first became aware of the proposed amendment change) that there may have to be a more extensive antitrust review than provided in the SER. I informed Tony Hsia during the week of October 8, 1990 that the SER as drafted, was not acceptable; moreover, that it was incorrect. At this time, I told Tony Hsia I thought we had to issue a Federal Register notice notifying the public of receipt of the amendment application and seek comment on the competitive ramifications, if any, of the proposed change in operators of both Perry and Davis-Besse. Subsequently, discussions were held with the licensee as well as internally among members of the staff resulting in a set of license conditions that the licensees agreed to have attached to their respective operating licenses.

DISCUSSION

The reason for this memorandum is two-fold, 1) to clarify the antitrust staff's position and input in this particular licensing action, and 2) to correct and elaborate on characterizations by Messrs Hall and Hsia in a similar memorandum to file dated December 14, 1990 (copy attached).

The antitrust staff's position on license amendment reviews involving new operators is to seek public input regarding the competitive implications of the change and then, not before, using all available data, develop a remedy, usually in the form of license conditions, if necessary, to ameliorate any identifiable competitive concerns that fall under the jurisdiction of the Atomic Energy Act of 1954, as amended. The series of amendment requests received in 1989 from System Energy Resources, Inc. (SERI) that proposed changing operators for all of its nuclear facilities to a newly formed nuclear operating company, Entergy Operations, Inc. (EOI), a wholly-owned subsidiary of the parent company of the existing operating companies, directly parallels the Davis-Besse and Perry amendment requests in question. The staff published receipt of the amendment requests (involving three nuclear plants) and provided a period for public comment on any antitrust issues that may be raised by the proposed changes in the amendment requests. Comments were received from two parties. After considering the comments received and working with the licensee for several months, the staff developed a set of license conditions that was designed to mitigate any anticipated market control over the power and energy produced from the respective facilities.

SERI was also concerned with an expeditious review of its amendments and urged the staff to complete its review prior to the end of 1989. The SERI amendment requests were dated August 15, 1989, the Federal Register notice seeking comments within 30 days was published on November 1, 1989 and the amendments were issued on December 14, 1989. There is no appreciable difference between the SERI/EOI amendment requests and the CEI/TE/Centerior Service Co. amendment requests. The review procedures should have been identical, yet they were not. There was no opportunity for public input in the formulation of the CEI/TE/Centerior Service Co. license conditions. There was no basis to provide preferential treatment, i.e., precluding a public comment period, to one licensing action over the other. Consistency in regulatory policy is important for prospective licensees; it enables them to factor this policy into their planning process. The staff did not review the SERI/EOI and CEI/TE/Centerior Service Co. amendment requests in a consistent manner.

Although the Hall/Hsia memorandum to files summarizing a meeting between the staff and OGC on December 6, 1990 generally conforms to the discussions that took place (as I recollect them), there are several points in the memorandum that should be clarified.

The amendments pertain to transfers of licenses and should be reviewed under the requirements imposed by 10 CFR 50.80 not 50.90. The distinction is significant for 50.80 specifically states that,

> An application for transfer of a license shall include information described in Section 50.33 and 50.34 of this part with respect to the identity and technical and financial qualifications of the proposed transaction as would be required by those sections if the application were for an initial license, and, if the license to be issued is a class 103 license, the information required by Section 50.33a. [Emphasis added]

Section 50.33a pertains to antitrust information requested by the staff and the Attorney General. Section 50.80 imposes the requirements associated with an initial application when a license is transferred and specifically requires submission of antitrust information associated with an initial application. Moreover, OGC's argument that the original Sholly notice was adequate for purposes of notifying the public of an opportunity to comment on antitrust matters does not recognize past practice in similar licensing actions nor does it provide a meaningful basis upon which to build a consistent staff policy. No Sholly notices have provided opportunity for antitrust comments. In the past, a separate antitrust notice has been published. There was no mention made in the original Sholly notice of antitrust concerns associated with the transfer in question or any mention of an opportunity to comment on anti-

trust matters. This is significant for 50.80c specifically requires ". . . appropriate notice to interested parties." In light of the fact that 50.80 also specifically addresses the need for antitrust information required in 50.33a, I feel 50.80 also recognizes the need to notify "interested persons" at the operating license stage including those persons interested in the antitrust or competitive concerns associated with the transfer. Sholly notices have not been used for this purpose in the past and any person interested in commenting on the antitrust aspects of the transfer would not be looking for a Sholly notice to trigger this opportunity.

With regard to whether all meeting attendees ". . . agreed that these provisions sufficiently address the antitrust issue . . . .", I did indicate that the license conditions appeared adequate to address most of the conceivable competitive issues that may arise from the transfer, but I did not indicate that the proposed conditions were necessarily "sufficient". I don't believe the staff knows whether or not the proposed conditions are sufficient until the conditions have seen the light of public comment. (Admittedly, this is a fine point of distinction; however, the necessity of maintaining an open and independent negotiating process involving all affected parties, represents the backbone of a fair regulatory review. Without public input, this process may be circumvented or at a minimum provide the appearance of being short-circuited.)

The argument that the new operator, Centerior Service Co. is a de minimis applicant and therefore is not required to provide Appendix L (CP) information is not only spurious, but it misreads totaly the concept of what a de minimis applicant is. The concept of a de minimis applicant was developed by the staff in the late 1970's to accommodate a few plants that experienced numerous small power entities seeking ownership shares in a plant, most notably the Millstone and Seabrook facilities. The staff believed that the small power entities (usually small cities or cooperative systems with distribution only power systems) were not fully integrated power systems capable of influencing prices or quantity of power supplied in their respective service areas, i.e., they did not possess any significant market power nor would the share in which they were applying for increase this likelihood. Consequently, the staff did not believe these smaller systems should be bound by the more stringent regulatory requirements stablished primarily to review larger, fully integrated electric power systems. These small systems were termed de minimis applicants by the staff and were not required to submit 50.33a information. Moreover, receipt of their applications was not usually noticed for public comment nor was the Attorney General's advice sought pursuant to the need to hold an antitrust hearing.

The term de minimis applicant has always been applied to applicants who intend to own a portion of the facility in question, not operate the facility. To apply the term de minimis and the less stringent regulatory licensing requirements associated with a de minimis applicant to a proposed new operator of a facility is not reasonable. A new facility operator, owning no generation, could command complete competitive control of a large power source and attendant transmission facilities without owning any of the facility itself or any other generation. For this reason, one cannot apply the de minimis argument to new plant operators. When the concept was developed, it was assumed that the plant operator would also be an owner of the facility as well. As we have seen over the past few years, more and more operators are not owners of the facility

they oversee. Moreover, OGC has misinterpreted the threshold by which the staff measures de minimis owners. The 200MW of generation threshold includes the portion of the plant being applied for, not just the generation owned at the time of application. It makes no economic sense to exclude the potential market power associated with the facility being licensed.

Finally, the staff does have a policy to request public input regarding any potential competitive impact resulting from transfers of licenses or new licensees. The policy is more than an "informal" policy, it is codified for new owners in NUREG-0970. We have proposed revising NUREG-0970 to include, among other revisions, specific reference to new operators to make the policy more consistently clear.

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Enclosure:
As stated

DISTRIBUTION: [AMENDMENT PROJECTS]

Central File	WLambe
PMAS: PTSB:R/F	GHoller
NRCPDR	RHall
LPDR	AHsia
AGody	JHannon
DNash	JRutberg

OFC	:PTSB:NRR	:PTSB:NRR	:	:	:	:	:
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