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July 24, 1997

By Hand Delivery

U.S. Nuclear Regulatory Commission
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One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Re: **Application for Transfer of Control Regarding
Operating License No. NPF-57 for the Hope
Creek Nuclear Generating Station (Docket No.
50-354)**

Ladies and Gentlemen:

This letter is in response to the petition for leave to intervene dated July 9, 1997 filed by the Delaware Municipal Electric Corporation, Inc. ("DEMEC"). The petition asks the Commission to request antitrust advice from the Department of Justice under Section 105c of the Atomic Energy Act regarding the proposed merger of Atlantic City Company, t/a Atlantic Electric ("ACE") and Delmarva Power & Light Company ("DP&L") and to approve the indirect transfer of control of ACE's interest in the Hope Creek license that will occur upon consummation of the merger only with conditions that would mitigate what DEMEC perceives to be anti-competitive effects of the proposed merger. ACE objects to DEMEC's petition for leave to intervene for the reasons set forth below.

First, DEMEC's petition to intervene is inappropriate because there is no antitrust proceeding in which intervention may be granted. Even assuming the Commission were to undertake a "significant changes" antitrust review -- which it should not as explained below -- there would be no proceeding in which intervention could be granted unless and until (1) the Commission were to make a finding of significant changes and send the application to the Department of Justice

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("DOJ") for its review and (2) DOJ were to act and provide antitrust advice in connection with the application. See 10 C.F.R. §§ 2.101(e)(1)-(4) and 2.102(d).¹⁴ None of this has occurred, nor should occur. Therefore, there is no proceeding in which intervention may be granted.

Second, no antitrust review of any kind should be undertaken with respect to ACE's application. As explained in the application, "ACE is, and will remain, a licensee and owner of [its] 5% interest in the Hope Creek Unit." Application at 7. Neither DP&L nor Conectiv (the new parent holding company) "will acquire any direct interest in the [Hope Creek] license or the electricity generated by ACE's 5% interest in Hope Creek." *Id.* at 8. Because the NRC's approval of ACE's application for the indirect transfer of control will not involve the issuance of a license, the antitrust provisions of Section 105c of the Atomic Energy Act do not apply. Section 105c only provides for an antitrust review in connection with a construction permit application and, where there have been "significant changes" from the time of the construction permit, in connection with the initial operating license application. 42 U.S.C. § 2135(c).¹⁵

¹⁴ Accord Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), Order of the Secretary, April 14, 1994. In that matter, the Commission had published notice of a requested license transfer and had requested comments on whether any significant antitrust changes were involved. 59 Fed. Reg. 11,813 (March 14, 1994). An electric cooperative filed a petition for leave to intervene in response to the notice. The Secretary's April 14, 1994 order held the petition in abeyance until a significant changes determination was made, at which time a schedule for responses would be provided "if appropriate."

¹⁵ The legislative history of section 105c unequivocally reinforces its statutory language that the antitrust review provided for by section 105c is limited to the "initial application" for a construction permit or operating license and not to "other applications that may be filed during the licensing process." As stated by the Joint Committee on Atomic Energy,

The Committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for an operating license, or the initial application for a modification which would

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In its recent approval of the indirect transfers of control resulting from the proposed merger of Ohio Edison and Centerior Energy, the NRC has expressly recognized that no antitrust review -- not even a "significant changes" review -- is to be undertaken with respect to an application for an indirect transfer of control of a license under 10 C.F. R. § 50.80. As stated by the NRC in the Beaver Valley Safety Evaluation for the Ohio Edison and Centerior merger:

The antitrust provisions of Section 105c of the Atomic Energy Act apply to an application for a license to construct or operate a facility licensed under Section 103 of the Act. Although FirstEnergy may become the holding company of the licensees for the Beaver Valley facilities, i.e., may indirectly acquire control of the licenses, it will not be performing activities for which a license is needed. Since approval of the instant application would not involve the issuance of a license, the procedures under Section 105c do not apply, including the making of any "significant changes" determination. Therefore, there is no need to conduct any additional antitrust review.³²

Similarly here, the NRC's approval of the instant application for indirect transfer of control does not involve the issuance of a license. After the merger, ACE will remain the licensee with respect to its interests in the Hope Creek Unit. Accordingly, no antitrust review is to be undertaken with respect to ACE's application, not even the making of a no "significant changes" determination.⁴²

constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for the purposes of triggering subsection 105 c., other applications which may be filed during the licensing process.

H. Rep. 91-1470, 91st Cong. 2d Sess., at 29 (1970) (emphasis added).

³²Safety Evaluation by the Office of Nuclear Reactor Regulation Related to the Indirect Transfers of Control of License Nos. DPR-66 and NPF-73 for Beaver Valley Power Station, Unit Nos. 1 and 2, Docket Nos. 50-334 and 50-412 at 3 (June 19, 1997) (emphasis added). See also [Formal cites to be added for safety evaluations issued for Perry and Davis Besse in connection with the proposed Ohio Edison and Centerior merger.]

⁴²In its petition, DEMEC relies heavily on and mischaracterizes the Commission's decisions in

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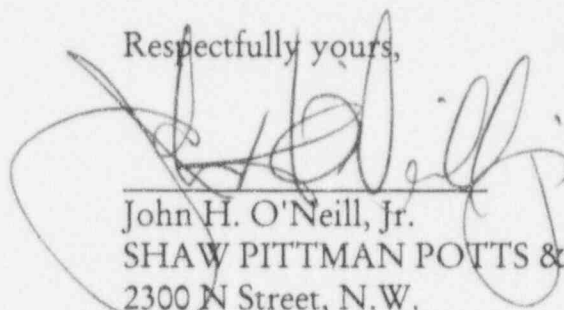
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Third, the petition to intervene effectively highlights the public policy reasons why the NRC should not consider antitrust issues in connection with mergers involving its licensees. The competitive issues of mergers involving electric utilities are fully considered by the Federal Energy Regulatory Commission ("FERC") as well as by other regulatory bodies. Here, DEMEC raises no issue unique to the NRC or tied to the NRC's jurisdiction of the Hope Creek license. Rather, DEMEC's petition merely refers to and summarizes its pleading before FERC as to why it believes the proposed merger has anticompetitive effects. Indeed, the entire substantive discussion in the petition focuses on the screening analysis required by FERC's merger policy guidelines. FERC is perfectly capable of reviewing and resolving these issues raised by DEMEC. As a matter of public policy, the NRC should not duplicate the efforts of FERC even assuming it had the statutory authority to conduct an antitrust review of the proposed merger.

In sum, there is no legal basis or public policy reason for the Commission to act upon DEMEC's petition for leave to intervene and therefore it should be denied.

Respectfully yours,



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South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980) and CLI-81-14, 13 NRC 862 (1981). Those decisions involved the operating license application for the Summer plant and therefore the NRC was authorized under Section 105c to undertake a significant changes review to determine whether significant changes had occurred since its antitrust review at the construction permit stage. In contrast, as discussed above, this case does not involve the issuance of a license and therefore Section 105c provides no statutory authority for the NRC to conduct a significant changes review under the three part test in the South Carolina cases. Moreover, the Commission did not make a finding of significant changes in the South Carolina cases as implied by DEMEC in its petition. See 13 NRC at 879.

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cc: Regional Administrator, NRC Region I
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