



RELEASED TO THE PDR

10/28/99

date

use
initials

POLICY ISSUE (Notation Vote)

August 30, 1999

SECY-99-220

FOR: The Commissioners

FROM: Karen D. Cyr
General Counsel

William D. Travers
Executive Director for Operations

SUBJECT: PROPOSED RULE -- CLARIFICATION OF REGULATIONS AND GUIDANCE
TO EXPLICITLY LIMIT WHICH TYPES OF APPLICATIONS MUST INCLUDE
ANTITRUST INFORMATION; DISPOSITION OF WOLF CREEK ANTITRUST
LICENSE CONDITIONS

50-482

PURPOSE:

To seek Commission approval to publish the attached proposed rule, regulatory guide, and standard review plan, and to issue the attached letter to the parties to the Wolf Creek transfer proceeding regarding the disposition of the existing antitrust license conditions in the event the operating license transfer is approved.

BACKGROUND AND DISCUSSION:

On June 22, 1999, the Commission issued a Memorandum and Order in the Wolf Creek license transfer proceeding dismissing a petition to intervene on antitrust grounds. *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC xxx (1999) (Wolf Creek). In *Wolf Creek*, the Commission "concluded that the Atomic Energy Act does not require or even authorize antitrust reviews of post-operating license transfer applications, and that such reviews are inadvisable from a policy perspective." The Commission further stated

CONTACTS:

Jack R. Goldberg, OGC
301-415-1681

Mike Davis, NRR
301-415-1016

1/1
DS14

9910290347 990830
PDR SECY
99-220 R PDR

that the NRC staff would be directed to initiate a rulemaking "to clarify the Commission's regulations to remove any ambiguities and ensure that the rules clearly reflect the views set out in this decision." On June 22, 1999, the Commission issued a Staff Requirements Memorandum directing the initiation of such a rulemaking and the clarification of Regulatory Guide 9.3 and NUREG-1574.

This paper seeks approval of the issuance of proposed changes to the Commission's regulations and guidance documents to clarify that they do not require the submission of antitrust information in connection with post-operating license transfer applications because the Commission no longer will conduct antitrust reviews of such applications.

As explained in the *Wolf Creek* Order, although this agency's past practice was to conduct antitrust reviews of post-operating license transfer applications, it does not appear that the Commission ever explicitly focused on the issue of whether such reviews were authorized or required by law, but instead apparently assumed that they were. *Wolf Creek* Order at 24. After a thorough *de novo* review of the scope of the Commission's antitrust authority, the Commission concluded that it was clear that Congress never contemplated such reviews but, on the contrary, limited the Commission's antitrust review responsibilities to the anticipatory, preclicensing stage of the regulatory process. *Id.* at 5-6. The Commission characterized the statutory scheme as best understood as containing an implied prohibition against post-operating license reviews and certainly no requirement of such reviews. *Id.* at 6. The Commission stated:

We now in fact have concluded, upon a close analysis of the Act, that Commission antitrust reviews of post-operating license transfer applications cannot be squared with the terms of the Act and that we therefore lack authority to conduct them. But even if we are wrong about that, and we possess some general residual authority to continue to undertake such antitrust reviews, it is certainly true that the Act nowhere requires them, and we think it sensible from a legal and policy perspective to no longer conduct them.

Id. at 24-25.

Because of the past practice of conducting antitrust reviews of license transfer applications, including those at the post-operating license stage of the regulatory process, the Commission closely examined its rules of practice to determine whether they required or warranted revision to conform to its decision in the *Wolf Creek* case. The Commission concluded that, notwithstanding its past interpretation of its rules as being consistent with an antitrust review of all transfer applications, including those involving post-operating license transfers, the rules themselves do not explicitly mandate such reviews. *Id.* at 27-28, 34. Indeed, after considering the various interpretations of the rules advanced by the parties and *amici curiae* in the *Wolf Creek* proceeding, the Commission concluded: "Not one comma of the Commission's current regulations need be changed in the wake of a cessation of such reviews, although because of the NRC's past practice of conducting such reviews, we have decided that clarification of our rules is warranted." *Id.* at 34. The Commission, therefore, directed that the rules be clarified "by explicitly limiting which types of applications must include antitrust information," *Id.* at 29, and that Regulatory Guide 9.3, "Information Needed by the AEC Regulatory Staff in Connection

with Its Antitrust Review of Operating License Applications for Nuclear Power Plants," and NUREG-1574, "Standard Review Plan on Antitrust Reviews," also be clarified.

The proposed clarifications to the regulations make clear that, consistent with the decision in the *Wolf Creek* case, no antitrust information is required to be submitted as part of any application for Commission approval of a post-operating license transfer. Because the current regulations do not clearly specify which types of applications are not subject to antitrust review, these proposed clarifying amendments will bring the regulations into conformance with the Commission's limited statutory authority to conduct antitrust reviews and its decision that such reviews of post-operating license transfer applications are not authorized or, if authorized, are not required and not warranted.

Direct transfers of facility licenses which are proposed prior to the issuance of the initial operating license for the facility, however, are and continue to be subject to the Commission's antitrust review. In order to make clear that the Commission's regulations do not require antitrust information as part of applications for post-operating license transfers, the staff is proposing to amend the regulations by specifying that antitrust information must be submitted only with applications for construction permits and "initial" operating licenses and applications for transfers of licenses prior to the issuance of the "initial" operating license. Thus the word "initial" will be inserted to modify "operating license" in appropriate locations and the word "application" will be modified where necessary to make clear that the application must be for a construction permit or initial operating license. Appendix L to 10 C.F.R. Part 50, "Information Requested by the Attorney General for Antitrust Review [of] Facility License Applications," will be similarly amended and clarified and a new definition will be added there to define "initial operation" to mean operation pursuant to the first operating license issued by the Commission for the facility.

Regulatory Guide 9.3, which describes the information needed by the Attorney General and NRC staff in connection with antitrust reviews of operating licenses, also will be revised in a similar fashion to apply only to initial operating licenses. In addition, NUREG-1574, "Standard Review Plan on Antitrust Reviews," will be rewritten to apply only to applications for construction permits and initial operating licenses.¹

Finally, still pending before the Commission is the disposition of the existing Wolf Creek antitrust license conditions in the event that the transfer of the operating license is approved. In response to the directive in CLI-99-19 that the parties address the disposition of the Wolf Creek antitrust license conditions in view of the anticipated transfer of the operating license for Wolf Creek to Westar Energy, Inc., on July 6, 1999, the Applicants for the transfer, KGE and KCP&L, and KEPCo, submitted the respective proposals.

In summary, Applicants propose, as their transfer application proposed, that the existing antitrust license conditions be retained, administratively substituting Westar for KGE and KCP&L, and be applicable to Westar as the new licensee. On the basis of KEPCo's belief that there would be adverse and anticompetitive effects of the proposed merger on it, KEPCo proposes that the existing antitrust license conditions be substantively amended to address its

¹Regulatory Guide 9.3 was issued by the Atomic Energy Commission in October, 1974, and, therefore, also will be updated as an NRC staff regulatory guide.

perceived problems with a simple substitution of Westar for KGE and KCP&L in the conditions. For the reasons explained below, the staff recommends that the Commission authorize it to deny KEPCo's request for substantive revision of the antitrust license conditions to address its asserted antitrust concerns about the proposed license transfer.

First, as was made clear in CLI-99-19, after careful and thorough analysis of its antitrust authority, the Commission concluded that it lacks statutory authority to undertake an antitrust review of post-operating license transfer applications. KEPCo's proposal to enhance existing license conditions based on asserted antitrust problems with the proposed transfer, problems that are disputed by Applicants, could be evaluated only after a review of the alleged antitrust problems and a resolution of the differences between Applicants and KEPCo. This is precisely the antitrust review the Commission decided it had no authority to perform (or, if it had authority, would not perform as a matter of policy). Thus KEPCo's proposal is tantamount to its original request to have the Commission conduct an antitrust review of the proposed transfer and, accordingly, flies in the face of the Commission's decision in CLI-99-19.

Second, it is far from clear that KEPCo is correct in its assertion that the application of the antitrust license conditions to the new licensee will result in draconian antitrust problems for KEPCo. In accordance with the amended license, Westar will be required to comply with the currently existing antitrust conditions verbatim throughout Westar's service area. In particular, with respect to KEPCo's concern about the differences in the two current sets of license conditions as they apply to KGE and KCP&L, Applicants commit Westar "to abide by whichever conditions were more restrictive to Westar and more favorable to KEPCo," Applicants' July 6th letter at 1. With respect to KEPCo's assertion that "it is far from clear what would be 'the more restrictive set of conditions for any given circumstances,'" KEPCo's July 6th letter at 6, Applicants state that "in any given circumstance, KEPCo could choose whether to rely upon the duties imposed on Westar either by the more specific KGE conditions or by the more general KCP&L conditions," Applicants' July 6th letter at 2. In this and other respects, it appears that Applicants are willing to give KEPCo the benefit, at KEPCo's choice, of both sets of conditions applicable verbatim to the new licensee, Westar.

Two additional points warrant emphasis. First, as stated above, and for the reasons in CLI-99-19, the Commission has decided that it has no authority to conduct the kind of antitrust review that KEPCo would have us undertake now in connection with the proposed license transfer. Accordingly, even if the staff is wrong that the Applicants proposal to substitute Westar as the new licensee in the Wolf Creek license conditions is the appropriate disposition and addresses KEPCo's antitrust concerns with the transfer, the Commission should not embark on a course to determine what new or different conditions might be warranted. Second, if future events prove KEPCo's antitrust concerns valid, then KEPCo has a number of options available to it to have those antitrust issues resolved (*see, e.g., Atomic Energy Acts* § 105a, b), including, if appropriate, seeking NRC enforcement of the transferred license conditions against Westar.

For these reasons, if the Applicants' proposed transfer is approved by the Commission, the existing antitrust license conditions should be administratively amended to substitute Westar as the licensee to which all antitrust license conditions apply. The attached draft letter would inform the parties to the Wolf Creek transfer proceeding of this determination.

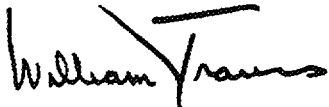
COORDINATION:

The Office of the Chief Information Officer has reviewed the proposed rule for information technology and information management implications and concurs in it. Additionally, the Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objections.

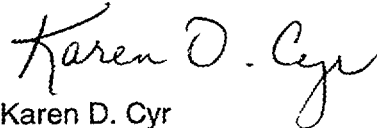
RECOMMENDATION:

That the Commission:

1. Approve publication of the attached draft *Federal Register* Notice and Proposed Rule and the attached draft guidance documents for a 60 day comment period.
2. Approve the issuance of the attached letter regarding the Wolf Creek antitrust license conditions.
3. Note:
 - a. The rulemaking would be published in the Federal Register for a 60-day public comment period;
 - b. The appropriate Congressional committees will be informed (Attachment 5).



William D. Travers
Executive Director for Operations



Karen D. Cyr
General Counsel

- Attachments: 1. Federal Register Notice with Proposed Rule
2. Draft Regulatory Guide 9.3
3. Draft NUREG-1574
4. Draft letter regarding Wolf Creek antitrust license conditions
5. Draft Congressional letters

Commissioners' completed vote sheets/comments should be provided directly to the Office of the Secretary by COB Thursday, September 16, 1999. Commission Staff Office comments, if any, should be submitted to the Commissioners NLT September 9, 1999, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected

cc: Commissioners
OGC
OCAA
OIG
OPA
OCA
ACRS

ASIEP
CIO
CFO
EDO
Regions
SECY

[7590-01-P]

Nuclear Regulatory Commission

10 CFR Parts 2 and 50

RIN 3150 AG 38

Antitrust Review Authority: Clarification

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to clarify its regulations to reflect more clearly its limited antitrust review authority by explicitly limiting the types of applications that must include antitrust information. Specifically, because the Commission is not authorized to conduct antitrust reviews of post-operating license transfer applications, or at least is not required to conduct this type of review and has decided that it no longer will conduct them, no antitrust information is required as part of a post-operating license transfer application. Because the current regulations do not clearly specify which types of applications are not subject to antitrust review, these proposed clarifying amendments would bring the regulations into conformance with the Commission's limited statutory authority to conduct antitrust reviews.

DATES: The comment period expires (60 days after publication). Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date. Comments may be submitted either electronically or in written form.

ADDRESSES: Written comments should be sent to: Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, Attention: Rulemaking and Adjudications Staff.

You may also provide comments via the NRC's interactive rulemaking web site through the NRC home page (<http://www.nrc.gov>). From the home page, select "Rulemaking" from the tool bar. The interactive rulemaking web site can then be accessed by selecting "Rulemaking Forum." This site provides the ability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking web site, contact Ms. Carol Gallagher, 301-415-5905; e-mail CAG@nrc.gov.

Comments received on this rulemaking may be examined at the NRC Public Document Room, 2120 L Street NW (Lower Level), Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Jack R. Goldberg, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001; telephone 301-415-1681; e-mail JRG1@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction and Purpose

In a license transfer application filed on October 27, 1998, by Kansas Gas and Electric Company (KGE) and Kansas City Power and Light Company (KCP&L) (Applicants),

Commission approval pursuant to 10 CFR 50.80 was sought of a transfer of the Applicants' possession-only interests in the operating license for the Wolf Creek Generating Station, Unit 1, to a new company, Westar Energy, Inc. Wolf Creek is jointly owned by the Applicants, each of which owns an undivided 47 percent interest. The remaining 6 percent interest is owned by Kansas Electric Power Cooperative, Inc. (KEPCo). The Applicants requested that the Commission amend the operating license for Wolf Creek pursuant to 10 CFR § 50.90 by deleting KGE and KCPL as licensees and adding Westar Energy in their place. KEPCo opposed the transfer on antitrust grounds, claiming that the transfer would have anticompetitive effects and would result in "significant changes" in the competitive market. KEPCo petitioned the Commission to intervene in the transfer proceeding and requested a hearing, arguing that the Commission should conduct an antitrust review of the proposed transfer under Section 105c of the Atomic Energy Act, 42, U.S.C. 2135(c). Applicants opposed the petition and request for a hearing.

By Memorandum and Order dated March 2, 1999, CLI-99-05, 49 NRC 199 (1999), the Commission indicated that although its staff historically has performed a "significant changes" review in connection with certain kinds of license transfers, it intended to consider in the Wolf Creek case whether to depart from that practice and "direct the NRC staff no longer to conduct significant changes reviews in license transfer cases, including the current case." In deciding this matter, the Commission stated that it expected to consider a number of factors, including its statutory mandate, its expertise, and its resources. Accordingly, the Commission directed the Applicants and KEPCo to file briefs on the single question: "whether as a matter of law or policy the Commission may and should eliminate all antitrust reviews in connection with license transfers and therefore terminate this adjudicatory proceeding forthwith." *Id.* at 200.

Because the issue of the Commission's authority to conduct antitrust reviews of license transfers is of interest to, and affects, more than only the parties directly involved in, or affected by, the proposed Wolf Creek transfer, the Commission in that case invited *amicus curiae* briefs from "any interested person or entity." CLI-99-05, 49 NRC at 200, n.1. (Briefs on the issue subsequently were received from a number of nonparties.) In addition, widespread notice of the Commission's intent to decide this matter in the Wolf Creek proceeding was provided by publishing that order on the NRC's web site and in the Federal Register, and also by sending copies to organizations known to be active in or interested in the Commission's antitrust activities. Id.

After considering the arguments presented in the briefs, and based on a thorough *de novo* review of the scope of the Commission's antitrust authority, the Commission concluded that the structure, language, and history of the Atomic Energy Act do not support its prior practice of conducting antitrust reviews of post-operating license transfers. The Commission stated:

It now seems clear to us that Congress never contemplated such reviews. On the contrary, Congress carefully set out exactly when and how the Commission should exercise its antitrust authority, and limited the Commission's review responsibilities to the anticipatory, prelicensing stage, prior to the commitment of substantial licensee resources and at a time when the Commission's opportunity to fashion effective antitrust relief was at its maximum. The Act's antitrust provisions nowhere even mention post-operating license transfers.

The statutory scheme is best understood, in our view, as an implied prohibition against additional Commission antitrust reviews beyond those Congress specified. At the least, the statute cannot be viewed as a requirement of such reviews. In these circumstances, and given what we view as strong policy reasons against a continued expansive view of our antitrust authority, we have decided to abandon our prior practice of conducting antitrust reviews of post-operating license transfers

Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 446 (1999).

II. Discussion

The Commission's decision in *Wolf Creek* was based on a thorough consideration of the documented purpose of Congress's grant of limited antitrust authority to the NRC's predecessor, the Atomic Energy Commission, the statutory framework of that authority, the carefully-crafted statutory language, and the legislative history of the antitrust amendments to the Atomic Energy Act. The Commission's *Wolf Creek* decision explained that, in eliminating the theretofore government monopoly over atomic energy, Congress wished to provide incentives for its further development for peaceful purposes but was concerned that the high costs of nuclear power plants could enable the large electric utilities to monopolize nuclear generating facilities to the anticompetitive harm of smaller utilities. Therefore, Congress amended the Atomic Energy Act to provide for an antitrust review in the precicensing stages of the regulatory licensing process. Congress focused its grant of antitrust review authority on the

two steps of the Commission's licensing process: the application for the facility's construction permit and the application for the facility's initial operating license. It is at these early stages of the facility's licensing that the Commission historically was believed by Congress to be in a unique position to remedy a situation inconsistent with the antitrust laws by providing ownership access and related bulk power services to smaller electric systems competitively disadvantaged by the planned operation of the nuclear facility. Congress emphasized that the Commission's review responsibilities were to be exercised at the anticipatory, prelicensing stages prior to the commitment of substantial licensee resources and at a time when the Commission's opportunity to fashion effective relief was at its maximum. *See Wolf Creek* at 446 - 448.

The Commission next focused on the structure and language of its antitrust review authority found exclusively in Section 105 of the Atomic Energy Act, 42 U.S.C. 2135. Section 105c provides for a mandatory and complete antitrust review at the construction permit phase of the licensing process when all entities who might wish ownership access to the nuclear facility and who are in a position to raise antitrust concerns are able to seek an appropriate licensing remedy from the Commission prior to actual operation of the facility. The construction permit antitrust review contrasts markedly from the only other review authorized by the statute. Specifically, Section 105c explicitly provides that the antitrust review provisions "shall not apply" to an application for an operating license unless "significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review . . . in connection with the construction permit for the facility." Section 105c.(2). Following this more limited and conditional review prior to initial operation of the facility, Section 105 makes clear that traditional antitrust forums are available to consider asserted anticompetitive conduct of Commission licensees, which are not relieved of operation of the antitrust laws. Section 105a, b. Further, if

any Commission licensee is found to have violated any antitrust law, the Commission has the authority to take any licensing action it deems necessary. Section 105a. *See id.* at 447 - 452.

After describing this statutory framework and structure, the Commission then closely examined the language of its statutory antitrust review authority. The Commission found that it focused on only two types of applications, namely those for a construction permit and those for an initial operating license, but not for other types of applications explicitly mentioned in Section 103 of the Atomic Energy Act, such as applications to “acquire” or “transfer” a license. Even if an application to transfer an operating license were considered an application for an operating license for the transferee, the Commission found that the specific “significant changes” review process mandated by Section 105 does not lend itself to an antitrust review of post-operating license transfer applications. The Commission noted that its past practice of conducting “significant changes” reviews of post-operating license transfer applications did not use the construction permit review as the benchmark for comparison as mandated by Section 105, but instead examined whether there were significant changes compared with the previous operating license review. Like the statutory framework, the statutory language was found to be inconsistent with authorization to conduct post-operating license antitrust reviews and certainly could not be found to support a required review at that time. *See id.* at 452 - 456.

Finally, the Commission reviewed the legislative history of the antitrust amendments. It found that the Joint Committee on Atomic Energy, in its authoritative report on the Commission’s precensing antitrust authority, explicitly clarified the scope of the terms “license application” and “application for a license” in the language which was enacted as Section 105. The Commission stated:

In its Report, the Joint Committee¹¹ made clear that the term "license application" referred only to applications for construction permits or operating licenses filed as part of the "initial" licensing process for a new facility not yet constructed, or for modifications which would result in a substantially different facility:

The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic-renew] a license, and also that the form of an application for 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 constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for purposes of triggering subsection 105 c., other applications which may be filed during the licensing process.

¹¹The Joint Committee Report is the best source of legislative history of the 1970 amendments. See Alabama Power Co. v. NRC, 692 F.2d, 1362, 1368 (11th Cir. 1982). The Report was considered by both houses in their respective floor deliberations on the antitrust legislation and is entitled to special weight because of the Joint Committee's "peculiar responsibility and place . . . in the statutory scheme." See Power Reactor Development Co. v. International Union, 367 U.S. 396, 409 (1961).

See id. at 458, *quoting* Report By The Joint Committee On Atomic Energy: Amending The Atomic Energy Act of 1954, As Amended, To Eliminate The Requirement For A Finding Of Practical Value, To Provide For Prelicensing Antitrust Review Of Production And Utilization Facilities, And To Effectuate Certain Other Purposes Pertaining To Nuclear Facilities, H.R. Rep. No. 91-1470 (also Rep. No. 91-1247), 91st Cong., 2nd Sess., at 29 (1970), 3 U.S. Code and Adm. News 4981 (1970) ("Joint Committee Report") (quoting from legislative history of 1954 Act).

In summary, the Commission concluded that neither the language of the Commission's statutory authority to conduct antitrust reviews nor its legislative history support any authority to perform antitrust reviews of post-operating license transfer applications and certainly cannot be interpreted to require such reviews.

The Commission's *Wolf Creek* decision is published in its entirety at 64 *FR* 33916; June 24, 1999. Interested persons are encouraged to read the *Wolf Creek* decision in its entirety for a complete understanding of the Commission's interpretation of its statutory antitrust authority.

Because of the Commission's past practice of conducting antitrust reviews of license transfer applications, including those at the post-operating license stage of the regulatory process, the Commission in the *Wolf Creek* case also closely examined its rules of practice to determine whether they required or warranted revision to conform to its decision in the *Wolf Creek* decision. The Commission concluded that, notwithstanding its past interpretation of its rules as being consistent with an antitrust review of all transfer applications, including those

involving post-operating license transfers, the rules themselves do not explicitly mandate such reviews. *Id.* at 462, 467.

The Commission's practice has been to perform a "significant changes" review of applications to directly transfer Section 103 construction permit and operating licenses to a new entity, including those applications for post-operating license transfers. While the historical basis for such reviews in the case of post-operating license transfer applications remains cloudy -- it does not appear that the Commission ever explicitly focused on the issue of whether such reviews were authorized or required by law, but instead apparently assumed that they were¹⁴ -- the reasons, even if known, would have to yield to a determination that such reviews are not authorized by the Act. See American Telephone & Telegraph Co. v. FCC, 978 F.2d 727, 733 (D.C. Cir. 1992). We now in fact have concluded, upon a close analysis of the Act, that Commission antitrust reviews of post-operating license transfer applications cannot be squared with the terms or intent of the Act and that we therefore lack authority to conduct them. But even if we are wrong about that, and we possess some general residual authority to continue to undertake such antitrust reviews, it is certainly true that the Act

¹⁴Until recently, the Commission's staff applied the "significant changes" review process to both "direct" and "indirect" transfers. Indirect transfers involve corporate restructuring or reorganizations which leave the licensee itself intact as a corporate entity and therefore involve no application for a new operating license. The vast majority of indirect transfers involve the purchase or acquisition of securities of the licensee (e.g., the acquisition of a licensee by a new parent holding company). In this type of transfer, existing antitrust license conditions continue to apply to the same licensee. The Commission recently did focus on antitrust reviews of indirect license transfer applications and approved the staff's proposal to no longer conduct "significant changes" reviews for such applications because there is no effective application for an operating license in such cases. See Staff Requirements Memorandum (November 18, 1997) on SECY-97-227, Status Of Staff Actions On Standard Review Plans For Antitrust Reviews And Financial Qualifications And Decommissioning-Funding Assurance Reviews.

nowhere requires them, and we think it sensible from a legal and policy perspective to no longer conduct them.

It is well established in administrative law that, when a statute is susceptible to more than one permissible interpretation, an agency is free to choose among those interpretations. Chevron, 467 U.S. at 842-43. This is so even when a new interpretation at issue represents a sharp departure from prior agency views. Id. at 862. As the Supreme Court explained in Chevron, agency interpretations and policies are not “carved in stone” but rather must be subject to re-evaluations of their wisdom on a continuing basis. Id. at 863-64. Agencies “must be given ample latitude to ‘adapt its rules and policies to the demands of changing circumstances.’” Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 42 (1983), quoting Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968). An agency may change its interpretation of a statute so long as it justifies its new approach with a “reasoned analysis” supporting a permissible construction. Rust v. Sullivan, 500 U.S. 173, 186-87 (1991); Public Lands Council v. Babbitt, 154 F.3d 1160, 1175 (10th Cir. 1998); First City Bank v. National Credit Union Admin Bd., 111 F.3d 433, 442 (6th Cir. 1997); see also Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973); Hatch v. FERC, 654 F.2d 825, 834 (D.C. Cir. 1981); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1971).

We therefore give due consideration to the Commission’s established practice of conducting antitrust reviews of post-operating license transfer applications but

appropriately accord little weight to it in evaluating anew the issue of Section 105's scope and whether, even if such reviews are authorized by an interpretation of Section 105, they should continue as a matter of policy. Moreover, as we noted above, the Commission's actual practice of reviewing license transfer applications for significant changes is on its face inconsistent with the statutory requirement regarding how significant changes must be determined. The fact that the statutory method does not lend itself to post-operating license transfer applications, while the different one actually used does logically apply, also must be considered and suggests that such a review is not required by the plain language of the statute and was never intended by Congress.

In support of the arguments advanced in KEPCo's briefs and some of the *amicus* briefs that the Commission must conduct antitrust reviews of transfer applications, various NRC regulations and guidance are cited. Just as the Commission's past practices cannot justify continuation of reviews unauthorized by statute, neither can regulations or guidance to the contrary. Before accepting the argument that our regulations require antitrust reviews of post-operating license transfer applications, however, they warrant close consideration.

Section 50.80 of the Commission's regulations, 10 C.F.R. § 50.80, "Transfer of licenses," provides, in relevant part:

(b) An application for transfer of a license shall include [certain technical and financial information described in sections 50.33 and 50.34 about the proposed transferee] 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 § 50.33a.

Section 50.33a, "Information requested by the Attorney General for antitrust review," which by its terms applies only to applicants for construction permits, requires the submittal of antitrust information in accordance with 10 C.F.R. Part 50, Appendix L. Appendix L, in turn, identifies the information "requested by the Attorney General in connection with his review, pursuant to section 105c of the Atomic Energy Act of 1954, as amended, of certain license applications for nuclear power plants." "Applicant" is defined in Appendix L as "the entity applying for authority to construct or operate subject unit and each corporate parent, subsidiary and affiliate." "Subject unit" is defined as "the nuclear generating unit or units for which application for construction or operation is being made." Appendix L does not explicitly apply to applications to transfer an operating license.

KEPCo argues that the section 50.80(b) requirement, in conjunction with the procedural requirements governing the filing of applications discussed below, requires the submittal of antitrust information in support of post-operating license transfer applications and that the Wolf Creek case cannot lawfully be dismissed

without a “significant changes” determination. See KEPCo Brief at 11. While we agree that section 50.80 may imply that antitrust information is required for purposes of a “significant changes” review, linguistically it need not be read that way. The Applicants plausibly suggest that the phrase “the license to be issued” could be interpreted to apply only to entities that have not yet been issued an initial license. See App. Brief at 11.¹⁵ Moreover, neither this regulation nor any other states the purpose of the submittal of antitrust information. For applications to construct or operate a proposed facility, it is clear that section 50.80(b), in conjunction with section 50.33a and Appendix L, requires the information specified in Appendix L for purposes of the Section 105c antitrust review, for construction permits, and for the “significant changes” review for operating licenses. But for applications to transfer an existing operating license, there are other Section 105 purposes which could be served by the information. Such information could be useful, for example, in determining the fate of any existing antitrust license conditions relative to the transferred license, as well as for purposes of the Commission’s Section 105b responsibility to report to the Attorney General any information which appears to or tends to indicate a violation of the antitrust laws.

¹⁵This reading is consistent with the history of section 50.80(b). Its primary purpose appears to have been to address transfers which were to occur before issuance of the initial (original) operating license, transfers which unquestionably fall within the scope of Section 105c. See Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2), LBP-78-13, 7 NRC 583, 587-88 (1978). When section 50.80(b) was revised in 1973 to require submission of the antitrust information specified in section 50.33a, the stated purpose was to obtain the “prelicensing antitrust advice by the Attorney General.” 38 Fed. Reg. 3955, 3956 (February 9, 1973) (emphasis added).

While we acknowledge that information submitted under section 50.80(b) has not been used for these purposes in the past, and has instead been used to develop “significant changes” findings, the important point is that section 50.80(b) is simply an information submission rule. It does not, in and of itself, mandate a “significant changes” review of license transfer applications. No Commission rule imposes such a legal requirement. Nonetheless, in conjunction with this decision, we are directing the NRC staff to initiate a rulemaking to clarify the terms and purpose of section 50.80 (b).¹⁶

KEPCo also argues that the Commission’s procedural requirements governing the filing of license applications supports its position that antitrust review is required in this case. See KEPCo Brief at 11 - 13. The Applicants disagree, arguing that nothing in those regulations states that transfer applications will be subject to antitrust reviews. See App. Reply Brief at 3. For the same reasons we believe that the specific language in Section 105c does not support antitrust review of post-operating license transfer applications, we do not read our procedural requirements to indicate that there will be an antitrust review of transfer applications. Indeed, the language in 10 C.F.R. § 2.101(e)(1) regarding operating license applications under Section 103 tracks closely the process described in Section 105c. As stated in 10 C.F.R. § 2.101(e)(1), the purpose of

¹⁶In one important respect the language of section 50.80(b), quoted above, in fact supports the Commission’s analysis of Section 105 and its legislative history. The phrase “if the application were for an initial license” certainly demonstrates that, consistent with the clearly intended focus of Section 105c on antitrust reviews of applications for initial licenses, the Commission has long distinguished initial operating license applications from license transfer applications. Be that as it may, clarification of section 50.80(b) will be appropriate in the wake of our decision that our antitrust authority does not extend to antitrust reviews of post-operating license transfer applications.

the antitrust information is to enable the staff to determine “whether significant changes in the licensee’s activities or proposed activities have occurred since the completion of the previous antitrust review in connection with the construction permit.” (Emphasis added.) As explained above, this description of the process for determining “significant changes” is consistent with an antitrust review of the initial operating license application for a facility but wholly inconsistent with an antitrust review of post-operating license transfer applications.

Id. at 459 - 463 (footnotes in original).

Indeed, after considering the various interpretations of the rules advanced by the parties and *amici curiae* in the *Wolf Creek* proceeding, the Commission concluded: “Not one comma of the Commission’s current regulations need be changed in the wake of a cessation of such reviews, although because of the NRC’s past practice of conducting such reviews, we have decided that clarification of our rules is warranted.” *Id.* at 467. Therefore, the Commission directed that the rules be clarified “by explicitly limiting which types of applications must include antitrust information,” *Id.* at 463, and that Regulatory Guide 9.3, “Information Needed by the AEC Regulatory Staff in Connection with Its Antitrust Review of Operating License Applications for Nuclear Power Plants,” and NUREG-1574, “Standard Review Plan on Antitrust Reviews,” also be clarified.

The proposed clarifications make clear that, consistent with the decision in the *Wolf Creek* case, no antitrust information is required to be submitted as part of any application for Commission approval of a post-operating license transfer. Because the current regulations do

not clearly specify which types of applications are not subject to antitrust review, these proposed clarifying amendments will bring the regulations into conformance with the Commission's limited statutory authority to conduct antitrust reviews and its decision that such reviews of post-operating license transfer applications are not authorized or, if authorized, are not required and not warranted.

Direct transfers of facility licenses which are proposed prior to the issuance of the initial operating license for the facility, however, are and continue to be subject to the Commission's antitrust review. In order to make clear that the Commission's regulations do not require antitrust information as part of applications for post-operating license transfers, the Commission is proposing to amend its regulations by specifying that antitrust information must be submitted only with applications for construction permits and "initial" operating licenses for the facility and applications for transfers of licenses prior to the issuance of the "initial" operating license. Thus, the word "initial" would be inserted to modify "operating license" in appropriate locations and the word "application" would be modified where necessary to make clear that the application must be for a construction permit or initial operating license. Appendix L to 10 CFR Part 50, "Information Requested by the Attorney General for Antitrust Review [of] Facility License Applications," would be similarly amended and clarified and a new definition would be added there to define "initial operation" to mean operation pursuant to the first operating license issued by the Commission for the facility.

III. Plain Language

The Presidential Memorandum dated June 1, 1998, entitled, "Plain Language in Government Writing," directed that the government's writing be in plain language. This memorandum was published June 10, 1998 (63 FR 31883). In complying with this directive, editorial changes have been made in the proposed revisions to improve the organization and readability of the existing language of paragraphs being revised. These types of changes are not discussed further in this notice. The NRC requests comment on this proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the address listed under the **ADDRESSES** heading.

IV. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this proposed rule, the NRC proposes to eliminate the submission of antitrust information in connection with post-operating license applications for transfers of facility operating licenses. This rule would not constitute the establishment of a standard that establishes generally-applicable requirements.

V. Finding of No Significant Environmental Impact and Categorical Exclusion

The Commission has determined under the National Environmental Policy Act (NEPA) of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule, if adopted, falls within the categorical exclusions appearing at 10 CFR 51.22 (c)(1), (2), and (3)(i) and (iii) for which neither an Environmental Assessment nor an Environmental Impact Statement is required.

VI. Paperwork Reduction Act Statement

The proposed rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget, approval number 3150-0011.

VII. Public Protection Notification

If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

VIII. Regulatory Analysis

The proposed revisions to the regulations clarify that antitrust information is required to be submitted only in connection with applications for construction permits and initial operating licenses and not in connection with applications for post-operating license transfers. Therefore, to the extent that, in the past, antitrust information was submitted with applications for post-operating license transfers, these proposed revisions will reduce the burden on such applicants by eliminating the submission of antitrust information and the costs associated with preparing and submitting that information. In short, the proposed revisions will result in no additional burdens or costs on any applicants or licensees and will reduce burdens and costs on others. Clearly, because the proposed revisions affect only when antitrust information need be submitted to the Commission, there will be no effect on the public health and safety or the common defense and security, and they will continue to be adequately protected. The cost savings to applicants resulting from these revisions justify taking this action.

To determine whether the amendments contained in this proposed rule were appropriate, the Commission considered the following options:

1. *The No-Action Alternative.*

This alternative was considered because the current rules are not explicitly inconsistent with the Commission's decision that antitrust reviews of post-operating license transfers are not authorized, or at least are not required and should be discontinued. Because the current rules have been interpreted to be consistent with the Commission's practice of conducting such

reviews, however, in that they have been interpreted to require the submission of antitrust information with post-operating license transfer applications, the Commission concluded that clarification of the rules are appropriate. Therefore, the Commission determined that this alternative is not acceptable.

2. Clarification of 10 CFR Parts 2 and 50

For the reasons explained above and in the Commission's *Wolf Creek* decision, the Commission decided that its rules could and should be made clearer that no antitrust information should be submitted with applications for post-operating license transfers because antitrust reviews of such applications are not authorized or, if authorized, should be discontinued as a matter of policy. Therefore, to make clear that there is no need to submit antitrust information in connection with post-operating license transfers, and because the proposed revisions would result in cost savings to certain applicants, with no additional costs or burdens on anyone, this option was chosen.

IX. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. This proposed rule affects only the licensing and operation of nuclear power plants. The entities that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the size standards established by the NRC

(10 CFR 2.810). Furthermore, this proposed rule does not subject any entities to any additional requirements, nor does it require any additional information from any entity. Instead, the proposed rule, if adopted, will clarify that certain information is not required to be submitted in connection with applications for post-operating license transfers.

X. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and a backfit analysis is not required because these amendments do not involve any provisions that would impose backfits as defined in 10 CFR 50.109. The rule does not constitute a backfit because it does not propose a change to or additions to requirements for existing structures, systems, components, procedures, organizations or designs associated with the construction or operation of a facility. Rather, this proposed rule eliminates the need for certain applicants to submit antitrust information with their applications.

XI. Proposed Amendments

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors,

Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 50

Antitrust, Classified Information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy reorganization Act of 1974, as amended; and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Parts 2 and 50.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority section for Part 2 continues to read as follows:

AUTHORITY: Secs.161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat.1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871).

Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161 b, i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201 (b), (i), (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.205(j) also issued under Pub. L. 101-410, 104 Stat. 890, as amended by section 31001(s), Pub. L. 104-134, 110 Stat. 1321-373 (28 U.S.C. 2461 note). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135).

2. In § 2.101 paragraphs (e)(1) and (e)(2) are revised to read as follows:

§ 2.101 Filing of application.

* * * * *

(e)(1) Upon receipt of the antitrust information responsive to Regulatory Guide 9.3 submitted in connection with an application for a facility's initial operating license under section 103 of the Act, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall publish in the Federal Register and in appropriate trade journals a "Notice of Receipt of Initial Operating License Antitrust Information." The notice shall invite persons to submit, within thirty (30) days after publication of the notice, comments or information concerning the antitrust aspects of the application to assist the Director in determining, pursuant to section 105c of the Act, whether significant changes in the licensee's activities or proposed activities have occurred since the completion of the previous antitrust review in connection with the construction permit. The notice shall also state that persons who wish to have their views on the antitrust aspects of the application considered by the NRC and presented to the Attorney General for consideration should submit such views within thirty (30) days after publication of the notice to: U.S. Nuclear Regulatory Commission, Washington, DC 20555. Attention: Chief, Policy Development and Technical Support Branch.

(2) If the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, after reviewing any comments or information received in response to the published notice and any comments or information regarding the applicant received from the Attorney General, concludes that there have been no significant changes since the completion of the previous antitrust review in connection with the construction permit, a finding of no significant changes shall be published in the FEDERAL REGISTER, together with a notice stating that any request for reevaluation of such finding should be submitted within thirty (30) days of publication of the notice. If no requests for reevaluation are received within that time, the finding shall become the NRC's final determination. Requests for a reevaluation

of the no significant changes determination may be accepted after the date when the Director's finding becomes final but before the issuance of the initial operating license only if they contain new information, such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

* * * * *

PART 50 - DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

3. The authority section for Part 50 continues to read as follows:

AUTHORITY: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955 as amended (42 U.S.C. 2131, 2235), sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Section 50.37 also issued under E.O. 12829, 3 CFR 1993 Comp., p. 570; E.O.

12958, as amended, 3 CFR, 1995 Comp., p. 333; E.O. 12968, 3 CFR 1995 Comp., p. 391.

Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 - 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

4. In § 50.42 paragraph (b) is revised to read as follows:

§ 50.42 Additional standards for class 103 licenses

* * * * *

(b) Due account will be taken of the advice provided by the Attorney General, under subsection 105c of the Act, and to any evidence that may be provided during any proceedings in connection with the antitrust aspects of the application for a construction permit or the facility's initial operating license.

(1) For this purpose, the Commission will promptly transmit to the Attorney General a copy of the construction permit application or initial operating license application. The Commission will request any advice as the Attorney General considers appropriate in regard to the finding to be made by the Commission as to whether the proposed license would create or maintain a situation inconsistent with the antitrust laws, as specified in subsection 105a of the Act. This requirement will not apply---

(i) With respect to the types of class 103 licenses which the Commission, with the approval of the Attorney general, may determine would not significantly affect the applicant's activities under the antitrust laws; and

(ii) To an application for an initial license to operate a production or utilization facility for which a class 103 construction permit was issued unless the Commission, after consultation with the Attorney General, determines such review is advisable on the ground that significant changes have occurred subsequent to the previous review by the Attorney General and the Commission.

(2) The Commission will publish any advice it receives from the Attorney General in the FEDERAL REGISTER. After considering the antitrust aspects of the application for a construction permit or initial operating license, the Commission, if it finds that the construction permit or initial operating license to be issued or continued, would create or maintain a situation inconsistent with the antitrust laws specified subsection 105a of the Act, will consider, in determining whether a construction permit or initial operating license should be issued or continued, other factors the Commission considers necessary to protect the public interest, including the need for power in the affected area. ¹

¹ As permitted by subsection 105c(8) of the Act, with respect to proceedings in which an application for a construction permit was filed prior to Dec. 19, 1970, and proceedings in which a written request for antitrust review of an application for an operating license to be issued under section 104b has been made by a person who intervened or sought by timely written notice to the Atomic Energy Commission to intervene in the construction permit proceeding for the facility to obtain a determination of antitrust considerations or to advance a jurisdictional basis for such determination within 25 days after the date of publication in the FEDERAL REGISTER of notice of filing of the application for an operating license or Dec. 19, 1970, whichever is later, the Commission may issue a construction permit or operating license in advance of consideration of, and findings with respect to the antitrust aspects of the application, provided that the permit or license so issued contains the condition specified in § 50.55b.

5. In § 50.80 paragraph (b) is revised to read as follows:

§ 50.80 Transfer of licenses.

* * * * *

(b) An application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 of this part with respect to the identity and technical and financial qualifications of the proposed transferee 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 construction permit or initial operating license, the information required by § 50.33a. The Commission may require additional information such as data respecting proposed safeguards against hazards from radioactive materials and the applicant's qualifications to protect against such hazards. The application shall include also a statement of the purposes for which the transfer of the license is requested, the nature of the transaction necessitating or making desirable the transfer of the license, and an agreement to limit access to Restricted Data pursuant to § 50.37. The Commission may require any person who submits an application for license pursuant to the provisions of this section to file a written consent from the existing licensee or a certified copy of an order or judgment of a court of competent jurisdiction attesting to the person's right (subject to the licensing requirements of the Act and these regulations) to possession of the facility involved.

* * * * *

6. In Appendix L to Part 50, the heading of Appendix L and Definition 1 are revised, Definitions 3 through 6 are redesignated as Definitions 4 through 7, and a new Definition 3 is added, to read:

APPENDIX L to PART 50 -- INFORMATION REQUESTED BY THE ATTORNEY GENERAL
FOR ANTITRUST REVIEW OF FACILITY CONSTRUCTION PERMITS AND INITIAL
OPERATING LICENSES

* * * * *

I. Definitions

1. "Applicant" means the entity applying for authority to construct or initially operate subject unit and each corporate parent, subsidiary and affiliate. Where application is made by two or more electric utilities not under common ownership or control, each utility, subject to the applicable exclusions contained in § 50.33a, should set forth separate responses to each item herein.

* * * * *

3. "Initially operate" a unit means to operate the unit pursuant to the first operating license issued by the Commission for the unit.

* * * * *

Dated at Rockville, Maryland, this ____ day of _____, 1999.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,
Secretary of the Commission



DRAFT REGULATORY GUIDE

Contact: M.J. Davis (301)415-1016

DRAFT REGULATORY GUIDE DG-9001

(Proposed Revision 1 to Regulatory Guide 9.3)

INFORMATION NEEDED FOR AN ANTITRUST REVIEW OF INITIAL OPERATING LICENSE APPLICATIONS FOR NUCLEAR POWER PLANTS

A. INTRODUCTION

As required by the Atomic Energy Act of 1954, the Nuclear Regulatory Commission conducts antitrust reviews with respect to the construction permits and initial operating licenses it issues for commercial nuclear power plants. Pursuant to 10 CFR 50.80, "Transfer of Licenses," of 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," all applicants are to submit the information required by 10 CFR 50.33a, "Information Requested by the Attorney General for Antitrust Review." Under certain circumstances, the Commission must make a finding as to whether the activities under the permit or license would create or maintain a situation inconsistent with the antitrust laws. An antitrust review at the initial operating license stage is not required unless the NRC determines that such a review is advisable on the grounds that significant changes in the licensee's activities or proposed activities have occurred after the antitrust review conducted by the Attorney General and the Commission at the construction permit stage.

This regulatory guide identifies the type of information that the staff considers germane for a decision as to whether a second antitrust review is required at the initial operating license stage.

The information collections contained in this draft regulatory guide are covered by the requirements of 10 CFR Part 50, which were approved by the Office of Management and Budget, approval number 3150-0011. If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

This regulatory guide is being issued in draft form to involve the public in the early stages of the development of a regulatory position in this area. It has not received complete staff approval and does not represent an official NRC staff position.

Public comments are being solicited on the draft guide (including any implementation schedule) and its associated regulatory analysis or value/impact statement. Comments should be accompanied by appropriate supporting data. Written comments may be submitted to the Rules and Directives Branch, ADM, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Comments may be submitted electronically to the interactive web site through NRC's home page <<http://www.nrc.gov>>. Copies of comments received may be examined at the same web site or at the NRC Public Document Room, 2120 L Street NW., Washington, DC. Comments will be most helpful if received by

Requests for single copies of draft or active regulatory guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Reproduction and Distribution Services Section, or by fax to (301)415-2289; or by email to <DISTRIBUTION@NRC.GOV>.

B. DISCUSSION

On June 18, 1999, the Commission issued a Memorandum and Order in the Wolf Creek license transfer proceeding dismissing a petition to intervene on antitrust grounds. *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999) (Wolf Creek). In *Wolf Creek*, the Commission "concluded that the Atomic Energy Act does not require or even authorize antitrust reviews of post-operating license transfer applications, and that such reviews are inadvisable from a policy perspective." The Commission further stated that the NRC staff would be directed to initiate a rulemaking "to clarify the Commission's regulations to remove any ambiguities and ensure that the rules clearly reflect the views set out in this decision." The Commission directed the initiation of such a rulemaking and the clarification of Regulatory Guide 9.3 and NUREG-1574, "Standard Review Plan on Antitrust Reviews." This regulatory guide is being revised to clarify that the guide applies only to initial operating license applications.

C. REGULATORY POSITION

1. An applicant for an initial license to operate a commercial nuclear power plant should provide the following items, along with a statement of any related changes that have occurred or are planned since submission of the construction permit application.

1.1 State the anticipated excess or shortage in generating capacity resources that were not expected at the construction permit stage. The reasons for the excess or shortage should be provided, along with data on how the excess will be allocated, distributed, or otherwise utilized or how the shortage will be mitigated.

1.2 Specify new power pools or coordinating groups, as well as changes in structures, activities, policies, practices, or membership of power pools or coordinating groups in which the applicant was or will be a participant.

1.3 Specify changes in transmission with respect to (1) the nuclear plant, (2) interconnections, or (3) connections to wholesale customers.

1.4 Specify changes in the ownership or contractual allocation of the output of the nuclear facility. The reasons and bases for such changes should be included.

1.5 Specify the changes in design, provisions, or conditions of rate schedules and the reasons for such changes.

1.6 Provide lists of all (1) new wholesale customers, (2) transfers from one rate schedule to another, including copies of schedules not previously furnished, (3) changes in licensee's service area, and (4) licensee's acquisitions or mergers.

1.7 Provide a list of future additions to generating capacity.

1.8 Summarize any requests or indications of interest by other electric power wholesale or retail distributors, along with the licensee's response, for any type of electric service or cooperative venture or study.

2. Licensees whose construction permits include conditions that pertain to antitrust aspects should list and discuss those actions or policies that have been implemented in accordance with such conditions.

3. Licensees should submit five copies of a separate document, titled "Information for Antitrust Review of Operating License Application." This document should contain the information requested above and should be submitted when the operating license application documents are submitted or as soon as possible thereafter.

D. IMPLEMENTATION

The purpose of this section is to provide information to applicants regarding the NRC staff's plans for using this regulatory guide.

This proposed revision has been released to encourage public participation in its development. Except in those cases in which an applicant proposes an acceptable alternative method for complying with the specified portions of the NRC's regulations, the methods to be described in the active guide reflecting public comments will be used in the NRC staff's antitrust review of initial operating license applications for nuclear power plants.

REGULATORY ANALYSIS

1. PROPOSED ACTION

On June 18, 1999, the Commission issued a Memorandum and Order in the Wolf Creek license transfer proceeding dismissing a petition to intervene on antitrust grounds. In *Wolf Creek*, the Commission "concluded that the Atomic Energy Act does not require or even authorize antitrust reviews of post-operating license transfer applications, and that such reviews are inadvisable from a policy perspective." The Commission further stated that the NRC staff would be directed to initiate a rulemaking "to clarify the Commission's regulations to remove any ambiguities and ensure that the rules clearly reflect the views set out in this decision." The Commission directed the initiation of such a rulemaking and the clarification of Regulatory Guide 9.3 and NUREG-1574, "Standard Review Plan on Antitrust Reviews." This regulatory guide is being revised to clarify that the guide applies only to initial operating license applications.

Regulatory Guide 9.3, "Information Needed by the AEC Regulatory Staff in Connection with Its Antitrust Review of Operating License Applications for Nuclear Power Plants," was issued by the Atomic Energy Commission in October 1974. This guidance is still valid for the most part, but it might be construed to apply to all operating license applications.

The proposed action is to revise Regulatory Guide 9.3 to clarify that its guidance applies only to initial operating license applications and to update the guide to current NRC format and style.

2. VALUE/IMPACT

2.1 Value

The value of updating Regulatory Guide 9.3 is from the clarification that antitrust reviews are not needed for any operating license applications except for initial operating license applications. This saves the applicants for post-operating-license transfer applications costs of researching and preparing the antitrust review, and it saves the NRC staff the costs of reviewing the applicants' submittals. A revised Regulatory Guide 9.3 would thereby clarify and simplify the licensing process for applicants who are involved in a change of ownership of a nuclear facility.

2.2 Impact

The only costs of revising Regulatory Guide 9.3 are the NRC staff time of updating a short (two pages) regulatory guide and the costs of printing and publishing the guide for public comment and then in final form.

3. TECHNICAL APPROACH

The guide does not set forth any technical positions, this section is not applicable.

4. PROCEDURAL APPROACH

The only appropriate procedure is to revise the existing regulatory guide. All other methods, such as regulations, policy statements, NUREG reports, and branch technical positions, would be inappropriate.

5. STATUTORY CONSIDERATIONS

Authority for the proposed action is derived from the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended and implemented through the Commission's regulations at 10 CFR 50.80, "Transfer of Licenses."

6. RELATIONSHIP TO OTHER EXISTING OR PROPOSED REGULATIONS OR POLICIES

The regulatory guide would be issued as a draft for public comment in support of the regulations at 10 CFR 50.80 and a proposed amendment to Appendix L to 10 CFR Part 50.

7. SUMMARY AND CONCLUSIONS

Revising Regulatory Guide 9.3 to clarify that it applies only to initial operating license applications would simplify the licensing process necessitated by a change of ownership. The revision would be consistent with the clarification to the Commission's regulations to remove any ambiguities and ensure that the guidance reflects the Commission's views on antitrust reviews of post-operating-license transfer applications.

Regulatory Guide 9.3 should be issued as a draft for public comment and then as a final regulatory guide that incorporates public comments.

DRAFT STANDARD REVIEW PLAN FOR ANTITRUST REVIEWS

ABSTRACT

This standard review plan describes the procedures used by the NRC staff to implement the antitrust review and enforcement provisions in Sections 105 and 186 of the Atomic Energy Act of 1954, as amended (the Act), and replaces NUREG-1574, published in December 1997. These procedures are principally derived from the Commission's Rules and Regulations in 10 CFR 2.101, 2.102, Part 2-Appendix A, Section X; 10 CFR 50.33a, 50.80, 50.90; Appendix L to Part 50; and 10 CFR 52.77. These procedures set forth the steps and criteria the staff uses in antitrust reviews of construction permit (CP) applications, initial operating license (OL) applications, combined construction permit/operating license (COL) applications, and applications for approval of the transfer of CPs, initial OLs, and COLs. In addition, the procedures describe how the staff enforces compliance with antitrust conditions appended to licenses.

TABLE OF CONTENTS

	<u>Page</u>
Abstract	i
Abbreviations	iv
Executive Summary	v
 1 INTRODUCTION	1-1
1.1 <u>Purpose</u>	1-1
1.2 <u>Standards of Review</u>	1-2
1.2.1 Section 105 of the Act	1-2
1.2.2 Regulatory Guide 9.1	1-3
1.2.3 Regulatory Guide 9.2	1-3
1.2.4 Regulatory Guide 9.3	1-3
1.2.5 <i>Summer Decision</i>	1-4
1.3 <u>Owners and Operators</u>	1-4
1.4 <u>COL License Applications</u>	1-4
1.5 <u>Transfer Reviews</u>	1-5
1.6 <u>Enforcement</u>	1-5
 2 REVIEW OF CONSTRUCTION PERMIT/INITIAL OPERATING LICENSE APPLICATIONS .	2-1
2.1 <u>Overview</u>	2-1
2.2 <u>Required Information</u>	2-2
2.2.1 10 CFR Information	2-2
2.2.2 Regulatory Guide 9.2	2-2
2.2.3 Response to Inquiries From the Attorney General	2-2
2.2.4 Published Information	2-3
2.2.5 Field Review	2-3
2.2.6 Applicant's Service Contracts and Agreements	2-3
2.3 <u>Acceptance Review and Notice of Receipt of Antitrust</u>	
<u>Information</u>	2-4
2.4 <u>Staff Review</u>	2-4
2.4.1 Criteria for Review	2-4
2.4.2 Analysis of Market Power	2-5
2.4.3 Analysis of Anticompetitive Behavior	2-5
2.4.4 Nexus	2-6
2.4.5 Settlement of Antitrust Issues	2-6
 3 REVIEW OF DIRECT TRANSFER APPLICATIONS SEEKING APPROVAL OF NEW OWNERS OR OPERATORS, AND INDIRECT TRANSFER APPLICATIONS BEFORE ISSUANCE OF THE INITIAL OPERATING LICENSE	3-1

3.1	<u>Overview</u>	3-1
3.2	<u>Types of Transfers and General Antitrust Review Requirements</u>	3-1
3.2.1	<i>De Minimis</i> Applicants	3-2
3.3	<u>Required Information for Transfer Applications</u>	3-3
3.3.1	Federal Energy Regulatory Commission Files	3-3
3.3.2	Field Investigation	3-3
3.4	<u>Notice of Receipt of Antitrust Information</u>	3-3
3.5	<u>Significant Changes Analyses Involving Direct Transfers of Partial Interests</u>	3-4
3.5.1	Draft Significant Changes Analysis	3-4
3.5.2	Director's Finding	3-5
4	ANTITRUST ENFORCEMENT	4-1
4.1	<u>Overview</u>	4-1
4.2	<u>Enforcement Under Sections 105a, 105b, and 186a of the Act</u>	4-1
4.2.1	Section 105a	4-1
4.2.2	Section 105b	4-2
4.2.3	Section 186a	4-2
4.3	<u>Enforcement of Antitrust License Conditions</u>	4-3
4.3.1	Section 10 CFR 2.206 Petitions	4-3
4.3.2	Compliance Investigations	4-3
4.3.3	Denial of Petition	4-4
4.3.4	Notice of Violation	4-4
4.3.5	Order To Modify, Suspend, or Revoke a License	4-5
4.3.6	Civil Penalties	4-6

ABBREVIATIONS

Act	Atomic Energy Act of 1954, as amended
CFR	<u>Code of Federal Regulations</u>
COL	combined construction permit/operating license
CP	construction permit
DOJ	Department of Justice
DPR	Demonstration Power Reactor
EIA	Energy Information Agency
FERC	Federal Energy Regulatory Commission
FP&L	Florida Power & Light Company
NARUC	National Association of Regulatory Utility Commissioners
NRC	Nuclear Regulatory Commission
NRR	Office of Nuclear Reactor Regulation
OGC	Office of the General Counsel
OL	operating license
RG	regulatory guide
SEC	Securities and Exchange Commission
SRP	Standard Review Plan

EXECUTIVE SUMMARY

The NRC's antitrust responsibilities are set forth in Section 105 of the Atomic Energy Act of 1954, as amended (the Act). This Standard Review Plan (SRP) describes the procedures and guidelines used by the NRC staff in carrying out the NRC's antitrust review and enforcement responsibilities under the Act. Although this report may be informative to the general public, it is primarily intended for current and prospective licensees and NRC staff members concerned with antitrust matters.

Section 1 of the SRP identifies the staff responsible for conducting antitrust reviews and provides an overview of staff procedures associated with the Commission's three broad categories of antitrust concern: (1) construction permit (CP)/initial operating license (OL) applications, (2) transfer applications before completion of initial licensing, and (3) enforcement authority over antitrust license conditions.

Section 2 describes the NRC staff's antitrust procedures for reviewing an application for a CP, an initial OL, or a combined construction permit/operating license (COL) and the advisory role played by the Department of Justice (DOJ) at this stage of review. The antitrust staff of the NRC, with the DOJ, conducts a prelicensing review, as required by Section 105c of the Act.

Pursuant to Section 105c, the Attorney General advises the NRC concerning a CP, an initial OL, or a COL application. In the past, the Attorney General has advised either that (1) no hearing was required by the NRC, (2) the NRC hold hearings, or (3) no hearing was necessary because the applicant had agreed to remedy any apparent inconsistencies with the antitrust laws. The Commission shall consider the Attorney General's advice and evidence provided during proceedings concerning such advice and shall make a finding as to whether activities under the license "would create or maintain a situation inconsistent with the antitrust laws." (The criteria and economic theory used in determining whether to grant licenses or impose antitrust license conditions are discussed as they pertain to specific cases that have already been litigated before Commission adjudicatory panels.)

Section 3 addresses the Commission's antitrust review procedures for initial OL applications following a CP antitrust review and for applications for

changes in control of licenses. A significant change review using the criteria set forth by the Commission in its *Summer* decision is performed before issuance of a Class 103 initial OL under Part 50. A full antitrust review of an initial OL application is required only if the Director of the Office of Nuclear Reactor Regulation (NRR) determines that significant changes (1) have occurred since the previous antitrust review, (2) are attributable to the applicant, and (3) have anticompetitive implications warranting remedy by the Commission. If a significant change finding is made, a second antitrust review is conducted following the same procedures set forth in Section 105c(1). For license transfers, the Atomic Energy Act does not require or authorize antitrust reviews of post-operating license transfer applications [See *Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station Unit 1)*, CLI-99-19, June 18, 1999]. Therefore, no antitrust review is required or authorized for license transfer applications after issuance of the initial unit OL.

Section 4 discusses the Commission's antitrust enforcement responsibilities. In fulfilling such responsibilities, the Commission may (1) suspend or revoke a license or take other actions deemed necessary in the event a licensee is found by a court of competent jurisdiction, or any Government agency having jurisdiction, to have violated the antitrust laws (Section 105a of the Act); (2) report to the Attorney General any information indicating that a licensee appears to have violated the antitrust laws (Section 105b of the Act); and (3) enforce Commission license conditions (Section 186a of the Act). In addition, 10 CFR 2.206 provides a mechanism for parties to bring formal complaints to the attention of the Director of the Office of NRR when the parties believe that licensees are not complying with license conditions.

In summary, this SRP (1) guides the Commission's antitrust staff in carrying out the Commission's antitrust responsibilities under the Act and (2) explains how antitrust considerations fit into the overall licensing process.

DRAFT STANDARD REVIEW PLAN FOR ANTITRUST REVIEWS

1 INTRODUCTION

1.1 Purpose

The Atomic Energy Act of 1954, as amended (the Act), declared that "the development, use, and control of atomic energy shall be directed so as to... strengthen free competition in private enterprise." In 1970, antitrust amendments to Section 105c of the Act were enacted requiring the Commission to conduct antitrust reviews of applications for construction permits (CPs) and initial operating licenses (OLs) under Section 103 of the Act, with certain limitations.

This standard review plan (SRP) describes the procedures by which the NRC staff judges the antitrust implications associated with the construction and initial operation of nuclear power plants. This SRP also outlines procedures for reviewing new joint owners, transfers to new owners or operators before initial operation, and requests for the enforcement of NRC antitrust license conditions.

The NRC has begun to work with the Federal Energy Regulatory Commission (FERC), the Securities and Exchange Commission (SEC), and the Department of Justice (DOJ) to develop methods by which the NRC can minimize the duplication of effort on antitrust issues and still carry out its statutory responsibilities. For the same reason (to minimize duplication), the NRC is also pursuing legislation to eliminate its review mandate.

The Office of Nuclear Reactor Regulation (NRR), with the advice of the Office of the General Counsel (OGC), is responsible for conducting the antitrust reviews.

The Act requires the Commission to conduct antitrust reviews of all applicants for initial OLs under Section 103 that have submitted nuclear power plant CP applications after Section 105 was enacted. Plants that received a CP (or in some cases, had filed an application for a CP) before Section 105 was enacted in December 1970 were grandfathered. The staff has also determined that no antitrust review is required for license renewals, unless there are plant modifications that would constitute a new or a substantially different facility. The NRC does not expect that any plants will have to make such modifications as a prerequisite for approval of license renewal. Thus,

antitrust review of the renewal of an OL is unlikely. Also, the Act does not require or authorize antitrust reviews of post-operating license transfer applications. Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station, Unit 1), CLI-99-19, June 18, 1999.

The following power reactors were licensed under Section 104b (DPR [demonstration power reactor] licenses): Arkansas 1, Beaver Valley 1, Big Rock Point, Brown's Ferry 1, 2, & 3, Brunswick 1 & 2, Calvert Cliffs 1 & 2, Cook 1 & 2, Cooper, Crystal River, Diablo Canyon 1 & 2 (which have antitrust license conditions), Dresden 2 & 3, Duane Arnold, FitzPatrick, Fort Calhoun, Ginna, Haddam Neck, Hatch 1, Indian Point 2 & 3, Kewaunee, Maine Yankee, Millstone 1 & 2, Monticello, Nine Mile 1, Oconee 1, 2, & 3, Oyster Creek, Palisades, Peach Bottom 2 & 3, Pilgrim, Point Beach 1 & 2, Prairie Island 1 & 2, Quad Cities 1 & 2, Salem 1 & 2, Sequoyah 1 & 2, Saint Lucie 1, Surry 1 & 2, Three Mile Island 1, Turkey Point 3 & 4, Vermont Yankee, and Zion 1 & 2.

1.2 Standards of Review

Although the electric power industry has changed considerably since Section 105 was enacted and since the Atomic Energy Commission began providing regulatory guidance in the early 1970s, the basic tenets and standards of review have not changed. Nuclear power production applicants and licensees are subject to review in order to determine whether activities under a license will create or maintain a situation inconsistent with the antitrust laws. The standards for reviewing licenses are embodied in the language of the Act itself and clarified in Regulatory Guides (Rgs) 9.1, 9.2, and 9.3 and have been applied to various licensing actions over the years, producing some case law to which applicants and the staff may refer in assessing future antitrust licensing activities before the NRC.

1.2.1 Section 105 of the Act

Section 105 provides that nothing in the Act will relieve any person from abiding by the antitrust laws. Moreover, Section 105c(5) requires the NRC to make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. The Act does not require the NRC to identify activities that constitute violations of the antitrust laws but to examine situations that appear to be "inconsistent" with the antitrust laws.

1.2.2 Regulatory Guide 9.1

Although RG 9.1, "Regulatory Staff Position Statement on Antitrust Matters," was published in 1973, shortly after the enactment of Section 105, the scope and standards of competitive review employed by the regulatory staff remain the same:

the Regulatory staff views activities under the license to embrace the planning, building, and operation of a nuclear facility as well as the integration of such a facility into an effective bulk power supply system. Meaningful review requires consideration of the applicant's activities to be licensed in the context of the bulk power supply system within which it operates.

In dealing with situations that may warrant NRC remedy,

the staff will seek to avoid determining the specifics of a coordination agreement, the details of unit participation, and the like. In general, reliance will be placed on the exercise of Federal Power Commission [now Federal Energy Regulatory Commission] and State agency jurisdiction regarding the specific terms and conditions of the sale of power, rates for transmission services and such other matters as may be within the scope of their jurisdiction.

1.2.3 Regulatory Guide 9.2

RG 9.2, "Information Needed by the AEC Regulatory Staff in Connection With Its Antitrust Review of Construction Permit Applications for Nuclear Power Plants," informs the applicant of what information the Attorney General and the NRC regulatory staff need to determine whether the applicant is abiding by the antitrust laws. This information request applies to both Part 50 and Part 52 license applications.

1.2.4 Regulatory Guide 9.3

RG 9.3, "Information Needed by the NRC Regulatory Staff in Connection With Its Antitrust Review of Initial Operating License Applications for Nuclear Power Plants," identifies the types of information that the regulatory staff needs to decide whether a second antitrust review is required at the initial OL stage in connection with Part 50 applications. The staff is not now required to conduct antitrust reviews at the OL stage for COL Part 52 applications.

1.2.5 *Summer* Decision

The Commission's decision in *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-14, 13 NRC 862 (1981) (*Summer*) involved an OL review under the Part 50 licensing process and established criteria the staff must follow in assessing anticompetitive implications during licensing reviews after issuance of a CP.

1.3 Owners and Operators

Each proposed owner or operator of a nuclear facility licensed under Section 103 of the Act must undergo a full antitrust review in connection with an application for a CP or a COL, and if an affirmative significant changes finding is made under *Summer*, applications for an initial OL under Part 50. Proposed transferees that become owners or operators before initial operation are subject to at least significant changes antitrust reviews. Small electric systems may be exempted from some antitrust review requirements. Facilities that are licensed under Section 104b of the Act (DPR licensees) and that have not had antitrust license conditions added to their licenses are exempt from all further antitrust review.

1.4 COL Applications

Generally, for 10 CFR Part 50 applications for new power production facilities, the NRC conducts a prelicensing antitrust review at the CP stage and a significant changes review at the initial OL stage. In 1993, the NRC, under 10 CFR Part 52, introduced an alternative application process combining the CP and initial OL reviews in a single COL review. The COL antitrust review process is now a one-time antitrust review, with a no significant changes review at the OL stage.

The Part 50 CP review and the Part 52 COL review processes are identical. The Commission sends the Attorney General a copy of the antitrust part of the license application. Within 180 days of transmittal, the Attorney General must advise the Commission as to whether activities under the license would create or maintain a situation inconsistent with the antitrust laws. In connection with such advice in the past, the Attorney General has advised that (1) no antitrust hearing needed to be held, (2) a hearing was necessary, or (3) a hearing was unnecessary if the applicant took certain actions or if certain conditions were attached to the license. In practice, the Commission staff and the DOJ staff confer extensively on these matters.

In RG 9.1, the Commission provided guidance to applicants on how the staff views the various issues regarding access to nuclear power and related services. RG 9.1 describes the staff's criteria for determining whether a situation inconsistent with the antitrust laws may be either created or maintained by an unconditioned license and how the staff would remedy such a situation.

1.5 Transfer Reviews

For license transfers, the Act does not require or authorize antitrust reviews of post-operating license transfer applications [see Kansas Gas & Electric Co., et al. (Wolf Creek Generating Station, Unit 1), CLI-99-19, June 18, 1999]. Therefore, no antitrust review is required or authorized for license transfer applications after issuance of the initial unit operating license.

In connection with 10 CFR 50.80 and Section 184 of the Act, the staff has imposed certain antitrust review requirements on applicants requesting approval to acquire an ownership interest in or to become operators of a nuclear power production facility before issuance of an initial OL. The staff uses the *Summer* decision to determine whether a new owner or operator before issuance of an initial OL would warrant a full OL antitrust review. Also, the Act does not require or authorize antitrust reviews of post-operating license transfer applications. [see Kansas Gas & Electric Co., et al. (Wolf Creek Generating Station, Unit 1), CLI-99-19, June 18, 1999].

1.6 Enforcement

Section 105a of the Act gives the Commission the power to suspend or revoke a license or to take other actions if a licensee is found by a court of competent jurisdiction to have violated the antitrust laws. Section 105b requires the Commission to report to the Attorney General any information it has that a utilization of special nuclear material or atomic energy appears to violate the antitrust laws. Under Section 186, the Commission is granted authority to revoke licenses for noncompliance with the terms and conditions of CPs, OLs, and COLs.

2 REVIEW OF CONSTRUCTION PERMIT/INITIAL OPERATING LICENSE APPLICATIONS

2.1 Overview

By virtue of Section 105c of the Act, NRC, with the advice of the DOJ, must conduct a *prelicensing* antitrust review of applications to construct nuclear power plants. Section 105c requires the Attorney General to provide advice to the Commission, as appropriate, within 180 days after the NRC has docketed and transmitted the application to the Attorney General. The Attorney General's advice assists the Commission in determining whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. In addition to the application, the NRC staff must promptly furnish background information to the Attorney General. The applicant furnishes this information pursuant to Appendix L to 10 CFR Part 50 and 10 CFR Part 52.

After investigating, the Attorney General generally will advise the Commission that (1) no antitrust hearing is necessary, (2) a hearing is necessary, or (3) no hearing is necessary if certain actions are taken by the applicant or if certain conditions are attached to the license. The Attorney General's advice is published in the *Federal Register* and the public is offered an opportunity to request a hearing pursuant to Section 105 of the Act, or to participate in a hearing if the Attorney General recommends one to the Commission.¹

If a hearing is held, the Commission must make a finding as to whether activities under the license "would create or maintain a situation inconsistent with the antitrust laws" (Section 105c(5), 42 U.S.C. 2135). In making that determination, the Commission must consider the Attorney General's advice and any other information it deems necessary. On the basis of its findings, the Commission has the authority to (1) issue or continue a license, (2) refuse to issue a license, (3) rescind or amend a license, or (4) issue a license with the conditions it deems appropriate.

In the past, when license conditions have been negotiated early in the review process, the Attorney General has advised the NRC that no hearing is necessary

¹ When the Attorney General recommends no hearing or no hearing with conditions, a member of the public or the NRC staff may still request that a hearing be held. If a member of the public petitions for an antitrust hearing, a special three-member board is convened to rule on the petition (cf. 10 CFR Part 2, Appendix A, Section X).

if the conditions are made a part of any license issued in connection with the application. However, pursuant to Section 105, if a settlement is not reached and the Attorney General recommends a hearing or an intervention petition is granted, a hearing must be held.

2.2 Required Information

2.2.1 10 CFR Information

In accordance with 10 CFR 2.101 and 50.33a of the Commission's rules, the information required by the Attorney General is submitted separately at least 9 months, but not more than 36 months, before any other part of the license application.

The complete information described in Appendix L to 10 CFR Part 50 is generally required only for applicants whose generating capacity exceeds 1,400 MW. Applicants with 1,400 MW or less of generating capacity may file an affidavit setting forth the facts about their generating capacity. Then, unless otherwise requested, applicants with a capacity of 200 to 1,400 MW need only respond to item 9 of Appendix L; applicants with less than 200 MW of capacity (*de minimis* applicants) need not respond to any of the questions unless specifically requested to do so by the staff.

2.2.2 Regulatory Guide 9.2

In addition to the information requested by the Attorney General, the NRC staff collects information pursuant to RG 9.2, "Information Needed by the NRC Staff in Connection With Its Antitrust Review of Construction Permit Applications for Nuclear Power Plants."

2.2.3 Response to Inquiries From the Attorney General

The Attorney General will normally request "third party" information from municipal electric utilities, rural electric cooperatives, and other utilities located in or near the applicant's service area about their competitive relationships with the applicant. The applicant identifies these utilities in response to item 9 of the Appendix L information it provides. Copies of the responses to these inquiries by the Attorney General should be obtained and used as part of the NRC review.

2.2.4 Published Information

To evaluate the applicant's market power, the reviewer will use information from (1) Forms 1 and 12, collected by the FERC, (2) the Energy Information Agency of the Department of Energy, and (3) other sources such as the *Directory of Electric Utilities* and *Moody's Public Utility Manual*, thereby obtaining information on the applicant's generating capacity and the transmission lines it owns within its service area and on its plans to increase its generating capacity and add transmission lines. It may also be necessary for the reviewer to survey the smaller electric utilities in the relevant areas by telephone, by mail, or in person, since statistics about such utilities may not be available in public sources.

2.2.5 Field Review

After examining the Appendix L submittal and other relevant information, the reviewer may contact individuals in or near the area the applicant serves to substantiate the responses and documents already examined. The reviewer may interview system planners and other officials affiliated with the applicant. In addition, officials from various municipal, cooperative, and privately owned utilities in or adjoining the applicant's service or planning area may be interviewed.

The interviews will focus on the interutility relationships among the various utilities in order to determine the competitive situation and whether the issuance of a license will create or maintain a situation inconsistent with the antitrust laws. The reviewer will be interested in how the utilities plan for their generation and transmission requirements, how and to what degree they coordinate, and how they plan to integrate the power from the nuclear facility to meet the electrical demands of their customers.

To determine if the applicant has abused its market power, the reviewer will ascertain whether the applicant has attempted to fix prices or exclude competition in its geographic and product market.

2.2.6 Applicant's Service Contracts and Agreements

The reviewer will analyze the applicant's service contracts and agreements for unnecessarily restrictive provisions. Such restrictive provisions, while not limited to the following examples, may (1) limit customers from selling surplus power other than to the applicant, (2) include ratchet provisions (which require a customer to keep paying a higher charge for electric power

and energy beyond the amount delivered), (3) limit the sale of power at wholesale to certain customers, or (4) prevent certain electric utilities from membership or participation in planning and coordinating groups. In addition, any pattern of applicant refusals to serve will be evaluated.

2.3 Acceptance Review and Notice of Receipt of Antitrust Information

Before the Appendix L information is sent to the Attorney General, the reviewer makes certain that the information is complete and therefore acceptable for docketing. If the application is acceptable, the reviewer will ask the licensing project manager to publish a notice in the *Federal Register* and in trade journals informing the public that the antitrust information has been received and is available for inspection in the NRC Public Document Room in Washington, D.C., and in local public document rooms. The notice invites interested parties to express their views within 60 days of the date of publication. All responses to this notice will be sent to the Attorney General. The reviewer will also notify OGC that the application has been accepted for docketing. The information is then submitted to the Attorney General with a request for antitrust advice.

2.4 Staff Review

While the Attorney General's review is in progress, the NRC reviewer should prepare a preliminary analysis. This analysis will be the basis of the staff's position. The staff may support the views of the DOJ on whether a hearing is necessary, or the staff may disagree with the DOJ or independently derive its own position. Similarly, when the DOJ advises that a hearing is needed, the staff will participate in any hearing and will determine independently what issues to press in the hearings.

2.4.1 Criteria for Review

The proper scope of antitrust review depends upon the circumstances of each case. The reviewer should employ market analyses focusing on the area served by the applicant. From the nature of the electric bulk power supply industry itself, the reviewer will have a general idea of the types of products and services supplied by the applicant. Products relevant to each individual case (e.g., baseload power, transmission access, reserve sharing, coordination planning) will vary depending on the extent of competition in the area and the needs of surrounding entities engaged in the bulk power services market.

Depending on the availability of various products and services within the relevant geographic area (i.e., depending on whether there are entry barriers), the reviewer will analyze the geographic market to determine what the relevant market is for review purposes. The relationship of the nuclear facility to the applicant's total system or power pool should be evaluated in every case. The reviewer can then assess whether the applicant has market power and, if so, whether it has abused its market power.

2.4.2 Analysis of Market Power

The reviewer must determine whether the applicant has the market power to withhold access to nuclear power or to abuse its market power in other ways and thereby maintain or create a competitive advantage through use of the nuclear facility. In determining whether the applicant has market power, the reviewer must ascertain how much control the applicant has over certain services in a specific geographic area. Although the reviewer must consider each application on its own merits and take circumstances into account, the reviewer may use the following cases as guides in determining what markets are relevant and should be analyzed:

- *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892 (1977)
- *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646, 13 NRC 1027 (1981)
- *Toledo Edison Co., et al.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-560, 10 NRC 265 (1979)
- *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP-77-24 (5 NRC 804 (1977), and LBP-77-41, 5 NRC 1482 (1977)

In analyzing antitrust implications, the reviewer should consider, among other things, the applicant's relevant market strengths and weaknesses, transmission access and availability, and the system's capacity for change. (Detailed issues for study can be found in *Farley*, LBP-77-24, 5 NRC 804.

2.4.3 Analysis of Anticompetitive Behavior

The fact that an applicant has market power does not necessarily mean that the applicant's conduct is inconsistent with the antitrust laws or that the applicant will abuse its market power. To assess the probability that the

applicant will abuse its market power, the reviewer must examine the applicant's behavior in the relevant market and compare it with competitors' behavior in the same market. In other words, the reviewer must determine if it appears reasonably probable that the activities under the license would create or maintain a situation inconsistent with the antitrust laws. Case examples the reviewer can refer to include *Midland* and *Davis-Besse*. In *Midland*, the Appeal Board found that the applicant's refusals to wheel power, or to coordinate with smaller utilities, and its exclusion of utilities from the Michigan power pool to be anticompetitive conduct and abuses of market power. In *Davis-Besse*, practices such as territorial allocations, attempts to fix prices, refusals to deal, and group boycotts were considered practices that increased the applicant's dominance and violated the antitrust laws.

2.4.4 Nexus

Proof of a situation inconsistent with antitrust laws or policies is only one of the prerequisites for relief under Section 105c of the Act. The second is a demonstration that the activities under the license would create or maintain the anticompetitive situation. Thus, a nexus, or connection, between an applicant's activities under the license and the anticompetitive situation is required. The *Farley* and *Davis-Besse* decisions show the reviewer what to consider in ascertaining whether a sufficient nexus exists between the activities under the license and an anticompetitive situation.

2.4.5 Settlement of Antitrust Issues

Section 2.759 of the Commission's Rules of Practice states that the public interest may be served through settlement of particular issues in a proceeding or through settlement of an entire proceeding. Settlement, by way of agreement on antitrust license conditions, may be negotiated at any step in the review process. The negotiations may involve the DOJ, the NRC staff, applicants, and in some cases, members of the public, and smaller electric systems as intervenors or potential intervenors.

Negotiations with the applicant begin before the Attorney General issues an advice letter. The DOJ usually invites the NRC staff to join the negotiations in the beginning and invites other interested parties, such as potential intervenors, later. If the negotiations are successful, the Attorney General will advise the Commission that no hearing is necessary if certain conditions, which have been agreed to by the applicant, are attached to the license. If a settlement is not reached before the Attorney General's advice is rendered, negotiations are encouraged during the prehearing stages and even after the

hearing has begun.

3 REVIEW OF DIRECT TRANSFER APPLICATIONS SEEKING APPROVAL OF NEW OWNERS OR OPERATORS AND INDIRECT TRANSFER APPLICATIONS BEFORE ISSUANCE OF THE INITIAL OPERATING LICENSE

3.1 Overview

As set forth in the Commission's decision in Wolf Creek, the Act does not require or authorize antitrust reviews of post-OL transfer applications. Therefore, this section addresses antitrust reviews for transfers that may occur before the issuance of a facility's initial OL, but after issuance of the CP (which is the license to be transferred).

If the application involves an indirect transfer of the license through transfer of control of the existing licensee to another entity, where the existing licensee remains the licensee, no antitrust review is conducted since there is no effective application for an OL.

If the application involves a direct transfer of the license, a significant changes review will be conducted for any licensee that was subject to a full antitrust review at the CP stage and which will remain a licensee, and a full antitrust review will be conducted for any proposed transferee that did not previously undergo any antitrust review.

3.2 Types of Transfers and General Antitrust Review Requirements

Transfers may involve (1) purchasing a share or all of a nuclear facility, (2) purchasing a major share of stock in the existing licensee, (3) acquiring or merging with a licensee, (4) corporate restructurings, or (5) the sale/leaseback of a facility. If the transaction is deemed to be an indirect transfer, with no new licensee added to the license, a Section 105 antitrust review (including a significant changes review) is not required or authorized by the Act. In a direct transfer of the entire interest in a facility from the existing CP holder to a new applicant, the staff would perform a full antitrust review of the new applicant (since it did not have a previous CP review). In a direct transfer of a partial interest in the facility from the existing CP holder to a new co-applicant, the staff would apply the *Summer* criteria discussed below on significant changes for the original CP holder to determine whether the original CP holder would undergo a second full review. The new co-applicant would undergo a full antitrust review, since it was not subject to a CP antitrust review.

Generally, applicants that apply to become new owners through the sale and leaseback of a nuclear facility are subject to the same antitrust requirements as any new licensee. However, the Commission has determined that sale-and-leaseback agreements involving new equity investors that have not taken an active role in the control (or future operation) of the nuclear facility involved in the sale do not require an antitrust review [see letter from C.R. Thomas to W.L. Stewart (December 8, 1995), forwarding Amendments 91 to NPF-51 and 74 to NPF-74 for the Palo Verde Nuclear Generating Station Units 2 and 3]. For these situations, the staff has developed a generic license condition. The license condition ensures the passive role of any new equity investor by prohibiting the new owner from exercising control over the lessee, the facility, or the power and energy to be produced by the facility. If the new equity investor takes an active role, the new investor would be subject to an antitrust review like any other new owner.

For review purposes, new operators of licensed power reactors that become licensees through corporate reorganizations, acquisitions, or the formation of nuclear operating service companies are treated by the staff much like new owner licensees. However, if a new operator is in fact only a plant operator and has no identifiable competitive impact on the bulk power services market in which the licensee operates, there is no basis to attribute market power or its abuse, as defined by Section 105, to the new operator.

If a license condition appended in the OL prohibits the new operator (or owner in the case of a sale-and-leaseback agreement) from marketing or brokering power and energy produced by the facility and holds the existing owners responsible and accountable for the actions of the operator, then the staff normally will not conduct an antitrust review.

3.2.1 *De Minimis* Applicants

An applicant owning less than 200 MW of total generating capacity is considered a *de minimis* applicant. Such applicants are generally too small to exercise any substantial degree of market power. Therefore, they are normally exempted from supplying Appendix L information, as discussed in Section 2 herein, and no notice of receipt of information from a *de minimis* applicant is published in the *Federal Register* (see 3.4). Further, if the *de minimis* applicant is a subsequent applicant, the DOJ is simply notified about the existence of an additional *de minimis* owner, and antitrust advice about the applicant is not requested from the Attorney General unless the staff has information suggesting that such advice should be sought. This NRC staff procedure does not preempt the Attorney General from offering advice or

requesting additional information.

3.3 Required Information for Transfer Applications

All applicants for construction permits or initial operating licenses pursuant to 10 CFR 50.80 are to submit the information required by 10 CFR 50.33a. In making any significant changes antitrust determination, the staff shall make use of all available public information and any records from other related proceedings. The information required by RG 9.3, "Information Needed for an Antitrust Review of Initial Operating License Applications for Nuclear Power Plants," concerns changes in licensee activities and will be considered by the staff.

3.3.1 Federal Energy Regulatory Commission Files

The docket files at the FERC generally contain information about the applicant's activities in the bulk power services market and relative materials should be reviewed by the staff as appropriate.

3.3.2 Field Investigation

In addition to obtaining information from the applicant, the NRC staff may contact selected nonapplicants concerning competitive relationships with the applicant.

3.4 Notice of Receipt of Antitrust Information

The staff will publish in the *Federal Register* notice of receipt of antitrust information or of the proposed transfer application when adequate antitrust information is included with the application. The notice shall provide for a period of public comment of 30 days from publication of the notice in the *Federal Register*.

To be accepted by the staff, public comments must address the antitrust aspects of the application. The staff uses the comments to determine whether the proposed transfer may create or maintain a situation inconsistent with the antitrust laws.

3.5 Significant Changes Analyses Involving Direct Transfers of Partial Interests

In reviewing direct transfers of partial interests in a facility, the staff will consider the criteria established by the Commission in its *Summer* decision (CLI-81-14, 13 NRC 862) to the extent applicable. The staff must follow these criteria at the initial OL stage when deciding whether there have been significant changes in the licensee's activities or proposed activities since issuance of the CP and the completion of an antitrust review at the CP stage. If so, a second full antitrust review is undertaken at the initial OL stage.

The issues addressed in *Summer* concerned activities of the Summer licensee since the completion of the Summer antitrust CP review. To initiate a full-scale antitrust review in accordance with the procedures set forth in Section 2 herein, the activities under scrutiny by the staff must (1) have occurred since the previous antitrust review of the licensee, (2) be reasonably attributable to the licensee, and (3) have antitrust implications that would likely warrant some Commission remedy. These changes must be reasonably apparent and must be discernible from the applicant's submittals, from the staff's investigations, or from papers that have been filed.

3.5.1 Draft Significant Changes Analysis

The reviewer, along with OGC, prepares a written draft significant changes analysis of the competitive situation. This analysis will consider, among other things, the extent to which potential changes in the relevant markets are attributable to the existing CP holder that previously was subject to an antitrust review, the antitrust implications of the changes, and whether they would likely warrant a Commission remedy.

This draft significant changes analysis is then forwarded to the DOJ for review and comment. Although there is no statutory limitation on the period in which DOJ's comments may be provided to the staff (such as during the CP review phase), the reviewer should try to ensure that the DOJ renders its advice in a timely manner. Upon receipt and review of DOJ's comments, a final significant changes antitrust finding is prepared for signature by the Director of NRR.

3.5.2 Director's Finding

If the significant changes antitrust analysis by the Director of NRR results in a Finding of Significant Change, the staff will forward the finding to the Attorney General and request advice as to whether an antitrust hearing should be held as a result of the finding. When the staff receives the Attorney General's advice, the staff will request publication of the Attorney General's advice in the *Federal Register* to give interested parties an opportunity to intervene or request a hearing.

If the Director of NRR makes a Finding of No Significant Changes, the finding is published in the *Federal Register* with a statement that any request for reevaluation of the finding shall be submitted within 30 days of the publication of the notice. Copies of the finding are also sent to the Commission, the applicant, and any person who submitted comments in response to the notice of receipt of antitrust information in the *Federal Register*. Normally, if no requests for reevaluation are received within the 30-day period, the finding becomes the NRC's final determination. Requests for reevaluation of the Finding of No Significant Changes may be accepted after the date when the Director's Finding becomes final but before the transfer application is approved only if they contain new facts or information about events of antitrust significance that have occurred since the Director's Finding or information that could not reasonably have been submitted before then.

The staff will review all requests for reevaluation and make a determination about whether the events described in the request represent new information that would affect the initial Director's Finding. If the staff finds that the request contains new information that was not considered in the initial Director's Finding, the Director will reevaluate the initial finding.

If, after reevaluating the finding, the staff determines that there has been no significant change, the Director of NRR will deny the request and publish a notice reaffirming the Finding of No Significant Changes in the *Federal Register*. Copies of the reaffirmation finding are also sent to the requestor, the applicant, and the Commission. The finding becomes the final NRC decision 30 days after publication in the *Federal Register* unless the Commission exercises its right to conduct a *sua sponte* review.

4 ANTITRUST ENFORCEMENT

4.1 Overview

Section 105 of the Act assigns to the NRC the responsibility for ensuring that applicants and licensees of nuclear facilities conduct their activities in conformance with the antitrust laws. The authority to enforce this responsibility includes the ability or duty to (1) suspend or revoke a license or take other actions deemed necessary if a licensee is found by a court of competent jurisdiction, or any Government agency having jurisdiction, to have violated the antitrust laws (Section 105a of the Act); (2) report to the Attorney General any information indicating that a licensee appears to have violated the antitrust laws (Section 105b of the Act); (3) enforce Commission license conditions (Sections 161 and 186a of the Act); and (4) impose civil penalties (Section 234 of the Act). In addition, 10 CFR 2.206 provides a formal mechanism for any person to request the Director of NRR to take appropriate enforcement action on antitrust matters.

4.2 Enforcement Under Sections 105a, 105b, and 186a of the Act

4.2.1 Section 105a

Section 105a identifies relevant statutes and provides for appropriate enforcement. Only one Section 105a enforcement case has come before the Commission. On May 31, 1978, counsel for several Florida cities submitted a petition for a Section 105c hearing and advised the Commission of a decision by the Court of Appeals in the Fifth Circuit [*Gainesville Utilities Department v. Florida Power & Light Company*, 573 F. 2d 292, 294 (5th Circ.), *cert denied*, 439 U.S. 966 (1978)], which held that Florida Power & Light Company (FP&L) had conspired to divide the market for electric service in violation of Section 1 of the Sherman Act. The Court of Appeals remanded the case to the District Court for further findings and determination of appropriate relief. The petition for a Section 105a proceeding was withdrawn after the cities and FP&L settled their differences.

To date, the Commission has not delegated authority to the staff or to licensing boards to take action with respect to Section 105a matters. Thus, for the present, the staff has an advisory role, calling the Commission's attention to possible Section 105a situations. In performing this role, the staff treats the phrase "in the conduct of the licensed activity" as synonymous with the phrase cited in Section 105c, "activities under the license" (described in Section 2 herein).

Both phrases encompass the planning, building, and operation of nuclear power reactors and their integration in effective bulk power supply systems.

4.2.2 Section 105b

Section 105b requires the Commission to report apparent violations to the Attorney General. Only one Section 105b case has come before the Commission. By motion of August 6, 1976, a group of Florida cities petitioned under Section 186a of the Act for an antitrust hearing with respect to FP&L's Turkey Point Units 3 and 4 and St. Lucie Unit 1 nuclear power plants. The Atomic Safety and Licensing Board denied the cities' petition. In *Florida Power & Light Co.* (St. Lucie Plant Unit 1, Turkey Point Plant, Units 3 and 4), ALAB-428, 6 NRC 221 (1977), the Appeal Board affirmed the decision of the Licensing Board, and the Commission declined to review the Appeal Board's decision. [*Florida Power & Light Co.*, CLI-77-26, 6 NRC 538 (1977)]. However, the Commission ordered the staff to promptly refer to the Attorney General the allegations of the Florida cities, as well as any related information it had suggesting that the licensee had violated or tended to violate the antitrust laws in utilizing special nuclear material or atomic energy. In accordance with this Order, the staff will, in similar situations in the future, refer such matters, with an account of the circumstances, to the Attorney General, emphasizing that the staff has not determined whether the actions of the licensee (or applicant) are inconsistent with the antitrust laws.

4.2.3 Section 186a

Section 186a gives the Commission authority to revoke licenses. In its Memorandum and Order of June 15, 1977, concerning the South Texas Project, the Commission referred to Section 186 of the Act as follows:

Section 186 gives the Commission authority to initiate a post-licensing enforcement proceeding in the event of violation of a specific antitrust licensing condition. For like reasons we would not be limited to mere reference to the Attorney General if a license applicant has falsified pertinent antitrust review information or had otherwise obtained an unconditioned license by some sort of fraud or concealment...

[*Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303 (1977).]

No further guidelines have been established for enforcing antitrust license

conditions. The staff follows the actual wording of the license conditions in enforcing such conditions.

If a license has been obtained on the basis of false information, the staff will take appropriate action to correct the situation; to make restoration (as far as possible) to those that may have been harmed because of the false information; and, when appropriate, to impose civil penalties on the licensee or to issue orders to modify, suspend, or revoke the license in question.

4.3 Enforcement of Antitrust License Conditions

4.3.1 Section 10 CFR 2.206 Petitions

A petition can be submitted in accordance with 10 CFR 2.206. The petitioner must specify the action requested and set forth the facts or conditions that constitute the basis for the request. Upon receipt of the petition, the reviewer will coordinate with OGC in preparing the following within 30 days:

- (1) a *Federal Register* notice to be signed by the Director of NRR;
- (2) a written acknowledgment to the petitioner, including a copy of the *Federal Register* notice;
- (3) a letter to the licensee or licensees against which the petition is filed, including a copy of the petition and a copy of the *Federal Register* notice; and
- (4) a letter to the Attorney General, including a copy of the petition and a copy of the *Federal Register* notice.

In addition, the reviewer will begin an investigation of the petition. The licensee may be required to respond to the petition pursuant to 10 CFR 50.54(f) and Section 182 of the Act. In response to the petition, the licensee may also voluntarily submit additional information that the reviewer should consider. The Director of NRR will inform the petitioner within a reasonable time whether the petition is granted or denied.

4.3.2 Compliance Investigations

Most compliance activities center on whether the applicant has refused in some way to share the output of its nuclear facility and/or to provide certain types of power supply services prescribed by the antitrust license conditions.

A reviewer conducting a Section 2.206 compliance investigation ordinarily uses written questionnaires, telephone contacts, and field surveys to determine the following:

- (1) which antitrust laws (for Sections 105a or 105b matters) and which anti-trust conditions are involved;
- (2) the extent to which the alleged violation depends on the interpretation of the antitrust laws or antitrust license conditions;
- (3) the effect of and the reasons for the alleged violation;
- (4) whether the alleged violation was willful; and
- (5) what remedial actions must be taken.

On the basis of the investigation, the staff will recommend (1) that the complaint or allegation has merit, (2) that a Notice of Violation be issued, or (3) that negotiations be pursued, followed by a Notice of Violation if the negotiations are unsuccessful.

4.3.3 Denial of Petition

If the staff investigation determines that a petition received under 10 CFR 2.206 is without merit, a Director's Decision and a *Federal Register* notice to that effect will be prepared and issued by the Director of NRR. The Office of the Secretary of the Commission, the licensee against which the complaint was lodged, and the petitioner will be provided a copy of the Director's Decision. The Director's Decision is subject to the Commission's review on its own motion under 10 CFR 2.206(c).

4.3.4 Notice of Violation

If the staff's investigation determines that a violation has occurred, a Notice of Violation and a Director's Decision in accordance with 10 CFR 2.201 will be prepared by the reviewer in conjunction with OGC and issued by the Director of NRR. The notice and decision will be sent to the licensee and the petitioner. Imposition of civil penalties may be considered in accordance with 10 CFR 2.205 and Section 234 of the Act.

The Response

The licensee's response to the Notice of Violation determines the course of the subsequent proceedings. If the licensee agrees to take the necessary steps to comply with its license requirements, the staff will ensure that the compliance steps are carried out expeditiously. If the licensee does not agree to take the steps the staff considers necessary to resolve the matter, or if the licensee unreasonably delays implementing such actions, the staff may move to issue an Order to modify, suspend, or revoke the license. The staff may also impose civil penalties in accordance with 10 CFR 2.205 and Section 234 of the Act.

4.3.5 Order To Modify, Suspend, or Revoke a License

An Order is prepared by the reviewer in conjunction with OGC, and issued by the Director of NRR in accordance with 10 CFR 2.202. The Order states the following:

- (1) the violations with which the licensee is charged or other conditions warranting an Order,
- (2) the action proposed by the Order, and
- (3) the licensee's requirements and procedural rights in responding to the Order.

The Order is published in the *Federal Register*, and copies are mailed to the licensee and other affected parties.

The Response

If the licensee demands a hearing, the hearing process is initiated.² If the licensee consents to the entry of an Order in substantially the form proposed in the Order, the Order is issued by the Director of NRR. If the licensee consents to the Order To Modify a License or does not respond within the time allotted, the license is amended as indicated. Thereafter, the reviewer simply

² The hearing could result in a decision by the Atomic Safety and Licensing Board or an Administrative Law Judge to absolve the licensee of charges or to order the licensee to take the actions prescribed. An Order is appealable.

monitors the licensee's compliance with the Order.

4.3.6 Civil Penalties

The Director of NRR can propose imposition of a civil penalty by issuing a Notice of Violation and Proposed Imposition of Civil Penalty prepared by the reviewer in consultation with OGC, as required by 10 CFR 2.205. The Notice of Violation specifies the date (or dates) and the nature of the alleged act or omission with which the licensee is charged; describes the circumstances; states the facts; cites the particular provision or provisions of the Act, license, regulations, or Order allegedly violated; and gives the amount of each penalty the Director of NRR proposes to impose. Within the period prescribed in the notice, the licensee may either pay the proposed penalty or answer the notice. If the licensee requests remission or mitigation of the proposed penalty, the staff will consider the reasons proffered and will either withdraw the proposed penalty or issue an Order imposing the civil penalty as originally proposed or in a mitigated amount. If the licensee fails to respond to the notice, the reviewer will prepare and the Director of NRR will issue an Order imposing the civil penalty as proposed. The licensee may pay the penalty or may request a hearing on the Order imposing a civil penalty within the period prescribed in the Order.

If the licensee fails to pay the penalty or demands a hearing within the prescribed period, the Commission may refer the matter to the Attorney General for collection. Continuing violations could subject the licensee to further civil penalties or to other sanctions, such as suspension or revocation of its license.

[Month xx], 1999

William T. Miller
Randolph Lee Elliott
Miller, Balis & O'Neil
1140 Nineteenth Street, N.W.
Suite 700
Washington, D.C. 20036-6600

Re: Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station, Unit 1), Docket
No. 50-482-LT

Dear Messrs. Miller and Elliott:

In response to the directive in CLI-99-19 that the parties address the disposition of the Wolf Creek antitrust license conditions in view of the anticipated transfer of the operating license for Wolf Creek to Westar Energy, Inc., on July 6, 1999, the Applicants for the transfer, KGE and KCPL, and you, on behalf of KEPCo, submitted the respective proposals. The Commission has referred those proposals to me for appropriate action.

In summary, Applicants propose, as their transfer application proposed, that the existing antitrust license conditions be retained and, with no substantive changes but after administratively substituting Westar for KGE and KCP&L, be made applicable to Westar as the new licensee. On the basis of KEPCo's belief that there would be adverse and anticompetitive effects of the proposed merger on it, KEPCo proposes that the existing antitrust license conditions be substantively amended to address its perceived problems with a simple substitution of Westar for KGE and KCPL in the conditions. For the reasons explained below, after consultation with the Commission, I must deny KEPCo's request for substantive revision of the antitrust license conditions to address its asserted antitrust concerns about the proposed license transfer.

First, as was made clear in CLI-99-19, after careful and thorough analysis of its antitrust authority, the Commission concluded that it lacks statutory authority to undertake an antitrust review of post-operating license transfer applications. KEPCo's proposal to enhance existing license conditions based on asserted antitrust problems with the proposed transfer, problems that are disputed by Applicants, could be evaluated only after a review of the alleged antitrust problems and a resolution of the differences between Applicants and KEPCo. This is precisely the antitrust review the Commission decided it had no authority to perform (or, if it had authority, would not perform as a matter of policy). Thus KEPCo's proposal is tantamount to its

original request to have the Commission conduct an antitrust review of the proposed transfer and, accordingly, is inconsistent with the Commission's decision in CLI-99-19.

Second, it is far from clear that KEPCo is correct in its assertion that the application of the antitrust license conditions to the new licensee will result in draconian antitrust problems for KEPCo. The Applicants July 6th submission on its face commits the new licensee, Westar, to compliance with the antitrust conditions verbatim throughout Westar's service area. In particular, with respect to KEPCo's concern about the differences in the two current sets of license conditions as they apply to KGE and KCP&L, Applicants commit Westar "to abide by whichever conditions were more restrictive to Westar and more favorable to KEPCo." Applicants' July 6th letter at 1. With respect to KEPCo's assertion that "it is far from clear what would be 'the more restrictive set of conditions for any given circumstances,'" KEPCo's July 6th letter at 6, Applicants state that "in any given circumstance, KEPCo could choose whether to rely upon the duties imposed on Westar either by the more specific KGE conditions or by the more general KCP&L conditions," Applicants' July 6th letter at 2. In this and other respects, it appears that Applicants are willing to give KEPCo the benefit, at KEPCo's choice, of both sets of conditions applicable verbatim to the new licensee, Westar.

Two additional points warrant emphasis. First, as stated above, and for the reasons in CLI-99-19, the Commission has decided that it has no authority to conduct the kind of antitrust review that KEPCo would have us undertake now in connection with the proposed license transfer. Accordingly, even if the staff is wrong that the Applicants proposal to substitute Westar as the new licensee in the Wolf Creek license conditions is the appropriate disposition and addresses KEPCo's antitrust concerns with the transfer, consistent with CLI-99-19, the staff cannot embark on a course to determine what new or different conditions might be warranted. Second, if future events prove KEPCo's antitrust concerns valid, then KEPCo has a number of options available to it to have those antitrust issues resolved (*see, e.g.*, Atomic Energy Acts § 105a, b), including, if appropriate, seeking NRC enforcement of the transferred license conditions against Westar.

For these reasons, if the Applicants' proposed transfer is approved by the Commission, the existing antitrust license conditions will be administratively amended to substitute Westar as the licensee to which all antitrust license conditions apply.

Sincerely,

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

cc: J. Silberg
Service List



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

The Honorable Joe L. Barton
Chairman, Subcommittee on Energy
Committee on Commerce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

In the near future, the Nuclear Regulatory Commission (NRC) intends to publish in the Federal Register the enclosed proposed amendment to the Commission's rules in 10 CFR Parts 2 and 50. The proposed rule is being developed to clarify the NRC's regulations to reflect more clearly its limited antitrust review authority by explicitly limiting which types of applications must include antitrust information. Specifically, because the Commission is not authorized to conduct antitrust reviews of post-operating license transfer applications, or at least is not required to conduct such reviews and has decided that it will no longer conduct them, no antitrust information is required as part of such license transfer applications. Because the current regulations do not clearly specify which types of applications are not subject to antitrust review, these proposed clarifying amendments will bring the regulations into conformance with the Commission's limited statutory authority to conduct antitrust reviews.

The Commission is issuing the proposed rule for public comment.

Sincerely,

Dennis K. Rathbun, Director
Office of Congressional Affairs

Enclosure:
Federal Register Notice

cc: Representative Ralph M. Hall



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

The Honorable James M. Inhofe, Chairman
Subcommittee on Clean Air, Wetlands,
Private Property and Nuclear Safety
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In the near future, the Nuclear Regulatory Commission (NRC) intends to publish in the Federal Register the enclosed proposed amendment to the Commission's rules in 10 CFR Parts 2 and 50. The proposed rule is being developed to clarify the NRC's regulations to reflect more clearly its limited antitrust review authority by explicitly limiting which types of applications must include antitrust information. Specifically, because the Commission is not authorized to conduct antitrust reviews of post-operating license transfer applications, or at least is not required to conduct such reviews and has decided that it will no longer conduct them, no antitrust information is required as part of such license transfer applications. Because the current regulations do not clearly specify which types of applications are not subject to antitrust review, these proposed clarifying amendments will bring the regulations into conformance with the Commission's limited statutory authority to conduct antitrust reviews.

The Commission is issuing the proposed rule for public comment.

Sincerely,

Dennis K. Rathbun, Director
Office of Congressional Affairs

Enclosure:
Federal Register Notice

cc: Senator Bob Graham

DRAFT

NRC PROPOSES AMENDING REGULATIONS CLARIFYING ANTITRUST REVIEW REQUIREMENTS

The Nuclear Regulatory Commission is proposing to amend its regulations to clarify that it will no longer conduct antitrust reviews of license transfer applications submitted by the owners of operating nuclear power plants, eliminating a review that is duplicated by other federal and state agencies.

The Atomic Energy Act and NRC regulations provide that no nuclear power plant operating license may be transferred directly or indirectly, without Commission consent. NRC has historically conducted antitrust reviews in connection with certain kinds of nuclear power plant license transfers.

As part of a review of a license transfer application submitted by two owners of the Wolf Creek nuclear power plant in Kansas, the Commission examined its rules of practice and concluded that its statutory mandate does not require an antitrust review in these circumstances. As a result, NRC is amending its regulations to more clearly reflect its antitrust review authority by explicitly limiting the types of applications that must include antitrust information in the application for a construction permit, initial operating license, and pre-operating transfers.

As a result of the change, parties submitting a license transfer application to NRC for an operating nuclear power plant will not be required to include antitrust information, eliminating a review that is duplicated by other agencies, including, as appropriate, the Federal Energy Regulatory Commission, Securities and Exchange Commission, Department of Justice, and the Federal Trade Commission as well as state public utility commissions. NRC will continue to conduct reviews of nuclear power plant license transfer applications to ensure, among other matters, that prospective owners meet financial qualifications and decommissioning funding assurance requirements.

Interested persons are invited to submit written comments on the proposed rule within 60 days of publication in an upcoming edition of the *Federal Register*. They should be addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Rulemakings and Adjudications Staff. Comments may also be submitted via the NRC's interactive rulemaking web site at <http://ruleforum.llnl.gov>.

##