

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: **SECY-99-220 - PROPOSED RULE -- CLARIFICATION OF REGULATIONS AND GUIDANCE TO EXPLICITLY LIMIT WHICH TYPES OF APPLICATION MUST INCLUDE ANTITRUST INFORMATION; DISPOSITION OF WOLF CREEK ANTITRUST LICENSE CONDITIONS**

Approved X ^{w/comments & edits} Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

Please see attached comments and edits.

Edward M. McGaffigan
SIGNATURE
September 7, 1999
DATE

Entered on "AS" Yes X No _____

Commissioner McGaffigan's Comments on SECY 99-220:

This Federal Register notice makes a sometimes difficult subject clear, and makes a persuasive case for the Commission's position. I would add only two footnotes, to clarify the implications of the Commission's position for combined licenses issued under Part 52. I would also change slightly two related sentences in the draft SRP. They appear to have been written before the Energy Policy Act of 1992 established that the operating license issued with a construction permit under Part 52 was a true operating license. Before that revision, the agency's legal position had been that the "authorization to operate" after construction was complete under the combined license was the "real" operating license. The SRP continues to speak in that vein, referring to an "OL stage" under Part 52. The second of the two sentences is, moreover, wrong to say that there will be more antitrust review at the "OL stage" under a combined license. My revisions of these sentences are attached.

Add to page 17 of the draft FRN, at the end of first, incomplete, paragraph, the following footnote:

"The same principle holds in the context of Part 52 of the Commission's regulations. Under that Part, the operating license is issued simultaneously with the construction permit in a combined license. The application for the combined license is subject to the agency's antitrust review, but antitrust reviews of post-combined license transfer applications are not authorized or, if authorized are not required and not warranted."

Add to page 17 of the draft FRN, at the end of 1st sentence of the first full paragraph, the following footnote:

"The paragraph speaks only to the historically typical case in which a construction permit (CP) is issued first, and then years later an operating license (OL). Under Part 52, the CP and OL are issued simultaneously, and the antitrust review is done before issuance. Thus, there could be no direct transfer of the facility CP before issuance of the initial OL."

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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.

*after issuance of a COL under
PART 52*

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.~~ *after construction but before operation under the COL.*

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.