Nuclear Regulatory Commission

10 CFR Parts 2 and 50

RIN 3150-AG38

Antitrust Review Authority: Clarification

AGENCY: 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.

January 3, 2000

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.

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

You may also provide comments via the NRC's interactive rulemaking web site (http://ruleforum.llnl.gov). 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 affects 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 prelicensing 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 prelicensing 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 Committee[11] 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.

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[11]The 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 were[14] --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

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[14]Until 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. Babbit, 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.

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[15]This 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

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[16]In 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.[1]

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.[2] 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

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[1]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.

[2]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.

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 only affect 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]

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[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.

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Dated at Rockville, Maryland, this 27 day of October, 1999.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,
Secretary of the Commission.