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In the Matter of	)	
KANSAS GAS AND ELECTRIC COMPANY	)	Docket No. 50-482-LT
et al.	)	
(Wolf Creek Generating Station, Unit 1)	)	

CLI-99-19

MEMORANDUM AND ORDER

I. INTRODUCTION

Pending before the Commission is a license transfer application filed on October 27, 1998, by Kansas Gas and Electric Company (KGE) and Kansas City Power and Light Company (KCPL) (Applicants) seeking Commission approval pursuant to 10 C.F.R. § 50.80 of a transfer of their possession-only interests in the operating license for the Wolf Creek Generating Station, Unit 1, to a new company, Westar Energy, Inc. Currently Wolf Creek is jointly owned and operated by the Applicants, each of which owns an undivided 47% interest, and Kansas Electric Power Cooperative, Inc. (KEPCo), which owns the remaining 6% interest. The Applicants request that the Commission amend the operating license for Wolf Creek pursuant to 10 C.F.R. § 50.90 by deleting KGE and KCPL as licensees and adding Westar Energy in their place.

Pursuant to the Commission's recently-promulgated Subpart M, 10 C.F.R. § 2.1300 et seq., KEPCo opposed the transfer on antitrust grounds, claiming, in a February 18, 1999, "Petition to Intervene and Request for Hearing," that the transfer would have "serious adverse and anticompetitive effects" (p. 5), would result in "significant changes" in the competitive market (pp. 15-17), and, therefore, warrants an antitrust review under Section 105c of the Atomic Energy Act, 42 U.S.C. § 2135(c). In response to the petition to intervene, on March 1, 1999, Applicants filed an "Answer of Applicants to Petition to Intervene and Request for Hearing of the Kansas Electric Power Cooperative, Inc." Applicants requested that the Commission deny the petition because the issues raised were outside the scope of the license transfer proceeding, the positions taken were not factually supported, and the Commission had not made and should not make a finding of "significant changes" in the activities under the license.

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 this 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." The Commission stated that, in deciding this matter, 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. The Commission also invited *amicus curiae* briefs.

Briefs and reply briefs have been filed by the Applicants and KEPCo. *Amicus* briefs were timely filed by the National Rural Electric Cooperative Association (NRECA), the Nuclear Energy Institute (NEI), the American Public Power Association (APPA), the Florida Municipal

Power Agency (FMPA), the National Association of State Utility Consumer Advocates (NASUCA), and the American Antitrust Institute (AAI), and an untimely brief was filed by WML Associates (WML).[1]

Applicants argue that both legal and policy reasons justify the elimination of all antitrust reviews in license transfer proceedings. They state that by the express terms of Section 105 of the Atomic Energy Act, which is the sole source of the Commission's antitrust jurisdiction, antitrust reviews are required only at two stages of the licensing process: when an application for a construction permit is submitted and then when the application for the initial operating license is submitted. Applicants' position is that "Commission antitrust review of a license transfer is not authorized by statute, nor would such a review be consistent with the purpose of section 105c. For these reasons, as a matter of law the Commission should eliminate all antitrust reviews in connection with license transfers." "Initial Brief of Applicants in Response to the NRC's Memorandum and Order Regarding Antitrust Review of License Transfers" (March 16, 1999) (Applicants' Initial Brief) at unnumbered p. 11. Applicants state it clearly another way: "neither section 105c nor Commission case law supports a finding that the Commission has jurisdiction to review the antitrust implications of a license transfer . . ." Id. at unnumbered p. 18. In addition to their argument that the Commission is not authorized to conduct antitrust reviews of transfer applications, Applicants also argue that there are compelling policy reasons why the Commission should not perform such reviews. Finally, and notwithstanding their "lack of authority" argument, Applicants request that the Commission decide this case not on the absence of authority, but rather on the merits of the merger and the antitrust issues (i.e., by finding no "significant changes" in the Applicants' activities).

KEPCo and NRECA, in their "Joint Brief of the Kansas Electric Power Cooperative, Inc.,

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[1]WML's brief was filed approximately five days after the time provided by CLI-99-05. WML's excuse is that the filing date coincided with Passover and the Easter holiday week and created unforeseen scheduling problems for it. Although WML has not satisfied us that it had good cause for the untimely filing, in the circumstances here we have considered WML's comments.

and *Amicus Curiae* National Rural Electric Cooperative Association" (March 16, 1999) (KEPCo Brief), argue that the Commission may not, as a matter of law, eliminate all antitrust reviews in license transfer proceedings. They argue that neither the statutory language nor its legislative history hint that Congress intended to allow the Commission to eliminate administratively any and all antitrust review when a nuclear power facility is sold or transferred. They further argue that even if the Commission had the statutory authority to eliminate such reviews, it cannot do so in this proceeding because applicable regulations "unambiguously" require a threshold "significant changes" determination which can only be changed by notice-and-comment rulemaking, which should not be undertaken for policy reasons.

NEI's position, reflected in the "Amicus Brief of the Nuclear Energy Institute on the Issue of Antitrust Reviews in License Transfer Cases" (March 31, 1999) (NEI Brief), is that the NRC has the legal authority to, and as a matter of policy should, eliminate antitrust reviews in license transfer cases as duplicative of other federal and state agencies with mandates to address competitive issues and because such reviews divert NRC's finite resources from its fundamental health and safety mission and constitute an unnecessary barrier to the completion of beneficial license transfers.

APPA and FMPA, in their "Joint Brief of the American Public Power Association and Florida Municipal Power Agency" (March 31, 1999) (APPA Brief), assert that a license transfer application seeks the issuance of an operating license requiring antitrust review and that this "proposition is so plain it previously has never been challenged." APPA Brief at 3. APPA and FMPA argue that the Act, the Commission's regulations, and its consistent past practices would be unlawfully disregarded were the Commission to abandon antitrust reviews of license transfer applications.

NASUCA supports KEPCo's argument that the Commission may not, as a matter of law, eliminate all antitrust reviews in connection with license transfers. "Amicus Filing, The National

Association of State Utility Consumer Advocates" (March 31, 1999) (NASUCA Brief).

AAI argues that antitrust is a primary statutory function of the Commission which can only be eliminated by Congress, though it can be limited by the Commission. "Motion to Submit Comments and Comments of Amici Curiae of the American Antitrust Institute" (March 31, 1999) (AAI Brief) at 4-5. AAI takes the position that the Commission's role of focusing an antitrust review on electric industry competitive problems cannot be substituted for by other agencies.

WML argues that the "Commission's success in conducting competitive reviews is unchallenged," and that without delaying any construction permit or operating license, NRC antitrust license conditions have saved "disadvantaged" entities millions of dollars in "monopoly rents" and significantly enhanced the competitive environment of the bulk power services markets. *Amicus Curiae* Brief, WML Associates" (April 5, 1999) (WML Brief) at 4. WML points out that Congress has not eliminated the NRC's antitrust function and speculates that, in view of its history, probably would not do so. Id. at 5.

II. ANALYSIS

After consideration of the arguments presented in the briefs, and based on a thorough *de novo* review of the scope of the Commission's antitrust authority, we have concluded that the structure, language and history of the Atomic Energy Act cut against our prior practice of conducting antitrust reviews of post-operating license transfers. 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 and to dismiss KEPCo's antitrust-driven request for a hearing on the proposed Wolf Creek license transfer.

A. The Atomic Energy Act

1. Statutory Framework: The Antitrust Provisions

Analysis of the Commission's statutory authority must begin with the language and structure of the Atomic Energy Act itself. To properly interpret both the specific language and the overall scheme of the Commission's antitrust authority, it is important to understand the background and history of that statutory authority.

In 1954, Congress wished to eliminate the government monopoly over the development of atomic energy for peaceful purposes and provide the incentives of competition and free enterprise in the further development of nuclear power.[2] Since nuclear power technology was developed to a great extent at government (*i.e.*, taxpayer) expense, Congress believed that its benefits should be available to all on fair and equitable terms. Congress was concerned, however, that because the construction of large nuclear generating facilities was expensive and only the largest electric utility companies likely could afford such a capital asset, they could monopolize nuclear power plants and exclude smaller utility companies from sharing in the benefits of nuclear resources and thereby create an anticompetitive situation. It, therefore, was especially concerned that smaller electric systems have access to nuclear power plant electrical

[2]See 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 8 (1970), 3 U.S. Code and Adm. News 4981 (1970) ("Joint Committee Report") (quoting from legislative history of 1954 Act).

output by sharing in their ownership at the outset. Ownership access by itself, however, would be meaningless if the generated electricity could not be effectively transmitted and distributed by the smaller owners, many of whom were "captive" bulk power supply customers of the larger, dominant utilities which would be constructing and operating the nuclear facilities. Thus, ownership access had to be accompanied by other services such as "wheeling" of bulk power.

To alleviate these concerns, Congress amended the Atomic Energy Act of 1946 ("Act") to authorize the Atomic Energy Commission, the NRC's predecessor, to conduct an antitrust review, in consultation with the Attorney General, prior to issuing a license for a nuclear generating facility. As subsequently amended in 1970, Section 105 of the Act, 42 U.S.C. § 2135, requires the Commission to determine whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. The Commission, with its unique authority over the licenses it issues, also was given the authority to remedy such situations by refusing to issue licenses or by amending or conditioning them as it deemed appropriate. With this historical background in mind, the carefully-crafted antitrust review authority given to the Commission can be considered.

Section 105 of the Act is the sole source of the Commission's antitrust authority. Before examining the Commission's specific antitrust authority granted in Section 105, it is important to understand that this authority is not plenary but instead, as a general matter, is limited to certain types of applications or otherwise limited in scope or nature. No other provision of the Act grants any antitrust authority to the Commission. As the Commission stated some years ago:

> We find the specificity and completeness of Section 105 striking. The section is comprehensive; it addresses each occasion on which allegations of anticompetitive behavior in the commercial nuclear power industry may be raised, and provides a procedure to be followed in each instance.

Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1311 (1977). Further, the Commission's antitrust authority is not derived from its broad powers provided by Sections 161 and 186 of the Act. Id. at 1317, 1317 n.12. Thus,

absent Section 105, the Commission would have no antitrust authority.

Because the prelicensing antitrust reviews described in Section 105c. apply only to applications for certain types of licenses authorized under Section 103, we set out Section 103 before turning to Section 105. Section 103a provides, in relevant part:

> The Commission is authorized to issue to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import or export . . . utilization or production facilities for industrial or commercial purposes.

Section 105 ("Antitrust Provisions") of the Act[3] provides, in relevant part:

> a. Nothing contained in this Act shall relieve any person from the operation of the [antitrust laws]. In the event a licensee is found by a court of competent jurisdiction, either in an original action in that court or in a proceeding to enforce or review the findings or orders of any Government agency having jurisdiction under the laws cited above, to have violated any of the provisions of such laws in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act.
> b. The Commission shall report promptly to the Attorney General any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or tend toward the violation of any of the foregoing Acts, or to restrict free competition in private enterprise.
> c. (1) The Commission shall promptly transmit to the Attorney General a copy of any license application provided for in paragraph (2) of this subsection, and a copy of any written request provided for in paragraph (3) of this subsection; and the Attorney General shall, within a reasonable time, but in no event to exceed

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[3]A point of clarification is in order concerning "antitrust laws." The "Acts" explicitly cited in Section 105a include the two most basic antitrust laws–the Sherman Act and the Clayton Act–as well as the Federal Trade Commission Act (FTC Act). Whether the FTC Act truly is an "antitrust" law is debatable. Clearly, conduct that violates the Sherman or Clayton Acts is also cognizable under Section 5 of the FTC Act. In FTC v. Cement Institute, 333 U.S. 683, 690-91 (1948), the Supreme Court specifically rejected the argument that because the price-fixing scheme (which the FTC had held was an "unfair method of competition") was cognizable under the Sherman Act, the FTC lacked jurisdiction. In general, all conduct prohibited by either the Sherman Act or the Clayton Act is within the scope of Section 5 of the FTC Act. See FTC v. Brown Shoe Co., 384 U.S. 316 (1966); FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 394 (1953); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609 (1953); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941). But practices which do not necessarily violate either the letter or spirit of the traditional "antitrust laws" (the Sherman, Clayton and Robinson-Patman Acts) may nevertheless violate Section 5 of the FTC Act as unfair or deceptive acts or practices affecting consumers, regardless of their effect on competition. FTC v. Sperry & Hutchison Co., 405 U.S. 233, 239 (1972). Whether or not purists would consider the FTC Act as an "antitrust law," that act is one of the specific acts enumerated in Section 105a and we hereinafter include it in our use of the phrase "antitrust laws."

> 180 days after receiving a copy of such application or written request, render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection. Such advice shall include an explanatory statement as to the reasons or basis therefor.
> (2) Paragraph (1) of this subsection shall apply to an application for a license to construct or operate a utilization or production facility under section 103: *Provided, however*, That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.
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> (5) . . . The Commission shall give due consideration to the advice received from the Attorney General . . . and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a.
> (6) . . . On the basis of its findings, the Commission shall have the authority to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate.
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Not surprisingly, the parties' and the *amicus* briefs focus almost exclusively on Section 105c, which describes the construction permit and operating license antitrust reviews, the antitrust finding the Commission must make, and the licensing remedies available to the Commission in the event of an adverse finding. While the language in Section 105c unquestionably is at the heart of the determination whether an antitrust review is required in connection with post-operating license transfer applications, we find that the scope of antitrust authority granted the Commission in Section 105 as a whole sheds considerable light on the correct interpretation of the specific language in Section 105c. And as will be seen, the structure of the Section 105 scheme, as well as the legislative history of Section 105, support the conclusion that Section 105c does not require, and indeed does not authorize, antitrust

reviews of post-operating license transfer applications.[4]

a. Statutory Structure

We start at the beginning, and will examine each portion of Section 105 in turn. At the outset, Section 105a makes clear that nothing in Section 105 relieves any person *(e.g.*, applicant or licensee--see Section 11s of the Act) from complying with any of the antitrust laws. Further, if any licensee is found by a court to have violated any antitrust law, then the Commission is empowered to suspend, revoke, or take such other action as it deems necessary, with respect to the license issued. Thus, after issuing an operating license, to the extent that an antitrust violation is found which may warrant some remedy involving the license itself, or "licensed activities," the Commission could order a remedy. Similarly, Section 105b requires the Commission to report to the Attorney General any information it may have with respect to its licensees' anticompetitive practices. As will be seen, these provisions assist in understanding the nature and scope of the prelicensing antitrust reviews required by Section 105c.

Section 105c.(1) provides for transmittal of "any license application provided for in paragraph (2)" and related information to the Attorney General, and for advice, with explanatory reasons, from the Attorney General regarding the antitrust finding to be made by the Commission pursuant to paragraph (5).

Section 105c.(2) states that the review process provided in paragraph (1) "shall apply to an application for a license to construct or operate" a nuclear power facility but that "paragraph (1) shall not apply to an application for a license to operate a . . . facility for which a construction

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[4]The issue of our authority to conduct antitrust reviews of post-operating license transfers has not been explicitly addressed heretofore in any Commission adjudicatory decision (or elsewhere by the Commission). While some briefs contain arguments that certain past Commission adjudicatory decisions can be read to imply that the Commission has asserted such authority, and others suggest the opposite, we conclude that at most they reflect an assumption by the Commission of such authority, but certainly not a reasoned conclusion. Accordingly, past adjudicatory decisions provide, at best, marginally useful assistance in resolving this issue.

permit was issued . . . unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission . . . in connection with the construction permit for the facility."

Section 105c.(5) requires the Commission, with respect to applications subject to paragraphs (1) and (2), "to make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws . . . ." In the case of affirmative findings, Section 105c.(6) grants the Commission authority to refuse to issue the license, to rescind or amend it, or "to issue a license with such conditions as it deems appropriate."

The overall structure of the process designed by Congress to address its concerns about potential antitrust problems arising from the licensing of nuclear generating facilities is evident from the nature of its concerns and the corresponding scheme provided above. To address the concern over smaller utilities' ability to obtain ownership access to a nuclear facility (and associated services such as "wheeling") before it operates and in order to resolve incipient antitrust problems before any competitors were damaged, a mandatory and "complete" antitrust review was provided at the construction permit stage of the licensing process.[5] At this time, all entities who might wish ownership access to the nuclear facility, and who are in a position to assert that the activities under the license would create or maintain a situation inconsistent with the antitrust laws, are able to seek an appropriate licensing remedy from the Commission prior to actual operation of the facility, thus realizing their fair benefits of nuclear power from the beginning of electrical power generation.

This construction permit review theoretically is the broadest antitrust review provided in the law, not only because it measures the competitive situation against all the antitrust laws,

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[5]The Commission's traditional process for licensing nuclear facilities is known as a two-step licensing process, consisting first of a construction permit followed by an operating license. See Section 185 of the Act, 42 U.S.C. §2235.

including the FTC Act, but also because the standard of anticompetitive conduct and basis for a remedy is not the traditional one of antitrust violations but the potential for the licensed activities to create or maintain "a situation inconsistent with the antitrust laws." [6] At the time Congress enacted Section 105, it envisioned this broad and comprehensive review at the construction permit phase of licensing a facility but, as we shall see, not at other licensing or post-licensing phases for the facility in question. Congress believed that at the construction phase -- before the plant is built and before its operation is authorized by the Commission -- the Commission would be peculiarly well-positioned to offer meaningful remedies, such as license conditions, if it found that granting the license would create or maintain a situation inconsistent with the antitrust laws.

The Commission's independent antitrust review responsibilities diminish from plenary reviews prior to initial licensing to passive information-reporting after licensing. Section 105c.(2) explicitly states that the Act's formal antitrust review provisions "shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground that 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." As suggested in the legislative history (see discussion below), Congress added this restriction -- in effect, a prohibition of second antitrust reviews at the operating license stage absent a significant changes finding -- as part of compromise legislation in 1970 intended both to require vigorous prelicensing antitrust reviews and to avoid undue disruption of utility planning and investment decisions.

Consistent with the progressively diminishing role Congress intended for the Commission regarding the competitive practices of its applicants and licensees, Sections 105a and b

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[6] But see note 22, *infra*.

preserve traditional antitrust forums to resolve allegedly anticompetitive conduct by Commission licensees. Once a nuclear facility is licensed to operate, traditional antitrust forums -- the federal courts and governmental agencies with longstanding antitrust expertise -- are better equipped than the Commission to resolve and remedy antitrust violations by NRC licensees. To the extent that a court finds antitrust violations that arguably warrant some unique "licensing" relief that only this Commission can provide, such as by imposing conditions on the operating license, then 105a provides the Commission with remedial (but not review) authority.

From the mandatory and broad construction permit review to the conditional review in connection with the initial operating license, to the constricted review authority after issuance of the initial operating license (limited to information-reporting), Section 105, in concept, describes a logical and progressively more narrow and less active role for a Commission whose primary and almost sole responsibility under the Act is to protect the public health and safety and the common defense and security.[7]

b. Statutory Language

The overarching structure of the Commission's antitrust responsibilities, both the prelicensing construction permit and operating license antitrust reviews, as well as the post-operating license authority to order a remedy for antitrust violations found elsewhere, as described above, is consistent with the very purpose for the Congressional grant of specific and limited antitrust authority to the Commission. We turn now to our analysis and interpretation of the key statutory words and phrases material to the issue of whether Section 105 contemplates antitrust reviews of post-operating license transfer applications.

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[7]If the Commission has continuing antitrust review responsibility over post-operating license transfers, it conceivably could have to conduct at least a "significant changes" review almost 40 years after the initial operating license is issued, since Section 103 of the Act provides that Section 103 licenses are issued for up to 40 years. Nothing in the Act or in its legislative history -- which, as we shall see below, focused on the Commission's "anticipatory," prelicensing antitrust role -- suggests that Congress intended to assign the Commission such extensive and long-lasting antitrust review duties.

Although the antitrust laws continue to apply to all Commission licensees after issuance of the facility operating license and the Commission continues to have authority to order licensing type relief, if warranted, based on violations of the antitrust laws found by other forums (Sections 105a and b), the prelicensing antitrust reviews required by Section 105c are limited both in terms of the types of applications subject to the review and the threshold for conducting the review. Section 105c.(1) requires transmittal of antitrust information to the Attorney General only for a "license application provided for in paragraph (2)." Paragraph (2), in turn, applies to "an application for a license to construct or operate a . . . facility under section 103" but limits the review of operating license applications by stating that paragraph (1) "shall not apply to an application for a license to operate a . . . facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission . . . in connection with the construction permit for the facility." Section 103a provides, in relevant part, that the "Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import or export . . . utilization or production facilities for industrial or commercial purposes."

By its terms, Section 105c.(2) requires a Commission antitrust review of applications for certain activities. The only types of applications the provision explicitly subjects to antitrust review are those for construction permits and operating licenses issued under Section 103. Section 103, however, does not use either "construct" or "operate" to identify the activities for which the Commission is authorized to issue licenses. These two basic terms, which are the hallmarks of the NRC's historical two step licensing process (construction permit followed by operating license), are conspicuously absent from Section 103. To construct a facility, however, is the same as to manufacture or produce a facility. "Construct" in Section 105c.(2), therefore, is

equivalent to the Section 103 activities of "manufacture" or "produce." Similarly, to operate a facility is the same as to possess and use the facility. "Operate" in Section 105c.(2) thus is equivalent to the Section 103 activities of "possess" and "use." The only types of applications expressly made subject to antitrust review under Section 105c.(2), therefore, are applications to manufacture or produce ("construct") a facility and applications to "possess" and "use" ("operate") a facility, not applications for any other activities requiring a license under Section 103.

Equally as conspicuous as the absence of the words "construct" and "operate" from Section 103 is the inclusion of "acquire" and "transfer" in Section 103 as activities explicitly requiring a license from the Commission. Yet Section 105c.(2) does not, explicitly or implicitly, identify applications to either "acquire" or "transfer" facilities as being subject to antitrust review. So the only types of applications explicitly mentioned in Section 105c.(2) as requiring an antitrust review (construction and operation) are not mentioned verbatim in Section 103 but are mentioned using equivalent language, while the type of application which is not mentioned in Section 105c.(2), but for which an antitrust review is urged by some (transfer), is identified verbatim in Section 103 (transfer) as well as in equivalency (acquire).

It would be strange, to say the least, if Congress intended the Commission to perform an antitrust review of post-operating license transfer (or acquisition) applications but did not mention applications for those Section 103 activities, either explicitly or equivalently, in Section 105c.(2), but instead mentioned only applications to "construct" and "operate," two commonly used words for the Section 103 activities of manufacture or produce, and possess and use, respectively. Construing Section 105c.(2) in this fashion would violate the basic canon of construction that where a particular term is used in one section of a statute, neither it nor its equivalent should be implied in another section of the same statute where it is omitted. See BFP v. Resolution Trust Co., 511 U.S. 531, 537 (1994); R. Mayer of Atlanta, Inc. v. City of Atlanta, 158 F.3d 538, 545

(11th Cir. 1998).

The explicit focus of Section 105c.(2) on applications for only two types of Section 103 activities -- construction (manufacture or production) and operation (possess and use), coupled with the omission from Section 105c.(2) of any mention, either explicitly or by equivalency, of applications to "transfer" (or "acquire") -- strongly suggests that our Section 105c prelicensing antitrust review authority does not include applications for post-operating license transfers. This conclusion is supported both by the overall structure of the Commission's antitrust authority provided in Section 105 and the specific language Congress used to authorize prelicensing antitrust reviews of only certain types of license applications. Congress's grant of limited antitrust review authority to the Commission does not give us free rein to conduct across-the-board reviews of license applications not specified by Congress. "The duty to act under certain carefully defined circumstances simply does not subsume the discretion to act under other, wholly different, circumstances, unless the statute bears such a reading." Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*). Accord, University of the District of Columbia Faculty Ass'n v. DCFRMAA, 163 F.3d 616, 621 (D.C. Cir. 1998).

The only conceivable way to interpret Section 105c to require some form of antitrust review of applications to transfer an existing operating license is to construe the application to transfer as an application for an operating license.[8] But if it is so construed, Section 105c.(2) brings our antitrust review responsibility into play only if there is a "significant changes" finding

[8]Such a construction is at odds with reality, since no new license will be issued to effectuate a Commission-approved transfer. Instead, as will be true in this Wolf Creek case if the Commission approves the transfer request, a license amendment will be issued to reflect the new licensee. The Commission has characterized such amendments as "essentially administrative in nature" and not involving any significant substantive changes. Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66727 (Dec. 3, 1998) (codified at 10 C.F.R. Part 2, Subpart M). An amendment reflecting a license transfer does not require a prior hearing. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 77 (1992).

made in accordance with the process described in that section. The mandated significant changes process, however, does not lend itself to reviews of post-operating license transfer applications.

To trigger the Commission's duty to conduct an antitrust review of an operating license application, there must be "significant changes" in the licensee's activities that "have occurred subsequent to the previous review by the Attorney General and the Commission . . . in connection with the construction permit for the facility." Section 105c.(2). It is immediately obvious from this language that the statutory "significant changes" inquiry is not compatible with antitrust reviews of post-operating license transfers, for the statutory baseline from which to measure "significant changes" is the facility's construction permit, whereas at the time of post-operating license transfers the facility already would have received its operating license, and undergone a previous "significant changes" review. It would be absurd for the Commission to look back again to the original construction permit and make the "significant changes" inquiry anew.

In short, while the statutory method of making the "significant changes" finding reflects a common sense approach in the case of the initial -- original -- application for an operating license submitted to the Commission by the construction permit licensee, the approach makes no sense whatever if a post-operating license application for license transfer is construed as the equivalent of an initial operating license application and thus force-fit into the "significant changes" process. A comparison of activities of new licensees with activities of other licensees who underwent at least two previous antitrust reviews (there could be a series of post-operating license transfer applications) for any facility that underwent an operating license antitrust review makes no practical sense and also would ignore the significant changes explicitly found to exist between construction and initial operation of the facility. The statutory scheme and language are simply inconsistent with treating post-operating license transfer applications as operating license

applications.

Interestingly, the Commission's past practice of conducting "significant changes" reviews of post-operating license transfer applications, now being reconsidered in this case, compared the activities at the time of transfer with those at the time of the previous operating license review, a comparison more logical than that required by the statute. We suspect that no one ever suggested that the Commission should have been using the statutorily-required construction permit review as the benchmark for its "significant changes" determination for post-operating license transfer applications for the simple reason that it makes no sense in reality if post-operating license transfer applications are deemed to be "operating license" applications for purposes of a Section 105c antitrust review. This, too, strongly suggests that Section 105c cannot be read to require Commission antitrust reviews of post-operating license transfer applications and that the Commission's past practice of reviewing post-operating license transfer applications for significant changes is at odds with the clear language of the statute.

Because the statute does not explicitly address the issue of antitrust authority over post-operating license transfer applications, however, we turn to the legislative history for additional guidance on Congressional intent.

2. Legislative History

Desiring to end the government's monopoly over the development of nuclear power for peaceful purposes, Congress, in 1954, amended the Atomic Energy Act of 1946 to provide for further development by private enterprise. Because the development of nuclear power had theretofore been at government (*i.e.*, taxpayer) expense, Congress wanted to ensure that commercial nuclear facilities were accessible to all types of electric utility systems, large investor-owned, smaller private ones, municipal systems, electric cooperatives, and others, on fair and equitable terms. Although large nuclear generating facilities would be expensive to construct, the non-capital generating costs were expected to be inexpensive (one AEC

Chairman erroneously predicted that nuclear-generated electricity would be "too cheap to meter"). This meant that, absent some mandated means to address this situation, large, wealthy, dominant electric utilities could achieve great economies of scale by constructing large, expensive nuclear facilities which the smaller utilities could not afford to do, thereby increasing the already dominant competitive position of the larger utilities in the marketplace. To address these concerns, Congress included in the 1954 Act a requirement that the Atomic Energy Commission (the NRC's predecessor), in consultation with the Attorney General, conduct an antitrust review prior to issuing any license under Section 103 for a nuclear power facility for commercial or industrial purposes.[9]

Because nuclear power plants were being licensed in the years after the 1954 amendments under Section 104b as "research and development" facilities, however, no Section 105 antitrust reviews actually were being conducted. In 1970, the Joint Committee on Atomic Energy identified the Section 105c antitrust review requirement as a major roadblock to "commercial" licensing under Section 103 and in need of clarification and revision. See Joint Committee Report at 13. Proponents and opponents of prelicensing antitrust review expressed strong positions and emotions from one extreme to the other. Id. at 14. Proponents of prelicensing antitrust review feared that, absent such review, the large, already dominant utilities would further increase their market share and power by monopolizing nuclear power, with its large economies of scale, with the smaller private, municipal and cooperative systems denied their fair share of nuclear power. These proponents, therefore, urged the need and importance of antitrust review "at the outset of the licensing process," "before any competitor was damaged"

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[9]Only commercial licenses issued under Section 103 of the Act were made subject to the antitrust review provisions. "Research and development" licenses issued under Section 104 were exempt from antitrust review. The 1954 Act authorized the issuance of commercial licenses only upon a written finding that such facilities had been "sufficiently developed to be of practical value for industrial and commercial purposes." For many years after 1954, the Commission made no findings of "practical value" and issued all licenses for the construction and operation of civilian nuclear power plants as "research and development" facilities under Section 104b of the Act.

or "much money and time has been spent." See Hearings at 21, 420, 481.[10]

Opponents of prelicensing review, on the other hand, believed that the Commission's Section 105a and b authority (to report anticompetitive conduct of its licensees to the Attorney General and to take licensing action to remedy antitrust violations found by a court) was sufficient by itself. Joint Committee Report at 14. They believed that it would be unreasonable and unwise to delay the construction and operation of nuclear facilities by imposing special antitrust reviews on those willing to invest in nuclear facilities. Id.

The AEC proposed an antitrust review at both the construction permit and operating license stages of the licensing process but with no operating license review in cases where antitrust concerns were satisfactorily resolved at the construction permit stage. Hearings at 38, 481. This proposal was met with strong opposition, including that of the Chairman of the Joint Committee. See Hearings at 37-38 (remarks of Rep. Holifield). The concern was that after a utility had planned, sized and constructed a facility to meet its customers' power requirements, including any requirements from the construction permit antitrust review, any further review would delay the licensing of the facility and unfairly damage the utility's considerable investment. Id. The legislation that resulted -- including the limitation of such reviews to construction permit applications and adding the "significant changes" trigger for a second antitrust review of operating license applications -- reflects a careful balancing and compromise of the respective concerns and positions. Joint Committee Report at 13. See also 116 Cong. Rec. H9449 (Daily Ed., Sept. 30, 1970). The 1970 amendments, which remain in effect today as reflected in Section 105, were passed by Congress after considering the Joint Committee Report.

As is evident from the language of Section 105c, the Commission's antitrust review obligations are triggered by applications for only two types of licenses issued under Section 103:

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[10]Prelicensing Antitrust Review of Nuclear Power Plants: Hearings Before the Joint Committee on Atomic Energy, Part I, 91st Cong., 1st Sess. (1969), Part II, 91st Cong., 2d Sess. (1970).

construction permits and operating licenses. As indicated above, applications for activities requiring a license under Section 103 other than enumerated activities equivalent to "construction" or "operation," such as "acquire" and "transfer," are not included in Section 105c.(2). The legislative history is consistent with this reading. 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.

Joint Committee Report at 29. See generally American Public Power Ass'n v. NRC, 990 F.2d 1309, 1311-12 (D.C. Cir. 1993). These remarks were made with the narrow issue in mind of clarifying the scope of the terms "license application" and "application for a license" used in Section 105c and thus reasonably can "be said to demonstrate a Congressional desire." See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 862 (1984). The "other applications which may be filed" but which do not trigger an antitrust review clearly encompass applications for those activities listed in Section 103, such as transfers, that do not

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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).

constitute construction or operation.[12]

In sum, the legislative history of the Commission's antitrust authority supports the overall scheme of one mandatory antitrust review at the initial construction permit stage of the licensing process and one potential antitrust review at the initial operating license stage if and only if there are significant changes from the previous construction permit review. So, too, does it support the interpretation of the term "license application" to exclude post-operating license transfer applications from an antitrust review based on their being interpreted as applications for an initial operating license.[13] There is no evidence in the statutory text or history that Congress expected the Commission to conduct antitrust reviews of post-operating license transfers. In such a

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[12]In American Public Power Ass'n v. NRC, 990 F.2d 1309 (D.C. Cir. 1993), the Commission's determination that license renewal applications were not required to undergo a Section 105 antitrust review was upheld because such applications were not "initial" applications or applications for a "new or substantially different facility."

[13]In its Joint Brief (*amicus curiae*) (at 6), the American Public Power Association and the Florida Municipal Power Agency argue that it "could not have been Congress's intention . . . that a utility must undergo an antitrust review if it applies for a construction permit, but not if it induces others to construct the project and then purchases the already-operational nuclear plant. After all, it is the operation of the plant, not its construction, that most offers the potential of harm to competition." (Emphasis in original.) We find it highly unlikely, to say the least, that one utility could "induce" another to construct a nuclear power plant in a sham scheme to obtain operational control of the completed and operationally-licensed plant without undergoing the NRC's prelicensing antitrust review. Moreover, if that were suspected and could be proven, then it would be strong evidence that the inducing utility had serious concerns that its market position or competitive practices might run afoul of the antitrust laws. In that case, those who arguably have been injured could bring a private antitrust action or bring the matter to the attention of the Justice Department, FERC, the FTC, or other governmental agencies with traditional antitrust authority. And if NRC authority over the license were considered to be necessary to fashion an appropriate remedy, the Commission could exercise its Section 105a authority.

APPA also argues that Sections 184 and 189 of the Act prevent the Commission from foreclosing antitrust hearings on license transfers. APPA Brief at 9-10. Section 184 prohibits license transfers unless, "after securing full information," the Commission finds the transfer in accordance with the Act, and Section 189 provides for hearings in certain licensing proceedings, including transfers. We disagree. If the Act does not require or even authorize antitrust reviews of post-operating license transfers, then antitrust issues associated with the transfer are not material to the license transfer decision and antitrust information is not required to be considered by the Commission, except perhaps to determine the fate of existing antitrust license conditions. We, therefore, do not believe that these provisions provide any obstacle to terminating these antitrust reviews.

detailed statutory scheme, Congressional silence on such transfers seems to us tantamount to an absence of agency authority. At the least, it cannot be said that Congress required antitrust reviews of post-operating license transfers.

B. NRC Regulations, Guidance, and Practice

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 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

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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.

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.

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

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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).

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 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.

Nevertheless, clarification of the rules governing the filing of applications by explicitly limiting which types of applications must include antitrust information is appropriate. So too should 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," be clarified. In conjunction with

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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.

this decision, we are directing the NRC staff to initiate an appropriate clarifying rulemaking.

C. Policy Considerations; Other Agencies and Other Forums

The parties' and *amicus* briefs, at our invitation, advanced policy reasons why the Commission should, or should not, terminate its practice of reviewing post-operating license transfer applications for antitrust considerations. Presuming that the Commission is free under the Act to continue its prior practice, we would abandon it as largely duplicative of other, more appropriate agencies' responsibilities, and not a sensible use of our limited resources needed to fulfill our primary mission of protecting the public health and safety and the common defense and security, from the hazards of radiation.

At the time of the 1970 antitrust amendments to the Atomic Energy Act, Congress believed that the Commission was in a unique position to ensure that the licensed activities of nuclear utilities could not be used to create or maintain a situation inconsistent with the antitrust laws. As explained above, the focus of the 1970 amendments was on prelicensing antitrust reviews conducted during the pendency of the two-step licensing process comprising applications for construction permits and initial operating licenses. In contrast to the competitive situation which existed in 1970, the current competitive and regulatory climate in which the electric utility industry operates is markedly different. Key statutory changes substantially enhance smaller utilities' ability to compete with the larger generating facilities and gain access to essential transmission services. These differences from 1970 reduce, if not eliminate, the incremental protection of competition that the NRC could provide through its antitrust reviews. To the extent that the Commission can still be considered to be in a unique position vis a vis other governmental authorities to address antitrust concerns, such uniqueness surely ends at the time the facility is granted its initial operating license.

In 1992, Congress passed the Energy Policy Act of 1992, Public Law 102-486 (EPAct), substantially enlarging the authority of the Federal Energy Regulatory Commission (FERC) to

prevent and mitigate potential and existing abuses of market power by electric utilities, including nuclear utilities. Specifically, the EPAct amended sections 211 and 212 of the Federal Power Act,[17] 16 U.S.C. §§ 824j and 824k, with respect to wholesale transmission services. Pursuant to these amended sections, any electric utility or person generating electricity may apply to FERC for an order requiring a transmission utility to provide transmission services to the applicant at prices recovering just and reasonable costs.

After enactment of the EPAct, FERC issued Orders 888 (April 24, 1996) and 888-A (March 4, 1997) which in part provide for tariffs to be filed regarding transmission service and certain necessary ancillary services.[18] In Order No. 888, FERC exercised its expanded statutory authority and required all public utilities that own, control or operate transmission facilities "to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory services."[19] Pursuant to these required tariffs, utilities can now enter into arrangements for transmission and ancillary services without instituting proceedings under section 211.

As a result, FERC now possesses statutory authority overlapping that of the NRC under Section 105 to remedy potential and existing anticompetitive conduct by the NRC's nuclear facility licensees, at least with respect to transmission services. As we noted above, transmission services are the services without which access to nuclear power facilities is meaningless and which, therefore, were of great concern to Congress in granting prelicensing antitrust review authority to the Commission. With this expanded FERC authority, however, the

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[17]Section 272 of the Atomic Energy Act provides that every NRC nuclear facility licensee is subject to the regulatory provisions of the Federal Power Act.

[18]It is our understanding that these FERC orders are currently undergoing judicial review.

[19]Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmission Utilities, 61 Fed. Reg. 21,540 (May 10, 1996), (to be codified at 18 C.F.R. Parts 35 and 385), reh'g denied in pertinent part, Order 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), petitions for review pending, People of New York, *supra* n.13.

NRC cannot be said to be in a unique position to address or remedy antitrust problems involving access to transmission services. To the contrary, NRC antitrust review might even be said to be redundant and unnecessary. As FERC stated in Order 888-A, "unbundled electric transmission service will be the centerpiece of a freely traded commodity market in electricity in which wholesale customers can shop for competitively-priced power." FERC Order 888-A, 62 Fed. Reg. 12,275 (1997). In conjunction with the Department of Justice's broad authority to enforce compliance by NRC licensees with the antitrust laws (see subsections 105a and b of the Act), this expanded FERC authority and enhanced competitive climate for the electric utility industry render the NRC's post-operating license antitrust reviews duplicative regulation contrary to the sound objective of a streamlined government.

Since 1970, changes in the Clayton Act also have contributed to eliminating any need for an NRC role in reviewing acquisitions of nuclear power facilities by new owners. The Hart-Scott-Rodino Antitrust Improvements Act or 1976, Pub. L. 94-435, 90 Stat. 1383 (1976), added section 7A to the Clayton Act, 15 U.S.C. § 18a, which established a "waiting period" notification process which allows the Department of Justice and the Federal Trade Commission to screen certain commercial transactions such as acquisitions of assets[20] for potential violations of the antitrust laws before the transactions are consummated. Under section 7A(f), DOJ has the authority to institute a court proceeding to enjoin a transaction that it has determined would violate the antitrust laws. Since the Clayton Act standard, like that of Section 105c, is "anticipatory" in nature, designed to permit the correction of anticompetitive problems in their incipiency,[21] the scrutiny of DOJ's pre-acquisition review is comparable at least to the NRC's "significant changes" review.

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[20]The transaction must meet certain threshold jurisdictional amounts, but acquisitions of nuclear power facilities always have met, and are expected to meet, the requirement and thus are subject to the screening process.

[21]See generally Houston Lighting & Power Co., CLI-77-13, 5 NRC 1303 (1977).

In summary, the competitive and regulatory landscape has dramatically changed since 1970 in favor of those electric utilities who are the intended beneficiaries of the Section 105 antitrust reviews, especially in connection with acquisitions of nuclear power facilities and access to transmission services. For this Commission to use its scarce resources needed more to fulfill our primary statutory mandate to protect the public health and safety and the common defense and security than to duplicate other antitrust reviews and authorities[22] makes no sense and only impedes nationwide efforts to streamline and make more efficient the federal government.

D. Existing Antitrust License Conditions

Whether or not the Commission conducts a "significant changes" review of post-operating license transfer applications, it still must consider the fate of any existing antitrust license conditions under the transferred license. Theoretically, at least, three possibilities exist: (1) the existing license conditions should be attached verbatim to the transferred license, (2) the existing conditions should be rescinded or eliminated in their entirety, or (3) the existing conditions should be modified and attached as modified to the transferred license. We do not believe it is possible in the abstract to generically preordain any one solution for all conceivable cases. The license conditions on their face, the nature of the license transfer, and perhaps the competitive situation as well, would need to be considered to determine what action were warranted in a given case. (For example, and without regard to the competitive situation, (1) it

[22]Theoretically, the Section 105c.(5) standard of "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws" is broader than any used elsewhere in antitrust law enforcement since no actual violation is required. As a practical matter, however, it is difficult at best to even envision a competitive situation which satisfied the Section 105 standard for relief but would not warrant relief under traditional antitrust statutes, which have been broadly construed by the courts. For example, Section 5 of the FTC Act has been held to empower the FTC "to arrest trade restraints in their incipiency without proof that they amount to an outright violation of Section 3 of the Clayton Act or other provisions of the antitrust laws." FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966). Thus, there will be no realistic gap in antitrust law enforcement if the NRC no longer performs antitrust reviews of post-operating license transfer applications.

might be appropriate to retain the existing conditions where they apply only to a particular co-owner or co-operator which will remain a licensee under the transferred license, (2) it might be appropriate to remove the conditions where they apply to only one of several licensees and that one will no longer be a licensee after the transfer, and (3) it might be appropriate to remove existing conditions or modify references to licensees in the conditions when existing licensees to whom the conditions apply merge among themselves or with other entities and new corporate licensees will result.)

While the issue of the appropriate treatment of existing antitrust license conditions in the past would have been addressed as part of the "significant changes" review of license transfers, there will need to be some means provided for consideration of the matter in connection with transfers of licenses with existing antitrust license conditions. In such cases, the Commission will entertain submissions by licensees, applicants, and others with the requisite antitrust standing that propose appropriate disposition of existing antitrust license conditions. Here, antitrust license conditions are attached to the Wolf Creek license. We therefore direct all parties to this proceeding (and other persons with an interest in the license conditions) to submit letters to the Commission addressing the disposition of the conditions. Such letters shall be filed within 15 days of this decision and shall not exceed 15 pages.[23]

E. Rulemaking versus Adjudication

KEPCo argues that the Commission cannot lawfully eliminate antitrust reviews by pronouncement in an adjudicatory decision, either in general or in this Wolf Creek case in particular, without first resorting to notice and comment rulemaking. See KEPCo brief at 11-14. KEPCo asserts that to do so would violate the NRC's regulations, id., and such a policy

[23]Consideration of the Wolf Creek antitrust license conditions is not inconsistent with our holding that the NRC need not conduct "significant changes" antitrust reviews of license transfers, for the Wolf Creek conditions were imposed at a licensing stage (initial licensing) when the NRC undoubtedly had antitrust authority. The Commission plainly has continuing authority to modify or revoke its own validly-imposed conditions. See Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 NRC 47, 54-59 (1992).

determination could not lawfully be binding in other cases, id. at 13. We disagree.

As explained above, no NRC regulation explicitly mandates an antitrust review of post-operating license transfer applications. 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. Thus, while a dismissal of this antitrust proceeding based on a new but permissible interpretation of the Commission's authority would be contrary to past practice, it would not be contrary to the explicit language of any Commission rule.

With respect to the propriety of deciding in this proceeding that henceforth there will be no antitrust reviews of post-operating license transfer applications in this or any future cases, "the Supreme Court has repeatedly emphasized that the choice between rulemaking and adjudication 'lies primarily in the informed discretion of the administrative agency." General Am. Transp. Corp. v. ICC, 883 F.2d 1029, 1031 (D.C. Cir. 1989), quoting SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). See also Cassell v. FCC, 154 F.3d 478, 485 (D.C. Cir. 1998).

In fact, what criticism there has been of agencies' use of adjudication to decide new general policy or changes in general policy has focused on the unfairness of doing so without giving nonparties advanced notice and opportunity to comment. See General Am. Transp. Corp., 883 F.2d at 1030, and the authorities cited therein. For the very purpose of avoiding such unfairness, however, the Commission in this case sought *amicus curiae* briefs from "any interested person or entity" and received briefs on the issue from a number of nonparties. CLI-99-05, 49 NRC at 200, n.1. Widespread notice of the Commission's intent to decide this matter in this 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. While KEPCo and others may have preferred that the Commission proceed by rulemaking, the Commission is acting well within its discretion in

deciding this matter now in this proceeding.

III. CONCLUSION

For the foregoing reasons, the Commission has 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. We therefore dismiss KEPCo's petition to intervene on antitrust grounds. Applicants and KEPCo may submit letters to the Commission suggesting the appropriate disposition of the existing antitrust license conditions due to the planned changes in Wolf Creek ownership and operation. All such letters shall be submitted to the Office of the Secretary no later than 15 days after the date of this Order and shall not exceed 15 pages in length. Any other person with an interest in the Wolf Creek antitrust license conditions also may submit a letter, not to exceed 15 pages, within 15 days of the date of this Order. Finally, the NRC staff will 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.

IT IS SO ORDERED.

For the Commission,

[Original Signed by Annette L. Vietti-Cook]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of June, 1999.