UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Kansas Gas and Electric Co. Corp., *et al.*	)	**Docket No. 50-482-LT**
	)	
(Wolf Creek Generating Station, Unit 1)	)	

AMICUS BRIEF OF THE NUCLEAR ENERGY INSTITUTE ON THE ISSUE OF ANTITRUST REVIEWS IN LICENSE TRANSFER CASES

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Dated: March 31, 1999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

CASES

MISCELLANEOUS

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In its Memorandum and Order docketed in this case on March 2, 1999, the Nuclear Regulatory Commission ("NRC" or the "Commission") invited the principal parties in the case, together with other interested parties, to submit briefs on the issue of 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 the pending proceeding. The Nuclear Energy Institute ("NEI"), as *amicus curiae* on behalf of the nuclear industry, supports the Commission's initiative to review this matter of significant importance to the industry. The NRC has the legal authority to, and as a matter of policy should, eliminate antitrust reviews in license transfer cases.

The NRC's mission of assuring adequate protection of the public health and safety in connection with the use of radioactive materials is not furthered by conducting antitrust reviews in license transfer cases. The NRC's mission also is not furthered because the conduct of duplicative and potentially burdensome antitrust reviews in the context of license transfer cases may well discourage beneficial transactions that would result in the transfer of nuclear operating licenses.

The NRC should decide Applicants' case in this docket on the basis of the existing record without regard to the outcome of the generic policy question concerning antitrust reviews on which the Commission has solicited briefs here. In parallel with that determination, but independent of it, the NRC should change its past practice and eliminate antitrust reviews in license transfer cases. The Commission has the clear legal authority to change its policy in the context of this proceeding. The NRC should do so, and also immediately conduct a rulemaking to conform its regulations to this new policy to eliminate any ambiguity concerning its antitrust review policy.

I. INTRODUCTION

A. The Memorandum and Order

In the Memorandum and Order, the Commission stated that it intends to consider in this case whether it should move away from NRC Staff's historical practice of performing a "significant changes" review in considering the antitrust aspects of certain kinds of license transfers, including the instant case. Memorandum and Order at 1-2. The Commission acknowledged that the legislation governing antitrust reviews, Section 105(c) of the Atomic Energy Act of 1954, as amended (the "AEA"), together with its legislative history, does not appear to contemplate the Commission engaging in antitrust reviews following issuance of an initial construction permit and operating license. Id. at 2. The Commission also recognized that the Federal Energy Regulatory Commission ("FERC") has been granted broad authority over competition issues in the electric power industry. Id. Accordingly, the Commission has proposed to use this case as a forum for resolving an issue of growing importance to the entire nuclear industry: whether it should conduct

antitrust reviews in license transfer cases. The Commission has invited interested *amicus curiae* to submit briefs on the issue by March 31, 1999.

B. NEI's Interest in this Case

The Nuclear Energy Institute is a not-for-profit organization whose nearly 300 members include all the utilities licensed to operate commercial nuclear power plants in the United States and other organizations and individuals in the nuclear industry. NEI establishes unified policies on matters affecting the nuclear industry, including the regulatory aspects of generic operational and technical issues, and represents its members on issues of broad importance to the industry. It is in this latter capacity that NEI submits this brief as *amicus curiae* on behalf of the nuclear industry.

The generic issue being considered in this case is an issue of growing importance to the nuclear industry. The number of license transfer applications reviewed by the NRC increased from two or three per year in past years to 20 license transfer applications in 1998.[1] NEI expects this trend of significant license transfer activity before the NRC to continue in future years. NRC antitrust reviews in license transfer cases potentially impose unnecessary costs and burdens on the applicants and the threat of delay from a protracted review or hearing.

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1. Information provided by Robert Wood, NRC Senior Financial Policy Advisor (March 29, 1999).

II. THE COMMISSION SHOULD ELIMINATE ANTITRUST REVIEWS IN LICENSE TRANSFER CASES

The NRC should eliminate antitrust reviews in license transfer cases for several reasons. For one, NRC antitrust reviews are duplicative of the reviews conducted by other federal and state agencies with statutory mandates to address competitive issues. The NRC should focus its finite resources on the licensing and regulatory functions most relevant to its core mission.

Moreover, the burdens and potential costs associated with NRC antitrust reviews in license transfer cases have a potentially chilling effect on transactions among nuclear owners and operators that could impair the transition to a more competitive retail electric market. The Commission should remove this unnecessary barrier to beneficial transactions.

A. The NRC Should Not Divert its Finite Resources to Duplicative Antitrust Reviews

The NRC's fundamental mission is to ensure that the uses of nuclear materials in the United States are carried out in a manner that adequately protects public health and safety and minimizes danger to life and property.[2] Although the NRC has a statutory mandate to conduct antitrust reviews in *initial* licensing cases, the Commission's antitrust functions are tangential to its core mission. The NRC should avoid dedicating its finite resources to activities that do not advance its fundamental responsibilities, particularly where those activities have no statutory underpinning, such as antitrust reviews in license transfer cases. That policy is made easier to implement where, as in the case of the antitrust reviews at issue here, other agencies of competent jurisdiction and special expertise already are required to perform those reviews whether or not the NRC performs its own reviews.

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2. Atomic Energy Act § 161(b), 42 U.S.C. § 2201(b).

Several federal agencies have responsibilities for enforcing the antitrust laws and other laws, regulations, and policies directed at preserving competition in the marketplace. The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have responsibilities for enforcing the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Antitrust Improvements Act. These statutes empower the agencies to investigate and prosecute anticompetitive activities, review and approve prospective mergers and other transactions, and procure various forms of relief to prevent or remedy competitive injury.

In addition, FERC has broad authority under Section 203 of the Federal Power Act, 16 U.S.C. §824b, to review, approve, and place competition conditions on mergers of FERC-jurisdictional utilities and dispositions of FERC-jurisdictional utility property, including, in practice, the transactions that are likely to trigger license transfer cases before the NRC.[3] Under FERC's Merger Policy Statement,[4] FERC will approve mergers only if it determines that the transaction will not adversely affect rates, competition, and federal and state regulation. In assessing the competitive impacts of the proposed merger, FERC conducts a rigorous competitive screening analysis that applies the DOJ/FTC Horizontal Merger Guidelines to assess five distinct factors affecting competition.[5] FERC will authorize the proposed merger only if it determines that the merger will

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3. For instance, the merger application of Western Resources, Inc., and Kansas City Power & Light Co. currently is pending before FERC in Docket No. EC97-56-000. The transaction underlying that application has given rise to the instant license transfer case.

4. Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, FERC Stats. & Regs. ¶ 31,044 (1996), *order on reconsideration*, 79 FERC ¶ 61,321 (1997) (the "Merger Policy Statement").

5. The Horizontal Merger Guidelines assess whether (1) the merger will significantly increase concentration and result in a concentrated market; (2) the merger raises concerns about

not cause competitive harm under this comprehensive test. If the proposed transaction does not satisfy FERC's competition standards, FERC can refuse to authorize the transaction or may impose conditions on its approval. Merger Policy Statement at 30,120-21. FERC retains jurisdiction over the parties to the transaction after its completion to remedy competition issues[6] and also has authority under Section 206 of the Federal Power Act to act on complaint or its own initiative to remedy practices subject to its jurisdiction that are unjust, unreasonable, unduly discriminatory, or preferential. 16 U.S.C. § 824e.

FERC's ability to fashion market power mitigation measures and remedies in merger cases is substantial. In the Merger Policy Statement, FERC identified several remediation measures it potentially could impose as conditions of merger approval, including requiring divestiture of generating assets or extension of transmission facilities to eliminate constraints, prohibiting trading over constrained transmission paths, and ordering membership in an independent transmission system operator that would ensure comparable and independent access for all customers to the applicants' transmission facilities. Merger Policy Statement Appendix A at 30,136-37. Kansas Electric Power Cooperative ("KEPCo") and the National Rural Electric Cooperative Association ("NRECA") seriously underestimate FERC's ability to fashion remedies to market power issues when they assert that only the NRC has the power to protect them against the Applicants' alleged

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potential adverse competitive effects; (3) entry would be timely, likely, and sufficient to deter or counteract the competitive effects of concern; (4) the merger will create any efficiency gains that reasonably cannot be achieved by the parties by other means; and (5) but for the merger, either party to the merger would be likely to fail, causing its exit from the market.

6. Federal Power Act § 203(b), 16 U.S.C. § 824b(b); see, e.g. IES Utilities, Inc., 81 FERC ¶ 61,187 (1997) ("The Commission retains the authority under Section 203(b) of the FPA to issue supplemental orders, as appropriate.")

market power. KEPCo and NRECA Initial Brief at 16-17. To the contrary, FERC has very broad power to impose conditions on its approval of the underlying merger in the event it determines such conditions are needed to remedy market power concerns.[7]

Moreover, in addition to federal agencies, state public utility regulators and other state agencies have substantial authority to regulate utilities in their states and to enforce state antitrust statutes.[8] Relevant to this case, the state utility regulatory bodies in Kansas and Missouri both are currently engaged in reviews of the merger underlying the instant license transfer case and will consider competition issues as part of their determinations.

As the NRC considers whether to continue antitrust reviews in license transfer cases, developments in the electric power industry demonstrate that the threat of the development of anticompetitive combinations is becoming less, not more, worrisome. Contrary to the argument advanced by KEPCo and NRECA, KEPCo and NRECA Initial Brief at 15-16, the electric power industry is becoming more competitive at both the wholesale and retail levels. Transactions in recent years have had the effect of disaggregating traditional electric utilities, resulting in heightened competition in wholesale markets.[9] At the retail level, twenty-two states have implemented or are

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7. Indeed, KEPCo has requested FERC to impose ten different conditions if it approves the merger between Western Resources, Inc., and Kansas City Power & Light Co. KEPCo Protest in FERC Docket No. EC97-56-000 (February 2, 1999).

8. For instance, New York's Donnelly Act is analogous to the federal Sherman Act in prohibiting various forms of anticompetitive activity and giving the state Attorney General antitrust enforcement powers. New York General Business Law Art. 22 (McKinney 1998).

9. Many traditional utilities, and almost all independent power producers, sell capacity and energy in the wholesale power market under market-based rate tariffs on file with FERC. FERC will grant market-based rate authority only to applicants that demonstrate that they cannot exercise generation or transmission market power. See, e.g., Alliant Services Co., 85 FERC ¶ 61,344 (1998).

in the process of implementing open access programs under which retail customers will have the option to select from among any number of suppliers of generating services, and twenty-seven other states are investigating the implementation of retail open access.[10] With these trends towards competition, the utility of NRC antitrust reviews in license transfer cases, already marginal given the authority of other federal and state agencies to police competition issues, will only diminish.

The NRC has recognized the redundancy of its activities, and its limited expertise, in conducting antitrust reviews. In Houston Lighting & Power Co., et al., (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303 (1977) ("South Texas"), the Commission acknowledged that "nuclear power is an area of considerable technical complexity [and] [i]ts governance should be entrusted to an agency which embodies that particular expertise. *But in the field of antitrust, our expertise is not unique.*" South Texas, CLI-77-13, 5 NRC at 1316 (emphasis added).

There is a wide disconnect between the NRC's antitrust role in license transfer cases and its unique expertise in the oversight of nuclear power. Given the gulf between the two, the NRC must consider whether, as a matter of policy, it should devote resources to conducting antitrust reviews that otherwise would be available to perform its nuclear oversight functions. In light of the NRC's mission and finite resources, the Commission should eliminate duplicative NRC antitrust reviews.

B. The NRC Should Dismantle the Unnecessary Barrier of Antitrust Review to Transactions That Will Further its Core Mission

The benefits of strongly-managed and financially healthy nuclear power operators are obvious. The NRC should do nothing to discourage transactions that will contribute to strong

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10. United States Department of Energy, Energy Information Administration, Status of State Electric Utility Deregulation Activity as of March 1, 1999 (last modified Mar. 1, 1999) <http://www.eia.doe.gov/cneaf/electricity/chg_str/tab5rev.html>.

management and financial stability among nuclear owners and operators, such as the formation of nuclear operating companies and sales of nuclear facilities. In reviewing the license transfer applications arising from these transactions, the NRC should apply its singular expertise and focus on core safety issues, such as the transferee's financial and technical qualifications, rather than divert resources to antitrust reviews.

The antitrust review process can be a long and difficult one, as the NRC has recognized. Under Section 50.33a of the Commission's regulations, an applicant subject to an NRC antitrust review may be required to provide the information and materials specified in Appendix L to Part 50 of the regulations. 10 CFR § 50.33a. This production burden is not insubstantial. The applicant then faces the prospect of an antitrust hearing, during which the applicant invariably incurs substantial fees for legal counsel, economic analysis, and other professional and support services. The hearing process can be, as the Commission has candidly acknowledged, a time-consuming process, subjecting the applicant to a potentially long delay in completing the underlying transaction. South Texas, CLI-77-13, 5 NRC at 1318.[11] These burdens and costs are exacerbated by the fact that they are incurred in a review that is duplicative of the other antitrust reviews the applicant faces.

The NRC erects an unnecessary impediment to the completion of beneficial transactions by conducting duplicative and potentially burdensome antitrust reviews in the context of license transfer cases. The NRC should eliminate this practice.

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11. Even the informal hearing procedure for license transfer cases under Subpart M to 10 CFR Part 2 offers no guarantee against complex and lengthy proceedings, as the NRC's General Counsel recently noted. SECY 99-006, Re-examination of the Hearing Process (January 8, 1999).

C. Neither the Atomic Energy Act Nor the NRC's Regulations Give the Commission On-Going Authority to Conduct, or Require the NRC to Conduct, Antitrust Reviews After Issuance of Operating License

No legal support for the NRC's practice of conducting antitrust reviews in license transfer cases can be found in the AEA. To the contrary, the weight of authority demonstrates that the scope of the NRC's antitrust review authority is limited to the initial licensing phase of the NRC's jurisdiction over a nuclear licensee.

1. Section 105(c) of the AEA Does Not Give the NRC On-Going Authority to Conduct Antitrust Reviews After Issuance of an Operating License. Section 105(c) of the AEA provides the NRC with its sole statutory authority to conduct antitrust reviews, and that authority is limited, on the face of the statute, to antitrust reviews conducted in the context "of any license application" provided for in subparagraph 2 of Section 105(c). AEA § 105(c)(1), 42 U.S.C. § 2135(c)(1). Subparagraph 2 limits the scope of Section 105(c) solely to "an application for a license to construct or operate a utilization or production facility under section 103," provided, however, that the operative provisions of Section 105(c) do not apply to an application for an operating license unless the Commission determines that an antitrust review is necessary at that stage of the licensing process because "significant changes" in the licensee's activities or proposed activities have occurred subsequent to the antitrust review conducted at the construction permit phase of the licensing process. AEA § 105(c)(2), 42 U.S.C. § 2124(c)(2). With this language, the AEA explicitly authorizes the NRC to conduct antitrust reviews of licensees' activities only at the initial stages of the NRC's jurisdiction over the licensee. Nothing on the face of the AEA gives the NRC express authority to conduct antitrust reviews in license transfer cases.

The legislative history of the AEA supports this plain reading of Section 105(c). In its report on the 1970 amendments to the AEA, the Joint Committee on Atomic Energy stated its belief that the provisions of Section 105(c) should have only limited application:

> 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 operating license, or the *initial* application for modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission.

Joint Committee Report 91-1470, *reprinted in* 1970 U.S.C.C.A.N. 4981, 5010 (emphasis added).

Judicial and NRC cases also support this limited-scope reading of Section 105(c). In American Public Power Assoc. v. NRC, 990 F.2d 1309 (1993), the United States Court of Appeals for the District of Columbia Circuit affirmed the NRC's determination not to perform antitrust reviews in license renewal cases. The Court noted that the term "license renewal" is absent from Section 105, raising "at least a question" whether Congress intended Section 105(c) to apply to license renewals, and the Court recognized that the Joint Committee Report emphasized that the words "any application" in Section 105(c) refer to an "initial application." APPA, 990 F.2d at 1313-14. On the basis of its review of the statute and its legislative history, the Court concluded that the NRC has permissibly construed the statute to "limit its antitrust review obligations to situations where it issues a new operating license." Id. at 1314. The term "license transfer" similarly is missing from the text of Section 105(c). Applying the APPA analysis in the instant context leads to the analogous conclusion that Section 105(c) applies to new licenses but not to license transfers.

The Commission previously has reached conclusions similar to the APPA court's. In South Texas, the NRC reviewed the scope of its antitrust review authority and concluded that its antitrust

responsibilities are limited to the responsibilities defined in AEA § 105. South Texas, CLI-77-13, 5 NRC at 1309. Reviewing the text of the statute and its legislative history, the Commission plainly stated, "we conclude that Congress had no intention of giving this Commission authority which could put utilities under a continuing risk of antitrust review." Id. at 1317. NRC antitrust reviews in license transfer cases put utilities at exactly that continuing risk.

Of significant importance to the NRC's analysis in South Texas was its conclusion that the limitation on its authority over antitrust matters is consistent with its special responsibilities for public health and safety. South Texas, CLI-77-13, 5 NRC at 1316. Acknowledging that any post-licensing antitrust remedies it could provide would not be appreciably different from what could be fashioned through "the traditional antitrust forums," the Commission recognized, "as did the Congress, that there are more suitable forums for antitrust enforcement." Id. at 1316-17.

NEI acknowledges that the Commission and the Atomic Safety and Licensing Appeal Board (the "Appeal Board") have suggested in dicta that the Commission might have the authority to conduct antitrust reviews in post-licensing cases. This dicta is far from authoritative. In South Texas, the Commission suggested, wholly without analysis, that authority to conduct an antitrust review in a license transfer case "could be drawn as an implication from our regulations." South Texas, CLI-77-13, 5 NRC at 1318, citing 10 CFR § 50.80. Citing this dictum in a footnote, the Appeal Board later stated that the NRC in South Texas had manifested its judgment that its antitrust jurisdiction over a nuclear licensee does not extend over the full 40-year term of the license "except perhaps as necessary . . . in circumstances where a plant is sold or so significantly modified as to require a new license." Florida Power & Light Co. (St. Lucie Plant, Unit 1), ALAB-428, 6 NRC 221, 226 n.12 (1977). The NRC noted this same dicta more recently, again without discussion.

Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 NRC 47 at 57 (1992). In the face of the Commission's reasoned analysis of the statute and its legislative history, this dicta, stated without analysis, cannot override APPA or provide any definitive support for the proposition that the Commission has the statutory authority to conduct antitrust reviews in license transfer cases.

2. The Commission's Regulations Do Not Require the NRC to Conduct Antitrust Reviews After Issuance of an Operating License. The AEA does not require the NRC to conduct antitrust reviews in license transfer cases. Accordingly, the NRC's regulations do not require the Commission to conduct antitrust reviews in license transfer cases. It is noteworthy that when the Commission recently amended its regulations governing its licensing procedures, it declined to impose such a requirement.

Section 50.80 of the NRC's regulations governs the transfer of licenses. Although Section 50.80(b) directs applicants to provide the Commission with the antitrust review information specified in 10 CFR § 50.33a, it does not explicitly require antitrust review.[12] In South Texas, the Commission, citing Section 50.80, suggested only that authority to conduct an antitrust review in a license transfer case "could be drawn as an implication from our regulations." South Texas, CLI-77-13, 5 NRC at 1318. This suggestion of inferential authority, without more, does not constitute a regulatory mandate to conduct antitrust reviews in license transfer cases.

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12. When 10 CFR § 50.80(b) was revised in 1973 to require license transfer applicants to furnish the NRC with the information specified in 10 CFR § 50.33a, 38 Fed.Reg. 3955, 3956 (February 9, 1973), license transfers occurred prior to issuance of the plant's operating license, during a period in the plant's life when the NRC's statutory authority to conduct antitrust reviews is unquestionable. In fact, the stated purpose of the 1973 revision was to incorporate the Attorney General's request for antitrust information "for the purpose of the *prelicensing* antitrust advice by the Attorney General." 38 Fed.Reg. 3955, 3956 (February 9, 1973) (emphasis added).

The text of Subpart A to Part 2 of the NRC's regulations ("Subpart A"), parts of which the Commission revised in December 1998 and which defines the procedures for issuance, amendment, transfer, or renewal of a license, likewise lends no support to the proposition that the NRC is required to conduct antitrust reviews in license transfer cases. The language of newly-revised Subpart A is most instructive in what it does not require.

In Subpart A, only two specific provisions -- Sections 2.101(e) and 2.102(d) -- address the conduct of antitrust reviews in licensing cases, but neither provision states that it is applicable to license transfer cases. Section 2.101(e) sets forth the procedures NRC Staff must follow upon receipt of the antitrust information "submitted in connection with an application for a facility operating license." Section 2.102(d) sets forth procedures for conducting antitrust reviews of applications for construction permits and applications for operating licenses. When amending provisions of Subpart A in December 1998, the NRC amended Section 2.101(a)(1) to insert the words "a license transfer" in the enumeration of the types of licensing applications to which Section 2.101's filing rules apply, but the Commission did not amend Sections 2.101(e) and 2.102(d) to make those antitrust review provisions explicitly applicable to license transfer cases. The Commission could have amended Sections 2.101(e) and 2.102(d) to make them explicitly applicable to license transfer cases, but it did not.[13]

In their initial brief, KEPCo and NRECA argue that Section 2.101(a)(1) "confirms beyond cavil" that license transfer applications are subject to Subpart A's antitrust review rules. KEPCo

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13. Following the APPA decision, which turned on the absence of the term "license renewal" in Section 105(c), APPA, 990 F.2d at 1313-14, there was an obvious need for the NRC to explicitly add the words "license transfers" to Sections 2.101(e) and 2.102(d) if the NRC wanted to make those sections applicable to license transfers, but again, the Commission did not do so.

Initial Brief at 11-12. In fact, however, the specific provisions of Subpart A governing antitrust reviews do not encompass license transfer applications, and the absence of any reference to license transfer applications in Sections 2.101(e) and 2.102(d), following the amendments to Section 2.101(a)(1) to explicitly apply that section's filing rules to license transfer applications, strongly contradicts KEPCo's and NRECA's argument. By amending Section 2.101(a)(1) to insert the words "a license transfer," the NRC made it clear (1) that it considered a license transfer application to be something different from an "application for a license," and (2) that where it intended a specific subsection of Subpart A to apply to license transfers, it would expressly make that subsection applicable by explicitly using the words "license transfer" in that subsection. By not amending Sections 2.101(e) or 2.102(d) to make license transfers subject to the antitrust review requirements to which construction and operating license applications are explicitly subject, the Commission implicitly declined to expand its mandate to require antitrust reviews in license transfer cases.[14]

The weight of authority demonstrates that the scope of the NRC's antitrust review authority is limited to the initial licensing phase of the Commission's jurisdiction over nuclear licensees. This legal conclusion comports fully with the reality that the Commission's limited antitrust functions are tangential to its core mission of protecting the public health and safety and the policy that the Commission should devote its finite resources to its core responsibilities. For these legal and policy reasons, the NRC should eliminate antitrust reviews in license transfer cases.

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14. Regulations, like statutes, are interpreted according to canons of construction. Black & Decker Corp. v. CIR, 986 F.2d 60, 65 (4th Cir. 1993). A basic canon of construction provides that where particular language is used in one section but not another, the term or its equivalent should not be implied where it is excluded. See, e.g., U.S. v. Heller, 635 F.2d 848, 855, n.12 (Temp. Emergency Ct. App. 1980), *vacated* 726 F.2d 756 (Temp. Emergency Ct. App. 1983).

III. THE NRC HAS THE LEGAL AUTHORITY TO CHANGE ITS POLICY TO ELIMINATE ITS PRACTICE OF CONDUCTING ANTITRUST REVIEWS IN LICENSE TRANSFER CASES

In parallel with its decision on Applicants' case in this docket on the existing record, the NRC should change its policy and eliminate antitrust reviews in license transfer cases. The NRC has the legal authority to do so in the context of this proceeding. It should do so, and also immediately conduct a rulemaking to conform its regulations to this new policy to eliminate any ambiguity concerning its antitrust review policy.

The AEA does not provide the NRC with express statutory authority to conduct antitrust reviews in license transfer cases, and the NRC's regulations do not require such reviews. The NRC's internal guidance documents, which do address antitrust reviews, are not controlling. NUREG-1574, "Standard Review Plan on Antitrust Reviews," and NRC 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," are the only NRC internal guidance documents that address the conduct of antitrust reviews. The Standard Review Plan provides that the Commission shall conduct at least threshold antitrust reviews in license transfer cases. But Regulatory Guide 9.3, issued in 1974, recognizes that the only antitrust reviews the NRC believed it was authorized to conduct were those reviews conducted prior to issuance of an initial operating license, stating, "[t]his regulatory guide identifies the type of information that the regulatory staff considers germane for a decision as to whether a *second* antitrust review is required at the operating license stage." Regulatory Guide 9.3 at 9.3-1 (emphasis added). Consequently, only one of the two relevant internal guidance documents -- the Standard Review Plan -- provides any support for the proposition that the NRC must conduct antitrust reviews in license transfer cases. This guidance

document is not controlling authority, however, and the NRC can change it, and the policies underlying it, in this proceeding.

Key to the determination of the procedure the Commission may use to eliminate antitrust reviews in license transfer cases is whether the Commission conducts antitrust reviews under a legislative, or substantive, rule or in accordance with an interpretive rule, statement of policy, or practice. If it is the former, the Commission may change the regulation only through a rulemaking that provides notice to the public and the opportunity for interested persons to participate. Administrative Procedure Act § 553, 5 U.S.C. § 553. If it is the latter, the Commission may change its policy in any case without engaging in the formalities of a rulemaking. Administrative Procedure Act § 553(b)(3)(A);[15] Syncor International Co. v. Shalala, 127 F.3d 90 (D.C. Cir. 1997); City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). A legislative, or substantive, rule is a rule that creates new law, rights, or duties, in what amounts to a legislative act by the agency. See, e.g., White v. Shalala, 7 F.3d 296 (2nd Cir. 1993). Legislative rules have the force of law. Batterton v. Francis, 432 U.S. 416, 425, n.9 (1976). An agency policy statement, on the other hand,

> represents an agency position with respect to how it will treat -- typically enforce -- the governing legal norm. By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. The agency retains the discretion and the authority to change its position -- even abruptly -- in any case because a change in its policy does not affect the legal norm.

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15. Administrative Procedure Act Section 553's notice and comment rules do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A).

Syncor International Co., 127 F.3d at 94. See also U.S. Telephone Ass'n v. FCC, 28 F.3d 1232, 1234 (D.C. Cir. 1994) ("[The] paradigm of a policy statement [is] indication of an agency's current position on a particular regulatory issue.")

Under these standards, the NRC conducts antitrust reviews in license transfer cases in accordance with an internal guidance document that is in the nature of a policy statement -- the Standard Review Plan on Antitrust Review -- rather than pursuant to a substantive regulation. As demonstrated, not only do the NRC's substantive regulations not require the Commission to conduct antitrust reviews in license transfer cases, the NRC recently declined to impose that requirement through a formal rulemaking when it had the opportunity to do so. It is apparent that the NRC conducts antitrust reviews in license transfer cases only because it is its policy to do so. Because agencies may change statements of policy without the formal requirements of a rulemaking, the Commission can change the NRC's practice of conducting antitrust reviews in license transfer cases in this case without further notice. Syncor International, 127 F.3d at 94; see also City of West Chicago, 701 F.2d at 647 (affirming the NRC's right to set new case-specific procedures as long as the Commission gives adequate notice, the Seventh Circuit stated, "though an agency may be bound by its own established customs and practices, it may satisfy due process requisites by prior public notice of its new policy or requirements.")

Moreover, the Commission recently affirmed its inherent authority to issue generic policy statements on the conduct of licensing proceedings and to issue case-specific guidance on both procedural and substantive issues. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45 (1998). In Calvert Cliffs, the Commission recalled the

statement of authority it issued in Seabrook Station concerning its power to conduct and act in adjudicatory hearings:

> While we may deal with matters before us in adjudicatory hearings only on the basis of the record which has been compiled, the [NRC] is not a court constrained to the "passive virtues" of judicial action . . . . We have regulatory responsibilities, which includes the avoidance of unnecessary delay or excessive inquiry in our licensing proceedings . . . . Ultimately the members of the Commission are responsible for the actions and policy of this agency, and for that reason *we have inherent authority to review and act upon any adjudicatory matter* before a Commission tribunal -- subject only to the constraints of action on the record and reasoned explanation of the conclusions.

Calvert Cliffs, CLI-98-15, 48 NRC at 52, citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), 5 NRC 503, 516 (1977) (emphasis added).

Consistent with the NRC's "inherent authority to . . . act upon any adjudicatory matter" before it (subject to the requirement that it act on the record and provide reasoned explanation of its conclusions), the NRC may act in this proceeding both to decide the Applicants' case and eliminate antitrust reviews in license transfer cases. The NRC's action will take place on the record of this case after ample notice of the Commission's intention to act has been provided to the public through publication of the Memorandum and Order in the Federal Register[16] and after the public has been given the opportunity to comment through the submission of *amicus* briefs.

In parallel with its action in this case, the NRC immediately should conduct a formal rulemaking, on an expedited basis, to eliminate any ambiguity created by 10 CFR § 50.80's requirement that license transfer applicants be required to submit antitrust information. Although

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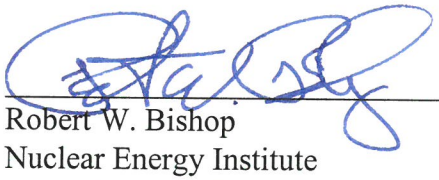
16. 64 Fed. Reg. 11,069 (March 8, 1999).

neither the AEA nor NRC's regulations authorize or require antitrust reviews in license transfer cases, the Commission should clarify that it will not conduct such reviews.

IV. CONCLUSION

With the Memorandum and Order, the NRC acknowledged a problem of increasing importance for the entire nuclear industry and took the initiative to solve it. The industry supports the agency's actions and strongly urges the Commission to implement the changes NEI has recommended here. The policy basis for eliminating antitrust reviews in license transfer cases is compelling. Clear legal authority exists for the Commission to act in this case in a parallel fashion to decide the Applicants' case and to change its policy in a generic manner to eliminate antitrust reviews in license transfer cases. The Commission should seize this opportunity to act.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Amicus Brief of The Nuclear Energy Institute On the Issue of Antitrust Reviews In License Transfer Cases on the following persons by electronic mail, with conforming copy served by U.S. Mail, first-class, postage prepaid:

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