
Procedures for Meeting NRC Antitrust Responsibilities

U.S. Nuclear Regulatory Commission

Office of Nuclear Reactor Regulation

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ABSTRACT

This report describes the procedures used by NRC staff to implement the anti-trust review and enforcement prescribed in Sections 105 and 186 of the Atomic Energy Act of 1954, as amended (the Act), as covered largely by the Commission's Rules and Regulations in 10 CFR Parts 2.101, 2.102, 2.200, 50.33a, 50.80, and 50.90. These procedures set forth the steps and criteria the staff applies in the antitrust review of construction permit and operating license applications and the amendments to those applications that deal with changes in ownership. In addition, the procedures describe how the staff enforces compliance by licensees when antitrust conditions have been appended to construction permits and operating licenses.

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ABBREVIATIONS

CAPCO	Central Area Power Coordination Group
CCCT	Combined CAPCO Company Territories
CFR	Code of Federal Regulations
CP	construction permit
DOE	Department of Energy
DOJ	Department of Justice
EIA	Energy Information Agency
FERC	Federal Energy Regulatory Commission
FP&L	Florida Power and Light Company
NARUC	National Association of Regulatory Utility Commissioners
NRC	Nuclear Regulatory Commission
NRR	Office of Nuclear Reactor Regulation
OELD	Office of the Executive Legal Director
OL	operating license

EXECUTIVE SUMMARY

The NRC's antitrust responsibilities are specifically addressed in the Atomic Energy Act of 1954, as amended (Act). The Act attempts to direct the development of the nuclear power industry in a way that strengthens free competition in the industry by giving the Commission the authority to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws."

The Act has provided the NRC with an antitrust mandate. It is the intent of this report to inform the reader about the procedures and guidelines used by the NRC staff in implementing its antitrust review and enforcement responsibilities as required by the Act. Though this report may be informative to the general public at large, it is intended primarily as a guide to a narrower group of readers who deal more closely with the NRC antitrust function. This group would include current and prospective nuclear plant licensees, the antitrust staffs of the Department of Justice and NRC, and other NRC staff and management that have an interest in NRC antitrust responsibilities.

Section 1 of this report identifies the staff responsible for conducting antitrust reviews and provides an overview of staff procedures associated with the Commission's four broad categories of antitrust concern: (1) construction permit (CP) applications; (2) operating license (OL) applications; (3) amended applications and applications involving joint ownership; and (4) enforcement authority over terms and conditions of CPs, OLs, and special nuclear material.

Section 2 describes the NRC staff's antitrust procedures associated with an application for a construction permit and the advisory role played by the Department of Justice at the CP stage of review. The antitrust staff of the NRC in conjunction with the Department of Justice conducts a prelicensing review as required by Section 105c of the Act.

The Attorney General can recommend one of three options to the NRC: (1) that no hearing is required by the NRC; (2) that the NRC hold hearings; or (3) that no hearing is necessary because the applicant has agreed to remedy any apparent inconsistencies outside of the hearing process. In those cases in which a hearing is held, the Commission must make a finding as to whether the granting of a license "would create or maintain a situation inconsistent with the antitrust laws." (The criteria and economic theory applied, i.e., the threshold elements established by the Act in determining whether or not to issue antitrust clearance, are discussed in detail as they pertain to specific cases which have already been litigated before Commission hearing examiners.)

Section 3 addresses the Commission's antitrust review procedures for operating license applications. A full antitrust review of an operating license application is required only if the Director of the Office of Nuclear Reactor Regulation determines that the significant change or changes (1) have occurred since the CP review, (2) are attributable to the applicant, and (3) have anticompetitive implications warranting Commission remedy. If a significant change finding is

made, the operating license antitrust review follows the same procedures and adheres to the same criteria followed for the construction permit antitrust review. For multiunit plants, separate operating license reviews will be conducted for each unit when the units are scheduled to be licensed 18 months apart.

Since the Antitrust OL reviews for significant changes may be completed 12 months or more before the operating license is issued (to accommodate for a possible hearing schedule), it is possible that new information regarding the applicant's competitive behavior could require additional review. Consequently, the NRC staff monitors the competitive behavior of the applicant(s) until the OL is issued.

Section 4 discusses antitrust procedures associated with amended applications (either CP or OL) and applications submitted for jointly owned facilities. Each individual applicant must undergo an antitrust review, both at the CP and OL stages. New co-applicants entering at any stage of the review process must undergo a CP review. New or subsequent applicants do not have to undergo a significant change review if the OL has already been issued. Similarly, there cannot be a significant change between the two events (from CP issuance to OL issuance) if the CP review is completed just before the operating license is issued.

In some instances in which a prospective co-owner of a nuclear facility owns or controls little generating capacity, the staff requires less documentation than for the larger applicant systems. Such co-owners are not generally of sufficient size to exercise any significant degree of market power and are termed de minimis applicants by the staff.

Section 5 discusses the Commission's antitrust enforcement responsibilities. The Act requires that the Commission ensure that applicants and licensees of nuclear facilities conduct their activities in conformance with the antitrust laws. The authority to enforce this responsibility includes the ability to do the following: (1) to suspend or revoke a license or take other actions deemed necessary in the event a licensee is found by a court of competent jurisdiction, or any government agency having jurisdiction, to have violated the antitrust laws (Section 105a of the Act); (2) to report to the Attorney General any information indicating that a licensee appears to have violated the antitrust laws (Section 105b of the Act); and (3) to enforce Commission license conditions (Section 186a of the Act). In addition, 10 CFR 2.206 provides a mechanism for aggrieved parties to bring formal complaints to the attention of the Director of the Office of Nuclear Reactor Regulation.

In summary, this report serves three primary purposes: (1) it provides guidance to the Commission antitrust staff in carrying out the antitrust mandate required by the Atomic Energy Act; (2) it provides Commission staff and management insight into how antitrust functions in the overall licensing process; and (3) it provides the public at large with insight into the active role played by antitrust procedures in the Commission's overall licensing responsibility.

PROCEDURES FOR MEETING NRC ANTITRUST RESPONSIBILITIES

1 INTRODUCTION

1.1 Purpose

The Atomic Energy Act of 1954, as amended (the Act), declared that "the development, use, and control of atomic energy shall be directed so as to...strengthen free competition in private enterprise."¹ The passage in 1970 of antitrust amendments to Section 105c of the Act gave the Commission the authority to "make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws..."²

These procedures describe the manner in which the NRC staff reaches judgment on the antitrust impacts caused by the construction and operation of nuclear power plants and specify means for determining the significance of these impacts. They also guide the treatment of joint owners, changes in ownership, and requests for the enforcement of NRC antitrust license conditions.

The staff responsibility for conducting the antitrust reviews rests with the Office of Nuclear Reactor Regulation and the Office of the Executive Legal Director.

1.2 Construction Permit Applications

Section 105c of the Act directs the NRC to conduct a prelicensing antitrust review of applications to construct and operate nuclear power plants.

As part of this process the Commission sends the Attorney General a copy of the antitrust portion of the license application. Within 180 days of transmittal, the Attorney General must advise the Commission if the issuance of a license would create or maintain a situation inconsistent with the antitrust laws. The Attorney General can advise the Commission that (1) no antitrust hearing need be held, (2) a hearing is necessary, or (3) no hearing is necessary if the applicant takes certain actions or if certain conditions are attached to the license. In practice the Commission staff and the Department of Justice staff interact significantly on these matters.

The Commission's Rules and Regulations provide for the settlement of particular issues in licensing matters. Settlement negotiations are used to avoid litigation and the need to conduct a hearing. To help applicants avoid litigation, the staff has issued Regulatory Guide 9.1 which explains how it views the various issues regarding access to nuclear power. The guide describes the criteria the staff employs to determine how a situation inconsistent with the antitrust laws could be either created or maintained by an unconditioned license

¹(42 U.S.C. 2011); Section 1b.

²(42 U.S.C. 2135c); Section 105c.

and what remedy it would seek in situations where negotiation or litigation is necessary.

1.3 Operating License Applications

Unlike the construction permit review which is conducted in conjunction with the Department of Justice, the operating license review requires that a significant change determination be made by the NRC staff before the Attorney General's advice is formally sought. The Commission has established three criteria for reaching a significant change determination. These are as follows:

- (1) The change must have occurred since the construction permit review.
- (2) It must be attributable to the applicant.
- (3) It must have anticompetitive implications which would likely require a Commission remedy.

Unless specific facts are available to support a significant change determination, a second antitrust review will not be initiated.

1.4 Joint Ownership

Each of the joint owners (or subsequent owners in the case of amended applications) of a nuclear facility must undergo an antitrust review before the construction permit or operating license is issued. Small electric systems can be exempted from some antitrust review requirements as discussed in Section 4.

1.5 Enforcement

Section 105a of the Act gives the Commission the power to suspend or revoke a license or take other actions in the event a licensee is found by a court of competent jurisdiction to have violated the antitrust laws. Section 105b requires the Commission to report to the Attorney General any information regarding special nuclear material which would appear to violate the antitrust laws. Under Section 186 the Commission is granted enforcement authority over the terms and conditions of construction permits and operating licenses.

2 ANTITRUST REVIEW OF CONSTRUCTION PERMIT APPLICATIONS

2.1 Overview

By virtue of Section 105c of the Act, the U.S. Nuclear Regulatory Commission (NRC), in conjunction with the Department of Justice, must conduct a prelicensing antitrust review of applications to construct nuclear power plants. Section 105c requires the Attorney General to advise the Commission, within 180 days after the NRC has docketed and transmitted the application to the Attorney General, whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. In addition to the application, the NRC staff must promptly furnish background information for the Attorney General's review. The applicant generally furnishes this information as specified by Appendix L to 10 CFR 50. The Attorney General is free to seek any additional information deemed necessary to complete the review.

After the Attorney General has completed his investigation, the Commission generally will be advised that (1) no antitrust hearing need be held, (2) a

hearing is needed or (3) no hearing is necessary if certain actions are taken by the applicant or if certain conditions are attached to the license. The Attorney General's advice is published in the Federal Register and the public is offered an opportunity to request an antitrust hearing, or to participate in a hearing if the Attorney General recommends one to the Commission.³

In those cases in which a hearing is held, the Commission must make a finding as to whether the granting of a license "would create or maintain a situation inconsistent with the antitrust laws."⁴ In making that determination, the Commission must consider the Attorney General's advice, and any other factors it deems necessary to protect the public interest. On the basis of its findings, the Commission has the authority (1) to issue or continue a license, (2) to refuse to issue a license, (3) to rescind or amend a license, or (4) to issue a license with conditions it deems appropriate.

On those occasions when license conditions have been negotiated early in the review process, the Attorney General has advised the NRC that no hearing is necessary if the conditions are made a part of any license that may be issued in connection with the application. However, in the event a settlement is not reached, and the Attorney General recommends a hearing or an intervention petition is granted, a hearing must be held before the Commission's Licensing Boards.

2.2 Required Data and Information

2.2.1 10 CFR Information

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

The complete information described in Appendix L of 10 CFR 50 is generally required only for applicants whose generating capacity exceeds 1400 MW. Applicants with 1400 MW or less of generating capacity may file an affidavit setting forth the facts about their generating capacity. Then, unless otherwise requested, applicants with capacity of 200 MW through 1400 MW need only respond

³When the Attorney General recommends no hearing or no hearing with conditions, a member of the public or the NRC staff can still request that a hearing be held. These situations have usually occurred when the conditions agreed upon by the Attorney General were alleged to be "insufficient" to remedy the situation inconsistent with the antitrust laws. If a member of the public petitions for an antitrust hearing, a special three-member board is convened to rule on the merits of the petitions.

⁴(42 U.S.C. 2135); Section 105c, paragraph 5. A three-member Atomic Safety and Licensing Board, composed of legal and other specialists, is appointed by the Commission to conduct the hearing. Its findings can be appealed to an Atomic Safety and Licensing Appeal Board, which in turn may be reviewed by the Commission at its discretion; and finally, any Commission action may be appealed to the U.S. Court of Appeals. The Boards selected for antitrust hearings are separate from the Boards used for health, safety, and environmental hearings.

to question 9 of Appendix L and applicants with less than 200 MW of capacity (de minimis applicants) need not respond to any of the questions.

2.2.2 Regulatory Guide 9.2

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

2.2.3 Response to Inquiries from the Attorney General

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

2.2.4 Published Data

In order to evaluate the applicant's market power the reviewer will use data from (1) Forms 1 and 12, collected by the Federal Energy Regulatory Commission (FERC), (2) data from the Energy Information Agency (EIA) of the Department of Energy (DOE), and (3) other data such as the Directory of Electric Utilities and Moody's Public Utility Manual, to obtain information on the generation capacity and the transmission lines that the applicant owns within its service and planning areas. To get a complete picture, it may be necessary for the reviewer to survey the smaller electric utilities in the relevant areas by telephone or by mail, since their statistics may not be available in public sources.

2.2.5 Field Review

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

The interview will focus on the inter-utility relationships among the various utilities in order to determine the competitive effect the nuclear facility will have in the relevant area. Specifically, the reviewer will be interested in how the utilities plan for their generation and transmission requirements, how and to what degree they coordinate, and how they plan to integrate the power from the nuclear facility to meet the electrical demands of their customers.

In order to determine if the applicant has abused its market power, the reviewer will inquire whether the applicant has refused these systems access to generating facilities, transmission services, or other coordination services.

2.2.6 Applicant's Service Contracts and Agreements

In order to determine if the applicant may be abusing its market power, the reviewer will analyze the applicant's service contracts and agreements for unnecessarily restrictive provisions. Such restrictive provisions while not limited to the following examples may (1) limit customers from selling surplus power other than to the applicant, (2) include ratchet provisions which require a customer to keep paying a higher charge for electric power and energy beyond the amount delivered, (3) limit the sale of power at wholesale to certain customers, or (4) prevent certain electric utilities from joining planning and coordinating groups. In addition, any pattern of applicant refusals to serve will be evaluated.

2.3 Acceptance Review

Before the Appendix L information is sent to the Attorney General, the reviewer will make certain that the information is complete, and therefore acceptable for docketing. If the application is acceptable, the reviewer will ask the licensing project manager to publish a Notice in the Federal Register and in trade journals informing the public that the antitrust information has been received and is available for inspection in the NRC Public Document Room in Washington, D.C. and local public document rooms. The Notice, which must be published for four consecutive weeks, invites interested parties to express their views within 60 days after publication of the Notice. All responses to this Notice are sent to the Attorney General.

The reviewer will also notify the Office of the Executive Legal Director (OELD) that the application has been accepted for docketing. OELD then submits the information to the Attorney General and requests antitrust advice.

2.4 Staff Review

During the period of the Attorney General's review, the NRC reviewer should prepare an analysis that will form the staff's position. The staff may support the views of the Department of Justice (DOJ) regarding whether a hearing is necessary, or the staff may disagree with DOJ or independently derive its own position. Similarly, when DOJ recommends that a hearing is needed, the staff will determine independently what issues it will support in the hearings.

2.4.1 Criteria for Review

Although there are limits to any inquiry, the proper scope of antitrust review turns upon the circumstances of each case. The relationship of the specific nuclear facility to the applicant's total system or power pool should be evaluated in every case. In addition, the applicant's market power and market behavior must be evaluated.

2.4.2 Analysis of Market Power

The reviewer must determine if the applicant has the market power to withhold access to nuclear power or in other ways to maintain or create a competitive advantage through use of the nuclear facility. In determining if the applicant has market power, the reviewer must determine the extent of control the applicant holds over certain services in a specific geographic area. Although each

application is considered on its own merits and the circumstances surrounding the application, the Appeal Board's decisions in the Midland, Farley, and Davis-Besse/Perry cases guide the reviewer in determining what relevant markets should be analyzed, and how to assess the applicant's market power.

In analyzing the competitive effects of licensing the Midland plant, the Appeal Board⁵ determined that the relevant geographic market in Michigan embraced the territory served by Consumers Power Company plus those areas that the company could reasonably serve. The Appeal Board concluded that the applicant had monopoly power in the coordination services market by virtue of undeniable dominance in the ownership and control of transmission facilities in the relevant geographic market. The Appeal Board also concluded that the company possessed monopoly power in the retail and wholesale power markets because of its predominant share of these markets, the high barrier to entry facing any new entrant to those markets, and because of Consumers Power Company's strategic dominance of generation and transmission facilities serving those markets. The Appeal Board in the Farley⁶ antitrust case found that the same criteria determined the geographic market and the product market in Alabama as in Michigan.

In the Davis-Besse/Perry case, the Appeal Board concluded that because of the structure of the relevant market and their positions in that market, the applicants for the Davis-Besse and Perry nuclear units had the ability to hinder or prevent other electric entities from gaining access to the benefits of coordinated operation and the economies of scale associated with large electric generating units.⁷ The Appeal Board also concluded that in numerous instances this ability had been used in a manner inconsistent with the antitrust laws. In analyzing the applicants' market power, the Appeal Board chose to focus on the coordination services market, a cluster of products including coordinated maintenance service, emergency support service, economy and diversity power interchange, transmission service, firm power for resale, and other capacity or energy exchanges. The geographic scope of the coordination services market was found to include the applicants' combined service areas, designated as the Combined CAPCO Company Territories (CCCT). Within the CCCT market area, the applicants jointly controlled more than 90 percent of the bulk power transmission and generation facilities, factors that the Appeal Board found indicative of the applicants' dominance in the coordination services market.

2.4.3 Analysis of Anticompetitive Behavior

The fact that the applicant may have market power does not necessarily mean that the applicant's conduct is inconsistent with the antitrust laws nor does it imply that the applicant will abuse its market power in the future. To assess the probability that the applicant will abuse its market power after the construction permit is issued, the reviewer must examine the applicant's conduct, specifically the applicant's behavior vis-à-vis its competitors in the relevant market. In other words, the reviewer must determine if the activities under the license would create or maintain a situation inconsistent with the antitrust laws. The Wolf Creek decision provides guidance to the

⁵6 NRC 892 (1977).

⁶5 NRC 804 (1977), 5 NRC 1482 (1977), 13 NRC 1027 (1981).

⁷10 NRC 265 (1979).

reviewer on how to analyze the applicant's competitive behavior to determine the abuse of market power:

It is far too late in the day to dispute that it runs counter to basic antitrust precepts to exercise monopoly power - however lawfully acquired initially - to foreclose competition or to gain competitive advantage, or to use dominance over a facility controlling market access to exclude competition and preserve a monopoly position. Electric utility companies are no more free than others to engage in those practices; their unjustified refusals to wheel power to or interconnect with smaller entities in the field have regularly been called to account as violative of antitrust policies.⁸

In the Midland case, the Appeal Board found that Consumers Power Company's refusal to wheel⁹ had an anticompetitive effect. Furthermore, Consumers' refusals to coordinate with small utilities were both unreasonable and anticompetitive. In addition, Consumers was found to have excluded small utilities from the Michigan Pool, another factor which was indicative of its anticompetitive intent to exclude small utilities from coordination.

In the Farley case, the Appeal Board found similar conduct by the applicant to be anticompetitive. In addition the Board found the applicant's selective use of low wholesale rates had the anticompetitive effect of forestalling plans to construct generation by its competitors.

In the CAPCO (Central Area Power Coordination Group) case, the Appeal Board observed that the increasing dominance of the applicants had not been passive or accidental but had been the result, at least in part, of policies such as refusing to engage in third-party wheeling, emergency interconnection, or reserve sharing with non-CAPCO entities in the CCCT. Some of these practices (e.g., territorial allocations, attempts to fix prices, refusals to deal, and group boycotts) were considered violations of the antitrust laws and served to increase the dominance of each individual applicant within its own service territory.

2.4.4 Nexus

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

⁸Wolf Creek (ALAB-279) NRCI-75/6, 572 (footnotes omitted).

⁹Wheeling service occurs when transmission facilities of one system are utilized to transmit power of another system. See Glossary of Important Power and Rate Terms, Abbreviations, and Units of Measurement (Inter-Agency Committee on Water Resources, Washington, D.C., 1965), p. 18.

In the Midland case, the Appeal Board noted that:

- (1) Nuclear plants, because of the economies inherent in their large-scale operations, are efficient to use but costly to build.
- (2) Small utility systems isolated in Consumers' service area are not in a practical position to build such plants.
- (3) Consumers Power Company has compounded the smaller systems' problems by refusing to wheel power to them, effectively eliminating their ability to coordinate with or even buy cheaper power from outside sources.
- (4) The installation by Consumers of large nuclear-powered generating units would exacerbate the anticompetitive situation.

In the Farley case, the Licensing Board noted that:

- (1) The operation of a nuclear plant is not to be considered in an air-tight chamber or in vacuo in ascertaining a meaningful nexus between activities under the license and the situation inconsistent with the antitrust laws.
- (2) The applicant's activities, with regard to both generation and transmission, would maintain an anticompetitive situation intertwined with or exacerbated by the award of a license to construct or operate a nuclear facility.
- (3) Reasonable access to both nuclear generation and transmission is required in order to prevent the maintenance of the anticompetitive situation.

In the Davis-Besse/Perry case, the Atomic Safety and Licensing Board ¹⁰ developed a structural nexus between the nuclear plant and the licensees' total electrical system and its operation. The Board noted some of the applicants' proposed findings of fact, namely:

- (1) The CAPCO Pool was formed so that applicants could coordinate installation of generation and transmission in order to further reliability and take advantage of scale economies.
- (2) To achieve these goals applicants engage in a construction program of jointly committed operating units using a one-system planning concept.
- (3) Complementing the generation construction program is another joint program, again making use of the one-system concept, to coordinate sufficient transmission facilities to permit carrying out the arrangements described in the (CAPCO) Memorandum of Understanding.

Thus, reviewers are able to direct the analysis of nexus based on the findings contained in the Midland, Farley, and Davis-Besse/Perry decisions.

¹⁰5 NRC 1 (1977).

2.4.5 Settlement of Antitrust Issues

Section 2.758 of the Commission's Rules of Practice states that the public interest may be served through settlement of particular issues in a proceeding or settlement of an entire proceeding. Antitrust license conditions may be negotiated at any step in the review process. The negotiations may involve the Department of Justice, the NRC staff, the applicants, and, in some cases, members of the public--including smaller electric systems that are intervenors or potential intervenors.

Typically, negotiations with the applicant begin before the Attorney General issues his advice letter. The Department of Justice usually will invite the NRC staff to join at the start of the negotiations and invites other interested parties, such as potential intervenors, at a later date. If the negotiations are successful, the Attorney General will advise the Commission that no hearing is necessary if certain conditions, which have been agreed to by the applicant, are attached to the license. If negotiations are unsuccessful before the Attorney General's advice is rendered, negotiations are nevertheless encouraged during the prehearing stages, into the hearing, and in some instances, after the hearing has begun.

3 ANTITRUST REVIEW OF OPERATING LICENSE APPLICATIONS

3.1 Scope

A full antitrust review of an operating license application is required only if the Director of the Office of Nuclear Reactor Regulation determines that significant changes (1) have occurred since the construction permit review, (2) are attributable to the applicant, and (3) have anticompetitive implications warranting Commission remedy.¹¹ These changes must be reasonably apparent and must be discernible from applicants' submittals, from staff's investigations, or from papers that are filed. A finding that a significant change has occurred must precede a formal antitrust review for an operating license. If a significant change finding is made, the operating license antitrust review follows the same procedures and criteria discussed in Section 2 above for the construction permit review. If multiunits are included in the application for the construction permit review, separate operating license reviews will be conducted only for those units which are scheduled to be licensed 18 months or more after the previous unit has been licensed.

3.2 Required Data and Information

3.2.1 Regulatory Guide 9.3

This regulatory guide indicates the type of information the applicant should provide for the staff to initiate its review. The applicant will be asked to update the Regulatory Guide 9.3 information when separate reviews for multiunit applications are necessary or when the original information submittal has become outdated.

¹¹See NRC 817 (1980) and 13 NRC 862 (1981).

3.2.2 Antitrust Files

The antitrust files pertaining to the initial construction permit (CP) review of the application form the baseline from which "changes" are measured. In addition, CP reviews of the same applicant may have been conducted in connection with other nuclear plants prior to the CP review of the nuclear plant of concern, thereby increasing the staff's general data base for a particular applicant.

3.2.3 Federal Energy Regulatory Commission Files

The docket files at FERC generally contain information about the applicant's activities in the wholesale and coordination services market.

3.2.4 Field Investigation

In addition to information from the applicant, the NRC staff contacts selected non-applicants to determine whether significant changes have occurred in the applicant's behavior. These non-applicants typically fall into the following categories: (1) those mentioned in any license conditions, (2) those mentioned by licensees in their responses to Regulatory Guide 9.3 questions, and (3) those mentioned in the advice letter from the Department of Justice. The focus of these contacts is primarily on relationships with the applicant.

3.3 Notice of Receipt of Antitrust Information

The reviewer will ask the licensing project manager to publish in the Federal Register and in appropriate trade journals a "Notice of Receipt of Operating License Antitrust Information." Such Notice shall invite persons to submit, within 30 days after publication of the Notice, comments or information concerning the antitrust aspects of the application to assist the Director in determining 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. Any person who offers comments will be put on the mailing list to receive copies of the determination made regarding a significant change.

Information updated in response to Regulatory Guide 9.3 as described in Section 3.2.1 above will be similarly treated.

3.4 Staff Analysis

The reviewer, in coordination with OELD, prepares a written analysis of the changes that have taken place since the CP review, the extent these changes are attributable to the applicant, their antitrust implications, and whether they would likely warrant a Commission remedy. OELD forwards to the Department of Justice for review and comment the analysis of whether there has been any significant change.

Upon receipt and review of the Department of Justice comments, a finding of whether there has been a significant change is prepared for signature of the Director of the Office of Nuclear Reactor Regulation. If the finding is made that there are no significant changes, the procedures of the CP review, described in Section 2, are repeated.

3.5 Finding of No Significant Changes

If the Director of the Office of Nuclear Reactor Regulation makes a Finding of No Significant Changes, the Finding is published in the Federal Register stating that any request for reevaluation of such Finding shall be submitted within 30 days of publication of the Notice. Copies of the Finding are also sent to the Commission, to the applicant, and to any person who submitted comments in response to the initial Notice of receipt of Regulatory Guide 9.3 information. If no requests for reevaluation are received within the 30-day period, the Finding shall normally become the NRC's final determination. Requests for reevaluation of the no significant changes determination may be accepted after the date when the Director's Finding becomes final but before the operating license (OL) is issued only if they contain new information, such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted before that date.

If, as a result of a reevaluation of the Finding described above, it is determined that there has been no significant change, the Director of the Office of Nuclear Reactor Regulation shall deny the request and shall publish a Notice reaffirming the Finding of No Significant Changes in the Federal Register. Copies of the reaffirmation Finding are also sent to the requestor, the applicant, and the Commission. Such Notice and Finding shall become the final NRC decision 30 days after being made and only in the event that the Commission has not exercised sua sponte review.

3.6 Antitrust Monitoring

Since the antitrust OL reviews for a significant change finding may be completed 12 months or more before the operating license is issued, it is possible that new information regarding the applicant's competitive behavior could require action. Consequently, the staff will monitor the competitive behavior of the applicant(s) until the OL is issued.

The staff will systematically review the following publications, among others, for any matter that could have antitrust significance:

NARUC Bulletin
Rural Electric Newsletter
Electrical Week
Inside NRC
Inside FERC
Electrical World
Wall Street Journal
Public Power Weekly Newsletter

If new information appears which could lead to a "significant change" finding, the staff will telephone the involved utilities for further information. Furthermore, every 12 months between the time the OL antitrust review is completed up until 60 days of the anticipated OL issuance, the staff will telephone the general managers of the affected utilities located within the applicant's service area, asking if there is any new information that should come to the staff's attention since the Finding of No Significant Changes. If new information surfaces, the utilities will be asked to docket any such information within 30 days. Upon its receipt, the staff will request OELD to transmit this information to

the Department of Justice. After each submittal, a memorandum or short report will be prepared stating why the matter does not represent a significant change, or if it does appear to represent a significant change, what the appropriate action should be.

4 JOINT OWNERSHIP

4.1 Introduction

Many nuclear power plants are owned, or will be owned, by more than one electric utility. The staff must perform an antitrust review at the construction permit review stage as described in Section 2 and a "significant change" determination at the operating license review stage, as described in Section 3 for each prospective owner that is identified in the construction permit application. In some instances, however, a prospective owner is not identified or named until late in the review process. This latter type of owner is hereafter referred to as a subsequent applicant.

4.2 Subsequent Applicants

If a subsequent applicant is named or identified after a construction permit or operating license has been issued, the permit or license, as the case may be, must be amended to include the additional owner. When reviewing an application for an amendment to a license or construction permit, the Commission follows the same considerations that govern the issuance of initial licenses or construction permits. Each of the prospective joint owners, both the initial and subsequent owners, must undergo an antitrust review as described in Section 2, either before the construction permit is issued, before the permit is amended, or before the operating license is amended, as the case may be. Each of the prospective joint owners must also undergo a "significant change" determination as described in Section 3, if sufficient time has elapsed for a significant change to have occurred between completion of the construction permit antitrust review and issuance of the operating license. Of course there cannot be a significant change between these two events if the operating license has already been issued. Likewise, there cannot be a significant change between the two events if the construction permit review is completed (for a subsequent owner) just before the operating license is issued.

4.3 De Minimis Applicants

An applicant with less than 200 MW of generating capacity is considered a de minimis applicant. Such applicants are generally too small to exercise any substantial degree of market power. Therefore, they are normally exempted from supplying Appendix L information as discussed in Section 2 above, and a Notice about the receipt of such information is not published in the Federal Register. Further, if the de minimis applicant is a subsequent applicant, the Department of Justice is simply notified about the existence of an additional de minimis owner, and antitrust advice on such an applicant is not requested from the Attorney General unless the staff has information suggesting that such advice should be sought. This NRC staff procedure does not preempt the Attorney General from offering advice or requesting additional information if he or she should so choose.

5 ANTITRUST ENFORCEMENT

5.1 Scope

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

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

5.2.1 Section 105a

Only one 105a enforcement case has come before the Commission. On May 31, 1978, counsel for several Florida cities advised the Commission of a decision by the Court of Appeals in the Fifth Circuit,¹² which held that Florida Power and Light Company (FPL) had conspired to divide the market for electric service, in violation of Section 1 of the Sherman Act. The Court of Appeals remanded the case to the District Court for further findings and to determine appropriate relief. Subsequently, the petition for a Section 105a proceeding was withdrawn after the cities and FPL settled their differences.

To date the Commission has not delegated authority to staff or to licensing boards to take action with respect to Section 105a matters. Thus, for the present, the staff serves in an advisory role by calling to the Commission's attention possible 105a situations. In performing this role, the staff treats the phrase, "in the conduct of the licensed activity," to be synonymous with the phrase, "activities under the license," as described in Section 2. Thus, the phrase encompasses planning, building, and operation of the nuclear power reactor as well as integrating such a facility into an effective bulk power supply system.

5.2.2 Section 105b

Only one 105b case has come before the Commission. By motion of August 6, 1976, a group of Florida cities petitioned under Section 186a of the Act for an antitrust hearing with respect to Florida Power and Light Company's Turkey Point 3 and 4 and St. Lucie 1 nuclear power plants. The Atomic Safety and Licensing Board denied the cities' petition. An Atomic Safety Licensing Appeal Board affirmed the decision of the Licensing Board, and the Commission declined to review the Appeal Board decision. However, the Commission ordered the staff

¹²Gainesville Utilities Department v. Florida Power and Light Company, 573 F. 2d 292, 294 (5th Circ.), cert denied, 439 U.S. 966 (1978).

to promptly refer to the Attorney General the allegations of the Florida cities, as well as any related information it had with respect to the utilization of special nuclear material or atomic energy, which suggest that the licensee has violated or tended to violate the antitrust laws. Consistent with this order, the staff will, for similar situations in the future, refer such matters and the circumstances underlying the referral to the Attorney General, emphasizing that the staff has not made a determination if the licensee's or applicant's actions are inconsistent with the antitrust laws.

5.2.3 Section 186a

In its June 5, 1977 Memorandum and Order on South Texas, the Commission referred to Section 186 of the Act as follows:

Indeed, all concede that other language in Section 186 gives the Commission authority to initiate a postlicensing enforcement proceeding in the event of violation of a specific antitrust licensing condition. For like reasons we would not be limited to mere reference to the Attorney General if a license applicant has falsified pertinent antitrust review information or had otherwise obtained an unconditioned license by some sort of fraud or concealment. . . .¹³

No further guidelines have been established for enforcing antitrust license conditions when such conditions are imposed on a licensee. The staff will enforce such conditions consistent with the actual wording of the license conditions. If the meaning of the wording is subject to dispute, such dispute will be resolved through negotiation or hearing.

If a license has been obtained on the basis of false information, the staff will take appropriate action to correct the situation; to make restoration to the extent possible to those that may have been harmed because of such information; and, where appropriate, to impose civil penalties on the licensee.

5.3 Enforcement of Antitrust License Conditions

5.3.1 Formal Petition

A formal petition can be brought to the staff's attention in accordance with 10 CFR 2.206.¹⁴ The petitioner must specify the action requested and set forth the facts or conditions that constitute the basis for the request. Upon receipt of the petition, the reviewer will coordinate with the Office of the Executive Legal Director in preparing the following within 30 days:

- (1) a Federal Register Notice to be signed by the Director of the Office of Nuclear Reactor Regulation
- (2) an acknowledgment in writing to the petitioner including a copy of the Federal Register Notice

¹³5 NRC 1311 (1977).

¹⁴NRR Office Letter No. 17, Revision 2, Procedures for Handling Requests for 10 CFR 2.206 Actions, March 30, 1981.

- (3) a letter to the licensee or licensees against whom the petition is made including a copy of the petition, and a copy of the Federal Register Notice
- (4) a letter to the Attorney General including a copy of the petition and a copy of the Federal Register Notice

In addition, the reviewer will begin an investigation of the petition. The licensee may be required to respond to the petition pursuant to 10 CFR 50.54(f) and Section 182 of the Act. The Director of the Office of Nuclear Reactor Regulation will inform the petitioner within a reasonable time whether the Director intends to grant or deny the requested action. If the petition is denied, the Director will provide the petitioner a copy of a written "Director's Decision under 10 CFR 2.206," and the decision is subject to the Commission's review under 10 CFR 2.206(c).

5.3.2 Informal Complaints

An informal complaint can be brought to the Office of Nuclear Reactor Regulation or the Office of the Executive Legal Director. Upon receipt of an informal complaint, the reviewer will proceed promptly as follows:

- (1) Contact and meet with representatives of the complaining party or parties to discuss the complaint and become familiar with the issues.
- (2) Investigate the complaint.
- (3) Work with the parties involved in an attempt to negotiate their differences.

If negotiations are not successful, the complainant could file a petition under 10 CFR 2.206 as described in Section 5.3.1 above.

5.3.3 Staff Monitoring

Many violations of license conditions will be called to the staff's attention by the aggrieved parties; however, to a limited degree, the staff, too, engages in self-initiated monitoring of its license conditions and of other judicial and administrative decisions involving competitive issues and licensees. This self-initiated staff monitoring program will involve the following:

- (1) perusal of periodicals such as Electrical Week, Electrical World, Public Power Weekly Newsletter, Inside FERC, and Rural Electrification
- (2) reviews of reports and legal decisions of the Federal Energy Regulatory Commission and other administrative agencies
- (3) occasional telephone contacts with responsible officials, and legal counsel of electric utilities that may be competitively affected by licensees
- (4) occasional contact with responsible officials of the Department of Justice and other administrative agencies

If the monitoring program reveals or suggests noncompliance, the reviewer will initiate further investigation of the matter as described below.

5.3.4 Compliance Investigations

Most compliance activities will center on whether the applicant has refused in some way to share in the output of its nuclear facility and/or to provide certain types of power supply and other services to electric utilities. In two instances in which the Director of the Office of Nuclear Reactor Regulation has issued a Notice of Violation, the alleged violation was not the direct refusal of the licensee to provide the transmission service or to file the transmission tariff, but rather the limitations that the licensee placed in the transmission tariff.

A reviewer conducting a compliance investigation will generally consider the use of written questionnaires, telephone contacts, and field surveys as necessary to determine the following:

- (1) which antitrust laws (for Sections 105a or 105b matters) and which antitrust conditions are involved
- (2) the extent that the alleged violation depends on the interpretation of the antitrust laws or antitrust license conditions
- (3) the effect of and the reasons for the alleged violation
- (4) the willfulness of the alleged violation
- (5) the actions that must be taken to remedy the alleged violation

On the basis of the investigation, the staff will (1) identify the claims of the various entities affected by the actual or alleged violation, (2) formulate staff opinion regarding the merits of the various claims, (3) provide a forum for negotiations between opposing parties, and (4) develop the justification for either terminating or initiating the next step of the enforcement plan.

5.3.5 Report

A report on all compliance investigations will be distributed to the antitrust staffs of the Office of the Executive Legal Director and the Office of Nuclear Reactor Regulation. The report will include the following:

- (1) a description of the inter-company relationships of the licensee and the complaining or affected parties
- (2) a discussion of the violation (for a Section 105a violation) or the allegations and issues as they relate to the license conditions or falsified information (for a Section 186 violation)
- (3) a recommendation as to whether (a) the complaint or allegations have merit, (b) a Notice of Violation should be issued, or (c) negotiations should be pursued followed by a Notice of Violation if the negotiations prove unsuccessful

5.3.6 Dismissal of a Complaint

If the staff investigation determines that a petition received under 10 CFR 2.206 is without merit, a Director's Decision and Federal Register Notice to

that effect will be prepared and issued by the Director of the Office of Nuclear Reactor Regulation.¹⁵ The Office of the Secretary, the licensee against whom the complaint was lodged, and the petitioner will be provided with a copy of the Director's Decision. The Director's Decision is subject to the Commission's review at its own motion under 10 CFR 2.206(c).

5.3.7 Notice of Violation

If the staff investigation determines that a violation has occurred, a Notice of Violation in accordance with 10 CFR 2.201 will be prepared by the reviewer in conjunction with the Office of the Executive Legal Director and issued by the Director of the Office of Nuclear Reactor Regulation. The Notice will be sent to the licensee and to the complainant.

5.3.7.1 The Response

The licensee's response to the Notice of Violation will determine the course of the subsequent proceedings. If the licensee agrees to take the necessary steps to comply with its license requirements and if no civil penalty is considered appropriate, the staff will ensure that the compliance steps are carried out expeditiously and will notify the parties involved that the matter has been resolved. If the licensee does not agree to take the steps considered by the staff as necessary to resolve the matter, or if the licensee unreasonably delays implementing such actions, it may be necessary to issue an Order To Show Cause or an Order To Modify the License. Imposition of civil penalties may also be considered in accordance with 10 CFR 2.205 and Section 234 of the Act. A Notice of Violation will always precede an Order To Show Cause, unless the violation is willful or the public interest requires that the Notice of Violation be omitted in accordance with 10 CFR 2.201(c).

5.3.8 Order To Show Cause or To Modify a License

An Order To Show Cause would be prepared by the reviewer in conjunction with the Office of the Executive Legal Director and issued by the Director of the Office of Nuclear Reactor Regulation in accordance with 10 CFR 2.202. The Order would state the following:

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

The Order To Show Cause would be published in the Federal Register, and copies would be mailed to the licensee and other affected parties.

An Order To Modify a License would be prepared by the reviewer and the Office of the Executive Legal Director and issued by the Director of the Office of

¹⁵Ibid.

Nuclear Reactor Regulation in accordance with 10 CFR 2.204. The Order would show the following:

- (1) The violations with which the licensee is charged or other conditions warranting issuance of the Order
- (2) the proposed amendment
- (3) when the amendment would be effective
- (4) the right of the licensee to request a hearing within 20 days with respect to all or any part of the amendment

The Order To Modify a License would be published in the Federal Register.

5.3.8.1 The Response

If the licensee demands a hearing, the hearing process would be initiated.¹⁶ If the licensee consents to the entry of an Order in substantially the form proposed in the Order To Show Cause, such Order would be prepared, as necessary, by the reviewer in conjunction with OELD and issued by the Director of the Office of Nuclear Reactor Regulation. If the licensee consents to the Order To Modify a License or does not respond within the period allotted, the license would be amended as indicated. Thereafter, the reviewer will simply monitor the licensee's compliance with the Order.

5.3.9 Civil Penalties

The Director of the Office of Nuclear Reactor Regulation (NRR) could propose imposition of a civil penalty by issuing a Notice of Violation and Proposed Imposition of Civil Penalty prepared by the reviewer in consultation with the Office of the Executive Legal Director consistent with 10 CFR 2.205. The Notice of Violation would specify the date or dates, facts, and the nature of the alleged act or omission with which the licensee is charged, the particular provision or provisions of the Act, license, regulations, or the Order involved in the alleged violation and the amount of each penalty which the Director of NRR proposes to impose. Within the period prescribed in the Notice, the licensee may either pay the proposed penalty or answer the Notice. If the licensee requests remission or mitigation of the proposed penalty, the staff will consider the reasons proffered and will withdraw the proposed penalty or will issue an Order imposing the civil penalty as originally proposed or in a mitigated amount. If the licensee fails to respond to the Notice, the reviewer will prepare and the Director of NRR will issue an Order imposing the civil penalty as proposed. The licensee may pay the penalty or may request a hearing on the Order imposing a civil penalty within the period prescribed in the Order.

¹⁶The hearing could result in a finding and an Order by the Atomic Safety and Licensing Board or an Administrative Law Judge which would absolve the licensee of charges or, conversely, order the licensee to take the actions prescribed in the Order. The Order would be appealable. Disobeying an Order which was immediately effective and not "stayed" on appeal could lead to the imposition of civil penalties or seeking of injunctive relief by the Commission (Section 232 of the Act).

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

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This report describes the procedures used by NRC staff to implement the antitrust review and enforcement prescribed in Sections 105 and 186 of the Atomic Energy Act of 1954, as amended (the Act), as covered largely by the Commission's Rules and Regulations in 10 CFR Parts 2.101, 2.102, 2.200, 50.33a, 50.80, and 50.90. These procedures set forth the steps and criteria the staff applies in the antitrust review of construction permit and operating license applications and the amendments to those applications that deal with changes in ownership. In addition, the procedures describe how the staff enforces compliance by licensees when antitrust conditions have been appended to construction permits and operating licenses.

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