

NOTATION VOTE

RESPONSE SHEET

Due 10/21/96  
RELEASED TO THE PDR

12/13/96

date

initials

TO: John C. Hoyle, Secretary

FROM: COMMISSIONER MCGAFFIGAN

SUBJECT: SECY-96-202 - DRAFT STANDARD REVIEW PLANS ON  
ANTITRUST AND FINANCIAL QUALIFICATIONS AND  
DECOMMISSIONING FUNDING ASSURANCE

Approved ☒ Disapproved ☐ Abstain ☐

Not Participating ☐ Request Discussion ☐

COMMENTS:

I agree with the Chairman's comments about clarifications to the draft Standard Review Plans, and I suggest a number of additional edits and corrections to the Plans as noted on the attached pages.

Edward M. McGaffigan Jr.  
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SIGNATURE

10/23/96

DATE

Release Vote ☒

Withhold Vote ☐

Entered on "AS" Yes ☒ No ☐

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PDR COMMS NRCC  
CORRESPONDENCE PDR

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## DRAFT STANDARD REVIEW PLAN ON ANTITRUST

## ABSTRACT

This Standard Review Plan 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) and replaces original NUREG-0970. These procedures are principally covered by the Commission's Rules and Regulations in 10 CFR Sections 2.101, 2.102, 2.2, 50.33a, 50.77, 50.80, and 50.90. These procedures set forth the steps and criteria the staff applies in the antitrust review of combined construction permit/operating license applications and amendments to construction permits, operating licenses and combined licensees. In addition, the procedures describe how the staff enforces compliance by <sup>licensees</sup> ~~licenses~~ when antitrust conditions have been appended to licenses. X

## ABBREVIATIONS

ACT	Atomic Energy Act of 1954, as amended
CFR	Code of Federal Regulations
COL	Combined Construction Permit/Operating License
CP	construction permit
DOE	Department of Energy
DOJ	Department of Justice
EIA	Energy Information Agency
→ EPAC	
FERC	Federal Energy Regulatory Commission
NARUC	National Association of Regulatory Utility Commissioners
NRC	Nuclear Regulatory Commission
NRR	Office of Nuclear Reactor Regulation
OGC	Office of the General Counsel
OL	operating license
105c	Section 105c of the Atomic Energy Act of 1954, as amended
SEC	<i>Securities and Exchange Commission</i>

## EXECUTIVE SUMMARY

The NRC's antitrust responsibilities are specifically addressed in Section 105 of the Atomic Energy Act of 1954, as amended (Act). The Act is designed to strengthen free competition in the industry by requiring the Commission 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 required the NRC to conduct antitrust reviews. 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 The Standard Review Plan identifies the staff responsible for conducting antitrust reviews and provides an overview of staff procedures associated with the Commission's three broad categories of antitrust concern: (1) combined construction permit/operating license applications; (2) amended applications; and (3) enforcement authority over terms and conditions of CPs, OLs, COLs and special nuclear material.

Those plants which had received a CP (or in some cases initiated CP filing) prior to enactment of Section 105 (December 1970), were grandfathered for purposes of antitrust review. There is no other distinction between the two classes of nuclear power plants for purposes of antitrust review. The staff has also determined that no antitrust review is required at the license renewal stage, unless there are changes in licensee activities or modifications which would constitute a new or substantially different facility. The NRC does not expect that any plants will require such modifications as a prerequisite for license renewal approval. Thus, antitrust review of the renewal of an operating license is not likely.

The following power reactors were licensed under Section 104b (DPR licenses): Arkansas 1, Beaver Valley 1, Big Rock Point, Brown's Ferry 1, 2, & 3, Brunswick 1 & 2, Calvert Cliffs 1 & 2, Cook 1 & 2, Cooper, Crystal River, Diablo Canyon 1 & 2 (have antitrust license conditions), Dresden 2 & 3, Duane Arnold, FitzPatrick, Fort Calhoun, Ginna, Haddam Neck, Hatch 1, Indian Point 2 & 3, Kewaunee, Maine Yankee, Millstone 1 & 2, Monticello, Nine Mile 1, Oconee 1, 2, & 3, Oyster Creek, Palisades, Peach Bottom 2 & 3, Pilgrim, Point Beach 1 & 2, Prairie Island 1 & 2, Quad Cities 1 & 2, Salem 1 & 2, Sequoyah 1 & 2, Saint Lucie 1, Surry 1 & 2, Three Mile Island 1, Turkey Point 3 & 4, Vermont Yankee, and Zion 1 & 2.

## 1.2 Standards of Review

Although the electric power industry has changed considerably since Section 105 was enacted and since the AEC provided regulatory guidance in the early 1970's, the basic tenets and standards of review have not changed. Nuclear power production applicants and licensees are subject to review for the

purpose of determining whether the issuance of a license will create or maintain a situation inconsistent with the antitrust laws. The standards of review of licenses are embodied in the language of the Act itself, clarified in Regulatory Guides 9.1-9.3 and applied to various licensing actions over the years resulting in substantial case law from which applicants and the staff can refer to in assessing future antitrust licensing activities before the NRC.

#### 1.2.1 Section 105 of the Act

Section 105 of the Atomic Energy Act of 1954, as amended provides that nothing contained in the Atomic Energy Act will relieve any person from the operation of the antitrust laws. Moreover, Section 105c(5) requires the NRC to make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. . . for every application to construct and operate a commercial power production facility (cf., Section 103 of the Act). The Act does not require the NRC to identify activities that comprise violations of the antitrust laws but to examine situations that appear to be "inconsistent" with the antitrust laws.

### 1.2.2 Regulatory Guide 9.1

Although Regulatory Guide 9.1, "Regulatory Staff Position Statement on Antitrust Matters" was published in 1973, shortly after the enactment of Section 105, the scope and standard of competitive review employed by the regulatory staff remains the same/ :

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~~The~~ Regulatory staff views activities under the license to embrace the planning, building, and operation of a nuclear facility as well as the integration of such a facility into an effective bulk power supply system. Meaningful review requires consideration of the applicant's activities to be licensed in the context of the bulk power supply system within which it operates.

In dealing with situations that may warrant NRC remedy,

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~~The~~ staff will seek to avoid determining the specifics of [e.g.] a coordination agreement, the details of unit participation, and the like. In general, reliance will be placed on the exercise of Federal Power Commission [now Federal Energy Regulatory Commission] and State agency jurisdiction regarding the specific terms and conditions of the sale of power, rates for transmission services and such other matters as may be within the scope of their jurisdiction.



## 2 REVIEW OF CONSTRUCTION PERMIT/OPERATING LICENSE APPLICATIONS

### 2.1 Overview

By virtue of Section 105c of the Act, the U.S. Nuclear Regulatory Commission (NRC), with the advice of the Department of Justice, must conduct a prelicensing antitrust review of applications to construct nuclear power plants. Section 105c requires the Attorney General to provide advice to the Commission as appropriate, within 180 days after the NRC has docketed and transmitted the application to the Attorney General. The Attorney General's advice assists the Commission in determining 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 furnishes this information pursuant to Appendix L of 10 CFR 50 and 10 CFR Part 52.

After the Attorney General has completed <sup>such an</sup> ~~his~~ investigation, the Commission generally will be advised that (1) no antitrust hearing is necessary, (2) a hearing is necessary 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 a hearing pursuant to Section 105 of the Act, or to participate in a hearing if the Attorney General recommends one to the Commission.<sup>1</sup>

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<sup>1</sup> When 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. If a member of the public petitions for an antitrust hearing, a special three-member board is convened to rule on the petitions.



Depending upon the degree of accessibility of various products and services within the affected geographic area, i.e., the extent of entry barriers present, the reviewer will examine the parameters of the geographic market to determine what the "relevant" market is for review purposes. The relationship of the specific nuclear facility to the applicant's total system or power pool should be evaluated in every case. The reviewer can then make an assessment of whether the applicant has market power and whether such market power has been abused.

#### 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 abuse its market power in other ways and thereby 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 as well as the circumstances surrounding each application, the Appeal Board decision in the Midland (6 NRC 892 (1977)), and the Licensing Board decisions Farley (5 NRC 804 (1977)), 5 NRC 1482 (1977), 13 NRC 1027 (1981)) and Davis-Besse/Perry (10 NRC 265 (1979)) cases provide a guide for the reviewer in determining what relevant markets should be analyzed.

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#### 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. To assess the

probability that the applicant will abuse its market power, the reviewer must examine the applicant's conduct, specifically the applicant's behavior compared with competitors in the relevant market. In other words, the reviewer must determine if it appears reasonably probable that the activities under the license would create or maintain a situation inconsistent with the antitrust laws. Case examples the reviewer can refer to include: Wolf Creek -- where the Appeal Board found the applicant's unjustified refusals to wheel power to or interconnect with smaller entities to be violative of antitrust policies; Midland -- where the Appeal Board found that the applicant's refusals to wheel power, coordinate with smaller utilities, and exclusion of utilities from the Michigan power pool to all be anticompetitive conduct and abuses of market power; Davis-Besse/Perry -- practices such as territorial allocations, attempts to fix prices, refusals to deal, and group boycotts were all considered practices that increased the applicant's dominance and represented violations of the antitrust laws.

#### 2.4.4 Nexus

Proof of a situation inconsistent with antitrust laws or policies 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 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.

#### 2.4.5 Settlement of Antitrust Issues

Section 2.759 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. Settlement, by way of agreement on antitrust license conditions, may be negotiated at any step in the review process. The negotiations may involve the Department of Justice, NRC staff, applicants, and, in some cases, members of the public, including smaller electric systems that are intervenors or potential intervenors.

Negotiations with the applicant begin before the Attorney General issues an advice letter. The Department of Justice usually will invite the NRC staff to join the negotiations in the beginning and invite 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 a settlement is not reached before the Attorney General's advice is rendered, negotiations are nevertheless encouraged during the prehearing stages, and in some instances, after the hearing has begun. ✓

in a nuclear facility, may undergo varying degrees of review.

### 3.2 New Owners

Subsequent applicants can become new owners by 1) purchasing a share of the assets of a nuclear facility; 2) purchasing stock in the licensee; 3) acquiring or merging with a licensee; or 4) through the sale/leaseback of a facility. Subsequent applicants who become new owners through the purchase of a nuclear facility or a portion thereof must undergo a significant change review as provided for in Section 105 of the Atomic Energy Act of 1954, as amended. Subsequent applicants who acquire a controlling interest in a licensee must undergo a significant change review and subsequent applicants who apply to become new owners through acquisition of, or merger with a licensee are also required to undergo a significant change review. X

Moreover, applicants who apply to become new owners through sale and leaseback of a nuclear facility are subject to the same antitrust requirements as any new licensee. However, the sale and leaseback agreements that have been reviewed by the staff have involved new equity investors that have not taken an active role in the operation or control of the nuclear facility involved in the sale and the Commission has determined that such transactions do not have to have an antitrust review (Cf., Public Service of New Mexico, Palo Verde). The staff has developed a generic license condition in these situations that assures the passive role of any new equity investor by prohibiting the new owner from exercising control over the lessee, the facility and the power and energy produced by the facility. If this passive role were to change, the new arrangement would have to be considered in the same manner as any other new owner.

### 3.3.2 De Minimis Applicants

An applicant owning less than 200 MW of total 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 of receipt of information from de minimis applicant is not published in the Federal Register. Further, if <sup>u</sup>a 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.

### 3.3.3. New Operators

Through corporate reorganizations, acquisitions or the formation of nuclear operating service companies, new operators of licensed power reactors that become licensees are treated by the staff for review purposes much like subsequent applicants discussed above. If the new operator is in fact only a plant operator and has no identifiable anticompetitive impact on the bulk power services market in which the licensee operates, there is no basis to attribute market power or abuse of same to the new operator as envisioned by Section 105.

If a license condition is included in the operating license prohibiting the new operator (or owner in the case of the sale/leaseback mentioned above) from

marketing or brokering of power and energy produced from the facility and holding the existing owners responsible and accountable for the actions of the operator, the staff normally will not conduct a formal antitrust review of the proposed new facility operator. However, new operators will be treated for purposes of antitrust review as new owners unless such a license condition~~s~~ is appended to the operating license. X

### 3.4 Required Data and Information

All subsequent applicants, pursuant to Section 50.80, are required to submit as much of the information identified in 50.33a, i.e., that required by an initial applicant for a nuclear production facility, as needed by the staff to determine whether a "significant change" has occurred. In making its significant change determination, the staff shall make use of all available public information as well as any record developed in other related proceedings. The information required by 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", addresses changed licensee activity and is germane to the significant change amendment review process. [In light of the deletion of the OL review requirements by EPACT, Regulatory Guide 9.3 will be revised to accommodate the amendment review process.] B

#### 3.4.1 Antitrust Files

The antitrust files pertaining to the initial construction permit or COL review of the application form the baseline from which "changes" are measured. In addition, CP or COL reviews of the same applicant may have been conducted



ditions. 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, when appropriate, to impose civil penalties on the licensee or issue orders to modify, suspend or revoke the license in question.

#### 4.3 Enforcement of Antitrust License Conditions

##### 4.3.1 Section 10 CFR 2.206 Petitions

A petition can be submitted in accordance with 10 CFR 2.206. 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 General Counsel 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;



- (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 ; and
- (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 petition is granted or denied.

#### 4.3.2 Compliance Investigations

Most compliance activities 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 services provided for by the antitrust license conditions.

A reviewer conducting a Section 2.206 compliance investigation generally considers 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 anti-trust 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; and
- (5) the actions that must be taken to remedy the alleged violation.

On the basis of the investigation, the staff will provide a recommendation as to whether (a) the complaint or allegation has 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.

#### 4.3.3 Denial of Petition

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. 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 on its own motion under 10 CFR 2.206(c).

#### 4.3.4 Notice of Violation

If the staff investigation determines that a violation has occurred, a Notice of Violation and a Director's Decision in accordance with 10 CFR 2.201 will be

prepared by the reviewer in conjunction with the Office of the General Counsel and issued by the Director of the Office of Nuclear Reactor Regulation. The Notice and Decisions will be sent to the licensee and to the petitioner. Imposition of civil penalties may be considered in accordance with 10 CFR 2.205 and Section 234 of the Act.

#### 4.3.4.1 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, the staff will ensure that the compliance steps are carried out expeditiously. 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 modify, suspend or revoke the license. Imposition of civil penalties may also be considered in accordance with 10 CFR 2.205 and Section 234 of the Act.

#### 4.3.5 Order To Modify, Suspend or Revoke a License

An Order would be prepared by the reviewer in conjunction with the Office of the General Counsel 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<sup>2</sup> and
- (3) the licensee's requirements and procedural rights in responding to the Order.

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

#### 4.3.5.1 The Response

If the licensee demands a hearing, the hearing process would be initiated.<sup>2</sup> If the licensee consents to the entry of an Order in substantially the form proposed in the Order, such Order would be 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.

#### 4.3.6 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 General Counsel consistent with 10 CFR 2.205. The Notice of Vio-

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<sup>2</sup> The hearing could result in a decision 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. The order would be appealable.