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# Standard Review Plan on Antitrust

Draft Report for Comment

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**U.S. Nuclear Regulatory Commission**

**Office of Nuclear Reactor Regulation**

W. M. Lambe, M. J. Davis



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**Division of Reactor Program Management  
Office of Nuclear Reactor Regulation  
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### 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, 52.77, 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 licenses. In addition, the procedures describe how the staff enforces compliance by licenses when antitrust conditions have been appended to licenses.

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**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
EPACT	Energy Policy Act of 1992
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
SEC	Securities and Exchange Commission
105c	Section 105c of the Atomic Energy Act of 1954, as amended

## 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.

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

When requested, pursuant to 105c of the Act, the Attorney General renders advice to the NRC as determined to be appropriate. In the past the Attorney General has recommended 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 with the antitrust laws 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 to issue antitrust clearance, grant licenses or impose antitrust license conditions are discussed as they pertain to specific cases which have already been litigated before Commission licensing boards.)

Section 3 addresses the Commission's antitrust review procedures for amendment applications. Subsequent applicants are required to undergo a significant change review subject to the criteria set forth by the Commission in its *Summer* decision. A full antitrust review of a license amendment application is required only if the Director of the Office of Nuclear Reactor Regulation determines that significant change or changes (1) have occurred since the previous antitrust review, (2) are attributable to the applicant, and (3) have anticompetitive implications warranting Commission remedy. If a significant change finding is made, the amendment review follows the same procedures set forth in Section 105c(1).

Section 4 discusses the Commission's antitrust enforcement responsibilities. The Act requires that the Commission, in connection with a utilization and production facility, make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws. In fulfilling its obligations under Section 105, the Commission may: (1) 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) 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) enforce Commission license conditions (Section 186a of the Act). In addition, 10 CFR 2.206 provides a mechanism for parties to bring formal complaints to the attention of the Director of the Office of Nuclear Reactor Regulation when such parties believe that licensees are not complying with license conditions.

In summary, this Standard Review Plan 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 considerations function in the overall licensing process; and (3) it provides the public at large with insight into the role played by antitrust procedures in the Commission's overall licensing responsibility.

# 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." The passage in 1970 of antitrust amendments to Section 105c of the Act requires 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 procedures described herein address the manner in which the NRC staff reaches a judgment on the antitrust implications associated with the construction and operation of nuclear power plants and specify means for determining the significance of these implications. They also outline the procedures for treatment of amendments involving joint owners, changes in owners or operators, and requests for the enforcement of NRC antitrust license conditions.

This draft SRP reflects current regulations and policy, and will be updated to reflect changes to regulations resulting from responses to the Advanced Notice of Proposed Rulemaking and the Draft Policy Statement.

The staff responsibility for conducting the antitrust reviews rests with the Office of Nuclear Reactor Regulation with the advice of the Office of General Counsel.

The Act requires the Commission to conduct antitrust reviews for all nuclear plants seeking a construction permit (CP) after the enactment of Section 105. 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 1970s, 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 to which applicants and the staff can refer 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:

[t]he 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,

[t]he 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.

### **1.2.3 Regulatory Guide 9.2**

Regulatory Guide 9.2, "Information Needed by the AEC Regulatory Staff in Connection with its Antitrust Review of Construction Permit Applications for Nuclear Power Plants", provides the applicant with the data request necessary for the Attorney General and the regulatory staff to make the determination whether the applicant is abiding by the antitrust laws. This data request applies to both Part 50 and 52 license applications.

#### 1.2.4 Regulatory Guide 9.3

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", 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. Although the staff is not now required to conduct antitrust reviews at the operating license stage for combined construction permit/operating license (COL) Part 52 applications, Regulatory Guide 9.3 identifies changes in the licensee's activities since the previous antitrust review and is germane to the staff's review of "significant changes" associated with the amendment review process.

#### 1.2.5 Summer Decision

Although the Commission's decision in the *Summer* proceeding was an operating license review under the Part 50 licensing process, the staff has broadly interpreted Section 105c(2) to require a review of a licensee's activities when a licensing action requires a change in control of a license for a facility. The *Summer* decision established criteria the staff must follow in addressing the competitive implications of licensing reviews after issuance of a construction permit.

### 1.3 Owners and Operators

Each owner or operator (subsequent owners or operators in the case of amended applications) of a nuclear facility must undergo an antitrust review before the operating license, COL, or amendment regarding a transfer of control of the license is issued. Small electric systems can be exempted from some antitrust review requirements as discussed in Section 3.

### 1.4 COL License Applications

For 10 CFR Part 50 applications for new power production facilities, the NRC conducts separate precensuring antitrust reviews at the construction permit and operating license stages of licensing a facility. In 1993, the NRC, under 10 CFR Part 52, introduced an alternative application process combining the construction permit and operating license reviews into one combined COL review. The new COL still provided for the possibility of an operating license review if "significant changes" occurred from the completion of the CP review to issuance of the OL. However, the enactment of the Energy Policy Act in 1992 eliminated the NRC's authority to conduct separate operating license reviews for 10 CFR Part 52 COL applications.

The Part 50 CP review and Part 52 COL review processes are identical. In either 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 provide such advice as determined appropriate in regard to the finding the Commission must make as to whether in those situations where a hearing is required the issuance of a license would create or maintain a situation inconsistent with the antitrust laws. The advice the Attorney General has provided in the past has been either, (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 has provided guidance to applicants in Regulatory Guide 9.1 explaining how the staff views the various issues regarding access to nuclear power and related services. Regulatory Guide 9.1 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 and what remedy it would seek in situations where the issuance of a license may create or maintain a situation inconsistent with the antitrust laws.

### **1.5 Amendment Reviews**

The staff has interpreted the review requirements for new owners or operators imposed by Section 105 to apply to applicants requesting ownership or to become an operator of a nuclear power production facility after issuance of an OL or a COL. The staff reviews the activities of the applicant to determine whether the changed ownership or operator represents a "significant change" since the previous antitrust review. In its *Summer* decision, the Commission provided review criteria to be used by the staff in its assessment of whether the addition of a new owner or operator after issuance of a CP represents a "significant change".

### **1.6 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 it has with respect to any utilization of special nuclear material or atomic energy which appears to violate the antitrust laws. Under Section 186, the Commission is granted authority to revoke licenses for noncompliance with the terms and conditions of construction permits, operating licenses and combined licenses.

## 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 such an 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>

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." Section 105c, paragraph 5. (42 U.S.C. 2135) In making that determination, the Commission must consider the Attorney General's advice, and any other information it deems necessary. On the basis of its findings, the Commission has the authority to (1) issue or continue a license, (2) refuse to issue a license, (3) rescind or amend a license, or (4) issue a license with conditions it deems appropriate.

In the past, 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, pursuant to Section 105 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.

### 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.

<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.

(C, 10 CFR Part 2, Appendix A Section X)

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 to question 9 of Appendix L; applicants with less than 200 MW of capacity (*de minimis* applicant) need not respond to any of the questions unless specifically requested to do so by the staff.

### **2.2.2 Regulatory Guide 9.2**

In addition to the information requested by the Attorney General, the NRC staff collects 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 and is planning within its service area. It may also be necessary for the reviewer to survey the smaller electric utilities in the relevant areas by telephone, mail, or in person since their statistics may not be available in public sources.

### **2.2.5 Field Review**

After examining the Appendix L submittal and other relevant information, the reviewer may contact individuals within or adjacent to the area 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 situation and to reach an initial determination as to whether the issuance of a license will create or maintain a situation inconsistent with the antitrust laws. 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 often inquire whether the applicant has refused to provide other entities with access to generating facilities, transmission services, or other coordination services.

#### **2.2.6 Applicant's Service Contracts and Agreements**

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 membership or participation in planning and coordinating groups. In addition, any pattern of applicant refusals to serve will be evaluated.

### **2.3 Acceptance Review and Notice of Receipt of Antitrust Information**

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 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 General Counsel (OGC) that the application has been accepted for docketing. The information is then submitted to the Attorney General with a request for antitrust advice.

### **2.4 Staff Review**

During the period of the Attorney General's review, the NRC reviewer should prepare a preliminary 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 participate in any hearing and will determine independently what issues it will support in the hearings.

#### **2.4.1 Criteria for Review**

The proper scope of antitrust review depends upon the circumstances of each case. The reviewer should employ market analysis focusing on the area served by the applicant entity. From the nature of the electric bulk power supply industry itself, the reviewer will have a general idea of the types of products and services supplied by the applicant. Those products relevant to each individual case, e.g., baseload power, transmission access, reserve sharing, coordination planning, will vary depending upon the extent of competition in the area and the various needs of surrounding entities engaged in the bulk power services market.

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)) case, and the Licensing Board decisions in the *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.

#### **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.

### 3 REVIEW OF AMENDMENT APPLICATIONS

#### 3.1 Overview

Requests for amendments to licenses involving changes in ownership or operational control must address whether the addition of a new owner or operator or changes in ownership share of a facility would create or maintain a situation inconsistent with the antitrust laws. The staff performs an initial antitrust review at the COL stage (or CP stage for Part 50 reviews) as described in Section 2. Prior to enactment of the Energy Policy Act in 1992, Section 105c(2) required the staff to review the licensee's activities under the license from the time the CP antitrust review was completed until the issuance of an OL. The "look back" period did not address activities already reviewed during the CP review, but focused on "significant changes" in the licensee's activities that had occurred since the previous antitrust review. No OL reviews are conducted for Part 52 antitrust reviews; however, the staff has endorsed and applied significant change review criteria to changes in owners or operators subsequent to the issuance of the COL. The addition of a new owner or operator, hereafter referred to as a subsequent applicant, may require a significant change review depending upon the individual circumstances surrounding the amendment application.

#### 3.2 Summer Decision

In its review of changes in control or ownership, the staff follows the criteria established by the Commission in its *Virgil C. Summer* decision (*Summer*, 11 NRC 817). The *Summer* decision established criteria the staff must follow in addressing the competitive implications of licensing reviews after issuance of a construction permit. Although *Summer* represented an operating license review under 10 CFR Part 50, the staff has interpreted Section 105c(2) to require a review of a licensee's activities when a licensing action requires a change in control or ownership of a licensed facility. (A new owner/operator at any stage of operation would pose the same competitive concern as at the CP stage.) Moreover, the staff has interpreted *Summer* and the review requirements established therein as governing guidance for post-CP licensing reviews.

The issues addressed in *Summer* revolved around activities of the Summer licensee since the completion of the Summer antitrust construction permit review. In order to initiate a full scale antitrust review pursuant to the procedures set forth in Section 2, the activities under scrutiny by the staff must (1) have occurred since the previous antitrust review of the licensee; (2) be reasonably attributable to the licensee; and (3) have antitrust implications that would likely warrant some Commission remedy. These changes must be reasonably apparent and must be discernible from applicant's submittals, from staff's investigations, or from papers that are filed.

#### 3.3 Subsequent Applicants

The addition of a subsequent applicant after an OL or COL has been issued requires the license to be amended to include the additional owner or operator. If the staff determines that there has been a significant change as a result of the addition of a new owner or change in the operator, then the review procedures outlined in Section 2 are followed. Subsequent applicants become new owners or operators in a variety of ways and depending upon the timing and manner in which they seek new ownership or operating responsibility in a nuclear facility, may undergo varying degrees of review.

### 3.3.1 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.

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.*, NRC letter dated December 8, 1995, forwarding Amendments 91 to NPF-51 and 74 to NPF-74 for the Palo Verde Nuclear Generating Station Units Nos. 2 and 3). 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 a *de minimis* applicant 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.

### 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 is appended to the operating license.

### **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.]

#### **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 in connection with other nuclear plants prior to the CP or COL review of the nuclear plant in question, thereby increasing the staff's general data base for a particular applicant.

#### **3.4.2 Federal Energy Regulatory Commission Files**

The docket files at the FERC generally contain information about the applicant's activities in the bulk power services market and should be selectively reviewed by the staff.

#### **3.4.3 Field Investigation**

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

### **3.5 Notice of Receipt of Antitrust Information**

At the CP or COL stages of review, the staff seeks input to the antitrust review from those persons or entities affected by the activities of prospective owners or operators of the facility being licensed. The staff seeks similar input in the amendment review process pursuant to proposed corporate ownership or operator changes and will publish in the *Federal Register* notice of receipt of antitrust information or notice of receipt of the proposed amendment when adequate antitrust information is included with the amendment request. The notice shall provide for a period of public comment of 30 days from publication of the notice in the *Federal Register*.

Public comments accepted by the staff will address the antitrust aspects of the application and will be used by the staff to determine whether the proposed amendment will create or maintain a situation inconsistent with the antitrust laws.

### **3.6 Staff Analysis**

The reviewer, in coordination with OGC, prepares a written analysis of the changes that have taken place since the completion of the COL antitrust review. This analysis examines the extent to which these changes are attributable to the applicant, their antitrust implications and whether they would likely warrant a Commission remedy.

This "significant change" analysis is then forwarded to the Department of Justice for review and comment. Although there is no statutory limitation on the period in which the Department's comments should be provided to the staff—as is the case during the construction permit review phase—every effort will be made to assure that the Department's advice is submitted in a timely manner. Upon receipt and review of the Department of Justice comments, a finding of whether there has been a significant change is prepared for signature by the Director of the Office of Nuclear Reactor Regulation.

#### **3.6.1 Parallel Reviews**

In its review of mergers, acquisitions, spin-offs or other ownership/operator changes involving licensees which are concurrently being reviewed by other federal regulatory bodies, e.g., FERC, SEC, DOJ, the staff makes every effort to use the data and the record(s) developed in these proceedings as aides in reaching its own independent analysis of whether the change in the licensee's activities is a "significant change". The staff will show due diligence in developing an NRC record, yet make every effort to avoid redundancy in the data collection required in its significant change analysis.

### **3.7 Director's Finding**

If the Director of the Office of Nuclear Reactor Regulation makes a Finding of Significant Change, the staff will forward the Finding to the Attorney General and request advice as to whether an antitrust hearing should be held as a result of this Finding. When the staff receives the Attorney General's advice, the staff will request publication of the Attorney General's advice in the *Federal Register* with an opportunity for interested parties to intervene or request a hearing.

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 the publication of the Notice. Copies of the Finding are also sent to the Commission, the applicant and to any person who submitted comments in response to the Notice of receipt of antitrust information noticed in the *Federal Register*. 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 license amendment 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.

The staff will review all requests for reevaluation and make a threshold determination whether the events described in the request represent new information that would affect the Director's initial Finding. If it is determined that the request does contain new information that was not considered by the Director in his initial Finding, the Director will reevaluate his initial Finding.

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 Finding shall become the final NRC decision 30 days after publication in the *Federal Register* unless the Commission exercises *sua sponte* review.

### 3.7.1 Restructurings

Restructurings or other types of disaggregations involving a *corporate* change of ownership or operator of a licensed facility undergo a significant change review, with the concomitant public notice and DOJ advice, and require a Director's Finding as described above. *Functional* restructurings not involving obvious changes in ownership control or operator are reviewed by the staff to determine whether a significant change review should be conducted. Although the standard of review is the same, i.e., create or maintain inconsistencies with the antitrust laws, there is a higher threshold of review associated with corporate changes in operator or ownership of a licensed facility—there is a FR notice published requesting public comment and the Director of NRR issues a formal Significant Change Finding. Functional restructurings are not usually noticed for public comment and usually do not require a Director's Finding.

## 4 ANTITRUST ENFORCEMENT

### 4.1 Overview

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 or duty to: (1) 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) report to the Attorney General any information indicating that a licensee appears to have violated the antitrust laws (Section 105b of the Act); (3) enforce Commission license conditions (Sections 161 and 186a of the Act); and (4) impose civil penalties (Section 234 of the Act). In addition, 10 CFR 2.206 provides a formal mechanism for any person to request the Director of the Office of Nuclear Reactor Regulation to take appropriate enforcement action on antitrust matters.

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

#### 4.2.1 Section 105a Identifies Relevant Statutes and Provides for Appropriate Enforcement

Only one 105a enforcement case has come before the Commission. On May 31, 1978, counsel for several Florida cities submitted a petition for a Section 105c hearing in which the Commission was advised of a decision by the Court of Appeals in the Fifth Circuit, (*Gainesville Utilities Department v. Florida Power and Light Company*, 573 F. 2d 292, 294 (5th Circ.), *cert denied*, 439 U.S. 966 (1978)) which held that Florida Power and Light Company (FP&L) 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 determination of appropriate relief. Subsequently, the petition for a Section 105a proceeding was withdrawn after the cities and FP&L 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 cited in 105c, "activities under the license," as described in Section 2.

Both phrases encompass planning, building and operation of the nuclear power reactor as well as the integration of such a facility into an effective bulk power supply system.

#### 4.2.2 Section 105b Requires the Commission to Report Apparent Violations to the Attorney General

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. The 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 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 whether the actions of the licensee (or applicant) are inconsistent with the antitrust laws.

#### **4.2.3 Section 186a Provides the Commission with Authority to Revoke Licenses**

In its June 15, 1977 Memorandum and Order in 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 post-licensing 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. . . . (5 NRC 1311 (1977)).

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, 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 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; 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; 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 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

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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.

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.

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 suspension or revocation of the license.

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The Nuclear Regulatory Commission is issuing this draft Standard Review Plan to describe the procedure used to implement the antitrust review and enforcement prescribed in Sections 105 and 186 of the Atomic Energy Act of 1954, as amended. This draft SRP reflects current regulations and policy, and will be updated to reflect changes in NRC regulations.

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