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VIA HAND DELIVERY

Secretary of The Commission
U.S. Nuclear Regulatory Commission
Attention: Rulemakings and Adjudications Staff
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Re: Comments on Proposed Rule Clarifying NRC's Antitrust Review Authority (64 Fed. Reg. 59671, November 3, 1999)

Dear Ms. Vietti-Cook:

I. Introduction

On behalf of the FirstEnergy Corp. subsidiary utility owners of the Perry Nuclear Power Plant, the Davis-Besse Nuclear Power Station and the Beaver Valley Power Station, Ohio Edison Company, The Cleveland Electric Illuminating Company, the Toledo Edison Company and Pennsylvania Power Company ("FE Owners"); the FirstEnergy Nuclear Operating Company ("FENOC"), the licensed operator of the FE Plants, hereby submits the following comments on the proposed rule clarifying NRC's antitrust review authority. FENOC supports the Commission's initiative to adopt the rulemaking revisions to its regulations as set forth in the proposed rule to codify the conclusion that the NRC is not authorized to conduct antitrust reviews of post-operating license transfer applications.

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As will be discussed in more detail below, Section 105 of the Atomic Energy Act, 42 U.S.C. § 2135 ("hereafter Section 105"), is the exclusive source of the Commission's limited antitrust review authority. Section 105 makes it clear that the NRC's antitrust review responsibilities are only at the prelicensing stage prior to the issuance of a construction permit and subsequently at the operating license stage, under certain specific circumstances, for commercial nuclear power plants. Section 105 simply does not mention, nor contemplate antitrust reviews for post-operating license transfers.

II. Section 105 of the Atomic Energy Act

Pursuant to the 1970 amendments and the enactment of Section 105, the NRC is required to determine "whether the activities under the [applied for] license would create or maintain a situation inconsistent with the antitrust laws." As noted above, Section 105, the exclusive source of the NRC's antitrust review authority, is specific rather than plenary and is limited to initial applications for construction permits for commercial nuclear power plants and one instance thereafter, at the time of the application for the operating license only in situations in which there have been "significant changes in the licensees activities since the previous [construction permit] antitrust review." Unlike the NRC's broad jurisdiction with regard to public health and safety matters, the NRC's antitrust authority is not derived from its broad powers provided by Sections 161 and 186 of the Atomic Energy Act of 1954, as amended. Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1311 (1977). Thus, as the Commission concluded in Kansas Gas and Electric Company, (Wolf Creek Generating Station, Unit 1) CLI-99-19, 49 NRC 441 (June 18, 1999), "[a]bsent Section 105, the Commission would have no antitrust authority." CLI-99-19, Slip. op at 8.

Section 105 contemplates an antitrust review for the initial application for a construction permit for Section 103 commercial nuclear reactors, the submittal of antitrust information by applicants, and the antitrust advice of the Attorney General at the construction permit phase of licensing such a facility. The only opportunity for further antitrust review under Section 105 is if and when the NRC makes a prior determination at the operating license stage that a second antitrust review is "advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred since the previous [construction permit] antitrust review." Thus, absent this affirmative prior determination of "significant changes in the licensee's activities since the construction permit antitrust review," the NRC is not authorized to conduct a second antitrust review at the operating license stage. This limited antitrust jurisdiction is appropriately characterized by the Commission in Wolf Creek as a "progressively diminishing role Congress intended for the Commission regarding the competitive practices of its applicants and licensees" CLI-99-19, Slip. op at 13. Therefore, once a nuclear facility is licensed to operate, "traditional antitrust forums - - the federal courts and governmental agencies with

longstanding antitrust expertise - - are better equipped than the Commission to resolve and remedy antitrust violations by NRC licensees." Id.

This conclusion is amply supported by the legislative history of Section 105. The legislative history makes it clear that the phrase "any license application" and "an application for a license" as used in subsection 105c refers to the:

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

Prelicensing Antitrust Review of Nuclear Power Plants: Hearings Before the Joint Committee on Atomic Energy, Part I, 91st Cong., 1 sess. (1969), Part II, 91 st. Cong., 2d Sess. page 29, (1970). "The phrases do not include for purposes of triggering subsection 105c., other applications which may be filed during the licensing process." Id. Thus, the NRC's antitrust jurisdiction was strictly limited by Congress to the construction permit phase, with the only exceptions being if there were significant changes prior to the time of the operating license application or the application for what would constitute a "new or substantially different facility" as determined by the NRC. Congress clearly did not contemplate that an NRC antitrust review would be applicable many years after the licensing of a commercial nuclear power plant in the event of direct or indirect transfers of interests associated therewith, pursuant to 10 C.F.R. §50.80.

This conclusion is consistent with the Commission's prior longstanding interpretation of its antitrust jurisdiction. As far back as 1977, in South Texas, supra, the Commission declined a broad antitrust enforcement role or an antitrust policing responsibility. In declining that role, the Commission stated:

> Some of the parties' arguments would assign to us a broad and ongoing antitrust enforcement role; They envision that we would have a continuing policing responsibility over the activities of licensees throughout the lives of operating licenses. As we shall show, we believe that the Congress envisioned a narrower role for this agency, with responsibility for initiating antitrust review focused at the two-step licensing process.

South Texas, supra, 5 NRC at 1309. The NRC has consistently declined an ongoing antitrust enforcement role, in light of the fact that requests for antitrust relief at the NRC ordinarily follow, or are but an appendage to, tariff disputes of various kinds pending before the FERC or state public utility commissions. See, e.g., Florida Power

& Light Co. (St. Lucie Nuclear Power Plant, Unit 2) DD-81-15, 14 NRC 589 (1981); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2) DD-95-10, 41 NRC 362 (1995).

After a detailed review of Section 105, the legislative history thereof, as well as certain judicial decisions, the Commission further concluded in South Texas "that Congress had no intention of giving this Commission authority which could put utilities under a continuing risk of antitrust review. Had Congress agreed with the proposition that this Commission should have broad antitrust policing powers . . . [l]ittle attention would have been paid to defining a two-step review process . . . Consequently, we find that the Commission's antitrust authority is defined not by the broad powers contained in Section 186 [and Section 161], but by the more limited scheme set forth in Section 105." 5 NRC at 1317.

Of the few judicial cases interpreting Section 105, this limited-scope reading of Section 105(c) is clearly supported. In American Public Power Association v. NRC, 990 F. 2nd 1309 (D.C. Cir. 1993), the U.S. Court of Appeals for the District of Columbia Circuit, affirmed the NRC's prior determination, that antitrust review is not required for applications for renewal of nuclear plant commercial licenses and that the NRC, accordingly, acted permissibly in limiting its antitrust review duties to not conduct reviews of post-operating license renewal applications. In so holding, the Court of Appeals noted the mandatory antitrust review at the construction permit stage for Section 103 licenses and a second antitrust review for a subsequent application for an operating license, only if it found significant changes in the licensee's activities or proposed activities have occurred after the review at the construction permit stage. 990 F. 2nd at 1311.[1] In denying an antitrust review at the license renewal stage, the court noted that the term "license renewal" is absent from Section 105 and the Court recognized that the Joint Committee Report emphasized that the word "any application" in Section 105(c) refers to an "initial application". 990 Fed. 2nd at 1313-14. Thus, the Court of Appeals concluded that the NRC had permissibly construed Section 105(c) to "limit its antitrust review obligations to situations where it issues a new operating license."

The same reasoning in APPA v. NRC applies to license transfer cases. There is no mention of "license transfer" or "license transfers" in Section 105(c). Applying the analysis of the Court of Appeals in APPA v. NRC to license transfers, leads to the ineluctable conclusion that Section 105(c) does not authorize an antitrust review of license transfer applications. The conclusion by the Court of Appeals is totally consistent with the Joint Committee Report, supra, that the term "license application" in Section 105(c) referred only to applications for construction

[1] The court noted, in addition, that there could be an antitrust review, based upon the court's review of the legislative history in the case, that a particular nuclear plant "was to be or had been . . . drastically modified". 990 Fed. 2nd at 1314.

permits, or applications for operating licenses where the Commission, in consultation with the Attorney General, had made a "significant change finding" or for an application for modifications of a nuclear power plant application which have resulted in a substantially different facility as determined by the NRC. Antitrust reviews in license transfer cases, "pursuant to 10 C.F.R. § 50.80" was clearly not contemplated by Congress nor the U.S. Court of Appeals in interpreting Section 105.

Moreover, NRC's regulations do not require the conduct of antitrust reviews in license transfer cases. In Subpart A to Part 2 to NRC's regulations ("Subpart A") only two specific provisions, § 2.101(e) and § 2.102(d), address the applicability of antitrust reviews in construction permit and operating license cases, but neither regulation provides that antitrust reviews are applicable to license transfer applications pursuant to 10 C.F.R. § 50.80. In addition, when the Commission amended the provisions of Subpart A in December of 1998, the Commission amended Section 2.101(a)1 to insert the words "a license transfer" in the listing of the types of license applications to which the § 2.101 general filing rules apply. However, the Commission did not amend either § 2.101(e)(i) or § 2.102(d) to make those regulations, which delineate antitrust review provisions and submittals, explicitly applicable to license transfer cases. Thus, antitrust review of license transfer applications is also not required by NRC regulations.

III. Duplicative Antitrust Jurisdiction

As the Commission noted in Wolf Creek, if antitrust reviews were to be conducted in the future with regard to license transfer applications, this would be "largely duplicative of other, more appropriate agencies' responsibilities, and not a sensible use of our limited resources needed to fulfill our primary mission of protecting the public health and safety and the common defense and security, from the hazards of radiation." CLI-99-19, Slip op. at 29. As the Commission stated:

> "To the extent that the Commission can still be considered to be in a unique position vis-a-vis other governmental authorities to address antitrust concerns, such uniqueness surely ends at the time the facility is granted its initial operating license."

Id. at 30.

In connection with transactions involving commercial nuclear power plant license transfer applications, at least three other federal agencies will review such transactions from a competitive, antitrust standpoint, thereby obviating the need, from both policy and government efficiency perspectives, of having the NRC use its limited resources to duplicate these efforts.

Pursuant to the Energy Policy Act of 1992, Public Law 102-486, the authority of the Federal Energy Regulatory Commission ("FERC") to prevent and mitigate potential and existing abuses of market power by electric utilities, including nuclear utilities, became clear. Under the FERC Merger Policy Statement,[2] the FERC will approve mergers (and associated asset transfer transactions) only if it determines that the transaction will not adversely affect competition, rates, and federal and state regulation. In assessing the competitive impacts of the proposed transaction, the FERC conducts a rigorous competitive screening analysis that applies the U.S. Department of Justice/Federal Trade Commission Horizontal Merger Guidelines to assess five distinct factors affecting competition. Those guidelines generally assess whether the merger will significantly increase concentration and result in a concentrated market; whether the merger raises concerns about potential adverse competitive effects: whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern; whether the merger will create any efficiency gains that reasonably cannot be achieved by the parties by other means; and last, but for the proposed merger, whether either party to the transaction would likely fail causing it to exit from the market. Accordingly, FERC applications for approval of such transactions normally contain detailed economic, and competitive analyses by qualified experts (primarily economists) and the FERC will approve proposed mergers and associated transactions only if it determines that the merger (or transaction) will not cause competitive harm under these guidelines. In approving such transactions, the FERC can either condition the transaction based on certain market power considerations or authorize the transaction subject to certain conditions. After the merger, or transfer, the FERC can, and often does, retain jurisdiction over the entities involved in the transaction to address complaints about competitive issues that may arise subsequently. FERC also has authority under Section 206 of the Federal Power Act to act on a complaint by a third party, or its own initiative, to remedy anticompetitive practices, subject to its jurisdiction. Mediation measures available to FERC in its Merger Policy Statement include the divestiture of generating assets or extension of transmission facilities; prohibiting trading over constrained transmission paths and other methods designed to ensure open access to a utility's transmission facilities. See Merger Policy Statement Appendix A at ¶ 30,136-37.

In addition, since 1976, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1383 (1986) added Section 7A to the Clayton Act, 15 U.S.C § 18a (hereafter "§ 7a"), which established a waiting period notification process which allows the U.S. Department of Justice (Antitrust Division) and the Federal Trade Commission to screen transactions involving the acquisition or disposition of assets such as interests in nuclear power

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

plants, including mergers and other transactions involving nuclear utilities, for potential violations of the antitrust laws before such transactions are consummated. Under § 7a, the DOJ has the authority to institute a court proceeding to enjoin such a transaction if it is determined that such transaction would violate the antitrust laws. Transactions requiring the filing of a 50.80 application at the NRC are subject frequently to the parallel jurisdiction of the U.S. Department of Justice, the Federal Trade Commission and the Federal Energy Regulatory Commission to address competitive concerns. As the Commission cogently noted in CLI-99-19, since the "Clayton Act standard, like that of Section 105(c) [of the AEA] is "anticipatory" in nature, designed to permit the correction of anticompetitive problems in their incipiency, the scrutiny of DOJ's pre-acquisition [and merger] review is comparable, at least, to the NRC's "significant changes" review. Slip op at 32.

Finally, in addition, the U.S. Department of Justice, under Sections 1 and 2 of the Sherman Act, has continuing jurisdiction, whether based on third-party complaints or on its own initiative, to investigate and enforce the antitrust laws at any time relative to nuclear utilities, independent of any pending or contemplated NRC license transfer application.

In addition to these statutory standards, there have been a number of regulatory initiatives, particularly at FERC, to protect against anticompetitive conduct, obviating the need for the NRC to replicate such authority in connection with a particular license transfer application. For example, FERC issued Order No. 888 on April 24, 1996 and Order No. 888-A on March 4, 1997, which, in part, required all public utilities, including nuclear utilities that own, control, or operate transmission facilities to have on file open access, non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory services. Pursuant to these required tariffs, utilities can now enter into arrangements for transmission and ancillary services without instituting formal proceedings under Section 211 of the Federal Power Act.

For the reasons discussed above, the NRC's antitrust review of 50.80 applications would be redundant and unnecessary in light of the express authority of the FERC and that of the Department of Justice and Federal Trade Commission to enforce compliance with the antitrust laws by electric utilities, including nuclear utilities.

IV. Existing Antitrust License Conditions

In Wolf Creek the Commission indicated that given the above statutory and regulatory developments since the 1970 amendments to 105 of the AEA, the Commission "must still consider the fate of any existing antitrust license conditions under the transferred license." CLI-90-19 at 33. In that regard, the undersigned support the action taken by the NRC in its "Order Approving Transfer of License from Illinois Power Company to AmerGen Energy Company,

LLC and Approving Conforming Amendment," dated November 24, 1999. In that case, the two-decade old antitrust license conditions, applicable to the original licensee, were not transferred to the new owner-operator of the Clinton Power Station. In its Safety Evaluation Report,[3] the Staff noted that antitrust license conditions are distinguishable from other types of nuclear plant license conditions that govern the safe operation of the plant and that would automatically be transferred intact with a license transfer. SER at 16. Therein, the Staff noted that the license conditions permitting ownership participation or purchase of unit participation in the Clinton plant had expired on its own terms. Id. at 17. It should be noted that this would generally be expected to be the case with respect to ownership provisions contained in antitrust license conditions of the 1970's or 1980's. In addition, the corporate entity, which was purchasing Clinton was a new entity, not in existence at the time of licensing. More importantly, the new entity was a power generator only without a public utility transmission network. Relatively recent regulatory developments at the FERC, since the time of the imposition of the NRC's antitrust license conditions, have permitted the formation of independent transmission companies not directly affiliated with the original parent. Thus, the NRC staff correctly concluded in Clinton that given the pervasive statutory, regulatory and competitive changes in the marketplace, that "there is not basis for these antitrust license conditions [to be made applicable] here when the operating license was transferred." SER at 16-17. In addition, the Staff noted that the "antitrust license conditions contain several provisions that can have no practical application to . . . [the transferee] which has no transmission or distribution network. Id. at 17.

Thus, even though no antitrust review under Section 105 was required or authorized in connection with the sale of the Clinton Nuclear Power plant, and even though the Staff did not conduct such an antitrust review, consistent with the numerous statutory, regulatory and policy developments referenced above, the original antitrust license conditions were deemed to have expired upon the sale and transfer of the Clinton plant to a new entity. Such an approach is commendable and realistic in light of all of the above discussed legal, regulatory, policy, and government efficiency considerations.

V. The NRC's Recent Practice of Performing Significant Change Reviews of License Transfers

Prior to the clarification of the Commission's lack of antitrust jurisdiction over license transfers, the NRC staff did conduct limited antitrust reviews of certain license transfer applications. As the Commission recognized in Wolf Creek, the NRC remains free to choose

[3] "Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Transfer of Clinton Power Station Operating License From Illinois Power Company to AmerGen Energy Company, L.L.C.," Docket No 50-461 (November 24, 1999).

among interpretations of its statute, even when that represents a departure from previous prior practice. As the Supreme Court noted in Chevron,[4] agency interpretations and policies are not "instantly carved in stone," but rather must be subject to varying interpretations of their wisdom on a continuing basis. Id. at 863-64, 104 S. Ct. at 2792. Federal agencies should be accorded flexibility in interpreting its statutes "not in a sterile vacuum, but in the context of implementing policy decisions in a technical and complex arena." Id. Thus, there is no mandate that an agency adhere to past practice when to do so does not add to agency decision-making and only serves to burden further (rather than simplify) the licensing process with the submittal of duplicative or unnecessary information. See Black Citizens For A Fair Media v. FCC, 719 F. 2nd 407 (D.C. Cir.) (1983), cert. denied, 467, U.S. 1255 (1984). This flexibility is reflective of the discretion of agencies "both to define the public interest and to determine what procedures best assure protection of that interest." Id. Even though some antitrust review of license transfer applications had been conducted by the NRC staff prior to the Commission's Wolf Creek decision, the agency is not bound by past policies, practices or statutory interpretations regarding post-operating license antitrust reviews, nor is it precluded from dispensing with such reviews altogether. See Porter County Chapter v. Isaak Walton League, Inc., v. AEC, 533 Fed. 2nd 1011, 1016 (7th Cir., 1976), cert. denied, 429 U.S. 945 (1976). As the Commission properly concluded in Wolf Creek, the limited Commission "antitrust reviews of post-operating license transfer applications cannot be squared with the terms and intent of the [Atomic Energy] Act and we therefore lack authority to conduct them." Slip Op. at 24.

VI. Conclusion

In summary, FENOC supports the NRC's efforts and conclusion to eliminate antitrust reviews from license transfer applications and looks forward to further development and similar clarification of the viability of existing antitrust license conditions in the presence of the same pervasive changes to the function, structure and operation of nuclear facilities, and the creation of stand alone transmission companies and generating companies reflecting the new and highly competitive electric marketplace.

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[4] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 104 S. Ct. 2778 (1984).

Respectfully submitted,

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cc: John P. Stetz, President, FENOC
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