

March 22, 2002

Mr. C. Lance Terry
Senior Vice President &
Principal Nuclear Officer
TXU Generation Company LP
Attn: Regulatory Affairs Department
P. O. Box 1002
Glen Rose, TX 76043

SUBJECT: COMANCHE PEAK STEAM ELECTRIC STATION (CPSES), UNITS 1 AND 2 -
ISSUANCE OF AMENDMENTS RE: DELETION OF ANTITRUST CONDITIONS
(TAC NOS. MB3609 AND MB3610)

Dear Mr. Terry:

The U. S. Nuclear Regulatory Commission (NRC) has issued the enclosed Amendment No.94 to Facility Operating License (FOL) No. NPF-87 and Amendment No. 94 to FOL No. NPF-89 for CPSES, Units 1 and 2, respectively. The amendments consist of deletion of Appendix C to the FOLs, in response to the application submitted by the former licensee, TXU Electric Company and adopted by the licensee, TXU Generation Company LP, dated June 19, 2001, as supplemented by letters dated August 15, August 31, November 20, and December 17, 2001. The application, as supplemented, requested that the antitrust conditions, contained in Appendix C of FOL Nos. NPF-87 and NPF-89, for CPSES, Units 1 and 2, respectively, be deleted. In addition, the application requested that the NRC consent to the direct transfer of control of TXU Electric's operating authority and 100-percent ownership interest in CPSES, Units 1 and 2, to a newly-formed generating company: TXU Generation Company LP. On December 21, 2001, the NRC issued an Order approving the transfer of the CPSES, Units 1 and 2, FOLs to TXU Generation Company LP, and on January 1, 2002, the NRC issued the associated, conforming license amendments.

The enclosed amendments delete the antitrust conditions contained in Appendix C of FOL Nos. NPF-87 and NPF-89.

Mr. C. L Terry

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A copy of our related Safety Evaluation is also enclosed.

Sincerely,
/RA/

David H. Jaffe, Sr. Project Manager, Section 1
Project Directorate IV
Division of Licensing Project Management
Office of Nuclear Reactor Regulation

Docket Nos. 50-445 and 50-446

Enclosures: 1. Amendment No. 94 to NPF-87
2. Amendment No. 94 to NPF-87
3. Safety Evaluation

cc w/encls: See next page

Mr. C. L Terry

-2-

A copy of our related Safety Evaluation is also enclosed.

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NAME	DJaffe	DJohnson	GKim*	RGramm
DATE	3/21/02	3/21/02	3/20/02	3/22/02

OFFICIAL RECORD COPY

Comanche Peak Steam Electric Station

cc:

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TXU GENERATION COMPANY LP

DOCKET NO. 50-445

COMANCHE PEAK STEAM ELECTRIC STATION, UNIT NO. 1

AMENDMENT TO FACILITY OPERATING LICENSE

Amendment No. 94
License No. NPF-87

1. The Nuclear Regulatory Commission (the Commission) has found that:
 - A. The application for amendment by former licensee, TXU Electric Company dated June 19, 2001, as supplemented by letters dated August 15, 2001, August 31, 2001, November 20, 2001, and December 17, 2001, as adopted by TXU Generation Company LP in a letter dated January 2, 2002, complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I;
 - B. The facility will operate in conformity with the application, as amended, the provisions of the Act, and the rules and regulations of the Commission;
 - C. There is reasonable assurance (i) that the activities authorized by this amendment can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations;
 - D. The issuance of this license amendment will not be inimical to the common defense and security or to the health and safety of the public; and
 - E. The issuance of this amendment is in accordance with 10 CFR Part 51 of the Commission's regulations and all applicable requirements have been satisfied.

2. Accordingly, the license is amended, and Appendix C to the license is deleted, as indicated in the attachment to this license amendment.
3. The license amendment is effective as of its date of issuance and shall be implemented within 30 days from the date of issuance.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

Robert A. Gramm, Chief, Section 1
Project Directorate IV
Division of Licensing Project Management
Office of Nuclear Reactor Regulation

Attachment: Changes to the Facility Operating License

Date of Issuance: March 22, 2002

TXU GENERATION COMPANY LP

DOCKET NO. 50-446

COMANCHE PEAK STEAM ELECTRIC STATION, UNIT NO. 2

AMENDMENT TO FACILITY OPERATING LICENSE

Amendment No. 94
License No. NPF-89

1. The Nuclear Regulatory Commission (the Commission) has found that:
 - A. The application for amendment by former licensee, TXU Electric Company dated June 19, 2001, as supplemented by letters dated August 15, 2001, August 31, 2001, November 20, 2001, and December 17, 2001, as adopted by TXU Generation Company LP in a letter dated January 2, 2002, complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations set forth in 10 CFR Chapter I;
 - B. The facility will operate in conformity with the application, as amended, the provisions of the Act, and the rules and regulations of the Commission;
 - C. There is reasonable assurance (i) that the activities authorized by this amendment can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the Commission's regulations;
 - D. The issuance of this license amendment will not be inimical to the common defense and security or to the health and safety of the public; and
 - E. The issuance of this amendment is in accordance with 10 CFR Part 51 of the Commission's regulations and all applicable requirements have been satisfied.

2. Accordingly, the license is amended, and Appendix C to the license is deleted, as indicated in the attachment to this license amendment.
3. The license amendment is effective as of its date of issuance and shall be implemented within 30 days from the date of issuance.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

Robert A. Gramm, Chief, Section 1
Project Directorate IV
Division of Licensing Project Management
Office of Nuclear Reactor Regulation

Attachment: Changes to the Facility Operating License

Date of Issuance: March 22, 2002

ATTACHMENT TO LICENSE AMENDMENT NOS. 94 AND 94

FACILITY OPERATING LICENSE NOS. NPF-87 AND NPF-89

DOCKET NOS. 50-445 AND 50-446

Replace the following pages of the Unit 1 Facility Operating License with the attached revised pages. The revised pages are identified by amendment number and contain marginal lines indicating the areas of change.

REMOVE

4

Appendix C

INSERT

4

-

Replace the following pages of the Unit 2 Facility Operating License with the attached revised pages. The revised pages are identified by amendment number and contain marginal lines indicating the areas of change.

REMOVE

3

Appendix C

INSERT

3

-

SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION

RELATED TO AMENDMENT NO. 94 TO

FACILITY OPERATING LICENSE NO. NPF-87

AND AMENDMENT NO.94 TO

FACILITY OPERATING LICENSE NO. NPF-89

TXU GENERATION COMPANY LP

COMANCHE PEAK STEAM ELECTRIC STATION, UNITS 1 AND 2

DOCKET NOS. 50-445 AND 50-446

1.0 INTRODUCTION

By application dated June 19, 2001, as supplemented by letters dated August 15, August 31, November 20, and December 17, 2001, former licensee, TXU Electric Company (TXU Electric) requested that the U.S. Nuclear Regulatory Commission (NRC or the Commission) consent to the direct transfer of control of TXU Electric's operating authority and 100-percent ownership interest in the Comanche Peak Steam Electric Station (CPSES), Units 1 and 2, to a newly-formed generating company: TXU Generation Company LP. In addition, TXU Electric requested that the antitrust conditions contained in Appendix C of Facility Operating Licenses (FOLs) NPF-87 and NPF-89 for CPSES, Units 1 and 2, respectively, be deleted. On December 21, 2001, the NRC issued an Order approving the transfer of the FOLs for CPSES, Units 1 and 2, to TXU Generation Company LP (the licensee), and on January 1, 2002, the NRC issued the associated, conforming license amendments. By letter dated January 2, 2002, TXU Generating Company LP adopted all proposed license amendments submitted by TXU Electric, including the proposed deletion of Appendix C to the FOLs. This safety evaluation (SE) concerns deletion of Appendix C to the FOLs.

The supplemental letters dated August 15, August 31, November 20, and December 17, 2001, provided clarifying information that did not change the NRC staff's proposed no significant hazards consideration determination (published August 20, 2001, 66 FR 43595) or expand the application beyond the scope of the *Federal Register* notice.

2.0 EVALUATION

The NRC staff retained the services of Mr. Joseph Rutberg, Esq., as a consultant, to evaluate the licensee's proposed deletion of Appendix C to the CPSES, Units 1 and 2 FOLs. The consultant's Evaluation Report (ER), which the NRC staff has reviewed, and adopted for reasons given therein, is attached to this SE. Accordingly, Appendix C to the CPSES, Units 1 and 2, FOLs may be deleted.

3.0 COMMENTS FROM THE UNITED STATES DEPARTMENT OF JUSTICE

The United States Department of Justice (DOJ) was consulted regarding the deletion of Appendix C to the FOLs. The DOJ had no comments.

4.0 STATE CONSULTATION

In accordance with the Commission's regulations, the Texas State official was notified of the proposed issuance of the amendments. The State official had no comments.

5.0 ENVIRONMENTAL CONSIDERATION

Pursuant to 10 CFR 51.21, 10 CFR 51.32, and 10 CFR 51.35, an Environmental Assessment, and Finding of No Significant Impact was published in the *Federal Register* on October 4, 2001 (66 FR 50696). Accordingly, based upon the Environmental Assessment, the Commission has determined that issuance of the amendments will not have a significant effect on the quality of the human environment.

6.0 CONCLUSION

The Commission has concluded, based upon the considerations discussed above, that (1) there is reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner, (2) such activities will be conducted in compliance with the Commission's regulations, and (3) issuance of the amendments will not be inimical to the common defense and security or to the health and safety of the public.

Principal Contributor: D. Jaffe

Date: March 22, 2002

Attachment: Evaluation Report

EVALUATION REPORT CONCERNING THE DELETION OF APPENDIX C

ANTITRUST CONDITIONS

COMANCHE PEAK STEAM ELECTRIC STATION UNITS 1 AND 2

DOCKET NO. 50 - 445 AND 50 - 446

PREPARED BY JOSEPH RUTBERG, Esq.

MARCH 2002

1.0 INTRODUCTION

TXU Electric Company (TXU Electric) is the holder of the facility operating licenses for the Comanche Peak Steam Electric Station, Units 1 and 2 (CPSES or the facility). Under the licenses, TXU Electric is exclusively authorized to operate and possess the facility, owned 100% by TXU Electric. By application dated June 19, 2001, TXU Electric requested that the U.S. Nuclear Regulatory Commission (NRC) consent to the direct transfer of TXU Electric's authority under the operating licenses for CPSES to occur on January 1, 2002, to a Texas limited partnership. At the time of the application was submitted the name of the limited partnership had not been determined, however we have since been advised by TXU Electric that the limited partnership will be named TXU Generation Company, LP. The application requests that the antitrust license conditions contained in Appendix C to the CPSES operating licenses (OLs) be removed as part of the transfer of the license to TXU Generation Company, LP.

The transfer aspect of the application was the subject of a separate Federal Register notice and will be considered in a separate Safety Evaluation.

A Federal Register notice was published on August 20, 2001, setting forth the requested amendments, indicating that the staff proposed to determine that the amendment request involves no significant hazards consideration and provided an opportunity for the public to comment on this finding. The Notice also set forth the procedures for any person who may wish to request a hearing in connection with the amendment. No comments were received and no requests for a hearing were filed by the date established in the Notice.

2.0 BACKGROUND

The antitrust license conditions TXU Electric is requesting to be removed from the CPSES licenses were added to the licenses in 1982. They were added after an Administrative Law Judge approved a proposed settlement of a proceeding involving allegations that TXU Electric had engaged in anticompetitive activities after the issuance of the CPSES construction permits. The license conditions were designed to assure that TXU Electric's activities under the CPSES licenses would not be used to create or maintain a situation inconsistent with the antitrust laws. To this end, the conditions require the licensee TXU Electric, and its subsidiaries and successors, to provide certain services and benefits to a group of electric utilities in the "North

Texas Area.” The antitrust conditions provide benefits to these entities including, among other things: an opportunity to obtain ownership access to the CPSES facilities and in future nuclear generating units (Conditions 1 & 14); sponsorship as a member in the Texas Interconnected System (as it then existed) and the benefits associated with that membership (Condition 2); coordination of reserves, and sale, purchase or exchange of emergency and/or scheduled maintenance bulk power (Conditions 3, 4, 5, 6, 7, 8 & 13); an opportunity to participate in and facilitate the exchange of bulk power transmission (Conditions 10, 11 &12); and best effort to resolve a proceeding then pending at the FERC (Condition 15).

The request to transfer the CPSES licenses is in furtherance of compliance with certain Texas restructuring legislation. The legislation requires, among other things, that electric utilities operating in Texas are to be separated into at least three separate business activities. The impact of this legislation and other factors on the determination as to whether to grant the request to remove the CPSES antitrust license conditions are discussed further in this safety evaluation.

3.0 EVALUATION

The Atomic Energy Act of 1954 (AEA), as amended does not require or authorize antitrust review of post-operating-license (post-OL) transfer applications. See *Kansas Gas and Electric Co.*, (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999). Even though no antitrust review under § 105 of the AEA is required or authorized, the staff still must determine whether the existing antitrust license conditions should remain in the licenses or be removed as requested by TXU Electric upon the transfer of the licenses to TXU Generation Company, LP. Two separate individual Notices were published in the Federal Register advising the public of the request filed by TXU Electric to transfer the licenses and to remove the antitrust license conditions. 66 F.R.43595 (August 20, 2001). The public was afforded an opportunity to submit comments and none were filed. If the request to remove the antitrust license conditions had not been filed, an alternative result could be the existing antitrust license conditions applicable to the current licensee TXU Electric, would not be deleted but TXU Generation Company, LP would be substituted throughout the OL, as appropriate.

The Commission has determined that it has the authority to amend a license at the request of a licensee to modify, suspend or revoke its own validly imposed antitrust conditions. *Ohio Edison* (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 NRC 47, 59 (1992), *Kansas Gas and Electric Company* (Wolf Creek Generating Station, Unit 1), 49 NRC 441, 466 (1999). In connection with the Wolf Creek facility, the Commission addressed the issues to be considered when such a request is made. The Commission acknowledged that several possibilities existed for the staff to consider: (1) keep the conditions in the transferred license, (2) eliminate the conditions, or (3) modify the conditions. The Commission opined that in the abstract, no one solution can be “generically preordain[ed]” for all cases. Among the things the Commission said should be considered by the staff in determining what action to take in response to such a request are the license conditions themselves, the nature of the license transfer, and the competitive situation, in order to determine what action is warranted in a given case.

In *Wolf Creek*, the Commission approved the proposed amendment of the Wolf Creek antitrust license conditions to simply substitute the transferee in place of the existing licensees, without substantive changes to the conditions. The two existing licensees subject to the conditions were

proposing to merge to essentially become the new proposed licensee (a co-licensee with a 6-percent ownership interest in the facility was not involved in the merger). In addition, the parties requested that the antitrust license conditions be amended at the time of the transfer to substitute the new entity that would become subject to the antitrust conditions. The new transferee represented that it would be a traditional electric utility with transmission and distribution assets; therefore, keeping the existing conditions in place would not be problematical insofar as the transferee directly had the capability of complying with provisions requiring certain interconnections and related services.

In general, antitrust license conditions are imposed by the NRC under Section 105 of the AEA if the NRC finds, based on an antitrust review prescribed by section 105, that the granting of a license would create or maintain a situation inconsistent with the antitrust laws. In making this determination, the Commission takes into account, among other things, any prior anticompetitive conduct of the applicant and whether the additional generating capacity under the OL conduct would create or maintain a situation inconsistent with the antitrust laws. Antitrust license conditions are generally specific to a particular entity and its conduct in the marketplace and are distinguishable from other types of license conditions that govern the safe operation of the plant and that would be automatically transferred intact in connection with a license transfer. While Section 105 of the AEA establishes a standard for determining when antitrust license conditions may be appropriate, the Act does not establish criteria for determining when it may be appropriate to remove antitrust license conditions.

TXU Electric submitted that the antitrust conditions should be removed because they will not be applicable to TXU Generation Company, LP since it will generate electricity for sale in the wholesale power market and will not be involved in the transmission, distribution or retail sale of the electricity it produces. In addition, the application asserts that the antitrust license conditions may be inconsistent with the competitive regime established by the Texas legislature. Furthermore, the application suggests that the removal of the antitrust license conditions would be appropriate since the Commission, in connection with another direct transfer of a license, removed the antitrust license conditions as part of the approval of the transfer. The case referred to by the applicant involves the direct transfer of the Clinton Power Station license from Illinois Power Company to AmerGen Energy Company, LLC.

As referenced above, TXU Electric's request to transfer the CPSES license to A TXU Generation Company LP is, at least in part, in furtherance of complying with certain Texas restructuring legislation designed to encourage competition in the generation, transmission, distribution and retail sale of electricity. The legislation requires, among other things, regulated electric utility operations in Texas to be separated into three business activities: (1) power generation; (2) transmission and distribution; and (3) retail electric service. Since TXU Electric is now an integrated electric utility, it must take steps to separate the various functions to comply with Texas law. The Business Separation Plan submitted by TXU Electric to the Public Utility Commission of Texas (PUCT) in order to comply with the change in law and, included with the application to transfer the CPSES licenses, provided that TXU Electric, which is a wholly owned subsidiary of TXU Corp., will be reorganized to comply with the Texas requirements.

After the process set forth in the Business Separation Plan is completed, the CPSES Units will be owned and operated by TXU Generation Company, LP, a subsidiary of TXU Corp. The

organizational chart submitted with the application indicates that there will continue to be an affiliation among the constituent parts of the old TXU Electric. TXU Generation Company LP, while a separate entity will, continue to be a subsidiary of the same holding company that will own the other parts of the former TXU Electric.

Following the Commission guidance in *Wolf Creek*, I have looked at the nature of the license conditions, what they were intended to accomplish and, and whether in light of the current competitive market there is still a need to retain the conditions in the license.

The antitrust conditions being asked to be removed from the CPSES licenses were added to the licenses in 1982. They were added after an Administrative Law Judge approved a proposed settlement of a proceeding involving allegations that TXU Electric was engaged in anticompetitive activities warranting an antitrust review. The license conditions were designed to ensure that activities under the CPSES licenses would not be used to create or maintain a situation inconsistent with the antitrust laws. To this end, and as mentioned above, the conditions require the licensee TXU Electric, and its subsidiaries, to provide certain services and benefits to a group of electric utilities in the "North Texas Area." The antitrust conditions provide benefits to these entities including, among other things: an opportunity to obtain ownership access to the CPSES facilities and to future nuclear generating units (Conditions 1 & 14); sponsorship as a member in the Texas Interconnected System (as it then existed) and the benefits associated with that membership (Condition 2); coordination of reserves, and sale, purchase or exchange of emergency and/or scheduled maintenance bulk power (Conditions 3, 4, 5, 6, 7, 8 & 13); an opportunity to participate in and facilitate the exchange of bulk power transmission (Conditions 10, 11 &12); and a best effort to resolve a proceeding then pending at the FERC (Condition 15).

In 1989, as the time grew closer for the issuance of the Comanche Peak Unit 1 OL, the staff determined that because of the substantial passage of time since the imposition of the antitrust conditions a "significant change" review was appropriate. This review provided an opportunity to consider the existing competitive situation in the market served by TXU Electric before issuance of an operating license. The staff determined that the competitive situation in Texas had changed for the positive. There was an increased willingness to transmit power by the major power systems in Texas. Specifically, TXU Electric had entered into several transmission scheduling agreements that facilitated power flows for a number of power systems in Texas. Furthermore, the staff found that there was an increase in coordination between bulk power suppliers and a more open market in Texas. Subsequent to the imposition of the antitrust license conditions, three entities (Brazos, TMPA and Tex-La) purchased approximately 12% of the facility from TXU Electric. However, prior to the issuance of the OL TXU Electric repurchased the ownership shares of the three minority owners and, at the time of the issuance of the operating licenses TXU Electric owned 100% of the facility. The FERC proceeding referred to in the antitrust license conditions (Condition 15) was resolved to the satisfaction of the staff. The staff concluded that the changes that had taken place in the relevant market had resulted in a positive competitive climate and recommended that no affirmative "significant change" finding be made and thus no further antitrust proceedings be undertaken.

The amendment request again provides an opportunity to consider the competitive situation in the Texas electric utility market served by TXU Electric in order to help it determine whether the antitrust license conditions should remain in the licenses after transfer to TXU Generating Company, LP. Since the issuance of the OLs for CPSES, I believe that the competitive

situation in Texas has further improved and that based on the following information there is a good indication that this improved competitive situation will continue.

In passing the legislation referred to above the Texas Legislature intended to encourage competition at both the wholesale and retail levels. Specifically, the Legislature determined, "that the production and sale of electricity is not a monopoly warranting regulation of rates, operations, and services and that the public interest in competitive electric markets requires that, except for transmission and distribution services . . . electric services and their prices should be determined by customer choices and the normal forces of competition" Texas Utilities Code § 39.001. The organization of an electric utility into separate business activities was in furtherance of this goal. Texas law also requires that a transmission and distribution utility that owns or operates transmission facilities shall provide wholesale transmission services on a nondiscriminatory basis. Texas Utility Code § 35.004.

Of particular value in understanding the current competitive situation in Texas is the January 2001 report of the Public Utility Commission of Texas (PUCT) issued to the 77th Texas Legislature on the *Scope of Competition in Electric Markets in Texas* (Report). The PUCT indicates that it intends to create an "environment in which there are many producers and sellers of electricity, receptive customers, clear commercial rules, and the infrastructure to permit vibrant competition." Report at 3. The Report notes that the legislature's decision in 1995 to introduce competition in the sale of electricity at wholesale has yielded billions of dollars in investment in new, efficient generating facilities in Texas. Report at 4. The PUCT acknowledges that a key factor in encouraging the building of new generation facilities is the ability to interconnect with a transmission network and that such a network enables customers and suppliers to reach each other. Report at 5. To accomplish the goal the PUCT has issued a number of rules designed to accomplish this purpose. Texas Utility Code §§ 35.001 et. seq. (Competition and Transmission Access in the Wholesale Market) and Texas Utility Code §§ 39.001 et seq. (Restructuring of Electric Utility Industry).

As noted above, the antitrust conditions have been in effect since 1982, a period of time enabling a determination as to whether the conditions have been effective in encouraging competition and whether any additional benefit will accrue by continuing to have them in the licenses after the transfer. Considering the conclusions reached by the staff at the time the OL was issued for Comanche Peak, Unit One; the change in state of the law in Texas encouraging competition and the PUCT's efforts to effectuate that policy; and the current state of competition in the electric utility industry in Texas as reported by the PUCT in its January 2001 report to the Texas legislature, I conclude that there is no compelling reason to continue to have the antitrust license conditions in the transferred licenses.

I also considered TXU Electric's position that this transfer is similar to the situation involving the transfer of the Clinton license to AmerGen where antitrust conditions were not transferred with the license to a new licensee. I do not agree that the transfer to TXU Generation Company LP raises the same issues as the Clinton transfer. A key difference between the two transfers is the fact that AmerGen was never affiliated or otherwise related to Illinois Power before or after the proposed transfer in the same sense that TXU Generation Company LP will be affiliated with the reorganized parts of TXU Electric, the entity whose prior conduct entered into the determination that antitrust conditions were initially warranted.

In the *Wolf Creek* decision at p. 465, the Commission noted:

In summary, the competitive and regulatory landscape has dramatically changed since 1970 in favor of those electric utilities who are the intended beneficiaries of the section 105 antitrust reviews, especially in connection with acquisitions of nuclear power facilities and access to transmission services. For this Commission to use its scarce resources needed more to fulfill our primary statutory mandate to protect the public health and safety and the common defense and security than to duplicate other antitrust reviews and authorities makes no sense and only impedes nationwide efforts to streamline and make more efficient the federal government.

Considering these points with the fact that the competitive situation in the electric utility market has changed favorably since the license conditions were imposed, almost twenty years ago, and the fact that the Texas Legislature and the PUCT are taking additional steps to further encourage competition in this market, I believe that it is appropriate to grant the TXU Electric's request to delete the antitrust conditions from the transferred license and accordingly so recommend.