UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	**Docket No. 50-482-LT**
Kansas Gas and Electric Company, et al.	)	
(Wolf Creek Generating Station, Unit 1)	)	

REPLY BRIEF OF APPLICANTS IN RESPONSE TO THE JOINT BRIEF OF KANSAS ELECTRIC POWER COOPERATIVE AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Kansas Gas and Electric Company ("KGE"), Kansas City Power & Light Company ("KCPL") and NKC, Inc. ("NKC") (collectively, "Applicants") submit this Reply Brief in response to the Joint Brief filed by Kansas Electric Power Cooperative, Inc. and *amicus curiae* National Rural Electric Cooperative Association (collectively, "KEPCo"). KEPCo makes three main points: (1) that the NRC is legally required to conduct license transfer antitrust reviews; (2) that the NRC as a matter of policy should conduct such reviews because no other agency can do so effectively; and (3) that the specific antitrust issues raised by KEPCo in this proceeding illustrate the need for antitrust reviews. Applicants disagree with KEPCo's arguments and will reply briefly to each point.

Applicants continue to believe, as stated in their Initial Brief, that the Commission can and should make a generic determination to dispense with license transfer antitrust reviews. Applicants also believe, however, that this individual proceeding should not be held up while the Commission is making that generic determination and the associated rulemaking. Accordingly, KEPCo's petition should be forthwith rejected on the merits because it does not state any cognizable antitrust claims and because it does not adequately support the issues raised. In parallel, the Commission can proceed on a generic basis to determine that antitrust reviews should be discontinued generally as a matter of regulatory policy and to make the necessary regulatory changes.

I. LICENSE TRANSFER ANTITRUST REVIEWS ARE NOT LEGALLY REQUIRED

Section 105 of the Atomic Energy Act, 42 U.S.C. § 2135, provides the sole requirements for the Commission to conduct antitrust reviews. It requires such a review of any application for a construction permit, and a further review at the operating license stage if – and only if – there have been "significant changes" in the licensee's activities since the construction permit review. No other antitrust reviews are required by, or even mentioned in, the statute. KEPCo recognizes this statutory scheme and acknowledges that section 105 "does not explicitly refer to license transfers." KEPCo Br. at 6.

KEPCo attempts to overcome the lack of an express statutory requirement by arguing that the transfer of a license is the same as issuing a new license and should be treated in the same manner. KEPCo Br. at 7. KEPCo's premise is incorrect. No new license will be issued in this proceeding. The Applicants are merely seeking approval of the transfer, and the operating license will be amended to reflect the identity of the new licensee. As the Commission has recognized, such amendments "are essentially administrative in nature" and do not embody any significant substantive changes. 63 Fed. Reg. 66727 (Dec. 3, 1998). An administrative license amendment is simply not the same as a new license and does not trigger an antitrust review. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 N.R.C. 69, 77 & n.6 (1992) (amendment reflecting license transfer does not require prior hearing).[1]

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[1] KEPCo quotes from the Appeal Board's opinion in Florida Power & Light Co. (St. Lucie Plant, Unit No. 1), ALAB-428, 6 N.R.C. 221 (1977). KEPCo Br. at 7. There, the Appeal Board recited the general rule that the NRC's antitrust jurisdiction "does not extend over the full 40-year term of the operating license but ends at its inception." 6 N.R.C. at 226. The Board then speculated in a footnote that there might "perhaps" be an exception "where a plant is sold or so significantly modified as to require a new license." Id. n.12. None of these circumstances was present in the St. Lucie case, so the Board's observation was unnecessary and certainly is not binding on

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Finding little support in the text of the statute, KEPCo argues that the Commission has interpreted section 105 to require an antitrust review of license transfer applications. KEPCo Br. at 7. For this proposition, KEPCo cites a footnote in Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 N.R.C. 47, 60 n.54 (1992). That footnote simply describes the Staff's practice at that time and does not hold or suggest that such reviews are *required* by section 105. Moreover, the Perry case did not involve a license transfer, but rather an application by the licensee to suspend its existing antitrust license conditions. Applicants are aware of no case – and KEPCo has cited none – in which the Commission has held that the Atomic Energy Act requires an antitrust review of license transfer applications. Indeed, the Commission's South Texas decision, discussed at length in the Applicants' Initial Brief, suggests just the opposite. Houston Lighting & Power Co. (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 N.R.C. 1303 (1977).[2]

KEPCo next attempts to minimize the legislative history and the American Public Power decision by arguing that they deal only with license renewal applications. KEPCo Br. at 9-10. The distinction is unpersuasive. The 1970 Joint Committee Report deals generally with the initial licensing process for a plant and subsequent applications that may be filed for amendments, extensions and renewals. The Report makes clear that antitrust reviews are triggered only by "the *initial* application for a construction permit, the *initial* application for operating license, or the *initial* application for a modification which would constitute a new or substantially different facility." H.

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the Commission. In any event, the footnote proves little here because Wolf Creek is not being sold or substantially modified, and there is no need for a new license.

[2] The Commission adhered to this position when it added Part 54 to its regulations, observing that "Congress did not intend antitrust review for other than initial operating licenses, absent modifications constituting a new or substantially different facility." 56 Fed. Reg. 64943, 64970 (Dec. 13, 1991).

Rep. No. 91-1470 (1970), reprinted in 1970 USCCAN 4981, 5010 (emphasis added). Antitrust reviews are not triggered by "other applications which may be filed." Id. The Joint Committee was clearly speaking generally, and not solely of license renewals. By any fair reading of the Report, Congress did not intend any post-licensing antitrust reviews of any sort, except where the nature of the facility was to be substantially changed. This interpretation was in substance accepted in the American Public Power case, where the D.C. Circuit examined the legislative history and held that "[t]he Commission has permissibly chosen to limit its antitrust review duties to situations where it issues a new operating license." American Public Power Ass'n v. NRC, 990 F.2d 1309, 1314 (D.C. Cir. 1993).

Finally, KEPCo argues that the Commission's regulations require antitrust review of license transfer applications. KEPCo Br. at 11-13. KEPCo relies primarily on 10 C.F.R. §§ 2.101(a)(1) and 2.101(e), but neither section supports KEPCo's position. Section 2.101(a)(1), as recently amended, simply specifies with whom an application for a license, a license transfer or a license amendment is to be filed. 63 Fed. Reg. 66730 (Dec. 3, 1998). It says nothing about whether license transfer applications will be subject to antitrust reviews. Section 2.101(e) deals with the processing of antitrust information submitted in connection with an application for an operating license. It says nothing about license transfer applications.[3]

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[3] Under section 2.101(e)(1), the review process begins "[u]pon receipt of the antitrust information responsive to Regulatory Guide 9.3 submitted in connection with an application for a *facility operating license* under section 103 of the Act." (emphasis added). Regulatory Guide 9.3 deals exclusively with antitrust reviews at the operating license stage. Neither the regulation nor the Regulatory Guide addresses license transfers. KEPCo argues that Applicants have admitted that the regulations apply to license transfers. KEPCo Br. at 13. In fact, the Staff's practice has been to review transfer applications generally in accordance with the "significant changes" analysis provided in section 2.101(e) for operating license applications. See NUREG-1574, Standard Review Plan on Antitrust Reviews § 3 (Dec. 1977). The issue here, however, is whether section 2.101(e) *requires* antitrust reviews for transfer applications. The regulation, on its face, clearly does no such thing. To the extent there is any doubt on the matter, it could be clarified in the rulemaking that the Commission will probably have to undertake to amend section 50.80(b).

The only regulation that may need attention is section 50.80(b). The antitrust information requirements in that provision were originally adopted in 1970 without notice and comment as a matter of procedure and practice. 35 Fed. Reg. 19655, 19657 (Dec. 29, 1970). Since the regulation refers to the license "to be issued," it may be that the antitrust review process was intended to apply only to transfers occurring during the initial licensing process and before issuance of the operating license. In any event, Applicants believe that it would be prudent to amend section 50.80(b) by rulemaking. In view of the advance Federal Register notice provided by the publication of the March 2 Memorandum and Order, 64 Fed. Reg. 11069 (March 8, 1999), the rulemaking could be conducted on an expedited basis. As KEPCo recognizes, the Commission is free to change its policies and practices so long as there is an adequate record and a reasoned basis for the change. KEPCo Br. at 14-15. The record being developed in this proceeding, along with the record developed in the rulemaking to amend section 50.80(b), should be more than sufficient to satisfy the requirements.

II. POLICY CONSIDERATIONS SUPPORT THE ELIMINATION OF LICENSE TRANSFER ANTITRUST REVIEWS

KEPCo's policy arguments boil down to two main contentions: First, increasing concentration in the electric utility industry increases the danger that valuable nuclear generating facilities can be misused to restrain competition. Second, only the NRC can effectively police its licensees and enforce the antitrust laws. KEPCo Br. at 15-19. Neither argument withstands scrutiny.

The first point might make some sense if we were dealing with an application to build a new nuclear plant. But the issue here is simply the transfer of an existing plant, well into its second decade of operation, from one company to another. That is not likely to change the competitive landscape significantly – even less so here where the transfer is merely a consolidation among existing co-owners of the plant. KEPCo's broad concerns about barriers to entry and the structure

of the industry can be better addressed and remedied by other agencies, such as FERC and the Justice Department, that have primary jurisdiction over such matters.[4] An NRC license transfer proceeding is a slender reed on which to rest a general reexamination of the electric utility industry.

KEPCo's second point is simply disingenuous. There is no doubt that FERC can and will remedy anticompetitive conditions or practices during its review of utility mergers.[5] Presumably that is why KEPCo chose to submit to FERC the very same claims it is making here. See Attachment 1 to KEPCo's Petition. Section 203b of the Federal Power Act, 16 U.S.C. § 824b(b), specifically provides that FERC may approver a merger "in whole or in part and upon such terms and conditions as it finds necessary and appropriate."

FERC's Merger Policy Statement makes it clear that FERC will perform a comprehensive antitrust review of utility mergers and that it considers the effect of mergers on competition to be "critically important."[6] FERC also made it clear that it will impose "conditions that are designed to remedy problems associated with the merger" and that it expects its "competition analysis to focus extensively on generation market power and on whether a proposed merger exacerbates market power problems." Merger Policy Statement at 30,120. FERC left no doubt as to its willingness to act:

> We intend to tailor conditions and remedies to address the particular concerns posed by a merger on a case-by-case basis.

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[4] KEPCo's complaints about barriers to entry are puzzling because KEPCo itself is a co-owner of Wolf Creek and shares in all the competitive benefits it provides. If Wolf Creek is a barrier to entry, it is a barrier that protects KEPCo no less than the Applicants.

[5] The mergers are also subject to review by the Justice Department or the FTC, and state agencies. KEPCo does not discuss those additional reviews.

[6] Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, 61 Fed. Reg. 68595 (Dec. 30, 1996), reprinted in III Fed. Energy Reg. Comm'n Rep. (CCH) at 30,118 (hereinafter "Merger Policy Statement").

> If an applicant does not propose appropriate remedies to mitigate the anticompetitive impact of a merger, the Commission intends to fashion such remedies during the course of its consideration of an application.

Id. at 30,121. And in fact FERC has imposed such conditions in other cases, including provisions relating to transmission access.[7]

KEPCo argues that FERC lacks authority to review or alter NRC license conditions. KEPCo. Br. at 19 & n.15. That may be true but is of no relevance. FERC will review the underlying economic conditions and will impose its own conditions to remedy any competitive problems that may be shown to exist. FERC does not need to alter the NRC's license conditions in order to grant KEPCo relief, if indeed KEPCo is entitled to relief. Moreover, FERC and the other federal and state agencies are much better equipped to make the broad policy judgments about economic conditions and competitive forces in the evolving electric utility industry. That is hardly the principal mission of the NRC. Nor is it the NRC's mission, as KEPCo urges (KEPCo Br. at 4), to "ensure that nuclear power is used economically." See Pacific Gas & Electric Co. v. State Energy Resources Cons. & Dev. Comm'n, 461 U.S. 190, 211-12 (1983). The NRC can safely leave the merger antitrust reviews to the other agencies without fear that legitimate competitive concerns will be ignored or overlooked.

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[7] See, e.g., Ohio Edison Co., 81 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,110, at 61,408 (1997) (conditions imposed to remedy intervenors' competitive concerns). James W. Moeller, Requiem for the Public Utility Holding Company Act, 17 ENERGY L.J. 343, 368-69 (1996) (describing Northeast Utilities and Public Service of New Hampshire merger); Stephen Angle & George Cannon, Jr., Independent Transmission Companies: The For-Profit Alternative in Competitive Electric Markets, 19 ENERGY L.J. 229, 272-78 (1998) (generally describing FERC's practices).

III. KEPCO'S ANTITRUST CLAIMS IN THIS CASE ARE WITHOUT MERIT

KEPCo closes by arguing that the specific antitrust claims it has raised in this proceeding illustrate the need for NRC antitrust reviews of license transfer applications. KEPCo Br. at 20-22. On the contrary, KEPCo's claims are wholly insubstantial and provide no basis for performing antitrust reviews of license transfer applications. The claims must be rejected, and KEPCo's Petition must be denied.[8]

KEPCo's main complaint appears to be that Westar Energy (the new licensee) would be able to dispatch Wolf Creek's power throughout the combined service areas of KGE and KCPL, while KEPCo would still be subject to the old KGE license conditions for its members in the old KGE service area, and subject to the old KCPL license conditions for its members in the old KCPL service area. See KEPCo Br. at 8, 20, 21.[9] This certainly was not the intent – nor will it be the effect – of the amendments to the Wolf Creek antitrust license conditions proposed by Applicants.[10] The proposed amendments substitute Westar Energy, Inc. as the defined "Licensee" in place of KGE and KCPL. Thus, the combined service areas of KGE and KCPL will become the "Licensee's Service Area." As the conditions are worded, KEPCo will be able to use its share of Wolf Creek power throughout the new Westar service area. KEPCo's complaint is therefore un-

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[8] KEPCo complains that it should not bear the burden of persuading the Commission to continue performing antitrust reviews of license transfer applications. KEPCo Br. at 15. However, KEPCo *does* bear the burden of demonstrating that its claims are within the scope of the proceeding, relevant to the findings the Commission must make, and adequately substantiated with facts or expert opinions. 10 C.F.R. § 2.1306(b)(2). KEPCo has completely failed to meet this burden.

[9] KEPCo states on page 20, for example, that "KEPCo's economic use of its share of Wolf Creek would be artificially restricted to the KGE area, while the Applicants would economically dispatch Wolf Creek over the combined Westar Energy control area."

[10] The proposed changes to the antitrust license conditions are reflected in a mark-up submitted to the NRC by letter dated November 10, 1998 from Otto L. Maynard, President of Wolf Creek Nuclear Operating Corporation.

founded.[11] Moreover, to the extent there is any inconsistency between the old KGE and KCPL conditions, Westar has clearly committed to abide by whichever conditions are more restrictive. See Applicants' October 27, 1998, Application to Transfer at 9-10 and nn. 7 & 8. Thus, KEPCo will get the benefit of whichever conditions are more favorable to it. KEPCo has no legitimate cause for complaint.

KEPCo's other "antitrust" claims have nothing to do with the traditional concerns of the antitrust laws. KEPCo says that it will have trouble negotiating with "the new 94% owner of Wolf Creek" and will have "no hope of effectuating a change in the operating license or ownership agreement." KEPCo Br. at 19.[12] This has nothing to do with wholesale or retail competition in the electric utility industry. Rather, it concerns the contractual relationship between KEPCo and its co-owners. The antitrust laws were not intended to enhance one party's bargaining power in a contract negotiation. Likewise insubstantial is KEPCo's complaint about the so-called "after-the-fact accounting." KEPCo Br. at 21. The terms and conditions under which Western Resources supplies power to KEPCo are set forth in an agreement that was filed with, and accepted by, FERC in 1993.[13] KEPCo should address any complaint regarding that agreement to FERC.[14] Such a complaint is not within the scope of this proceeding.

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[11] This is illustrated by the two conditions (2(b) and 7(d)) cited by KEPCo to show how it would be unfairly limited to the old KGE service area. KEPCo Br. at 20-21. In both cases, the service area of the amended conditions will now be that of Westar.

[12] KEPCo does not explain what changes it would like to make, nor why it thinks negotiating with two 47% co-owners is easier than dealing with one 94% co-owner.

[13] See FERC Letter Order of Dec. 9, 1993, Docket No. 93-683 (referencing Western Resources' FERC Rate Schedule No. 264). Regulatory Guide 9.1 makes it clear that the NRC will defer to FERC and state agencies concerning the terms and conditions for the sale of power and transmission services.

[14] KEPCo has raised this issue in the FERC merger proceeding, and it will be addressed there. In addition, under section 206 of the Federal Power Act, 16 U.S.C. § 824e, FERC has juris-

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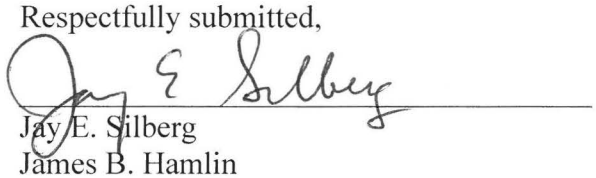
In their Answer to KEPCo's Petition to Intervene, Applicants explained in detail why KEPCo's claims are inadmissible and must be rejected. For the reasons stated there, KEPCo's Petition should be dismissed wholly apart from the broader policy issues raised by the March 2 Memorandum and Order.

Respectfully submitted,



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diction to review complaints regarding whether contracts subject to its jurisdiction are just and reasonable.

CERTIFICATE OF SERVICE

I hereby certify that on the 23d day of March, 1999, the foregoing Reply Brief of Applicants in Response to the Joint Brief of Kansas Electric Power Cooperative and National Rural Electric Cooperative Association was served upon the persons listed below by e-mail with a conforming copy deposited in the U.S. mail, first-class, postage-prepaid.

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