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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

RESPONSE OF WML ASSOCIATES
TO COMMISSION MEMORANDUM AND ORDER CLI-99-19

The Nuclear Regulatory Commission (Commission or NRC) in its Memorandum and Order dated March 2, 1999 (CLI-99-05) in the captioned proceeding sought comments from the Parties in the proceeding and interested nonparties as to whether it should eliminate antitrust reviews in connection with license transfers and thereby terminate the proceeding originated by Kansas Electric Power Cooperative (KEPCo). The Commission received comments from the Parties and several interested nonparties. In its Memorandum and Order dated June 18, 1999 (CLI-99-19), the Commission dismissed Kansas Electric Power Cooperative, Inc.'s (KEPCo) petition seeking an antitrust review in conjunction with the transfer of the Wolf Creek Generating Station, Unit 1 (Wolf Creek) operating license to a newly formed entity, Westar Energy, Inc. CLI-99-19 also provided the opportunity for the Parties and other interested persons to respond by letter pursuant to the "appropriate disposition of the existing antitrust license conditions due to the planned changes in the Wolf Creek ownership and operation." CLI-99-19, p. 35.

WML Associates would like to provide the following comments on the Commission's Memorandum and Order and any proposed disposition of existing antitrust license conditions

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attached to the Wolf Creek license being transferred to the new owner.

I. Initial Brief of WML Associates

The Commission's characterization of our initial Brief did not capture the thrust of the argument against cessation of post-operating license reviews. Indeed, we do believe [as emphasized by the Commission in CLI-99-19, p. 5] that the Commission has had a significant role in promoting competition in electric bulk power markets resulting in "disadvantaged" entities saving millions of dollars in monopoly rents. However, the thrust of WML Associates' argument was that the Commission's reading of the Act and its legislative history is incorrect. The Commission interpreted its antitrust review authority to terminate with the issuance of the nuclear operating license. We disagree, as stated in our *Amicus Curiae* Brief in the captioned proceeding:

> If the NRC believes that its mandate to conduct competitive reviews of new owners is limited to owners at the construction permit or combined construction operating license stage and not new owners resulting from license transfers, it should seek clarification from Congress concerning its review responsibilities under Sec. 105c(2) of the Atomic Energy Act of 1954, as Amended (Act). *Amicus Curiae* Brief of WML Associates, p. 2.

The Commission's reading of the Act as well as its interpretation of the legislative history of the Act appear too complex. The Act requires a competitive review at the construction permit (CP) stage, and the operating license (OL) stage if "significant changes" are identified, of all prospective new owners of nuclear power production facilities.[1] The Act does

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[1]In many instances, nonowner operators can wield the same type of market control as an owner operator and should be reviewed for any anticompetitive activities that may impact the markets in question. However, relatively small, or *de minimis*, applicants are excluded from the

not preclude review of new owners after issuance of an OL. A "reasonable man" or common sense reading of the Act requires review of all new owners--to do otherwise could lead to "sham" reviews and circumvention of the competitive review process intended by Congress.[2]

To read the Act as precluding the review of a new owner because the ownership change occurred after issuance of an OL, would contradict the simple, direct requirement of conducting reviews of prospective owners called for in the Act. The simple interpretation seems obvious, i.e., review all new owners, while the complex interpretation appears contradictory, i.e., review new owners at the CP/OL or COL, but not post-operating license. Nowhere does the Act state or imply that new post-operating license owners would undergo a review at the Federal Energy Regulatory Commission, Department of Justice, Federal Trade Commission or in any other *fora*. The Commission should draft legislation eliminating whatever competitive review function(s) it feels it has performed in the past and is no longer required to perform and forward said draft legislation to the House Judiciary Committee and the House Commerce Subcommittee on Energy and Power for their review. Congress intended for all new owners to be reviewed and it is Congress who should provide the public with the rationale as to why all new owners, as proposed by the Commission, should not undergo a competitive review.

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normal antitrust review procedures.

[2]As envisioned by the Commission in CLI-99-19, prospective owners could undergo a license review at the OL stage, fully intending to sell, merge or transfer in some way the facility to another entity after issuance of the OL, thereby completely circumventing the review process for the new entity. The Commission's ruling in CLI-99-19 may have the unintended effect of stimulating a variety of machinations by licensees and potential licensees seeking to avoid competitive scrutiny of their marketing activities.

II. Wolf Creek Antitrust License Conditions

We do not believe the destiny of antitrust license conditions should be determined by Commission *fiat*. The antitrust license conditions attached to over one half of the operating reactor licenses were developed after close examination of individual competitive environments throughout the country. The Wolf Creek license conditions, and indeed all of the NRC's antitrust license conditions, were developed primarily from case specific data and focused to lessen abuses or potential abuses of market power by applicants or licensees of nuclear power production facilities. Any suggestion of eliminating or modifying any antitrust license conditions without a careful consideration of the competitive implications of such action seems incredulous.

Antitrust license conditions, unless specifically developed as time-sensitive, are a part of the nuclear license and do not expire until the license expires. Although many conditions grant access to various aspects of the nuclear facility and ancillary services on a one-time basis, the majority involve continuing obligations with accompanying competitive benefits in various bulk power services markets. Eliminating, rescinding or modifying antitrust license conditions which were developed after careful analysis of the competitive structure, conduct and performance of site specific data and markets, would not be in the public interest; moreover, such a policy would seem to contradict the intent of Section 105c.

Although we do not support changes in existing antitrust license conditions without a factual basis of support, we do believe that if competitive circumstances change, the

Commission can, as it did in Ohio Edison Co.,[3] conduct hearings to determine if license conditions should be modified. If there were a need to modify these license conditions based on "changed circumstances", we would envision, as in Ohio Edison Co., the licensee or another interested entity, making the request for such a hearing. The Commission seems to agree,

> We do not believe it is possible in the abstract to generically preordain any one solution for all conceivable cases. The license conditions on their face, the nature of the license transfer, and perhaps the competitive situation as well, would need to be considered to determine what action were warranted in a given case. CLI-99-19, p. 33. [Emphasis added]

However, in the very next sentence of the same passage, the Commission considers three scenarios in which license conditions may be modified "without regard to the competitive situation". Indeed, any post-operating license change in the Wolf Creek antitrust license conditions or any antitrust license conditions, should not be determined "without regard to the competitive situation", as implied by the Commission, but only in conjunction with an analysis of the existing competitive situation addressed by the conditions and the effect on the

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[3]Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 NRC 47, 54-59 (1992) In this proceeding, the Licensees requested suspension of the antitrust license conditions attached to the Perry Nuclear Power Plant, Unit 1. Their request was denied by the staff and ultimately by the Licensing Board and the Commission. The Licensees originally agreed that if they prevailed on an initial "bedrock" legal issue, then the Licensing Board would hold a factual evidentiary proceeding. The City of Cleveland challenged the Commission's authority to suspend antitrust license conditions and appealed the decision to the Circuit Court of Appeals for the District of Columbia. The Court upheld the Commission's order and denied the City's appeal on October 27, 1995. Consequently, there was no need to conduct a factual proceeding in this case; however, we view this case as a test case and would expect any subsequent requests to modify license conditions to be based on the factual circumstances unique to the entities involved.

competitive situation from a modification of the license conditions.

Antitrust license conditions are not the "boilerplate" license conditions often imposed by other Commission regulations. Antitrust license conditions are sensitive to both product and geographic parameters and have usually been developed and made a part of a particular license after contentious debate concerning the licensee's conduct and performance in specific markets. Modifying or eliminating antitrust license conditions without ample "sunshine" on all of the relevant issues that led to their original imposition would be irresponsible. We suggest that any requests to change the Wolf Creek antitrust license conditions, or any other antitrust license conditions, be examined in the context of a factual, evidentiary hearing before the Commission. Moreover, any such hearing should only be convened at the request of the parties involved or other interested entities and should not as a matter of policy or procedure accompany all license transfers.

III. Rulemakings

The Commission indicated that it will direct the staff to "initiate a rulemaking to clarify the terms and purpose of section 50.80(b)". CLI-99-19, p.28. Given the Commission's leanings and stated policy objective to reduce, and eliminate in certain areas[4], its role as antitrust adjudicator for its licensees, we must assume that any rulemaking process will reverse a Commission policy to ensure that all new owner's activities do not "tend to create or maintain a situation inconsistent with the antitrust laws." The Commission's rules and regulations,

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[4]Referring to its prior practice of post-operating license antitrust reviews, the Commission has stated that, "we would abandon it as largely duplicative...and not a sensible use of our limited resources...." CLI-99-19, p. 29.

primarily 10 CFR 50.33(a), 10 CFR 50.80(b), Regulatory Guides 9.1-9.3, and its Standard Review Plan for conducting antitrust procedures and reviews, have historically been interpreted by the Commission to require reviews of all new owners. Prior to making this shift in policy, we suggest that the Commission undertake its rulemaking process with the following two corollaries in mind:

a. the Commission has interpreted the legislative history of the Atomic Energy Act with short-run policy objectives in mind, and

b. there has been no concrete proposal put forward by the Commission to shift this review responsibility to another federal agency.

It would seemingly be more prudent for the Commission to have its interpretation of the legislative history of the Act validated by Congress before it changes its rules and procedures that have worked so well since the Commission's inception. Even though the domestic commercial nuclear power industry has developed into a mature industry, regulators should not cloud the competitive landscape for nuclear power, which may have beneficial effects on our power mix in the future, with rules and regulations designed to limit, not promote, competition in bulk power services markets.

The Commission in CLI-99-19, has decided to narrow the regulatory scope over its licensees' competitive activities. We believe the Commission's rulemaking process should not only include input by all interested entities, but include coordination with the other federal agencies that the Commission expects to accede its current regulatory oversight role. As we stated in our *Amicus Curiae* Brief,

> To do otherwise would create a regulatory gap or "grey area" of review because no other agency has <u>explicit</u> jurisdiction to review the competitive effects associated with a change in

nuclear plant ownership. *Amicus Curiae* Brief of WML Associates, p. 7.

For the foregoing reasons, we strongly urge the Commission to reconsider its decision in CLI-99-19 and seek Congressional input pursuant to the Commission's review responsibilities for all new owners of nuclear power production facilities, including ownership changes after issuance of an operating license. In the next five years, there may be many new hybrid owner operator and nonowner operator changes involving nuclear plant licensees--requiring an even more diligent oversight of licensees' competitive activities. Any future rulemaking should duly consider, not ignore, this trend. Moreover, we feel any attempt to modify existing antitrust license conditions must occur in a setting where all of the requisite facts are considered by the Commission and not in an environment where short-run policy objectives may temper the ultimate benefits that accompany increased competition in the electric bulk power industry.

Respectively submitted,

William M. Lambe

William M. Lambe, Principal

WML Associates
4834 Chevy Chase Blvd.
Chevy Chase, MD 20815
301-951-7050

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CERTIFICATE OF SERVICE

I hereby certify that I have provided copies of the foregoing document, Response of WML Associates To Commission Memorandum and Order CLI-99-19, in the captioned proceeding to the following persons by deposit in the U.S. mail (*) or by e-mail (**), as indicated.

Office of the Secretary* **
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail: secy@nrc.gov)

Office of Commission Appellate*
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Harold Haun**
Vice President of Administration
and General Counsel
Kansas Electric Power Cooperative, Inc.
5990 SW 28th Street
P.O. Box 4877
Topeka, KS 66604
(E-mail: hhaun@kepco.org)

Douglas Smith, Esq.**
General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
(E-mail: douglas.smith@ferc.fed.us)

Robert W. Bishop**
Vice President and General Counsel
Nuclear Energy Institute
1776 I Street, N.W.
Washington, DC 20006)
(E-mail: rwb@nei.org)

Jay Silberg, Esq.**
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, DC 20037
(E-mail: jay_silberg@shawpittman.com)

Richard Geltman, Esq.**
General Counsel
American Public Power Association
2301 M Street, N.W.
Washington, DC 20037
(E-mail: rgeltman@appanet.org)

William T. Miller, Esq.**
Miller, Balis & O'Neil, P.C.
Suite 700
1140 Nineteenth St., N.W.
Washington, DC 20036
(E-mail: wmiller@mbolaw.com)

Wallace Tillman, Esq.**
General Counsel
National Rural Electric Cooperative Assoc.
4301 Wilson Boulevard
Arlington, VA 22203
(E-mail: wallace.tillman@nreca.org)

Joel I. Klein, Esq.**
Assistant Attorney General
U.S. Department of Justice
Antitrust Division, Rm. 3109
10th St. and Constitution Ave., N.W.
Washington, DC 20530
(E-mail: antitrust@usdoj.gov)

Daniel I. Davidson, Esq.**
Ben Finkelstein, Esq.**
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Suite 1100
Washington, DC 20005
(E-mail: dan.davidson@spiegelmcd.com)
(E-mail: ben.finkelstein@spiegelmcd.com)

Charles A. Acquard, Executive Director*
National Association of State Utility
Consumer Advocates
1133 15th Street, N.W., Suite 550
Washington, DC 20005

Albert A. Foer, President**
The American Antitrust Institute
2919 Ellicott Street, N.W.
Washington, DC 20008
(E-mail: bfoer@aol.com)

William M. Lambe

William M. Lambe, Principal

WML Associates
4834 Chevy Chase Blvd.
Chevy Chase, MD 20815
301-951-7050

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