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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

In the Matter of

Kansas Gas and Electric Company, et al.  
(Wolf Creek Generating Station, Unit 1)

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Docket No. 50-482-LT

**INITIAL BRIEF OF APPLICANTS IN RESPONSE TO THE  
NRC'S MEMORANDUM AND ORDER REGARDING  
ANTITRUST REVIEW OF LICENSE TRANSFERS**

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**INITIAL BRIEF OF APPLICANTS IN RESPONSE TO THE  
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ANTITRUST REVIEW OF LICENSE TRANSFERS**

**I. INTRODUCTION**

On October 27, 1998, Kansas Gas and Electric Company ("KGE"), Kansas City Power & Light Company ("KCPL"), and NKC, Inc. ("NKC") (collectively referred to as the "Applicants") submitted an application requesting that the Nuclear Regulatory Commission ("NRC" or "Commission") consent to the transfer of KGE's and KCPL's possession-only interests in the Operating License for the Wolf Creek Generating Station, Unit 1 ("Wolf Creek") to NKC, which will later be renamed Westar Energy, Inc. (NKC and Westar Energy, Inc. will be collectively referred to as "Westar Energy").<sup>1</sup> The Application also requests that the Commission amend the Operating License pursuant to 10 C.F.R. § 50.90, in order to delete KGE and KCPL as licensees and to add Westar Energy in their place.

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<sup>1</sup> "Application to Transfer KGE's and KCPL's Possession-Only Interest in Operating License No. NPF-42 for the Wolf Creek Generating Station and to Amend Operating License No. NPF-42 to Reflect Transfer of Ownership" (the "Application"). The Application was submitted under cover letter from the Wolf Creek Nuclear Operating Corporation ("WCNOC"), which joined the Application with respect to the administrative license amendment request under 10 C.F.R. § 50.90.



KGE and KCPL each currently owns an undivided 47% interest in Wolf Creek; the remaining 6% undivided interest in Wolf Creek is held by the Kansas Electric Power Cooperative, Inc. ("KEPCo"). KGE, KCPL, and KEPCo each own the stock of WCNOG, and are responsible for the costs of operating, maintaining and decommissioning Wolf Creek in proportion to their respective ownership interests in Wolf Creek. As the Application explains in detail, Westar Energy is the new company to be formed as a result of a transaction in which the electric utility operating assets of Western Resources, Inc. (KGE's parent), KGE, and KCPL will be combined. Western Resources, Inc. ("Western Resources"), operating under its trade name KPL and through its wholly owned subsidiary KGE, is a public utility engaged in the generation, transmission, distribution, and sale of electric energy in Kansas.

On February 18, 1999, KEPCo filed a Petition to Intervene and a Request for Hearing in this proceeding (the "Petition"). KEPCo's Petition claimed that the proposed license transfer would have anticompetitive effects. KEPCo, therefore, requested that the Commission conduct an antitrust review of the Application under section 105 c. of the Atomic Energy Act ("Act").<sup>2</sup> In their March 1, 1999 Answer to KEPCo's petition, the Applicants requested that the Commission reject the Petition because the issues raised therein were outside the scope of this license transfer proceeding, the Petition did not make the necessary factual showing to support its position, and the Commission has not made, nor should it make, a finding of significant change.<sup>3</sup>

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<sup>2</sup> 42 U.S.C. § 2135(c).

<sup>3</sup> See, Answer of Applicants to Petition to Intervene and Request for Hearing of the Kansas Electric Power Cooperative, Inc., Docket No. 50-482 (filed March 1, 1999) ("Answer").

On March 2, 1999, the Commission issued a Memorandum and Order, CLI-99-05, stating that although the NRC Staff "historically has performed a 'significant changes' review in considering the antitrust aspects of certain kinds of license transfers,"<sup>4</sup> the Commission in this case will consider whether it should change this prior practice and direct the NRC Staff to no longer conduct significant changes reviews in license transfer proceedings.<sup>5</sup> Accordingly, the Commission directed the parties to this proceeding to submit briefs addressing the following issue: "whether as a matter of law or policy the Commission may and should eliminate all antitrust reviews in connection with license transfers and therefore terminate this adjudicatory proceeding forthwith."<sup>6</sup>

As set forth below, the Commission should reject KEPCo's Petition for the reasons explained in Applicants' Answer, regardless of how the Commission rules on the question raised in CLI-99-05. Applicants' Answer establishes grounds for rejecting the Petition independent of whether the Commission decides to eliminate all antitrust reviews of license transfers. In direct response to CLI-99-05, Applicants also demonstrate below that the Commission should, for legal and policy reasons, eliminate all antitrust reviews of license transfers. If the Commission decides to eliminate antitrust reviews of license transfers, however, the Commission should initiate an expedited rulemaking to make conforming changes to 10 C.F.R. § 50.80(b), which currently requires certain license transfer applicants to submit antitrust information to the Commission. Nevertheless, regardless of how the Commission decides to resolve the issue in CLI-99-05, KEPCo's Petition should be rejected on the grounds set forth in Applicants' Answer.

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<sup>4</sup> CLI-99-05, slip. op. at 1, 64 Fed. Reg. 11,069 (1999).

<sup>5</sup> Id. at 2.

<sup>6</sup> Id.

## **II. SUMMARY OF RESPONSE TO CLI-99-05**

There are both legal and policy justifications for the NRC to eliminate all antitrust reviews in license transfer proceedings. By its express terms, section 105 of the Act -- which is the sole source of the Commission's jurisdiction over antitrust issues -- requires the Commission to perform antitrust reviews at two, and only two, stages of the licensing process: first, when an application is submitted for a license to construct a nuclear plant; and second, when an application is submitted for a license to operate a nuclear plant. Section 105 does not contemplate Commission review of antitrust issues upon a license transfer. In addition, Commission and court precedent, as well as the legislative history of section 105, unequivocally support a legal finding that the Commission need not conduct antitrust reviews of license transfer applications.

There also are compelling policy reasons why the Commission should not perform antitrust reviews of license transfers. The NRC's primary mission is to protect the public health and safety, not to economically regulate utilities. Other governmental agencies have jurisdiction over -- and the expertise necessary to evaluate -- antitrust implications of transactions that result in license transfers of nuclear power plants. For example, in this proceeding the Federal Energy Regulatory Commission ("FERC"), the State Corporation Commission of the State of Kansas, ("Kansas Commission"), the Missouri Public Service Commission ("Missouri Commission"), and either the Federal Trade Commission ("FTC") or the Department of Justice ("DOJ"), will all review antitrust aspects of the Applicants' proposed merger. Thus, performing an antitrust review of license transfers would be an inefficient and unnecessary use of the NRC's limited resources, especially where there is no statutory imperative requiring such consideration.



In addition, congressional action and initiatives by other federal agencies have significantly lessened barriers to access to nuclear power, which was the primary goal underlying Congress' enactment of section 105 c. The FERC recently has taken steps to increase access to electric transmission by exercising its authority to order wheeling under the Energy Policy Act of 1992 and by mandating under Order No. 888 that all public utilities file nondiscriminatory open access transmission tariffs. Numerous states have implemented, or are in the process of implementing, regulations allowing retail customers transmission access to generation of their own choice. These developments have significantly reduced, if not eliminated, the justification underlying the NRC's antitrust responsibilities.

As CLI-99-05 recognizes, the Commission Staff has performed reviews of license transfers under section 105 c. to determine whether significant changes have occurred subsequent to the Commission's last antitrust review. This practice should not deter the Commission from eliminating such reviews for the future. Agencies are free to change the policies, practices and statutory interpretations, where supported by a reasoned basis. In the event the Commission determines that such a change is appropriate, the Commission should initiate an expedited rulemaking to make conforming changes to 10 C.F.R. § 50.80(b), which currently requires certain license transfer applicants to submit antitrust information to the Commission, although it does not explicitly require any review of that data.

### **III. ARGUMENT**

#### **A. The Commission Should Reject KEPCo's Petition For The Reasons Set Forth In Applicants' March 1 Answer.**

In CLI-99-05, the Commission asks whether it should eliminate all antitrust reviews in license transfer proceedings. The Commission need not decide that issue in order to reject KEPCo's Petition in this docket. In its Answer, Applicants demonstrated that the Commission

should reject KEPCo's Petition because: (1) it fails to meet the requirements set forth in 10 C.F.R. § 2.1306(b) of the NRC regulations; and/or (2) the NRC had not made, nor should it make, a finding of significant change. Based upon these considerations, the Commission should dismiss KEPCo's Petition, irrespective of its finding on the generic issue raised in CLI-99-05. Accordingly, Applicants urge the Commission to reject KEPCo's Petition for the reasons set forth in the Answer.

**B. As A Matter Of Law, The NRC Should Eliminate All Antitrust Reviews In Connection With License Transfers.**

**1. The Atomic Energy Act Does Not Authorize The Commission To Perform Antitrust Reviews of License Transfer Applications.**

Section 105 of the Act defines the Commission's antitrust jurisdiction. Under section 105 c.(1), which specifically sets forth the Commission's authority to perform antitrust reviews, when a party files with the Commission an application seeking a license to construct a commercial nuclear power plant, the Commission must obtain the Attorney General's advice concerning whether the application raises adverse antitrust concerns.<sup>7</sup> The Commission is required to publish the Attorney General's advice in the Federal Register and to give due consideration to that advice and evidence provided in subsequent proceedings.<sup>8</sup> The Commission must then "make a finding as to whether the activities under the license would

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<sup>7</sup> § 105 c.(1) & (5); 42 U.S.C. 2135(c)(1) & (5). The Commission's antitrust jurisdiction over a construction permit application under section 105 c. applies to all applications for commercial licenses under section 103 of the Act, 42 U.S.C. 2133. Facilities to be licensed under section 104 b. of the Act, 42 U.S.C. 2134(b), were only subject to antitrust review at the construction permit stage if (1) the construction permit was issued before enactment of the 1970 antitrust amendment to the Act; (2) an intervenor requested an antitrust review before the amendment was enacted; and (3) that intervenor renewed such request 25 days after the NRC published notice of the operating license application. 42 U.S.C. § 2135(c)(3); American Pub. Power Ass'n v. NRC, 990 F.2d 1309, 1313-1314 (D.C. Cir. 1993). Wolf Creek was licensed under section 103.

<sup>8</sup> § 105 c.(5); 42 U.S.C. 2135(c)(5).

create or maintain a situation inconsistent with the antitrust laws. . . ."<sup>9</sup> The Act, therefore, provides for a detailed antitrust review by the Commission at the construction permit stage of a license application.

The Act also provides for a potentially less detailed antitrust review by the Commission upon application for a license to operate a nuclear plant. Upon receiving an operating license application, the Commission must determine whether "significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous [antitrust] review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility."<sup>10</sup> Only if the Commission finds that such significant changes exist, is the full antitrust review process set forth in section 105 c.(1) triggered.<sup>11</sup>

The filing of construction permit and initial operating license applications are the only two licensing actions for which the Commission is authorized by statute to perform an antitrust review. Section 105 c. does not grant the Commission antitrust jurisdiction over license transfers, nor does any other subpart of section 105.<sup>12</sup> Moreover, section 105 is the only section of the Act which addresses the Commission's statutory jurisdiction to review the antitrust implications of a license application. As the NRC has stated, "[n]o part of the Atomic Energy

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<sup>9</sup> Id.

<sup>10</sup> § 105 c.(2); 42 U.S.C. 2135(c)(2). See footnote 7, supra, for an explanation of the very limited circumstances under which a section 104 b. license was subject to antitrust review at the operating license stage.

<sup>11</sup> Id.

<sup>12</sup> Section 105 a. states that nothing in the Act shall relieve any person from operation of the full range of antitrust laws and authorizes the Commission to suspend, revoke, or take other action against any licensee who has been found by a court of competent jurisdiction to have violated such law "in the conduct of the licensed activity." 42 U.S.C. 2135(a). Section 105 b. requires the Commission to report to the Attorney General "any information it may have with respect to any utilization of special nuclear material or atomic energy which appears to violate or tend toward violation of . . ." the antitrust laws. 42 U.S.C. 2135(b). Neither section 105 a. nor b. authorizes NRC antitrust review of a license transfer.



Act other than Section 105 explicitly deals with antitrust matters."<sup>13</sup> In fact, in South Texas, the Commission rejected arguments that other sections of the Act -- such as section 186 and section 161 -- provide the Commission with the general authority to conduct antitrust reviews:

We find the specificity and completeness of Section 105 striking. The section is comprehensive; it addresses each occasion on which allegations of anticompetitive behavior in the commercial nuclear power industry may be raised, and provides a procedure to be followed in each instance.<sup>14</sup>

The Commission added that its "antitrust authority is defined not by the broad powers contained in Section 186, but by the more limited scheme set forth in Section 105."<sup>15</sup> Likewise, the Commission rejected the "suggestion that Section 161 may serve as a source of [antitrust] authority independent of Section 105."<sup>16</sup>

The Act's legislative history and Commission cases interpreting that history make it clear that section 105 c. was intended to provide the Commission with the authority to conduct only prelicensing reviews of antitrust issues. The Commission has recognized that there is a "consistent thread" running through the legislative hearings and debates regarding section 105 c. which demonstrates that the section was designed to address "'prelicensing' or 'anticipatory' antitrust review."<sup>17</sup> For example, in its report recommending enactment of section 105 c., the Joint Committee on Atomic Energy stated that section 105 c. was intended to apply only to initial license applications:

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Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1311 (1977).

<sup>14</sup> Id. at 1312.

<sup>15</sup> Id. at 1317 (footnote omitted).

<sup>16</sup> Id. at 1317 n. 12.

<sup>17</sup> Id. at 1314.

The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases 'any license application,' 'an application for a license,' and 'any application' as used in the clarified and revised subsection 105 c. refer 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. The phrases do not include, for purposes of triggering subsection 105 c., other applications which may be filed during the licensing process.<sup>18</sup>

Limiting the scope of antitrust review to the construction permit and initial operating license stages also is consistent with the purpose of section 105 c. When it was considering the enactment of section 105 c., Congress heard the concerns that access to low-cost nuclear power would significantly increase a utility's competitive advantage.<sup>19</sup> Congress concluded that the appropriate time to address this concern would be at the construction stage, in order to ensure that the antitrust review would be completed before investors took on the risk of building a nuclear power plant. Various parties participating in the legislative hearings emphasized this point. For example, the head of the Justice Department's Antitrust Division pointed out that "applying antitrust policies when new production facilities are licensed facilitates effective implementation of these policies in a fashion minimizing uncertainty and risk for the private

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<sup>18</sup> Atomic Energy-Utilization for Industrial or Commercial Purposes, H. R. Rep. No. 91-1470 at 5010 (1970) (emphasis added).

<sup>19</sup> See, e.g., Prelicensing Antitrust Review of Nuclear Power Plants: Hearings before the Joint Committee on Atomic Energy, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess. (1969), (comments of Walter B. Comegys, Acting Assistant Attorney General, Antitrust Division, Department of Justice: "We do think that adequate access implies the same opportunity to receive low-cost power for the same uses as those who have the unique low-cost facility.") at 128. See also id. at 75, Comments of Joseph F. Hennessy, AEC General Counsel: "The problem centers on the very large plants that do provide the most economical source of energy . . . and an opportunity for the small publicly owned utilities to have access to that newly available cheap source of power."

companies involved.”<sup>20</sup> He added that addressing antitrust questions “at the outset of the licensing proceeding, and obtaining the Attorney General’s advice on the issues, can permit an early and orderly resolution of antitrust problems before much money and time has been spent.”<sup>21</sup> The Director of Policy Planning for the Department of Justice’s Antitrust Division similarly stated “the procedure [for applying antitrust policies to uses of nuclear fuels] enables companies to be advised at an early stage in the planning of projects concerning any inconsistency between their plans and competitive policies. Thus, we should be able to minimize the number of times plans are thrown into uncertainty after significant time and resources have been committed to them.”<sup>22</sup>

The Commission itself has recognized that Congress did not intend section 105 c. to apply beyond initial plant licensing. In South Texas, the Commission states that Congress did not give the Commission the authority to place nuclear utilities “under a continuing risk of antitrust review.”<sup>23</sup> The Commission in that case rejected claims that it had the power to review antitrust concerns beyond initial licensing, stating:

Had Congress agreed with the proposition that this Commission should have broad antitrust policing powers independent of licensing, the statute that emerged from these discussions would have looked quite different. Little attention would have been paid to defining a two-step review process. The terminology of all participants in the drafting process would not have been focused so directly on ‘prelicensing’ review.<sup>24</sup>

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<sup>20</sup> Id. at 120.

<sup>21</sup> Id. at 121.

<sup>22</sup> Id. at 7.

<sup>23</sup> South Texas, 5 NRC at 1317.

<sup>24</sup> Id.



The U.S. Court of Appeals for the D.C. Circuit likewise has found that section 105 c. is applicable only at the initial construction permit and operating license stages. In American Public Power Association v. NRC, supra, the Court of Appeals upheld a Commission determination that its rules governing the renewal of nuclear power plant operating licenses need not require an antitrust review for renewal applications. The NRC found that section 105 c. did not require antitrust review of a license renewal application because such an application would not be an "initial application" or an application for a "new or substantially different facility."<sup>25</sup> The Court of Appeals upheld the Commission's conclusion, stating that "[s]ection 105's provisions are triggered only by an 'application for a license'", as that term was understood by Congress when it enacted section 105 c. and interpreted by the Commission in adopting the license renewal rules.<sup>26</sup> Accordingly, because a license renewal application was not an initial application for a construction permit, an operating license, or a new or substantially different facility, the Court of Appeals found that section 105 c. did not require the Commission to perform antitrust reviews of nuclear plant license renewal applications. This analysis applies equally to license transfer requests.

The plain language of section 105 c., its legislative history, Commission decisions, and court precedent uniformly support the conclusion that section 105 c. gives the Commission jurisdiction to perform antitrust reviews relating to nuclear plants only at the construction permit and initial operating license stages. Commission antitrust review of a license transfer is not authorized by statute, nor would such a review be consistent with the purpose of section 105 c.

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<sup>25</sup> Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,969 (1991).

<sup>26</sup> American Pub. Power Ass'n, 990 F.2d at 1311-12; See 56 Fed. Reg. at 64,969-71.

For these reasons, as a matter of law the Commission should eliminate all antitrust reviews in connection with license transfers.

Despite the fact that NRC antitrust review of license transfers is not required by statute, 10 C.F.R. § 50.80(b) requires that an applicant for a license transfer submit to the NRC the antitrust information required by 10 C.F.R. 50.33a "if the license to be issued is a class 103 license. . . ." The phrase "if the license to be issued" could be interpreted as consistent with the language of section 105 c., requiring that the information in § 50.33a only be submitted by parties that have not yet been issued an initial license. Nevertheless, if the Commission decides that it should eliminate antitrust reviews of license transfers, as Applicants believe it should, the most prudent course of action would be for the Commission to initiate an expedited rulemaking (as described in section III.D of this brief) to make § 50.80(b) clearly consistent with such a decision and section 105 c.

**2. The Commission' Adjudicatory Decisions Have Not Directly Addressed Whether Antitrust Review Of License Transfer Applications Is Required.**

Although there is no statutory basis for Commission jurisdiction to perform antitrust reviews after the initial issuance of an operating license, other parties to this proceeding may attempt to argue that language in Commission cases supports a conclusion that the Commission has such authority. While the Commission has held that its antitrust review authority is a "prelicensing" authority,<sup>27</sup> the Commission has not directly ruled on whether antitrust review is

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<sup>27</sup> South Texas, 5 NRC at 1314.

appropriate at the license transfer stage.<sup>28</sup> Its case law, therefore, does not support antitrust review of license transfers.

In Florida Power and Light Company (St. Lucie Plant, Unit No. 1), ALAB-428, 6 NRC 221 (1997), for example, the Atomic Safety and Licensing Appeal Board cited with approval the Commission's holding in South Texas that, "in no uncertain terms . . . the NRC's supervisory antitrust jurisdiction over a nuclear reactor license does not extend over the full 40-year term but ends at its inception."<sup>29</sup> In a footnote, the Appeal Board then added "[e]xcept perhaps as necessary . . . where a plant is sold. . . ."<sup>30</sup> The Appeal Board's speculation in a footnote that there might be some type of post-licensing review of antitrust issues upon the sale of a plant is hardly a binding Commission precedent.

In Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2),<sup>31</sup> an Atomic Safety and Licensing Board found that, where new or additional co-owners were added to a construction permit, a 105 c. antitrust review may be conducted after the initial issuance of that permit. In affirming the Licensing Board's decision, the Appeal Board stated in a footnote that "an amendment of an existing license to add new owners was 'an initial application' insofar as [the Licensing Board was] concerned; hence, preclicensing antitrust review was required . . . ." This statement should not be used to support a finding that license transfers are akin to an initial application. Fermi involved amendments to construction permits that took place prior to issuance of an operating license, i.e., in the time period during which antitrust reviews are

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<sup>28</sup> In South Texas, the Commission stated that antitrust authority over license transfers "could" be drawn from section 50.80(b). That statement is not binding Commission precedent, however, and would be addressed by the rulemaking suggested in section III.D of this brief.

<sup>29</sup> St. Lucie, 6 NRC at 226 (footnote omitted).

<sup>30</sup> Id. at 226 n. 12 (emphasis added).

<sup>31</sup> LBP-78-13, 7 NRC 583 (1978), aff'd, ALAB-475, 7 NRC 752, 756 n.7 (1978).



authorized under section 105 c. The Fermi case does not hold that the Commission has antitrust jurisdiction over operating licenses that have already been issued, which is the question at issue here.

Fermi was cited with approval in South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1).<sup>32</sup> Like Fermi, Summer authorized Commission antitrust review of a construction permit amendment that added a new co-owner before the operating license was issued.<sup>33</sup> Summer did not address whether an antitrust review should be conducted after an initial operating license is issued.<sup>34</sup>

For these reasons, Commission case law does not support a finding that the Commission has the authority to perform an antitrust review of a license transfer.

**C. As A Matter Of Policy, The Commission Should Eliminate All Antitrust Reviews In Connection With License Transfers.**

**1. Performing Anti-Trust Reviews Of License Transfers Would Be An Inefficient And Unnecessary Duplicative Use Of The Commission's Resources.**

The NRC's primary mission is to protect the public health and safety. Jurisdiction over health and safety issues, "which continues through the lives of outstanding licenses," is properly entrusted to the NRC because it has the necessary technical expertise.<sup>35</sup> The Commission has acknowledged, however, that its expertise in the field of antitrust "is not unique," and that it

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<sup>32</sup> CLI-80-28, 11 NRC 817, 830-31 (1980).

<sup>33</sup> Id. at 827.

<sup>34</sup> Even if the Fermi and Summer cases were to support performing a post-operating license antitrust review of license transfers to new owners, that finding would be inapplicable to the Applicants' proceeding. The Applicants are not seeking to transfer the license to, or to add, a new owner. The license at issue will be transferred to a new entity -- Westar -- which will be created as part of the merger between two of the current owners of Wolf Creek. The proposed merger will have no functional competitive consequences.

<sup>35</sup> South Texas, 5 NRC at 1316.

merely applies antitrust principles developed by other bodies.<sup>36</sup> In fact, the Commission has stated that only at the initial licensing stage is it in a unique position to address Congress' concerns regarding competition.<sup>37</sup> As the Commission has recognized, the situation is quite different, however, once the plant has begun operating:

When nuclear power plants have been constructed and are operating, anticompetitive behavior can be remedied only by modifying or conditioning existing behavior. Whatever form of remedy the agency can offer is not appreciably different from that which may be fashioned by the traditional antitrust forums. In this posture, we recognize, as did the Congress, that there are more suitable forums for antitrust enforcement.<sup>38</sup>

As this passage indicates, the anticompetitive effects of license transfers will not go unreviewed. To the contrary, numerous other governmental bodies, which are charged with and have the necessary expertise to perform economic regulation, will analyze the competitive effects of transactions which result in license transfers.

For example, review of the Applicants' proposed merger currently is pending before the FERC in Docket No. EC97-56-000, where KEPCo has raised issues similar to those raised in its Petition.<sup>39</sup> Under its Merger Policy Statement,<sup>40</sup> the FERC will perform a comprehensive

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<sup>36</sup> Id. at 1316.

<sup>37</sup> According to the Commission, "[n]o nuclear power can be generated without an NRC license and the licensing process thereby allows us to act in a unique way to fashion remedies, if we find that an applicant's plans may be inconsistent with the antitrust laws or their underlying policies." Id.

<sup>38</sup> Id. at 1316-17.

<sup>39</sup> In fact, the testimony on which KEPCo's Petition relies is testimony filed by KEPCo in the FERC merger proceeding. See Attachments 1 and 2 to KEPCo's Petition.

<sup>40</sup> Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, III FERC Stats. & Regs., Regulations Preambles ¶ 31,044, 61 Fed. Reg. 68,595 (1996).

antitrust analysis in Docket No. EC97-56-000 that will address KEPCo's concerns, to the extent they involve antitrust issues.<sup>41</sup>

According to its Merger Policy Statement, "the [FERC], in applying the Federal Power Act standard that mergers must be consistent with the public interest, must account for changing market structures and pay close attention to the possible effect of a merger on competitive bulk power markets and the consequent effects on ratepayers."<sup>42</sup> Thus, when analyzing proposed mergers, the FERC will take into account three factors, "the effect on competition, the effect on rates and the effect on regulation."<sup>43</sup> In order to evaluate the effect on competition, the FERC applies the DOJ/FTC Merger Guidelines, including the Guidelines' five-step process for analyzing mergers.<sup>44</sup> This detailed review would fully identify if there are valid antitrust concerns, including those raised by KEPCo. In addition, there are other federal agencies with jurisdiction over the proposed merger. For example, the parties are required to make a pre-merger filing with DOJ and the FTC under the Hart-Scott-Rodino Antitrust Improvements Act,<sup>45</sup>

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<sup>41</sup> As Applicants' Answer points out, to the extent KEPCo's concerns are not based on antitrust issues but on its dissatisfaction with negotiated transmission agreements or other business arrangements, KEPCo is free to file a complaint at FERC under section 206 of the Federal Power Act or to bring a civil suit on the contract. Answer at 7.

<sup>42</sup> Merger Policy Statement at 30,111.

<sup>43</sup> Id.

<sup>44</sup> Under these five steps:

First, the Agency [i.e., FERC] assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured. Second, the Agency assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects. Third, the Agency assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern. Fourth, the Agency assesses any efficiency gains that reasonably cannot be achieved by the parties through other means. Finally, the Agency assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market. Id. at 30,111. See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992).

<sup>45</sup> 15 U.S.C. § 18.



and one of these agencies will review the competitive effects of the merger under section 7 of the Clayton Act.<sup>46</sup>

Moreover, public utility commissions in Kansas and Missouri also will perform antitrust reviews of the Applicants' proposed merger. Approval of the Applicants' merger currently is pending before the Kansas Commission in Docket No. 97-WSRE-676-MER. KEPCo has raised similar "antitrust" issues in that proceeding to those it has raised before the NRC and the FERC.<sup>47</sup> In a recent order, the Kansas Commission stated that it will weigh a variety of factors when it reviews merger applications, including "[t]he effect of the proposed transaction on the existing competition."<sup>48</sup> In fact, the Kansas Commission has issued an order in the Applicants' pending merger proceeding requiring that the Applicants submit a market power study evaluating the possible benefits of the proposed merger, as well as a description of how the merged entity is likely to determine its retail generation price.<sup>49</sup> The Kansas Commission required this information as part of its efforts to protect consumers in the event retail access were to become available in Kansas.<sup>50</sup>

In addition, the Applicants have filed an application for merger approval by the Missouri Commission in Case No. EM-97-515. The Missouri Commission also is likely to address retail

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<sup>46</sup> 15 U.S.C. § 18a.

<sup>47</sup> See Testimony of Gordon T.C. Taylor, Ph.D. on behalf of KEPCo, Exhibit (GT-1), Kansas Corporation Commission Docket No. 97-WSRE-676-MER (Feb. 18, 1999).

<sup>48</sup> In the Matter of the Application of Kansas City Power & Light Company, et al., Kansas Corporation Commission, Consolidated Docket Nos. 172,745-U, slip op. at 35 (Nov. 18, 1997).

<sup>49</sup> In the Matter of the Joint Application of Western Resources, Inc., and Kansas City Power & Light Company for Approval of the Merger of Kansas City Power & Light Company with Western Resources, Inc. and for Other Related Relief, Docket No. 97-WSRE-676-MER, Kansas Corporation Commission Order No. 6 Pre-Hearing Conference Order, slip op. at 23 (Aug. 20, 1997).

<sup>50</sup> Id. at 22.

market power issues, given that it analyzed such issues when it reviewed the recent merger application of Union Electric Company and CIPSO Incorporated.<sup>51</sup>

As the Commission has recognized, after the construction permit and operating license stages, antitrust review of nuclear licensees should be left in the hands of forums that are better suited to address such issues. It would be an unnecessary and inefficient use of the Commission's resources to perform antitrust reviews of license transfers where other state and federal governmental bodies will be performing their own comprehensive antitrust reviews. This point is especially relevant in cases such as the Applicants', where numerous other forums -- including the FERC, the FTC or DOJ, the Kansas Commission, and the Missouri Commission -- will analyze carefully the competitive effects of the proposed merger at both the wholesale and retail level. Accordingly, the NRC should decline to perform any type of antitrust review in its license transfer proceedings.

**2. Recent Developments Regarding Open Access Transmission  
Also Favor Elimination Of License Transfer Antitrust Review.**

As set forth above, section 105 c. was enacted to ensure competitive access to low-cost nuclear power. Recent developments in the electric industry at both the federal and state level have significantly reduced the likelihood that parties will be unable to access nuclear generation.

As CLI-99-05 states, the Energy Policy Act of 1992 ("EPAct") gave the FERC broad authority to order transmitting utilities to provide wholesale transmission services, upon application, to any electric utility, federal power marketing agency, or any other person

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<sup>51</sup> See In the Matter of the Application of Union Electric Company (Public Service Commission of the State of Missouri Case No. EM96-149), Report and Order, slip. op. at 11-18 (issued February 21, 1997).

generating electric energy for resale.<sup>52</sup> In the time period between promulgation of the EPAct and the FERC's issuance of Order No. 888, which mandated that all utilities provide open access transmission, the FERC liberally exercised its power to require wheeling. For example, prior to the passage of its Order No. 888<sup>53</sup> the FERC had issued orders requiring wheeling in 12 of the 14 cases on which it had acted.<sup>54</sup>

The FERC further enhanced access to interstate transmission systems, and thus generation, when it issued Order No. 888. In that Order, the FERC required all public utilities that own, operate or control facilities used for transmitting electric energy in interstate commerce to file with the FERC non-discriminatory open access transmission tariffs. These tariffs require public utilities to provide network and point-to-point interstate transmission service to customers based on the same rates, terms and conditions that the utility transmits power for itself. According to FERC, these open access tariffs are designed to further the goal of ensuring that customers receive the benefits of competitively priced generation on a non-discriminatory basis.<sup>55</sup>

Given that (1) ongoing structural changes in the electric utility industry have provided for greatly improved access to nuclear generation; and (2) numerous regulatory bodies other than the NRC (whose resources and expertise are best used to protect the public health and safety) will address antitrust concerns that may be raised by transactions resulting in license transfers, policy

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<sup>52</sup> 16 USC §§ 824j-k. See CLI-99-05, slip op. at 2, 64 Fed. Reg. at 11,070.

<sup>53</sup> Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services By Public Utilities; Recovery Of Stranded Costs By Public Utilities And Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), III FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order 888-A, 62 Fed. Reg. 12,274 (May 14, 1997), III FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

<sup>54</sup> Order No. 888, slip op. at 33, 61 Fed. Reg. at 21,547.

<sup>55</sup> Order No. 888, slip op. at 49, 61 Fed. Reg. at 21,550.



considerations overwhelmingly support the NRC's elimination of all antitrust reviews of nuclear license transfers.

**D. The Commission Staff's Past Practice Of Performing Significant Changes Reviews Of License Transfers Applications Is Not Controlling, But An Expedited Rulemaking Should Be Initiated.**

Despite the fact that neither section 105 c. nor Commission case law supports a finding that the Commission has jurisdiction to review the antitrust implications of a license transfer, the NRC Staff has conducted antitrust reviews of certain license transfers. The procedures followed by the Staff are described in NUREG-1574, Standard Review Plan on Antitrust Reviews (Dec. 1997).<sup>56</sup> This past practice should not, however, deter the Commission from reconsidering the appropriateness of its Staff conducting antitrust reviews of license transfers.<sup>57</sup> On the contrary, the agency remains free to change the Staff's policies, practices and statutory interpretations, so long as there is a reasoned basis for the change and the agency remains faithful to the requirements of the controlling statute.<sup>58</sup>

In particular, an agency may change its licensing process to eliminate certain issues from consideration and to reduce the amount of information that the applicant must submit.<sup>59</sup> The Staff's prior practice of conducting license transfer antitrust reviews does not bind the Commission or preclude it from adopting a different policy.<sup>60</sup> Accordingly, the Commission is

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<sup>56</sup> A summary of the Staff's antitrust reviews is presented in NUREG/CR-6558, NRC Antitrust Licensing Actions, 1978-1996, at Table 3.3 (Sept. 1997).

<sup>57</sup> Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863 (1984).

<sup>58</sup> See Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1734 (1996); Center for Science in the Pub. Interest v. Department of the Treasury, 797 F.2d 995, 999 (D.C. Cir. 1986).

<sup>59</sup> Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (D.C. Cir. 1983), cert. denied, 467 U.S. 1255 (1984).

<sup>60</sup> Porter County Chapter of the Izaak Walton League, Inc. v. AEC, 533 F.2d 1011, 1016 (7<sup>th</sup> Cir.) (Staff working papers and Regulatory Guides not binding on NRC), cert. denied, 429 U.S. 945 (1976); see Smiley, 116 S. Ct. at 1734 (opinion of agency Deputy Chief Counsel not binding on agency).

free to dispense with Staff antitrust reviews of license transfers. It is well established that administrative agencies have broad discretion to address particular issues "through the process of rulemaking, individual adjudication, or a combination of the two procedures."<sup>61</sup>

Applicants seeking to transfer operating licenses issued under section 103 are currently required by 10 C.F.R. § 50.80(b) to submit antitrust information with their applications.<sup>62</sup> Therefore, if the Commission decides for legal and policy reasons to eliminate antitrust reviews of license transfers, as the Applicants believe it should, the Commission should initiate an expedited rulemaking to remove this filing requirement from 10 C.F.R. § 50.80(b), after a 30-day period for comments. Advance notice of the matters under consideration has already been given by publication of CLI-99-05 in the Federal Register.<sup>63</sup> Thus, the Commission should be able to initiate and complete a rulemaking to amend § 50.80(b) on an expedited schedule. The disposition of this proceeding, however, should not be held up pending the rulemaking. Rather, this proceeding should be dismissed forthwith on the merits for the reasons stated in Applicants' Answer.

#### IV. CONCLUSION

For the reasons set forth above, regardless of how the Commission decides the issue raised in CLI-99-05 and implements that decision, the Commission should deny KEPCo's Petition in this proceeding because, as set forth in Applicant's March 1 Answer, (1) KEPCo's

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<sup>61</sup> NAACP v. FPC, 425 U.S. 662, 668 (1976).

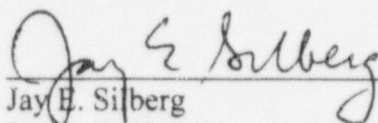
<sup>62</sup> In South Texas, the Commission stated that antitrust authority over license transfers "could be drawn as an implication from our regulations. 10 C.F.R. § 50.80(b)." South Texas, 5 NRC at 1318 (emphasis added). The Commission expressly stated in that case, however, that it was not deciding the issue of whether it had antitrust jurisdiction over license transfers, and noted that such jurisdiction is "not explicitly referred to in the statute or its history." Id.

<sup>63</sup> See 64 Fed. Reg. 11,069 (March 8, 1999).

Petition fails to meet the NRC's requirements for interventions and hearing requests under 10 C.F.R. § 2.1306; and/or (2) the Applicants' proposed license transfer does not implicate any significant changes that would merit a full antitrust review by the NRC.

With respect to the issue raised by CLI-99-05, as a matter of both law and policy the Commission should eliminate all antitrust reviews in connection with license transfers, and should initiate an expedited rulemaking to conform 10 C.F.R. § 50.80(b) to such a determination.

Respectfully submitted

A handwritten signature in dark ink, appearing to read "Jay E. Silberg", is written over a horizontal line.

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March 16, 1999



CERTIFICATE OF SERVICE

DOCKETED  
USNRC

I hereby certify that on the 16th day of March, 1999, the foregoing Initial Briefing of 24 APR 28  
Applicants In Response To The NRC's Memorandum And Order Regarding Antitrust Review Of  
License Transfers was served upon the persons listed below by e-mail with a conforming copy  
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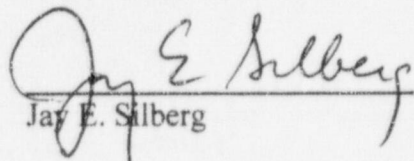
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