

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: CHAIRMAN DICUS

SUBJECT: SECY-99-220 - PROPOSED RULE -- CLARIFICATION OF REGULATIONS AND GUIDANCE TO EXPLICITLY LIMIT WHICH TYPES OF APPLICATION MUST INCLUDE ANTITRUST INFORMATION; DISPOSITION OF WOLF CREEK ANTITRUST LICENSE CONDITIONS

Approved ^{w/edits} x Disapproved Abstain

Not Participating

COMMENTS: SEE ATTACHED EDITS

 Aneta Jay Dicus
SIGNATURE

 September 15, 1999
DATE

Entered on "AS" Yes x No

[Month xx], 1999

William T. Miller
Randolph Lee Elliott
Miller, Balis & O'Neil
1140 Nineteenth Street, N.W.
Suite 700
Washington, D.C. 20036-6600

Re: Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station, Unit 1), Docket
No. 50-482-LT

Dear Messrs. Miller and Elliott:

In response to the directive in CLI-99-19 that the parties address the disposition of the Wolf Creek antitrust license conditions in view of the anticipated transfer of the operating license for Wolf Creek to Westar Energy, Inc., on July 6, 1999, the Applicants for the transfer, KGE and KCPL, and you, on behalf of KEPCo, submitted the respective proposals. The Commission has referred those proposals to me for appropriate action.

In summary, Applicants propose, as their transfer application proposed, that the existing antitrust license conditions be retained and, with no substantive changes but after administratively substituting Westar for KGE and KCP&L, be made applicable to Westar as the new licensee. On the basis of KEPCo's belief that there would be adverse and anticompetitive effects of the proposed merger on it, KEPCo proposes that the existing antitrust license conditions be substantively amended to address its perceived problems with a simple substitution of Westar for KGE and KCPL in the conditions. For the reasons explained below, after consultation with the Commission, I must deny KEPCo's request for substantive revision of the antitrust license conditions to address its asserted antitrust concerns about the proposed license transfer.

First, as was made clear in CLI-99-19, after careful and thorough analysis of its antitrust authority, the Commission concluded that it lacks statutory authority to undertake an antitrust review of post-operating license transfer applications. ~~KEPCo's proposal to enhance existing license conditions based on asserted antitrust problems with the proposed transfer, problems that are disputed by Applicants, could be evaluated only after a review of the alleged antitrust problems and a resolution of the differences between Applicants and KEPCo. This is precisely the antitrust review the Commission decided it had no authority to perform (or, if it had authority, would not perform as a matter of policy).~~ Thus KEPCo's proposal is tantamount to its

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original request to have the Commission conduct an antitrust review of the proposed transfer and, accordingly, is inconsistent with the Commission's decision in CLI-99-19.

Second, it is far from clear that KEPCo is correct in its assertion that the application of the antitrust license conditions to the new licensee will result in draconian antitrust problems for KEPCo. The Applicants July 6th submission on its face commits the new licensee, Westar, to compliance with the antitrust conditions verbatim throughout Westar's service area. In particular, with respect to KEPCo's concern about the differences in the two current sets of license conditions as they apply to KGE and KCP&L, Applicants commit Westar "to abide by whichever conditions were more restrictive to Westar and more favorable to KEPCo." Applicants' July 6th letter at 1. With respect to KEPCo's assertion that "it is far from clear what would be the more restrictive set of conditions for any given circumstances," KEPCo's July 6th letter at 6, Applicants state that "in any given circumstance, KEPCo could choose whether to rely upon the duties imposed on Westar either by the more specific KGE conditions or by the more general KCP&L conditions," Applicants' July 6th letter at 2. In this and other respects, it appears that Applicants are willing to give KEPCo the benefit, at KEPCo's choice, of both sets of conditions applicable verbatim to the new licensee, Westar.

Two additional points warrant emphasis. First, as stated above, and for the reasons in CLI-99-19, the Commission has decided that it has no authority to conduct the kind of antitrust review that KEPCo would have us undertake now in connection with the proposed license transfer. Accordingly, even if the staff is wrong that the Applicants proposal to substitute Westar as the new licensee in the Wolf Creek license conditions is the appropriate disposition and addresses KEPCo's antitrust concerns with the transfer, consistent with CLI-99-19, the staff cannot embark on a course to determine what new or different conditions might be warranted. Second, if future events prove KEPCo's antitrust concerns valid, then KEPCo has a number of options available to it to have those antitrust issues resolved (*see, e.g., Atomic Energy Acts § 105a, b*), including, if appropriate, seeking NRC enforcement of the transferred license conditions against Westar.

For these reasons, if the Applicants' proposed transfer is approved by the Commission, the existing antitrust license conditions will be administratively amended to substitute Westar as the licensee to which all antitrust license conditions apply.

Sincerely,

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

cc: J. Silberg
Service List

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VIII. Regulatory Analysis

The proposed revisions to the regulations clarify that antitrust information is required to be submitted only in connection with applications for construction permits and initial operating licenses and not in connection with applications for post-operating license transfers. Therefore, to the extent that, in the past, antitrust information was submitted with applications for post-operating license transfers, these proposed revisions will reduce the burden on such applicants by eliminating the submission of antitrust information and the costs associated with preparing and submitting that information. In short, the proposed revisions will result in no additional burdens or costs on any applicants or licensees and will reduce burdens and costs on others. Clearly, because the proposed revisions affect only when antitrust information need be submitted to the Commission, there will be no effect on the public health and safety or the common defense and security, and they will continue to be adequately protected. The cost savings to applicants resulting from these revisions justify taking this action.

To determine whether the amendments contained in this proposed rule were appropriate, the Commission considered the following options:

1. *The No-Action Alternative.*

This alternative was considered because the current rules are not explicitly inconsistent with the Commission's decision that antitrust reviews of post-operating license transfers are not authorized, or at least are not required and should be discontinued. Because the current rules have been interpreted to be consistent with the Commission's practice of conducting such

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