

August 30, 1999

FOR: The Commissioners

FROM: Karen D. Cyr /s/
General Counsel

William D. Travers /s/
Executive Director for Operations

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

PURPOSE:

To seek Commission approval to publish the attached proposed rule, regulatory guide, and standard review plan, and to issue the attached letter to the parties to the Wolf Creek transfer proceeding regarding the disposition of the existing antitrust license conditions in the event the operating license transfer is approved.

BACKGROUND AND DISCUSSION:

On June 22, 1999, the Commission issued a Memorandum and Order in the Wolf Creek license transfer proceeding dismissing a petition to intervene on antitrust grounds. *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC xxx (1999) (Wolf Creek). In *Wolf Creek*, the Commission "concluded that the Atomic Energy Act does not require or even authorize antitrust reviews of post-operating license transfer applications, and that such reviews are inadvisable from a policy perspective." The Commission further stated that the NRC staff would be directed to initiate a rulemaking "to clarify the Commission's regulations to remove any ambiguities and ensure that the rules clearly reflect the views set out in this decision." On June 22, 1999, the Commission issued a Staff Requirements Memorandum directing the initiation of such a rulemaking and the clarification of Regulatory Guide 9.3 and NUREG-1574.

This paper seeks approval of the issuance of proposed changes to the Commission's regulations and guidance documents to clarify that they do not require the submission of antitrust information in connection with post-operating license transfer applications because the Commission no longer will conduct antitrust reviews of such applications.

As explained in the *Wolf Creek Order*, although this agency's past practice was to conduct antitrust reviews of post-operating license transfer applications, it does not appear that the Commission ever explicitly focused on the issue of whether such reviews were authorized or required by law, but instead apparently assumed that they were. *Wolf Creek Order* at 24. After a thorough *de novo* review of the scope of the Commission's antitrust authority, the Commission concluded that it was clear that Congress never contemplated such reviews but, on the contrary, limited the Commission's antitrust review responsibilities to the anticipatory, preclicensing stage of the regulatory process. *Id.* at 5-6. The Commission characterized the statutory scheme as best understood as containing an implied prohibition against post-operating license reviews and certainly no requirement of such reviews. *Id.* at 6. The Commission stated:

We now in fact have concluded, upon a close analysis of the Act, that Commission antitrust reviews of post-operating license transfer applications cannot be squared with the terms of the Act and that we therefore lack authority to conduct them. But even if we are wrong about that, and we possess some general residual authority to continue to undertake such antitrust reviews, it is certainly true that the Act nowhere requires them, and we think it sensible from a legal and policy perspective to no longer conduct them.

Id. at 24-25.

Because of the past practice of conducting antitrust reviews of license transfer applications, including those at the post-operating license stage of the regulatory process, the Commission closely examined its rules of practice to determine whether they required or warranted revision to conform to its decision in the *Wolf Creek* case. The Commission concluded that, notwithstanding its past interpretation of its rules as being consistent with an antitrust review of all transfer applications, including those involving post-operating license transfers, the rules themselves do not explicitly mandate such reviews. *Id.* at 27-28, 34. Indeed, after considering the various interpretations of the rules advanced by the parties and *amici curiae* in the *Wolf Creek* proceeding, the Commission concluded: "Not one comma of the Commission's current regulations need be changed in the wake of a cessation of such reviews, although because of the NRC's past practice of conducting such reviews, we have decided that clarification of our rules is warranted." *Id.* at 34. The Commission, therefore, directed that the rules be clarified "by explicitly limiting which types of applications must include antitrust information," *Id.* at 29, and that Regulatory Guide 9.3, "Information Needed by the AEC Regulatory Staff in Connection with Its Antitrust Review of Operating License Applications for Nuclear Power Plants," and NUREG-1574, "Standard Review Plan on Antitrust Reviews," also be clarified.

The proposed clarifications to the regulations make clear that, consistent with the decision in the *Wolf Creek* case, no antitrust information is required to be submitted as part of any application for Commission approval of a post-operating license transfer. Because the current regulations do not clearly specify which types of applications are not subject to antitrust review, these proposed clarifying amendments will bring the regulations into conformance with the Commission's limited statutory authority to conduct antitrust reviews and its decision that such reviews of post-operating license transfer applications are not authorized or, if authorized, are not required and not warranted.

Direct transfers of facility licenses which are proposed prior to the issuance of the initial operating license for the facility, however, are and continue to be subject to the Commission's antitrust review. In order to make clear that the Commission's regulations do not require antitrust information as part of

applications for post-operating license transfers, the staff is proposing to amend the regulations by specifying that antitrust information must be submitted only with applications for construction permits and "initial" operating licenses and applications for transfers of licenses prior to the issuance of the "initial" operating license. Thus the word "initial" will be inserted to modify "operating license" in appropriate locations and the word "application" will be modified where necessary to make clear that the application must be for a construction permit or initial operating license. [Appendix L to 10 C.F.R. Part 50](#), "Information Requested by the Attorney General for Antitrust Review [of] Facility License Applications," will be similarly amended and clarified and a new definition will be added there to define "initial operation" to mean operation pursuant to the first operating license issued by the Commission for the facility.

Regulatory Guide 9.3, which describes the information needed by the Attorney General and NRC staff in connection with antitrust reviews of operating licenses, also will be revised in a similar fashion to apply only to initial operating licenses. In addition, NUREG-1574, "Standard Review Plan on Antitrust Reviews," will be rewritten to apply only to applications for construction permits and initial operating licenses. ⁽¹⁾

Finally, still pending before the Commission is the disposition of the existing Wolf Creek antitrust license conditions in the event that the transfer of the operating license is approved. 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 KCP&L, and KEPCo, submitted the respective proposals.

In summary, Applicants propose, as their transfer application proposed, that the existing antitrust license conditions be retained, administratively substituting Westar for KGE and KCP&L, and be 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 KCP&L in the conditions. For the reasons explained below, the staff recommends that the Commission authorize it to 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 original request to have the Commission conduct an antitrust review of the proposed transfer and, accordingly, flies in the face of 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. In accordance with the amended license, Westar will be required to comply with the currently existing 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, the Commission should not 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 should be administratively amended to substitute Westar as the licensee to which all antitrust license conditions apply. The attached draft letter would inform the parties to the Wolf Creek transfer proceeding of this determination.

COORDINATION:

The Office of the Chief Information Officer has reviewed the proposed rule for information technology and information management implications and concurs in it. Additionally, the Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objections.

RECOMMENDATION:

That the Commission:

1. Approve publication of the attached draft *Federal Register* Notice and Proposed Rule and the attached draft guidance documents for a 60 day comment period.

2. Approve the issuance of the attached letter regarding the Wolf Creek antitrust license conditions.
3. Note:
 - a. The rulemaking would be published in the Federal Register for a 60-day public comment period;
 - b. The appropriate Congressional committees will be informed (Attachment 5).

William D. Travers
Executive Director for Operations

Karen D. Cyr
General Counsel

CONTACTS: Jack R. Goldberg, OGC
301-415-1681
Mike Davis, NRR
301-415-1016

Attachments: [1. Federal Register Notice with Proposed Rule](#)
[2. Draft Regulatory Guide 9.3](#)
[3. Draft NUREG-1574](#)
[4. Draft letter regarding Wolf Creek antitrust license conditions](#)
[5. Draft Congressional letters](#)

ATTACHMENT 4

[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 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

ATTACHMENT 5

The Honorable Joe L. Barton
Chairman, Subcommittee on Energy
Committee on Commerce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

In the near future, the Nuclear Regulatory Commission (NRC) intends to publish in the *Federal Register* the enclosed proposed amendment to the Commission's rules in [10 CFR Parts 2 and 50](#). The proposed rule is being developed to clarify the NRC's regulations to reflect more clearly its limited antitrust review authority by explicitly limiting which types of applications must include antitrust information. Specifically, because the Commission is not authorized to conduct antitrust reviews of post-operating license transfer applications, or at least is not required to conduct such reviews and has decided that it will no longer conduct them, no antitrust information is required as part of such license transfer applications. Because the current regulations do not clearly specify which types of applications are not subject to antitrust review, these proposed clarifying amendments will bring the regulations into conformance with the Commission's limited statutory authority to conduct antitrust reviews.

The Commission is issuing the proposed rule for public comment.

Sincerely,
Dennis K. Rathbun, Director
Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Representative Ralph M. Hall

The Honorable James M. Inhofe, Chairman
Subcommittee on Clean Air, Wetlands,
Private Property and Nuclear Safety
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In the near future, the Nuclear Regulatory Commission (NRC) intends to publish in the Federal Register the enclosed proposed amendment to the Commission's rules in 10 CFR Parts 2 and 50. The proposed rule is being developed to clarify the NRC's regulations to reflect more clearly its limited antitrust review authority by explicitly limiting which types of applications must include antitrust information. Specifically, because the Commission is not authorized to conduct antitrust reviews of post-operating license transfer applications, or at least is not required to conduct such reviews and has decided that it will no longer conduct them, no antitrust information is required as part of such license transfer applications. Because the current regulations do not clearly specify which types of applications are not subject to antitrust review, these proposed clarifying amendments will bring the regulations into conformance with the Commission's limited statutory authority to conduct antitrust reviews.

The Commission is issuing the proposed rule for public comment.

Sincerely,
Dennis K. Rathbun, Director
Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Senator Bob Graham

DRAFT

***NRC PROPOSES AMENDING REGULATIONS
CLARIFYING ANTITRUST REVIEW REQUIREMENTS***

The Nuclear Regulatory Commission is proposing to amend its regulations to clarify that it will no longer conduct antitrust reviews of license transfer applications submitted by the owners of operating nuclear power plants, eliminating a review that is duplicated by other federal and state agencies.

The Atomic Energy Act and NRC regulations provide that no nuclear power plant operating license may be transferred directly or indirectly, without Commission consent. NRC has historically conducted antitrust reviews in connection with certain kinds of nuclear power plant license transfers.

As part of a review of a license transfer application submitted by two owners of the Wolf Creek nuclear power plant in Kansas, the Commission examined its rules of practice and concluded that its statutory mandate does not require an antitrust review in these circumstances. As a result, NRC is amending its regulations to more clearly reflect its antitrust review authority by explicitly limiting the types of applications that must include antitrust information in the application for a construction permit, initial operating license, and pre-operating transfers.

As a result of the change, parties submitting a license transfer application to NRC for an operating nuclear power plant will not be required to include antitrust information, eliminating a review that is duplicated by other agencies, including, as appropriate, the Federal Energy Regulatory Commission, Securities and Exchange Commission, Department of Justice, and the Federal Trade Commission, as well as state public utility commissions. NRC will continue to conduct reviews of nuclear power plant license transfer applications to ensure, among other matters, that prospective owners meet financial qualifications and decommissioning funding assurance requirements.

Interested persons are invited to submit written comments on the proposed rule within 60 days of publication in an upcoming edition of the *Federal Register*. They should be addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Rulemakings and Adjudications Staff. Comments may also be submitted via the NRC's interactive rulemaking web site at <http://ruleforum.llnl.gov>.

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1. Regulatory Guide 9.3 was issued by the Atomic Energy Commission in October, 1974, and, therefore, also will be updated as an NRC staff regulatory guide.