UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:

Kansas Gas and Electric Corp. *et al.*;
(Wolf Creek Generating Station,
Unit 1); CLI–99–05

Docket No. 50–482–LT

JOINT BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AND FLORIDA MUNICIPAL POWER AGENCY

This brief *amicus curiae* is being submitted pursuant to the invitation extended by the Commission in its Memorandum and Order of March 2, 1999, published at 64 Fed. Reg. 11,069. It is submitted on behalf of the American Public Power Association (APPA)[1] and the Florida Municipal Power Agency (FMPA).[2] The brief addresses the question identified by the Commission: whether as a matter of law or policy the Commission may and should eliminate all antitrust reviews in connection with license transfers. APPA and FMPA support and urge the positions and arguments contained in the brief *amicus curiae* of the American Antitrust Institute.

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[1] The American Public Power Association ("APPA") is the national service organization representing the interests of the nation's approximately 2,000 municipal and other state and local government-owned utilities throughout the United States. Approximately 1,870 of these systems are cities and municipal governments that currently own and control the day-to-day operations of their electric utility systems. APPA members include state public power agencies and serve many of the nation's largest. Collectively, APPA members make 15 percent of all kilowatt-hour sales delivered to 40 million Americans.

[2] Florida Municipal Power Agency (FMPA) is a nonprofit, joint action agency formed by municipal electric utilities. The Agency's primary purpose is to enable municipal electric utilities to work together for mutual advantage on joint projects, such as power supply resources, fuel supplies and transmission facilities. Twenty-seven municipal electric systems, serving approximately 650,000 customer accounts, are members of FMPA. (Twelve members have generation; fifteen do not.)

The matter is so clear that to the best of our knowledge, NRC antitrust review of license transfers has never before been questioned. The law has been recognized as requiring that the NRC consider the antitrust impacts of transfer of a nuclear license and that when significant impacts are found an antitrust review must be conducted. The language of the statute, the requirements of the Commission's regulations, and the decisions of the Commission all recognize this requirement. Indeed, the Commission's Memorandum and Order recognizes this prior practice. 64 Fed. Reg. at 11,070. Furthermore, we believe it would defy the clear intent of Congress for any applicant for a nuclear operating license to never have to face even the possibility of an antitrust review by the Commission and the Department of Justice. Yet what is being considered in this matter is the grant of an operating license without the recipient (Westar Energy) ever having undergone antitrust review.

As Chevron instructs "if the intent of Congress is clear, it is the end of the matter." *Chevron, Inc. v. NRDC,* 467 U.S. 837, 842 (1984). Here the issue is whether the Commission may eliminate all antitrust reviews even in the face of significant changes in connection with the transfer of a nuclear license. The dispositive statutory provision is section 105(c) of the AEA, which requires antitrust review of an "application for a license to construct or operate a utilization or production facility under section 103." 42 U.S.C. § 2135. A transfer of a license, at least in some contexts, effectively grants a new license that requires antitrust review. Section 105(c) further provides that if a construction permit has been issued antitrust review of "an application for a license to operate" is required if " the Commission determines such review is advisable on the ground that

significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility." *Id.*

The issue the Commission is considering is the issuance of both a new license and "an application for a license to operate." Unless the transfer is approved, the transferee is not authorized to operate the nuclear facility. The plainest meaning, therefore, demonstrates that what is being sought is a license to operate a nuclear facility. This proposition is so plain it previously has never been challenged.

As stated, the Commission's memorandum of March 2, 1999 acknowledges that "the NRC staff historically has performed a 'significant changes' review in considering the antitrust aspects of certain kinds of license transfers." That has indeed been the practice of the staff, but the staff was certainly not operating as rogue elephants. It was following the Commission's decisions and regulations. In *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), 36 N.R.C. 47 (1992), this Commission noted that the sale of a plant was one occasion triggering an exception to the general rule against post-licensing antitrust jurisdiction on the part of the Commission.

The Commission's regulations require that applications for transfer of a license must contain information required by 10 C.F.R. §50.33a, as if the application were for an initial license. *Id.* §50.80(b). The Commission has to our knowledge consistently followed these procedures in license transfer cases.[3] Moreover, in *Houston Lighting &*

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[3] *See, e.g., Gulf States Utilities Co.*, 60 Fed. Reg. 18,151 (1995) (finding no significant change); *Ohio Edison Co.*, 36 N.R.C. at 60 n.45 ("under 10 CFR §2.101(e) a significant change review is undertaken if an amendment request involves the transfer of control of the operating license from the original owner(s) of a

Power Co. (South Texas Project, Unit Nos. 1 and 2), 5 N.R.C. 1303, 1318 (1977), the Commission recognized that this regulation implied the existence of antitrust review in conjunction with applications for transfer of an interest in a licensed nuclear plant.

In short, the governing statute requires, the Commission's regulations require, and the Commission has consistently treated an application for a license transferring operating control of a nuclear facility as one subject to antitrust review upon a finding of significant change. The Commission does not have authority to disregard the plain meaning of the statute and its consistent past practice, any more than an agency such as the FCC or the FPC is free to disregard a statutory regulatory scheme simply because the agency believes it to be outdated. *MCI Telecommunications v. AT&T*, 512 U.S. 218, 231-32 (1994); *FPC v. Texaco, Inc.*, 417 U.S. 380, 399-400 (1974).

It appears that the Commission's (hopefully) tentative conclusion that "the governing legislation, section 105(c) of the AEA, and its legislative history does not appear to call for fresh Commission antitrust reviews after the initial construction permit and operating license stage" rests almost exclusively on dictum in *American Public Power Ass'n v. NRC*, 990 F.2d 1309, 1311-13 (D.C. Cir. 1993), and the excerpts from legislative history employed in that decision. The holding in that case was that the language of section 105 could be construed not to require significant changes antitrust reviews of applications to renew an operating license. A renewal license does not change the status quo *per se*. There is no reason to suspect *a priori* that a facility will operate

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facility to another entity.")

any differently the day before and the day after the renewal or that its antitrust impact will differ before or after. That is certainly not the case when a license is transferred. Antitrust is concerned with economic issues and potentials for market power abuse. These factors are directly impacted by issues of plant ownership and the use of a plant in particular markets and under particular market arrangements.[4]

Thus, the addition of a nuclear facility to the system of the new licensee could itself constitute a substantial change and could lead to a situation inconsistent with the antitrust laws. For practical purposes a new situation is being created by the issuance of a new operating license to a new operator. The Licensees' contention that there is only need for one antitrust review during the life of a facility is nonsense. As a statutory matter, the issue at the license application stage is whether there have been substantial changes in *the licensee's activities or proposed activities* since the last review. A cursory glance at Appendix L to 10 C.F.R. Part 50 shows that the Attorney General's antitrust review is focused on the properties and activities of the *license applicant*, not on the plant. Moreover, the definition of "Applicant" in Appendix L states that where a plant is to be licensed to multiple entities not under common ownership or control, each utility must respond separately.

If antitrust review in connection with license transfers is barred, then the plain intent of Appendix L, and more importantly, the statute will have been circumvented. Antitrust review is supposed to cover *every* independent applicant for a plant. Each new

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[4] The impact of ending NRC antitrust review of transfers of nuclear license is set forth in the attached affidavit of David Penn.

owner must be licensed and, therefore, becomes subject to antitrust review.. Moreover, adding a *new* applicant by means of a license transfer plainly has the potential to render the initial antitrust review incomplete, and therefore may constitute a significant change. It could not have been Congress's intention, nor the Attorney General's, that a utility must undergo an antitrust review if it applies for a construction permit, but not if it induces others to construct the project and then purchases the already-operational nuclear plant. After all, it is the *operation* of the plant, not its *construction*, that most offers the potential of harm to competition. What is being considered here, therefore, is nullification of the command of Congress.

This Commission clearly recognized in *Ohio Edison Co., supra,* 36 N.R.C. at 23, that Congress placed a limitation on post licensing antitrust review to provide certainty to the licensee that it would not be drawn into continuing antitrust proceedings before the Commission." Here the antitrust review will not deal with the antitrust position of the existing licensee. It will deal with the antitrust situation of the *new* applicant for the new license. Ensuring that every nuclear licensee undergoes one antitrust review in conjunction with a given nuclear facility is *supportive* of the policy interests discussed in *Ohio Edison*, not contrary to those interests as the licensees now argue.

The applicable policy is that any licensee of a nuclear plant must be subject to antitrust review. This basic principle was examined and applied in *Detroit Edison Co.* (Fermi), 7 N.R.C. 583 (1978) (ASLB). There a construction permit had been granted to Detroit Edison which filed an amendment to add new co-owners. An individual sought antitrust review of the proposed change in ownership. In response, Detroit Edison did not

argue that the two co-owners should never be subject to antitrust review (the proposition now being considered) but merely that they should be subject to antitrust review at the later operating license stage if significant changes were found to have occurred. The Board held that antitrust review could not be so deferred, because the statute required an antitrust review in conjunction with a would-be licensee's initial application. It explained:

> Without exalting form over substance, it is clear that these applications [to become co-licensees] are within the scope of the phrase 'any license application' for antitrust review purposes within the meaning of §105c(1), *supra,* and trigger an opportunity for intervention raising antitrust issues as to the two cooperatives. To construe the statute otherwise would permit a utility with no antitrust problems to undergo an antitrust review and obtain an unconditioned construction permit, and then sell an overwhelming interest to another monopolizing utility. Under the Licensee's argument, there could then be no antitrust review until the later operating license stage, which itself could be a more limited review than the normal prelicensing antitrust review contemplated by the statute. Such an unequal treatment of applicants, insulating from prelicensing antitrust review those who came in later by way of amendments to construction permits, would subvert the Congressional intentent and purpose of §105c.
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> The legislative history of the statute is consistent with this interpretation. The House Report states:
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> > The Committee recognizes that applications may be amended from time to time, that there may be applications to extend or review a license, add also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into an application for an operating license. The phrases '*any license application,*' 'an application for a license,' 'any application' as used in the clarified and revised subsection 105c *refer to the initial application* for a construction permit. [Emphasis supplied.]

> Since the two cooperatives in this case are required to submit an application to become co-licensees, these constitute *their* 'initial application for a construction permit.' ... it would be unrealistic to look solely at the original applicant which later sought ownership amendments, and ignore later applicants for a co-license to avoid a prelicensing antitrust review of the latter.

7 N.R.C. at 588.

Finally, we note that in *Ohio Edison Company, supra,* at n.39, this Commission queried whether a request by a party that it be relieved of the antitrust conditions of a license means that other parties should be able to request that additional conditions be imposed. This Commission recognized that "such an approach may not be inconsistent with the underlying philosophy of section 105(c) and could be sound policy. Congress placed limitations on post licensing antitrust review to provide certainty to the licensee that it would not be drawn into continuing antitrust proceedings before the Commission. When the licensee initiates a proceeding to suspend or modify the antitrust conditions, the policy of insulating the licensee from continuing antitrust proceedings may not hold the same, if any, force." That is certainly true in the instant situation.

If a nuclear license subject to antitrust conditions is transferred, it might seem that the new licensee should be subject to the same antitrust conditions as the old licensee. However, in many cases, those conditions were tailored to the activities inconsistent with the antitrust laws that the old licensee was engaging in or could be engaged in. In many circumstances it would be ridiculous to impose these inapposite conditions upon a new licensee. However, it also would not necessarily be appropriate to nullify them. The

question must turn on whether the new licensee should be subject to the old conditions, new conditions, or no conditions. In other words, on a significant changes analysis.

We repeat it is undeniable that the intent of section 105(c) is to ensure that no entity operates a nuclear facility without having undergone antitrust review, or at least the potential of such review. Any other construction is entirely intent-defeating.

The passage of the Energy Policy Act of 1992 has no relevance to the question whether antitrust reviews should be conducted in conjunction with license transfers. That statute expanded the authority of the Federal Energy Regulatory Commission to order the provision of transmission service when a complaint is filed. Moreover, EPAct has a savings clause to protect existing antitrust review.[5] However, nuclear license *transfers* raise issues of concentration of *generation,* which are beyond the scope of the EPAct provisions.

The Licensees have argued that NRC antitrust review of license transfers is unnecessary in light of the FERC's jurisdiction to review mergers under Section 203 of the Federal Power Act. However, the FERC has repeatedly disavowed Section 203 jurisdiction over sales of generation,[6] so there is no basis for the NRC to presume any regulatory overlap. The utilities also mention the FERC's open access policies and its general increasing reliance on competition. But reliance on competition makes antitrust

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[5] The suggested of the exclusivity of Federal Energy Regulatory Commission, now FERC, regulatory authority was disposed of over twenty-five years ago in *Otter Tail Power Co. v. F.P.C.,* 410 U.S. 366. (1973). *Accord, United States v. Philadelphia National Bank,* 374 U.S. 321 (1963); *Consumers Power Co.* (Midland Units 1 and 2), 6 NRC 892 (1977).

[6] *E.g., Consumers Power Co.*, 52 F.E.R.C. ¶ 61,023, at 61,142 (1990), *petition for review denied sub nom. Michigan Pub. Power Agency v. FERC*, 963 F.2d 1574 (D.C. Cir. 1992).

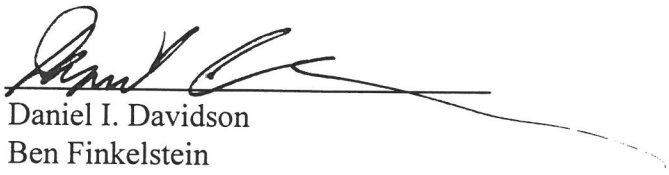
scrutiny of nuclear plant acquisitions *more* important, not less important, because of the absence of other regulatory checks.

In general, irrespective of the antitrust responsibilities of other entities, this Commission has always recognized that pre-licensing antitrust review has a very special role in the general antitrust enforcement scheme because of the unique opportunity presented to resolve difficult antitrust issues. *E.g.*, *Houston Lighting & Power*, 5 N.R.C. at 1316-18. Ultimately, pre-licensing antitrust review is not the NRC's responsibility on account of special expertise so much as on account of the special *opportunity* presented. That opportunity arises at a would-be licensees's first involvement with a nuclear plant, whether that first involvement be through a construction permit application or an application for transfer of control.

Finally, the Commission must give due consideration to Section 189(a)(1)(A) of the Act, 42 U.S.C. § 2239(a)(1)(A), which includes an "application to transfer control" among the events which trigger the right to a hearing upon request of any person whose interest may be affected by the proceeding. A person who stands to lose the effective protection of existing antitrust license conditions as the result of an application for transfer of control clearly comes within the ambit of Section 189(a)(1)(A). Accordingly, foreclosing a hearing under these circumstances, as the Commission is considering, plainly runs afoul of the Atomic Energy Act. Likewise, Section 184, prohibits transfers unless "after securing full information," the Commission "find[s] that the transfer is in accordance with the provisions" of the Act, which demands adherence to the mandated antitrust policy.

For the foregoing reasons, APPA and FMPA submit that a policy of blanket elimination of antitrust reviews in conjunction with applications for transfer of control of licensed nuclear facilities would contravene the Atomic Energy Act and would constitute an unsound departure from established Commission practice.

Respectfully submitted,



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March 31, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

| Docket No.

AFFIDAVIT OF DAVID PENN

1. My name is David W. Penn.

2. My address is 3032 North Stafford Street, Arlington, Virginia 22207.

3. My current position is Deputy Executive Director, American Public Power Association, Washington, D.C. APPA is the national trade association representing the interests of over 2,000 state and local publicly owned electric utilities in the United States.

4. Prior to joining APPA in 1991, I served 13 years as the first general manager of Wisconsin Public Power, Inc. (WPPI), a wholesale supplier of electricity to its 30-member/owner municipal communities in Wisconsin. Earlier I served as chief economist of the U.S. Department of Energy's office of competition; chief economist of the Nuclear Regulatory Commission's antitrust licensing review; and chief of the Federal Trade Commission's economic research and services division. Over the past 30 years my writings and testimony have been published in numerous utility industry and academic journals, book collections, and government staff reports and hearings records.

5. I earned a B.S. in 1966 from the University of Wisconsin and an M.A. in 1968 from Washington University in St. Louis, both in economics.

6. At APPA, among other management and subject areas, I am ultimately responsible for the policy and member system support on issues of power supply, transmission access, NERC and other system reliability matters, market power, mergers, interventions and other filings at FERC, and analysis and maintenance of industry

financial and operating statistics. At WPPI, I took the fledging power supply agency from its beginnings to a $125 million operation with a mix of power supply contracts with a dozen parties in five states and as far away as 1,000 miles, minority generating plant ownership, plant construction, use of member generation capacity, and hard-fought transmission access arrangements. At the Department of Energy, I was responsible for evaluating competitive impacts of the agency as well as energy markets themselves, including nuclear and other baseload generation in electricity. At the NRC, I participated in the antitrust review of nuclear generating facilities when license applications were at their peak. My support ranged from preparing analyses, providing internal policy advice, to developing expert witness and other testimony. As a result of my experience, I am familiar with electricity markets—both economic and physical—and how they are affected by the ownership and operation of nuclear generation facilities. Historically, a relatively small number of very large vertically integrated utilities have dominated electric markets. This dominance has often come about through control of transmission and retail franchises. These same companies are the primary owners of most large nuclear generating facilities in the United States.

7. Nuclear technology was developed to a very great extent by the Federal government, including through the Manhattan Project, the nuclear submarine program, and the continuing government subsidization of developments in fuels, applied R&D, and generation facilities. The antitrust review provided for in the Atomic Energy Act results from a conviction that those who receive the benefits of the enormous governmental investments in nuclear technology should not be permitted to use the fruits of those

investments contrary to antitrust policy. A parallel purpose is to protect the competitive opportunities of smaller systems compared with those who benefit from nuclear licenses.

8. As a result of the Commission's antitrust authority, many major utilities have become subject to antitrust license conditions. These conditions have had very significant impacts in shaping competitive electric markets. They remain significant to the industry's market structure. A failure to maintain these conditions would undoubtedly substantially reduce electric industry competition.

9. For basic reference and breadth of impact, see my March, 1977, article, "The NRC's Antitrust License Conditions and the Structure of the Electric Utility Industry," in Mitre Workshop Proceedings, MTR-7193, pp. 227-300; and D.W. Penn, J.B. Delaney, and T.C. Honeycutt, *The U.S. Nuclear Regulatory Commission's Antitrust Review of Nuclear Power Plants: The Conditioning of Licenses,* NRC staff report, NR-AIG-001, May 1976. "[T]he degree of competition in the electrical utility industry is significantly increased by the NRC's antitrust license conditions. ... In sum, I feel that the NRC's antitrust review and its attendant license conditions are playing a significant role (1) in providing for a more competitive structure and increased competitive opportunities, especially in the bulk power and bulk power services markets, (2) in promoting coordination, and hence, efficiency, reliability, and organizational diversity, and (3) in helping to allow more substitution of the dynamic discipline of regulation by the market in place of the often static regulation by Commissions and Federal agencies." (Mitre, pp. 291, 292.)

10. If nuclear licenses can be transferred without *any* Commission antitrust review, companies may be able to evade or eliminate antitrust conditions. Many antitrust

conditions came about through agreements among market participants, including NRC licensees. In the process of negotiations, in reliance upon the continued effectiveness of antitrust license conditions, many smaller systems settled cases or failed to press potential cases in reliance upon the conditions. Neighboring entities that were intended beneficiaries of conditions have entered into millions of dollars of investments, including in nuclear plants and in other generation and transmission, based upon the legal rights that are ensured by the conditions. If the conditions were eliminated or undercut, this would upset contract and other reliance interests of these systems, weaken competition and deprive systems of bargained for benefits.

11. Transfers of licenses without adequate opportunity for Commission review may allow the sellers of nuclear plants to escape their bargains. Such transfers could be made to affiliated companies or to larger successor companies, for example, through merger. Sham sales could result for the purpose of permitting licensees to avoid the pro-competitive requirements of antitrust license conditions.

12. Many regions throughout the country are subject to constrained transmission conditions because of physical limitations of transmission systems, because of actions by companies to protect their markets, or both. Although the Federal government through the antitrust laws, the actions of this Commission, and the "open access" policies of the Federal Energy Regulatory Commission has been acting to open transmission, transmission constraints can and do severely restrict market opportunities by creating small, geographically balkanized bulk power markets. Additionally, large transmission owners are aware that their transmission policies can aid their own and their affiliates' marketing departments, injuring actual or potential competition by existing

firms and new entrants. Adding to the impact of transmission barriers and attendant market power is the ability of some transmission owners to limit the use of transmission over transmission interfaces (*i.e.*, interconnections between transmission systems). Transmission owners may be able to "determine" transmission capabilities in ways that limit competitors' use of transmission. They can set Available Transfer Capacity and Capacity Benefit Margins (*i.e.*, reserved transmission) in ways that discriminate against smaller systems. Many transmission companies refuse to join regional, independent transmission systems, thereby creating "pancaked" rates and market disadvantages for competitors. Transmission owners can often create transactional costs in negotiating transmission service agreements and the terms of transmission use, notwithstanding the theoretical open availability of tariffed service. One merely need examine any recent volume of Federal Energy Regulatory Commission reports to find the many examples of controversy and abuse.

13. For example, Florida has limited interface capacity to the north. Within Florida at least one large transmission owner and nuclear licensee has refused to agree to regional transmission arrangements, thereby limiting competitive opportunities for dependent systems. The so-called ERCOT transmission area in Texas has only two d.c. transmission ties to interstate transmission grids. The major Michigan transmission owners claim that transmission is constrained to the south. There are other mid-west transmission constraints that can severely limit power flows.

14. In California, the outage of one or more of the Diablo Canyon units has a severe adverse impact on import capability from the Pacific Northwest and desert Southwest. American Electric Power recently confirmed widespread concern that both

Cook units will be unavailable for summer 1999. According to W. Robert Kelley of AEP, "The Cook plant affects critical pathways for some transmission customers' power supply, and the market needs to know the availability of transmission services before they can finalize their energy options." (*Electricity Daily*, March 29, 1999, p. 1.)

15. Nuclear plants tend to be very large and often have comparatively low operating costs. Especially in regions where there are limitations of available generating capacity or constrained transmission, the unreviewed transfer of nuclear plants may permit those plants to be used to manipulate power sales markets, contrary to antitrust principles. If the owner of large base load plants and other generation withholds or overprices nuclear energy, it can destabilize market energy conditions, create artificial power shortages or cause "price spikes." Such activities may severely injure competitive market opportunities for smaller competing systems.

16. In my negotiating and operating experience as General Manager of WPPI, I was acutely aware of the role large nuclear plants owned by very large private power company competitors could play in potentially crippling the economic markets and altering the region's reliability. The operation of the Zion and other nuclear plants of Commonwealth Edison in Illinois could determine the power flows northward into Wisconsin. Two summers ago this was reaffirmed as Wisconsin citizens held their breath in being dependent on less reliable sources from the west because a whole array of northern Illinois nuclear units were out of commission and the resulting generation configuration virtually eliminated the possibility of transfers to the north. From the west, flows on the crucial single 345 kV transfer line were subject in a general equilibrium sense to NSP's loading of its nuclear and other baseload capacity. Within the state of

Wisconsin, control of the generation on the greatly more populous eastern side of the state confers ultimate control over which customers will have electricity and at what price during constrained situations. This large generator capacity in Wisconsin is owned by Wisconsin Electric and the state's other private power companies and is heavily weighted with three large nuclear units located on the shores of Lake Michigan. The importance of this in-state generation, and its inability to fully protect the state, was brought home again during last summer's "price spikes" in the Upper Midwest. The 1998 experiences even led Wisconsin Electric to complain to FERC about NSP's manipulations and contributed to legislatively driven production investment actions now being implemented by efforts of the Governor's office and the Public Service Commission.

17. Although the Federal Energy Regulatory Commission and other regulatory agencies are promoting competition, the opportunity for larger companies to exercise market power not only remains, but it is being exercised. The combination of market control and reduced regulation makes antitrust review of the potential use of nuclear plants increasingly important. Other factors that emphasize the need for antitrust review are the extensive number of recent mergers and merger applications in the industry.

18. Based on the above, power from nuclear plants can be sold into closed markets, thereby creating "situations inconsistent with the antitrust laws." The transfer of plants may permit the sale of power from nuclear plants into differently configured markets to the disadvantage of smaller systems.

19. Many NRC license conditions have focused on plant participation, transmission access, coordination and wholesale power access. Plant transfers may be used to weaken existing conditions or the effectiveness of existing conditions for each in these

areas. First, it is certainly possible to have renewed nuclear monopolization. If a majority owner of a nuclear plant sells its interest to a third party, an anticompetitive situation may be created unless minority plant owners can also sell their interests on similar terms or unless suitable corrective conditions are made applicable to the new licensee.

20. Second, most existing license conditions cover transmission access over a transmission network that covers only the licensees' transmission system. Where there is a merger, if a license transfer takes place, but transmission license conditions are limited to the original licensees' transmission system, the merging system may obtain access to a larger transmission network, but the minority owners may be limited to the original -- now truncated -- system. In this way, the larger system will have access to a broad market on far more favorable terms than the smaller one.

21. Third, through its license conditions this Commission has recognized the importance of electrical coordination. Large systems are often in a position to deny coordination. In an environment that has reduced regulation, especially where mergers create large internal systems, transferees of NRC licenses may coordinate their generation, including their nuclear generation, but deny coordination and similar bulk power services offered internally or to affiliates.

22. Fourth, the reduction of regulation is leading to less favorable wholesale power terms, including where wholesale power is generated using nuclear plants. Antitrust enforcement may be required. License transfers may create conditions of dominance or reduce smaller system access.

23. The applicants in this case argue that NRC antitrust review is unnecessary because other agencies, such as the Department of Justice, the Federal Trade Commission,

the Federal Energy Regulatory Commission or the state agencies may perform the NRC functions. Other agencies do not have the authority or continued electric industry focus that is required to correct the above potential abuses. The Department of Justice, Federal Trade Commission and many state antitrust enforcement agencies do not concentrate on electric matters. They often tend to correct abuses after the fact as opposed to adopting preventive measures. They tend to perform a policing function.

24. Although the Federal Energy Regulatory Commission has merger approval authority, it is difficult to envision that agency adopting prophylactic measures that parallel the NRC conditions. FERC's ability to broadly condition the use of nuclear plants may be deemed limited. Where generation is concerned, the agency tends to defer to state authority, even in the context of mergers. Plant construction—and operation—are generally deemed local matters. The FERC performs essential functions to aid competition, but ones that are differently focused than that of the NRC. Also, FERC's generation authority is deemed to be incomplete. FERC has yet to clarify its authority over generation asset divestiture where there are no transmission facilities. See "Petitioners' Answer to Motions and Response to Protests," filed March 30, 1999, by the American Public Power Association and Citizen Power, Inc., in FERC Docket No. EL99-40-000.

25. Likewise, many, but not all, states are concerned about antitrust impacts. However, state regulation can hardly deal with developing multi-state holding companies and market concerns.

26. In writing this affidavit, I point out very real problems. The type of problems that I raise are not only potential, but occur, in fact. For the NRC to avoid any examination of license transfers invites anticompetitive abuse.

27. In giving this affidavit, I do not mean to imply that in some situations a limited NRC antitrust review would be inappropriate. However, it cannot be said that this would be true in *all* cases. That being the case, the Commission must afford those affected by license transfers the attempt to demonstrate real problems that license transfers may cause, including granting adequate initial discovery where information to prove potential abuse would be in the possession of the license transfer applicants.

David W. Penn

March 31, 1999

Edward Eskin
Notary Public, District of Columbia
My Commission Expires Nov. 30, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing document to be served upon the following persons by deposit in the U.S. mail, first class, postage prepaid, as indicated by an asterisk (*) or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by double asterisks (**), with copies by electronic mail as indicated.

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