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July 6, 1999

Ms. Annette L. Vietti-Cook
Secretary
Nuclear Regulatory Commission
Washington, DC 20555-0001

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

Dear Ms. Vietti-Cook:

Kansas Electric Power Cooperative, Inc. ("KEPCo") submits this letter pursuant to the Commission's direction in Memorandum and Order CLI-99-19 (June 18, 1999), that the parties to this proceeding submit letters within fifteen days addressing the disposition of the existing antitrust conditions attached to the license for the Wolf Creek Generating Station No. 1 ("WGCS" or "Wolf Creek") in light of the proposed license transfer and amendment.

This proceeding arises from the application dated October 27, 1998, and supplemented on November 10, 1998, to transfer to a new company, Westar Energy, Inc. ("Westar Energy"), the possession-only interest of Kansas Gas and Electric Company ("KGE") and Kansas City Power and Light Company ("KCPL") in Operating License No. NPF-42 ("the Operating License") for Wolf Creek and for an amendment to the Operating License to reflect this transfer of ownership ("the Application").

20629

Background

1. The Proposed License Transfer and Amendment. KGE and KCPL each owns an undivided 47% interest in Wolf Creek. KEPCo owns a 6% undivided interest. Wolf Creek is located in the KGE service area. KEPCo, KGE, and KCPL hold possession-only interests in the Operating License for Wolf Creek. KEPCo, KGE, and KCPL likewise own the stock of the Wolf Creek Nuclear Operating Corporation ("WCNOC"). The Operating License authorizes WCNOC, as agent for the owners, to possess, use, and operate Wolf Creek.

KGE is a wholly owned subsidiary of Western Resources, Inc. ("WRI"), formerly named The Kansas Power & Light Company ("KPL"). The current KGE is the result of the 1991 merger of a predecessor company, also named KGE, with a wholly owned subsidiary of KPL.1/ WRI provides electric utility service under its trade name KPL and through its subsidiary KGE.

The proposed transfer of KGE's and KCPL's possessory interests in the WCGS license to Westar Energy arises from the proposed merger of WRI and KCPL. Under the proposed merger, the electric utility operating assets of WRI (KPL), KGE, and KCPL will be combined and transferred to Westar Energy. Thus, Westar Energy will succeed to the ownership interests of KGE and KCPL in Wolf Creek and WCNOC, and to the rights and duties of KGE and KCPL under the Operating License and under the WCGS ownership and operating agreements to which KEPCo is a party.

2. Description of KEPCo. KEPCo is a generation and transmission cooperative with twenty-one rural electric cooperative member systems, which together distribute electric power

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1/ *See* Application, p. 1 & n.1; Amendment No. 53 to License No. NPF-42 (Nov. 19, 1991).

to more than 300,000 rural Kansans. KEPCo is responsible for supplying the wholesale power and energy requirements of its members.

KEPCo is a transmission-dependent utility of WRI and KGE, and thus depends entirely on them for service to its members' delivery points on the transmission systems of the two utilities. Sixteen of KEPCo's member systems have bulk power delivery points on the transmission systems of WRI and/or KGE. Eleven of these member systems have delivery points located within the service area of WRI,2/ and eight have delivery points in the service area of KGE.3/ These KEPCo member systems receive power from KEPCo resources through WRI and KGE's transmission facilities.

KEPCo purchases partial-requirements wholesale power from WRI and transmission and ancillary services from WRI and KGE. KEPCo's own power-supply resources require transmission through WRI, KGE, or both. These resources are preference power purchased from

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2/ These eleven cooperatives are Ark Valley Electric Cooperative Association, Inc.; Brown-Atchison Electric Cooperative Association, Inc.; Bluestem Electric Cooperative Association, Inc.; Butler Rural Electric Cooperative Association, Inc.; DS&O Rural Electric Cooperative Association, Inc.; Flint Hills Rural Electric Cooperative Association, Inc.; Leavenworth-Jefferson Electric Cooperative, Inc.; Lyon-Coffey Electric Cooperative, Inc.; Ninnescah Rural Electric Cooperative Association, Inc.; Smoky Hill Electric Cooperative Association, Inc.; and Twin Valley Electric Cooperative, Inc.

3/ These eight cooperatives are Butler Rural Electric Cooperative Association, Inc.; Caney Valley Electric Cooperative Association, Inc.; Heartland Rural Electric Cooperative, Inc.; Lyon-Coffey Electric Cooperative, Inc.; Radiant Electric Cooperative, Inc.; Sedgwick County Electric Cooperative Association, Inc.; Sumner-Cowley Electric Cooperative, Inc.; and Twin Valley Electric Cooperative, Inc.

the Southwestern Power Administration ("SWPA") and KEPCo's 6% undivided interest in Wolf Creek.

In addition, two of KEPCo's member systems are connected to and receive wholesale requirements power from KCPL.4/ These two member systems have eight delivery points in the KCPL control area. KEPCo depends entirely on KCPL for service to its members' loads in the KCPL service area, and thus is also a transmission-dependent utility of KCPL.

Thus, KEPCo has interests in this proceeding as (1) a co-owner of Wolf Creek; (2) a transmission-dependent utility on the systems of WRI, KGE, and KCPL; (3) a wholesale power-supply customer of WRI and KCPL; and (4) a competitor of WRI, KGE, and KCPL in providing wholesale bulk power. Moreover, KEPCo's member systems are actual or potential competitors of WRI, KGE, and KCPL in providing retail electric service.

3. The Merger's Differential Effect on Applicants and KEPCo. The proposed merger and transfer of KGE's and KCPL's possessory interests in the WCGS license to Westar Energy would allow Westar Energy to operate the merged companies' generating resources in a single fully integrated control area in the combined service areas of WRI, KGE, and KCPL. Westar Energy would be able to use its 94% share of Wolf Creek to serve its load throughout that combined service area on an economic dispatch basis. But absent substantive amendment by this Commission, the antitrust conditions to the Operating License would maintain a distinction between KEPCo members in the KGE service area and KEPCo members located elsewhere in

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4/ These two cooperatives are Heartland Rural Electric Cooperative, Inc., and Lyon-Coffey Electric Cooperative, Inc.

the Westar Energy service area, thereby allowing Westar Energy to force KEPCo to operate at a competitive disadvantage relative to Westar Energy, due to, *inter alia*, restrictions on KEPCo's efficient use of its resources, including its 6% share of Wolf Creek.

Moreover, as a result of the merger, KEPCo, if it attempted to sell its share of WCGS, would lose one of the only two likely competitors to purchase its share and, under the right-of-first-refusal provision in the WCGS Ownership Agreement, would be severely restricted in its ability to offer to sell its share of WCGS to any entity but Westar Energy.

As we demonstrate below, amendment of the antitrust conditions attached to the Operating License to remedy these collateral effects of the merger and license transfer and amendment are within this Commission's authority and are necessary to prevent antitrust injury that KEPCo otherwise would sustain. The Commission cannot assume that any other federal or state agency will grant this relief in conjunction with a review of the proposed merger.

KEPCo's Proposed Amendments to the Antitrust License Conditions

The antitrust license conditions to the Wolf Creek Operating License must be amended as a result of the merger and license transfer to prevent anticompetitive restrictions on KEPCo's ability to use its generation resources, including its share of Wolf Creek itself.

Appendix C to the Operating License contains separate antitrust conditions for KGE and KCPL. These conditions are different as between the two companies. In particular, the KGE conditions contain certain restrictive conditions regarding KEPCo (specifically, its predecessor Kansas Electric Cooperatives, Inc., or "KEC"). The KCPL conditions do not contain these restrictive conditions.

In the November 10, 1998 supplement to the instant Application, the Applicants did not propose to combine the KGE and KCPL license conditions, but simply to amend the definition of the "Licensee" in each case to be Westar Energy. Such minor amendment would leave in place not just duplicative conditions, but the significant differences in the two sets of conditions. The resulting disparity would create an unacceptable uncertainty about the rights and obligations of Westar Energy and KEPCo. The Application's proposed solution to this problem was inadequate, stating simply that "Westar will follow the more restrictive set of conditions for any given circumstances."5/ The Application did not even propose that this gloss on the conditions be written into the conditions themselves, and, in any event, this gloss merely substituted one uncertainty for another, because it is far from clear what would be "the more restrictive set of conditions for any given circumstances." Finally, although the Application explained that KEPCo can seek to apply the more general license conditions applicable to any "entity" in the Westar Energy service area, 6/ the more restrictive license conditions applicable to KEPCo in the KGE license conditions would remain in place.

Thus, condition 2(b) of the KGE conditions provides, *inter alia*, that "no less than 42 percent of the total demand requirements of the KEC members in Licensee's Service Area shall be satisfied by KEC by use of its available power from Wolf Creek Nuclear Unit Number 1." Section 1(i) of the KGE conditions defines "KEC members in Licensee's Service Area" to be

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5/ Application, p. 10, n.8.

6/ *Id.*

eight specific distribution cooperatives located in the KGE service area when the license was originally issued in 1976.7/

This restriction on KGE's wheeling obligations under the antitrust conditions to the Operating License is in effect carried forward in the 1993 "Electric Power, Transmission and Service Contract" between KGE and KEPCo, and it serves as the basis for WRI's refusal to provide KEPCo with the economic benefits of the economic dispatch of its share of Wolf Creek. WRI economically dispatches its resources and KEPCo's resources (including their shares of Wolf Creek) but abuses its authority over after-the-fact accounting to deny KEPCo the full benefit of the economic dispatch of KEPCo's resources. For example, if KEPCo's load in the KGE area is less than KEPCo's Wolf Creek entitlement, WRI deprives KEPCo of the economic benefit of that low-cost energy, which could be dispatched to serve KEPCo load in the WRI area (outside the KGE service area). Instead, WRI requires KEPCo to purchase energy to serve its members in the WRI area from WRI at approximately double the price of the cost of its Wolf Creek energy.8/

7/ Condition 1(i) states: "'KEC members in Licensee's Service Area' refers to the following KEC member rural electric cooperatives: the Butler Rural Electric Cooperative Association, Inc.; the Caney Valley Electric Cooperative Association, Inc.; Coffey County Rural Electric Cooperative Association, Inc.; the United Electric Cooperative, Inc.; the Radiant Electric Cooperative, Inc.; the Sedgwick County Electric Cooperative Association, Inc.; the Sekan Electric Cooperative Association, Inc.; and Sumner-Cowley Electric Cooperative, Inc." Eight KEPCo member cooperatives have delivery points in the KGE service area today. *See supra* n.3. The names are different because of mergers among some of KEPCo's members and the addition of a delivery point by a cooperative previously not served by KGE.

8/ The anticompetitive effect on KEPCo that would be caused by the restrictive KGE Wolf (continued...)

A similar restrictive condition is in the transmission sections of section 7 of the KGE conditions. Section 7(b) of the KGE conditions obligates KGE to transmit for KEPCo up to 90 MW of preference power that KEPCo obtains from SWPA.. But section 7(d) of the KGE conditions provides, that in each year of commercial operation of Wolf Creek, "no less than 40 megawatts of power transmitted for KEC pursuant to the provisions of subparagraph 7(b) above, if available, shall be used to satisfy the power requirements of the KEC members in Licensee's Service Area." Once again, section 1(i) of the conditions defines these KEPCo members by name, and they are the KEPCo members in the KGE service area when the license conditions were written.

The proposed amendment to the KGE conditions in the Application would not by itself remove these unwarranted limitations, which are anticompetitive and inconsistent with the operating realities to be enjoyed by the merged company. Condition 1(a) would be amended so that "Licensee" means Westar Energy. But condition 1(i) would not be amended; it would carry

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8/ (...continued)
Creek conditions under the proposed merger is explained in more detail at pages 58-61 of the Direct Testimony of Gordon T. C. Taylor, Ph.D. ("Taylor Testimony"), which was appended as Attachment 1 to KEPCo's March 16, 1999, motion to intervene in this docket. The Taylor Testimony was submitted with KEPCo's Protest filed at the Federal Energy Regulatory Commission ("FERC') on February 2, 1999, in FERC Docket No. EC97-56-000. Dr. Taylor is an independent consulting economist who specializes in antitrust and economic regulation of the electric power industry. Dr. Taylor served for five years on the staff of the Federal Energy Regulatory Commission, where he was Director of the Division of Economics and Finance. Subsequently, as a consultant to the U.S. Department of Justice, Antitrust Division, Dr. Taylor assisted in preparing antitrust licensing conditions for three nuclear generating plants (Comanche Peak Nuclear Project, South Texas Nuclear Project, and St. Lucie No. 2 Nuclear Generating Plant).

forward the restrictions on KEPCo and the limitations on KGE's obligations as if nothing had changed to KGE or KEPCo's operations since 1976.

The proposed merger of KGE, WRI, and KCPL and transfer of the Operating License to Westar Energy would greatly exacerbate KEPCo's existing difficulties. WRI's present authority over after-the-fact accounting would be extended to encompass the KCPL area in addition to the WRI (KPL) and KGE areas. Westar Energy would be able to dispatch the output of Wolf Creek and other Westar resources on a combined basis to serve loads throughout the Westar Energy area. KEPCo's 6% share of Wolf Creek and its SWPA preference power would be included in this central economic dispatch, which includes service to KEPCo's delivery-point loads served from the Westar Energy transmission system and located in the Westar Energy control area. Yet Westar Energy would be free to treat KEPCo's generation resources, including its share of Wolf Creek, as if KGE still existed and KEPCo's members in the former KGE service area as of 1976 were separately served. In short, the license's antitrust conditions would restrict Westar Energy's obligations based on a fiction, and Westar Energy would be able to continue WRI's practice of arbitrarily denying KEPCo benefits by assigning KEPCo costs in after-the-fact accounting, arbitrarily raising KEPCo's costs.

It would seem irrefutable that the KGE license conditions in question were not intended to provide a tool for discrimination that could be applied to have an anticompetitive effect on KEPCo. Yet the proposed merger of the WRI, KGE, and KCPL electric utility operations would have precisely that result. In other words, license conditions intended to protect KEPCo as a transmission-dependent utility from anticompetitive acts would be turned on their head and used

anticompetitively to raise KEPCo's costs of doing business, thereby unfairly diminishing its competitiveness.

In order to mitigate the abuse of market power by the merged company, Westar Energy, the KGE license conditions at a minimum should be amended to state expressly that a license condition specifically applicable to KEPCo will not restrict KEPCo's rights or Westar Energy's duties to KEPCo under other, more general, license conditions. Moreover, all license conditions should apply to KEPCo's members' delivery points in the entire Westar Energy service area, not just to members in one discrete sub-area within the Westar Energy service area. Thus, section 1(i) of the KGE conditions should be amended to identify all KEPCo members in the Westar Energy service area. These are the members listed in footnotes 2, 3, and 4 above. These changes are essential so that the misuse of market power witnessed in the wake of the KPL/KGE merger does not continue on an even larger scale in the wake of the proposed merger with KCPL.

Accordingly, in addition to the minor amendments proposed in the Application, the antitrust conditions for KCPL and KGE should be amended to state that the more restrictive KGE conditions otherwise applicable to KEPCo (Conditions 2(b), 3-5, 6(b), and 7-9) do not restrict KEPCo's rights or Westar Energy's duties under other license conditions. Moreover, the definition of "KEC members in Licensee's Service Area" in KGE condition 1(i) should be amended to include all KEPCo members with facilities in the Westar Energy service area, in accord with the language in the analogous KCPL condition 1(b).9/

9/ KCPL Condition 1(b) states: "'Licensee's Service Area' means those portions of the States of Missouri and Kansas which are certificated to Licensee by the respective state

(continued...)

The Antitrust Conditions Should Be Amended To Protect KEPCo's Rights To Sell Its Share of Wolf Creek.

Under section 5.4 of the Wolf Creek Ownership Agreement, an owner wishing to sell its share of Wolf Creek must give the other owners at least one year to exercise a right of first refusal ("ROFR") following receipt of a *bona fide* offer.10/ KEPCo has asked the other owners to waive this ROFR prerequisite, because it makes a sale of KEPCo's share extremely unlikely; to date, they have refused.

The proposed merger would cause a potential adverse effect by creating control by Westar Energy over KEPCo's ability to sell its share of WCGS. As a practical matter with the ROFR in place, Western Resources and KCPL are the only potential buyers of KEPCo's share today. After the merger, Westar Energy will be the only potential buyer. Today, with KGE and KCPL each owning 47% shares, the ROFR gives each of them a margin of time to purchase the other's share before its sale to an outside party. Less importantly, it also gives KGE and KCPL time to consider buying KEPCo's share before its sale to the other co-owner (which would give majority control of Wolf Creek to the purchaser). But with the merger of KGE and KCPL, the ROFR has outlived these conceivable purposes of forestalling a transfer of control of Wolf Creek. A sale by KEPCo would not disturb Westar Energy's operating control. KEPCo

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9/ (...continued)
regulatory commissions. An entity shall be deemed to be in the 'Licensee's Service Area' if it has electric power generation, transmission, or distribution facilities located in whole or in part in or adjacent to the above-described area or in counties served in part at retail by Licensee."

10/ The WCGS Ownership Agreement was filed as Attachment 3 to KEPCo's motion to intervene in this proceeding.

therefore requests that the Commission require, as a condition to its approval of the license-transfer application, that the applicants delete the ROFR provision from the Ownership Agreement as a condition to approval of the license-transfer application.

Moreover, KEPCo requests that the Commission require, as a further condition on approval of the license-transfer application, that Applicants cannot sell, lease, or otherwise transfer all or part of their interests in Wolf Creek or WCNOC to any third party, including an affiliate, unless Applicants provide KEPCo reasonable notice of the proposed transaction and an opportunity to participate in the transaction on the same or equivalent terms and conditions. Like the elimination of the ROFR, this measure will permit KEPCo to market its share of Wolf Creek. It will enable KEPCo to participate on equal terms with Applicants in any future transaction involving Wolf Creek or WCNOC. The Commission can readily enforce this condition, because any subsequent transfer and amendment of the Operating License will require Commission approval.

These conditions are within the broad remedial authority of this Commission (and very likely only this Commission, and not other agencies that may review the merger).11/ Just as this Commission had authority to order the sale of an ownership interest in Wolf Creek to KEPCo in order to redress the anticompetitive conduct of KGE in refusing to wheel for and coordinate with KEPCo in the 1970s, so may this Commission order the applicants to amend this contract to

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11/ The NRC has broad latitude in formulating remedies where a situation inconsistent with the antitrust laws is shown. *E.g., Alabama Power Co.*, 13 NRC 1027, 1098-1102 (1981); *Toledo Edison Co. & Cleveland Electric Illuminating Co.*, 10 NRC 265, 282-294 (1979).

facilitate KEPCo's sale or transfer of its minority share of Wolf Creek to remedy the potential anticompetitive conduct of the merged company.

Accordingly, in light of the combination of adverse and anticompetitive effects of the merger on KEPCo, it is appropriate to eliminate the applicants' ROFR and require the applicants to include KEPCo in any subsequent transfer of the applicants' interests in WCGS or WCNOC.

Respectfully submitted,

William T. Miller

William T. Miller
Randolph Lee Elliott