UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Request for the Transfer and Amendment	)	Docket No. 50-482
of the Wolf Creek Generating Station	)	
Facility Operating License NPF-42 To	)	
Reflect Transfer of Ownership	)	

REPLY BRIEF OF THE KANSAS ELECTRIC POWER COOPERATIVE, INC.

In accordance with the Memorandum and Order of March 2, 1999 ("the March 2 Order"), issued by the Nuclear Regulatory Commission ("the Commission" or "NRC") in this proceeding, the Kansas Electric Power Cooperative, Inc. ("KEPCo") submits this brief in reply to the Initial Brief of Applicants In Response to the NRC's Memorandum and Order Regarding Antitrust Review of License Transfer, filed on March 16, 1999.

ARGUMENT

I. Applicants' Re-argument of Their Answer to KEPCo's Petition Is Not Proper at This Juncture.

The Applicants begin by arguing that the Commission should reject KEPCo's Petition for Intervention and Request for a Hearing ("KEPCo's Petition") based on Applicants' March 1 Answer to KEPCo's Petition ("Applicants' Answer") "regardless of how the Commission rules on the question raised in CLI-99-05." (App. Br. at 5-6; *see id.* at 3, 21.) Applicants' argument has no place in the limited briefing ordered by the Commission. KEPCo has not filed a reply to Applicants' Answer because the March 2 Order forbade it. KEPCo's initial brief was not intended to be a reply, and KEPCo reiterates its request that it be allowed to file a reply before the

Commission reaches the merits of KEPCo's Petition.1/ By leading with this argument, the Applicants highlight their recognition that the Commission cannot lawfully use this case to abandon antitrust review in license-transfer proceedings. *See infra* p. 9.

II. Applicants' Argument That the AEA Does Not Authorize Antitrust Reviews for License-Transfer Applications Is Incorrect.

Applicants argue that section 105 of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2135, permits only two antitrust reviews during a nuclear reactor's life: at the construction permit stage and the initial operating license stage. (App. Br. at 7.) According to the Applicants, the legislative history and case law show that antitrust issues are to be addressed at the prelicensing stage only. (App. Br. at 8-11.) Applicants contend that the statute's drafters were concerned that continuing antitrust review would disturb investor expectations. (App. Br. at 9-10.)

Section 105 does not use the words "prelicensing" or "initial" to describe antitrust reviews. Moreover, contrary to the Applicants' claims, the report of the Joint Committee on Atomic Energy did not state that antitrust review was limited to applications for initial licenses. (App. Br. at 8.) Instead, the Committee stated that the statute "refer[s] to the *initial application* for a construction permit, the *initial application* for an operating license, or the *initial application* for a modification . . ." (*Id.* at 9 (citing Atomic Energy-Utilization for Industrial or Commercial Purposes, H.R. Rep. No. 91-1470 at 5010 (1970)) (emphasis added).) As KEPCo explained in its initial brief, the application to transfer a license to a new owner is an "initial application" of a new entity to own and/or operate a plant. Commission precedent affirms this, as noted below.

1/ *See* Letter of KEPCo Counsel dated March 16, 1999 requesting that KEPCo be permitted to respond to the Applicants' Answer once the Commission has concluded this preliminary phase of the case.

In addition, antitrust review in this case would not disturb the expectations of investors in the Wolf Creek plant. All that KEPCo requests is that it be allowed to use its share of Wolf Creek as economically as the Applicants plan to do. Moreover, the Applicants, unlike the plant owners that concerned the drafters of the 1970 amendment to section 105, *voluntarily* subjected themselves to an antitrust review by applying for authority to change the plant's ownership. They knew that antitrust review was within the NRC's authority, as their application makes clear.

Lastly, Applicants' reliance on *South Texas* is misplaced. *South Texas* was not a license-transfer application, and the Commission noted in *dicta* that its regulations suggested that it has the authority to conduct an antitrust review of license-transfer applications.2/ More significantly, the 1977 *South Texas* decision cannot have settled the Commission's antitrust authority as the Applicants claim, for a common-sense reason: for over twenty years after *South Texas* was decided, the Commission has performed antitrust reviews on license-transfer applications, as the Applicants concede (App. Br. at 20).

KEPCo has already explained that neither *APPA v. NRC* nor the legislative history relied upon in that case support the proposition that the Commission does not have the statutory authority to conduct an antitrust review. (KEPCo/NRECA Br. at 9-11.) Applicants do not rebut this explanation. They assert that the D.C. Circuit "has found that section 105 c. is applicable only at the initial construction permit and operating license stages" and that the analysis allegedly underlying this holding "applies equally to license-transfer requests." (App. Br. at 11.) First and foremost, Applicants misstate the court's holding. The court narrowly held that the Commission

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2/ 5 NRC at 1318; *see also* KEPCo and NRECA Brief at 9.

could reasonably construe section 105 not to require significant changes reviews of license-renewal applications. The court noted that the legislative history appeared to address this specific point, and the court expressly refused to rest its holding on any other language in the legislative history, including the "initial application" language the Applicants now rely on. Thus, the court did *not* hold that section 105 is only to be used "at the initial construction permit and operating license stages." Indeed, this legislative history does not use the word "transfer" and nowhere indicates that a license-transfer application would not trigger an antitrust review.

Furthermore, a license-transfer application, unlike a renewal application, seeks a change in the plant's ownership.3/ A change in ownership may signify serious changes in the management and operation of a plant, and may ultimately result in severe anticompetitive licensee activities (as evidenced in KEPCo's Petition). Therefore, *APPA* has no precedential value with regard to license-transfer applications.

III. Applicants' Argument That the Commission Has Not Determined in Its Case Law Whether Antitrust Review Is Required in a License-Transfer Application Situation Is Based on a Misreading of the *St. Lucie*, *Fermi*, and *Summer* Cases.

Applicants argue that the Commission has never *directly* stated whether antitrust review is required in a license-transfer application proceeding. (App. Br. at 12-14.) Applicants acknowledge, however, that the Commission has addressed this question in several cases,

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3/ Because of this change in the ownership of the plant, a license-transfer application should be viewed as an "initial application" and, in turn, an "application for a license" as envisioned by the legislative history and the statute.

including the *St. Lucie* case,4/ the *Fermi* case,5/ and the *Summer* case.6/ Applicants then unsuccessfully attempt to deaden the impact of the Commission statements in these cases.

First, Applicants argue that the quote in *St. Lucie* supporting this type of antitrust review includes the word "perhaps" and is included in a footnote ("hardly a binding Commission precedent."). (App. Br. at 13.) The Applicants, however, have redacted the key quotation. Footnote 12 actually reads: "Except perhaps as necessary to enforce the terms of a license or to revoke one fraudulently obtained, or in circumstances where a plant is sold or so significantly modified as to require a new license."7/ Read in context, the word "perhaps" modifies the phrase "to enforce the terms of a license or to revoke one fraudulently obtained" and not the phrase "in circumstances where a plant is sold." Moreover, footnote 12 cites the *dicta* in *South Texas* that the Commission's antitrust review extends to instances where a plant is sold or significantly modified. More importantly, the Atomic Safety and Licensing Appeal Board ("Appeal Board") directly stated in *St. Lucie* that it has the authority to do this type of review. The statement is not invalid because it is in a footnote.

Applicants concede that in *Fermi* the Appeal Board stated that "an amendment of an existing license to add new owners was 'an initial application' requiring pre-licensing review."

4/ *In re Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1; Turkey Point Nuclear Generating Plant, Units 3 and 4)*, 6 NRC 221, 226 n. 12 (1977).

5/ *In the Matter of The Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit No. 2)*, 7 NRC 583 (1978), *aff'd* 7 NRC 752 (1978).

6/ *In the Matter of South Carolina Electric and Gas Company and South Carolina Public Service Authority (Virgil C. Summer Nuclear Station, Unit 1)*, 11 NRC 817 (1980).

7/ *St. Lucie*, 6 NRC at 226 n.12.

(App. Br. at 13 (citing *Fermi*, 7 NRC at 756 n.7).) Applicants also concede that *Summer* instituted an antitrust review of a construction permit amendment because the amendment added a new owner. (App. Br. at 14.) Applicants attempt to distinguish *Fermi* and *Summer* by arguing that in both cases the amendments were filed before the operating license was issued. (App. Br. at 13-14.) That fact, however, was not the determining factor in going forward with the antitrust review in either case.8/ Antitrust review was initiated because of the serious potential impact of ownership changes, as the Licensing Board stated in *Fermi*:

> Without exalting form over substance, it is clear that these applications 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 ownership 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 intent (sic) and purpose of §105c.[9/]

The Licensing Board also stated that "[s]ince the two cooperatives in this case are

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8/ In fact, the Commission instituted a full antitrust review in *Fermi* prior to the licensing phase of the case despite the applicants' request that the Commission wait until that phase of the case and then do a "significant changes" review. This immediacy, and the Commission's willingness to undertake a full antitrust review in between the construction permit phase and the operating license phase undercuts Applicants' argument that the statute only permits an antitrust review twice in the life of a plant.

9/ *Fermi*, 7 NRC at 588.

required to submit an application to become co-licensees, these constitute their 'initial application for a construction permit.'"10/ The Licensing Board extended this logic to applications for the transfer of a license: "The regulations pertaining to the transfer (footnote 5--"10 CFR §50.80(b)") or amendment (footnote omitted) of a license or construction permit are likewise in harmony with these concepts."11/ The Board recognized that "even though each of the joint applicants, considered alone, might be free of antitrust problems, the joint venture *per se* could conceivably raise antitrust problems."12/ The import of this holding, affirmed by the Appeals Board, is clear: license-transfer applications are to be treated as "initial applications" and should, therefore, be subject to antitrust review under section 105.

IV. Applicants' Argument That Antitrust Review in This Case Would Be Duplicative Is Unpersuasive.

Applicants argue that, as a matter of policy, the Commission should eliminate this type of antitrust review because the Commission's efforts would be wasteful and duplicative of the actions of other administrative agencies. (App. Br. at 14-18.) Applicants contend that: (a) once a plant is operating, the Commission has no special expertise in antitrust review; and (b) other agencies, including the Federal Energy Regulatory Commission ("FERC"), state public utility commissions, and the Federal Trade Commission or the Department of Justice, will consider the competitive effects of a merger even if the NRC does not undertake any review.

10/ *Id.*

11/ *Id.* at 588-589.

12/ *Id.* at 589. This holding in *Fermi* directly answers the Applicants' argument, in footnote 34 of their brief, that in this case, unlike *Fermi* and *Summer*, "Applicants are not seeking to transfer the license to, or to add, a new owner." As is clear from the quotation above, a merger of two otherwise acceptable applicants may raise antitrust concerns.

Applicants are simply incorrect in arguing that the NRC has no special expertise in antitrust review relating to nuclear power facilities. The NRC is the only agency that has the expertise and is tasked with reviewing the activities of an owner or operator of a nuclear unit to ensure that it does not "create or maintain a situation inconsistent with the antitrust laws." (*See* KEPCo/NRECA Br. at 18-19.) Moreover, the NRC is the only agency that can order as a remedy changes to the license conditions as KEPCo seeks. Other agencies are presumably relying on the NRC to carry out its duties. Although other agencies may consider the competitive impacts of the merger, none will review whether the new licensee's use of its nuclear facility will damage the competitive environment for its customers and competitors, and none can grant KEPCo the entire relief it has requested in this case.

V. Applicants' Argument That Open Access Has Alleviated the Need for License-Transfer Antitrust Review Is Similarly Unpersuasive.

Applicants argue that "[r]ecent 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." (App. Br. at 14.) Applicants cite the passage of EPAct and the issuance of Order 888, both of which have lead to the increased ability of customers to use transmission facilities to buy generation from different competitive sources. (App. Br. at 18-19.)

KEPCo addressed this argument in its initial brief (at 16-18). The owners of nuclear facilities are still in the cat-bird's seat with regard to competition, and mergers can exacerbate the anticompetitive environment because of resulting generation market power. Applicants' oblique contention that "structural changes in the electric utility industry have provided for greatly improved access to nuclear generation," thus obviating the need for the Commission's antitrust

review (App. Br. at 19) is simply not true in the current case. The Applicants' merger may well give *the Applicants* improved access to Wolf Creek, but even with the Applicants' proposed amendments to the license conditions, the merger would give KEPCo less access—*i.e.*, KEPCo's economic use of its share of Wolf Creek would still be restricted to the KGE area. (*See* KEPCo/NRECA Br. at 20-21.) This result clearly supports the need for antitrust review of transfer license applications at the NRC.

VI. Applicants as Much as Admit That the Commission May Not Lawfully Abandon in This Case Its Practice of Performing Antitrust Reviews of License Transfers.

Applicants concede that the NRC cannot change its regulations at 10 C.F.R. § 50.80(b) (requiring applicants to submit antitrust information with an application to transfer an operating license) without notice and comment rulemaking. (App. Br. at 21.) 13/ KEPCo agrees that the Commission must follow its existing regulations. Although the Applicants do not cite 10 C.F.R. § 2.101, those regulations are just as binding. They contain the procedures for antitrust reviews of license applications, and they were recently amended expressly to include license-transfer applications. The Commission cannot lawfully rescind or modify its regulations in this case. These regulations require a determination of whether there have been significant changes since the Commission's previous antitrust review. KEPCo's Petition may not be dismissed without that finding. Moreover, the facts of this case warrant a finding that significant changes have occurred.

13/ Applicants suggest an expedited rulemaking to change these regulations after a 30-day comment period based on the advanced notice provided "by publication of CLI-99-05 in the Federal Register." KEPCo disagrees that the publication of CLI-99-05 provided adequate advance notice that the Commission was considering to amend its license-transfer and antitrust review regulations. If the Commission wishes to propose changes to its regulations, it issue a notice of the proposed changes in a separate docket and allow an adequate period (*i.e.*, more than 30 days) for comments and reply comments.

CONCLUSION

For the reasons set forth above and in the KEPCo/NRECA initial brief, the Commission may not, and should not, discontinue its practice of performing a "significant changes" review in license-transfer cases in this case. Furthermore, the Commission should perform a "significant changes" review in this case, and based on the results of such review, should perform an antitrust review of the effects of this transfer on competition.

Respectfully submitted,

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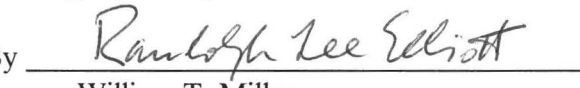
By 

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CERTIFICATE OF SERVICE

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