New Hampshire
Yankee

Ted C. Feigenbaum
President and
Chief Executive Officer

NYN-91004

January 14, 1991

United States Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Document Control Desk

References: (a) Facility Operating License No. NPF-86, Docket No. 50-443

(b) Application to Amend Facility Operating License No. NPF-86 to Authorize North Atlantic Energy Corporation ("NAEC"), as a Licensee, to Acquire and Possess the PSNH Ownership Interest in Seabrook ("Application")

Subject: FERC Initial Decision and SEC Memorandum Opinion and Order Related to Joint Plan and Operating License Amendment Application

Gentlemen:

New Hampshire Yankee (NHY) hereby supplements the Application filed on November 13, 1990 in the above Docket [Reference (a)].

In the Application, under the heading "Antitrust Considerations" [Reference (b), at pages 8-10], the licensees/applicants referred to the pending proceedings with respect to aspects of the Joint Plan which were being conducted before the Federal Energy Regulatory Commission (FERC) and the Securities and Exchange Commission (SEC). The purpose of this Supplement is to update that information.

The FERC proceeding was initiated on behalf of Northeast Utilities (NU) on January 6, 1990, seeking approval under the Federal Power Act of NU's acquisition from PSNH of jurisdictional assets as part of the Joint Plan and of NAEC's sale of Seabrook power and other rate matters. Over 60 parties intervened in that proceeding, raising numerous contentions including antitrust issues. After extensive hearings before an Administrative Law Judge, an Initial Decision was issued on December 20, 1990, a copy of which is filed herewith as Exhibit A. That decision deals extensively with the antitrust contentions raised. It concludes that the Joint Plan, as proposed, with some additional conditions, should be approved as in the public interest (see Exhibit A, pages 25-50 and 59) and it approves the sale of power by NAEC to the successor to PSNH (see Exhibit A, page 54 et seq.). Thus, the Administrative Law Judge's action validates the proposed action by NAEC, a prospective licensee of the NRC, and constrains the real parties in interest to the Joint Plan, namely NU and the successor to PSNH. Neither of those latter entities will be a licensee subject to the jurisdiction of the NRC in this docket after the Joint Plan has been implemented.

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The Initial Decision is subject to final review by the FERC Commissioners.

In addition, on October 5, 1989 an Application was filed with the Securities and Exchange Commission (SEC) for approval of those aspects of the Joint Plan which are subject to its jurisdiction under the Public Utility Holding Company Act of 1935. Again voluminous pleadings were filed by third parties, including many of the intervenors before FERC, raising contentions on competitive issues similar to those pursued b. ore FERC. On December 21, 1990, the SEC issued its Memorandum Opinion and Order, approving the aspects of the Joint Pl..n subject to its jurisdiction and specifically finding the merger would not tend toward the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interests of investors or consumers. A copy of the SEC Order is filed herewith as Exhibit B. A petition for rehearing has been filed with the SEC.

The undersigned submits that the foregoing actions by FERC and the SEC support the proposition that no independent antitrust review by the Commission is required or appropriate.

Very truly yours,

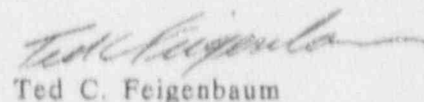

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EXHIBIT A to NYN-91004

53 FERC ¶ 63,020

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northeast Utilities Service Company (Re Public Service Company of New Hampshire)	))))	Docket Nos. EC90-10-000, ER90-143-000, ER90-144-000, ER90-145-000, and EL90-9-000

INITIAL DECISION

(Issued December 20, 1990)

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Jerome Nelson, Presiding Administrative Law Judge:

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PROCEDURAL HISTORY

Northeast Utilities (NU), acting through a service company called NUSCO, seeks approval under Section 203 of the Federal Power Act to acquire the jurisdictional assets of Public Service Company of New Hampshire (PSNH). The applicant will be referred to as NU in this decision. NU is a holding company which controls Connecticut Light and Power Company, Western Massachusetts Electric Company, and Holyoke Water Power Company. The proposed acquisition is part of a plan for the reorganization of PSNH, which is in bankruptcy. In connection with the application, NU also filed four rate schedules pursuant to Section 205 of the Federal Power Act (the Seabrook Power Contract, the Sharing Agreement and two Capacity Interchange Agreements).

On March 2, 1990, the Commission issued an order granting interventions by all requesting parties, consolidating the Sections 203 and 205 dockets, accepting and suspending the rate schedules, and granting in part NU's motion to expedite the hearing schedule by requiring that an initial decision be issued no later than December 31, 1990. Northeast Utilities Service Company, 50 FERC ¶ 61,266 (1990). That order required a hearing on the Section 203 acquisition application, and on the question of whether the rate schedules submitted as part of the plan of reorganization are just and reasonable.

On March 7, 1990, NU submitted its direct case, which consisted of the prepared testimony and exhibits of six witnesses. After extensive discovery, including numerous depositions of NU, Staff, intervenor and third party witnesses, the Staff and intervenors filed their respective direct cases on May 25, 1990. The direct cases of Staff and intervenors included the prepared testimony and exhibits of 49 witnesses. On June 25, 1990, Staff and intervenors filed cross-rebuttal cases through the prepared testimony and exhibits of 19 witnesses. On July 20, 1990, NU filed its rebuttal case through the prepared testimony and exhibits of 12 witnesses. Twenty-five days of hearings were held during August and September of 1990. Thirty-five witnesses were cross-examined, and 809 exhibits were admitted into evidence.

Briefs and reply briefs were filed in October of 1990. Four days of oral argument ended on November 13, 1990.

I. "SYNERGIES" OR BENEFITS

Under Section 203 of the Federal Power Act, the Commission "shall approve" a merger if it is "consistent with the public interest." NU must "show affirmatively that the disposition is consistent with the public interest" (50 FERC ¶ 61,266 at 61,833,

61,834, fn 43 (1990)). It is sufficient if the "probable merger benefits . . . add up to substantially more than the costs of the merger." Utah Power & Light Co., 47 FERC ¶ 61,209 at 61,750 (1989); Utah Power & Light Co., 45 FERC ¶ 61,095 at 61,299 (1988). As the Commission stated (47 FERC at 61,750):

> That is all that is required of the Applicants since they need not show a positive benefit of the merger. Rather, they need only show that the merger is compatible with the public interest.

The applicant's showing in the present case amply satisfies the test. The principal benefit is the resolution of PSNH's bankruptcy. The monetary benefits relied on are: $800 million resulting from NU's operation of Seabrook; improved availability of fossil units with savings approximating $100 million; administrative and general expense savings reductions of more than $124 million; coal purchase savings of about $39 million; and capacity and energy savings for NU and PSNH of $364 million as a result of single-system status in the New England Power Pool (NEPOOL). In addition, the applicant emphasized enhancements to transmission service resulting from its General Transmission Commitments and New Hampshire Corridor Proposal, discussed separately infra. 1/

A. Resolution of PSNH's Bankruptcy

The merger is part of a plan which enables a reorganized PSNH to emerge from bankruptcy. The bankrupt company is the largest utility in New Hampshire, providing electric service to approximately 375,000 customers, with 1,800 miles of transmission lines in the State. Its successful reorganization is unquestionably in the public interest. As the Commission said in the hearing order, "[w]e cannot ignore the fact that PSNH is the largest utility in the State of New Hampshire and that it serves every county in the State. We view the final conclusion of its emergence from bankruptcy as a matter of significant importance" (50 FERC at 61,840). The rehearing order again recognized this consideration, acknowledging "the unique factual circumstances presented by PSNH's bankruptcy and the public interest in resolving PSNH's reorganization" and "the public interest in PSNH's emergence from bankruptcy as a viable utility" (51 FERC at

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1/ See, Initial Brief of Northeast Utilities Service Company, pp. 2-10; Busch Direct, Ex. 1, pp. 17-19; Sawhill Rebuttal, Ex. 225, p. 30; Opeka Direct, Ex. 40, pp. 5-12, 29-36; Id. at pp. 41-53; Opeka Rebuttal, Ex. 52, pp. 14-17, 27; Ex. 52, pp. 38-40; Schultheis Rebuttal, Ex. 157, pp. 176-179; Noyes Direct, Ex. 9, pp. 7-15; Noyes Rebuttal, Ex.14, pp. 5, 7-12; Sabatino Direct, Ex. 18, pp. 10-12; Sabatino Rebuttal, Ex. 33, p. 4-13.

61,484, 61,485). See also, In Re Evans, 1 FPC 511 (1937) (approving an acquisition involving the reorganization of a bankrupt utility).

Nor can the interests of creditors and stockholders be ignored. The Official Committees of PSNH's Unsecured Creditors and Equity Security Holders correctly urge that the merger's impact on investors must be taken into consideration. The value of their recovery hinges on the merger. They will receive contingent notes, approximately one-third of exchangeable reorganized PSNH common stock, and contingent warrant certificates. The exchangeable stock has full value only if the merger occurs; the certificates will have no value if there is no merger (Ex. 267, pp. 4-5). Almost half of the stockholders' recovery under the reorganization plan is affected by the merger (Id. at 11). These investors -- who have received no dividends for six years and have seen "enormous losses" and "dramatically deteriorated" book equity (Id.) -- will be seriously injured without the merger. See, In re Evans at 517 ("the Commission is inclined to regard the right of these public bondholders as of primary importance after the consumers have been protected").

Some intervenors say that resolving PSNH's bankruptcy should not count as a merger benefit because the reorganization plan already envisions that company's emergence from bankruptcy as a "stand-alone" entity. This circumstance does not mean that the merger somehow has no remedial impact on the bankruptcy. Indeed, the situation is just the other way around.

First, PSNH becomes a "stand alone" entity only as part of a two-step NU merger plan. All parties to the reorganization contemplated that status as an interim step en route to the merger. The plan accepted by the Bankruptcy Court, PSNH's unsecured creditors and equity security holders, Connecticut's Department of Public Utility Control, and New Hampshire's Governor, Attorney General, Public Utilities Commission and legislature envisioned the merger -- not "stand alone" PSNH -- as the ultimate destiny for the reorganized company.

Moreover, PSNH's ability to survive alone is doubtful. The New Hampshire Commission's approval of the reorganization, while not conditioned on the merger rested on the assumption that it would occur. Indeed that Commission expressed "substantial concern" about the validity of the plan without a merger, and said that a "stand alone" PSNH would leave ratepayers "at risk" (Ex. 239A, pp. 126, 127, 176). New Hampshire's highly experienced and well qualified financial adviser testified that if the merger were denied, he would have "serious concern" that PSNH would be so weak as to be unable to avoid another bankruptcy, and would thus recommend that the State withdraw its support (Tr. 2834-2835). Continuing to maintain a weakened PSNH as a company which would be marginal at best, and indeed could

well end up in bankruptcy again, is not "consistent with the public interest."

In any event, Section 203 requires a determination as to whether "the proposed . . . acquisition . . . will be consistent with the public interest . . ." (emphasis added). The "proposed" transaction here is a merger, not a "stand alone" PSNH.

There is no requirement that the Commission examine some non-merger scenario in comparison with the proposal before it. The statute is not "hostile" to mergers; nor does it treat them as "presumptively harmful" (see, Pacific Power & Light Co. v. FPC, 111 F.2d 1014, 1017 (9th Cir. 1940). Whether certain benefits could or could not be achieved without a merger is simply not the issue. See, Utah Power & Light Co., 45 FERC ¶ 61,095 at 61,298, 61,299 (1988) (rejecting merger benefits because they were "attainable absent the merger" was improper, and "overly rigid"). Just as the "possibility of achieving a particular benefit through a contractual arrangement [as opposed to merger] does not diminish the cost savings associated with that benefit" (Id.), so the possibility of rescuing PSNH in some other way does not diminish the merger benefit.

The proposal here under review involves PSNH's emergence from bankruptcy under the approved merger plan. Emergence from bankruptcy is a distant benefit which unquestionably flows from this proposal. Whether such a result could somehow have been produced in some other way is not the question here. PSNH's recovery is entitled to substantial weight in the consideration of the acquisition's consistency with the public interest.

B. NU's Operation of Seabrook

NU claims that a reduction of $527 million in operating costs will be attributable to its operation of the Seabrook plant. These savings are based on economies of scale, management techniques, and NU's proven record of excellence in managing and operating four nuclear generating facilities (NU Br. pp. 5-6). The New Hampshire Public Utilities Commission found NU's operation of Seabrook to be a substantial inducement to agreement with the merger proposal (Ex. 239-A, p. 174). NU's witness, Mr. Opeka, testified that NU has received high ratings from the Nuclear Regulatory Commission, recently ranking among the top three nationally in safety and operational performance. Mr. Opeka also testified to a detailed three-month analysis starting with the bottom employees and working up (Tr. 2048) (corroborated

by an independent consulting firm) which quantified these savings by comparing Seabrook to NU's own Millstone 3 plant. 2/

The New England Intervenors attack the study because it was made "without the benefit of one-on-one discussion with Seabrook's current operator, NHY [New Hampshire Yankee]" (Br. p. 6). There was a reason for this. As Mr. Opeka explained (Ex. 52, p. 12):

> Although we had originally hoped that our analysis would include the input of NHY, we were asked by the Seabrook Joint Owners to carry on such discussions with NHY personnel during the critical period when they would be attempting to accomplish the startup, full power ascension testing and commercial function of the unit. For that reason, we did not try to obtain NHY input during the conduct of our analysis.

Moreover, as NU argues, "[w]hile NHY's budget figures may be accurate for its own operation of Seabrook, it is NU's operation of Seabrook, not NHY's, which is reflected in the bottoms-up study and is relevant here" (NU Reply Br. p. 3). Intervenors did not offer any contrary evidence, and the argument that there should have been more communication with NHY is not a reason for discarding NU's study.

The New England intervenors argue that the projected $527 million should not be counted because the same savings could be achieved without merger, through a management contract. But NU will operate Seabrook under the merger plan, and the substantial savings which can be realized under the merger plan are benefits, whether or not they could be achieved through a managerial service contract. Here, as in Utah, supra, "the possibility of achieving a particular benefit through a contractual arrangement does not diminish the cost savings associated with that benefit." 3/

Next, the New England Intervenors argue that the $527 million figure should be reduced by $196 million because NU is already under a five-year obligation to manage Seabrook -- even if there is no merger. The proposed reduction assumes a five-

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2/ See, Opeka Direct, Ex. 40, pp. 6-7; Opeka Rebuttal, Ex. 52, pp. 11-29; Fakonas Rebuttal, Ex. 53, pp. 11-14; Id. at pp. 17-19, 21-23.

3/ Utah Power & Light Co. at 61,299; see also, Southern California Edison Co., 47 FERC ¶ 61,196 at 61,671-72 (1989).

year contract, but the record shows that the five-year obligation has been reduced to two years (Tr. 1882-1883). Moreover, the argument ignores the fact that after the contract runs out, "stand alone" PSNH would be left to operate Seabrook without the many benefits which flow from NU's status as a multi-unit nuclear organization (Ex. 40, pp. 17-19). But even a deduction to reflect the existing contract nonetheless leaves over $330 million in total Seabrook savings, which would be directly attributable to the merger.

None of the challenges is sufficient to alter the conclusion that an NU-operated Seabrook will produce substantial savings. No opposing witness had the credentials of NU's Mr. Opeka -- a nuclear engineer with well over twenty years' experience in operating and managing nuclear power plants. NU's high ratings and extensive nuclear experience can only provide a valuable benefit to the Seabrook plant; the economies of scale are virtually certain to bring some positive (even if not precisely quantifiable) benefits to the merger. NU's control and management of Seabrook is an important benefit properly attributable to the merger.

C. Fossil Units; Administrative and General Expense; Coal Purchasing

(1) NU projects savings of about $100 million from improved availability of PSNH's fossil units. NU's own fossil steam plants exceeded NEPOOL's target unit availabilities for the four years between 1985 and 1988. In addition, NU's witness testified that NU could improve PSNH's plants by applying NU operating procedures such as the Production Maintenance Management System; Inter-Plant Maintenance Force; a database designed to automatically compute performance parameters; and training and performance improvement programs (Ex. 40. pp. 40, 41-52). Mr. Opeka attributed much of NU's own success to its development of such programs. MMWEC's Mr. Russell, though challenging the total, implicitly agreed that some such benefits would, indeed, occur -- arguing that they were overstated, and, in any event, achievable without merger. Mathematical precision is not required here. It is enough that NU's operation of the PSNH fossil steam plants will produce savings. Such benefit, whether or not achievable elsewhere, counts as a plus in the proposed merger context. See, Utah, supra.

(2) NU's claim to $124 million in benefits resulting from a reduction in administrative and general (A&G) expenses produced no serious challenge. Mr. Reynolds, an economist who testified for several intervenors, pressed for more studies of such savings, and particularly "a cross-section comparison of different sized utilities, showing that A&G expense as a percentage of total revenue fell as firm size increased" (Ex. 520, p. 35). While more studies might always be useful, the

record is sufficient on the issue. NU's Vice President for Regulatory Relations -- an accountant with years of experience with the company -- testified that the savings were based upon NU's and PSNH's analyses of their systems and their focus on identical tasks performed by both companies. The New Hampshire Commission's own analysis corroborated this factor, and found that NU had actually underestimated A&G savings (Ex. 14, pp. 7-8; Ex. 16). No one presented a contrary analysis. Common sense dictates that combining personnel and removing duplicative functions will produce benefits to the merged company. Such benefits can accrue to ratepayers and investors and must be considered as positive factors in determining whether this merger is consistent with the public interest.

(3) NU, relying on its history for purchasing lower-priced coal on the spot market, urges savings of some $39 million (or about two dollars per ton). The New England Intervenors -- while not disputing that NU has achieved economy purchases in the past -- [illegible] to the increased risk of larger spot market pu[illegible] opposed to long-term contracts. Of course, long-term contracts are more certain than spot market purchases, but that does not mean that the latter must be disregarded. This is especially so here, where NU's track record shows its successful experience in that market. The New Hampshire Commission accepted these savings (Ex. 239A, p. 121). Even considering that there are no absolute guarantees in the spot market, there is no reason to assume that NU's past record and expertise would be worth nothing. Intervenors' second attempt -- that the coal savings could be achieved without merger "through contracting" (Ex. 520, p. 36) -- has no merit under Utah, supra.

D. NEPOOL Synergies

NU and PSNH are members of the New England Pool (NEPOOL), "a comprehensive interconnection and coordination arrangement among numerous New England utilities" (Municipalities of Groton v. FERC, 587 F.2d 1296, 1298 (D.C. Cir. 1978)). NEPOOL operates under an agreement drawn by its members and approved by the FERC's predecessor. This NEPOOL agreement (Ex. 603, p. 10) allows companies to elect "single participant" status in certain circumstances. It is undisputed that NU and PSNH qualify for such status under the Agreement, and that electing it will save them some $360 million because the two companies' combined obligations to the pool are significantly less than their obligations as separate companies.

The New England Intervenors, together with Boston Edison, resist this outcome, arguing that these savings for the merged company will effectively come from the pockets of all other NEPOOL members. NU, backed by New Hampshire and Connecticut, presses vigorously for recognition of these merger savings.

As shown by New Hampshire and Connecticut (Br. p. 61 and items there cited), these savings were a vital part of the long and strenuous negotiations which culminated in the resulting PSNH reorganization plan. The concept of combined system status under NEPOOL and the resulting savings for New Hampshire (some $146 million) were specifically relied upon by the State in approving the Rate Agreement as consistent with the public good (Ex. 239A, pp. 118-121, 122). Denying these legitimate benefits to PSNH in order to help other companies would prejudice the New Hampshire rate payers, who would have to absorb $146 million in additional costs (Ex. 242, p. 3). These same considerations apply to Connecticut and its ratepayers, who would lose the benefit of the savings otherwise derivative from NU.

That a merger could create these NEPOOL benefits under the Agreement was envisioned by NEPOOL members from the outset. When asked why the Commission should approve a merger which allows NU and PSNH to achieve NEPOOL savings at others' expense, Mr. Bigelow (a NEPOOL founder) explained (Tr. 4619-4620):

> The best way I can answer that is that when we put NEPOOL together 20 years ago, we recognized that these things might happen. This is not something that snuck up on people. It was there and the NEPOOL agreement was put together after, I've got to tell you, five years of long, painful negotiations in which every party had to give something to get something.
>
> Mr. Schultheis and I participated in that and it was the longest negotiation I was ever in in my life. All the parties were there from big utilities to the small utilities. There were a lot of trade-offs made in which some utilities gained here and lost there.
>
> And we did discuss at length what would happen because we recognized, in fact, we were then coming up to a potential merger of Boston-Edison, Eastern Utilities, New England Power. It was recognized that these kinds of things could happen in the future and we spelled out the ground rules and recognized that that would happen when it happened. And the people who didn't like it got something else for it.

> It was a negotiated arrangement that we all signed to a degree 20 years ago. And it represented, like everything else, an agreement in which everybody came out a little bit unhappy. But I think the pool has been the most successful pool in this country and has worked very well, because we all made concessions here and there to make it work.

The New England Intervenors cite language in the FPC's approval of NEPOOL as supporting their arguments against single participant status (Br. p. 63, citing New England Power Pool Agreement, 56 FPC 1562, 1580 (1976)). Nothing in that decision precludes single system status for NU-PSNH. Judge Wagner's initial decision in that case made clear that "the only question" about single participant status involved "the desire of the Municipal Intervenors to extend the single participant rule to include groupings of other 'small systems'" (Id. at 1596). The Commission's reference to the "detrimental" effect of conferring single system status on "any group of systems" (Id. at 1580) was modified by the phrase "such as MMWEC," and was directed to that entity.

The FPC's remarks about certain Vermont utilities with similar load patterns qualifying for single participant status do not disqualify NU-PSNH. Allowing parties to obtain a status for which they might not have qualified does not justify denying such status to those who do qualify.

The Commission recently approved the merger of Newport Electric Corporation into Eastern Utility Associates, expressly noting among the identifiable advantages to the merged entity: "reduced capacity requirements and lower energy production costs resulting from composite load treatment under NEPOOL." Newport Electric Corp., 50 FERC ¶ 61,382 at 62,171 (1990). This is the very thing NU contends here. The New England Intervenors distinguish the case on the ground that it involves "smaller" utilities with savings of a "few million dollars, not hundreds of millions" (Br. p. 62). But the NEPOOL agreement makes no size distinction. It provides that "[a]ll entities which are controlled by a single person . . . which owns at least seventy-five percent of the voting shares of each of them shall be collectively treated as a single participant for purposes of this Agreement, if they each elect such treatment" (Ex. 603, Sec. 3.1). Single participant status is, by the express terms of the NEPOOL agreement, available to all entities, regardless of size.

Finally, the language of the Agreement itself favors such status. The sentence conferring single participant status uses the word "shall," and the sentence following recognition of companies' rights to elect such treatment reads: "They are encouraged to do so" (emphasis added). That is the agreement

made by the members and approved by the FPC. It has fostered reliable and efficient centralized bulk power operations over a multi-company six-state area for years. It encourages precisely what NU intends to do here.

II. ANTI-COMPETITIVE ASPECTS OF UNCONDITIONED MERGER

A. The Merged Company's Power Over Transmission and Surplus

An array of experienced utility executives and well-qualified economists testified that the merger would have anti-competitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts).

These concerns were especially well-focused and articulated by one of NU's supporting witnesses, Mr. Bigelow, Vice President of the New England Power Company, who corroborated the opponents' conclusions about the need for protective conditions. Mr. Bigelow's conclusions about the merger's anti-competitive impacts, in an industry and region where he has forty years of experience, were bolstered by his comparative neutrality 4/ and openness. As the Principal New England Intervenors said: "[i]t was not a high-priced consultant, rather the plain-speaking Mr. Bigelow, who capsulized the fundamental change that will result from the proposed merger: '. . . combining into one entity control over the single largest source of surplus capacity in New England with control over key transmission facilities necessary to provide access to alternative sources of bulk power in the region'" (Br. p. 10, quoting Ex. 261, p. 21).

Utilities in Eastern REMVEC will be surrounded by territory of the merged company, and completely dependent upon it to get electricity in from other places. NEP correctly argues that an unconditioned merger would create a "virtual wall around electrical systems in southeastern New England and the three million customers they serve" (Br. pp. 5-6). As Montaup Electric Company's witness, Mr. Taglianetti, put it: "[i]n essence NU would have a 'transmission curtain' around Montaup and other Eastern REMVEC utilities" (Ex. 537, p. 6). Even NU's own

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4/ Mr. Bigelow's company was certainly "not opposing" the merger (Tr. 4751). But if it were turned down, "[s]o be it, . . . the impacts that it has on us are not such that we should take a strong position. They're certainly not doing this merger as a favor to us . . . [b]ut they have addressed the concerns that we had . . . and we have no reason to oppose it" (Tr. 4750-4751).

witness, the Executive Director of Harvard University's Energy and Environmental Center (Mr. Lee) candidly acknowledged that "[w]hen I first heard of this merger [before any wheeling commitments] I was very concerned about the ability of a utility to control the flow of power from northern New England to southern New England" (Tr. 5934).

The merger would leave 45 Eastern REMVEC utilities "isolated" inside the curtain (Ex. 416, p. 17). This situation is apparent from the maps (see, Exs. 4, 57, 240). 5/ These companies, confronting increasing opposition to the siting of new power plants within their region, will need to rely on other outside sources for supplies of bulk power, and on other utilities to get that power into Eastern REMVEC. To get that needed power -- whether from non-utility generators (NUGs), from other New England utilities, or from Canada -- the Eastern REMVEC buyer needs transmission. Absent conditions, the merged company would, as Mr. Bigelow said, "create a near monopoly over key transmission facilities and corridors . . ." (Ex. 261, p. 23).

Because PSNH "controls the only transmission lines linking Maine and New Brunswick to the rest of New England" (id.), Eastern REMVEC utilities will necessarily have to deal with the merged company in order to get power from those areas. The merged company's control would also extend to access from New York (Tr. 4505). NU controls 72% of the New York-New England "interface" (Ex. 261, p. 23) -- facilities which transfer power between the two regions -- and needs only a small portion of that share for its own use. NEP and another company own and use the remaining 28% for their own needs (Id.) Thus a large portion of NU's 72% is the only New York-New England capacity available for use by others. When this capacity is taken together with the New Hampshire lines, the merged company will control some 92% of the capacity available for transmission to New England (Ex. 261, p. 23; Ex. 262). As Mr. Bigelow said: "the NU-PSNH merged company would essentially control access from the southeastern portion of New England in all directions outside, both the north and the east into Maine, into New Hampshire, and west to New York" (Tr. 4505).

This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices (Id. at 24). That the merged company could use its power to force its own extra goods on buyers elsewhere is an especially significant concern because NU-PSNH will have the largest block of surplus capacity in New England (Id. at 22).

5/ The company's own map (Ex. 4) is reproduced as an attachment to this initial decision.

NU, while acknowledging that the merger will produce combined surpluses, argues that the merged company's surplus capacity should not be treated as a "product market" for purposes of analyzing competitive impact (Br. pp. 27, 38, 39-40); it stresses Dr. Hay's statement that focusing on surplus would be like measuring the baseball concessionaire's power "one hour after the ball game is over," when "the guy says 'I've got all the unsold peanuts. Goodness Gracious, do I have a monopoly?'" (Tr. 5747).

But the Commission has squarely recognized such excess as a market. Public Service Co. of Indiana, 51 FERC ¶ 61,376 at 62,205 (1990). Market power over today's unsold peanuts can be critical at tomorrow's game, and if that market power extended to arenas and stadiums all over New England, the Concessionaire's control becomes all the more significant. Moreover, as Mr. Bigelow said, the excess capacity creates a motivation for the merged company to favor its own "unsold peanuts" over someone else's -- even if the other suppliers' goods are cheaper.

The merger's impacts are no less anti-competitive when viewed from an all New England perspective. Eastern REMVEC utilities will be the buyers from northern sellers who may be in Canada or Maine (Ex. 261, pp. 7, 26). Many of the small power projects, upon which the southern New England utilities will rely, will be located elsewhere in New England (Id. at 8), and transmission will be necessary to get the product moving south. Those northern sellers will need to break through the NU-PSNH stronghold in order to get their power to southern New England buyers. The merger, with its resulting transmission "curtain," cuts the regions off from each other.

B. Asserted Alternatives to NU-PSNH

(1) Non-Utility Generation

The most significant alternative is non-utility generation (NUGs) -- electricity produced by various persons (e.g., owners of cogeneration facilities and small power producers) who sell power to utilities. The applicant (through Dr. Kalt's testimony) takes the view that NUGs are "a viable resource alternative" for utilities in Eastern REMVEC and all of New England (Br. p. 44). Opposing intervenors and Staff challenge this reliance.

Applicant's case for NUGs rested on the proposition that they were important alternatives because the Eastern REMVEC utilities had said so in various documents (Br. pp. 44-45 and exhibits there cited). The question is not what intervenors have said, but whether the NUGs' future is sufficiently assured as to warrant the conclusion that they could neutralize the merged company's strength.

The "uncommitted" NUGs, which applicant counted on, are subject to many uncertainties. Such units, while planned, have not yet received construction or environmental licenses (Tr. 4724-4725). The likelihood of a NUG receiving all necessary permits varies from license to license and state to state (Tr. 4726). But in urging these NUGs as realistic alternatives, NU treated them all alike, making no individual analysis as to whether any particular plant would ever actually operate (Tr. 4727, 4750).

Indeed, the documents upon which applicant relied contained many NUG plants which turned out to have been substantially delayed or cancelled altogether (Staff Br. pp. 30-31 and exhibits there cited; see also, Tr. 4729-4730, 4732-4733, 4734-4735, 4737, 4739-4740, 4746). For example, NU counted on a project which had "run into a lot of local opposition" so that "everybody's backing away on this one" (Tr. 4738).

Mr. Bigelow (whose company plans some reliance on NUGs) agreed that "there's a fair degree of uncertainty" in the estimates relied upon by NU as to when siting and environmental licenses will be granted (Tr. 4736). The shortest possible elapsed time between NUG application and actual operation could not be "less than three years" (Tr. 4749). NEPOOL itself recognizes a "high uncertainty" in comparing those NUGs which are planned and those which will actually operate five to seven years later (Ex. 55B, p. 32).

When asked whether one should not look at NUG projects individually to make judgements "about the extent to which they are there or are coming there or are not going to be there," Mr. Bigelow answered: "[a]bsolutely. There are a very wide variety of conditions" which could affect the outcome of each such proposal (Tr. 4750). Yet documents upon which NU built its case for NUGs as a competition-disciplining device made no such project-by-project study. They simply compiled whatever various utilities said about NUGs and did not go beyond that (Tr. 4750).

"Contingency" NUGs, also relied upon by NU, are even less reliable. In 1989 NEPOOL explained that "[t]he economics" of resources "have not been evaluated . . ." (Ex. 55B, p. 13). In 1990, even after redefining "contingency" resources to include only long-term "identifiable" projects, NEPOOL still said that it "has not conducted detailed reliability or economic evaluations of these resources," and that there was only a 30% probability of such contingencies being available as projected (Ex. 55E, pp. 19, 21).

There are other difficulties inherent in relying on NUGs as alternatives to the merged company's strength. NUG developers have lost time and opportunities because they needed to achieve sufficient economics of scale (Eastern REMVEC Intervenors Br.

pp. 26-27 and record references there cited). Siting coal-fired NUGs in Eastern REMVEC faces major environmental opposition, risks, and uncertainties (Id. at 27-28). Gas-fired NUGs in that region are no more certain, considering limits on firm gas transportation and on availability from local distribution companies (Id. at 30-31).

Taken as a whole, these considerations show that although NUGs will certainly operate, the magnitude and likelihood of their full projected availability is not such to support them as remedies for the merger's anti-competitive potential.

(2) Demand Side Management

"Demand side management" (DSM) refers to programs and devices aimed at causing consumers to use less electricity or less costly electricity -- i.e., to reduce the demand for electricity from the utility's system (see, Ex. 55, p. 106; "Glossary of Terms," pp. 19-20). There is no question that Eastern REMVEC utilities invest seriously in -- and plan for -- these programs and their results. The issue is whether these efforts to reduce demand constitute meaningful alternatives to the merged company's competitive strength.

The Staff's Dr. Baughcum explained that DSM techniques are not alternatives to NU's market power because they "are not product substitutes but policy measures" (Ex. 549, p. 42, emphasis in original). The consultant for the Mass. Systems (Mr. Winterfeld) also took the view that DSM was not a substitute for bulk power, explaining that automobiles with fuel-efficient engines were not substitute products for gasoline (Ex. 416, p. 24). Conservation approaches are not the same thing as alternative sources of power or of transmission; not buying the product is conceptually different from buying an alternative product. A monopolist's power could always be rationalized on the theory that people could choose to buy less of the product. Dr. Baughcum properly reasoned that market power should not be tested by a customer's ability to cut down on purchases.

But wholly apart from conceptual difficulties, there are other reasons why DSM is not an effective device to police the merged company's power. First, DSM programs take time. Dr. Baughcum explained that techniques require approval of state commissions, and necessarily involve administrative proceedings; several years are then required for effective implementation (Ex. 549, p. 60). As expressed by Mr. Kahal and Dr. Swan, witnesses for the Maine and Vermont regulatory authorities, two Maine utilities, and the American Paper Institute (Ex. 449, p. 37):

> DSM load savings do not spring into existence overnight. In addition to research, testing and the regulatory appeal process, DSM programs are normally phased in over time. It takes several years to 'ramp up' a program and achieve the targeted savings.

They show that NU's projected DSM savings will take ten years to get from 215 MW to 2213 MW (Ex. 453). Some projects involve a gradual customer sign-up over many years; others become effective only when customers' old appliances wear out, or when new homes are built (Ex. 449, p. 38). The Executive Director of the Massachusetts Energy Facilities Siting Council explained that it took two years for certain programs to get from beginning to initial implementation, and another five years for full public introduction, installation and performance (Ex. 444, pp. 22-23). As he said, DSM savings "can take many years to appear" (Id.)

DSM programs are marked by uncertainties. Political considerations are relevant. NU's Mr. Lee warned about "just-in-time planning," where, because of surpluses, "the pressure of government to move ahead different programs, [DSM, inter alia] begins to wane" (Tr. 5914-5915). Boston Edison's witness testified to "considerable uncertainty" as to whether DSM sources "will be there as planned" (Ex. 524, p. 19). Moreover, the amount saved may not be significant. COM/Electric's Mr. Sayer, with nearly twenty-five years of experience in New England utility planning, said that "DSM would not significantly impact" his company's foreseeable supply needs "[e]ven if the maximum foreseeable potential of the next 30 years were achieved . . ." (Ex. 534, p. 14). Mr. Levitan, a consultant for the New England Cogeneration Association warned that: "DSM often requires long lead times, is difficult to measure, and savings can be hard to sustain" (Ex. 500, p. 11). He concluded: "there is reason to believe -- as NEPOOL has stated -- that DSM will continue to be the largest uncertainty among alternative 'supply' sources" (Id. at 15). NU's Dr. Cagnetta acknowledged "uncertainty" in DSM, and agreed with the applicant's statement that "[d]isagreement is fairly common among industry professionals concerning how much savings are available from conservation activities and what those savings could be, and how best to acquire them" (Tr. 5623).

(3) Self-Owned Generation

NU also relied on self-owned utility generation (UG) as an alternative to any potential exercise of market power by the merged company (Ex. 55, pp. 88, 110-114). The record is not sufficient to support such reliance. That a utility can sometimes build a new power plant does not dispose of the matter. The road to such an alternative can be long and tortuous.

Siting, licensing and environmental opposition are strong. NU's Mr. Schultheis acknowledged that "construction of utility generation projects faces even greater opposition than non-utility generation projects" (Tr. 3573). Even when successful, such construction in the region necessarily involves substantial lead times. Applicant's own documents show lead times of seven and nine years for certain projected self-owned generation (Ex. 134, p. 3; Tr. 3577-3578). Staff showed substantial lead times for other New England power plant construction: "Bangor Hydro listed four hydro projects that, in turn, took 9, 14, 14 and 15 years to bring on line . . Central Maine Power (CMP) listed several power projects requiring 4-12 years to bring on line [and] estimated that licensing might now take 5-7 years . . . MMWEC indicated that it required more than seven years to bring on line the first unit of a 511 MW power project" (Ex. 549, p. 78). These hurdles make new utility generation too doubtful to warrant reliance as a competition-disciplinary device.

(4) Other "Alternatives"

Nor are there other real alternatives. The proposed MMWEC line to New York is speculative; such a facility could not be built without the cooperation and agreement of those utilities whose service areas would be crossed (Ex. 261L, p. 81; Ex. 444, p. 23). The possibility of increased Canadian access "post-2000" (Ex. 55, p. 116) is, by its terms, of no significance for at least ten years -- during which time the merged company has vast power over north-south transmission and its own surplus to promote. The option of "leaning" on NEPOOL resources is contrary to NEPOOL's own principles, and has no merit (see, Principal New England Intervenors Brief, p. 30 and Eastern REMVEC Intervenors Brief, pp. 39-40). As NU's Mr. Schultheis himself once said (Ex. 55G, p. 2):

> The NEPOOL Agreement has always been understood to provide that the Participants have the obligation to install or contract for capacity adequate to meet their respective Capability Responsibility and thus provide for their share of pool reliability. The Capability Responsibility Adjustment and Deficiency charge mechanisms were created to deal with situations where Participants inadvertently misjudged their Capability Responsibility or resources and ended up short. This mechanism was not intended to be considered as an alternative choice to meeting basic obligations.

C. Long-term/Short-term Impacts

The evidence shows that anti-competitive consequences are not limited to the short term. NU's own studies of the New England market show that "[l]ong term competition appears to be greatest from potential cogeneration projects and Corridor purchases" (Ex. 123B, p. 638). This is the very "long-term" competition which could be most easily frustrated by the merged company's power over transmission. Power from New Brunswick or Quebec, which can go south only if, as, and when NU so allows is only as "competitive" as NU wants it to be.

It is true that until NUG facilities become commercial, Eastern REMVEC utilities will rely "for a significant portion of their power needs" on short-term purchases of bulk power from other utilities in and out of New England (Ex. 261, p. 6). But the Eastern REMVEC need for transmission is no less critical over the long run. The arrival of the NUGs does not somehow destroy NU-PSNH's power; indeed such operations heighten the importance of NU's control (Ex. 261, p.7).

Commercial NUGs are of no avail unless their product can get south. Limiting Eastern REMVEC buyers to independent generating sources inside their own region would not be "in anybody's best interests" (Tr. 4506). As Mr. Bigelow explained, the region's increasingly competitive wholesale power market demands a wider range of alternatives, which, in turn creates a marketplace where potential resources compete with each other -- all to the customers' ultimate benefit (Tr. 4506-4507).

NU's own witness, Mr. Lee, acknowledged that it is "better for the region [Eastern REMVEC] to have access to as many sources as possible coming in from the north" because of "price and economics" considerations (Tr. 6035-6036). Mr. Bigelow said that the best "long-term power supply opportunities would be located in Maine and New Brunswick" (Ex. 261, p. 26), and there must be a way to get those goods to the southern market. That way -- the only way -- is via the merged company.

Of course NU's strength may be most acute when its surplus creates a motivation to chill competitive goods while favoring its own merchandise. But NU's control over transmission does not vanish when the surplus ends; it, like the merger, remains forever. Surplus or not, "short" term or "long" term, the only way to get northern power to southern buyers would be over the merged company's lines. As expressed by Professor Kamerschen, NEP's expert, (Ex. 265, p. 9):

> . . . The merger would give NU, both now and in the future, control over both of the major transmission corridors necessary to import bulk power into southeastern New England. This includes the east-west corridor to New York and the north-south corridor through New Hampshire, which is vital to importing bulk power from New Hampshire, Maine, New Brunswick and Nova Scotia. (Emphasis added).

Nor is the "short-term/long-term" dichotomy especially meaningful for this industry in this part of the country. As expressed by Mr. Legrow, Boston Edison's NEPOOL and Power Supply Administrator (with seventeen years of experience in the New England utility business), "we are always in relatively short-term capacity planning problems" (Tr. 5283). The company is

> always in the need to either sell excess capacity or to buy additional capacity to compensate for plants that we've planned on that don't come in on time, or for plants that do come in on time but the load hasn't developed such that we need to sell or we need to purchase (Tr. 5283-5384).

This "short-term" problem "recurs continually" on Boston Edison's system and on every system (Tr. 5284). Dr. Reynolds said that for this reason, utilities are "always operating in the short-run" (Ex. 520, p. 7). See also the testimony of NU witness, Mr. Lee, concerning utilities' "just-in-time planning" (Tr. 5914-5915).

The anti-competitive effects of this merger, if unconditioned, will, therefore, exist over the years immediately following the transaction, and will continue for the foreseeable future -- over the "short term" and the "long term," however those words may be defined. For these reasons, an unconditioned merger would have serious anti-competitive consequences for New England generally and for Eastern REMVEC utilities in particular.

D. Disputes About Numerical Measures

Given the above findings as to the anti-competitive consequences of the merger, there is no need in this case to resolve disputes about the relative significance of various Herfindahl-Hirschman Index (HHI) numbers; of the Department of Justice's Guidelines reference to a 35% market share; or of the Guidelines themselves in the context of an electric utility merger.

Moreover, these tools are designed in significant part to measure the potential for post-merger collusive behavior (Ex.

549, pp. 11, 23; Ex. 551, pp. 20, 22, 24, 29, 33-34). But the likelihood of such an event -- NU/PSNH colluding with other firms -- was virtually non-existent. NU's Brief (at pp. 21-22) accurately portrays the uncontradicted testimony:

> The only factual evidence on the issue was provided by the panel for the Eastern REMVEC utilities who testified in unison that the [collusion] conception was inconsistent with any behavior they had even heard of and inherently unthinkable (citing Tr. 5275-5282).

On this record, therefore, the Guidelines and "HHI" numbers may have less meaning -- a circumstance which also militates against attempting to adjudicate a controversy about them.

Finally, as the Commission said in Public Service Co. of Indiana, 51 FERC ¶ 61,367 at 62,205 (1990):

> There are various methods of analyzing market power such as HHI determinations, market shares, concentration ratios . . . However we do not believe that any one type of evidence is sufficient for this analysis, and we will not rely on any mechanical market share analysis to determine whether a firm has market power.

Here there is abundant evidence that the merged company will have "market power" by controlling the New England transmission "curtain" and the excess capacity. An examination of the disputed numerical devices would serve no useful purpose in the circumstances of this case.

III. CONDITIONS

An unconditioned NU-PSNH merger would have anti-competitive consequences. For that reason, the parties focused extensively on the question of appropriate conditions. Section 203(b) allows the Commission to approve an acquisition of control "upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission." The parties urge a variety of generic conditions involving NU's General Transmission Commitments; transmission over the New Hampshire Corridor, a Regional Transmission Arrangement, and NEPOOL voting. In addition, various intervenors press for particular individual conditions.

A. Wheeling (General Transmission Commitments)

Section 203(b)'s conditioning power allows the Commission to order wheeling when necessary to ameliorate the merger's likely anti-competitive effects (Utah, supra at 61,282). In the instant case, virtually everyone agrees that transmission access is essential in order to render the transaction consistent with the public interest. NU implicitly admits as much by volunteering its own post-merger General Transmission Commitments (Ex. 178). These reflect significant advances over the pre-merger world of ad hoc negotiations -- a regime which posed serious difficulties for transmission customers. See, summary at pp. 43-45 of the Eastern REMVEC Brief.

Many intervenors, together with the Staff, propose their own "Merger Tariff"; others offer additional suggestions, with varying degrees of detail as to what the company's post-merger transmission ought to be. But the company's own Commitments are an integral part of its proposal, and as one of the intervenor's witnesses said, are "a starting place" (Ex. 439, p. 4). Section 203 requires a determination as to whether "the proposed . . . acquisition" will be consistent with the public interest. Here the "proposed" transaction includes the NU commitments, and they must be the focal point of the transmission condition inquiry. Certainly they can be modified as necessary. If the finished product -- the NU-PSNH merger, with the "proposed" Commitments as modified -- is consistent with the public interest, that is the end of the matter. Whether some other plan might be "better" from a customer's viewpoint is of no significance.

(1) Time Dimensions

(a) The company proposes to offer transmission service in increments ranging from 30 days to five years. The 30-day period for firm service reflects NU's compromise from an earlier position, is duplicated in the intervenors proposed Merger Tariff (at p. 7), has wide support (Tr. 7075-7078, 7090-7091), and raises no question worth discussing.

As to non-firm service, the intervenors' proposed tariff (at p. 7) offers a one day minimum, instead of the company's seven-day minimum (Tr. 7079). Intervenor evidence showed the frequency of short-term transactions involving a few days or hours and requests for short-term service for periods of less than seven days. MMWEC's consultant explained that NU, by demanding minimum terms of seven days for transmission service as short as one day was able to "lock[] up this short-term business for itself by refusing to allow others to procure the wheeling service necessary to compete for it" (Ex. 313, p. 19). The company argued that a minimum charge of seven days for one day's worth of service was a reasonable balance between the needs of the one-day customer and NU's need to maintain the transmission system all

year (Tr. 7101). The applicant's point was not supported by any particularized evidentiary study. The record supports the intervenors, particularly in the context of the merged company's increased power. The requisite transmission tariff must offer firm service for a one-day minimum term.

(b) The company's proposed five-year limit on firm service was strongly attacked as inadequate. The intervenor-Staff "Merger Tariff" instead envisions offerings of "twenty years or longer by agreement of the parties," with a customer option to extend the term for the contractual life of the facility generating the power to be transmitted (at p. 7).

These intervenors correctly assert a need for more than five years' worth of service. Mr. Taglianetti, an executive with responsibility for transmission contracts, stated: "[m]ost power contracts cover significantly longer periods of time" (Ex. 537, p. 8). Mr. Bigelow said that QF and similar projects (i.e., NUG's) "need assured service . . . for the long term, coincident with their power contracts" (Ex. 261, p. 18). The Staff's transmission witness, Mr. Krezanoski, testified that twenty years would be the appropriate maximum for transmission service requests (Ex. 601, p. 37). The NUG developers, Mr. Kearney and Mr. Riva referred to twenty-year supplies and twenty- year contracts as underlying certain projects (Tr. 4912-4913, 5016). See also, Ocean State Power, 44 FERC ¶ 61,261 at 61,984 (1988) (a twenty-year contract between a developer and certain Eastern REMVEC utilities).

The applicant does not want to commit itself to transmission for longer than five years, because it cannot predict what the situation will be then. But some reasonable guarantee of firm transmission will be essential to discipline the merged company's competitive power. Mr. Lee of Harvard's Energy and Environmental Policy Center (applicant's witness) testified that developers need the assurance of "some certitude" (Tr. 5944), and NEP's Mr. Bigelow referred to "assured" service coincident with contract length. Five years of "certitude," to be followed by all the difficulties inherent in ad hoc negotiations, is not enough for developers and financiers, who may well be looking at a $450 million investment in a facility with a twenty-year obligation (Tr. 4912-4913, 5016).

The intervenor-Staff proposal envisions a tariff which would offer firm transmission service for the life of the commitment underlying the facility in question. But such an open-ended obligation demands too much. During oral argument several counsel spoke of a maximum finance commitment of 35 years, advising that they knew of nothing which went past that period (Tr. 7072, 7113). But it does not follow that bankers should necessarily dictate transmission terms, rather than follow them. Moreover, counsel's statements had some uncertainty. Considering

the transmission customers' need for "some certitude," the record more clearly justifies a twenty-year maximum, as opposed to thirty-five years. The merged company's transmission tariff must offer service for up to twenty years, unless, of course, the parties agree on something different.

(c) The company proposes to file its transmission tariff within 60 days following consummation of the merger (Tr. 7134). The intervenor-Staff proposal includes an interim transmission rate, which, assuming Commission approval of the merger, would govern the merged company until such time as it filed whatever tariff the Commission had required. This interim step, apparently designed to obviate certain transitional problems which arose in the Utah proceedings, 6/ is unnecessary. I see no need for requiring one tariff (with potential for controversy, charges, collections and refunds) to be followed by yet another tariff, with its own potential for still other disputes.

Avoiding a transitional period will make it unnecessary to require a transitional tariff. To achieve this result, consummation of the merger must be conditioned on the concurrent filing of a compliance tariff which fully reflects all of the terms and conditions set out in this initial decision. Such a condition should encourage a prompt and fair compliance filing because NU could not begin to reap the merger benefits without it.

(2) Various Other Matters

(a) The company's proposal contains a reciprocity clause (Ex. 178, p. 7) which requires NU-PSNH's wheeling customers to offer equivalent transmission service to the merged company. The Staff and some intervenors rightly challenge this provision. There is no warrant in this merger case for imposing such a requirement on all utilities who use the company's transmission facilities. Conditioning the merger upon NU's agreeing to wheel is a necessary step to ameliorate the potential anti-competitive consequences, and thus render the transaction consistent with the public interest. These considerations do not justify forcing the transmission customers into action. They are not seeking to merge; they seek only to get power through the NU-PSNH "curtain." Notions of reciprocity, perhaps relevant in later deliberations about a Regional Transmission Arrangement (see, Section III, C(1), infra), have no place here.

(b) Many of the opposing intervenors argue against the merged company's refusal to exclude "tie line" and

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6/ Tr. 7134-7140, 7187-7188; see also, Utah Power & Light Co., 45 FERC ¶ 61,095 (1988), 51 FERC ¶ 61,295 (1990).

"lost opportunity charges" in its transmission commitments (New England Intervenor's Brief, p. 35; Eastern REMVEC Intervenors' Brief, p. 44). The merits of these disputed charges are at issue in other NU proceedings pending before the Commission which, indeed, involve some of the same opponents and lawyers (NU Reply Br. p. 50; Tr. 7131, 8172-8165, 8178-8181). In these circumstances, there is no need for still more litigation about them here. Consummation of the merger is conditioned on the merged company's agreeing to accept the FERC's decision as to the validity of those challenged charges in the dockets cited in the above transcript pages.

(3) Constraints; Priorities; Removal Costs; etc.

"Native load" customers are located in the service areas which the utility is licensed to serve. The merged company's native load customers will be primarily the retail customers of Connecticut, Western Massachusetts and New Hampshire. Transmission customers outside the NU-PSNH service area want to use the merged company's facilities to transmit or "wheel" power to their areas. Sometimes physical constraints will preclude the merged company from carrying all the electricity that is demanded by both groups (native load and wheeling customers). Much of the controversy about wheeling conditions involves the choices to be made when the merged company confronts such constraints. What happens when the constraints cannot be removed? Alternatively, when the merged company is able to make necessary upgrades, who pays them?

(a) Priorities when Constraints Cannot Be Removed

Although the merged company is willing to build such upgrades or additions as necessary to remove constraints, siting, environmental, or other regulatory concerns may sometimes preclude the work. In that event, priorities of access must be established among those demanding the merged company's facilities. In the context of this case, the "priorities" dispute involves dollars, not failures of electricity. The priority "winner" gets cheaper power; no one loses electricity.

The merged company would favor its native load customers when an irremediable constraint produces a conflict between their needs and those of transmission customers. Some intervenors argue against such a priority, reasoning that concepts of "parity" or "nondiscrimination" require that transmission customers be allowed to sign on with the merged company, and be treated the same as the rest of the company's customers. Under this approach, every customer, native load or wheeling, would get equivalent treatment, presumably sharing in all available power.

These intervenors believe that such egalitarian service would create more reliable wheeling, and thus furnish a stronger competitive alternative to NU-PSNH's strength. But an approach which equates wheeling with a utility's obligation to serve its own retail customers is fraught with difficulties.

The merging companies' very existences are linked to their obligation to serve native load customers. That is why they hold lawful monopolies. The native load customers have regularly borne the costs of the NU-PSNH facilities. The future transmission customer, who wants to use those facilities, has not. The ratepayers of NU and PSNH, who have paid for the facilities through the years, have used them, have planned on them and have relied on them; NU and PSNH have correspondingly planned for those ratepayers years into the future. This situation is not unique to NU and PSNH. Every New England utility favors its own native load. Nothing in the NEPOOL agreement requires its members to surrender their native load preference, and none do. Even the proposed intervenor-Staff merger tariff recognizes that native load should prevail in cases where constraints cannot be removed (Tr. 8143-8147).

There is no legal requirement that a utility equalize its native load customers with all others. The antitrust laws' "essential facilities" doctrine recognizes the legitimate primacy of the company's own customers. Even if NU's facilities were "essential," that status would not warrant destroying native load preference (see, Utah Power & Light Co., 45 FERC ¶ 61,095 at 61,287 (1988)). Utah expressly recognized that the merged company could reserve from its wheeling obligations so much of its capacity as would be necessary to serve native load (45 FERC at 61,291). See also, City of Vernon v. Southern California Edison Co., No. CV. 83-8127, C.D. Calif, Aug. 30, 1990, pp. 25-28 ("[r]easonable access does not include that which would harbor Edison's other customers . . . Edison is not obligated by the antitrust laws to confer a benefit n Vernon at the expense of its own customers . . . Edison's de ial of access to its transmission system was motivated by a desire to benefit its own customers . . . .")

The reasonableness of a native load preference is also reflected in the Federal Power Act. Section 217(a) provides that no wheeling order may be entered under Sections 210 or 211 unless the Commission determines that such order "will not impair the ability of any electric utility affected by the order to render adequate service to its customers." This provision, while not binding in a Section 203 case, nevertheless reflects significant legislative approval of priority for native load.

NU's choice, to prefer native load when constraints are immutable, is fair, and it strikes a reasonable balance between conflicting interests.

(b) Cost Allocation When NU Can Make Necessary Upgrades

When the merged company is able to build the upgrade, who pays for it? All parties agree that the costs of building a "generator lead, a feed from the generating plant hooking up to the network transmission system" can properly be borne by the transmission customer (Tr. 8062-8063). Beyond this, there are differing views.

Those intervenors who urge that native load and transmission customers are all the same would "roll in" future upgrade costs with all other company costs and charge them to everyone as part of NU's general rate structure. The applicant and a number of opposing intervenors disagree. They would allocate the costs of future needed upgrades according to concepts of responsibility, but they differ widely over the appropriate standard of measurement and other details.

"Rolling in" of upgrades, while administratively simple, blends everything and everyone together, and thus ignores any concept of responsibility. There is nothing inherently improper in attempting to allocate costs to those responsible for them. The Commission, while generally adhering to rolled-in pricing, does not preclude particularized cost allocations to specific customers where appropriate. Utah Power & Light Co., 45 FERC ¶ 61,095 at 61,291, fn. 163 (1988); Public Service Co. of Indiana, 51 FERC ¶ 61,367 at 62,203 (1990), Opinion on Rehearing, 52 FERC ¶ 61,260 at 61,966 (1990); Northern States Power Co., 52 FERC ¶ 61,123 at 61,543 (1990).

Even the Staff's transmission witness -- who would abolish native load priority and "roll in" upgrades to everybody -- could not oppose incremental pricing in principle (Tr. 6539). When asked whether it would be appropriate, "if procedures are available . . . to efficiently identify which customers cause which costs to be incurred, . . . to assign those costs to those customers," he stated: "I believe that a fully developed and supported form of incremental cost pricing is a potential means of pricing the transmission service" (Tr. 6540).

If an upgrade is caused by transmission customers, why should they not pay for it? Conversely, why should an NU retail ratepayer in Hartford, Connecticut have to pay anything for a facility used by a Boston utility to wheel power over NU's lines to Eastern Massachusetts? Why should the Hartford homeowner subsidize the Bostonian by so much as even one mil? Why should the New Hampshire Commission, for example, authorize an upgrade

to benefit Massachusetts wheeling customers, if its costs are to be partly borne by New Hampshire ratepayers? Allocating particular costs to those responsible for them -- where that can be done feasibly -- is fair, and altogether consistent with the public interest. As the Commission said in System Energy Resources, Inc., 41 FERC ¶ 61,238 at 61,616 (1987), "[p]rinciples of fairness in ratemaking support the concept that those who are responsible for the incurrence of costs be the ones who bear those cost burdens."

For these purposes, NU would use the test articulated by Mr. Schultheis (Ex. 157, p. 40):

> The standard that NU uses is that the wheeling customers must make a pro rata contribution whenever the facilities would not have been needed but for the wheeling transfers across a constrained interface. This means that NU's native load customers pay for the new facilities they create the need for and wheeling customers pay for the facilities they create the need for.

The Staff and many intervenors believe that this test improperly loads the scales by creating a presumption in favor of native load customers and against transmission customers (Tr. 8118-8119, 8121). They propose a merger tariff which leans the other way, giving primacy to any transmission agreement which precedes any "subsequent, incremental firm service to retail customers of the Company" (Merger Tariff, p. 11). They would thus create a kind of "seniority system" in which any signed-on transmission customer takes priority over whatever comes later -- including NU's own native load growth.

This proposed dichotomy between "old" and "new" native load has its own difficulties.7/ The distinction did not receive close scrutiny during the hearing, and its details were not fully

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7/ So far as appears, there is no Commission precedent for such an approach. When pressed for authority, counsel relied on Order No. 436 "on the gas side, not the electric side" (Tr. 8127). The two fields are different and, absent Commission guidance, I cannot conclude that the machinery for open access on pipeline systems necessarily warrants importing a similar regime into the electric utility business.

worked out. 8/ NU's Reply Brief (at pp. 35-36) fairly describes some of the questions raised by the proposal:

> Consider an NU customer who has lived in Hartford for 20 years. If he decides he needs a new larger refrigerator for his family, is that incremental native load? If yes, how and why is this load distinguishable for purposes of establishing transmission access priorities? The same is true for a long-time customer who buys a new, bigger home or for the children of a long-time customer who move[s] across the street to a new house. When businesses grow and change locations, their electricity demands grow. In other cases, a growing business may build a new more efficient plant that consumes less electricity. The fact is, no electric system is designed to calculate and account for all of these permutations.

But whatever their merits, these efforts to construct cost allocation approaches which tilt one way or another should all fail. There is no basis for "presumptions" or other devices designed to influence the inquiry into how the costs of a particular facility should be assigned. The analysis should be even-handed and neutral. Mr. Schultheis' test, construed and applied that way, is acceptable.

Particular disputes about responsibility for particular facilities are for later proceedings. Though this record contains testimony about "incremental" and "rolled in" and "embedded" ratemaking, and talks about economic "efficiency" and "price signals," these considerations cannot be meaningfully addressed in the abstract. We are dealing with unknown costs of unknown facilities to be built at unknown times in unknown places for unknown reasons. There is no reason now to attempt to answer remote and hypothetical questions about such future disputes.

Future attempts to collect costs for upgrades will, as NU agrees, involve rate filings under Section 205 (e.g. Tr. 8079). As in any rate case, the merged company would have the burden of proof. Opponents of a proposal would be free to show that cost responsibility should be distributed in some different way. There could be a dispute as to the size of the transmission

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8/ It was part of a commendable effort to reduce and simplify the array of requested conditions. This particular aspect unfortunately did not draw serious attention during the evidentiary hearing.

customer's pro rata share; there could be a dispute over causation and responsibility, with wheeling customers claiming that particular upgrade costs were attributable to many factors and should be spread to all, or apportioned to some. These and other questions would be litigated in future proceedings, involving particularized proposals filed under Section 205.

But leaving these individualized questions for future proceedings does not mean that the merged company's transmission customers must face unlimited financial exposure. The record supports two significant protective limitations.

First, the General Transmission Commitments require that the merged company, prior to contracting, identify those constraints which it "anticipates reasonably could require the construction of additional facilities during the term of the wheeling contract" and "provide its best estimate of the maximum cost to that wheeling customer . . . to remove each identified potential constraint . . . " (Ex. 178, pp. 5-6).

The company agrees that the facilities identified in the estimates, will constitute the customer's "maximum exposure" (Tr. 8188). As explained by NU counsel,

> We would think that what our commitment is, at the time transmission is requested, we will identify any upgrades that we think may be necessary to provide that service and that [we] were limited in the future to those upgrades . . . [W]e might identify two problems up front, but that's it. You pay for what's identified up front. (Tr. 7264)

When asked: "[a] third problem comes along several years later, you can't bill them for it?," NU counsel agreed, stating: "[t]hat's our tough luck" (Id.)

Second, in addition to a facility restriction, the merged company should also generally be limited to the dollars set out in the estimate. The company expressed its willingness to be so bound, if it could be protected against unforeseen future restraints -- e.g., an environmental requirement that all lines be put under ground (Tr. 7306-7307). That qualification is reasonable; NU-PSNH should not be unduly penalized for later events which could not reasonably have been foreseen.

In situations involving nuclear plant decommissioning estimates, the FERC has accepted a 25% contingency to reflect unknowns and unplanned occurrences. See, e.g., System Energy Resources, Inc., 49 FERC ¶ 61,318 at 62,189, fn. 8 (1989), where the contingency covers "unplanned-for occurrences [including] adverse weather impacts, equipment breakdown delays and labor

strikes, . . . [and] unknown escalation rates for labor costs and radioactive waste disposal costs." That 25% figure is reasonable here for analogous unknown and unplanned-for occurrences related to future upgrades.

An estimate process so constructed -- with limits on the specific facilities and dollars needed -- gives the transmission customers substantial protection. Several witnesses emphasized the need for assured service and certainty, and these conditions respond to that need. Final exposure will be limited and known, a factor which helps to make NU-PSNH wheeling service a more available and meaningful competitive alternative.

Next, there are arguments about alleged double or triple billing. For example, suppose NU spends $30 million to remove a constraint, enabling it to carry the combined loads of a transmission customer and native load customers. If the transmission customer's needs "cause" a pro rata share of, say, $10 million, then that amount can be properly billed incrementally to the particular transmission customer. The remaining $20 million would, under NU's approach, be rolled in to all NU customers including the transmission customer. That customer would thus end up paying twice: once for its legitimate pro rata incremental responsibility for the facility (the $10 million), and again as part of the universe of those paying the rest of the facility's costs (the remaining $20 million) on a rolled-in basis (Tr. 7266). That is unfair. The transmission customer should not be charged for the other $20 million, and the merged company's tariffs cannot authorize such collections.

The other double-billing claim has no merit. It involves NU's collection of what are variously referred to as "base rate" or "base system" or "system charges," reflecting the costs of transmitting electricity over the company's existing system. Some wheeling customers say that they should not have to pay a pro rata incremental share of an upgrade (the $10 million in the above example), and also pay the "base" charge. But these charges do not duplicate each other. The customer's incremental share of the upgrade reflects its pro rata responsibility for the facility. The "base rate" is an ongoing charge for the use of the existing system itself. The wheeling customer unquestionably uses that system and ought to pay for it. Paying directly for part of a particular upgrade does not excuse the transmission customer from paying to use the rest of the system.

Finally, intervenors and Staff are concerned about the possibility that non-firm service could "bump" firm transmission service. During oral argument, the company explained that it would not bump firm for non-firm: "[w]hat Mr. Schultheis has said is that, once you get firm service from NU . . . . later economy, non-firm purchases for sales do not take priority over that. You've got a firm service and you've got the priority"

(Tr. 8181). This would be so even if the economy purchase was for NU native load customers (Id.) To this extent, therefore, concerns about priorities for off-system sales disappear.

But rather than "bumping," NU proposes to allocate capacity for firm service in relationship to "its historical use of its New York tie-lines" (Tr. 8182). There would be no "bumping," but space would be allocated according to this "historical use" consideration. On its face, this effort weakens the merged company's wheeling commitment. Whatever adjustments are made for historical use of New York ties can only result in less, not more transmission capacity. Perhaps this is a reasonable balance between native load and transmission customers. But the company's briefs do not spell out this "historical, ew York" position with any precision. It certainly is not in the commitments themselves (Ex. 178); nor is it developed in the cited portion of Mr. Schultheis' testimony (Ex. 123, p. 176, cited by NU at Tr. 8181). The applicant has not satisfactorily explained what this limitation means and what it would produce, and has failed to carry the burden of proving its reasonableness.

(c) Ten-Year Priority for NU Excess

NU's proposed commitments give the merged company a ten-year preference for off-system transmission of its own excess production. The company explains that because its surplus capacity is being paid for by native load ratepayers, fairness demands that it get priority in using its lines to sell off its own excess production.

Staff and most opposing intervenors emphasize the potential anti-competitive overtones of this ten-year priority. Surplus is a subject over which the merged company will have great control; and the first ten years happen to cover the period when that control is most acute. It is undisputed that the merger will, as its NEPCO supporter recognized, combine "into one entity control over the single largest source of surplus capacity in New England with control over key transmission facilities necessary to provide access to alternative sources . . ." (Ex. 261, p. 21). The Staff's analysis of NU data shows that the extent of such control will exceed 65% in every year from 1993 through 2000 (Ex. 503, Table 3). During the years 1992 through 1996, when the total New England surplus capacity is biggest, the merged company's share will be 51%, 66%, 83%, 91%, and 91% respectively (Id.)

To give the merged company exclusive rights over these goods over these years aggravates the merger's potential anti-competitive impact. The company's desire to move its own excess could easily operate to displace others. The wheeling necessary to alleviate the merger's anti-competitive effects would be

seriously weakened if NU had a ten-year right to subordinate the intervenors' concerns to its own.

Nor is the priority necessary. As several witnesses reasoned, if NU's surplus was priced competitively, it would sell; if it was not so priced, then the goods should not be promoted artificially by giving them a priority. Mr. Kahal and Dr. Swan testified: "There is no reason that NU will necessarily be deprived of using the transmission system to sell its own existing surplus generation capacity as long as it prices that capacity at competitive rates . . ." (Ex. 449, p. 79, emphasis in original). Removal of this ten-year priority is necessary in order to render the transaction consistent with the public interest.

Because this priority fails, there is no occasion to address the subsidiary challenge to NU's apparent attempt to preserve for itself the right to charge transmission customers -- when it has used the ten-year priority to pre-empt them. If the Commission restores the ten-year priority, it may wish to consider this apparently harsh aspect, which the company may now be willing to modify (see, Tr. 7565-7566).

B. The New Hampshire Corridor Proposal

(1) Introduction

The New England Power Co. (NEP) and PSNH have end-to-end transmission facilities and service areas; PSNH controls access to northern sources, while NU controls access to western sources. The merger would give NU control of both corridors. NEP and all other southeastern New England utilities could reach northern and western sources only by dealing with the merged company.

In these circumstances NEP initially opposed the merger, while at the same time seeking to improve its situation through negotiation with NU. Each side had much to fear from the other. NEP might have ended up at the mercy of the merged company. NU, eager to go forward with the merger, was now facing a most powerful opponent. Hard bargaining between top executives (Mr. Schultheis for NU and Mr. Bigelow for NEP) ultimately produced the New Hampshire Corridor Proposal (sometimes referred to as Corridor or Corridor Proposal), and NEP became a "supporting intervenor."

Under this Proposal (Ex. 154), the two companies effectively agreed to lease specified portions of their end-to-end transmission to other New England utilities. Using this Corridor, a utility otherwise isolated by the merged company's transmission curtain could obtain long-term firm access to northern New England or Canadian sources.

The proposed service has many attractive features. It will operate under cost-based rates, subject to FERC review. NU's disputed "lost opportunity" or "tie line" charges will not apply. Service is available in ten-year increments for up to 30 years -- a limit which easily meets the twenty-year need shown on the record. Ten-year customers are guaranteed against sustaining any upgrade costs. The companies agree to make such improvements as may be necessary, in response to NEPOOL members' votes (excluding their own). A utility is free to "broker" the service -- i.e., sublease part of its share to anyone else.

That the Corridor Proposal creates benefits and improvements cannot be seriously questioned. The Eastern REMVEC intervenors, though seeking to modify the Proposal, acknowledge that if taken at face value and fully utilized, "it ameliorates anti-competitive effects . . . " (Br. p. 52). Even the New England Intervenors and New Brunswick Power -- who argue that the Corridor fails unless strengthened -- nonetheless see it as making "favorable, necessary changes . . ." (Br. p. 45) and "some favorable changes to the status quo . . ." (Br. p. 2). The Staff's transmission witness, Mr. Krezanoski, while also seeking to improve the Corridor Proposal, testified that it and the General Transmission Commitments

> provide some measure of relief to the anti-competitive effects of this merger . . . without these measures, I believe that transmission access may have been somewhat more restricted and supplies of delivered bulk power in the relevant markets may have been somewhat more limited (Ex. 601, p. 18).

He went on to recognize that "[t]o the extent that it guarantees people certain levels of transmission service, well, then, that is some improvement" (Tr. 6233). Mr. Lee, Executive Director of Harvard University's Energy and Environmental Policy Center, acknowledged that "[w]hen I first heard of this merger, I was very concerned about the ability of a utility to control the flow of power from northern New England to southern New England" (Tr. 5934-5935). But he changed his mind after reviewing NU's Corridor Proposal and other commitments because they will result in "mov[ing] power more expeditiously from northern New England to southern New England after this merger than you were able to under the old policies of Public Service of New Hampshire" (Id.)

The Eastern REMVEC intervenors say that the Proposal ameliorates anti-competitive effects only if fully utilized -- an allegedly unclear outcome because of supposed uncertainty about Central Maine Power's participation (Br. p. 52). There is no evidence that Central Maine will refuse to participate in Corridor service. Mr. Bigelow had conversations with an employee of that company, and "came away with the feeling" that it was

worth putting the Corridor Proposal together (Tr. 4558, 4561). There is evidence that Central Maine had previously been responsive to specific requests for transmission from Canada (Tr. 4712). Moreover, that company participated actively throughout these proceedings and made no statement disavowing the Corridor Proposal. In these circumstances, any alleged uncertainty does not warrant scuttling either the Corridor Proposal or the merger.

Challenges to particular details of the Corridor Proposal are examined next.

(2) Size of the Corridor

The Corridor Proposal makes available as much as 400 MW of transmission capacity for wheeling across New Hampshire to southern New England. 9/ That is not an insignificant allocation. It is enough power to serve the peak demands of about 400,000 people (Tr. 7624), a number which exceeds the total of PSNH's ratepayers, and is about eight times the population of Holyoke. NEP agreed to participate in its part of the end-to-end Corridor, thus receiving the option to subscribe for half of the 400 MW. The remaining Corridor capacity (at least 200 MW) is available to southern New England utilities.

Bangor Hydro, the Maine Commission, and the Vermont agencies, say that the Corridor Proposal should be expanded to "the amount available which was uncommitted prior to the merger," a capacity of 740 MW over PSNH's lines. But requiring the merged company to lease out all of PSNH's pre-merger availability would leave no room for expanded transmission over NU/PSNH's own lines. There is no legitimate reason to force NEP to turnover twice what it wanted to -- merely because PSNH had a certain pre-merger capacity. The Corridor size reflects NU's view as to the most that it could dedicate without penalizing PSNH's future native load.

COM/Electric complains that its Corridor share is already subsumed by an existing contract involving Canadian power from Pt. LePreau. Mr. Sayer said: "the Corridor Plan gives COM/Electric the option to purchase . . . 26 MW which is one (1) MW in excess of its current Pt. LePreau purchase . . ." (Ex. 534, p. 18). But, the Pt. LePreau contract expires in October of 1991 (Id.) Moreover, as set out in the Corridor Proposal itself, all existing transmission obligations from Pt. LePreau to COM/Electric and others do not extend beyond October 31, 1995

9/ A total of 40 MW were made available as a separate matter to Vermont utilities, and 12 MW were allocated to UNITIL and the New Hampshire Cooperative.

(Ex. 154, p. 2). That there are existing contracts is certainly not the fault of NU or NEP, and those companies have structured the Proposal to preserve such contractual rights. Under any view, the situation is temporary. Ultimately the Corridor Proposal gives COM/Electric and the other intervenors the opportunity to lock in increments of long-term north-south transmission capacity -- an option they never had before.

Other attacks on Corridor size -- that NU deliberately understated its own native load share in order to reduce the universe to be divided with NEP, and that NEP took more of that universe than it should have -- are really challenges to the bargaining process itself. On this record, there is no reason to plunge into the negotiations and take them apart.

Each company was adverse to the other. NU wanted eagerly to go forward with a merger which will bring substantial benefits to its ratepayers and stockholders. NEP, a powerful New England utility (the only company big enough to have veto power in NEPOOL), was out to defeat the acquisition because of its anti-competitive overtones. Each was represented by senior officers who were knowledgeable, experienced, articulate, and deeply loyal to their companies. There is every reason to believe that the NU-NEP negotiations were arm's length bargaining sessions between two adversaries.

NU's motivation to shrink the universe was balanced by NEP's desire to expand it -- as a safeguard against the anti-competitive effects which brought NEP to the bargaining table. The result was the product of these two conflicting aims. The "size" outcome of these talks is consistent with some other evidence 10/; fairly reflects a process in which both sides were giving up something and getting something; and unquestionably produces greater potential for wheeling power from Canada and Maine to southern New England than ever existed before. If Corridor expansion is needed, then NU has agreed to conduct necessary studies, and to undertake feasible construction where appropriate financial commitments are made (Ex. 154, pp. 7-10; Ex. 123, p. 162). Meanwhile the General Transmission Commitments, as modified in this decision, will also be in effect. Considering all of the circumstances, the Corridor's size -- enough for the peak demands of 400,000 people -- is reasonable.

10/ *See* citations in New Hampshire Initial Brief, p. 56 and NEP's Initial Brief, p. 11.

(3) Access for Northern Utilities and NUGs

Many intervenors (New Brunswick Power, Bangor Hydro, Four States, and Principal New England Intervenors) urge that the Corridor Proposal, now open only to utilities in Massachusetts, Rhode Island and Connecticut, be modified so that Vermont and Maine utilities could be eligible to subscribe (Condition "Bangor 1"). The record supports such a condition. Northern New England is the most likely location for future NUG developers. Failure to include northern utilities could leave them without assurance of ways to bring locally-produced power to southern New England markets (See, Exs. 479, p. 16; 449, pp. 71-76). Moreover, Southern utilities (for whose benefit the proposal was designed) may also be sellers, as Mr. Bigelow recognized (Tr. 5610-4611). In that event, the northern buyer has legitimate interests in Corridor transmission. More competition for the movement of goods can only benefit the public. A northern utility who wants to price goods more attractively by seeking to use the Corridor -- whether as a buyer or seller -- should have that opportunity. Northern utilities are just as threatened by the merger's transmission curtain as southern ones. The merger cuts each off from the other. Finally, NU itself acknowledged that opening the Corridor to northerners "doesn't cost us any more money or make any difference to us" (Tr. 7610); there is no persuasive reason not to do so.

The intervenor-Staff proposal would require NU to provide Corridor service -- indeed all wheeling -- to "qualifying facilities and independent power producers," as well as utilities (Merger Tariff, p. 1). This requested expansion fails under the Commission's decision in Utah Power & Light Co., 47 FERC ¶ 61,209 at 61,739-61,742 (1989), holding that qualifying facilities were properly excluded, while only those independent power producers fitting with the definition of "utility" were properly included. Following Utah, therefore, the Corridor service will be open to all utilities, including those independent power producers who so qualify. 11/

(4) Alleged "Market Allocation"

Eastern REMVEC Intervenors portray the Corridor Proposal as a "market allocation" agreement (Br. p. 51). This claim is without merit. The settlement between these end-to-end adversaries has no comparison with horizontal market allocation

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11/ The Commission's comments in Utah (at 61,742) about not prescribing "a generic approach to future merger proceedings" apparently applied to the independent power producers' exclusion from a transitional tariff -- a problem not present in the instant case. For this reason, I must follow Utah, notwithstanding the NUGs argument for inclusion.

agreements between competitors. See, 2 Kalinowski, Antitrust Laws and Trade Regulation (1990), Chapter 6F, "Horizontal Market Division." PSNH and NEP do not compete with each other to deliver power from Maine to southern New England. They could not divide up common territory or customers even if they wanted to. Nor does the Corridor Proposal reflect an effort of NU or NEP to keep someone else out of the market. If anything, it opens to competitors an area which otherwise could have been closed. Finally there is no basis for imputing any collusive conduct here; as stated, the facts are entirely consistent with hard-fought arm's length bargaining.

(5) The Ten-Year Increments

As noted, Corridor service will be available in ten-year increments, with a maximum of thirty years. That "[b]ulk power contracts in New England can be for as short as one day (Ex. 123, p. 80) does not mean that the Corridor must necessarily be offered in one-day periods. To require NU and NEP to offer one day's worth of service would inject day-to-day uncertainty and unpredictability for both companies. There is particularly no basis for requiring NEP to subject itself to such instability. That company is not here seeking merger approval, but is indeed trying to protect itself against the merger's anti-competitive consequences. To require NEP, in such a context, to keep open a portion of its lines to all takers on a day-to-day basis is too great a price to pay for having chosen to participate in the Proposal.

Those who want to use the Corridor on a short-term basis can, of course, do so under the brokering provisions. There is nothing to prevent buyers or sellers from entering into a ten-year lease on the Corridor, and then effectively "sub-lease" rights for any shorter time period. Finally, the General Transmission Commitments, which offer potential wheeling for short-term periods, are fully available over the non-Corridor portion of PSNH's facilities.

As to long-term use, the Corridor Proposal allows twenty-year subscribers to extend another ten years -- for thirty years total. That is more than enough. As explained supra in the context of the general wheeling commitments, the record shows a twenty-year need.

The Corridor Proposal's provisions for firm service, like the ten-year increments, reflect NU's and NEP's reasonable need for certainty. They have agreed to hand over to others 452 MW of their own capacity for between ten and thirty years, and have a right to rely on firm reservations of Corridor capacity. Parties needing non-firm service can broker or purchase capacity on short-term or non-firm bases from subscribers. They can use the General Transmission Commitments as modified here. A reasonably

long period for subscription of firm service, tied to unrestricted brokering, strikes a fair balance of the uncertainties involved.

Some intervenors argue that taking a ten-year subscription with the hope of brokering part of it presents a substantial risk. If such a company cannot obtain "sub-lessees" for the unused portion, state regulators might disallow recovery of the costs which the "lessee" has to pay to NU and NEP. Such a result could vitiate the Corridor Proposal and thus, the argument runs, leave the merged company's competitive power unchecked.

Of course it is possible that the Corridor could be undersubscribed. No one can guarantee the future. But hypothetical state commission hostility to assumed brokerage failures was nowhere crystallized in the testimony or views of the state commissions in this case. Mandating short-term Corridor service for these reasons would give too much weight to speculation and is not warranted by this record.

(6) Emergency Allocation and Native Load Priority

New England Intervenors and Staff take issue with the provision at I.6 of the Corridor Proposal, which states, "[r]eliability of service [under emergency conditions] to NU/NH and NEP native loads shall continue to have first priority in the use of the transmission facilities involved hereunder." In the event of an emergency, non-NU/non-NEP service on the Corridor will be determined according to NEPEX operating rules (Ex. 154, p. 4).

Many intervenors and the Staff now urge a Corridor Proposal condition designed to put "everybody's native load in the same boat for purposes of reliability" (Tr. 7655). That, among other things, is done in Core Condition 6, para. 1, supported by Principal Intervenors, Staff and others. That condition, <u>not</u> opposed by NEP, states:

> 1. NU Companies and NEP further agree that such service shall not be subject to limitation or interruption except for emergency conditions or as otherwise agreed to pursuant to NEPEX operating rules. Reliability of service to native loads of all entities provided service under the provisions of this proposal shall be equal, except to the extent that contracts in existence on or before January 8, 1990 of NU Companies and NEP require.

This provision is fair and equitable. NEP, as noted, does not object to it (Tr. 7658). NU was concerned about possible

future problems if NEPEX were not allocating capacity (Tr. 7654). As intervenors pointed out, the parties can always come back and ask the Commission to modify the condition if NEPEX dissolves, or other particular problems arise (Tr. 7659-60). Core Condition 6, para.1, is adopted, without prejudice to the right of any subscriber, NU/NH, or NEP to seek specific relief from the Commission for any problem arising from these emergency procedures.

(7) Extension of Time to Elect Subscription

The subscription period in the Proposal requires "binding responses shall be due three (3) months after the date of the Initial Offering," and "NEP and NU/NH's obligations to continue to offer the service as provided aforesaid shall terminate as of November 1, 1993" (Ex. 154, pp. 2, 5). It is NU's position that this is enough time for utilities to decide.

Intervenors and Staff propose an extension of this option date to May 1, 1995 (Core Condition 6, para. 2). This is the same date NU itself agreed to in its Settlement with Vermont Utilities (Ex. 123-T, p. 4; Tr. 2541). NEP does not oppose this extension. NEP I.B. at 25. Core Condition 6, para. 2, is accepted as a condition.

(8) Charges for New Facilities

New England Intervenors, Eastern REMVEC and others assert that the procedural machinery concerning new facilities is too vague. Section II of the Corridor Proposal sets out the parties' commitments regarding new facilities, including feasibility studies and an appeals procedure. Expansion of interfaces is subject to request by NEPOOL members (with NU and NEP not voting), and a refusal to build is, upon a similar vote, subject to arbitration. This language, which places checks and balances in the hands of other NEPOOL members, is sufficient for these purposes. Alleged abuses of the Corridor Proposal procedures, like violations of any conditions required here, would be subject to FERC complaint procedures.

(9) Conflict Override

Intervenors propose an "override" condition, whereby all differences between the Corridor Proposal and other merger conditions would be resolved in favor of the latter (Condition 6). NEP resists this condition which would effectively substitute NU's General Commitments, as modified, for the Corridor Proposal. Such an outcome destroys what had been bargained for. NEP is certainly not here seeking merger approval, and, indeed, would not be unhappy if the whole transaction fell through (Tr. 4751). Nor is NEP rigidly opposing any change; it has acceded to intervenor-sought modifications.

NEP carefully negotiated a Proposal which satisfies its concerns and which dedicates a portion of its own lines to open access by others. This non-merging company should not be forced to adopt conditions formulated to ameliorate the anti-competitive impacts of someone else's acquisition.

The Corridor Proposal's terms can, of course, be examined by all concerned as part of a NEPOOL-sponsored Regional Transmission Arrangement. If changes are necessary, they can be addressed in that overall context.

(10) Miscellaneous

Other challenges to the Proposal have been considered and rejected. As explained, supra, the Proposal is the product of arm's length bargaining, and significantly improves north-south transmission access in New England. For these reasons, it is largely adopted here, subject only to those changes with which NU or NEP agreed, or are otherwise essential to alleviate the merger's anti-competitive aspects

C. Other Conditions

(1) Regional Transmission Arrangement

The concept of a Regional Transmission Arrangement (sometimes referred to as "RTA") envisions a NEPOOL-sponsored and administered all-New England solution to the region's transmission problems. This regional approach was supported by a wide array of interests, and was opposed by no one in the case. Among those endorsing the concept of a NEPOOL-sponsored regional approach are: the applicant; New England Power Company; State of New Hampshire and New Hampshire PUC, the Principal Eastern REMVEC Intervenors; the Principal New England Intervenors; the Four States (governmental entities from Maine, Massachusetts, Rhode Island, and Vermont); and the Commission Staff.

As explained by Dr. Voll, Chief Economist for the New Hampshire Commission, the regional approach has been discussed and examined over a period of several years by many state officials, by the Power Committee of the New England Governors' Conference, by a Task Force formed under that Committee, and by NEPOOL itself (Ex. 237, pp. 16-20). Most recently the Task Force and NEPOOL were reviewing a draft proposal circulated by Commissioner Tierney of Massachusetts, only to have that analysis suspended because of the pendency of the instant merger proceedings.

An idea that has that much appeal to such a diverse group obviously warrants the most serious consideration. This merger proceeding is not (and cannot be) the vehicle for actually adopting a regional transmission arrangement. But that does not

mean that it disappears from this case. Such an arrangement is the focus of a condition sought by most intervenors and the Staff: a NEPOOL-sponsored RTA, which, when approved by the Commission, would replace the "merger tariff" they now urge. The subject of a regional arrangement was addressed by several witnesses. Mr. Schultheis himself said: "[i]t is imperative that transmission access issues in New England be addressed and resolved on a regional basis" (Ex. 123, p. 183), and pledged NU "to help develop a regional transmission access plan, such as the Tierney proposal . . ." in order to promote competition (Ex. 123, p. 195). The company also agreed, as part of its General Transmission Commitments, to "support all responsible efforts to develop and implement a New England regional program concerning access to and payment for wheeling services on existing and new transmission facilities" (Ex. 178).

Review of this merger proposal for its consistency with the public interest cannot ignore that which the company itself has addressed as "imperative." Section 203(b) refers explicitly to requiring "coordination in the public interest." The need for, and merit in, the regional approach is undisputed; it has widespread support and no opposition. In these circumstances, the merged company can hardly complain about a condition which requires it to do what it said it would do to facilitate what it regards as imperative.

Within six months following consummation of the merger, NU shall submit to NEPOOL for its consideration, a draft proposed Regional Transmission Arrangement, prepared after consultation with NEPOOL members, state regulatory bodies, and other potential transmission customers.

(2) NEPOOL Voting

Action of the NEPOOL Management Committee can, under the NEPOOL agreement, be defeated in two ways: (a) by any two members with 15% of the voting power, or (b) by any one member with 25% of the voting power. The present controversy is about the one member 25% rule. As matters stand today (pre-merger), NU, while close to veto power, does not have it. A merged NU-PSNH, on the other hand, will have 29% voting power and an effective veto within the Management Committee.

The FPC's original approval of NEPOOL expressly envisioned a veto, which NU then had, but later lost. Such veto was never used by NU; NEPCO, which now holds such power, has also never used it (Tr. 4755-4758). But that was before the merger. Now the smaller companies are confronting NU-PSNH, with a "transmission curtain" effectively isolating them, while also controlling surplus capacity. Pointing to prior difficulties in negotiations for transmission access (see, summary of evidence at pp. 43-44 of the Eastern REMVEC Intervenors' Brief), they argue

that the totality of the merger picture, coupled with potential veto of their proposals in NEPOOL, gives the merged company too much power.

Intervenors and Staff suggest "Condition 7," which would restrict the merged company from using its veto power -- but only in the situation where the issue before the Management Committee is a proposed amendment concerning the company's voting strength. The subject of NU's NEPOOL voting power is certainly reachable here. Indeed, the company itself has agreed to at least two such NEPOOL voting restrictions in the dispute resolution provisions of the Corridor Proposal (Ex. 154, p. 8). The intervenors' relatively narrow suggestion, as refined below, will provide some valuable assurance to all NEPOOL members, and will help make the transaction consistent with the public interest.

The condition would restrict the merged company's veto only in the situation where all other NEPOOL members themselves voted to restrict the merged company's voting strength on the Management Committee. During oral argument, the company -- while objecting to any restriction -- made several well-focused criticisms of the proposed voting restriction. Many of those points have merit, and are addressed next.

First, the proposal has no floor, and could allow other members to reduce NU-PSNH's Management Committee vote to, say, one percent. NU now has 23.5% voting strength (Tr. 7293-7294). The condition should not therefore be utilized to reduce NU-PSNH's Management Committee voting strength below 23.5%.

Second, the condition shall not be construed to prevent the merged company from engaging in any form of advocacy intended to cause other NEPOOL members to vote any way on any matter.

Third, the condition applies solely to the merged company's voting power on the Management Committee, and not its vote or its powers elsewhere in NEPOOL.

Fourth, the condition does not in any way alter the existing two company 15% rule. The merged company, plus one other, can veto anything in the Management Committee.

Fifth, the condition does not alter whatever Management Committee voting strength NU would otherwise have in voting on any proposal concerning a Regional Transmission Arrangement. If it otherwise would be entitled to 29% of the Management Committee vote, it could obviously veto such an Arrangement.

Sixth, any alteration of the merged company's Management Committee voting strength must be filed with the FERC, where it will be fully reviewable under Section 205.

Finally, as the company and New Hampshire point out, the proposal has no time dimension. To require the merged company to operate forever under a threat creates uncertainties which are unwise for all concerned. Some limit is necessary. The NEPOOL agreement itself suggests a framework: Section 10.4(ii) provides a maximum ninety-day period for the Management Committee to complete its consideration of "any new or materially changed plan for any other action to be taken by it which may have a significant effect . . . ." A ninety-day period, sufficient for considering significant operating changes, should also suffice for considering whether to propose the relevant voting change. The condition's restriction on the merged company's veto power shall therefore apply only to a voting change proposal submitted to the Management Committee within ninety days following consummation of the merger. Presumably, the Management Committee would, in turn, complete its consideration of any such proposal within ninety days of its submission.

Some intervenors would preclude the merged company's veto "on matters substantially affecting the competitive market," (Condition 9). This proposal cuts too broadly, would invite endless disputes about whether a particular matter does or does not "substantially affect the competitive market" and is denied.

(3) New Hampshire Electric Cooperative

(a) This company seeks particular relief concerning an on-going dispute with PSNH about underlying Seabrook-related agreements (Condition 1). This dispute between New Hampshire parties is local in nature, involves essentially intra-state matters, and is being pressed before the New Hampshire Commission and the New Hampshire state courts. That NU now controls PSNH's litigation positions in the controversy does not somehow convert the dispute into a merger-related one. The controversy is before New Hampshire tribunals, and that is where it belongs. The Coop's requested condition as to the Seabrook-related agreements is denied.

(b) Reduced to essentials, Condition 2 addresses the relationship between the merged company and the Coop as a TDU (Transmission Dependent Utility). Effects of the merger on TDUs are discussed below at section III(C)(6)). I see nothing in the Coop's situation that so distinguishes it from the other TDUs to warrant different treatment. The Coop will, of course, share in the protections generally accorded to the TDUs, _infra_. Condition 2 is denied.

(c) The Coop's condition 3 has no direct link to the merger, but apparently invokes old difficulties as a basis for now strengthening its ability to compete with the merged company. Such conditions have no place here. _See_, _Southern_

Pacific Transportation Co. v. ICC, 736 F.2d 708, 722 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985), upholding the ICC's view that "conditions on a merger are not to be used to ameliorate long-standing problems which were not created by the merger," and rejecting proposed conditions which were concededly unrelated. The Coop's Condition 3 is denied.

(4) Holyoke

The City of Holyoke Gas & Electric Department requested four conditions: the appointment of an ombudsman; a requirement that NU "spin-off" its transmission facilities to a separate company; a divestiture by NU of its subsidiary, the Holyoke Water Power Co.; and a prohibition on NU's conditioning any Holyoke real estate sales or leases on electricity purchasing requirements.

(a) The ombudsman proposal has much to commend it. As explained by the Administrative Conference of the United States, (in the governmental context) an ombudsman is: "a means of inquiring into certain grievances about administrative acts or failures to act and, in suitable cases, to criticize or to make recommendations concerning future official conduct." Recommendation 90-2, June 7, 1990 (1 C.F.R. § 305.90-2). Such persons have operated successfully at local, state, and federal governmental levels; have succeeded in colleges and universities; have been recommended for general use in the corporate world; and have been favorably used by at least one natural gas company.12/

An ombudsman appointed by the merged company would be a valuable asset. As Holyoke points out, NU's past transmission policies did produce criticisms from those who were (or wanted to be) customers. In the post-merger world, the company will, for the first time, provide transmission service by tariff, not by individual negotiation. But the new service may well generate its own complaints. The merged company -- with vast power over transmission and control of surplus power -- must offer viable wheeling service in order to alleviate potential anti-competitive consequences. The presence of an ombudsman can help to secure that goal.

The company sees the appointment of such a person as an implicit criticism of its own management. This reaction, while

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12/ Verkuil, "The Ombudsman and the Limits of the Adversary System," 75 Col. L. Rev. 845 (1975). "The Case for the Corporate Ombudsman," Legal Times, August 7, 1989; "Gas Executives' Forum: Captive Customers," Public Utilities Fortnightly, Oct. 13, 1988, p. 79.

understandable, is not a valid basis for rejecting the proposal. The appointment of an ombudsman is not intended as a "slap in the face." There is no doubt that NU's managers, some of whom I have seen and heard at length, have effectively and honestly run the company in the best interest of its ratepayers and stockholders.

But every business, no matter how well run, can trigger some dissatisfied customers. The ombudsman can help the company, while posing minimal difficulty for it. The person (as proposed) would be chosen solely by the company, not by customers or the government. The only requirement is that he or she be a non-employee with experience in bulk power matters. Compensation would be set by the company. The arrangement could be full-time or part-time, as circumstances warrant. The requirement would be in effect only for the first five years after the merger. As modified 13/, I adopt Holyoke's "Ombudsman" condition as "appropriate to secure maintenance of adequate service" (Sec. 203(b)).

The ombudsman is not the only avenue for dissatisfied customers. The Commission's Enforcement Task Force maintains a "hotline" (telephone 202-208-1390) through which complaints can be received. The agency's Enforcement lawyers share the phone duty, and assist complainants by attempting to resolve controversies. 14/ _See also_, _Amerada Hess Pipeline Corp._, 53 FERC ¶ 61,266 (1990), approving the use of alternative forms of dispute resolution. Formal complaint proceedings and adjudication also play a key role, particularly where the dispute is significant or complex and involves the need to sort out conflicting factual versions. _Cf._, Section 582 of the "Administrative Dispute Resolution Act" (P.L. 101-552), recognizing that informal dispute resolution may well be inappropriate in some cases.

(b) Spinning off transportation assets to a new corporation seems a serious and difficult step, which produces relatively little in return. Holyoke says that a separate transmission corporation will enhance the Commission's ability to find out what will be going on -- to give the FERC a "handle to enforce" conditions (Tr. 8022). The Commission's Enforcement Staff did not intervene to support such relief, and the trial Staff takes no position on it. There is no evidence of any prior FERC difficulty with allegedly "shielded" dealings which need to be more "visible" (Holyoke Br. p. 8; Tr. 8025). Moreover, NU

13/ The requested requirement for annual reports to the Commission is unnecessary. A decision about publishing a report or reports should rest within the discretion of the ombudsman.

14/ _See_, "Informal Dispute Resolution Working Quickly, Effectively," _The [FERC] Chronicle_, Nov./Dec. 1990, pp. 1, 11.

counsel represents that this spin-off poses legal, financial and practical problems involving various state agencies, the FERC, the Bankruptcy Reorganization Plan, the NU bond indenture agreement, and financing arrangements -- all of which could burden the company with substantial costs (Tr. 8025-8026). For all these reasons, the "spin-off" condition is rejected.

(c) Divestiture of Holyoke Water Power Company's retail business is a drastic remedy, wholly uncalled-for by anything in this record. Insofar as the City of Holyoke seeks to bolster its own competitive posture, the effort does not belong in someone else's merger case. Cf., Southern Pacific Transportation Co. v. ICC, 736 F.2d 708, 722 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985). The City is covered by the protection given the TDUs, and is entitled to no more in this regard. This condition is rejected.

(d) During the hearings, NU made a commitment that it "will not condition the sale or lease of real property in the City of Holyoke, Massachusetts on the requirement that the buyer or lessee also purchase electricity from an NU company" (Tr. 3794-3795). This continuing commitment will apply to any existing lease of Holyoke Water Power Co. (Id.) NU does not oppose a merger condition embodying this commitment (Tr. 8045), and it is hereby adopted. The City's request for even broader relief, requiring notification concerning alleged past agreements, is unnecessary. Save for one lease, there is no evidence of any other on-going land electricity arrangement. Within thirty days after consummation of the merger, NU will notify that lessee that the relationship (if any) between the lease and electricity purchases no longer exists.

(5) CMEEC

By its filing of November 30, 1990, Connecticut Municipal Electric Energy Cooperative (CMEEC) withdrew its Statement of Conditions, earlier filed in this proceeding. CMEEC represents that it has now "executed an amended and restated Transmission Service Agreement ("TSA") that settles CMEEC's concerns relating to NU's proposed acquisition of PSNH" (Notice of Withdrawal, pp. 1-2). A copy of that Agreement was attached to the withdrawal. There is no need for further review of CMEEC's position in this case. Post-merger relationships between NU and CMEEC shall be governed by the above Agreement.

(6) TDUs

The Transmission Dependent Utilities (TDUs) are "entirely dependent on NU or PSNH for their bulk power transmission needs" (TDU Br. p. 3). These companies (most of which involve municipal ownership) are not big enough to own or construct sufficient generation to meet their loads. As their brief states, they "are

physically unable to engage in any bulk power transaction without using the NU or PSNH transmission systems. Absent economic access to NU's or PSNH's transmission facilities, the TDU cannot survive as an independent entity" (Br. p. 4). The TDUs compete with NU and PSNH in the wholesale bulk power market; each TDU, like NU/PSNH, seeks out attractive sources of supply. TDUs thus "are in the uneasy position of having their only source of essential transmission service in the hands of their principal competitor" (Br. p. 10). These small companies, uniquely vulnerable to possible anti-competitive conduct, are entitled to some measure of protective assurance regarding NU-PSNH's post merger conduct.

They seek a tariff "which provides each such TDU access to the NU transmission system with rights to the use of that system equivalent to those exercised by NU itself at a cost equivalent to that incurred by NU itself for comparable service and usage" (Condition 10). This condition would give the TDU's a higher status than they had before the merger. The TDUs stood in NU/PSNH's shoes, as alter egos of those companies, and there is no reason why the merger should be the occasion for such a transformation. Condition 10 is denied.

TDUs can obtain protection with something less drastic. They have longstanding relationships with NU and PSNH which allow them to meet their obligations. The Commission, responding to concerns about NU/PSNH's post-merger treatment of pre-existing contracts, has already stated: "[t]he acquisition will have no effect on existing contracts . . . [t]he Commission will review any contract modification when filed. We need not address the matter in this hearing" (50 FERC ¶ 61,266 at 61,836 (1990)).

Considering that statement, and the existence of ongoing negotiations between NU and the TDUs, 15/ it would be prudent for present purposes simply to maintain the *status quo*, -- the situation which the Commission's order envisions. All rates, terms and conditions of NU-PSNH transmission service to the TDUs in effect on this date shall, therefore, be maintained after the merger, unless and until changes are either agreed upon by the merged company and the TDUs, or authorized by the Commission.

IV. RATE ISSUES

A. Transmission Rates of the Merged Company

Certain intervenors and the Staff see this proceeding as an appropriate vehicle for litigating the actual transmission rates

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15/ See letter of December 5, 1990 from Mr. Adragna to me (copy to all counsel).

to be charged by the merged company (see, Briefs of Listed Fourteen Intervenors and of the Staff). NU resists these efforts, arguing that this merger case need not and should not be expanded to embrace a transmission rate proceeding.

It is settled that the "scope of the inquiry" is among the "housekeeping details addressed to the discretion of the agency . . ." (City of San Antonio v. CAB, 374 F.2d 326, 329 (D.C. Cir. 1967)). See, Richmond Power & Light v. FERC, 574 F.2d 610, 624 (D.C. Cir. 1978)(FERC's "wide leeway" in controlling its calendar can sustain deferral of issues for a separate proceeding). The question, therefore, is whether the Commission intended to add a transmission rate case to the instant proceedings.

Those who say yes point to a sentence in the hearing order which directed the parties to address whether the "price and non-price terms" of the company's transmission commitments would be sufficient to mitigate its post-merger market power (50 FERC ¶ 61,266 at 61,835). This mention of "price terms" does not mandate a transmission rate case. The Commission's comment appeared in a lengthy discussion which described the commitments as a "point of departure" for examining market power problems, (Id.) The agency's focus was on the merged company's power, not pricing details.

By contrast, the same order shows that when the Commission wants to institute a rate case, it says so in plain English.

> . . . a public hearing shall be held for the purpose of determining whether the proposed merger of PSNH and Northeast is consistent with the public interest; and whether the rates, terms and conditions of the Seabrook Power Contract, the Sharing Agreement and the Capacity Interchange Agreements are just, reasonable and in the public interest (50 FERC at 61,840-61,841; emphasis added).

The orders on rehearing and granting clarification also included explicit language confirming the requirement for rate proceedings involving the Seabrook Power contract (51 FERC at 61,485; 52 FERC at 61,210). The absence of any such direction concerning transmission rates -- anywhere in the three orders governing this case -- further demonstrates that the sentence relied upon by intervenors was not intended to create a second rate case.

This reading is consistent with prior Commission practice. See, Utah Power & Light Co., 45 FERC ¶ 61,095 at 61,298 (1988) (rates should not be developed in context of a Section 203 merger proceeding); Southern California Edison Co., 47 FERC ¶ 61,196 at 61,673 (1989)(following Utah, and rejecting request that the

hearing embrace "the rates for transmission services following the merger").

Finally, the Commission's hearing and rehearing orders spoke repeatedly and emphatically about the need to expedite this proceeding (50 FERC ¶ 61,266 at 61,834, 61,839-61,840; 51 FERC ¶ 61,177 at 61,485-61,487). These orders require an initial decision by December 31, 1990, if not sooner. These comments requiring expedition confirm the view that the agency did not intend silently to create still another rate case in the context of this merger proceeding.

B. Whether NU's Rate Schedule Filings Are Just and Reasonable

(1) The Untouchable "Package" Theory

NU made certain rate filings connected with the merger. These include the Seabrook Power Contract (concerning purchase of output from the Seabrook nuclear plant), and the Capacity Interchange Agreements (dealing with NU's and PSNH's rights to get power from each other). Aspects of these contracts are challenged by the Staff. NU and its supporters resist the Staff's attacks. They argue as a threshold matter that because the agreements are part of an integrated Reorganization Plan, negotiated and approved by all concerned, the Staff may not take that "package" apart and alter any of its details.

This "package" defense ignores the Commission's orders. The Commission directed a public hearing "for the purpose of determining . . . whether the rates, terms, and conditions of the Seabrook Power Contract . . . and the Capacity Interchange Agreements are just, reasonable and in the public interest . . ." (50 FERC at 61,841). Nothing in that order (or in the later orders) suggests a limitation to the "package." The hearing order spoke broadly about the Seabrook contract: "[f]urther our review indicates that the Seabrook Power Contract may be unjust and unreasonable. Accordingly, we will set the Seabrook Power Contract for hearing" (Id.) Because that contract was not the product of arm's length bargaining, "[w]e therefore will carefully scrutinize [its] rates, terms and conditions . . . " (50 FERC at 61,839).

On rehearing, the Commission rejected a request that it find the Seabrook contract rates just and reasonable without a hearing because they were part of the approved plan (51 FERC at 61,481-61,482, 61,484-61,485). In a July order granting clarification, the Commission again rejected the "package" defense, and made clear that a particular aspect of the Seabrook contract was indeed being set for hearing (52 FERC ¶ 61,046). Of course, rates must be examined as a whole -- for their "end result" -- in determining whether they are just and reasonable (Jersey Central

Power & Light Co. v. FERC, 810 F.2d 1168, 1177-78 (D.C. Cir. 1987)). But that does not render their individual parts immune from the careful scrutiny which the Commission orders explicitly required. The Staff's challenges must be examined.

(2) The Seabrook Power Contract

(a) Rate of Return

(i) The return on equity in the Seabrook Power Contract is 13.75%. The Seabrook agreement is a life-of-the-unit power contract under which North Atlantic Energy Corp. (NAEC), a new NU subsidiary, will take over PSNH's interest in Seabrook. NAEC will then sell its share of Seabrook's capacity and energy to PSNH. The contract allows for rate base treatment of only $700 million of PSNH's $2.9 billion original investment in Seabrook. For the first ten years the return on equity for NAEC is fixed at 13.75%, regardless of any change in capital markets. After the tenth year, NAEC's return will equal the average of the returns approved by the Commission for certain other single-unit, nuclear generating companies in New England. (Ex. 9, pp. 28-29; Ex. 14, pp. 15,17; Ex. 239, p. 14).

The Staff recommends a return of 13.1%. Its witness, Ms. Watson, presented an independent analysis for determining a rate of return under the Seabrook Power Contract, using the Discounted Cash Flow (DCF) methodology and testing that result by a comparable risk analysis. She calculated a proposed Seabrook return by first using NU as a "proxy" for NAEC and calculating what NU's return ought to be. She determined that a reasonable range for NU would be 11.61% to 13.55%, and recommended a return near the top of that range (13.5%). She then made a downward adjustment of 0.4% because she believed that the Seabrook Contract protections (the cost of service formula tariff and a guaranteed purchaser) made NAEC less risky than NU.

Staff has attempted to comply with the Commission's general approach to rate of return: a DCF study assuming NU's validity as a proxy for NAEC and a comparison with returns of analogous companies. But the attempt to show that NAEC is less risky than NU is not convincing. NAEC's single asset, Seabrook, is a controversial and troubled nuclear plant which was a major factor in causing the bankruptcy. NAEC's bond ratings, projected into the future, reflect a greater risk than NU's present ratings. In addition, although electric utilities generally need pre-tax earnings equal to twice their total debt interest for purposes of issuing new debt (Tr. 6699), NAEC, under Staff's 13.1% return (Ex. 623, p. 46U), would fall below that level. 16/ These

16/ NAEC's pre-tax coverage under her return, would range from 1.41 in 1990 to 1.85 in 1998.

considerations show that NAEC has risks which outweigh those of NU.

Wholly apart from these difficulties, an overall view of the contract provision shows that its end result is just and reasonable. PSNH's share of Seabrook is $2.9 billion; but the amount used in rate base by NAEC for that share is $700 million. A return on equity cannot be examined in isolation, without considering the effects of rate base treatment -- where, as here, rate base is reduced below what Commission standards would otherwise allow. See. Northeast Utilities Service Co., 52 FERC ¶ 61,097, reh'g denied, 52 FERC ¶ 61,336 (1990) (allowing one of NU's subsidiaries a 14.5% return on equity where the operating company did not include the full cost of all of the facilities for which recovery was justified). See also, Florida Power & Light Co., 32 FERC ¶ 61,059, at 61,295 (1989); Jersey Central Power & Light Co., 810 F.2d at 1177-78.

NU could well have paid the full $2.9 billion, properly included it in rate base, and earned a commensurate return from its ratepayers for years to come. Testing the overall fairness of the "end result" by focusing only on what was paid, instead of what was saved, ignores the fact that NU negotiated a favorable deal by paying less than $2.9 billion for PSNH's Seabrook share. To reduce the return on equity because NU was able to pay substantially less would penalize the company for having obtained a good deal for its ratepayers. The contract's return allowance is less than it might have been. The end result, a return of 13.75% on a rate base of $700 million (instead of $2.9 billion), is just and reasonable.

(ii) The automatic formula adjustment that becomes operative after the tenth year of the contract is unjust and unreasonable. The formula determines the return for NAEC based on the returns allowed to four Yankee companies. Such an approach leads to a return that is not designed to recover the utility's cost of equity. The Commission has previously rejected formula rates that automatically adjust the return on common equity (New England Power Company, 31 FERC ¶ 61,378, at 61,841 (1985)). See, Green Mountain Power Corporation, 46 FERC ¶ 61,164, at 61,570-71 (1989). The rehearing order in this case makes clear that "we will not grant an exception to our policy prohibiting automatically adjusting return on equity provisions" (51 FERC at 61,485). NU has not shown why, despite this language, there should be some different result. The automatic formula adjustment included in the Seabrook Power Contract for determining the ROE after the tenth year is rejected.

(b) Section 12

Under Section 12 of the Seabrook Contract, PSNH, NAEC and the State of New Hampshire agree that "in any proceeding by FERC

under Section 206 the FERC shall not change the rate charged under this Agreement unless such rate is found to be contrary to the public interest." The Commission's hearing order questioned that limitation, explaining that although parties can waive their own rights, it knew of no court decision authorizing them to waive non-parties' rights (including the Commission's) under Section 206. The Commission explained that such a waiver, if otherwise legitimate to preserve contracted-for rates under the Mobile-Sierra cases 17/, would be improper here. This is because NU was "on both sides of the bargaining table" in the NU-PSNH-NAEC arrangement (50 FERC at 61,839). For this reason, the Commission concluded, "we believe we have the authority under the 'public interest' standard to modify a contract where it may be unjust, unreasonable, unduly discriminatory or preferential" (Id.)

The Staff seeks to strike the quoted language from Section 12. Such a step is not necessary. The Commission made clear that in the particular circumstances surrounding the Seabrook contract, it retains power -- through the "public interest" language -- to make modifications under the traditional just and reasonable and non-discrimination standards. Any remaining controversy over such power can best be resolved later -- if, as, and when the FERC chooses to exercise it in the context of some particular modification.

(c) Cash Working Capital Allowance

As a general matter, a utility first pays its bills, and later recovers the underlying costs from ratepayers. Time may intervene between the utility's payment and its reimbursement, during which period, the company has effectively advanced funds without any return. The concept of a "cash working capital allowance" compensates the company for this lag.

There is no dispute about NAEC's and PSNH's general entitlement to such allowances in the Seabrook Power Contract and the Capacity Interchange Agreements. Rather, the controversy (between the Staff and NU) involves the question whether there is any lag -- and thus the basis for any allowance -- regarding those companies' fuel expenses.

The Staff, resting on Carolina Power & Light Co., 6 FERC ¶ 61,154 (1979), argues that NU has not provided sufficient evidentiary support for the existence of the lag vis a vis fuel. But NU's witness Noyes did testify as to the existence and dimension of such a lag (Ex. 14, p. 32). Staff's brief does not

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17/ United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 322 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

comment on this testimony, and it is essentially uncontradicted. Carolina envisions use of the "actual lag" and that is what Mr. Noyes attempted to do here. In the absence of any contrary evidence, his testimony is sufficient.

(d) Decommissioning Expense

The decommissioning expense allowance "represents what can be viewed for simplicity as a negative salvage value for the plant after its service life has ended" (Ex. [illegible]5, p. 18). This large expense is collected from ratepay[illegible]he service life of the nuclear plant, though NAEC does [illegible] spend the money until the plant's life has end[illegible] under the contract, these expenses would be calculated under New Hampshire law and the Joint Ownership Agreement. Staff correctly argues that the level of decommissioning expense requires FERC approval under Section 205 of the Federal Power Act.

NU has not even attempted to quantify these costs, let alone supplied any detailed information about what is likely to be a substantial burden on ratepayers. See, e.g., Boston Edison Co., 52 FERC ¶ 61,010 (1990) (decommissioning costs of $122 million measured by 1985 dollars). NAEC should file with FERC the initial decommissioning expense estimate to be recovered under the contract prior to its collection in rates. If NAEC desires to begin to collect rates related to a change in the decommissioning estimate, a filing with the FERC is required. Of course it will be important for NU to have adequate funds to decommission Seabrook. But providing a FERC review mechanism for this great an item is necessary to assure the proper charge to ratepayers in present and future rates.

(3) Capacity Interchange Agreements

These Agreements (the "power up" and the "power down" commitments) include a return on equity of 14.5%. Staff's DCF and risk analysis provided a return of 13.5% -- the return which NU itself will need. As noted supra, Staff's methodology for determining the return for NU accords with FERC's general approach. NU is an appropriate proxy to use for PSNH since the latter will be a subsidiary of NU upon approval of the reorganization plan and PSNH's emergence from bankruptcy. The Commission has repeatedly used the parent as a proxy for a subsidiary where the subsidiary's stock is not traded. See, Connecticut Light & Power Company, Western Massachusetts Electric Company, Holyoke Water Power Company, & Holyoke Power & Electric Company, 43 FERC ¶ 61,508 (1988).

NU introduced no study, and virtually no evidence, to support its 14.5%. Its consultant, Dr. Olson, testified that the 14.5% return for the power-up and the power-down contracts, while in the "ball park," is a "number that is common in many Northeast

Utilities transmission and power sales agreements." He continues, "I don't think there is any good economic reason for that in today's environment. I think that is a number that has resulted from a combination of negotiations in the past, plus some Commission decisions that have set that number at 14.5" (Tr. 6142). He had the opinion that the ranges for the power-up contract would probably be from 13% to 15%, and for the power-down contract from 14.5% to 17%.

The ranges were not derived from empirical studies, and NU's own figure (14.5%) apparently was used solely because it had been employed in other cases. There is no reason why these intra-company transactions are entitled to a higher rate of return than NU itself is allowed to earn. In these circumstances, the Staff's 13.5% return, determined after DCF analysis, is appropriate for these agreements.

C. Miscellaneous Rate Issues

(1) NU will pay an acquisition premium of some $800 million. The MACT Towns fear that NU might someday seek to recover the acquisition premium from its wholesale ratepayers. They also worry about possible significant increases in NU wholesale power costs, and the assignment of certain costs to the transmission function under the relevant agreements. NU has not proposed to recover these moneys from its customers, and agrees that Commission approval would be required before it could do so. If NU later makes such requests, MACT Towns will have ample opportunity to assert their concerns. For these reasons there is no need now to address the merits of the MACT Towns' concerns.

(2) The Connecticut Office of Consumer Counsel, *et al.*, state that NU's acquisition financing proposal is highly leveraged and that the debt to equity ratio will be too high. They say there will be additional risk that NU's profitable subsidiaries may end up paying those debts if the merger fails to fulfill expectations. For these reasons, these intervenors recommend two conditions: that "customers of NU's existing subsidiaries should not be required to financially subsidize NU or its stockholders if the acquisition results in adverse financial impacts such as a higher cost of capital" and in all future rate proceedings, "cost of equity capital for NU's existing subsidiaries shall be calculated without regard to NU's consolidated cost of capital, as the acquisition will likely increase that cost" (Ex. 488, pp. 4-5).

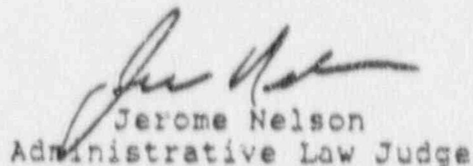
NU structured the merger to insulate its operating subsidiaries and ratepayers from risk, while giving them the merger's benefits (Ex. 6, pp. 52-56). That such risk has been sharply reduced was also shown by Dr. Olson (Ex. 207, pp. 36-38). This conclusion was corroborated by Standard and Poor's, and by

Booz, Allen & Hamilton, Inc. who so reported to the Connecticut Commission (Ex. 6, pp. 54-55).

For these reasons, there is no present need to speculate about some impact which may never occur. If there are later attempts to pass on these debts, they can be reviewed in the context of individual rate filings.

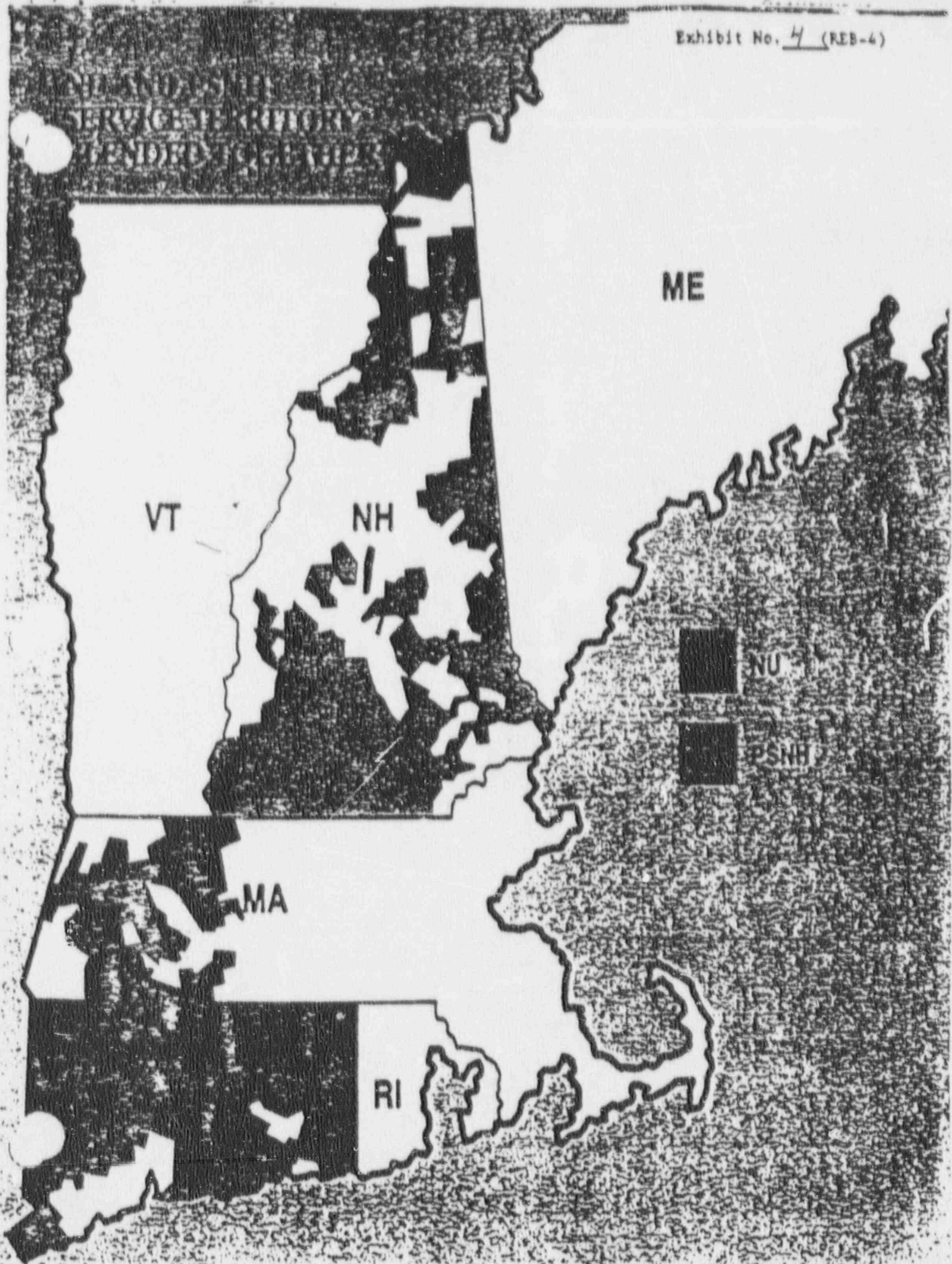
CONCLUSION

Subject to the terms and conditions set out in this initial decision, the proposed merger is consistent with the public interest and is approved. Subject to the modifications set out here, the rates, terms and conditions of the Seabrook Power Contract, the Sharing Agreement, and the Capacity Interchange Agreements are just, reasonable and in the public interest.



Jerome Nelson
Administrative Law Judge

Exhibit No. 4 (REB-4)



New Hampshire Yankee
January 14, 1991

EXHIBIT B to NYN-91004

SECURITIES AND EXCHANGE COMMISSION

(Release No. 35-25221; 70-7698)

Northeast Utilities
Memorandum Opinion and Order Authorizing Acquisition of Public Service Company of New Hampshire and Related Financings; Exception from Competitive Bidding; Reserving Jurisdiction; Denying Requests for Hearing

December 21, 1990

Northeast Utilities ("Northeast"), West Springfield, Massachusetts, a registered public-utility holding company ("Applicant"), has filed an application-declaration ("Application") under sections 6(a), 7, 9(a), 10, 12(b), 12(c) and 12(d) of the Public Utility Holding Company Act of 1935 ("Act") and rules 43, 45, 50 and 50(a)(5) thereunder. Thirteen amendments to the Application have been filed, the last on November 19, 1990.

The Commission issued a notice of the filing of the Application on February 2, 1990 (Holding Co. Act Release No. 25032). Fourteen hearing requests from forty-one separate entities were received. Four of these requests, representing twenty-one entities, were subsequently withdrawn. 1/

1/ Requests for hearing filed by the following entities are now pending: (1) American Public Power Association ("APPA"); (2) Connecticut Office of Consumer Counsel ("Conn-OCC"); (3) Environmental Action Foundation ("EAF"); (4) Massachusetts Department of Public Utilities ("Mass DPU"); (5) Massachusetts Municipal Wholesale Electric Company ("MMWEC"); (6) National Rural Electric Cooperative Association ("NRECA"); (7) New Hampshire Office of Consumer Advocate ("NH-OCA"); (8) Vermont Department of Public Service ("Vermont-DPS"); (9) Vermont Public Service Board ("Vermont-PSB"); and (10) 11 Massachusetts utilities (Boylston Municipal Light Department, Braintree Electric Light Department, City of Holyoke Gas and Electric Department ("Holyoke"), Georgetown Municipal Light (continued...)

In addition, eight entities filed comments or notices of appearance. 2/

1/(...continued) Department, Littleton Electric Light and Water Department, Princeton Municipal Light Department, Shrewsbury Electric Light Plant, Sterling Municipal Light Department, Taunton Municipal Lighting Plant, Town of Rowley Municipal Lighting Plant and West Boylston Municipal Lighting Plant (collectively, "11 Massachusetts Utilities")).

Requests for hearing filed by Paxton Municipal Light Department, Holden Municipal Light Department and Connecticut Municipal Electric Energy Cooperative were withdrawn. After entering into a settlement agreement, dated July 16, 1990 ("Settlement Agreement"), 18 Vermont utilities (Allied Power and Light Company, City of Burlington Electric Department, Central Vermont Public Service Corporation, Citizens Utilities Company, Franklin Electric Light Company, Green Mountain Power Corporation, Town of Hardwick Electric Department, Vermont Electric Cooperative, Inc., Vermont Electric Generation and Transmission Cooperative, Inc., Vermont Electric Power Company, Inc., Vermont Marble Company, Washington Electric Cooperative, the Villages of Jacksonville Electric Company, Ludlow Electric Light Department, Morrisville Water and Light Department, Northfield Electric Department, Stowe Water and Light Department, and the Swanton Electric Power Company (collectively, "18 Vermont Utilities")), withdrew their joint request for a hearing, and now support the Application.

2/ Notices of appearance were filed by the: (1) Connecticut Department of Public Utility Control ("Conn-DPUC"); (2) Massachusetts Attorney General ("Mass-AG"); (3) Maine Public Utilities Commission ("Maine-PUC"); (4) Rhode Island Attorney General ("Rhode Island-AG"); and (5) Rhode Island Division of Public Utilities and Carriers ("Rhode Island-DPUC").

Comments were filed by: (1) the Attorney General of New Hampshire, in support of the Management Services Agreement ("MSA") between Public Service Company of New Hampshire and Northeast Utilities Service Company ("NUSCO"), Northeast's wholly-owned service company subsidiary; (2) Eastern Utilities Associates ("EUA"), a registered holding company which, through its subsidiaries, has a 15% joint ownership interest in the Seabrook Nuclear Power Project ("Seabrook"), located in Seabrook, New Hampshire, <u>see infra</u> note 7, and (continued...)

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I. INTRODUCTION

Public Service Company of New Hampshire ("PSNH"), a New Hampshire publicly owned electric utility, is the largest electric utility in New Hampshire, supplying electricity to approximately 75% of New Hampshire's population. PSNH distributes and sells electricity at retail in approximately 200 cities and towns in New Hampshire and sells at wholesale to five other utilities and municipalities. PSNH has a 35.6% joint ownership interest in the Seabrook Nuclear Power Project

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2/(...continued)
(3) New England Electric System ("NEES"), a registered holding company which, through its subsidiary electric utility company, New England Power Company ("NEPCO"), has a 10% joint ownership interest in the Seabrook project. Both EUA and NEES filed comments regarding the MSA. See infra note 6 (discussion of MSA).

("Seabrook"). 3/ On January 28, 1988, PSNH filed a voluntary petition for protection from its creditors under Chapter 11 of the United States Bankruptcy Code, as amended ("Bankruptcy Code"). PSNH is a debtor-in-possession in bankruptcy reorganization proceedings pending in the United States Bankruptcy Court, District of New Hampshire ("Bankruptcy Court"). 4/

Northeast has been an integrated electric public-utility system since 1966. 5/ Northeast, through its three wholly-owned operating subsidiaries, Connecticut Light and Power Company ("CL&P"), Western Massachusetts Electric Company ("WMECO") and Holyoke Water Power Company ("HWP"), provides retail electric service in Connecticut and western Massachusetts. Northeast also provides wholesale electric service to seven municipal and investor-owned electric systems. Additionally, Northeast Utilities Service Comp... ("NUSCO"), Northeast's service company

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3/ Seabrook is a two unit nuclear fueled power plant ("Unit No. 1" and "Unit No. 2") that is jointly owned by twelve electric utilities ("Joint Owners") in New England. Unit No. 1, a 1,150-megawatt plant, received its full power operating license from the Nuclear Regulatory Commission ("NRC") and has completed all testing and been in full commercial operation since August 17, 1990. Unit No. 2 has been cancelled.

4/ Public Serv. Co. of N.H., No. 88-0043 (Bankr. D. N.H. Jan. 28, 1988).

5/ Northeast Utils., 42 S.E.C. 963 (1966).

subsidiary, provides various centralized services to Northeast system companies. 6/

II. PROPOSAL

Northeast proposes to acquire PSNH ("Acquisition") pursuant to a Joint Plan of Reorganization ("Plan") proposed by NUSCO, PSNH, the Official Committee of Unsecured Creditors of PSNH and the Official Committee of Equity Security Holders of PSNH appointed in the bankruptcy proceeding, and the holders of a majority of PSNH's third mortgage bonds. 7/

6/ Under the MSA, NUSCO is fully responsible for the management of PSNH, at cost, during the interim transition period between the Bankruptcy Court's confirmation of the plan filed by Northeast proposing its acquisition of PSNH, and consummation of the acquisition, subject to certain requirements. In the event that the acquisition is not consummated, the MSA will terminate, except that NUSCO will be obligated to continue to provide management services for specified periods until alternate arrangements can be put in place.

By letters dated January 5, 1990 and February 26, 1990, NUSCO notified the Commission of NUSCO's intention to render certain services under the MSA, in accordance with the 60-day letter procedure specified in the Commission's order dated June 30, 1966, Northeast Utils. Serv. Co., Holding Co. Act Release No. 15519. By letter dated March 16, 1990, the Commission advised NUSCO that it does not object to NUSCO rendering interim management and administrative services to PSNH prior to its proposed acquisition by Northeast.

7/ Each of the class of PSNH's creditors and equity security holders -- except for the holders of PSNH warrants, the most junior of the classes -- voted to approve the Plan. The Bankruptcy Court entered its order on April 20, 1990 ("April 1990 Order") confirming the Plan, committing PSNH to the merger with Northeast and "cramming down" the Plan on the warrant-holders class that did not vote to approve it. On June 15, 1990, three PSNH shareholders filed an appeal from the Bankruptcy Court's April 1990 Order. The appeal is (continued...)

The Plan values PSNH assets at approximately $2.317 billion, with PSNH's interest in Seabrook valued at $700 million 8/ and its non-Seabrook assets valued at $1.617 billion. 9/ PSNH's creditors and equity security holders will receive cash payments of approximately $2.105 billion ("Cash Distribution Requirement"), PSNH's equity security holders will receive $205 million in notes ("Notes"), and approximately $7 million in cash

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7/(...continued)
pending.

8/ As of December 31, 1989, PSNH valued Seabrook at approximately $1.790 billion.

9/ The effect of this valuation will be to write down the value of the Seabrook assets and assign a "premium" of approximately $787 million to PSNH's non-Seabrook assets, which are expected to have a net book value as of consummation of the acquisition of approximately $830 million. Northeast expects to recover the premium from PSNH's ratepayers pursuant to a rate agreement, dated as of November 22, 1989, ("Rate Agreement"), as amended, entered into between NUSCO and the Governor and Attorney General of New Hampshire. The Rate Agreement has been appealed to the New Hampshire Supreme Court by three PSNH shareholders claiming that the rates are insufficient, and by a group representing New Hampshire retail electric consumers claiming the rates are too high. The New Hampshire Supreme Court heard oral arguments in this matter on December 6, 1990.

Pursuant to the Rate Agreement, a temporary 5.5% rate increase in base retail rates was placed in effect on January 1, 1990 for PSNH. The Rate Agreement commits New Hampshire to, among other things, an additional six annual rate increases of 5.5% for PSNH and allows for the recovery of fuel and purchase power costs and expenses. The rate increases were made permanent by order of the New Hampshire Public Utilities Commission ("NHPUC"), dated July 20, 1990.

will be used to pay transfer taxes. 10/ The Plan provides for Northeast to acquire PSNH in either a one step transaction ("One-Step Transaction") or a two step transaction ("Two-Step Transaction"). 11/

A. The One-Step Transaction

Northeast will acquire PSNH in the One-Step Transaction if all conditions to the Acquisition are met, including receipt of all necessary regulatory approvals, 12/ by December 31, 1990 (or a later date, if extended) ("Reorganization Effective

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10/ The Cash Distribution Requirement will require the issuance of securities producing net proceeds of approximately $2.112 billion because of approximately $7 million of transfer taxes.

11/ Because regulatory obstacles could delay reorganization and, thus, cash distributions to creditors, the Plan provides for either a one- or two-step transaction. The Two-Step Transaction will be used if the necessary regulatory approvals are not timely obtained.

12/ The principal conditions that must be satisfied before PSNH can be acquired in the One-Step Transaction are: (1) the entry of the Bankruptcy Court order confirming the Plan, which occurred on April 20, 1990, and is now on appeal; (2) receipt of all necessary regulatory approvals, including, the approval of the Commission, the Federal Energy Regulatory Commission ("FERC") and all relevant state commissions; (3) completion of satisfactory financing arrangements; (4) receipt of a favorable ruling on federal income tax consequences; (5) a determination that the aggregate amount of prepetition claims by unsecured creditors does not exceed $900 million; and (6) receipt of provisional ratings for the notes to be issued by North Atlantic Energy Corporation ("North Atlantic"), a to-be-formed wholly-owned public-utility subsidiary of Northeast that will own all of PSNH's interest in Seabrook, of BB or better (or equivalent rating) on a when issued basis by at least two specified rating agencies.

Date"). 13/ The Acquisition will be completed under the Bankruptcy Code with Northeast's purchase of a new issue of up to 100 million authorized shares of PSNH common stock, $1.00 par value, and the cancellation under the Plan of all currently issued and outstanding PSNH securities, with the possible exceptions of two series of PSNH pollution control revenue bonds. 14/

As discussed above, PSNH creditors and PSNH equity security holders will receive the Cash Distribution Requirement of

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13/ Due to delays in receiving the necessary regulatory approvals, the original Reorganization Effective Date of August 1, 1990 has been extended to December 31, 1990, which may be further extended.

14/ The two series of pollution control bonds that may remain outstanding are: (1) $100 million aggregate principal amount of The Industrial Development Authority of the State of New Hampshire ("NHIDA") Pollution Control Revenue Bonds, 1986 Series A; and (2) $112.5 million aggregate principal amount of NHIDA Adjustable Rate Solid Waste Disposal and Pollution Control Revenue Bonds, 1989 Series (collectively, "PCRBs").

Northeast currently contemplates that PSNH would, upon reorganization, refund the PCRBs and approximately $10 million of the $20 million aggregate principal amount of another series of NHIDA Pollution Control Revenue Bonds, 1983 Series A ("Series A Bonds"), with the proceeds derived from the issuance of up to $222.5 million in aggregate principal amount of NHIDA tax-exempt pollution control refunding revenue bonds. As noted above, the remaining $10 million aggregate principal amount of NHIDA Series A Bonds will be cancelled under the Plan. Northeast also anticipates that the NHIDA will issue approximately $60 million aggregate principal amount of tax-exempt pollution control revenue bonds and approximately $200 million aggregate principal amount of taxable pollution control revenue bonds (all or a portion of which may be converted to tax exempt status in the future), to allow the acquired PSNH to reimburse itself for its portion of the cost of pollution control, sewage, and/or solid waste disposal facilities at Seabrook.

approximately $2.105 billion. PSNH equity security holders will also receive up to $205 million of Notes issued by North Atlantic and approximately 8,431,000 warrants ("Northeast Warrants") to buy Northeast common stock. Northeast will issue one Northeast Warrant for every five shares of PSNH common stock that are outstanding immediately before the Reorganization Effective Date. 15/

Upon Northeast's acquisition of PSNH's new issue of common stock and the cancellation of PSNH's outstanding common and preferred stock, PSNH will become a wholly-owned subsidiary company of Northeast ("New PSNH") and will have no further obligation to PSNH's debt or equity security holders, except to holders of the PURBs, if outstanding. New PSNH will transfer its interest in Seabrook to North Atlantic 16/ for approximately $700 million, consisting of approximately $495 million in cash and $205 million of Notes, issued by North Atlantic for distribution to PSNH's equity security holders. Northeast would also form a

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15/ As of June 30, 1990, there are 42,154,548 shares of PSNH common stock outstanding.

A Northeast Warrant will entitle the holder during the exercise period, beginning on the date the Northeast Warrants are issued, which will be the date Northeast acquires PSNH, and terminating five years later, to purchase, for cash, one share of Northeast common stock, to be issued and sold by Northeast for $24.00 per share, subject to certain adjustments. The Northeast Warrants will be freely transferable.

16/ North Atlantic will enter into a power contract to sell its share of the power generated by Unit No. 1 to New PSNH after it is acquired by Northeast on terms that will allow North Atlantic to recover its investment in Seabrook.

new wholly-owned special purpose subsidiary, North Atlantic Energy Services Corporation ("NAESC"), which will assume responsibility for the operation of Seabrook Unit No. 1, 17/ and, as discussed below, Northeast, New PSNH and North Atlantic would issue and sell certain securities and engage in related transactions.

New PSNH will raise up to $1.610 billion from: (a) $20 million in estimated cash on hand and (b) through the issuance and sale of: (1) all of its new issue of common stock 18/ to Northeast for a cash purchase price of approximately $318 million; (2) approximately 5.1 million shares of a class of 25 million shares of $25.00 Cumulative Preferred Stock, Series A, $25.00 par value per share, to the public or in a privately negotiated transaction to net approximately $125 million in cash; (3) first mortgage bonds, issued under the General and Refunding Mortgage Indenture, dated as of August 15, 1978 ("G&R Indenture"), between PSNH and New England Merchants National Bank, Trustee ("New England Merchants"), as amended and restated,

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17/ NAESC will assume operating responsibility for Unit No. 1 under an agreement to be reached with the other Joint Owners after Unit No. 1 receives its full power operating license from the NRC, which became effective on March 15, 1990, and Northeast's acquisition of PSNH is completed. PSNH's New Hampshire Yankee division is currently responsible for the operation of Seabrook and its employees will be transferred to NAESC. NAESC's organization will be similar to other special purpose companies regulated under the Act. NAESC's organization and issuance of securities will be subject to further Commission authorization.

18/ New PSNH will initially have 100 million authorized shares of common stock, $1.00 par value per share.

or under a new first mortgage indenture, secured by a first lien on its ownership interest in non-Seabrook assets, in the approximate amount of $342.5 million; 19/ (4) approximately $200 million of NHIDA taxable pollution control revenue bonds; and (5) approximately $282.5 million of NHIDA tax-exempt pollution control refunding revenue bonds. New PSNH will borrow its remaining cash requirements, estimated at $322 million, through a term loan facility with a maturity of less than five years, 20/ and will retain one or more banks to organize a banking group to arrange for placement of the term loan facility.

In addition to the $205 million in Notes issued by North Atlantic for distribution in accordance with the Plan, it will raise up to $495 million in cash through the issuance and sale of: (1) up to 1,000 shares of common stock, $1.00 par value per share, to Northeast for $140 million in cash; and (2) first mortgage bonds or other long-term debt, 21/ unsecured or secured by a first lien on its interest in Seabrook, through private

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19/ Northeast forecasts an interest rate of 10.75% per annum and a term of ten years for the New PSNH first mortgage bonds.

20/ Northeast forecasts an interest rate of 9.75% per annum, and that the loans would be repaid in three years.

21/ The first mortgage bonds will have a medium term maturity, in the range of ten years or less, depending on market conditions. Northeast projects an interest rate of 11.5% per annum and a term of ten years for these bonds.

placement or a negotiated underwriting, to realize net proceeds up to $355 million in cash. 22/

In addition, New PSNH and North Atlantic each propose to put in place a revolving credit agreement with syndicates of commercial banks under which $100 to $150 million and $100 million of short-term borrowings can be made available to New PSNH and North Atlantic, respectively, on a revolving basis to meet their respective working capital obligations. 23/

22/ The following table summarizes the various proposed issuances of securities and other financings by New PSNH and North Atlantic to raise the Cash Distribution Requirement:

<u>SOURCES OF CASH TO NEW PSNH</u>
(Millions)

Amount	Source
$318.0	Northeast Purchase of Common Stock
125.0	Preferred Stock
342.5	First Mortgage Bonds
482.5	NHIDA Bonds
322.0	Term Loan
20.0	PSNH Cash at Time of Reorganization (est.)
$1,610.0	

<u>SOURCES OF CASH TO NORTH ATLANTIC</u>
(Millions)

Amount	Source
$140.0	Northeast Purchase of Common Stock
355.0	Long-Term Debt
$495.0	
$2,105.0	Cash Distribution Requirement

23/ The credit agreements will provide for competitive bids under a "Dutch Auction" basis or at a specified interest rate, which can be the prime rate or a rate tied to prime rate or to a percentage of the certificate of deposit rate, or any other acceptable method.

B. The Two-Step Transaction

Under the Two-Step Transaction, PSNH will be reorganized as an independent company in the first step ("Step A"), and in the second step ("Step B") reorganized PSNH will be merged under New Hampshire law with a newly-created, wholly-owned subsidiary of Northeast, to be named Northeast Utilities Acquisition Corp. ("NUAC"). Northeast will acquire PSNH in the Two-Step Transaction if the necessary regulatory approvals are not received by the Reorganization Effective Date. 24/ This will enable PSNH unsecured creditors and equity shareholders to receive a substantial portion of the Cash Distribution Requirement at Step A, pending receipt of all necessary regulatory approvals to the Acquisition at Step B. The remaining Cash Distribution Requirement will be distributed at the time the Acquisition is concluded.

1. Step A

In Step A, PSNH will be reorganized under the Bankruptcy Code as an independent company ("Stand-Alone PSNH") conducting all of PSNH's utility operations and retaining its interest in

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24/ The principal conditions that must be satisfied before PSNH can be reorganized as Stand-Alone PSNH in Step A of the Two-Step Transaction are the same as those required to conclude the Acquisition under the One-Step Transaction, see supra note 12, with one exception. Step A requires receipt of regulatory approvals only from the relevant Connecticut and New Hampshire commissions.

In addition to the conditions which must be satisfied in Step A to create Stand-Alone PSNH, the merger cannot be consummated at Step B unless Northeast receives all other necessary regulatory approvals, including the approval of the Commission and the FERC.

Seabrook. Stand-Alone PSNH will not be a subsidiary of Northeast, 25/ but will be bound by a merger agreement ("Merger Agreement") with NUAC. 26/ Under the Merger Agreement, Stand-Alone PSNH will agree to merge NUAC into it when all regulatory approvals and other conditions are satisfied, with Stand-Alone PSNH as the surviving corporation, which would then be known as New PSNH, a wholly-owned public-utility subsidiary of Northeast.

In order to fund the approximately $2.105 billion Cash Distribution Requirement, Stand-Alone PSNH will use an estimated $20 million in cash on hand and issue and/or sell certain securities. Stand-Alone PSNH will issue up to 32.4 million shares of common stock, or an estimated 21.2 million and 11.2 million shares to PSNH's unsecured creditors and to its preferred and common shareholders, respectively, valued at $20 per share, or approximately $648 million. 27/ The 32.4 million shares of common stock will be cancelled when the merger is consummated in

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25/ Stand-Alone PSNH will be subject to regulation under the Act after it is merged into the Northeast system.

26/ The Plan provides that NUAC will have 1,000 authorized shares of common stock, $1.00 par value per share, all of which will be issued to and acquired by Northeast for approximately $318 million in cash prior to the merger.

27/ The $20 value is a result of the negotiations which culminated in the creation of the Plan. The holders of Stand-Alone PSNH common stock will be entitled to receive quarterly stock dividends, the first of which will be payable at the end of the calendar quarter in which the Reorganization Effective Date occurs. The stock dividends will accrue continuously from July 1, 1990 at a quarterly rate of two shares per 100 shares outstanding for the period ending December 31, 1990, and thereafter at three shares for every 100 shares outstanding.

step B and, in exchange for their shares, PSNH's unsecured creditors and equity shareholders will receive the $648 million in cash at that time. Additionally, Stand-Alone PSNH will issue and sell certain securities, including: (1) approximately 5.1 million shares of cumulative preferred stock, $25.00 par value per share, designated as $25.00 Cumulative Preferred Stock, Series A, to the public for approximately $125 million; (2) first mortgage bonds, issued under the G&R Indenture between PSNH and New England Merchants, or under a new first mortgage indenture, as discussed above, 28/ secured by a first mortgage lien on its non-Seabrook assets for an aggregate principal amount of approximately $342.5 million; (3) approximately $200 million of taxable NHIDA bonds; (4) approximately $282.5 million of tax-exempt NHIDA bonds; and (5) notes under a term loan, which Northeast projects to be approximately $487 million. 29/ Stand-Alone PSNH will also issue $205 million in Notes (issued by North Atlantic in the One-Step Transaction). PSNH's common and

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28/ *See supra* pp. 10-11.

29/ The following table summarizes the various issuances of securities and other financings by Stand-Alone PSNH to raise the Cash Distribution Requirement:

SOURCES OF CASH TO STAND-ALONE PSNH
(Millions $)

$ 648.0	Common Stock
125.0	Preferred Stock
342.5	First Mortgage Bonds
482.5	NHIDA Bonds
487.0	Term Loan
20.0	Cash of PSNH at Time of Reorganization
$2,105.0	Cash Distribution Requirement

preferred shareholders will also receive contingent warrant certificates ("Contingent Certificates") 10/ to be exchanged on a one-to-one basis for the Northeast Warrants. 11/

2. Step B

Under Step B (1) Northeast will form, and acquire all of the common stock of, NUAC for $318 million; (2) NUAC will merge with and into Stand-Alone PSNH ("Merger"), which will be the surviving corporation know[illegible] as New PSNH, a wholly-owned public-utility subsidiary of Northeast; 12/ (3) Stand-Alone PSNH common stock held by PSNH's unsecured creditors and equity security holders will be cancelled and the holders will receive $20 in cash per share for such stock, or $648 million; (4) the holders of Contingent Certificates will receive the Northeast Warrants; and (5) New PSNH's interest in Seabrook will be transferred to North Atlantic for $700 million, consisting of $495 million in cash and assumption of the $205 million of Notes originally issued by

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10/ Stand-Alone PSNH, rather than Northeast, will issue the Contingent Certificates at Step A so that, if there should be any delay in obtaining the regulatory approvals necessary for N[illegible]theast to issue the securities, the issuance of the Contingent Certificates will not be affected at Step A. The Contingent Certificates would become null and void if the merger does not occur in Step B.

11/ *See supra* note 15 and accompanying text (discussion of Northeast Warrants under the One-Step Transaction). Northeast will issue the Northeast Warrants to NUAC immediately prior to the merger for distribution to PSNH's creditors and shareholders.

12/ As a result of the merger, New PSNH will be the issuer of Stand-Alone PSNH's outstanding securities. *See supra* note 29 (table summarizing issuance of securities by Stand-Alone PSNH).

Stand-Alone PSNH, thus releasing New PSNH from its obligations under the Notes.

Northeast states that, in the event that it is determined that it is impractical 13/ to effect some or all of the contemplated sales of securities on the closing date, the maximum amount of short-term "bridge" financing for North Atlantic and Northeast would be up to $400 million and $500 million, respectively. 14/

III. NORTHEAST'S SOURCE OF FUNDS

Northeast will invest approximately $458 million in cash in New PSNH and North Atlantic, which it proposes to raise through a term loan facility of approximately $229 million from bank or other institutional lenders, 15/ and the issue and sale of up to approximately $229 million of its common stock. Northeast

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13/ Northeast would consider it impractical to effect a sale of securities if, because of unusual and currently unforeseen economic, market or financial circumstances beyond the control of the issuing company, it were to consult with financial advisors and determine that the securities in question could not be sold in the necessary amounts, on reasonable terms and at a reasonable cost.

14/ These amounts do not reflect revolving credit arrangements of up to $100 million for Northeast, as authorized by order dated July 29, 1988 (Holding Co. Act Release No. 24686), and $100 million for North Atlantic, as proposed under the Plan.

15/ The term loan facility will also be used, as necessary, to provide Northeast with the necessary cash to pay: (1) its interest obligations on the Acquisition financing and (2) dividends payable on Northeast's common stock until New PSNH and North Atlantic are able to begin paying cash dividends to Northeast on their respective common stock issuances.

anticipates that the term loan facility will be paid through the issue and sale of up to approximately $340 million of additional shares of its common stock, which will be subject to further Commission authorization.

IV. NORTHEAST'S PAYMENT OF DIVIDENDS

Northeast requests authorization to pay dividends on its common stock based upon its unrestricted consolidated retained earnings, 26/ for up to five years after its acquisition of PSNH. 27/ At the end of that period, Northeast will be subject

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26/ The amount of dividends will be calculated by the equity method of accounting, and will not be limited to the portion of consolidated retained earnings represented by dividends distributed to Northeast by its subsidiaries.

As of June 30, 1990: (1) Northeast's consolidated retained earnings, calculated on the equity method of accounting, totaled approximately $765 million; (2) the restricted retained earnings of Northeast's subsidiaries totaled approximately $597 million and, accordingly, (3) Northeast has available for the payment of dividends approximately $168 million of consolidated unrestricted retained earnings.

27/ The Applicant states that, in the early years after the Acquisition, New PSNH and North Atlantic will need to retain earnings and retire their own debt rather than pay dividends to Northeast. In order to maintain common stock dividends to Northeast's shareholders, Northeast must be able to pay dividends out of its consolidated unrestricted retained earnings because there will not be sufficient forecasted earnings available initially from the operations of New PSNH and North Atlantic to support Northeast's dividend obligations.

Northeast's consolidated retained earnings represent the accumulated earnings of its subsidiaries that are retained after dividends have been declared and paid by Northeast to its common stock shareholders. A significant portion of the retained earnings are restricted as a result of conditions contained primarily in the first mortgage bond indentures (continued...)

prospectively to the limitations imposed under the Act, except
that it will not be required to return the retained earnings paid
from the undistributed retained earnings subaccount.

V. EXCEPTIONS FROM COMPETITIVE BIDDING

Exceptions from the competitive bidding requirements of rule
50 under subsection (a)(5) 38/ are requested in connection with
the following issuances and sales of securities: (1) New PSNH's
preferred stock, first mortgage bonds, pollution control bonds
and notes in connection with its revolving credit borrowings and
term loan borrowings; (2) North Atlantic's first mortgage bonds,
$205 million in Notes and notes in connection with its bridge
financing and revolving credit borrowings; (3) Northeast's
Warrants to PSNH's preferred and common shareholders and common
stock thereunder, additional shares of common stock and notes in
connection with its term loan borrowings.

In support of its request for an exception from competitive
bidding, Northeast states that: (1) New PSNH will be emerging
from an unprecedented utility bankruptcy and will be establishing
its entire capital structure at a single time through the

37/(...continued)
and other debt instruments of Northeast's subsidiaries.
Because of the insufficient forecasted earnings noted above,
Northeast must use a portion of retained earnings that is
undistributed and unrestricted to maintain its common stock
dividends. However, rule 26(c)(3) requires that Northeast
file a declaration under section 12(c) of the Act in order
to pay dividends out of undistributed reta[illegible]ed earnings.

38/ *See infra* note 41.

issuances and sales of the proposed securities; (2) in light of the substantial complexities involved in financing the Acquisition, the best price for the securities can be achieved through a concerted pre-pricing marketing effort by a syndicate led by knowledgeable investment bankers, or a private placement of the securities; (3) active participation with experienced and skilled investment bankers is needed to best determine the appropriate terms of the securities to be issued and whether a public sale of the securities is feasible or desirable; (4) the proposed issuances require flexibility as to the amounts, maturities, call protections and other terms, to adjust to prevailing market conditions at the time of the Acquisition and to meet the financing needs of a transaction that has been and will continue to be negotiated among multiple parties in an attempt to implement an acceptable consensual plan of reorganization; and (5) the issuance of this substantial amount of new securities by New PSNH must be coordinated in the One-Step Transaction with the issuance by Northeast of additional shares of its common stock and by North Atlantic of its first mortgage bonds.

VI. REQUEST FOR RESERVATION OF JURISDICTION

In either the One- or Two-Step Transaction, Northeast has requested that the Commission approve certain transactions and reserve jurisdiction over others. 21/

In the One-Step Transaction, Northeast requests a reservation of jurisdiction over: (1) Northeast's term borrowings, issuance and sale of common stock to raise additional capital and interim bank borrowings, if any; (2) North Atlantic's issuance of first mortgage bonds, interim bank borrowings, if any, and short-term borrowings; (3) the Capital Funds Agreement between Northeast and North Atlantic; and (4) New PSNH's issuances and sales of first mortgage bonds, pollution control revenue bonds, preferred stock, term borrowings, and short-term borrowings.

In the Two-Step Transaction, the Applicant requests a reservation of jurisdiction over: (1) Northeast's term borrowings, issuance and sale of common stock, and interim bank borrowings, if any; (2) North Atlantic's issuance and sale of first mortgage bonds, interim bank borrowings, if any, and short-

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21/ The record is not yet complete as to the exact nature of certain securities that may be issued and borrowings that may be effected to consummate the Plan, and the terms thereof, which Northeast states will be determined nearer to the Acquisition date and will be reflected in one or more additional amendments to its Application or by a separate application. Consequently, Northeast requests authorization for those transactions over which the record is complete and that the Commission reserve jurisdiction over all other transactions, pending completion of the record.

term borrowings; and (3) the Capital Funds Agreement between Northeast and North Atlantic.

VII. DISCUSSION

In light of the facts, the representations contained in the Application, our analysis of the proposed transactions contained herein, and our conclusions below with regard to the applicable standards of the Act, the Commission believes that, except as to those matters over which jurisdiction is reserved, the proposed transactions should be authorized. The Commission will condition its order on a reservation of jurisdiction, consented to by the Applicant, over certain other transactions, pending completion of the record. These transactions will be examined under the applicable standards of the Act by the Division of Investment Management by delegated authority.

A. Issuance and Sale of Securities

The Applicant requests authorization for the issuances and sales of all securities over which jurisdiction is not reserved, including: (1) in The One-Step Transaction, (a) 1,000 shares of New PSNH's common stock, $1 par value per share, to Northeast for approximately $318 million in cash; and (b) $205 million in Notes issued by North Atlantic to PSNH's equity security holders; (2) in the Two-Step Transaction, all of NUAC's common stock, consisting of 1,000 authorized shares of common stock, $1 par value per share, to Northeast for approximately $318 million in cash; and (3) in either the One-Step- or Two-Step Transaction,

(a) up to approximately 8,413,000 of Northeast Warrants to PSNH's preferred and common stockholders; (b) upon exercise of the Northeast Warrants, the issuance by Northeast of 8,413,000 shares of common stock; and (c) all of North Atlantic's common stock, consisting of 1,000 shares of common stock, $1 par value per share, to Northeast for approximately $140 million in cash.

The issuance and sale of securities by a registered holding company or a subsidiary thereof are governed by sections 6 and 7 of the Act and rules 43, 40/ 50 and 50(a)(5). 41/ Section 6(a)

40/ North Atlantic's, NUAC's and New PSNH's issuance and sale of common stock to Northeast and Northeast's transfer of Northeast Warrants to NUAC are also governed by rule 43. Rule 43 provides, in relevant part, that: "(a) [n]o registered holding company or subsidiary thereof shall, directly or indirectly, sell to any company in the same holding company system . . . any securities . . . except pursuant to a declaration . . . and . . . order of the Commission . . . ."

41/ Unless otherwise excepted, the competitive bidding requirements of rule 50(b) and (c) apply "to every declaration and application regarding the issuance or sale of any securities of, or owned by, any registered holding company or subsidiary company thereof . . . ." Under rule 50(b), an applicant is required to publicly invite sealed, written proposals for the purchase or underwriting of securities and to comply with the provisions of rule 50(c). Rule 50(c) requires the submission of two independent proposals for the purchase or underwriting of securities. Together, rule 50(b) and (c) address the conditions required for the maintenance of competitive bidding.

North Atlantic's, NUAC's and New PSNH's issuance and sale of common stock to Northeast and Northeast's issuance of Northeast Warrants to NUAC are excepted from the competitive bidding requirements of rule 50 under subsection (a)(3) thereunder where they have "been approved by the Commission pursuant to section 10 of the Act."

Northeast's issuance of the Northeast Warrants to PSNH equity shareholders and, upon exercise of the Warrants, Northeast's (continued...)

prohibits the issue or sale of a security by a registered holding company or its subsidiary company unless the Commission authorizes the sale under section 7 of the Act.

The Commission must first determine that the requirements of sections 7(c) and (g) are satisfied. 42/ Under section 7(c) of

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41/(...continued)
issuance of common stock and North Atlantic's issuance of Notes are subject to the competitive bidding requirements of rule 50 under the Act. The Applicant has requested that these issuances be excepted from rule 50's requirements under subsection (a)(5) thereunder. Subsection (a)(5) excepts from the competitive bidding requirements of rule 50 the issuance and sale of securities where the Commission finds, in relevant part, that compliance with rule 50(b) and 50(c) is not:

> appropriate to aid the Commission (in carrying out the provisions of section 7 of the Act) to determine whether the fees, commissions or other remuneration to be paid directly or indirectly in connection with the issue, sale or distribution of such securities are reasonable, or whether any term or condition of such issue or sale is detrimental to the public interest or the interest of investors or consumers . . . .

42/ Section 7(g) provides:

> If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 6, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected.

Northeast states that no state commission has jurisdiction over the issuance of Northeast Warrants or, upon exercise of the Warrants, the issuance of Northeast common stock, and over NUAC's issuance of common stock. Northeast states that only the (continued...)

12/(...continued)
NHPUC has jurisdiction over North Atlantic's issuance of common stock and a request for authorization has not yet been filed with the NHPUC. Northeast further states that only the NHPUC may have jurisdiction over North Atlantic's issuance of $205 million of Notes with the determination of jurisdiction by the NHPUC not resolved. The Conn-PUC has waived jurisdiction over the proposed issuance of securities and has approved all other transactions subject to its jurisdiction, with the exception of New PSNH's issuance of common stock to Northeast in the One-Step Transaction. Request for authorization for New PSNH's issuance of common stock has not yet been filed with the Conn-PUC.

On April 12, 1990, NUSCO and PSNH filed separate requests with the Vermont-PSB and the Maine-PUC for declaratory rulings confirming that: (1) any exercise of their respective jurisdiction over the Plan is preempted by the Bankruptcy Code; and (2) they lack subject matter jurisdiction over all security issuances in Step A of the Two-Step Transaction and, with regard to all other transactions contemplated in Step A, that they either lack jurisdiction or approve them. NUSCO and PSNH also filed a complaint with the Bankruptcy Court requesting a temporary restraining order restraining the Vermont-PSB from commencing or continuing any action to regulate or exercise jurisdiction over the Plan and a declaratory judgment determining that the Vermont-PSB has no jurisdiction over the Plan. The Bankruptcy Court has yet to issue its order in this matter.

On June 18, 1990, the Maine-PUC issued its order exempting from approval all aspects of Step A of the Two-Step Transaction, and has deferred any action on the issue of jurisdiction over other aspects of the Acquisition. On July 20, 1990, the Vermont-PSB issued its order approving the issuances of securities and other transactions subject to its jurisdiction at Step A of the Two-Step Transaction, and deferred ruling on its jurisdiction in Step B.

Northeast states that no other state commissions have jurisdiction over the proposed transactions.

We note that the proposed issuances of these securities are subject to the terms and conditions prescribed in rule 24, including the conditions set forth in rule 24(c)(2). Rule 24(c)(2) provides that:

> [I]f the transaction is proposed to be carried out in whole or in part pursuant to the express authorization of any State commission, such

(continued...)

the Act, the Commission shall not authorize a proposed financing unless it makes at least one of several alternative findings, including, that: "such security is to be issued and sold solely (A) . . . for the purpose of effecting a merger, consolidation, or other reorganization . . . ."

With respect to the issuances and sales of securities for which authorization is now sought, section 7(c)(2)(A) is satisfied. The issuances and sales of the North Atlantic, NUAC and New PSNH common stock, the issuance of North Atlantic Notes, the issuance of the Northeast Warrants and, upon the exercise of those warrants, the issuance of Northeast common stock, are each an integral part of the reorganization of PSNH under the Plan confirmed by the Bankruptcy Court. The issuance of the Northeast Warrants and of the Northeast common stock thereunder are required by the Merger Agreement.

Once the requirements of sections 7(c) and 7(g) are satisfied, the proposed issuances and sales of securities shall

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42/ (...continued)
transaction shall be carried out in accordance with such authorization, and if the same be modified, revoked or otherwise terminated, the effectiveness of the declaration or order granting the application shall be, without further order or the taking of any action by the Commission, revoked and terminated.

Therefore, the effect of a state commission having jurisdiction over the proposed transactions denying authorization, or modifying, revoking or otherwise terminating its authorization with respect to any transaction authorized by the Commission's order would be to automatically revoke and terminate the effectiveness of this order.

be authorized unless the Commission makes adverse findings under section 7(d). 43/

With respect to the requirements of section 7(d)(1), we note that the proposed issuances and sales of securities are consistent with Commission precedent. 44/ Common stock is the cornerstone of a company's capital structure. Further, the Commission has approved the issuance of warrants by public

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43/ Section 7(d) prohibits approval of the issuance and sale of a security where:

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding company system;

(2) the security is not reasonably adapted to the earning power of the declarant;

(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

(5) . . . ; or

(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

44/ See National Fuel Gas Co., 44 S.E.C. 115 (1969) (authorizing the issuance of common stock by a utility holding company to effect a merger); Central Maine Power Co., 12 S.E.C. 371 (1942) (authorizing the issuance of various securities to effect merger of two public utility holding company subsidiaries).

utility holding company systems on several occasions where, as in the Northeast-PSNH negotiations, the warrants were offered as an added incentive for the shareholders to agree to the terms of the proposed transaction. 45/ In the instant case, the Northeast Warrants are required by the Plan and the Merger Agreement, will be outstanding for only five years, will have exercise prices approximately 20% above current market prices and are comparable to the subscription rights utilities commonly issue. The Commission has also approved the issuance of notes where, as here, they are issued in connection with the acquisition of utility assets. 46/

While under section 7(d)(1) the Commission generally requires a common equity to total capitalization ratio of not less than 30%, 47/ we have approved acquisitions resulting in equity ratios of less than 30% where projected future infusions of capital through the sale of common stock would increase common

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45/ See, e.g., Rochester Gas and Elec. Corp., 29 S.E.C. 858 (1949) (authorizing holding company to issue warrants giving holders right to purchase common stock of subsidiary); United Light and Ry. Co., Holding Co. Act Release No. 8831 (Feb. 8, 1949) (authorizing holding company to issue warrants giving right to purchase common stock of subsidiary).

46/ See, e.g., Entergy Corp., Holding Co. Act Release No. 25136 (Aug. 27, 1990) (proceeds from issuance of notes to parent used to acquire utility assets from associate company).

47/ See, e.g., Columbia Gas Sys., Inc., Holding Co. Act Release No. 23971 (Dec. 30, 1985), aff'd sub nom. Garaham v. SEC, 804 F.2d 1248 (3d Cir. 1986); Georgia Power Co., 45 S.E.C. 610, 615 (1974), citing Eastern Utils. Assocs., 34 S.E.C. 390, 444-45 (1952) and Kentucky Power Co., 41 S.E.C. 39, 39 (1961).

equity to above 30%. 48/ With respect to this Application, we believe that there are compelling circumstances to warrant our approval of a consolidated equity capitalization below the traditionally acceptable 30% level.

Northeast projects that, before it begins selling common stock to repay its proposed borrowings, its consolidated common stock equity to consolidated capitalization ratio would be approximately 28% at the time the Acquisition is consummated and would rise to 33% within two years. 49/ We note that a state agency -- the NHPUC in its July 20, 1990 order -- has considered under the Rate Agreement the necessary financings to consummate the Acquisition and their effect on PSNH's capital structure. 50/

48/ See, e.g., Eastern Utils. Assocs., Holding Co. Act Release No. 24879 (May 5, 1989) (authorizing equity capitalization level of 28.9%).

49/ The pro forma consolidated capital structure of Northeast and PSNH as of June 30, 1990, and projected as of July, 1992, reflecting the Acquisition is as follows:

($Millions)

	Acquisition Pro Forma		Projections as of July, 1992
Common Stock Equity	$1,994.2	27.6%	33.0%
Preferred Stock	697.1	9.6	9.0
Long-Term Debt	4,349.5	60.2	58.0
Short-Term Debt	190.0	2.6	--
	$7,230.8	100.0%	100.0%

50/ The NHPUC order states that all financing proposals of PSNH and North Atlantic have been considered within the Rate Agreement decision, although specific approval to issue North Atlantic common stock to Northeast has not been sought.

Furthermore, the Commission is mindful of the unprecedented nature of the bankruptcy proceedings involving PSNH and the need to successfully reorganize PSNH in the most efficient and economical manner possible. Therefore, in light of the particular circumstances surrounding the proposed acquisition as well as the projected rapid increase within two years of Northeast's equity to total capitalization ratio, we consider Northeast's projected common equity to total capitalization ratio to be appropriate. The Commission does not find that issuances and sales of the North Atlantic, NUAC and New PSNH common stock, the issuance of Notes by North Atlantic and the issuance of the Northeast Warrants and Northeast common stock thereunder are not reasonably adapted to the security structure of Northeast and its consolidated system. Section 7(d)(1) is satisfied.

The Commission also finds that no adverse findings are required under section 7(d)(2) regarding whether the security is reasonably adapted to the earning power of the declarant. The securities being issued and sold include the initial shares of common stock necessary to form the special purpose corporations that will enable the Acquisition to be consummated; these securities would have no current effect on the earnings power of the Applicant. None of the equity securities involved in these issuances has any special dividend provisions. Additionally, the Notes are reasonably adapted to North Atlantic's earning power because it anticipates having sufficient funds to meet its

obligations under the Notes as a result of the power contract between it and New PSNH.

As stated above, Northeast is seeking to pay dividends on its common stock in reliance on its unrestricted consolidated retained earnings. This method of determining dividends should facilitate Northeast's ability to issue and sell additional shares of its common stock needed to fund its equity investment in PSNH, without causing its current subsidiaries to pay up dividends greater than otherwise necessary. To assure the earning capacity of the PSNH assets being added to the Northeast system, the Rate Agreement commits the ratepayers of PSNH to an additional six annual 5.5% rate increases and recovery of certain costs and expenses. When coupled with the existing financial health of the Northeast system, the Rate Agreement should provide sufficient economies for the combined Northeast-PSNH system to meet both the obligations arising from the Acquisition and the general conduct of its electric utility business. Thus, the Commission does not find that any of such proposed issuances and sales of securities are not reasonably adapted to the earning power of the declarant. Section 7(d)(2) is satisfied. .

With regard to section 7(d)(3), the Commission does not find that the proposed issuances and sales of common stock, Notes and warrants is not necessary or appropriate to the economical and efficient operation of Northeast. Each proposed security issuance is an integral part of the Plan and, as discussed herein, is calculated to be those best suited to attract

investors and raise the capital necessary to fund the Plan as economically and efficiently as possible. Section 7(d)(3) is satisfied.

Under section 7(d)(4), the Commission must examine the reasonableness of the fees and commissions or other remuneration in connection with the proposed issuances and sales of securities. The fees, commissions or other remuneration to be paid with respect to these issuances are estimated at $855,000. They constitute normal costs of issuance, including counsel fees, and represent a minor part of the overall cost of the reorganization and the Acquisition. Section 7(d)(4) is satisfied.

Concerning section 7(d)(6), the Commission does not find that the terms and conditions of the proposed issuances and sales of these securities by North Atlantic, NUAC, New PSNH and Northeast are detrimental to the public interest or the interest of investors or consumers. The proposed security issuances and sales are, as discussed _supra_, an integral part of the Acquisition, which we find to be in the public interest and in the interest of investors and consumers. Section 7(d)(6) is satisfied.

The Commission finds that it is not necessary to impose any additional terms and conditions on the securities transactions under section 7(f) of the Act.

With regard to Applicant's request for an exception from competitive bidding with respect to the issuances and sales of

the proposed securities, the Commission finds that, for the reasons stated above, it is neither appropriate nor necessary to comply with the competitive bidding requirements of rule 50(b) and (c), and such issuances and sales are hereby exempted under rule 50(a)(5).

B. Acquisitions of Securities and Utility Assets

Section 9(a) of the Act, in relevant part, makes it unlawful for any registered holding company or its subsidiaries to acquire any securities or utility assets unless the Commission approves the transaction under section 10. 51/

51/ Section 10 requires that an application be filed for approval under section 9(a) of the acquisition of securities or utility assets or of any other interest in any business. If the Commission is satisfied under subsection 10(f) that relevant State laws have been complied with, it is required to approve a proposed acquisition under subsection 10(b), unless the Commission makes certain findings, including, in relevant part, that:

> (1) such acquisition will tend towards interlocking relations or the concentration or control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;
>
> (2) in case of acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration . . . paid . . . is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the . . . utility assets underlying the securities to be acquired; or
>
> (3) such acquisition will unduly complicate the capital structure of the holding company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the

(continued...)

1. Section 10(b)(1)

Section 10(b)(1) of the Act requires the Commission to approve a proposed acquisition unless the Commission finds that it "will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers."

As with any addition of a new subsidiary to a holding company system, the Acquisition will result in certain interlocking relationships between PSNH and other Northeast subsidiaries. 52/ These interlocking relationships are necessary

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51/(...continued)
proper functioning of such holding-company system.

Notwithstanding the provisions of subsection 10(b), subsection 10(c), in relevant part, prohibits Commission approval of:

> (1) an acquisition of securities or utility assets . . . which . . . is detrimental to the carrying out of the provisions of section 11; or
>
> (2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commission finds that such acquisition will serve the public interest by tending towards the economical and the efficient development of an integrated public-utility system.

52/ See American Natural Gas Co., Holding Co. Act Release No. 13991 (Sept. 30, 1958) (common directors among companies in a registered holding company system is permissible; an integrated public-utility holding company system presupposes, in the interest of efficiencies and economies, the existence of interlocking officers and directors).

to integrate New PSNH into the Northeast system and will be in the public interest and in the interest of investors and consumers.

New PSNH and North Atlantic each will be a first-tier subsidiary directly owned by Northeast and will be subject to New Hampshire law and to NHPUC regulation. New PSNH's nine member board of directors will consist of five senior officers of Northeast (two of which will also be PSNH's Chairman and new President and Chief Operating Officer) and four New Hampshire residents not employed by New PSNH or Northeast. In contrast, the boards of directors of Northeast's other operating companies consist solely of Northeast's senior management. North Atlantic, whose activities are limited to holding PSNH's Seabrook assets, will also have a board of directors comprised solely of Northeast employees. Furthermore, the relationship between New PSNH and North Atlantic and the other Northeast subsidiaries will be similar to the present relationships among Northeast's existing subsidiaries.

The public interest is served by bringing a prompt end to the PSNH bankruptcy and by providing PSNH with the management, capacity and financial resources to make it viable again. The Commission does not find that the Acquisition will result in interlocking relations "of a kind or to an extent detrimental to the public interest or the interest of investors or consumers."

Section 10(b)(1) prohibits utility acquisitions that result in an undue concentration of economic power. Section 10(b)(1)

allows the Commission to "exercise its best judgment as to the maximum size of a holding company in a particular area, considering the state of the art and the area or region effected." 53/ The Commission reaches its determination of whether to prohibit the enlargement of a system on the basis of all the circumstances, not on the basis of size alone. 54/

The addition of PSNH to the Northeast system will not significantly change the relationship between the size of the Northeast system and the balance of the New England electric utility industry. On the basis of peak load capacity, the Northeast system and the next largest system, NEES, represent approximately 23% and 19% of New England, respectively, while the combined Northeast-PSNH system will represent approximately 29%. When measured by operating revenues, number of electric customers and KwH sales, the combined Northeast-PSNH system represents less than one-third of the largest electric utilities in New England.

53/ American Elec. Power, Inc., 46 S.E.C. 1299, 1309 (1978). In New England Elec. Sys., 45 S.E.C. 684 (1975) ("NEES Decision"), the Commission reviewed the relative sizes of three potential combining companies, and the combined companies as a whole, in terms of five different sets of data: (1) operating revenues, (2) number of electric customers, (3) kilowatt hour ("KWH") sales, (4) kilowatt capacity, and (5) electric power generated in kilowatt hours. By each measure, the combined companies in the NEES Decision would have represented about 40% of New England. The Commission, however, rejected the proposed combination because of an inadequate showing of resultant economies and efficiencies to support an allocation of that magnitude.

54/ See Sierra Pac. Resources, Holding Co. Act Release No. 24566 (Jan. 28, 1988); Centerior Energy Corp., Holding Co. Act Release No. 24073 (Apr. 29, 1986).

well below the 40% that would have resulted in the NEES Decision; when measured by total assets, the combined Northeast-PSNH system increases to 36.7%, still below the 40% level. 55/

The Acquisition will also result in a combined electric utility system that remains within the mid-size range of the eight other registered electric holding company systems and of the 31 largest investor-owned electric utilities in the United States. 56/ Among the nine registered electric holding company systems, the combined Northeast-PSNH system will be fourth in total assets, fifth in both operating revenues and electric customers and seventh in electric KwH sales. When compared to the 31 largest investor-owned electric utilities in the United States, the combined Northeast-PSNH system will be in the midsize range. Seventeen of the investor-owned electric utilities as to operating revenues, and 16 as to total assets, would be larger

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55/ The following table illustrates the size of the combined Northeast-PSNH system compared to the 16 largest electric utilities in New England, as of December 31, 1989:

	TOTAL ASSETS $ ($Millions)	%	OPER. REV. ($Millions)	%	ELEC. CUST. (000)	%	KWH (Millions)	%
NORTHEAST	6,523	26.7	2,206	24.7	1,244	23.3	24,893	23.7
PSNH	2,448	10.0	619	6.9	383	7.2	7,656	7.3
TOTAL	8,971	36.7	2,825	31.6	1,627	30.5	32,548	31.0
LARGEST ELECS.	24,467	100.0	8,940	100.0	5,338	100.0	105,057	100.0

56/ See Amend. No. 13 to Application, Exh. J-1 to J-8.

than the Northeast-PSNH combined system. 57/ Given the approximate size of the Northeast-PSNH system and the resultant economic benefits discussed herein, it does not appear to the Commission that the Northeast-PSNH system would exceed the economies of scale of current electric generation and transmission technology or provide undue power or control to Northeast within the New England region or within the electric utility industry.

One intervenor (MMWEC) alleges that the Acquisition will adversely effect the voting and continued viability of the New England Power Pool ("NEPOOL"), an organization comprised of virtually all of the electric utilities in New England, including PSNH and the Northeast operating companies. 58/ We note that, at the time NEPOOL was created in 1971, and the voting rules were established and agreed upon by all NEPOOL participants, the Northeast system had more than 25% of the total NEPOOL voting rights and, thus, possessed the ability to veto any action by refusing to vote in favor of that action. 59/ Northeast's

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57/ Id.

58/ Under the agreement governing NEPOOL ("NEPOOL Agreement") the region's generation and transmission facilities are planned and operated as part of a single regional New England bulk power system. NEPOOL's Management Committee is the executive body with ultimate authority over most matters in the pool. The NEPOOL Agreement was reviewed and approved by the FERC and signed by all NEPOOL participants.

59/ Under the NEPOOL Agreement, voting rights are determined on the basis of each member's peak load to the total peak load of all members. Actions of the Management Committee are effective only if 75% of the total voting rights are cast in (continued...)

acquisition of PSNH will increase Northeast's current voting percentage, which is 23%, to 29%, far short of the 75% required to take action but sufficient to veto any action. However, this situation is similar to that which existed at the creation of NEPOOL. Further, this situation presently exists through the voting rights of NEES' subsidiary companies. 60/

Section 10(b)(1) also requires the Commission to consider possible anticompetitive effects of the Acquisition. 61/ The antitrust ramifications of an acquisition must be considered in light of the fact that public utilities are regulated monopolies and that federal and state administrative agencies regulate the rates charged consumers. 62/ A notification and report form under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, with respect to the Acquisition was filed with the

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59/(...continued)
favor of an action. Thus, a single NEPOOL participant having at least a 25% interest could effectively prevent actions from being taken by refusing to vote in favor of that action. The NEPOOL Agreement further provides that at least two members having 15% of the total votes can defeat any proposed action.

60/ For the past 20 years, the NEES system has had the ability to block action by the Management Committee because four of NEES' operating subsidiaries are considered to be two participants with more than 15% of NEPOOL voting rights: (1) NEPCO, Massachusetts Electric Company and Granite State Electric Company, are considered one participant, and (2) Narragansett Electric Company is treated as a separate participant.

61/ See Municipal Elec. Assn. of Mass. v. SEC, 413 F.2d 1052 (D.C. Cir. 1969).

62/ See American Elec. Power Co., 46 S.E.C. 1299, 1313-14 (1978).

Federal Trade Commission and the U.S. Department of Justice, and the required waiting period has expired.

The Commission has approved acquisitions that decrease competition when it concludes that the acquisitions would result in benefits such as possible economies of scale, elimination of the duplication of facilities and activities, sharing of production capacity and reserves, and generally more efficient operations. 63/ Given the approximate size of the Northeast-PSNH system and the resultant economic benefits discussed herein, 64/ we conclude that the Acquisition does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied.

2. Section 10(b)(2)

Section 10(b)(2) of the Act requires that the Commission approve Northeast's acquisition of securities of PSNH unless it finds that the consideration, including all fees, commissions and other remuneration is unreasonable in light of "the sums invested in or the earning capacity of . . . the utility assets underlying the securities to be acquired."

63/ See Centerior Energy Corp., Holding Co. Act Release No. 24073 (Apr. 29, 1986) (Commission accepted forecasted savings as a basis for findings that economies and efficiencies are probable). See also American Elec. Power Co., 46 S.E.C. at 1324-25; Ohio Power Co., 44 S.E.C. 340, 343 (1970).

64/ See supra notes 82-88 and accompanying text.

The consideration to be paid by Northeast for PSNH, as provided in the Plan, was arrived at through an "auction" process in the bankruptcy proceeding in which the interests of PSNH investors and PSNH consumers were both effectively represented. 65/ Two other bidders and PSNH's own management presented alternative plans for investors and ratepayers, and the Northeast Plan ultimately prevailed only after months of negotiations. NUSCO negotiated the terms, on the one hand with representatives of the official committees of PSNH's creditors and shareholders, who were committed to receiving the highest realizable value for their investments in PSNH, and on the other hand with negotiators for the State of New Hampshire, who were committed to maintain electric rates in New Hampshire as low as reasonably possible.

In addition, the Commission has assessed the reasonableness of the consideration to be received by the various parties. In determining the fairness of the proposed transaction, the Commission considered testimony presented in conjunction with Northeast's application to the NHPUC. 66/ We also reviewed the "Projected Financial Statements of New PSNH and North Atlantic"

65/ Cf. Ohio Power Co., 44 S.E.C. 340, 346 (1970) (prices arrived at through arm's length negotiations are particularly persuasive evidence that section 10(b)(2) is satisfied); Southern Co., Holding Co. Act Release No. 24579 (Feb. 12, 1988) (assistance of independent consultants in setting consideration deemed to be evidence that the requirements of the Act are satisfied).

66/ See Amend. No. 13, Exh. D.9.3.

("Financial Statements"), which Northeast prepared and used as the basis for this testimony. 67/ These statements set forth the assumptions made in the projections. The assumptions appear reasonable in light of their basis in determining the fairness of the exchange to the investment Northeast will make to acquire New PSNH. 68/ The projected financial statements and their assumptions indicate the return on equity of Northeast's investment in New PSNH and North Atlantic. 69/ The projected return on investment for Northeast appears reasonable for an acquisition of this size and represents an appropriate risk to Northeast's investors and the public affected by this investment.

Section 10(b)(2) also requires the Commission to consider the reasonableness of the fees involved in the Acquisition. The estimated $855,000 in fees and expenses associated with the issuances and sales of securities we discussed above under section 7(d)(4), are also attributable to the proposed acquisition of those securities by Northeast and New PSNH. For

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67/ Id. The Financial Statements have been evaluated by: (1) the NHPUC; (2) the Conn-DPUC through its consultant, Booz, Allen & Hamilton, Inc. ("Booz Allen"); (3) Northeast's consultant, Morgan Stanley & Company; (4) Northeast's independent public accounting firm, Arthur Andersen & Company; and (5) three banks that may be the principal lenders to Northeast, New PSNH and North Atlantic, (a) Bankers Trust Company of New York, (b) Chemical Bank and (c) Citibank. Written reports evaluating the Financial Statements were prepared by the NHPUC and Booz Allen for the Conn-DPUC, and were part of the basis of each state commission's order authorizing the Acquisition.

68/ Id.

69/ Id.

the reasons discussed ab[illegible] . conclude that these fees and expenses are reasonable. [illegible] accordingly, no adverse findings are required under section 10(b)(2) of the Act.

3. Section 10(b)(3)

Section 10(b)(3) of the Act requires a proposed acquisition to be approved unless the Commission finds that it would "unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system."

The proposed post-Acquisition capital structure of each of the effected entities in the combined system is expected to be as follows: (1) New PSNH may have first mortgage bonds, secured and unsecured debt (using interest rate swaps, other hedging transactions or credit enhancement techniques), pollution control bonds, term borrowings (expected to mature in less than five years), preferred stock and common stock; (2) North Atlantic may have first mortgage bonds, secured and unsecured long term debt (using inte[illegible] rate swaps, other hedging transactions or credit

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76/ The record is not yet complete as to the remaining fees and expenses to be incurred in connection with the Acquisition, which Northeast projects will be approximately $45 million. The Commission will condition its order on a reservation of jurisdiction, consented to by the Applicant, over the fees and expenses incurred in connection with the proposed Acquisition, pending completion of the record. These fees and expenses will be examined under the standards of section 10(b)(2) of the Act by the Commission's Division of Investment Management by delegated authority under a reservation of jurisdiction.

enhancements techniques), the Notes and common stock; (3) Northeast may have outstanding term borrowings (expected to mature in less than five years), stock warrants (expected to be exercisable for five years at $24 per share) and common stock. Should the warrants be exercised, the underlying common stock is expected to represent approximately seven percent of the outstanding shares.

As included in the _pro forma_ consolidated capital structure of Northeast-PSNH discussed in the analysis of section 7(d)(1) above, the Acquisition will affect Northeast system's capital structure principally through the issuance of approximately $1.8 billion of new debt securities and approximately $354 million of new equity securities. The securities that would be issued are standard senior securities and other basic financings of the type the Commission frequently approves for registered holding companies. 71/ We again note that Northeast's common equity position will decrease to approximately 28% upon consolidation of the two companies but its consolidated equity position is forecasted to exceed 30% 72/ within two years of consummation of

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71/ _See, e.g._, _New Orleans Pub. Serv. Co._, Holding Co. Act Release No. 23612 (Feb. 21, 1985); _Arkansas Power & Light Co._, Holding Co. Act Release No. 23934 (Dec. 4, 1985); _Columbus and S. Ohio Elec. Co._, Holding Co. Act Release No. 24149 (July 14, 1986); _Entergy Corp._, Holding Co. Act Release No. 25136 (Aug. 27, 1990).

72/ _See supra_ notes 49 and 67. The Commission notes that the Conn-DPUC and the NHPUC have, in reviewing the proposals before them, consi-red and relied upon Northeast's forecasts.

the Acquisition. While the record is not yet complete as to the specific terms and conditions associated with these acquisitions, the Commission believes that the amount and type of securities proposed to be issued and sold to effectuate the Plan will not be detrim...al to Northeast's consolidated capital structure.

The Commission concludes that the Plan will benefit PSNH creditors, shareholders, and consumers by bringing an end to the bankruptcy, providing reasonable payments to creditors and shareholders, and providing consumers with the protection of an agreed limit on post-bankruptcy rate increases. Northeast shareholders and the customers of its operating subsidiaries will benefit from the economies and efficiencies to be achieved from the development of a stronger and more diverse utility system. Accordingly, the Commission makes no adverse findings under section 10(b)(3).

4 Section 10(c)(1)

No adverse findings are required under section 10(c)(1) of the Act, which requires, in relevant part, that the Commission not approve the proposed Acquisition if it "is detrimental to carrying out the provisions of section 11." Under section 11(b)(1), registered holding company systems must limit their operations "to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system . . . ."

Section 2(a)(29)(A) of the Act defines "integrated public utility system," as applied to electric utility companies, to mean:

> a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation.

Northeast's and PSNH's transmission lines are interconnected through a transmission line owned by Vermont Electric Power Company, Inc. ("VELCO"), an investor-owned Vermont utility company. Northeast's, PSNH's and VELCO's transmission lines constitute a part of the 345 KV Northfield-Scobie line ("Northfield-Scobie Line"), which begins as a WMECO line near Northeast's Northfield Mountain Pumped Storage Project in north-central Massachusetts, extends north to the New Hampshire border and connects with a 345 KV line owned by PSNH. The PSNH line parallels the Connecticut River in New Hampshire before it crosses the Connecticut River into Vermont and interconnects with VELCO's single right of way transmission line. The VELCO line continues for approximately one-quarter of a mile through a substation in Vernon, Vermont owned by the Vermont Yankee Nuclear Power Corporation ("Vermont Yankee") and then recrosses the

Connecticut River to the same point it departed New Hampshire. 73/

VELCO and certain other Vermont utilities have entered into a Settlement Agreement, dated July 16, 1990, with Northeast under which VELCO agrees to provide service to Northeast and PSNH over VELCO's portion of the Northfield-Scobie Line for at least ten years, with no charge for such service. 74/ On the basis of this right of use agreement, we find that the combined Northeast-PSNH system meets the integration requirements of section 11(b)(1). 75/ We find that the Northeast system does and will satisfy the standards of section 2(a)(29)(A) of the Act.

As discussed above, the Northeast and PSNH systems operate in geographically contiguous states -- Connecticut, Massachusetts and New Hampshire -- which are all located in New England

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73/ See Amend. No. 13, pp. 37-40.

74/ The VELCO Agreement grants Northeast the right to use the VELCO line for ten years, with automatic two year extensions, subject to termination upon two years notice.

There is also a transmission agreement between Northeast and NEPCO pending before FERC which, if approved, would also provide an interconnection between Northeast's and PSNH's transmission facilities through those of the NEES system.

75/ Centerior Energy Corp., Holding Co. Act Release No. 24073 (Apr. 29, 1986) (physical interconnection requirements are met where power transmission lines that the companies have the right to use connect the two service areas). See also, Electric Energy, Inc., 38 S.E.C. 658, 668-671 (1958); Cities Serv. Power & Light Co., 14 S.E.C. 28, n. 44 (1943). Nevertheless, the use of a third party cannot be relied upon to integrate two distant utilities. See section 2(a)(29)(A) ("[i]ntegrated public utility system means . . . a . . . system confined in its operations to a single area or region . . .").

Further, New PSNH and North Atlantic will be maintained as separate New Hampshire corporations subject to NHPUC jurisdiction, with four New Hampshire residents on the New PSNH board of directors. Therefore, the advantages of localized management will be preserved and the effectiveness of regulation will continue essentially unchanged. 76/ The combined Northeast-PSNH system also will remain subject to extensive regulatory oversight by the Commission, FERC and the state utility commissions overseeing each utility subsidiary.

We conclude that the Northeast-PSNH system may be operated as a single interconnected and coordinated system confined in its operations to a single region, New England, in the states of Connecticut, Massachusetts and New Hampshire, an area that is not

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76/ Holyoke, one of the 11 Massachusetts Utilities, alleges that there is no effective state regulation of Holyoke Water Power Company ("HWP"), a subsidiary of Northeast acquired in 1967.

The Commission, in its 1967 Opinion, however, found that "HWP and its subsidiary are now and will continue to be subject to regulation by the Massachusetts Department of Public Utilities and the Federal Power Commission," without making any finding as to the extent of regulation. Northeast Utils., 43 S.E.C. 462, 466 (1967). There is no requirement that the Commission, in approving an acquisition under section 10, find that a utility is subject to any particular degree of state regulation or even that there is state regulation at all. The requirement of section 10 is simply that the we find that the holding company system, after the acquisition, will not be "so large as to impair . . . effectiveness of regulation." The inclusion of an individual utility in a regulated holding company system is not barred if a state chooses not to regulate that utility. In 1967, the Commission found HWP to be within the standards of section 2(a)(29)(A), and we do not now change our view in that regard.

so large as to impair the advantages of localized management, efficient operation, and the effectiveness of regulation. In addition, the combined Northeast-PSNH system would be limited under section 11(b)(1) to "such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of" the integrated Northeast-PSNH system. Other than the operating utility companies, the combined Northeast-PSNH system will consist of the holding company, Northeast, and other subsidiary companies performing functions that are incidental and necessary and appropriate to the operation of the utility companies: (1) Northeast's (a) real estate subsidiaries, which own facilities leased and used in connection with those utilities, (b) service company subsidiary, NUSCO, which provides services primarily to the other Northeast subsidiaries 77/ and (b) other subsidiaries which engage in the development and ownership of qualifying cogeneration and small power production facilities; 78/ (2) PSNH's one active subsidiary, a real estate company that owns facilities that are leased to and used in PSNH's business; and (3) North Atlantic, one of the newly formed companies contemplated by the Plan, which will be a project finance vehicle owning an interest in the Seabrook project. Section 11(b)(1) is satisfied.

77/ See Northeast Utils. Serv. Co., Holding Co. Act Release No. 15519 (June 30, 1966).

78/ See Northeast Utils., Holding Co. Act Release No. 24893 (May 17, 1989)

With regard to section 11(b)(2), 79/ as we discussed under section 10(b)(3) above, the Commission does not find that the proposed acquisition and related financings will unduly complicate the capital structure of the holding company system. The addition of New PSNH, NUAC and North Atlantic to the Northeast System is appropriate and necessary to accomplish the Acquisition. Placing PSNH's ownership interest in Seabrook in a separate corporation should provide more effective managerial control and regulation. Additionally, voting power will be equitably and fairly distributed among the security holders of Northeast and its subsidiaries because all of the current and proposed subsidiaries of Northeast will be wholly owned, except for the four existing Yankee nuclear generating companies. 80/ Further, all outstanding preferred stock of Northeast's subsidiaries following the Acquisition will contain the voting provisions required by the Commission's standards.

79/ Section 11(b)(2) of the Act provides, in relevant part, that the Commission require each registered holding company system take the necessary steps to ensure that:

> the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding company system.

80/ Maine Yankee Atomic Power Co., 43 S.E.C. 764 (1968); Vermont Yankee Nuclear Power Corp., 43 S.E.C. 693 (1968); Connecticut Yankee Atomic Power Co., 41 S.E.C. 705 (1963); Yankee Atomic Elec. Co., 36 S.E.C. 552 (1955).

2. Section 10(c)(2)

No adverse findings are required under section 10(c)(2) of the Act with regard to the economic and efficient operation of the Northeast-PSNH integrated public-utility system. 81/ Northeast forecasts total savings to Northeast-PSNH resulting from the Acquisition to be approximately $837 million through the year 2002. 82/ This amount represents a substantial percentage of the $2.317 billion Northeast is to pay for PSNH, and is in excess of the well estimated $45 million cost to consummate the Acquisition. 83/ These savings fall into six categories and are identified as the Seabrook O&M Expense Synergy 84/, the Fossil

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81/ The economies and efficiencies must be derived "by virtue of the affiliation." Wisconsin's Envtl. Decade, Inc. v. SEC, 882 F.2d 523, 528 (D.C. Cir. 1989) citing Union Elec. Co., 45 S.E.C. 489, 494 (1974). Specific dollar forecasts of future savings are not necessarily required; a demonstrated potential for economies will suffice even when these are not precisely quantifiable. See American Elec. Power Co., 46 S.E.C. 1299 (1978); Centerior Energy Corp., Holding Co. Act Release No. 24073 (Apr. 29, 1986).

82/ See Amend. No. 13, Exh. D.5.8-10, D.9.1 and D.9.5. These savings have been evaluated by the NHPUC, the Conn-DPUC, through its consultant, Booz Allen, and by Northeast's consultant, Cresap, a division of Towers, Perrin, Forster & Crosby, Inc., a management consultant hired by Northeast to evaluate Seabrook savings.

83/ See Amend. No. 13, Para. 62A, pp. 77-78 (November 19, 1990); Centerior Energy Corp., Holding Co. Act Release No. 24073 (Apr. 29, 1986).

84/ With the acquisition of PSNH, the Northeast-PSNH system will become the lead owner of Seabrook. Northeast expects that its multi-unit nuclear operation experience and expertise will benefit Seabrook operations and permit cost reductions of PSNH's power generation costs by approximately $188 million on a cumulative net present value basis.

(continued...)

Steam Unit Availability Synergy 85/, the Energy Expense Synergy 86/.

84/(...continued)
The reduced operation and maintenance expenses for Unit No. 1 will also benefit CL&P and other New England utilities with ownership shares in Seabrook. The savings to CL&P and other Joint Owners are projected to be more than $21 million and $318 million, respectively, a portion of which will also benefit other New England utilities which purchase Seabrook power through power purchase agreements with NHWEC or other Joint Owners.

85/ In addition, the operation of the generating [illegible]nd transmission facilities of PSNH and the North[illegible]ast operating companies is coordinated and centrally dispatched under the NEPOOL Agreement. Under the NEPOOL Agreement, any improvement of the performance of PSNH's fossil steam generating units would result in a reduction in the amount of generating capacity New PSNH and New England must support. The total capacity reduction for the combined Northeast-PSNH system from improved generating unit availabilities is expected to grow to approximately 70 megawatts, for a total savings to the combined Northeast PSNH system of $73 million on a cumulative net present value basis. Energy expense reductions associated with the fossil steam capacity reductions is expected to approximate $28 million for the Northeast-PSNH system.

86/ Northeast and NUSCO state that the existing combined capacity of the Northeast and PSNH systems will be used to satisfy the load more effectively and will lower energy expenses for the combined Northeast-PSNH system resulting in an anticipated savings of approximately $218 million on a cumulative net present value basis, which, however, will be offset by an increase in capacity requirements and energy costs to the remaining NEPOOL participants. Northeast and NUSCO expect that, for the Joint Owners of Seabrook and certain other utilities with indirect interests in Seabrook, these cost increases will be reduced by the savings brought about by Northeast's more efficient operation and maintenance of Seabrook. See supra note 84.

the Peak Load Diversity Synergy 87/, the A&G Expense Synergy and the Coal Purchasing Synergy. 88/

The Commission notes that, in cases involving electric utility acquisitions, significant savings can be achieved from better utilization of generation capability and the consolidation of utility operations, fossil fuel pricing, personnel, service company services and management information systems. 89/ Given the structural similarities between these two companies and other electric utility companies, the record before us, including the Applicant's projected savings, and our experience with previous acquisitions, we conclude that it is probable that the projected savings would result from the proposed Acquisition.

87/ While the Northeast system has historically experienced significant peak loads in the summer and winter months, the PSNH system has its highest peak loads during the winter. The peak loads of the combined Northeast-PSNH system are expected to be lower than the sum of the annual peak loads of the two separate systems. Consequently, the combined Northeast-PSNH system will be required to provide less capacity to meet its obligations under the NEPOOL Agreement. This capacity reduction is expected to be approximately 100 megawatts, or a projected savings of approximately $146 million on a cumulative net present value basis.

88/ The savings resulting from the combined A&G Expense Synergy and the Coal Purchasing Synergy is expected to be approximately $163 million on a cumulative net present value basis, consisting of approximately $124 million in purchasing, administrative and general expenses and approximately $39 million of coal purchasing reductions.

89/ See American Elec. Power Co., 46 S.E.C. 1299 (1978); Electric Energy, Inc., Holding Co. Act Release No. 13871 (Nov. 28, 1958).

6. Section 10(f)

Section 10(f) of the Act, in relevant part, prohibits Commission approval of an acquisition under section 10 unless it appears to the Commission's satisfaction that applicable state laws have been observed. The appropriate state regulatory commissions have yet to approve all aspects of the Acquisition and related transactions, and an issue exists as to whether their approval is needed in light of the bankruptcy proceedings. 20/ Pursuant to rule 24(c)(2), when an issue under state law is raised, we may approve the transaction under section 10, subject to compliance with state law. 21/ The Commission's order will be issued authorizing the proposed Acquisition subject to the terms and conditions prescribed in rule 24 under the Act, specifically those under rule 24(c)(2).

C. Intrasystem Transactions

1. Assumption of Notes

The assumption by North Atlantic of the Notes 22/ on the transfer to it by New PSNH of its interest in Seabrook are

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20/ See supra note 42.

21/ Central and S.W. Corp., Holding Co. Act Release No. 22635 (Sept. 16, 1982).

22/ The Notes would be issued initially by Stand-Alone PSNH at Step A of the Two-Step Transaction and assumed by North Atlantic in Step B, and issued by North Atlantic in the One-Step Transaction.

subject to section 12(b) of the Act 23/ and rule 45. 24/ The assumption will constitute part of North Atlantic's payment for the Seabrook interest and, as an integral part of the Acquisition, is necessary and appropriate. Section 12(b) of the Act is satisfied.

2. **Northeast's Payment of Dividends**

Northeast's proposed payment, for up to five years, of dividends on its common stock in reliance on its consolidated

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23/ Section 12(b) of the Act makes it unlawful for any registered holding company or subsidiary thereof:

> to lend or in any manner extend its credit to . . . any company in the same holding-company system in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

24/ Rule 45 provides, in relevant part, that no registered holding company or subsidiary company "shall . . . lend or in any manner extend its credit to nor indemnify . . . any company in the same holding company system, except pursuant to a declaration . . . and . . . order of the Commission . . . ."

unrestricted retained earnings is subject to section 12(c) 25/ of the Act and rule 26(c) 26/ thereunder.

25/ Section 12(c), in relevant part, makes it unlawful for any registered holding company or its subsidiary companies:

> to declare or pay any dividend on any security of such company . . . in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public-utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

26/ Rule 26(c) requires, in relevant part, that:

> (c) Every registered holding company and every subsidiary company thereof shall hereafter follow the equity method of accounting for investments in any subsidiary company.
>
> . . . .
>
> (2) Every company subject to this rule shall maintain a subaccount to its retained earnings account which shall be periodically debited or credited with its proportionate share of undistributed retained earnings of subsidiary companies.
>
> (3) No company subject to this rule shall declare or pay any dividends . . . from or on the basis of any balances recorded in the subaccount referred to in paragraph (2) above, except pursuant to a declaration under Section 12(c) of the Act.

We note that Northeast will be subject to the limitations of rule 26(c)(3) of the Act at the end of the five-year period. However, at any time after three years from the date of the Acquisition, the Commission may require the Applicant to (continued...)

Northeast's payment of dividends in reliance on its consolidated unrestricted retained earnings for up to five years after the Acquisition would enable it to continue paying the level of dividends approved by its Board. 97/ This technique should enable Northeast to issue additional common stock when needed to fund its equity investments in PSNH without causing its other subsidiaries to pay up dividends greater than would otherwise be necessary. 98/ Section 12(c) and rule 26(c) are satisfied.

3. Transfer of Seabrook

New PSNH's transfer of Seabrook to North Atlantic is subject to section 12(d) of the Act 99/ and rule 43. 100/

96/(...continued)
justify the continuation of the exception to rule 26(c)(3) and may exercise its authority to revoke, modify or extend such continuation on a prospective basis.

97/ *See supra* note 37 and accompanying text. As noted above, New PSNH and North Atlantic may not begin paying dividends to Northeast for up to five years.

98/ Northeast states that, if its other operating subsidiaries distributed higher dividends to Northeast than they would have in the absence of the Acquisition, the common equity portion of their capitalizations would be reduced. As a result, the higher distribution could be characterized by regulators, security analysts and rating agencies as a subsidy of the Acquisition.

99/ Section 12(d) of the Act makes it unlawful for any registered holding company:

> to sell any . . . utility assets, in contravention of such rules and regulations or orders regarding the consideration to be received for such sale, [and] maintenance of competitive conditions . . . as the Commission deems necessary or appropriate in

(continued...)

We have discussed under section 10(b)(2), *supra*, the consideration to be paid in connection with the Acquisition, including the $700 million to be paid for PSNH's Seabrook assets. 101/ The $700 million to be paid for the Seabrook assets is the value established by the Plan and the Rate Agreement approved by the NHPUC and is appropriate. 102/ Further, this transfer to North Atlantic will merely move the asset from one Northeast subsidiary to another and should have no impact on competitive conditions. Section 12(d) and rule 43 are satisfied.

99/(...continued)
the public interest or for the protection of investors or consumers . . . ."

100/ Rule 43 provides, in relevant part, that no registered holding company or subsidiary "shall, directly or indirectly, sell to any company in the same holding company system or to any affiliate . . . any securities or utility assets or any interest in any business, except pursuant to a declaration . . . and . . . order of the Commission . . . ."

101/ In either the One-Step- or Two-Step Transaction, North Atlantic will pay PSNH approximately $495 million in cash. In addition, in the One-Step Transaction North Atlantic will issue $205 million of Notes for distribution in accordance with the Plan, which Notes it will assume in the Two-Step Transaction.

102/ As noted above, as of December 31, 1989, PSNH valued Seabrook at $1.790 billion. The Plan values these assets at $700 million, which would result in a write-down of the value of the Seabrook assets. However, a "premium" of approximately $787 million has been assigned under the Plan to the non-Seabrook assets of PSNH.

III. REQUESTS FOR HEARING

The most significant issues raised and arguments made by the intervenors may be summarized as follows: (1) concentration of control questions under section 10(b)(1); (2) the new economies and efficiencies requirement under section 10(c)(2); (3) capital structure/cost of capital concerns under sections 10(b)(3) and 11(b)(2); and (4) the single integrated system standard of section 11(b)(1).

Twenty-two entities 103/ opposed the proposed Acquisition on the basis of section 10(b)(1). These entities argue that Northeast and PSNH are the only utilities with excess generating capacity available in the New England region. They also assert that the proposed Acquisition will give Northeast "monopoly" control over transmission corridors into and out of the New England region, contrary to the pro-competitive federal antitrust policies. 104/ Another petitioner, NEES, filed comments stating

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103/ Requests for a hearing on the basis of section 10(b)(1) were made by: APPA, NPSCA, EAF, Mass-DPU, MMWEC, Vermont-DPS and Vermont-PSB and the 11 Massachusetts Utilities. Notices of Appearance on the basis of section 10(b)(1) were filed by: Maine-PUC, Mass-AG, Rhode Island-AG and Rhode Island DPUC.

104/ With regard to these concerns, Northeast argues that the basic facts about its share of the New England transmission and surplus generation capacity are undisputed and that, in the absence of any material dispute about these facts, there is no need to develop them further in a hearing. It asserts, therefore, that the dispute before the Commission is not one concerning significant issues of material fact, but rather of the conclusions to be drawn from the facts. Furthermore, Northeast states that, because of the transmission commitments entered into in connection with the proposed acquisition which will cause Northeast to give (continued...)

that it would oppose the Acquisition on section 10(b) grounds if FERC fails to approve the transmission agreement reached between Northeast and NEPCO.

To the extent a proposed acquisition will result in concentration of control detrimental to the public interest or the interest of investors or consumers, the Commission has jurisdiction under section 10(b)(1) of the Act to consider allocation of excess generating capacity, transmission access or the flow of electricity over transmission lines of any holding company system. 105/ To the extent that these matters are specifically regulated, they are properly within the jurisdiction of FERC and the appropriate state commissions.

We have considered the size and other characteristics of the Northeast-PSNH system after the proposed Acquisition and the resultant economic benefits, discussed supra. We have found, inter alia, that the Northeast-PSNH combined system would not be disproportionate in size to the other utilities in NEPOOL, or other New England utilities, and that economic benefits will or

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104/(...continued)
up a substantial measure of its control of transmission facilities, the acquisition will increase the availability of Northeast's and PSNH's transmission facilities to other New England utilities and, in the process, accomplish a level of access to transmission that could not and would not have occurred without the proposed acquisition.

105/ See City of Lafayette, Louisiana v. SEC, 454 F.2d 941, 955 (D.C. Cir. 1971) aff'd 411 U.S. 747 (1973); Municipal Elec. Assn. of Mass., 413 F.2d at 1058-59.

are likely to result from the proposed Acquisition. 106/ As a result, we do not find that an increase in control over transmission corridors or control over excess generating capacity, on balance, require disapproval under section 10(b)(1) or the imposition of conditions under section 10(e) of the Act. 107/ Accordingly, we do not find that the Acquisition tends towards the concentration of control of public utility companies of a kind or to an extent detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1).

Eighteen parties 108/ opposed the proposed Acquisition on the grounds that it did not meet the requisite "new economies and efficiencies" standards of section 10(c)(2). Twelve of these parties (the 11 Massachusetts Utilities and NH-OCA) argue that the potential for new economies and efficiencies should be carefully examined in a hearing, but they fail to sufficiently allege disputed issues of fact or law. The Mass-DPU, however, disputes the projected economies and efficiencies expected from the Acquisition, classifying such projections as "either

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106/ *See supra* notes 81-89 and accompanying text.

107/ *See Municipal Elec. Assn. of Mass.*, 413 F.2d at 1060-61.

108/ Requests for hearing raising issues under section 10(c)(2) were filed by the APPA, NRECA, Conn-OCC, EAF, Mass-DPU, MMWEC, 11 Massachusetts Utilities and New Hampshire-OCA.

speculative, nonexistent, or overstated." 109/ Several intervenors 110/ argue that the alleged economies and efficiencies do not serve the public interest because they arise at the expense of other utilities and their customers. In addition, they charge that these proposed benefits are obtainable without the Acquisition or already exist due to the joint planning and operations currently taking place under NEPOOL and are thus not economies and efficiencies arising "by virtue of the affiliation," adding that the Acquisition merely allows Northeast to reallocate these benefits to itself, and that various agreements between the merging companies tend to allocate economies away from Northeast affiliates and towards PSNH to the detriment of the customers of the Northeast affiliates.

The Commission has examined the economies and efficiencies associated with the proposed Acquisition. Among these synergies, several will be new and could not result except from the Acquisition. The combined system will benefit, for example, from: (1) Northeast's multi-unit nuclear operation experience

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109/ With respect to the petitioners' challenge regarding the existence and sufficiency of new economies and efficiencies, Northeast again argues that there is no factual dispute as to several of the synergies it forecasts, and that as to others, the challenges are largely unsupported by any offer of proof that would require a hearing. Additionally, Northeast argues that none of the comments on the remaining types of savings predicted in its application, suggest that the savings do not exist or offer proof that the amount alleged should be different.

110/ APPA, NRECA, Conn-OCC, EAP and MMWEC.

and expertise; (2) the combined capacity of the Northeast summer peaking system with PSNH's winter peaking system; (3) certain administrative and general services of Northeast's service company subsidiary, NUSCO; and (4) coal purchasing efficiencies which do not presently exist within the PSNH system. Northeast has attributed $497 million of their stated $837 million of total savings resulting from the Acquisition to these synergies. These savings are not unsubstantiated. Northeast has demonstrated a potential that these savings will occur. Such a showing is sufficient for purposes of section 10(c)(2) of the Act. 111/

Intervenors assert that certain synergies should not be considered because they result from a reallocation of savings at the expense of third parties. While certain reallocations affecting third parties may occur as a result of the Acquisition, the Commission has nevertheless concluded that, in light of the benefits of the resulting efficiencies and economies, 112/ the Acquisition is consistent with the public interest provision of section 10(c)(2).

As discussed supra, the Commission is satisfied that the Applicant has shown on the record that the Acquisition and related transactions will result in economies and efficiencies

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111/ See supra note 81.

112/ See supra note 86 (cost increases will be reduced by the savings brought about by Northeast's more efficient operation and maintenance of Seabrook).

for the resultant integrated public utility system as required under section 10(c)(2) that would not be achieved otherwise.

Two petitioners filed submissions seeking a hearing under sections 10(b)(3) and 11(b)(2) on the financial aspects of the Acquisition. EAP argues that the capital and corporate structure proposed by Northeast is too complex, as it would increase the number of corporations and complicate the cost allocation rules and capital structure arrangements. EAP also argued that the application lacks basic information that would enable the Commission to determine whether the capital structure is unduly complicated. The Conn-OCC expressed concern regarding "the apparently incomplete and/or insufficient substantiation relating to the financial assumptions upon which the [A]pplication is based," and notes that several aspects of the Acquisition's financing raise issues of material fact which would require additional analysis in an evidentiary hearing. 111/

The Commission has examined the proposed multiple financings (e.g., common stock, preferred stock, long-term and short-term debt) and the capital structure of the Northeast-PSNH

111/ Regarding the concerns the petitioners expressed relating to the lack of information on financing for the proposed Acquisition and the possible effects of the financing on Northeast affiliates and customers, Northeast asserts that these concerns focus, however, on the possible effects of the financings on Northeast subsidiaries, rather than on the actual details of the financings, which it states will be subject to subsequent Commission approval. It then argues that the application is already clearly sufficient to show the impact of its financing arrangements on Northeast subsidiaries and therefore no hearing on the matter should be required.

system, including both New PSNH and North Atlantic, in connection with the Acquisition. The long-term debt will include first mortgage bonds and term loans. These proposed security issuances and the resulting capital structure are no different than those of the three existing Northeast system operating utilities or of other holding company systems regulated under the Act. With regard to the Northeast Warrants, as discussed *supra*, their issuance is required by the Merger Agreement and the Commission has previously authorized the issuance of warrants where, as here, the standards of the Act are satisfied. 114/ Further, the allocation of costs associated with the issuance of these securities is also routine. As discussed *supra*, we do not believe the proposed capital structure to be unduly complex. 115/

With regard to the Intervenors' argument that the Acquisition will unduly complicate the corporate structure of Northeast, we note that, although NUAC will be created as a transitory corporation to consummate the Acquisition, the transactions proposed herein ultimately will result in the creation of only one additional corporation, North Atlantic, which will own PSNH's interest in Seabrook. With the exception of the Seabrook interest, the assets and function of PSNH will be virtually identical after the Acquisition.

114/ *See* note 45 and accompanying text.

115/ *See supra* note 71-72 and accompanying text.

The Commission has examined the financial assumptions that relate to the proposed financings and concluded that, as to the proposed issuances and sales of common stock, Notes by North Atlantic and Northeast Warrants that the Commission is approving herein, the record is sufficient to make the required findings under the Act. The Intervenors that claim that the record is inadequate have not sufficiently explained why the record is incomplete with regard to those securities that the Commission is approving herein. With regard to the proposed securities over which jurisdiction is being reserved, sufficient information has been provided to establish the routine nature of these securities and the parameters of the terms and conditions that will be associated with their issuance and sale. The terms and conditions will be provided by the Applicant and will be examined under the relevant provisions of the Act by the Division of Investment Management by delegated authority.

One petitioner, NEES, argues that Northeast and PSNH are interconnected by only one line at the Vermont Yankee site in Vernon, Vermont, and that the flows of electricity across the New England grid are such that the merged entity, without transmission service by NEPCO, would not consist of a system "which under normal conditions may be economically operated as a single interconnected and coordinated system," as required under section 11(b)(1) of the Act. NEES states that the Northeast-NEPCO agreement is currently before the FERC, and argues that a

hearing on the proposed Acquisition will be necessary in the event that FERC disallows that agreement.

We have previously noted that the 18 Vermont Utilities have entered into a Settlement Agreement with Northeast and PSNH that grants to the Northeast-PSNH combined system contractual rights to use that segment of the Northfield-Scobie Line owned by VELCO. The Settlement Agreement provides Northeast-PSNH the necessary contractual rights to operate the merged entity as a single integrated electric utility system under the Act. The pending Northeast-NEPCO agreement would only add integration support to the Acquisition; it is not necessary in order to establish integration, which we have found is satisfied through the Northfield-Scobie Line.

Section 20 of the Act provides, in relevant part that "[o]rders of the Commission under this title shall be issued only after opportunity for hearing." 116/ Rule 23(d) further provides that "[i]f the Commission deems that a hearing is appropriate in the public interest or the interest of investors or consumers, it will issue an order thereon, and in that event a declaration or

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116/ Rule 23(e) under the Act provides that the Commission will publish notice of the filing of a proposal in the Federal Register giving "[a]ny interested person . . . not later than fifteen days after the publication of such notice or other date as may be fixed therein . . . to request in writing that a hearing be held, stating his reasons therefor and the nature of his interest." Notice of the filing of the Application was published in the Federal Register on February 8, 1990, 55 Fed. Reg. 4,506 (1990), giving interested persons until February 26, 1990 to file comments or to request a hearing in this matter.

application shall not become effective except pursuant to further Commission action."

In analyzing a hearing request, the Commission determines whether a request raises a significant issue of fact or law that is relevant to the findings the Act requires the Commission to make in order to grant the application or permit the declaration to become effective. A simple assertion that a particular standard of the Act has not been met does not suffice to raise a significant issue of fact or law. 117/ Furthermore, "although constitutional requirements of due process may require a hearing in some circumstances, even in the absence of a specific statutory requirement, 118/ the Commission is not required to hold a hearing if the issues before it would not be further developed in a hearing." 119/

With regard to the intervenors' requests for hearing and their replies to the Applicant's responses, the Commission has already addressed many of the issues presented by the intervenors

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117/ Centerior Energy Corp., Holding Co. Act Release No. 24073 (Apr. 29, 1986).

118/ For instance, there must be an evidentiary hearing at the request of an interested party when there is a issue of material fact. See Independent Bankers Assn. of Ga. v. Board of Governors of the Fed. Reserve Sys., 516 F.2d 1206, 1220 (D.C. Cir. 1975); General Motors Corp. v. FERC, 656 F.2d 791, 795 n. 7 (D.C. Cir. 1981).

119/ Eastern Utils. Assocs., Holding Co. Act Release No. 24641 (May 18, 1988), citing City of Lafayette v. SEC, 454 F.2d at 953 (hearing not required "in matters where the ultimate decision will not be enhanced or assisted by receipt of the evidence.").

in its discussion concerning the proposed transactions. To the extent that the Commission has not discussed the issues presented by the intervenors, we have considered them and concluded that a hearing on the Application is not warranted.

II. CONCLUSION

The Commission has carefully examined the Application, the numerous comments and requests for hearing filed and supplemented by the intervenors, and the Applicant's responses to these interventions. We have considered the applicable standards of the Act, and concluded in each instance that the proposed Acquisition is consistent with these standards. The Commission reached these conclusions on the basis of the complete record before us. No hearing is required to develop these facts further.

The Commission finds that the Acquisition and related transactions and the request for an exception from the competitive bidding requirements of rule 50(b) and (c) under rule 50(a)(5) are not an unreasonable course of action, do not require adverse findings, and are consistent with the requirements of the Act. Further, as no issue of fact or law that would warrant a hearing has been raised, we conclude that the requests for hearing should be denied.

Due notice of the filing of said Application has been given in the manner prescribed in rule 23 promulgated under the Act, and no hearing has been ordered by the Commission. Upon the

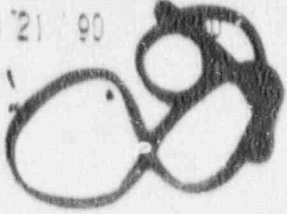
basis of the facts in the record, it is hereby found that, except as to those matters over which jurisdiction has been reserved, the applicable standards of the Act and rules thereunder are satisfied, and that no adverse findings are necessary:

IT IS ORDERED, that the requests for a hearing be, and they hereby are, denied;

IT IS FURTHER ORDERED, pursuant to the applicable provisions of the Act and rules thereunder, that, except as to those matters over which jurisdiction is reserved, the Application be, and it hereby is, granted and permitted to become effective forthwith, subject to the terms and conditions prescribed in rule 24 under the Act, including the conditions set forth in subparagraph (c)(2) thereunder, with regard to: (1) Northeast's issuance of Northeast Warrants; (2) NUAC's acquisition of Northeast Warrants; (3) New PSNH's acquisition of Northeast warrants; (4) Northeast's issuance of common stock upon exercise of the Northeast Warrants; (5) North Atlantic's issuance and sale of common stock to Northeast; (6) NUAC's issuance and sale of common stock to Northeast; (7) New PSNH's issuance and sale of common stock to Northeast; (8) Northeast's acquisition of (a) North Atlantic common stock, (b) NUAC common stock and (c) New PSNH common stock either directly or through the merger of NUAC into Stand-Alone PSNH; (9) North Atlantic's acquisition of PSNH's interest in Seabrook and its assumption of related obligations; (10) North Atlantic's assumption or issuance of the

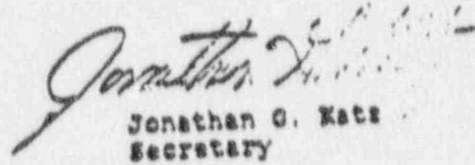
$205 million of Notes; (11) New PSNH's transfer of its interest in Seabrook to North Atlantic; and (12) waiver of rule 26(c)(3) requirements relating to the payment of dividends on Northeast's common stock, subject to conditions discussed herein; provided that, Northeast file a certificate of notification informing the Commission, within ten days of any notice under the VELCO-Northeast Agreement, of the intention to amend, terminate or otherwise affect the Velco-Northeast Agreement, or of its actual termination in any event;

IT IS FURTHER ORDERED, that jurisdiction should be, and it hereby is, reserved over the following transactions, pending completion of the record, which transactions are to be examined under the applicable standards of the Act by the Division of Investment Management by delegated authority: (1) Northeast's issuance and sale of additional common stock to [illegible] capital, term borrowings and interim bank borrowings, if any; (2) North Atlantic's issuance of first mortgage bonds, interim bank borrowings, if any, and short-term borrowings; (3) the Capital Funds Agreement between Northeast and North Atlantic; (4) New PSNH's issuances and sales of first mortgage bonds, pollution control revenue bonds and preferred stock, and its term borrowings and short-term borrowings; and (5) except as to $855,000 in fees and expenses discussed above under section 7(c)(4) of the Act, the fees and expenses associated with the Acquisition; and



IT IS FURTHER ORDERED, that jurisdiction should be, and it hereby is, reserved to further consider the proposed transactions in the event that the Rate Agreement between NUSCO and the Governor and Attorney General of New Hampshire does not take effect.

By the Commission.



Jonathan G. Katz
Secretary

Dated: December 21, 1990