Attachment 5

UNITED STATES OF AMERICA
BEFORE THE
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

BRIEF OF THE CITY OF HOLYOKE GAS & ELECTRIC DEPARTMENT OPPOSING EXCEPTIONS

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BRIEF OF HG&E OPPOSING EXCEPTIONS

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Pursuant to Rule 711 of the Rules of Practice and Procedure, 18 C.F.R. § 385.711, the City of Holyoke Gas & Electric Department ("HG&E") hereby files its brief opposing exceptions to the December 20, 1990, Initial Decision ("I.D.") of the Presiding Administrative Law Judge ("ALJ"). HG&E is also joining in the BRIEF OF PRINCIPAL NEW ENGLAND INTERVENORS ("PNEI") OPPOSING EXCEPTIONS.1/

EXCEPTIONS OPPOSED

In this brief, HG&E opposes the following exceptions:

Excessive Merger Tariff transitional transmission rates

HG&E opposes Staff Exception 3, insofar as Staff expressly advocates transitional merger tariff rates of \$22.89 per kW-year (or \$1.9075 per kW-month) for Firm Transmission Service ("FTS") or \$11.06 per kW-year (or \$.9217 per kW-month) for Non-Firm Transmission Service ("NTS"), as well as any other exception which may, impliedly advocate such rates, which appear in Eastern REMVEC Utilities Br.2/

1/ That PNEI Brief on Exceptions references Part II of this brief and individual Intervenors similarly plan to reference Part I of this brief. In addition, Counsel authorize us to state that (a) the Massachusetts Municipal Electric Company ("MMWEC") joins in Parts I and II, (b) the Towns of Concord, Norwood and Wellesley, Massachusetts join in Parts I and III, and (c) the Vermont Department of Public Service and Vermont Public Service Board, the Rhode Island Public Utilities Commission, the Massachusetts Department of Public Utilities, the Maine Public Utilities Commission, the New Hampshire Electric Cooperative, and the MA CT Towns (comprising the City of Chicopee, Massachusetts, Municipal Lighting Plant, Town of South Hadley, Massachusetts, City of Westfield, Massachusetts Gas & Electric Department, and Town of Wallingford, Connecticut) join in Part I of this brief.

2/ As used herein, "___ Br. at __" refers to a named party's brief on exceptions and the page number, part or appendix in that brief.

at Appendix A, Sched. II, Page No. 2, ¶¶ 1.a. and 2.a.; Ten Eastern REMVEC Utilities Br. at Appendix, Sched. II, Page No. 2, ¶¶ 1.a. and 2.a.; Staff Br. at 77-78.

<u>Ombudsman</u>

HG&E opposes Northeast Utilities Service Company ("NU") Exception 2-unnumbered last bullet.

HG&E opposes Eastern REMVEC Utilities Exception 15.

HG&E opposes Connecticut Department of Public Utility Control ("CT DPUC") Exception C.

<u>Erroneous Legal Presumption Assumed to Favor Approval</u>

HG&E opposes NU Exception 2.

EXCEPTIONS OF OTHERS ADOPTED BY HG&E

HG&E adopts Bangor Hydro-Electric Company and Maine Public Service Company Exception (5).

REBUTTAL OF POLICY CONSIDERATIONS CLAIMED TO WARRANT COMMISSION REVIEW

The exceptions opposed by HG&E should not be granted. A proposed Merger Tariff firm transmission rate of $22.89 per kW-year would be grossly excessive, anticompetitive, inconsistent with the public interest, unjust and unreasonable and unduly discriminatory; even $11.06 is excessive for non-firm transmission. The ALJ's provision for an ombudsman during a transition period for implementation of the merger and conditions thereto is fully justified. Contrary to NU's presumption, disapproval, rather than conditional approval, should be the norm for an anticompetitive merger such as NU's proposal.

SUMMARY OF THE BRIEF

If there is to be an interim Merger Tariff (as HG&E recommends), it would be erroneous to use Staff's proposed $22.89 per kW-year firm transmission rate either as a transitional rate to be collected even temporarily by NU or as a refund floor. A lower Merger Tariff rate (based on NEPOOL Agreement formulae) should be collected; if NU wishes to substitute any higher rate, it should be required to show under Section 203 of the Federal Power Act ("FPA" or "the Act") that such rate will have no anticompetitive effect, as urged in the Brief on Exceptions of Bangor-Hydro Electric Company and Maine Public Service Company (which HG&E adopts); if NU wishes to put into effect its own Merger Tariff rate, then it should be collected subject to refund with no refund floor or, at most, with a refund floor based on NEPOOL Agreement formulae.

Staff's witness here could not explain or justify the $22.89 per kW-year (which was intended for a firmer type of service than the Merger Tariff contemplates). Moreover, in a subsequent NU transmission rate proceeding, Staff is presenting an analysis that is strikingly different from the one in this case, and the same Staff witness who sponsors the $22.89 rate here is now proposing a much lower rate: $9.39 per kW-year for service which NU characterizes as "firm" preferred. In addition, $22.89 is far out of line with NU's most recent rate for far firmer service (to CMEEC) as well as the tariff rates charged by New England Power Company ("NEPCO") as set out and explained in this record. Even the $11 transitional rate is excessive for non-firm transmission service under the Merger Tariff.

The ALJ's provision for an ombudsman should be retained as a modest contributor toward mitigating anticompetitive effects of the merger. In the alternative, if the Commission is persuaded that appointment of such ombudsman by NU would be undesirable, the Commission should relieve NU of the duty to appoint and make the appointment itself.

The Commission has no duty to "save" anticompetitive mergers. NU has not shown any public interest reason for "saving" this anticompetitive merger. The record refutes the theses that this merger is essential to bring a viable Public Service Company of New Hampshire ("PSNH") out of bankruptcy or to manage the Seabrook nuclear power plant efficiently. This merger will cost many New England utilities and their customers dearly. Therefore, following Supreme Court guidance, this merger application should be denied.

STATEMENT OF THE CASE

HG&E adheres to the Statement in its Brief on Exceptions.

ARGUMENT

I. A MERGER TARIFF TRANSITIONAL RATE OF $22.89 PER KW-YEAR FOR FIRM TRANSMISSION SERVICE WOULD BE MUCH TOO HIGH, ANTICOMPETITIVE, UNJUST, UNREASONABLE, UNDULY DISCRIMINATORY AND INCONSISTENT WITH THE PUBLIC INTEREST; A RATE OF $11 WOULD ALSO BE TOO HIGH FOR NON-FIRM TRANSMISSION SERVICE [3]

As NU witness Kalt admitted,[4] post-merger transmission rates that are too high will discourage or block efficient transmission, thus having an anticompetitive effect directly comparable to denial of transmission service.[5] As recently noted by the Court of Appeals for the Second Circuit:

> there need not be an outright refusal to deal in order to find that denial of an essential facility occurred. It is sufficient if the terms of the offer to deal are unreasonable.[6]

3/ Counsel advise that MMWEC, the Towns of Concord, Norwood and Wellesley, Massachusetts, the Vermont Department of Public Service and Vermont Public Service Board, the Rhode Island Public Utilities Commission, the Massachusetts Department of Public Utilities, the Maine Public Utilities Commission, the New Hampshire Electric Cooperative and the MACT Towns (comprising the City of Chicopee, Massachusetts, Municipal Lighting Plant, Town of South Hadley, Massachusetts, City of Westfield, Massachusetts Gas & Electric Department, and Town of Wallingford, Connecticut) join in this Part I.

4/ Tr. 2148; lines 4-8 Ex. 55-F.

5/ See Brief of HG&E on Exceptions ("HG&E Br.") at 19.

6/ Delaware & Hudson Ry. v. Consolidated Rail Corp., 902 F.2d 174, 179-80 (2d Cir. 1990).

The power to overcharge is the power to deny access. And the power to overcharge over a protracted transitional period, even subject to refund, is also a source of competitive concern.7/ Transitional rates, exceeding $22 per kW-year, incorporated in a Merger Tariff for firm transmission service ("FTS"),8/ are much too high.

A. The Transmission Rate Analysis Underlying the $22.89 Is Unreliable

In supporting an FTS transmission service rate of $22.89 per kW-year,9/ Staff did not prepare or present any study of the applicability of its costing methodology to NU's circumstances.10/ Nor did NU.11/ Staff contended that its costing methodology had been used by the Commission in the past, but did not refer to any merger case, contested or uncontested, in which the Commission had selected Staff's approach as an appropriate methodology.12/ Staff supports its analysis by stating that witness Whitfield "developed these proposed rates by using the best date available at the time her pre-filed testimony was completed and the standard

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7/ In this regard, the Commission may wish to note that in the rate proceeding instituted to implement conditional approval of the PacifiCorp merger in 1988 a Third Pre-Hearing Conference was held on November 11, 1990, and a Procedural Schedule has not yet been set. See order issued January 23, 1991, by Presiding Administrative Law Judge Zimet in Docket Nos. ER89-493 and ER89-494.

8/ Staff Br. at 77-78. See also Eastern REMVEC Utilities Br. at Appendix A, Schedule II, Page No. 2, ¶ 1.a. [$1.9075 per kW-month x 12 months per year = $22.89 per kW-year]; Ten Eastern REMVEC Utilities Br. at Appendix, Schedule II, Page No. 2, ¶ 1.a.

9/ Ex. 611-A.

10/ Tr. p. 6616, line 4 - p. 6622, line 21 (Whitfield cross).

11/ It should be clear that NU's case in chief did not advocate selection of transmission rates in this merger proceeding. Ex. 14 at 49 (Noyes). NU did recalculate Staff's amount (Ex. 14 at 56), but failed to spell out any justification for Staff's methodology.

12/ Nor did the witness refer to any other NU case in which the methodology had been in issue and determined to be appropriate for NU under section 205 of the Act.

Commission policies. . . ."13/ However, the "standard ... policies"14/ and the data employed by Ms. Whitfield result in an artificially high rate.

Specifically, in calculating an FTS rate, Ms. Whitfield used a figure for NU investment costs that was far higher than the cost of NU's Pool Transmission Facilities (PTF), but could not explain or identify the sources of the difference (a discrepancy amounting to 31% of Staff's transmission investment costs).15/ She justified using NU's Form 1 costs (which are 45% higher16/ than the PTF costs used in the NEPOOL Agreement rates) on the stated ground that NU commonly used those Form 1 "rolled in" costs in formulating contract rates for firm service. However, she admitted that NU, in calculating a non-firm transmission rate, uses the lower PTF costs, instead of the higher Form 1 costs on which Staff relied; and she could not explain NU's varying cost selections, which she found "unexpected."17/

13/ Staff Br. at 78.

14/ In Opinion No. 356, the Commission recently reversed another ALJ's decision to be guided by this same "standard" or "more traditional" methodology where the record "did not explore the merits" of the methodology to be selected "but focussed instead" on whether a different, "subfunctional methodology was implemented properly." Pacific Gas & Elec. Co., 53 FERC ¶ 61,146 (1990) at 61,524. Here, intervenors have challenged the appropriateness of the "standard" methodology which Staff and NU failed to justify on this record.

15/ Tr. p. 6614, line 1 - p. 6618, line 18.

16/ Tr. p. 6615, lines 1-12: 45% = 31% divided by 69%.

17/ Tr. p. 6615, line 1 - p. 6618, line 18. (In fact, NU does not universally use "rolled in" costs in "firm" contracts. E.g., NU uses only PTF costs in its "firm" contract for transmission of New York Power Authority power from the New York border to HG&E. Ex. 123RR, Attachment 1, p. 2, second line RATE ($/KW-YR) 9.83, and NOTE 4, type of service, last page "Firm Service." Ex. 385, p. 1, part B. See FERC Rate Schedules Holyoke Water Power Co. No. 43 and related affiliate rate schedules.)

Having used Form 1 data, which admittedly may include more than PTF costs, the Staff witness was at a loss to explain the specific sources of difference. For example, PTF investments comprise facilities operated at 69 kV and above whereas (continued...)

Furthermore Staff's costs included non-network facilities (e.g., radial transmission lines which tie a single generator to the network)[18] even though Mr. Krezanosky the policy witness, testified that, in the future, such costs should be excluded from the rate and imposed directly on the customer:

> I am proposing to treat those facilities that are necessary just to interconnect that new generating source to the system, which are not used to serve other customers, just that new generating source, to treat those as the responsibility of that new generating source.[19]

No party disputed Staff's position as to the future. I.D. at 30. The only reason given to justify rolling in costs of past radial lines was that they "generally constitute a small portion of the total" cost.[20] Yet Staff's cost witness had "no idea" how much of the specific transmission costs in Staff's computation in this case are for radial lines.[21] That information was not available from the Form 1 annual reports on which Staff relied or, so far as witness Whitfield knew, from any other report regularly received by the Commission.[22]

17/(...continued)
Form 1 might include lower-voltage facilities. However, NU witness Schultheis had testified that all of NU's transmission facilities operate at 69 kV or above and only PSNH operates some of its "transmission" facilities at 34 kV. Tr. 2796-97 and 2799 (Schultheis cross); cf. Tr. 4, 6615-16 (Whitfield cross). And PSNH's total transmission costs, including facilities operated at 69 kV and above, represented only 19 percent of the total used by the witness (Ex. 614, p. 10, NET C.O.S. line, $22 million compared with $122 million); accordingly, Form 1 facilities operated at voltages below 69 kV could hardly account for anywhere near the unexplained 31% difference for NU and PSNH combined.

18/ Tr. p. 6611, line 23 - p. 6613, line 2; p. 6594, line 21 p. 6595, line 7 (Krezanosky cross).

19/ Tr. p. 6595, lines 15 - 23. Ex. 608, Schedule II, ¶ 2.

20/ Tr. 6595, lines 8 - 17.

21/ Tr. p. 6613, lines 3 - 14.

22/ Id., lines 15 - 25.

Similarly, Staff's denominator, by which it allocated the costs between transmission customers and NU's retail native load, as too low. Relying, in part, on NEPCO witness Bigelow, MMWEC witness Russell concluded that a denominator restricted to "demands" (of NU's retail native load plus one of the TDUs) was too low, inconsistent with long-standing NEPOOL practice, and would deny NU's competitors a level playing field.23/

In addition, transmission cost must relate to service quality. As Mr. Schultheis and Mr. Meany testified, significant changes in the priorities of service might necessitate a different costing methodology.24/ Staff's cost determinations (of $22) were made in the context of proposing a service of the firmest sort -- equal in quality to that rendered to NU's firm native load -- and transferrable to third parties.25/ The Merger Tariff now proposed by Staff and most intervenors (including HG&E) would provide service that would be subordinated to certain priorities on the NU system. (And the so-called "firm" transmission service that NU now provides and proposes to continue after merger is even less firm than the firm service in the Merger Tariff.) Cost-based rates for such subordinated service should, therefore, be lower in realistic recognition of those priorities.

23/ Ex. 368, p. 8, line 1 - p. 9, line 14 (Russell cross-rebuttal). In this proceeding, Mr. Russell suggested using kilowatts of generating capacity connected to NU's transmission network plus kilowatts of firm wheeling demands NU had contracted to serve as an allocator (instead of the lower demand, used by Staff). Mr. Russell's recommendation here was similar to the method presented by Staff in several more recent Section 205 rate cases through witness Zero. See Part I.B., below. However, in that proceeding, Mr. Russell is using a somewhat different allocation method and derives a rate of $12.97 per kW-year for preferred transmission service by NU.

24/ Tr. p. 3396, line 6 - p. 3397, line 21 (Schultheis cross) and Tr. p. 3088, lines 17 - 23 (Meany cross).

25/ Ex. 601, p. 35, lines 9 - 20 (Krezanosky direct).

Above all, transitional transmission rates need to be viewed in the competitive context of this proposed merger. It is essential that the Commission consider the competitive disadvantage to which transmission customers of NU/PSNH would be placed if compelled to pay such rates.

Especially troubling, the Merger Tariff transitional Base Rates are so high as to threaten customers and competition long beyond any assumed transitional period. They may persist for many years. Those Base Rates match (or virtually match) levels in most recent NU contracts,[26] which appear to be the rate levels NU now plans to include in its own tariff proposals <u>after</u> consummation of the proposed merger.[27] Although Staff would require NU promptly to file replacement rates (for the transitional rates), one must doubt whether NU would seek to change the high transitional rates proposed at all. For example, if NU filed <u>increased</u> replacement rates, it would bear the burden of proof. However, if NU adhered to the same rates in its post-merger rate filing, or requested only a modest reduction, objecting parties would bear the burden of proof and could be denied any meaningful relief. Moreover, under these circumstances, NU could avoid filing a full justification for its new rates under the Commission's Rules.[28] That would be an enormous and unfair shift of the burden (inasmuch as NU bears the burden of proof in this proceeding).

In the interests of preventing any such unfair result, any order issued herein establishing transitional transmission rates should require NU, in filing any

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<u>26</u>/ <u>E.g.</u>, Ex. 123-RR, p. 2 (1990 Forecast), NEP (ALTRESCO), TERM START 05/01/90, FORECASTED TRANS. RATE ($/KW-YR) 24.27, NOTE 2: Preferred Service (Ex. 123-RR, p. 15). A very recent exception is the preferential, post-record Transmission Service Agreement ("TSA") with CMEEC, priced at $14.79 per kW-year addressed in Part I.C., below.

<u>27</u>/ Ex. 123, p. 182; Tr. p. 3397, lines 2 - 21 (Schultheis cross).

<u>28</u>/ 18 C.F.R. § 35.13(a)(2) (1990).

superseding rate schedules, to comply fully with the filing requirements imposed by 18 C.F.R. § 35.13 and not to permit NU to avail itself of the abbreviated filing requirements provided for in Section 35.13(a)(2).29/

B. More Recent Staff Analyses of NU "Firm" Transmission Costs Indicate Significantly Lower Cost-Based Rates

As previously observed (HG&E Br. at 17-18), Commission Trial Staff has recently presented testimony recommending that proposed NU "cost-based" rates for supposedly "firm" NU transmission services be reduced. We referred to analyses performed by Staff witness Zero in two Section 205 rate cases (involving CL&P service to Aetna Life Insurance Company and WMECO service to UNITIL Power Corporation.)30/ This analysis differs so markedly from the approach presented here, as to further illustrate that $22.89 is unacceptable.

Since filing its brief on exceptions, HG&E has learned that, even more recently, Staff -- through the self-same witness who sponsored the $22 rate in this case -- has presented a cost-based rate of $9.39 per kW-year for NU in two additional Section 205 rate cases -- less than half the Merger Tariff transitional rate

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29/ The issue is by no means hypothetical, since the Rule is implemented in ordinary Section 205 rate cases (not following on the heels of a merger). See Central Maine Power Co., 53 FERC ¶ 61,465, order issued December 28, 1990, in Docket No. ER90-539-000 et al. implementing the Rule despite the plea of Maine Public Service Company (slip opin. at 14).

30/ See Prepared Direct Testimony of Donald J. Zero ("Zero Test.") filed November 1, 1990, in Northeast Utils. Serv. Co., Docket Nos. ER90-390-000 et al. Both Aetna and UNITIL are NU customers involved in purchases from cogeneration facilities.

here.[31] NU characterizes its services at issue in those two cases as "firm" and "preferred" whereas Staff treats them as less than firm.

Mr. Zero found that the Aetna and UNITIL proposed rates were unreasonable because they used a coincident peak demand allocation methodology appropriate only for firm transmission service, and the service offered was of lower priority than that offered to NU native load customers.[32] Mr. Zero recommended that if the transmission service offered:

> is at a priority level just below that for firm power service to wholesale and retail customers, I would allocate costs based on the capability of NU's transmission system as measured by its generation capability and firm purchases. . . .
>
> On the other hand, if the transmission service is allowed to be interrupted because of the importing or exporting of economy power to benefit NU's native load customers, I would allocate costs on a completely different basis. NU would, in effect, be providing service . . . only until it needs to utilize its transmission facilities solely for NU's native load customers. I would then allocate only incremental O&M costs to the service.[33]

Interestingly, Mr. Zero quoted NU witness Schultheis' testimony in this proceeding to support his conclusion that the transmission service offered by NU to non native-load customers is of a lower priority than firm service.[34] Mr. Zero concluded that, because the priority of the service being offered was between firm

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31/ Responsive Direct Testimony of Wendelin W. Whitfield ("Whitfield Resp. Test.") filed November 27, 1990, in Northeast Utils. Serv. Co., Docket Nos. ER90-390-000 et al.; Responsive Direct Testimony of Donald J. Zero ("Zero Resp. Test.") filed November 27, 1990, in Northeast Utils. Serv. Co., Docket Nos. ER90-390-000 et al. These cases involve NU service transmitting power from New York State to MMWEC and United Illuminating Company ("UICO"), purchasing from the New York Power Authority and Niagara Mohawk Power Company, respectively.

32/ Zero Test. at 8-9.

33/ Zero Test. at 10.

34/ Zero Test. at 11 - 12.

and non-firm, transmission costs should be allocated based on NU's transmission system capability (measured by generation capability and firm purchases).35/

Unit rates for Aetna and UNITIL transmission service were recalculated by Mr. Zero for illustrative purposes, implementing Staff recommended changes in demand allocation (to comport with priority of service) and transmission revenue credit procedures. The recalculated rate for Aetna (based on 1986 CL&P cost data) was $15.91 per kW-year (reduced from NU's proposed $26.45 per kW-year); the recalculated rate for UNITIL (based on 1988 NU cost data) was $11.85 per kW-year (reduced from NU's proposed $24.67 per kW-year).36/

As noted above, the most recent Staff analyses, contained in the November 27 testimonies filed by Staff witnesses Zero and Whitfield, yield a recommended rate based on 1989 NU cost data of $9.39 per kW-year for NU's allegedly "firm" transmission service to MMWEC and UICO. Mr. Zero referred to his previous (November 1 Aetna and UNITIL) testimony in recommending adjustments to the demand allocation procedure (again, to comport with actual priority of service) and made a similar adjustment to the transmission revenue credit procedure.37/ Ms. Whitfield, the sponsor of the $22 per kW-year rate in this proceeding, recalculated NU's transmission facilities carrying cost and, incorporating Mr. Zero's adjustments, which included increased revenue credits and a reduced return on equity, produced the $9.39 per kW-year rate.

35/ Zero Test. at 12 - 13.

36/ Zero Test. at 19-20.

37/ Zero Resp. Test. at 9 - 10, 12 - 13. In that proceeding, MMWEC witness Russell, applying a somewhat different methodology, still derived $12.97 for NU's service on behalf of MMWEC -- far lower than $22.89 per kW-year.

Clearly, in light of these more recent Staff analyses of NU cost-based transmission rates, the $22 per kW-year is unreasonable, insupportable, and "out of line."38/

C. **Any Rate Higher Than NU's $14.79 Rate (Agreed to in Late 1990) for Super-Firm Service to CMEEC Would Be Unduly Discriminatory and Anticompetitive**

The transitional rate supported by Staff also does not take into account the Transmission Service Agreement ("TSA") between NU and CMEEC filed in this proceeding at the end of November 1990.39/ That TSA provides for a cost-based transmission service rate of $14.79 per kW-year. That cost-based rate is for super-firm service, i.e., service equivalent in priority to NU's native load.40/ It is, therefore, firmer than service under the proposed Merger Tariff. This cost-based NU-CMEEC TSA rate raises a presumption that any higher rates are unduly discriminatory.41/

D. **The Non-Firm Transitional Rate of $11 Is Also Too High**

Given the recent Staff prepared testimony finding $9.39 per kW-year to be NU's cost for rendering an intermediate-quality transmission service which NU alleges to be "firm" (Part I.B., above), the transitional rate for non-firm service (as characterized by NU) certainly should not be an even higher $11.06 -- as the Merger

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38/ See Atlantic Refining Co. v. Public Serv. Comm'n of N.Y., 360 U.S. 378, 391 (1959), motion denied, 361 U.S. 801.

39/ See I.D. at 50 and HG&E Br. at 18. The TSA was filed in this proceeding on November 29 or 30, 1990, and was subsequently tendered for filing, with a requested January 1, 1991, effective date, as an FERC Rate Schedule amending, restating, and superceding FERC Rate Schedule Nos. CL&P 217 and Supplements 1-5, WMECO 180, Holyoke Water Power Co. 31, and Holyoke Power & Electric Co. 21. Notice dated January 17, 1991, in Docket No. ER91-209-000.

40/ CMEEC TSA at Section 1.1, p. 3.

41/ Public Serv. Co. of Indiana v. FERC, 575 F.2d 1204, 1212 (7th Cir. 1978).

Tariff proposes. Indeed, as explained in Part I.E., below, NEPCO's tariffs for both "firm" and "non-firm" service also provide rates in the neighborhood of $8-9 and NEPCO offers a service which is at least as reliable as (and possibly firmer than) NU's firm service. In these circumstances, there can be no justification for NU to start at $11 for the Non-Firm Transmission Service ("NTS") under the Merger Tariff, much less for a refund floor at that excessive level.

E. Any Transitional Rate Higher Than NEPCO's $8-9 Tariff Rates Would Be Out of Line

NEPCO charges transmission tariff rates of just over $8 per kW-year for "non-firm" service 42/ and about $8 - $9 per kW-year, for "firm" transmission service.43/ Moreover, Mr. Bigelow indicated that NEPCO provides a service at least as reliable as (if not firmer than) NU's "firm" or "preferred" service,44/ even though NU charges roughly three times NEPCO's price.45/ There is no satisfactory explanation in this record for the discrepancy between NEPCO's actual tariff rates and the transitional Merger Tariff rates proposed for NU. Especially considering the fact that these transmission services will take place in the context of the "tight" NEPOOL power pool,46/ as well as the section 203 reasons for a Merger Tariff, there

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42/ Tr. p. 4585, lines 21-25 (Bigelow cross). Ex. 261-I, Schedule II, p. 1 (NEPCO Tariff 3).

43/ Tr. p. 4596, lines 14 - 17 (Bigelow cross). Ex. 261-D (NEPCO Tariff 4).

44/ Tr. p. 4661, line 11 - p. 4662, line 1 (Bigelow cross).

45/ Comparing Ex. 123-RR, p. 2, NOTE 2 ["Preferred Service"] rates ($24.27 per kW-yr) with Tr. p. 4596 ($8-9; Bigelow cross).

46/ See Fort Pierce Utils. Auth. of the City of Fort Pierce v. FERC, 730 F.2d 778, 784 (D.C. Cir. 1984).

must be a reasoned explanation for setting transitional rates in the Merger Tariff that would be so far out of line with NEPCO's standard tariff rates.47/

F. The Appropriate Transitional Rates for Merger Tariff Firm Transmission Service Are the NEPOOL Agreement PTF Rates Rather Than the Higher Transitional Rates Proposed in the Merger Tariff

In contrast to the artificially high transitional rates proposed by the Merger Tariff, the NEPOOL Agreement formulae transmission rates (i.e., those which would apply were the Merger Tariff governed by that Agreement) are fair to NU, as well as its customers, and pro-competitive.48/ These NEPOOL rates, which NU is using today for transmission of power from Pool-planned units, also raise the presumption that higher rates, such as those in the Merger Tariff, are discriminatory.49/

The NEPOOL Agreement "EHV PTF" transmission rate for power received and delivered at 345 kV only is now $2.75 per kW-year; for transactions effected over NU's 115 and/or 69 kV lines, the "Lower Voltage PTF" rate is now $5.70; and a total transmission rate of $8.45 applies where transactions use both EHV and NU's Lower Voltage pool transmission facilities.50/ (In case of lower voltage deliveries or deliveries on non-network facilities, there may be an adder under section 13.7 of the

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47/ The situation is directly analogous to that raised under the Natural Gas Act, at a time when the Commission was still trying to regulate independent producers of natural gas on a company-by-company cost-of-service basis. Atlantic Refining Co., 360 U.S. at 391.

48/ NU has argued that the NEPOOL transmission rate formulae were adopted to encourage New England utilities to participate in Pool-planned generating units by the pricing of transmission from such units. NU Reply Br. to ALJ at 50-51. By the same token, of course, such rates will encourage transmission access, to overcome anticompetitive effects of the merger. And there is no evidence that such NEPOOL Agreement rates are so low as to be contrary to the public interest (within the meaning of FPC v. Sierra Pac. Power Co., 350 U.S. 348, 355 (1956), motion to amend denied, 351 U.S. 946) or, even, outside the band of reasonableness.

49/ See Part I.C., above.

50/ Allen Ex. 385, p. 1, part C. ("Other transmission agreements"), NEPOOL. Ex. 603, pp. 116 - 127, §§ 13.3, 13.4, 13.5 (NEPOOL Agreement).

NEPOOL Agreement.) While the Lower Voltage 115 and 69 kV rates may vary slightly depending on the delivering utility, the EHV rate does not. Its use is supported by witnesses Russell,[51] Moskovit ... ee.[53]

The NEPOOL Agreement rate fo ... made answers to the transitional tariff rate issue. They are ... with[54] NU's TDU transmission rates under the CMEEC TSA (viz. $14.79 per kW-year for "super-firm" service) or the transmission tariff rates charged by NEPCO: viz. just over $8 per kW-year for "non-firm" service [55] and about $8 - $9 per kW-year, for "firm" transmission service, which, as explained in Part I.E., above, provide a higher quality, i.e., firmer "firm" service than the so-called "firm" or "preferred" service offered by NU. The day after the Merger Tariff takes effect, NU will be free to propose a higher rate if it believes it can support that rate under FPA Section 205 and the applicable merger conditions. NU could also request the Commission to impose only a nominal suspension of NU's superseding rate.

Thus, implementation of the NEPOOL Agreement provision is reasonable to all parties, and avoids need for detailed determinations by the Commission in this proceeding.

51/ Ex. 368, p. 9, lines 7 - 10.

52/ Ex. 477, p. 29, lines 14 - 18 and p. 15, line 16 - p. 18, line 6.

53/ Ex. 479, pp. 21 - 22.

54/ See Atlantic Refining Co., 360 U.S. at 391.

55/ Tr. p. 4585, lines 21-25 (Bigelow cross). Ex. 261-I, Schedule II, p. 1 (NEPCO Tariff 3).

II. THE ALJ CORRECTLY PRESCRIBED APPOINTMENT OF AN OMBUDSMAN DURING THE FIRST FIVE YEARS OF THE MERGER 56/

NU, Eastern REMVEC Utilities and Connecticut DPUC criticize the ALJ's requirement that NU appoint a post-merger ombudsman. NU Br. at 102-103, Eastern REMVEC Utilities at 31, CT DPUC Br. at 50-54. Their arguments against such condition are exceptionally unmeritorious. The ALJ's modest but innovative condition (I.D. at 48-49) should be affirmed. As the CT DPUC admits:

> ... the Initial Decision finds that "NU's past transmission policies did produce criticisms from those who were (or wanted to be) customers," and that an ombudsman can help to achieve the goal of alleviating potential anticompetitive effects in connection with the offer of wheeling service.

CT DPUC Br. at 51 (footnote omitted). And as the ALJ found:

> 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.

I.D. at 48. As observed by the ALJ, "at least one natural gas company" has "favorably used" an ombudsman.57/

56/ Counsel advises that MMWEC joins in this Part II.

57/ I.D. at 48. National Fuel Gas Company elected, for the sake of better management of customer relations, to appoint an ombudsman. Public Utilities Fortnightly, Oct. 13, 1988, p. 79. In that instance, the ombudsman acts on behalf of retail customers; here, the ombudsman would act on behalf of wholesale and transmission customers. The ombudsman condition, as originally proposed [and with the portion deleted by the ALJ's amendment bracketed], would provide: "NU Companies shall appoint and pay for an Ombudsman for interests of Customers for NU sales or transmission services subject to the jurisdiction of the Commission (including long-term or short-term sales of surplus power). The Ombudsman will be a person experienced in electric bulk power matters who is not an employee of NU Companies. The Ombudsman will be available to assess Customer complaints of NU Company non-responsiveness to Customer needs. NU Companies shall notify each present and future Customer of the name, address and phone number of the Ombudsman. [~~NU Companies shall annually file with the Commission a report by the Ombudsman together with NU's responses thereto.~~] This merger condition will remain in effect for five calendar years following the Commission's order herein, unless extended by further order under section 203 of the Federal Power Act."

(continued...)

NU criticisms. NU does not address the Initial Decision's stated reasons for the conditions, quoted above; instead, NU would arbitrarily narrow the issue, arguing that the condition should be set aside because it was proposed by HG&E,58/ based on HG&E experiences with NU, and because the "Commission has already quite firmly ruled" that pertinent allegations are baseless.59/ NU is doubly wrong: NU carefully overlooks the widespread experience of utilities throughout New England with NU which prompted the ALJ's condition. Moreover, NU misrepresents the significance for this issue of the Commission's conclusions as to treatment of HG&E.

The record evidences NU's "onerous," domineering and dilatory tendencies as experienced by other utilities, in addition to HG&E.60/ Even if the merger is approved with seemingly adequate conditions, NU will find some room to delay or dominate, if it can. Given NU's history and its FERC-protected customers' perception of that history, creating a mediating ombudsman role to address disputes promptly makes eminently good sense. Contrary to NU's argument (NU Br. at 103), NU willingness to commence deliveries promptly will not avail if the price charged is too high. Access can be denied by onerous rates, terms and conditions just as much

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57/(...continued)
HG&E Br. to ALJ at 5. The Ombudsman is to be a single individual. The Ombudsman should not be a present or past employee of NU. The Ombudsman should respond only to Customers, meaning those who purchase or seek FERC-regulated services, not retail consumers.

58/ To resist a salutary message, NU attacks the messenger.

59/ The full citation for the "ruling" on which NU relies is Northeast Utils. Serv. Co., 52 FERC ¶ 61,097 (1990), reh'g denied, 52 FERC ¶ 61,336 (1990), petition for rev. filed sub nom City of Holyoke Gas & Elec. Dept. v. FERC, No. 90-1565 (D.C. Cir. appeal filed Nov. 26, 1990).

60/ See testimony of Messrs. Bigelow (NEPCO, Tr. 4540); Ex. 261A, response to MPUC Data Request 1); McKinnon (MMWEC, Ex. 269, pp. 36-7; Russell (MMWEC, Ex. 313, pp. 22, 27-37; Krezanosky (Staff, Ex. 601, pp. 22-23).

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IMAGE EVALUATION TEST TARGET (MT-3)

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6"

as by blatant refusal to deal,[61] or by the need for recourse to protracted or costly administrative or judicial proceedings. The ALJ's creative ombudsman condition, which would assign a single expert and objective critic to look over NU's shoulder (and comment) at the behest of NU's FERC-protected customers, is in harmony with the findings of the new Administrative Dispute Resolution Act signed by President Bush on November 15, 1990.[62] NU's recalcitrant opposition to this moderate condition says more about NU's will to dominate than about the actual condition; NU here illustrates how difficult it probably will be to secure implementation of major pro-competitive conditions.

What is more, the Commission's discussion of HG&E's experience in the case cited by NU also supports the ombudsman condition. There, NU had more than quadrupled (almost quintupled) a transmission rate abruptly and took two years to cut back the increased rate to merely double what it had previously collected; the Commission expressly noted with approval the NU "concessions" that twice reduced NU's original increased rate.[63] Thus, that case involved an oppressive action by NU which required correction, and, after this merger proposal came before the Commission, NU was amenable to mitigate the rate increase it had imposed in the effort to "reduce controversy" and avoid a contested rate increase, which the

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61/ See HG&E Br. at 19; PNEI Br. Opposing Exceptions, Parts II.E., III.C.1.

62/ P.L. 101-552, 5 U.S.C. § 581 note. Section 2 of that Act finds that: "(1) administrative procedure ... is intended to offer prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts; (2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in ... a decreased likelihood of achieving consensual resolution of disputes; ... (4) ... alternative means can lead to more creative, efficient and sensible outcomes; ..."

63/ 52 FERC at 61,487.

Commission order noted.[64] However, after the merger there would be less reason to anticipate NU willingness to oblige if "controversy" arose once more -- say, as to interpretation or implementation of merger conditions. Accordingly, an ombudsman could be particularly useful in post-merger circumstances to resolve controversy without regulatory proceedings, just as the ALJ anticipated.

Criticisms of "E...ern REMVEC Utilities." Eastern REMVEC Utilities challenge the condition (Br. at 31) as adding "an unnecessarily burdensome and costly layer of regulation" and as "inappropriate since it does not mitigate the anti-competitive harms of the merger." These challenges miss the mark. (a) The condition does not add any layer of regulation at all; the ombudsman is a private citizen/mediator -- not a regulator.[65] (b) The condition will not be unduly costly,[66] particularly if successful implementation of transmission tariffs reduces needs for recourse to the ombudsman. However, if the Commission is persuaded that NU would be unduly burdened by the heavy responsibility of selecting such an outside, impartial ombudsman,[67] the Commission should relieve NU of the duty to appoint and make the appointment itself. (c) By itself, of course, the ombudsman condition will not be sufficient to cure the harms of the merger. However, it will mitigate the harm somewhat and is essential to help make other mitigation conditions work better.

64/ See Leary Ex. 376, p. 6, lines 18-22. 52 FERC at 61,487.

65/ The ALJ made the point perfectly clear, explaining that "the ombudsman is not the only avenue for dissatisfied customers ..." I.D. at 49. The condition simply gives customers an extra informal, mediatory forum in which to try to resolve business problems without turning to the regulators.

66/ NU could pay the ombudsman by the day worked, there being no reason to set a fixed annual salary.

67/ As proposed, the ombudsman would be a person well versed in bulk power matters who had not been employed by NU.

Criticisms of CT DPUC. The Connecticut DPUC argues that the ombudsman requirement exceeds the "minimum necessary [conditions] to render the transaction consistent with the public interest," is too intrusive on management, threatens to encroach on state responsibilities and is based on the wrong subsection of the Federal Power Act. (a) To the contrary, the ALJ found that "an ombudsman can help to" achieve the indispensible "goal" of alleviating potential anticompetitive effects of the merger. I.D. at 48. (b) An ombudsman is an independent, outside mediator, not an intruder into management's affairs (or a captive of management policy).

(c) There is also no basis for the preposterous claim of a "potential for conflict between the federally imposed ombudsman and state authority" over local distribution utilities. CT DPUC Br. at 52. Even if the ombudsman were, say, to detect improper actions by the post-merger NU aimed at mollifying an unconstitutional attempt by state regulators to burden interstate commerce, the most that this "federally imposed" mediator could do is to blow the whistle.68/

(d) Finally, CT DPUC argues that the ALJ erroneously based his ombudsman condition on Subsection 203(b), rather than Subsection 203(a) of the Act. HG&E has similarly argued that the ALJ took too narrow a view of the Commission's authority under Section 203.69/ Be that as it may, there is ample basis in the record (as we

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68/ It is difficult to fathom to what state right the CT DPUC's obscure words really refer, and the Commission should pay them no heed. Under the Commerce Clause, of course, Connecticut may not prefer their consumers over other consumers in other states affected by this merger with regard to the supply of electricity or natural gas. New England Power Co. v. New Hampshire, 455 U.S. 331 (1982); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).

69/ HG&E Br. at 22; contrast NU Br. at 77-78 claiming that the ALJ "alluded" to the broader authority of Subsection 203(a) "which is the operative provision in this case" even though the Initial Decision expressly cites only Subsection 203(b).

have shown) to justify and require such a condition if the merger proposal can be altered to become consistent with the public interest and, therefore, approvable at all pursuant to Subsection 203(a).

III. DISAPPROVAL, RATHER THAN CONDITIONAL APPROVAL, IS THE NORMAL REMEDY FOR AN ANTICOMPETITIVE MERGER SUCH AS THIS ONE 70/

NU assumes that this Commission has a duty to save the proposed merger by imposing whatever conditions are needed to render the merger minimally palatable under Section 203(a) of the Federal Power Act. NU Br. at 76-79. While it is true, as HG&E stated in its Brief, that the Commission retains the authority to adopt whatever conditions may be needed to make the merger consistent with the public interest, this authority does not impose upon the Commission the duty to save the merger. HG&E Br. at 22. In fact, the converse presumption is correct.

The Commission's duty is to determine whether the proposed merger is anticompetitive and whether it would be consistent with the public interest. If the Commission determines -- as the ALJ did here -- that the merger as proposed fails to satisfy those standards, then the presumption is that the merger should be denied, so as to protect competition and preserve the public interest.71/

In Utah Power & Light Co.,72/ the ALJ concluded that the Commission lacked authority to conditionally approve an anticompetitive merger, holding that the

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70/ Counsel advises that the Towns of Concord, Norwood and Wellesley, Massachusetts, join in this Part III.

71/ Furthermore, in Section 205 and 206 cases, the Commission has adopted a policy of rejecting proposals where a utility fails "to demonstrate that its proposal is the least anticompetitive method of obtaining legitimate ... objectives." Florida Power & Light Co., 8 FERC ¶ 61,121 at 61,448 (1979), reh'g denied, 9 FERC ¶ 61,015.

72/ Utah Power & Light Co., 45 FERC ¶ 61,095 (1988), 47 FERC ¶ 61,209 (1989), petition for rev. filed sub nom Environmental Action et al. v. FERC, No. 89-1333 et al. (D.C. Cir., argued October 16, 1990).

Commission's power to condition was limited to the specific bases enumerated in § 203(b) for imposing merger conditions. The Commission disagreed as to the limits of its conditioning power, holding that, in addition to § 203(b), it had a second source of conditioning authority in § 203(a) itself. The Commission reasoned that if a proposed merger, as presented, is not consistent with the public interest, and if the Commission could design conditions which, if accepted, would convert the merger into one that would be consistent with the public interest, then the Commission has authority to approve the merger conditionally rather than to deny the merger.73/ Whereas the ALJ had disapproved the merger outright, the Commission conditionally approved the merger. The Commission, however, did not hold that it had any duty in that case (much less in other cases) to "save" a merger -- by imposing conditions under § 203(a) -- which is inconsistent with the public interest.74/

Where the proposed merger is inconsistent with the public interest as a result of the merger's anticompetitive effects, the correct presumption favors denial of the application, and keeping the two utilities divested, rather than "saving" the merger. In a long line of cases, beginning with United States v. E. I. duPont de Nemours & Co., 366 U.S. 316 (1961), motion denied, 366 U.S. 956 (1961) and reviewed very recently in California v. American Stores Company, ___ U.S. ___, 110 S. Ct. 1853 (1990), the federal courts have recognized that divestiture is normally the appropriate remedy for an unlawful acquisition. In duPont, supra, the court established the rule succinctly:

> It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. That

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73/ See Utah Power & Light, 45 FERC at 61,280-83.

74/ The Commission may, of course, disapprove a merger based wholly on a finding of anticompetitive effect. Kansas Power & Light Co. v. FPC, 554 F.2d 1178, 1184-85 and n.9 (D.C. Cir. 1977).

> statute is specific and "narrowly directed," Standard Oil Co. v. United States, 337 U.S. 293, 312, [69 S. Ct. 1051, 93 L. Ed. 1371] (1949), and it outlaws a particular form of economic control -- stock acquisitions which tend to create a monopoly of any line of commerce. The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. . . . Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found.

366 U.S. at 328-31 (footnotes omitted).

Although the choice of divestiture is not inevitable, divestiture is the normal remedy because it preserves competition, threatened by the merger, with a certainty and a freedom from regulatory oversight that does not attend other remedies.75/ Indeed, courts have been reluctant to accept arguments that the particular evils of mergers can be adequately remedied by injunctive provisions and have opted for the surer remedy of divestiture.76/ The reasons for judicial preference for divestiture is obvious: Preservation of separate competitors with conflicting interests is far more likely to stimulate competition than the episodic supervision by an outsider of the behavior of a firm with enhanced market power.

Therefore, any conditional approval of an anticompetitive merger must be supported by specific findings and conclusions overcoming the presumption in favor of divestiture (that is, disapproval, preventing the merger from taking place). Conditions increase regulatory intervention in the marketplace. The result is greater cost to society. In contrast, divestiture (or disapproval of merger) allows greater

75/ See Yamaha Motor Co. v. F.T.C., 657 F.2d 971, 982 (8th Cir. 1981) cert. denied sub nom. 456 U.S. 915 (1982); Ash Grove Cement Co. v. F.T.C., 577 F.2d 1368, 1380 (9th Cir. 1988), cert. denied, 439 U.S. 982 (1978).

76/ See, e.g., Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1275-76 (E.D. Pa. 1987).

reliance on market forces and is more likely to achieve the goals of market efficiency underlying the FPA and the antitrust laws.

The ALJ correctly found that the merger as proposed would be anticompetitive and injurious to the public interest. The burden is on NU to justify why, in light of the Supreme Court's duPont decision, the proposed merger should be conditionally approved rather than denied outright. Yet, the only reason NU provides to justify conditional approval rather than denial is its claim that the merger is necessary to rescue PSNH from bankruptcy. That claim is simply not supported by the facts, and contradicts past representations by NU itself.77/ Accordingly, NU has failed to overcome the presumption established by the Supreme Court in favor of divestiture. Given the evidence of likelihood of anticompetitive injury, as well as the evidence of cost and rate increases for utilities other than NU and PSNH (PNEI Br. at Part I.C.), the merger proposal should be denied.

CONCLUSION

For the foregoing reasons, the exceptions opposed should be denied and the relief requested in HG&E's briefs should be granted.

Respectfully submitted,

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Dated: January 24, 1991

77/ PNEI Br. at 20-25 (Part I.B). Similarly, the merger is not essential to maintain efficient operation of the Seabrook nuclear generating station. PNEI Br. at 42-49 (Part I.D.).

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing of the **BRIEF OF THE CITY OF HOLYOKE GAS & ELECTRIC DEPARTMENT OPPOSING EXCEPTIONS** upon all persons on the Restricted Service List in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Washington, D.C., this 24th day of January 1991.

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