SECURITIES AND EXCHANGE COMMISSION

(Release No. 35-25273 ; 70-7695)

Northeast Utilities
Supplemental Memorandum Opinion and Order Authorizing Acquisition of Public Service Company of New Hampshire and Related Financings; Granting Requests for Reconsideration; Denying Requests for an Evidentiary Hearing

March 15, 1991

On December 21, 1990, the Commission issued a Memorandum Opinion and Order (Holding Co. Act Release No. 25221) ("December Order") authorizing the acquisition ("Acquisition") by Northeast Utilities ("Northeast"), West Springfield, Massachusetts, a public-utility holding company registered under the Public Utility Holding Company Act of 1935 ("Act"), of the Public Service Company of New Hampshire ("PSNH"), a New Hampshire publicly owned electric utility, and related transactions, subject to certain reservations of jurisdiction, and denying requests for a hearing. 1/ The City of Holyoke Gas & Electric Department ("Holyoke") has filed a petition for rehearing and reconsideration of the December Order, and the Massachusetts Municipal Wholesale Electric Company ("MMWEC") has filed a petition for rehearing. Northeast has filed a response.

The petitioners argue that the Commission erred in approving the Acquisition. They allege various errors. Their chief argument, however, is that the Commission failed to provide a sufficient analysis of the anticompetitive effects of the

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1/ The procedural history of this matter is set forth in the December Order. See Northeast Utils., Holding Co. Act Release No. 25221 (Dec. 21, 1990).

Acquisition. They base their challenge, in large part, on the initial decision of the Federal Energy Regulatory Commission ("FERC") Administrative Law Judge ("ALJ") issued December 20, 1990, approving the merger of Northeast and PSNH. 2/ The ALJ found that the merger, if unconditioned, would have anticompetitive consequences. He concluded, however, that the proposed merger would be consistent with the public interest once certain terms and conditions were imposed. 3/ Those conditions included, inter alia, changes in Northeast's transmission commitments to mitigate the anticompetitive effects of the Acquisition.

To address the issues raised by Holyoke and MMWEC, the Commission grants their requests for reconsideration.

I. DISCUSSION

A. Section 10(b)(1)

Section 10(b)(1) of the Act prohibits, inter alia, approval of an acquisition that would result in "the concentration of control of public-utility companies, of a kind or to an extent

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2/ Northeast Utils. Serv. Co. (Re Public Serv. Co. of New Hampshire), Docket Nos. EC90-10-000, ER90-143-000, ER90-144-000, ER90-145-000, and EL90-9-000 (Dec. 20, 1990). The matter is before the FERC on exceptions from the initial decision of the ALJ.

3/ Under section 203 of the Federal Power Act ("FPA"), the FERC "shall approve" a merger if it is "consistent with the public interest." In its determination, the FERC must consider the anticompetitive consequences of the proposed transaction. See Gulf States Utils. Co. v. FPC, 411 U.S. 747 (1973).

detrimental to the public interest or the interest of investors or consumers." In determining whether the Acquisition would result in an undue concentration of control, the Commission in its December Order expressly considered a variety of factors, including peak load capacity, operating revenues, number of electrical customers, KWH sales and total assets of the merged company. We concluded that the size of the resulting system would not exceed the economies of scale of current technology or provide undue p. r or control to Northeast within the New England region o within the electric utility industry.

The Commission's analysis under section 10(b)(also includes consideration of federal antitrust policies. 4/ In our December Order, we recognized that the Acquisition would decrease competition, but concluded that the Acquisition's benefits would outweigh its anticompetitive effects. The petitioners challenge this determination, arguing that the Commission ignored the anticompetitive effects of the merged company's control of transmission facilities and surplus power. 5/

4/ Municipal Elec. Assn. of Mass. v. SEC, 413 F.2d 1052, 1056-57 (D.C. Cir. 1969) ("Section 10(b)(1) must take significant content from [federal antitrust] policies."); Environmental Action, Inc. v. SEC, 895 F.2d 1255, 1260 (9th Cir. 1990) ("Federal antitrust policies are to inform the SEC's interpretation of section 10(b)(1).").

5/ The petitioners also challenge the Commission's failure to make use of the Department of Justice's Merger Guidelines ("Guidelines") in its analysis of potential anticompetitive effects. The Commission has considered the testimony in the record concerning the application of the Guidelines to the Acquisition. We note that the Guidelines are an analytical (continued...)

As the petitioners note, our anticompetitive analysis under section 10(b)(1) is cast largely in terms of size and corporate structure, rather than in terms of transmission access or excess capacity. This focus reflects this agency's primary concern with the structure of public-utility holding company systems. 6/ However, our evaluation of whether an acquisition will result in an undue concentration of control is based on all of the circumstances, not on size alone. 7/ In cases such as the instant one, where anticompetitive issues arise involving the allocation of excess generating capacity, transmission access or the flow of electricity over transmission lines of a holding company system, the Commission also considers these issues in determining whether a proposed acquisition will result in a

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tool. To the extent the Guidelines are intended to identify anticompetitive concerns, the Commission is satisfied that it has adequately identified those concerns.

6/ See American Elec. Power Co., Inc., 46 S.E.C. 1299, 1323 (1978); accord Louisiana Power & Light Co., Holding Co. Act Release No. 22765 (Dec. 21, 1982); New England Elec. Sys., Holding Co. Act Release No. 22309 (Dec. 1, 1981); Arkansas Power & Light Co., 45 S.E.C. 567, 574 (1974); Vermont Yankee Nuclear Power Corp., 43 S.E.C. 693, 699 (1968); New England Power Serv. Co., 10 S.E.C. 562, 571 (1941).

7/ Sierra Pac. Resources, Holding Co. Act Release No. 24566 (Jan. 28, 1988), aff'd sub nom. Environmental Action, Inc. v. SEC, 895 F.2d 1255 (9th Cir. 1990); Municipal Elec. Assn. of Mass. v. SEC, 413 F.2d at 1056-57; see American Elec. Power Co., Inc., 46 S.E.C. at 1309.

concentration of control detrimental to the public interest or the interest of investors or consumers. 8/

To that end, the Commission has considered evidence in this proceeding that the merged company would control key transmission lines that carry bulk power to an entire region of New England and would also be the largest supplier of surplus bulk power in the area. 9/ The merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior. 10/ In the December Order, the

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8/ See Municipal Elec. Assn. of Mass. v. SEC, 413 F.2d at 1058-59 ("This type of control, albeit indirect in the sense of not constituting control by internal company voting or managerial authority, does not seem . . . to be beyond the reach of the language of Section 10(b)(1) . . . ."); American Elec. Power Co., Inc., 46 S.E.C. 1299. Contrary to Holyoke's suggestion, in reviewing the Acquisition the Commission has considered the interests of consumers in the New England area generally and not just consumers serviced by Northeast and PSNH.

9/ "Bulk power" generally refers to the wholesale purchase or sale of energy between electric utilities. "Surplus bulk power," "surplus capacity" or "excess capacity" refer to the amount of energy available to a utility in excess of the demand on that utility for electric power.

10/ As explained by the ALJ, control over key transmission corridors:

> 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. That the merged company could use its power to force its own extra goods on buyers elsewhere is an especially significant concern because [Northeast]-PSNH will have the largest block of surplus capacity in New England.

FERC ALJ decision at 16.

Commission relied upon the transmission commitments made by Northeast, and the New Hampshire Corridor Plan ("Plan") entered into by Northeast and New England Electric System ("NEES"), as a means of curbing such anticompetitive behavior. 11/ The ALJ, in the initial FERC decision, found these commitments to be insufficient and concluded that the anticompetitive effects of the Acquisition required the imposition of additional terms and conditions regulating the sale and transmission of bulk power.

Both the Commission and the FERC have statutory responsibilities with respect to the anticompetitive consequences of mergers in the public-utility industry. However, the Commission in administering the Act and the FERC in administering the Federal Power Act ("FPA") pursue different goals in their

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11/ Under Northeast's general transmission commitments, it will provide transmission service to third parties whenever capacity is available for this purpose. It will expand its system to provide transmission service for others whenever it is compensated therefor and such expansion can reasonably be achieved. Under the Plan, Northeast and NEES will open up a corridor through New Hampshire to facilitate transfers of electricity from Maine, across the PSNH system, to eastern Massachusetts, Rhode Island, Connecticut and Vermont. The transmission commitments and Plan will provide southerr New England utilities with access to bulk power from utilities in northern New England and Canada.

Northeast has represented to this Commission that it will provide transmission "in all instances," so long as it can continue to serve its own customers "reliably and economically." We assume that Northeast's offer is made in good faith and will be honored. See American Electric Power Co., Inc., 46 S.E.C. at 1312 n.32. We draw support for this assumption from the fact that Northeast is already a substantial provider of transmission services for others in New England.

regulation of the utility subsidiaries of holding companies. 12/ Congress designed the Act primarily to eliminate financial abuses by public-utility holding companies. 13/ Thus, the Commission, as the agency with expertise in financial transactions and corporate finance, is charged with regulation of the corporate structure and financing of public-utility holding companies and their affiliates. Congress enacted the FPA to regulate the wholesale interstate sale and distribution of electricity, closing the regulatory gap created by Public Util. Comm'n v.

12/ The Public Utility Act of 1935, ch. 687, 49 Stat. 803, included two separate but overlapping pieces of legislation, Title I, which is the Public Utility Holding Company Act of 1935 ("Act"), 15 U.S.C. 79 et seq., and Title II, which is designated Parts I and II of the Federal Power Act ("FPA"), 16 U.S.C. 824 et seq.

13/ By 1932, approximately 49% of the investor-owned utilities were controlled by three holding companies. Virtually all the holding company systems were characterized by extremely complex capital structures that made it difficult, if not impossible, for investors to analyze the quality of earnings and the financial condition of the companies in which they were investing. In the early 1930s, many of the holding companies collapsed, leaving investors with billions of dollars of losses.

Congress found the operation of these systems detrimental to the interests of United States consumers and investors and concluded that the systems' interstate character had rendered state regulation largely ineffective. The specific abuses identified by Congress included the pyramiding of voting control, overcapitalization, securities issued upon the basis of fictitious and unsound asset values, intrasystem profiteering on transfers of securities, financial mismanagement, excessive intrasystem management fees and service charges, the concentration of economic power not susceptible to state regulation, and the expansion of holding company systems without regard to the integration and coordination of related utility properties. See section 1(b) of the Act.

Attleboro Steam & Elec. Co., 273 U.S. 83 (1927), in which the Supreme Court had held that such transactions were beyond the reach of state regulation. Congress has entrusted administration of the FPA to the FERC as the agency with the technical expertise necessary to regulate the transmission of energy. 14/

Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the Commission, in determining whether there is an undue concentration of control, identifies such issues, we can look to the FERC's expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the

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14/ Justice Stevens, concurring in a recent Supreme Court decision, explained:

> Congress enacted [the Act] to prevent financial abuses among public utility holding companies and their affiliates. It entrusted the [Commission], the agency with the expertise in financial transactions and corporate finance, with the task of administering the act. The [Commission] carries out its duties essentially by monitoring inter-affiliate financial transactions and eliminating potential conflicts of interest. Congress enacted the FPA to regulate the wholesale interstate sale and distribution of electricity. It entrusted the administration of the FPA . . . to the FERC as the agency with the technical expertise required to regulate energy transmission.

Arcadia v. Ohio Power Co., ___ U.S. ___, ___, 111 S.Ct. 415, 423 (1990) (citation omitted).

Acquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the FPA. 15/

B. Other Matters

Petitioners assert several other arguments that the Commission has considered and rejected. First, Holyoke charges that the Acquisition will violate the requirement of sections 10(c)(1) and 10(c)(2) of the Act that the resulting system be "not so large as to impair . . . the effectiveness of regulation." 16/ Specifically, Holyoke alleges that an existing subsidiary of Northeast, Holyoke Water Power Company ("HWP"), currently violates this "effectiveness of regulation" requirement. 17/ Holyoke's argument goes not to the size of the system but, rather, to HWP's status under the state regulatory scheme governing public utilities. 18/

15/ The Commission of course has on-going authority to rescind or further condition its approval under the Act. See section 20(a).

16/ Both section 10(c)(1), by reference to section 11, and section 10(c)(2) require that the merged Northeast-PSNH system be an "integrated public-utility system." By definition, such a system must be "not so large as to impair . . . the effectiveness of regulation." Section 2(a)(29) of the Act.

17/ HWP, which provides retail electric service to 44 industrial customers, all located within the City of Holyoke, is a direct competitor of Holyoke.

18/ Because HWP's sole electric business is "supplying electricity in bulk," the Massachusetts Department of Public Utilities does not regulate the rates that HWP charges its industrial customers. See Mass. Gen. Law Ch. 164, § 94.

As noted, the Act requires that an acquisition not result in a system that is so large as to impair the effectiveness of regulation. In so doing, the Act seeks to protect the ability of the states to regulate their public utilities. 19/ The Act does not, however, require that the Commission, in approving an acquisition under section 10, find that a utility company is subject to any particular degree of state regulation or even to state regulation at all. The extent to which Massachusetts chooses to regulate MWP has no bearing upon our determination of whether the Acquisition will result in a system that is so large as to impair the effectiveness of regulation. Thus, this challenge fails.

Holyoke further alleges that Northeast has acquired a real estate business without Commission approval, in violation of sections 9(a)(1) and 11(b)(1) of the Act. 20/ At issue is MWP's ownership of several properties, not used in the company's utility operations, that could be sold or developed for industrial use. Because the Acquisition will not alter this situation, we decline to determine in this proceeding whether

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19/ See supra note 13.

20/ Section 9(a)(1) of the Act requires Commission approval of the acquisition of "any securities" by a registered holding company. An acquisition under section 9(a)(1) must satisfy the standards of section 11(b)(1), which limits a registered holding company system "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 . . . ."

HWP's property holdings are reasonably incidental or necessary or appropriate to the operations of the holding company system. 21/

Finally, Holyoke asserts that Northeast's control of three separate subsidiaries that provide electric service in Massachusetts unduly complicates the structure of the Northeast system. 22/ Holyoke therefore urges the Commission to deny the application for approval of the Acquisition under section 10(b)(3) of the Act or to condition approval upon Northeast's elimination of one or more of these subsidiaries pursuant to section 11(b)(2) of the Act. 23/ The Acquisition itself will neither create undue complication in the Northeast system, nor

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21/ HWP, from the time of its incorporation until it was acquired by Northeast in 1967, was actively involved in industrial development in the City of Holyoke. The Commission, in approving Northeast's acquisition of HWP, expressly reserved the question whether HWP's nonutility businesses could remain within the Northeast system. The Commission notes that, since 1967, HWP has gradually disposed of its real estate holdings. It has not acquired any property within the past ten years.

22/ The three subsidiaries are HWP, its subsidiary Holyoke Power & Electric Co., and Western Massachusetts Electric Co. Holyoke intervened in 1967 when the Commission approved Northeast's acquisition of HWP, resulting in Northeast's control of three separate subsidiaries that operate in Massachusetts. See Northeast Utils., 43 S.E.C. 462, 470 n.11 (1967). At that time, Holyoke did not allege that the acquisition of HWP would violate section 11 of the Act by unnecessarily complicating Northeast's corporate structure.

23/ Section 10(b)(3) requires that the Commission approve an acquisition unless it finds that the acquisition "will unduly complicate the capital structure of the holding company system of the applicant . . . ." Section 11(b)(2), inter alia, prohibits the retention of a company that would "unduly or unnecessarily complicate the structure . . . of such holding company system."

will it affect the situation with respect to the Massachusetts subsidiaries of which Holyoke complains. Accordingly, we reject Holyoke's arguments in this regard. 24/

MMWEC argues that section 10(c)(2) of the Act bars the Acquisition because it will not tend toward the economical and efficient development of the Northeast-PSNH integrated public-utility system. MMWEC challenges the Commission's findings concerning potential economies and efficiencies that would result from the Acquisition and asserts that, in any event, the benefits could be achieved by contract rather than by acquisition. 25/ In

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24/ We note that the Commission has approved the existence of multiple utility subsidiaries within a single state where the statutory standards, in particular sections 10(c)(2) and 11(b)(2), were met. For example, the Central and Southwest Corporation, a registered holding company, has three electric utility subsidiaries operating in Texas, while American Electric Power Company, another registered holding company, has three electric utility subsidiaries in Ohio.

25/ We reject MMWEC's assertion that these savings could be achieved without the Acquisition. Certain synergies predicted by Northeast come about because, under the Act, Northeast must provide services to affiliates at cost. See section 13(b) of the Act and rule 90 thereunder. In the absence of an affiliate relationship with PSNH, Northeast would not have an obligation to provide services at cost, and the projected savings would not necessarily accrue.

Further, this argument assumes that PSNH could be viable indefinitely as a "stand-alone" entity. Petitioners cite the July 20, 1990 order issued by the New Hampshire Public Utilities Commission ("NHPUC") as having found that a stand-alone PSNH would be viable. Petitioners are incorrect in their characterization of this order. Although the NHPUC found that "Stand-alone PSNH is at least marginally able to support its capitalization and will survive as a viable entity" (id. at 164), it also made clear that it did not believe there was "a substantial possibility of being left with a Stand-alone PSNH" (id. at 126). The NHPUC also found

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the December Order, the Commission examined at length the economies and efficiencies associated with the Acquisition. We are satisfied that the benefits of these economies and efficiencies satisfy the public interest provision of section 10(c)(. . 26/

The parties have renewed their requests for an evidentiary hearing. They have had a further opportunity to present their arguments. We have considered these arguments, and we have reviewed the record in light of them. We conclude that Holyoke and MMWEC have failed to raise a genuine issue of material fact that could be resolved by, and thus would warrant, an evidentiary

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that there would be a "risk to the public associated with a Stand-alone PSNH." Id. at 128; see also FERC decision at 8 ("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.'"). These conclusions of NHPUC and the FERC are consistent with the Commission's own finding that "[t]he 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, of course, cannot guarantee the success of PSNH. Based upon the evidence in the record, however, we are satisfied that the merged PSNH will be in a stronger financial position than a stand-alone PSNH would be.

26/ Moreover, the Commission has recognized that a public utility's emergence from bankruptcy reorganization is a benefit that, in itself, may satisfy the standards of section 10(c)(2). See, e.g., Middle West Corp., 1 S.E.C. 514 (1936) (reorganized utility better able to serve the public). Cf. Utilities Power & Light Corp., 4 S.E.C. 131 (1938) (facilitates reorganization of the parent of a public utility); Peoples Light and Power Co., 2 S.E.C. 829 (1937) (substitution of a solvent company for an insolvent company).

hearing. 27/ Accordingly, we again deny the requests for such a hearing.

II. CONCLUSION

As explained above, the Commission conditions its approval of the Acquisition upon the FERC's issuance of a final order approving the merger under section 203 of the FPA. Subject to that condition, the Acquisition, on the terms and conditions set forth in the December Order, satisfies the statutory standards.

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 in the December Order, 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 reconsideration are granted;

IT IS FURTHER ORDERED, that the requests for an evidentiary hearing are again denied;

IT IS FURTHER ORDERED, that approval hereunder is conditioned upon the issuance of a final order of the Federal Energy Regulatory Commission that the merger of Northeast and

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27/ Wisconsin's Environmental Decade, Inc. v. SEC, 882 F.2d 523, 526 (D.C. Cir. 1989)("It is well settled that evidentiary hearings are required only when a genuine issue of material fact exists."); accord Environmental Action, Inc. v. SEC, 895 F.2d 1255, 1265-66 (9th Cir. 1990), citing Cerro Wire & Cable Co. v. FERC, 677 F.2d 124, 129 (D.C. Cir. 1982).

PSNH satisfies the requirements of section 203 of the Federal Power Act; and

IT IS FURTHER ORDERED, that the December Order, as modified, is affirmed.

By the Commission.

Jonathan G. Katz
Secretary

Dated: March 15, 1991