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VIA HAND DELIVERY

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Public Service Company of New Hampshire, Docket No. 50-443A
CITY OF HOLYOKE GAS & ELECTRIC DEPARTMENT REPLY TO CL&P/PSNH RESPONSE RELATING TO FINDING OF NO SIGNIFICANT CHANGES REGARDING ANTITRUST ISSUES

Dear Mr. Murley:

The City of Holyoke Gas & Electric Department ("HG&E") hereby replies to the Response ("Response") filed with the Commission by Connecticut Light & Power Company ("CL&P") and Public Service Company of New Hampshire ("PSNH") (collectively, "Applicants") on March 27, 1992. Applicants' Response, and this Reply, relate to the Director's finding that no "significant changes" regarding antitrust issues would result from the proposed transfer to two subsidiaries wholly-owned by Northeast Utilities ("NU") of PSNH's ownership interest in, and operating responsibility for, the Seabrook Nuclear Power Station, Unit 1 ("Seabrook").

1. The Commission's Antitrust Standard and Deferral to the FERC

Applicants argue that "the antitrust inquiry provided for in Section 105(c) [of the Atomic Energy Act ("AEA")] and enunciated in Alabama Power does not apply" unless there is a significant change in the licensee's activities since the prior review. Response at 3-4. The relevant Summer test for a "significant change" is whether the changes "have antitrust implications that would be likely to warrant

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Commission remedy."[1] Applying this test, the Applicants conclude that the existence of the FERC conditions renders any Commission remedy unnecessary, and hence there is no "significant change." The flaw in this reasoning is that the Commission does not know whether the FERC conditions are adequate to satisfy the AEA -- and therefore whether a Commission remedy would truly be unnecessary -- without examining those conditions and the anticompetitive situation that they are intended to mitigate in the context of the AEA standard.[2] Thus, it is the Applicants who engage in "circular reasoning" by arguing that no antitrust review is required because there is no antitrust problem, but that the Commission should not examine whether there really is no antitrust problem because no antitrust review is required.

Applicants assert that "it is not at all clear" that there is a "material" difference between the FERC's and the Commission's statutory standards because the FERC "applied the standards enunciated in Section 7 of the Clayton Act." Response at 5 n.9. Although the FERC noted its duty to "consider the policies underlying the antitrust laws," neither of the two FERC orders approving the NU/PSNH merger ever discussed or even cited the Clayton Act.[3] Moreover, the

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[1] South Carolina Elec. & Gas Co. and South Carolina Pub. Serv. Auth. (Virgil C. Summer Nuclear Station, Unit No. 1), 13 N.R.C. 862, 872 (1981) (emphasis omitted).

[2] In fact, it is not even clear what the final FERC conditions will be. On March 30, 1992, the FERC issued an "Order Granting Rehearing for Purpose of Further Consideration" in the NU/PSNH merger case, Docket No. EC90-10-006, raising the possibility that the FERC will further modify its conditions in response to several petitions for reconsideration that have been filed in that proceeding.

[3] In fact, the only references to the Clayton Act appear in Commissioner Trabandt's dissent to Opinion 364, in which he explains that FERC "adjudications under the Federal Power Act differ from those under the Sherman and Clayton Acts...." Dissent, slip op. at 17.

FERC emphasized that its decision looked beyond application of those laws toward different goals:

> ...[T]he competition issues addressed by the antitrust laws are only one facet of the [Federal Power Act's ("FPA")] "public interest" standard. The "public interest" under the FPA is not limited to the goals of the antitrust laws and instead is directed primarily to the broader goal of "the orderly production of plentiful supplies of electric energy .. at just and reasonable rates."

Opinion 364 at 19 (citing NAACP v. FPC, 425 U.S. 662, 670 (1976)). Since it is unclear to what extent, if any, FERC applied the Clayton Act standards, the Commission cannot assume that the Clayton Act standards are satisfied. Yet, the Notice fails to mention either the Clayton Act or the Department of Justice ("DOJ") Merger Guidelines, a fact that Applicants do not dispute.

Applicants also contend that antitrust review should be denied because "five agencies have reviewed the antitrust implications of the merger...." Response at 6. The fact is that only one agency -- the FERC -- has publicly examined the anticompetitive implications of the merger. The SEC and the NRC Director (in the Notice) both defer to the FERC analysis and imposition of conditions. Neither agency examined whether those conditions are adequate. The DOJ and Federal Trade Commission ("FTC") have never conducted a public review of the merger. To support its proposition that the DOJ and FTC have sanctioned the merger, Applicants refer twice to their own Hart-Scott-Rodino ("H-S-R") filing, but that filing is a notice filing only; lack of action by the DOJ and FTC does not constitute approval of the merger. Clayton Act § 7A(i)(1), 15 U.S.C. § 18a(i)(1). Applicants' reasoning is (once again) circular, since to argue that the DOJ should not conduct a public review because the DOJ has not "determined that the merger ... would

present any competitive problem in the region" (Response at 6) is to assume the outcome of that review before DOJ conducts it.

Finally, Applicants argue that there is no nexus between the transfer of the PSNH ownership and operating interests in Seabrook and the anticompetitive injury that would be suffered by HG&E and others. HG&E has previously demonstrated the nexus between NU's obtaining control over Seabrook's generation and transmission facilities and the market power that NU would obtain over generation and transmission in New England. HG&E June 13, 1991 Comments at 2-6. HG&E will not repeat those arguments here, and indeed, need not, because Applicants present a compelling picture of the nexus between NU's acquisition of PSNH, whose principal asset is Seabrook (indeed, Applicants' have previously described the Seabrook license transfer as an "integral part" of the merger), and the impacts on HG&E at pages 7-8 & nn. 13-14 of its Response.

2. NU's Claimed $527 Million in Savings from Efficient Nuclear Operations

Applicants do not dispute that the Commission is in a better position to judge NU's claims of managerial "excellence" in operating nuclear plants, and therefore in a better position to judge the likelihood of NU achieving the hundreds of millions of dollars of benefits NU alleges. See HG&E Request for Reevaluation at 7-8. However, Applicants imply that the issue is not relevant because (they contend) the FERC did not offset benefits of the merger against anticompetitive harm. The FERC concluded, however, that the "[t]he merger's benefits, and the mitigating effect of the conditions adopted herein, make the merger consistent with

the public interest...."[4] Since the FERC conditions only "mitigate"[5] -- rather than eliminate -- the anticompetitive harm of the merger, the FERC could only have found the merger to be "consistent with the public interest" if the FERC concluded that the remaining anticompetitive impact was outweighed by the benefits claimed by NU. This Commission should, therefore, apply its resources and experience to determine if the claimed benefits from NU's "managerial excellence" in nuclear operations are supportable.

3. The NAESCO Exculpatory Clause and the Separation of Seabrook Operation from Ownership

Applicants assert that the prior exculpatory clause applicable to PSNH was "less favorable" than the one adopted on July 19, 1990 for NU's affiliate North Atlantic Energy Service Co. ("NAESCO").[6] There are two critical differences, however. First, PSNH owned assets (principally Seabrook) that could be placed at risk if it incurred liability through its own malfeasance. NAESCO owns no assets, thereby leaving to others the responsibility to pay for any damage caused. Second,

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[4] Opinion 364 at 45 (emphasis added). Moreover, Opinion 364 reveals that the FERC considered it its responsibility to weigh the total benefits against the total anticompetitive costs of the merger: "It is sufficient if the 'probable merger benefits ... add up to substantially more than the costs of the merger.'" Id. at 16 (citing Utah Power & Light Co., 47 FERC ¶ 61,209 at 61,750).

[5] "Mitigate" is defined as "1. to cause ... to become more gentle or less hostile: Mollify 2. to make less severe, violent, cruel, intense, painful ... <disasters can be, if not prevented, at least mitigated...>." Webster's Third New International Dictionary.

[6] Applicants incorrectly claim that HG&E did not include MMWEC's arguments in HG&E's initial comments or reply comments. Reply at 8 n.16. HG&E stated in its April 1, 1991 Comments (at 1 n.1) that "HG&E hereby supports and incorporates herein the Comments being filed with the Commission today by [MMWEC], of which HG&E is a member."

the NAESCO exculpatory clause, unlike PSNH's, purports to exculpate not only NAESCO, but all of its affiliates, including NU and North Atlantic Energy Corporation ("NAEC"), the would-be owner of Seabrook.

Applicants contend that "financial realities" of the merger dictate that ownership of Seabrook be transferred to an entity other than PSNH (i.e., NAEC). Assuming this bare assertion were true (and assuming it were relevant to the Commission's review), it provides no justification for NU's proposal to segregate Seabrook operations into another, asset-less subsidiary (i.e., NAESCO). If Applicants are implying that the alleged "benefits" of the merger should allow NU to escape scrutiny by the Commission of NU's exercise of market power through the separation of operation and ownership, then the Commission should at least investigate whether the benefits alleged by NU of owning and operating Seabrook will likely accrue.

4. HG&E's Request for Clarification

Applicants do not respond to HG&E's request for clarification. HG&E renews its request that the Director clarify that the Commission's approval of the license transfer is conditioned upon NU and PSNH complying with all current and future conditions that may be imposed as a result of agency reconsideration, remand from judicial review, or otherwise in connection with the proposed merger.

Conclusion

WHEREFORE, for the reasons stated above, HG&E requests that the Director reevaluate the Notice's finding of no significant antitrust changes and, after

reevaluation, reverse the finding and initiate a formal antitrust review of the proposed transfers of PSNH's ownership and operating licenses.

Respectfully submitted,

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