New Hampshire
Yankee

Ted C. Feigenbaum
President and
Chief Executive Officer

NYN-92012

January 30, 1992

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

(c) NHY Letter NYN-91138 dated, August 28, 1991, T.C. Feigenbaum to Document Control Desk (FERC Opinion and Order Affirming In Part, Modifying In Part and Reversing In Part Initial Decision and Conditionally Approving Disposition of Facilities)

Subject: FERC Order on Rehearing, Opinion No. 364-A

Gentlemen:

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

In Reference (c), NHY submitted the decision of the FERC Commissioners approving the merger of Northeast Utilities and Public Service Company of New Hampshire subject to conditions relating primarily to the merged company's obligation to provide transmission service to third parties. Several parties motioned the FERC for rehearing of the transmission access issue. On December 10, 1991, the FERC issued an order scheduling oral argument on the issues and presented for argument a FERC Staff transmission pricing proposal. Oral argument on the motions for rehearing was held on January 8, 1992.

On January 29, 1992, the FERC, by a 5-0 vote, issued its final order on rehearing. The enclosed order modifies some of the conditions of the earlier FERC decision and appears to have addressed the most critical concerns of the States of New Hampshire and Connecticut regarding transmission service. The Connecticut Department of Public Utility Control is scheduled to issue a final decision on the merger on March 31, 1992. With the issuance of this decision, the final federal approval needed for the transfer of ownership to take place is that of the NRC.

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Very truly yours,

Ted C. Feigenbaum

TCF:AMC/ss

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 364-A

Northeast Utilities Service Company (Re Public Service Company of New Hampshire)	)))	Docket Nos. EC90-10-004, ER90-143-004, ER90-144-004, ER90-145-004 and EL90-9-004

ORDER ON REHEARING

Issued: January 29, 1992

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martin L. Allday, Chairman;
Charles A. Trabandt, Elizabeth Anne Moler,
Jerry J. Langdon and Branko Terzic.

Northeast Utilities Service Company (Re Public Service Company of New Hampshire)) Docket Nos. EC90-10-004, ER90-143-004, ER90-144-004, ER90-145-004 and EL90-9-004

OPINION NO. 364-A

ORDER ON REHEARING

(Issued January 29, 1992)

I. Introduction

On August 9, 1991, the Commission issued an Opinion and Order (Opinion) conditionally authorizing Public Service Company of New Hampshire (PSNH) to dispose of all of its jurisdictional facilities. 1/ Concurrent with the disposition of facilities, PSNH would merge with, and become a subsidiary of, Northeast Utilities (NU). (Hereinafter, the disposition of facilities and the merger will be referred to interchangeably).

On September 6, 1991, the New England Power Company (NEPCO) filed a request for rehearing and clarification. On September 9, 1991, requests for rehearing were filed by: Northeast Utilities Service Company, an NU subsidiary filing on NU's behalf; the New Hampshire Public Utilities Commission and the State of New Hampshire (collectively, New Hampshire); the Connecticut Department of Public Utility Control (Connecticut); the Vermont Department of Public Service and the Vermont Public Service Board (collectively, Vermont); the City of Holyoke Gas & Electric Department (Holyoke); the Towns of Concord, Norwood, and Wellesley, Massachusetts (collectively, MassTowns); a number of parties referring to themselves as Certain New England States and Utility Systems (NE States and Utilities); 2/ Central Maine

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1/ Northeast Utilities Service Company, Opinion No. 364, 56 FERC ¶ 61,269 (1991). The presiding judge's initial decision appears at 53 FERC ¶ 63,020 (1990).

2/ The NE States and Utilities consist of American Public Power Association, Holyoke, Maine Public Utilities Commission, Massachusetts Department of Public Utilities, Massachusetts (continued...)

Power Company (Central Maine); Canal Electric Company, Commonwealth Electric Company and Cambridge Electric Light Company (collectively, Com/Electric); Bangor Hydro-Electric Company and Maine Public Service Company (Bangor/Maine); the American Paper Institute, Inc., MASSPOWER, the Electricity Consumers Resource Council (ELCON), and Four States 3/ (collectively, QF Supporters); MASSPOWER; Boston Edison Company; and the National Association of Regulatory Utility Commissioners (NARUC). Also on September 9, 1991, NARUC filed a motion to [illegible] of time.

On September 23, 1991, the QF Supporters filed an answer to [illegible] motion for clarification.

On October 1, 1991, the Commission issued an order granting rehearing for the purpose of further consideration.

On [illegible], 1992, the Commission held oral argument on the issues of opportunity/incremental cost pricing and immutable constraint procedures, including the Commission Staff's proposed

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2/(...continued)
Municipal Wholesale Electric Company (MMWEC), MassTowns, Rhode Island Division of Public Utilities and Carriers and Rhode Island Attorney General, Ten Eastern REMVEC Utilities (the electric systems of Boylston, Braintree, Georgetown, Littleton, Princeton, Reading, Rowley, Shrewsbury, Taunton and West Boylston, Massachusetts), and Vermont.

3/ The Four States consist of the Maine Public Utilities Commission, Massachusetts Attorney General, Massachusetts Department of Public Utilities, Vermont, Rhode Island Division of Public Utilities and Carriers and Rhode Island Attorney General.

resolution of these issues. 4/ The Commission also allowed the parties to file written statements addressing these issues. 5/

On January 14, 1992, NU filed a supplemental pleading concerning certain commitments it made at the oral argument on January 8, 1992. 6/ On January 21, 1992, responses to NU's supplemental pleading were filed by Connecticut; the Ten Eastern REMVEC Utilities; the Four States, the Eastern REMVEC Utilities and the American Paper Institute, Inc.; MMWEC and the MassTowns; and the Municipal Electric Systems. On January [illegible], responses to NU's supplemental pleading were filed by the Eastern REMVEC Utilities and the New England Cogeneration Association.

In the present order, the Commission decides the merits of the requests for rehearing. The Commission generally reaffirms the Opinion in approving the merger subject to certain conditions. However, the Commission modifies some of the conditions imposed in the Opinion.

Certain arguments raised on rehearing have already been addressed by the Commission and warrant no further response. The

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4/ Participants in the oral argument were NU, Connecticut, New Hampshire, the Four States, NEPCO, a group of utilities referred to as the "Eastern REMVEC Utilities" (Com/Electric, Boston Edison Company and Montaup Electric Company), Central Maine, Bangor Hydro-Electric Company, the Ten Eastern REMVEC Utilities, a group of entities referred to as the Municipal Electric Systems (MMWEC, Holyoke, MassTowns, and the American Public Power Association), MASSPOWER, the American Paper Institute, Inc., the New England Cogeneration Association, MMWEC, MassTowns, ELCON, and the Vermont Public Service Board.

5/ Written comments were filed by the Secretary of Energy, the Connecticut Industrial Energy Consumers, and all of the participants in the oral argument except Central Maine and the New England Cogeneration Association.

6/ At the January 8, 1992 oral argument, see Tr. 6-7, 203, and in its January 14, 1992 supplemental pleading:

> NU committed that, when it competes to make off-system capacity sales with other bulk power suppliers who are relying on transmission service under NU's tariff, it would apply its transmission tariff to its own off-system sales on a non-discriminatory basis.

NU's January 14, 1992 supplemental pleading at 1.

present order generally discusses only those arguments not already adequately addressed in the Opinion.

II. NARUC's Motion To Intervene

NARUC states that it is a quasi-governmental organization whose members include the state officials charged with regulating the retail rates and services of electric and gas utilities. NARUC asserts that certain conditions imposed by the Commission in the Opinion "will directly affect the jurisdiction and operations of the State regulatory commissions in New England, who are members of the NARUC, as well as the retail ratepayers of the merged company and other New England utilities."

NARUC argues that it has a strong interest in intervening to support its transmission policy, as contained in two resolutions attached to its motion. One of these resolutions was enacted by NARUC itself and supports federal legislation promoting and protecting state authority and interests on transmission. The other resolution was enacted by NARUC's regional affiliate, the New England Conference of Public Utilities Commissioners, Inc. (NECPUC). NECPUC's resolution urges the Commission to clarify that it "does not intend to exercise broad authority over transmission siting, access, and pricing; rather, the FERC will defer to the New England States' efforts to develop a RTA [Regional Transmission Arrangement]." 7/

NARUC states that it will limit its participation to supporting NECPUC's resolution. NARUC also agrees to accept the record as it stands. NARUC states that, in light of the issues in this proceeding, NARUC was unable to adopt a position until the New England commissions reached a limited consensus. NARUC argues that this proceeding has become "a major vehicle for the consideration of important and far-reaching reforms to Federal transmission policies." 8/ NARUC asserts that, as the national representative of the state commissions sharing jurisdiction over transmission matters with the Commission, NARUC is directly affected by and concerned with the Commission's resolution of these issues.

We will grant NARUC's untimely but unopposed motion to intervene. NARUC's motion meets the requirements of section 214 of the Commission's Rules of Practice and Procedure. 9/ NARUC and its regional affiliate, NECPUC, were unable to adopt a position earlier in this proceeding because two of the New

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7/ NARUC Request for Rehearing, Appendix A at 2.

8/ NARUC Motion to Intervene at 4.

9/ 18 C.F.R. § 385.214 (1991).

England commissions support the merger, while the other commissions oppose the merger. This rift among the New England commissions was overcome only by their united opposition to certain aspects of the Opinion and constitutes good cause for NARUC's delay in filing. Moreover, NARUC's interest is not adequately represented by the other parties. Finally, NARUC's intervention will not disrupt this proceeding or place additional burdens on the other parties, since NARUC has agreed to limit its participation to supporting NECPUC's resolution and to accept the record as it stands.

III. Benefits of the Merger

A. Standard for Attributing Benefits to the Merger

The Commission ruled in the Opinion that a claimed benefit should be attributed to the merger even if that benefit was achievable without the merger. 10/ The Commission stated that, because the Federal Power Act (FPA) is not hostile to mergers and does not treat mergers as presumptively harmful, merger applicants need not prove that a merger is the only means of accomplishing the statute's objectives. The Commission rejected the contrary approach of the U.S. Department of Justice's Merger Guidelines, under which claimed merger benefits must be obtainable only through the merger. The Commission reasoned that the public interest under section 203 of the FPA is broader than the policies of the antitrust laws and that section 203 requires the Commission to approve any merger that is consistent with the public interest.

On rehearing, several intervenors challenge the Commission's conclusions. For example, the NE States and Utilities argue that the Commission should have applied the antitrust policy of the Merger Guidelines. 11/ They argue that the Commission must take antitrust policy as it finds it, and must apply that policy in the anticompetitive element of its section 203 inquiry. Similarly, MASSPOWER argues that Supreme Court precedents 12/ construing the Bank Merger Act of 1966 13/ require the

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10/ 56 FERC at 61,994-96.

11/ NE States and Utilities Request for Rehearing at 22-26. See also MassTowns Request for Rehearing at 18-19; Central Maine Request for Rehearing at 10-14; Holyoke Request for Rehearing at 5-6.

12/ United States v. Phillipsburg National Bank and Trust Company, 399 U.S. 350 (1970); United States v. Third National Bank in Nashville, 390 U.S. 171 (1968) (Nashville).

13/ 12 U.S.C. § 1828(c) (1988).

Commission to ignore claimed benefits achievable through non-merger means. 14/ MASSPOWER asserts that the FPA and the Bank Merger Act of 1966 apply the same "public interest" standard for decisions on whether to approve a merger, and that the rules for judging claimed benefits must therefore also be the same.

The intervenors argue that the Commission's ruling is contrary to a statement by the D.C. Circuit Court of Appeals 15/ that the Commission must consider whether a significant loss of competition between merging companies is offset by "compensating public benefits which otherwise were not likely of achievement." 16/

The intervenors further assert that the Commission applied different standards in analyzing the merger's benefits and anticompetitive effects. 17/ They argue that, in measuring merger detriments, the Commission gave no weight to the anticompetitive harm that could result even without the merger, i.e., the harm that could result in the future even if NU and PSNH remain unaffiliated companies. They assert that, since the Commission focused only on the incremental anticompetitive effects of the merger, only incremental benefits should be counted, i.e., benefits that could not be achieved absent the merger.

Despite the arguments on rehearing, we continue to believe that recognition of claimed merger benefits obtainable through non-merger means is appropriate. To reject such benefits because they are obtainable through non-merger means is to prefer non-merger arrangements over mergers. The Bank Merger Act has been construed as containing such a preference for non-merger arrangements, i.e., as barring a merger dependent upon benefits obtainable through other means. 18/ The same policy appears in the Merger Guidelines. The FPA, however, is not hostile to mergers, does not treat them as presumptively harmful and, thus, contains no such preference for non-merger arrangements. 19/ Since the FPA contains no preference for non-merger arrangements,

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14/ MASSPOWER Request for Rehearing at 5-9.

15/ Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1130 (D.C. Cir. 1969) (Allegan).

16/ NE States and Utilities Request for Rehearing at 26-27.

17/ Id. at 27.

18/ Nashville, 390 U.S. at 189.

19/ 56 FERC at 61,995. See Pacific Power & Light Company v. FPC, 111 F.2d 1014, 1016 (9th Cir. 1940) (PP&L).

the FPA also does not require the rejection of claimed benefits obtainable through non-merger means.

Although the Bank Merger Act and the FPA both use the phrase "public interest," this phrase is very broad and derives its meaning "from the purposes of the regulatory legislation." 20/ As explained above, the Bank Merger Act and the FPA express different policies toward mergers. This conclusion is confirmed by the Bank Merger Act's requirement that a proposed merger's anticompetitive effects must be "clearly outweighed in the public interest" by the merger's benefits, i.e., must produce a net benefit to the public. As stated by the Supreme Court, the Congressional intent of the Bank Merger Act was for:

> bank mergers first to be subject to the usual antitrust analysis; if a merger failed that scrutiny, it was to be permissible only if the merging banks could establish that the merger's benefits to the community would outweigh its anticompetitive disadvantages. 21/

The FPA, in contrast, requires only that a merger be "consistent with the public interest," not that the merger produce a net benefit to the public. 22/ As stated in Opinion No. 364, merger applicants need not show that a positive benefit to the public will result from a proposed merger. 23/

Our position is not undermined by the statement in Allegan that claimed merger benefits should be otherwise "not likely of achievement." This statement in Allegan was mere dicta, noted by the court in holding that the Commission properly accorded significant weight to a city's political decision to sell its electric system to a utility. 24/ Also, the statement cited by the intervenors was simply quoted from the Commission's order on rehearing and reflects an approach that the Commission has since abandoned. In any event, crediting only claimed benefits otherwise "not likely of achievement," is a far cry from the intervenors' proposed standard of crediting only claimed benefits otherwise "not possible of achievement." Allegan does not endorse the standard sought by the intervenors.

20/ NAACP v. FPC, 425 U.S. 662, 669 (1976).

21/ Nashville, 390 U.S. at 182 (emphasis added).

22/ PP&L, 111 F.2d at 1016.

23/ 56 FERC at 61,994. See PP&L, 111 F.2d at 1017.

24/ Allegan, 414 F.2d at 1130.

We also reject the argument that the Opinion applied different standards in assessing the merger's benefits and anticompetitive harm. In both contexts, the Commission assessed the merger's likely effects by comparing the pre-merger situation to the post-merger situation, i.e., by comparing what exists today to what will exist after the merger. In neither context did the Commission's analysis focus on the myriad of possibilities that might occur in the future absent the merger.

B. NEPOOL Savings

In the Opinion, the Commission summarily affirmed the presiding judge's decision to allow NU and PSNH, after the merger, to seek "single participant status" in NEPOOL. 25/ The Commission noted that single participant status would save the merged company approximately $364 million in NEPOOL costs, but that these costs would be shifted to other NEPOOL members.

Several intervenors argue on rehearing that the Commission should condition the merger to prevent the cost shift. 26/ The intervenors argue that the Commission inconsistently rejected a condition preventing the NEPOOL cost shift while adopting a condition limiting the merged company's NEPOOL voting rights. 27/ The intervenors argue that the Commission adopted the NEPOOL voting condition because the founding NEPOOL members did not anticipate a merger allowing two companies such as PSNH and NU to gain a veto power in NEPOOL. The intervenors assert that the Commission failed to apply the same logic in analyzing the proposed cost shift conditions, i.e., failed to conclude that such conditions were warranted because the founding NEPOOL members did not anticipate a merger causing a large cost shift.

The intervenors challenge the reliability of the primary evidence cited by the presiding judge (testimony by NEPCO witness Bigelow that the parties negotiating the NEPOOL agreement anticipated, and allowed, such merger-based cost shifts). 28/ The intervenors contend that Mr. Bigelow is bound by NEPCO's settlement with NU to support NU's request for single participant status and thus is not impartial. They also assert that Mr. Bigelow's testimony is subjective, anecdotal and speculative.

25/ 56 FERC at 61,996-97. See 53 FERC at 65,213-14.

26/ See NE States and Utilities Request for Rehearing at 3-15; Central Maine Request for Rehearing at 21-31; Boston Edison Request for Rehearing at 3-6.

27/ NE States and Utilities Request for Rehearing at 9-10.

28/ Boston Edison Request for Rehearing at 5.

They contend that it is difficult to assume that the NEPOOL founders anticipated the unique merger proposed in this case.

The intervenors argue that the Commission wrongly took for granted that allowing single participant status for the merged company will result in a massive cost shift. 29/ They state that the granting of single participant status is not per se unjust, but argue that the cost shift in this case should be prevented because it results from an anticompetitive merger.

The intervenors challenge the presiding judge's finding that the NEPOOL Agreement encourages parties to seek single participant status. 30/ They argue that, although the agreement expressly encourages eligible parties to elect single participant status, this statement is outweighed by the agreement's general prohibition against parties taking "advantage of the provisions of the Agreement so as to harm another Participant or to prejudice the position of any Participant in the electric utility business." They also note that one of NEPOOL's stated objectives is the "equitable sharing of the resulting benefits and costs."

We reject the intervenors' arguments. The evidence demonstrates that the founding NEPOOL members in fact anticipated the possibility of a merger causing a large cost shift. When the presiding judge asked Mr. Bigelow (a key negotiator of the original NEPOOL agreement) why the Commission should allow NU and PSNH to achieve NEPOOL savings at others' expense, Mr. Bigelow explained that "[t]he best way I can answer that is that when we put NEPOOL together 20 years ago, we recognized that these things might happen." 31/ Mr. Bigelow went on to state:

> 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. [32/]

29/ NE States and Utilities Request for Rehearing at 4-8.

30/ Boston Edison Request for Rehearing at 6.

31/ Tr. 4619.

32/ Id.

Mr. Bigelow's testimony on this issue is persuasive. While the intervenors challenge the reliability of Mr. Bigelow's testimony on this issue, they cite no evidence rebutting his testimony. Mr. Bigelow's unrebutted testimony on this issue is entitled to more weight than the unsupported arguments of counsel.

As to the Commission's alleged inconsistency on the issues of NEPOOL costs and NEPOOL voting, we are aware of no evidence on the NEPOOL voting issue similar to Mr. Bigelow's testimony on the NEPOOL cost issue. The Commission's decision on the issues of NEPOOL costs and NEPOOL voting is consistent with Mr. Bigelow's testimony on costs and the lack of such evidence on voting.

We see no merit in the intervenors' argument that the Commission ignored the possibility of granting single participant status yet preventing the cost shift. The primary effect of single participant status is the cost shift. Our decision to allow this status reflects our view that the NEPOOL Agreement anticipates such cost shifts. We reject the arguments that the cost shift should be barred as contrary to the public interest under section 203 of the FPA. The NEPOOL Agreement was drafted in anticipation of cost savings and set forth procedures on how such savings would be shared. No compelling reason has been raised to warrant a Commission-imposed modification of that agreement. NEPOOL will continue to produce savings after the merger. The mechanisms for sharing these savings are contained in the filed NEPOOL Agreement and do not warrant further investigation here.

Finally, we find more relevance in the NEPOOL Agreement's explicit endorsement of single participant status than in the agreement's general goal of "equitable sharing" and prohibition on members "taking advantage" of the agreement to harm or prejudice other members. The NEPOOL Agreement specifically encourages eligible parties to seek single participant status; the provisions cited by the intervenors are general, not specific. Construing the general consistent with the specific, we find single participant status for the merged company consistent with an equitable sharing, as envisioned by the NEPOOL Agreement, and not violative of the ban on taking advantage of the agreement's provisions to harm or prejudice other members.

IV. The Effect on Competition

A. The Relevant Comparison

To determine the merger's effect on competition, the Commission compared the pre-merger competitive situation with the competitive situation that would result from an unconditioned

merger. 33/ The Commission held that, contrary to NU's argument, NU's transmission commitments should be considered only in the remedial part of the Opinion, after the Commission determined what, if anything, needed to be remedied. The Commission used NU's commitments as the starting point of its conditioning analysis.

NU argues on rehearing that NU's commitments should have been considered in the Commission's competition analysis, not its remedial analysis. 34/ NU asserts that the Commission improperly considered NU's commitments as only one possibility "out of an array of potential mitigation measures." 35/ NU argues that both judicial precedent and logic require the Commission to analyze the merger's competitive effects with NU's commitments, instead of first analyzing the competitive effects of an unconditioned merger and then analyzing the remedial effects of NU's commitments. 36/

We reject NU's arguments. As stated in the Opinion, the Commission properly began its analysis by examining the unconditioned merger:

> We must compare the competitive situation which existed before the merger to the competitive situation which would result from an unconditioned merger in order to establish a baseline for determining whether the merger should be conditioned and, if so, in what ways. Without such an initial assessment, we cannot determine whether additional conditions are necessary to mitigate any anticompetitive effects of the merger. We find it sufficient, and appropriate, to

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33/ 56 FERC at 61,999.

34/ NU Request for Rehearing at 59-61. See also New Hampshire Request for Rehearing at 34; Connecticut Request for Rehearing at 41.

35/ NU Request for Rehearing at 60.

36/ NU cites United States v. Connecticut National Bank, 362 F. Supp. 240, 283 (D. Conn. 1973), vacated on other grounds, 418 U.S. 656 (1974) (Connecticut); United States v. Atlantic Richfield Company, 297 F. Supp. 1061, 1068-69 (S.D.N.Y. 1969), aff'd sub nom. Bartlett v. United States, 401 U.S. 986 (1971) (Atlantic Richfield); and White Consolidated Industries v. Whirlpool Corporation, 612 F. Supp. 1009, 1028, 1032, injunction vacated, 619 F. Supp. 1022 (N.D. Ohio 1985), aff'd, 781 F.2d 1224 (6th Cir. 1986) (White).

> consider NU's proposed transmission commitments in the remedial part of our decision, after we determine what, if anything, needs to be remedied. [37/]

The Commission's analysis of the unconditioned merger demonstrated that the merger would enhance NU's market power. The Commission then examined NU's proposed conditions and determined that these conditions, in several respects, would not adequately mitigate the merger's anticompetitive effects. For example, the Commission found that NU's proposed five-year minimum duration of tariff service, followed by individual negotiations, would not adequately mitigate NU's enhanced market power; the Commission thus required a longer duration of tariff service. 38/ The Commission found that NU's proposed seven day minimum duration of non-firm service also would not adequately mitigate the merger's anticompetitive effects; the Commission required NU to offer a one-day minimum. 39/ In these examples and in general, the Commission did not consider NU's proposed conditions as only one possibility "out of an array of potential mitigation measures." Instead, the Commission treated NU's proposed conditions as the principal mitigation measures and modified those conditions only when necessary to ensure the merger's consistency with the public interest.

The cases cited by NU do not require a different analysis. These cases stand only for the proposition that remedies proposed by merger applicants must be considered, not that such remedies must be considered in the factfinder's competitive analysis instead of its remedial analysis. In two of these cases, the merger opponents argued unsuccessfully that the merger applicants' proposed remedies should be wholly ignored. 40/ Here, the Commission has not ignored NU's proposed conditions but has considered those conditions in the Commission's remedial analysis, not its competitive analysis. In the other case cited by NU, the court used an analysis similar to this Commission's own, examining the merger applicants' proposed remedy after finding that "the permissibility of the proposed transaction

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37/ 56 FERC at 61,999 (footnote omitted).

38/ Id. at 62,033-35.

39/ Id. at 62,035.

40/ Connecticut, 362 F. Supp. at 283 (rejecting the argument that a proposed divestiture "should not be considered by the Court"); Atlantic Richfield, 297 F. Supp. at 1068 (rejecting the argument that a proposed divestiture "should be completely ignored by the court").

hinge[d] entirely upon" the efficacy of the applicants' proposed remedy. 41/

B. The Relevant Markets

NU argues that the Commission erred in finding transmission service to be a relevant product. 42/ NU argues that the relevant product is delivered bulk power, since utilities value transmission service only to the extent it allows them to obtain [illegible] that is more economical than proximate power. NU further asserts that defining transmission as a relevant product is contrary to the Commission's decision in Buckeye Pipe Line Company, 43/ in which the Commission concluded that "the relevant price for the purposes of making a determination of whether Buckeye [an oil pipeline company] can profitably increase its transportation prices above the competitive level is the delivered product price." In particular, NU cites the Commission's reasoning in Buckeye that market power in the transportation of goods can be limited by delivered product suppliers, who provide both product and transportation.

NU also argues that the Commission erred in ignoring various substitute sources of bulk power, including local non-utility generation, local utility generation and demand-side management investments. 44/ NU states that the availability of these substitute sources would defeat any effort by the merged company to use its control of transmission capacity to significantly raise prices.

NU asserts that the Commission ignored several cases involv[illegible] market-based rates in which the Commission examined the buyer's supply options to determine whether those options prevented the seller from exercising market power. 45/ NU further asserts that the Commission ignored cases in which the Commission found that New England utilities operate in a

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41/ White, 612 F. Supp. at 1028.

42/ NU Request for Rehearing at 48-53. See also New Hampshire Request for Rehearing at 33; Connecticut Request for Rehearing at 39.

43/ Opinion No. 360, 53 FERC ¶ 61,473 at 62,666 (1990), reh'g denied, Opinion No. 360-A, 55 FERC ¶ 61,084 (1991).

44/ NU Request for Rehearing at 46-47, 53.

45/ Id. at 63.

competitive environment and that NEPOOL serves an important role in assuring transmission access in New England. 46/

Despite NU's arguments on rehearing, the Commission continues to believe that transmission is a relevant product in this case. As stated in the Opinion, transmission services in New England are relevant products because they can be, and are, traded separately and because, for many buyers and all sellers, there are no substitutes for this product. 47/ Defining transmission as a relevant product is not contrary to Buckeye since the product market in that case was defined as the transportation of refined petroleum pipeline products. 48/ While the Commission measured market power in Buckeye I, by examining the delivered product price, that focus was appropriate in that case because there were adequate and competitive substitutes for the delivery of such products by Buckeye. For example, the Commission noted that Buckeye's customers could have purchased petroleum products delivered by truck instead of by pipeline. 49/ Electricity, however, cannot be delivered by truck or other means: the only mode of transportation is transmission lines. The only substitutes for transmission of electricity are local generation and demand side management. The Commission has found these options to be inadequate substitutes here, concluding that "all of these alternatives have too long a development period and the prices at which they would become available are too uncertain for them to provide adequate price-discipline in short-term power markets." 50/ On rehearing, NU has raised no arguments demonstrating otherwise. Since the record in this case demonstrates no adequate substitutes for transmission of electricity in the New England region at this time, transmission of electricity is a relevant product.

The Commission's findings here also do not contravene its findings in cases allowing market-based rates for New England utilities. The Commission's focus in those cases was on the options available to specific buyers when they selected specific sellers; the evidence in those cases addressed the options available at definite times in discrete areas. The Commission neither examined, nor reached conclusions on, the entire New

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46/ NU cites Ocean State Power, 44 FERC ¶ 61,261 (1988), and Dartmouth Power Associates Limited Partnership, 53 FERC ¶ 61,117, (1990).

47/ 56 FERC at 62,002.

48/ 53 FERC at 62,663-64.

49/ 53 FERC at 62,666.

50/ 56 FERC at 62,003.

England market. The focus here is on all of New England for all of the foreseeable future. The record in this case does not convince us that the range of options previously found available to specific buyers at specific times will be available on a dependable and timely basis throughout New England for the entire relevant period. Similarly, while the record reaffirms NEPOOL's beneficial role in coordinating utility services in New England, the record also demonstrates that NEPOOL may not satisfy all the needs for transmission access in New England. 51/ Our findings here are, and must be, based on [illegible] case, not on findings in past cases where the evidence was more limited in terms of both the size of the market and the timeframe of our analysis.

C. Market Power

The Commission found in the Opinion that the merger would increase NU's market power over the New England transmission network. 52/ The Commission explained that the merger would substantially increase NU's ownership of key New England transmission facilities. Additionally, the Commission found that the merger would reduce competition by allowing only one company, instead of two, to control transmission access by New England utilities to power from the New York Power Pool, Quebec and Maine.

The Commission also found that the merger would enhance the merged company's market power in the short-term bulk power market. 53/ The Commission noted that, after the merger, NU would control more than 65 percent of New England's surplus generating capacity from 1993 through 1998. The Commission reasoned that NU's dominant share of excess capacity would allow it to exercise market power in short-term bulk power.

NU argues that focusing on its ownership of transmission facilities wrongly ignores the extent to which those facilities are contractually committed to long-term uses. 54/ NU claims as an example that, absent capacity expansions, the merged company would control only five percent of the uncommitted transmission capacity into Eastern REMVEC in 1991 and less than 30 percent for the rest of the decade. NU asserts that analyzing total capacity instead of uncommitted capacity contradicts the

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51/ Id. at 62,006.

52/ Id. at 62,005-06.

53/ Id. at 62,006-07.

54/ NU Request for Rehearing at 57-59. See also Connecticut Request for Rehearing at 41.

decisions of federal antitrust courts, 55/ as well as the finding in the U.S. Department of Justice's Merger Guidelines that total capacity may overstate a firm's competitive significance if that capacity is already committed.

NU argues that the Commission erred in finding that the merger would end competition between NU and PSNH to provide transmission services. 56/ NU asserts that, for geographical reasons, NU and PSNH are not competitors for the transmission of power to New England's principal sub-regions (Maine, Vermont and Eastern REMVEC). NU states that: Maine utilities do not adjoin NU and have always had to use PSNH to reach southern utilities; Vermont utilities are not directly connected to NU and, as a practical matter, must use PSNH to reach NU; and only one Eastern REMVEC utility (NEPCO) can reach both PSNH and NU and thus treat them as competitors for its transmission needs. NU states that the other Eastern REMVEC utilities can reach PSNH and NU only through NEPCO and, absent the merger, have no assured long-term access over NEPCO's system.

NU also argues that its transmission commitments will allow New England utilities much more transmission access than PSNH and NU would offer as stand-alone companies. 57/ NU argues that the merger thus cannot enhance its market power in transmission markets.

As to short-term bulk power, NU argues that the merged company's share of excess capacity would provide no market power because the regional demand for such capacity is low and because other suppliers could readily meet the demand. 58/ NU also contends that the merged company's surplus capacity cannot justify transmission conditions that last longer than the surplus or involve more power than the amount of the surplus.

We reject NU's argument that ownership of transmission capacity is an inappropriate measure of market power in this case. Our focus here is on market power over both the long run and the short run. We are concerned with the merged company's market power not only in the year after the merger's consummation, but also into the future. Ownership is an

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55/ NU cites United States v. General Dynamics Corp., 415 U.S. 486 (1974) (General Dynamics).

56/ NU Request for Rehearing at 53-57.

57/ Id.

58/ Id. at 61-62. See also New Hampshire Request for Rehearing at 35; Connecticut Request for Rehearing at 39-40.

appropriate measure of control of transmission services over the long run.

Availability of transmission capacity, in contrast, changes upon contract expiration, and can change even more quickly depending upon other factors. A company owning contractually-committed transmission capacity may have little market power today but gain substantial market power when the contracts expire. The extent to which contractual access mitigates a transmission owner's control thus depends on such factors as the length of the contracts and the other contractual terms. When such information is complete and available for the entire time period, contract rights to long-term firm transmission service can be a relevant consideration.

In this case, however, the record on availability of transmission capacity is incomplete. Since contractual commitments are not identified by each facility's owner, there is no record of how much of the available capacity will be controlled by the merged company on interfaces with more than one owner. Also, the terms of existing contracts are not described. Availability of the merged company's transmission facilities cannot be determined without contract-by-contract identification of, inter alia, the owner of the facility, the duration of the contract, and the terms of the commitment. Moreover, even if all of this information were in evidence, availability alone would still be insufficient to determine the merger's effect on NU's control of transmission facilities over the merger's indefinite time span. While this merger is expected to continue indefinitely, NU's contracts do not. Thus, in our view, ownership remains a proper consideration in this case.

NU's claim that it will control only five percent of the uncommitted transmission into Eastern REMVEC in 1991 is unconvincing. NU derived this number through an apples-and-oranges comparison, dividing its share of uncommitted transmission capacity into Eastern REMVEC by the total transmission capacity into Eastern REMVEC. The proper comparison is between NU's uncommitted capacity and all uncommitted capacity or between NU-owned capacity and total capacity. NU has further skewed the calculation by reducing its amount of uncommitted capacity to reflect transmission commitments not supported by record evidence.

While the court in General Dynamics focused on uncommitted coal reserves and not contractually-committed reserves, coal can be used only once; once committed by contract, coal reserves generally do not revert to the owner and become a renewed source of market power. Contractually-committed transmission capacity, in contrast, is generally usable again; when the contracts expire, once-committed transmission capacity reverts to the owner and can again be the source of market power.

The Commission also rejects NU's argument that the merger would not reduce the competitive options available to New England utilities. Contrary to NU's argument, this reduction in competitive options does not depend on whether all such utilities are directly interconnected with both PSNH and NU. Instead, the Commission's conclusion rests on the existence of major strategic corridors and interfaces of electric trade in New England. Buyers and sellers need to use the strategic corridors even if they are not directly connected to them. Thus, a utility controlling the strategic corridors may have market power over utilities that are not directly connected to the corridors. The relevant markets in this case are characterized by two strategic corridors: one, controlled by NU, to the south and west and the other, controlled by PSNH, to the north and west. 59/ These corridors are essential paths between buyers and sellers in the New England market, constituting the links used by many buyers and sellers to conduct electricity trade. Certain utilities may require additional contract arrangements to reach those corridors. Even utilities requiring such ancillary arrangements, however, are likely to seek access to power supply sources available over either of these two corridors. After the merger, both corridors will be controlled by NU, not by independent and self-interested companies. Thus, contrary to NU's argument, NU's potential market power is not limited to those utilities with which it is directly interconnected and an unconditioned merger would in fact reduce the competitive transmission options in New England.

We again find that this merger is not justified solely by NU's argument that the merged company will offer more transmission access than NU and PSNH would have offered absent the merger. According to NU's argument, any merger of any number of companies could be justified by the most meager and meaningless improvement in transmission access, regardless of the merger's effect on competition. We find no warrant for such an analysis and do not believe that such an analysis would protect the public interest. As we stated in the Opinion:

> Even assuming that NU's transmission commitments will improve the transmission service offered by the applicants, this fact alone would not render the proposed merger pro-competitive, as claimed by NU. The issue is not simply whether the merged company will

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59/ 56 FERC at 62,005-06. See also Utah Power & Light Co., Opinion No. 318, 45 FERC ¶ 61,095 at 61,284-85 (1988), order on reh'g, Opinion No. 318-A, 47 FERC ¶ 61,209 (1989), order on reh'g, Opinion No. 318-B, 48 FERC ¶ 61,035 (1989), remanded on other grounds sub nom. Environmental Action, Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991).

> offer improved transmission service. NU's argument ignores the other focal point of the anticompetitive analysis: the merged company's increased market power and incentives to use that power. Thus, in our view, the issue is whether the transmission service to be offered sufficiently mitigates the anticompetitive effects of the merged company's increased market power and incentives. NU's commitments do not adequately mitigate the merger's anticompetitive effects. [60/]

NU has not persuaded us otherwise on rehearing.

We agree with NU that excess capacity, in and of itself, is not a source of market power in the short-term bulk power market. Excess capacity shows the amount of capacity readily available but not yet demanded in the market. However, changes in circumstances, *e.g.*, demand growth, can convert excess capacity into a sought-after good. The opportunity to exercise market power arises if the ownership of the readily-available capacity is concentrated in a single entity and such a change in circumstances occurs. Here, NU is expected to control more than 65 percent of the excess capacity in New England during this decade. Moreover, many New England utilities expect to need additional generating capacity during this time. 61/ While some of these utilities plan on meeting their need with newly-built capacity, 62/ construction of generation capacity is subject to delays. 63/ As the dominant source of existing surplus capacity, NU will be able to exercise market power in short-term bulk power markets, absent conditions.

Finally, we reiterate that the Commission's conditions are imposed to mitigate enhanced market power in two markets: transmission and short-term bulk power. The merged company's market power in transmission will be broader, and will last for the foreseeable future. While NU's enhanced market power in short-term bulk power may dissipate over time, its enhanced market power in transmission fully warrants the scope of the Commission's conditions.

60/ 56 FERC at 62,012.

61/ Ex. 176 at 2.

62/ *Id.* at 1.

63/ *E.g.*, Tr. 5831.

V. Conditions

A. Disposition of the Merger

The Commission decided in the Opinion to approve the proposed merger subject to certain conditions. 64/ The Commission found that the merger would produce substantial benefits, but that these benefits were outweighed by the merger's likely anticompetitive effects. The Commission concluded that the public interest supported approving the merger, and thus realizing the merger's benefits, while conditioning the merger to mitigate its likely anticompetitive effects.

NU asserts that the Commission never meaningfully weighed the costs and benefits of the proposed merger. 65/ According to NU, the merger would save ratepayers approximately $800 million, resolve PSNH's bankruptcy on a basis that leaves PSNH financially strong, enhance transmission access on the NU system, and place NU's "highly regarded" nuclear organization in charge of operating the Seabrook Nuclear Plant. 66/ NU argues that the Commission makes only passing reference to these benefits but never weighed them properly against the merger's costs.

The MassTowns argue that monetary benefits do not offset anticompetitive harms, since the benefits and harms are of different types and affect different groups. 67/ The MassTowns assert that this merger's benefits accrue solely to NU's stockholders and possibly its customers, while the anticompetitive harms will affect everyone else in New England, plus others in surrounding areas who will be less able to trade with suppliers or customers in New England.

We find the arguments on rehearing unpersuasive. While NU claims that the Commission "never meaningfully weighed" the merger's costs and benefits, NU offers no different method for "meaningfully" weighing such costs and benefits. NU instead offers only conclusory arguments against the results of the Commission's method. We stand by our judgment in the Opinion.

The MassTowns' argument that the merger's monetary benefits do not offset its anticompetitive harm ignores the conditions imposed by the Commission. These conditions adequately mitigate the merger's anticompetitive harms. The proposed merger, with

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64/ 56 FERC at 62,011.

65/ NU Request for Rehearing at 44.

66/ Id.

67/ MassTowns Request for Rehearing at 20.

these conditions and in light of the merger's benefits, is consistent with the public interest.

B. General Transmission Commitments

1. Existing Transmission Capacity

a. Native Load Priority

Under NU's General Transmission Commitments ("GTC"), NU sought to limit its obligation to provide wheeling service out of existing transmission capacity by reserving: (1) a temporary priority for the transmission of existing surplus generation on NU's system (later expanded by NU to all existing NEPOOL surplus generation); and (2) an absolute priority for power purchases made on behalf of its native load customers. 68/ In rejecting these native load priority reservations, the Commission ruled that firm transmission service should generally be accorded priority over non-firm service, even if the latter would otherwise benefit the merged company's native load customers. 69/ However, the Commission allowed the merged company to reserve firm transmission capacity needed to ensure reliability of service to its native load customers and to honor existing contractual commitments to others. The Commission allowed NU to use transmission capacity reserved for system reliability for non-firm transactions.

NU argues that the Commission's rejection of these native load priority provisions was not based upon a merger-related change in competitive conditions. 70/ According to NU, the decisive question is whether the merger will enhance market power by significantly reducing buyers' alternatives compared to their alternatives absent the merger. NU argues that, absent the merger, both NU and PSNH would have an unfettered right to use their transmission systems for economy trades on behalf of their native load customers. NU asserts that buyers' alternatives will not be affected by the continuation of that practice after the merger and that the Commission's conditions lack a sufficient legal nexus to any merger-related anticompetitive harm.

68/ Ex. 178 at 1.

69/ 56 FERC at 62,018-21.

70/ NU Request for Rehearing at 34-37. See also New Hampshire Request for Rehearing at 36; Connecticut Request for Rehearing at 37-38.

NU also argues that a native load priority for economy trades is not anticompetitive. 71/ NU asserts instead that a utility's use of its transmission system for economy trades to reduce its customers' costs furthers the antitrust goal of lowering consumer prices. NU argues that courts have consistently held that even a monopolist controlling essential facilities need not allow access by others if their use would increase costs for its customers. 72/ In particular, NU states that two courts recently have held that reserving a native load priority for non-firm transactions is not anticompetitive. 73/ NU also argues that the efficiency gains of its economy trades are no less protected by the antitrust laws than the efficiency gains of utilities supplanting NU's economy trades. 74/

NU argues that the Commission's priority provisions would improperly favor the non-firm transactions of others over NU's non-firm transactions. 75/ NU asserts that its wheeling customers may purchase firm service and use the capacity for non-firm transactions. NU asks the Commission to require that wheeling customers "either be using the service for their own firm capacity transactions or lose any priority . . . over NU's own non-firm uses." 76/ Alternatively, NU proposes to allow firm wheeling under its compliance tariff "only for firm capacity that would be specified in the request for service." 77/

If the Commission reaffirms its ruling on priorities, NU asks the Commission at least to clarify the scope of the

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71/ NU Request for Rehearing at 37-42.

72/ NU cites a number of cases, including Illinois v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1486 (7th Cir. 1991), and Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360, 368-69 (9th Cir.), cert. denied, 488 U.S. 870 (1988). See also New Hampshire Request for Rehearing at 29 n.17, 36-37; Connecticut Request for Rehearing at 13.

73/ NU cites Cities of Anaheim v. Southern California Edison Co., 1990-2 Trade Cas. (CCH) ¶ 69,246 (C.D. Cal. 1990), appeal pending, No. 90-56375 (9th Cir.), and City of Vernon v. Southern California Edison Co., 1991-1 Trade Cas. (CCH) ¶ 69,336 (C.D. Cal. 1990).

74/ NU Request for Rehearing at 42-43.

75/ Id. at 65-66; New Hampshire Request for Rehearing at 12.

76/ NU Request for Rehearing at 66.

77/ Id.

"reliability" exception. 78/ NU argues that this exception is unclear and could be construed as applying to only as much transmission capacity as NU needs to ensure compliance with NEPOOL and Northeast Power Coordinating Council reliability criteria. NU suggests that:

> It is important that "reliability" be defined to include interconnection capacity that -- although not strictly necessary for the utility to meet its minimum capacity resource obligations -- was installed to "back-up" large generation additions on a system and to enhance reliability in emergency conditions. [79/]

NU asserts that defining "reliability" as excluding such capacity would discourage the future construction of such capacity.

New Hampshire argues that eliminating the native load priority will result in less transmission capacity being available. 80/ New Hampshire asserts that, without a native load priority, state siting authorities will approve only the bare minimum of transmission upgrades or will impose conditions in order to protect native load customers, while state regulators will deny cost recovery for transmission facilities used for third-party wheeling. New Hampshire also argues that preserving the native load priority only for reliability purposes is meaningless in this case because reliability in New England is assured by NEPOOL. 81/

New Hampshire asserts that elimination of the native load priority is particularly onerous in light of the presiding judge's findings that: (1) NU and PSNH have planned their transmission systems primarily to serve native load customers; (2) native load ratepayers of NU/PSNH, not future transmission customers, have borne the costs of the existing system; and (3) the native load ratepayers have used the existing system, planned on it and relied on it. 82/

78/ Id. at 26-31.

79/ NU Request for Rehearing at 27.

80/ New Hampshire Request for Rehearing at 6-14.

81/ New Hampshire Request for Rehearing at 11-12. See also NU Request for Rehearing at 7-8; Connecticut Request for Rehearing at 17 n.19.

82/ New Hampshire Request for Rehearing at 21-22. See 53 FERC at 65,221-22.

New Hampshire contends that the Commission lacks authority to preclude "economic" service to NU/PSNH native load customers. 83/ New Hampshire states that the FPA limits the Commission's authority to matters not regulated by the states and that the Commission "has no authority to set retail rates, to abrogate retail tariffs, or to preclude NU/PSNH from using its system to provide 'economic' service to its customers." 84/ In particular, New Hampshire contends that sections 202 and 212 of the FPA 85/ both prohibit the Commission from issuing any wheeling order impairing a utility's ability to provide adequate service, as opposed to just reliable service. 86/

The NE States and Utilities argue that firm wheeling should have the same priority as reliability of service to NU's native load. 87/ They argue that firm wheeling customers have their own native load customers and that reliability of their customers' service also deserves protection. They argue that a priority for NU's native load reliability is thus discriminatory, unjust and anticompetitive. They also argue that a priority for native load reliability is inconsistent with the Commission's rules requiring that natural gas pipelines offering open access transportation must do so on a non-discriminatory basis.

The MassTowns assert that NU should be required to give all firm wheeling the same priority as NU's native load. 88/ Alternatively, the MassTowns argue that wheeling customers should be assured of receiving capacity credit within NEPOOL regardless of the transmission service priority. The MassTowns assert that these conditions, if not applied to all power wheeled by NU, should at least be applied to any New York Power Authority (NYPA) preference power wheeled by NU.

The MassTowns assert that the Commission erred in allowing NU to reserve, and use for economy trades, transmission capacity needed for reliability of service to native load customers. 89/ The MassTowns assert that this principle is too vague and is subject to overreaching by NU. The MassTowns also argue that

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83/ New Hampshire Request for Rehearing at 23-26.

84/ Id. at 23.

85/ 16 U.S.C. §§ 824a and 824k (1988).

86/ New Hampshire Request for Rehearing at 26-28.

87/ NE States and Utilities Request for Rehearing at 15-20.

88/ MassTowns Request for Rehearing at 2.

89/ Id. at 2-6.

the Commission arbitrarily based its ruling on NU testimony in this proceeding that it built certain transmission lines for reliability of service to its native load, while the Commission ignored contemporaneous and contrary NU testimony that the lines were built to serve all of New England. 90/

Bangor/Maine argue that the Commission erred by not eliminating a priority for native load growth over wheeling services. 91/ They assert that the Commission eliminated a priority for native load growth for natural gas pipelines in Order No. 436. 92/ They argue that the Commission arbitrarily failed to explain its departure from the course taken in Order No. 4[illegible]

In response to these arguments by NU and the intervenors, we again reiterate that under no circumstances will NU be required to provide firm wheeling service out of existing transmission capacity where doing so would impair or degrade reliability of service to native load customers. 93/ In Opinion No. 364, the Commission defined "native load customers" as those customers on whose behalf NU, by statute, franchise or contract, [illegible]

90/ The MassTowns cite Ex. 123-II at 5-6 and Western Massachusetts Electric Co., 39 FPC 723, 732-33 (1968), reh'g denied, 40 FPC 296, aff'd sub nom., Municipal Electric Ass'n of Mass. v. FPC, 414 F.2d 1206 (D.C. Cir. 1969).

91/ Bangor/Maine Request for Rehearing at 17-21.

92/ Order No. 436, FERC Stats. and Regs., Regs. Preambles 1982-85 ¶ 30,665 (1985), vacated, Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988). Bangor/Maine assert that, although Order No. 436 was vacated, the Commission put Order No. 436 back into effect through Order No. 500, FERC Stats. and Regs., Regs. Preambles 1986-90 ¶ 30,761 (1987), vacated, American Gas Ass'n v. FERC, 888 F.2d 136 (D.C. Cir. 1989), cert. denied, 111 S.Ct. 373 (1990).

93/ The GTC also expressly allow NU to not provide transmission service out of existing transmission facilities if NU needs those facilities to meet "then-existing contractual commitments" to others. Ex. 178 at 1. We approved this provision in Opinion No. 364, stating that "[t]o the extent that this provision prevents NU from reallocating the use of existing transmission capacity from 'then-existing contractual commitments' to other subsequent arrangements, and from subjecting such 'commitments' to incremental cost pricing because of a subsequent transmission constraint, we find this provision acceptable in this proceeding." 56 FERC at 62,014.

undertaken the obligation to plan, construct, and operate its system to provide reliable service. 94/ In our view, this definition includes both NU's retail native load customers, as well as its wholesale full and partial requirements customers, to the extent NU must provide power supply services to these types of customers. 95/ NU's retail native load customers have a right to service that stems from state statute and/or franchise law. In contrast, NU's wholesale requirements customers' rights to service are defined by contract. See Electric Rates; Construction Work in Progress; Anticompetitive Implication, Docket No. RM86-6-000, Order No. 474, FERC Stats. & Regs. ¶ 30,751 at p. 30,716 (June 18, 1987). Thus, while the basis of the obligation to plan, construct and operate transmission varies depending on whether the customer is a retail customer or wholesale requirements customer, NU has the obligation nonetheless. In return for the utility's obligation to serve, NU's native load customers are responsible for the fixed costs of the transmission system and contribute to those costs through retail and wholesale rates. Accordingly, NU should be allowed to give priority to providing safe and reliable service to its native load customers using existing transmission capacity built to serve those customers.

Many intervenors have requested that the Commission offer some guidance as to the meaning of reliability, arguing that NEPOOL already ensures "that the lights do not go out." Similarly, NU asks the Commission to clarify that:

> (1) some reservation of transmission capacity to back-up NU's large generating units is legitimate, and reliability-related, (2) transmission capacity that is used to provide generation reserves cannot be fully preempted by third parties for their own wheeling transactions, and (3) "reliability" encompasses capacity needs for some reasonable planning horizon into the future. [96/]

We generally agree with the principles proposed by NU but, on NU's third point, will require that any capacity needed for reliability purposes within a reasonable planning horizon must be offered for wheeling use until NU expects to need the capacity

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94/ 56 FERC at 62,014 n.259.

95/ As discussed in n. 93 and on p. 42, we do not intend the merger conditions to abrogate NU's existing contractual commitments, whether for sales, purchases or transmission.

96/ NU Request for Rehearing at 30-31.

for reliability reasons. Also, in these circumstances, native load growth must bear its pro rata share of the incremental cost of expansion. That is, if an upgrade is planned to meet the needs of both native load and wheeling customers, both sets of customers must bear part of the incremental cost. We also recognize the difficulty in precisely demarcating transmission needed for "reliability" purposes from transmission needed for "economic" purposes. This task, however, belongs in the first instance to NU. 97/ We note that if NU seeks and is allowed to recover some amount of opportunity costs, as discussed in the next section, this should reduce any incentive for NU to overestimate the amount of existing transmission capacity needed for native load reliability purposes.

On rehearing, NU also seeks to limit the types of transactions for which a wheeling customer may use transmission capacity it has purchased from NU on a firm basis. Specifically, NU seeks authority to require "that purchasers of firm transmission must either be using the service for their own firm capacity transactions or lose any priority that this service would have over NU's own non-firm uses." 98/ This request is denied. Moreover, at oral argument, NU conceded that it has no problem with allowing a purchaser of firm transmission service from NU to resell it, "as long as the transaction to which it is resold doesn't have a different electrical impact on the NU system." 99/ In light of this concession, NU's rehearing on this point appears to be moot.

In light of the conditions imposed in Opinion No. 364, the ability of the third-party transmission customer to reassign its transmission rights provides further assurance that the merged company will not be able to exercise market power. Without reassignment rights, a third party might hesitate in making the financial commitments to obtain long-term firm transmission service. Reassignment will allow the third party, during periods when it does not need the transmission service for itself, the

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97/ Clearly, any party denied wheeling service out of existing transmission capacity because of "reliability" concerns would be free to challenge the basis for NU's refusal. NU would be required to justify its position upon such complaint. And, such a challenge would not relieve NU of its obligation to build new transmission facilities to meet the request. See Section V.B.2.a, infra.

98/ NU Request for Rehearing at 66.

99/ Oral argument on January 8, 1992, Tr. 20.

opportunity to recover some of the revenue it pays NU from other third parties and thus reduce its costs. 100/

Accordingly, we will require NU's compliance filing to include a specific provision within its firm transmission tariff permitting a purchaser of firm transmission to reassign transmission rights on a firm or non-firm basis, so long as the assignment would not affect operational terms or conditions of the original sale (e.g., the point of receipt, point of delivery, quantity). If NU believes the assignment would impose any additional costs upon NU, the burden of filing for recovery of the additional costs and the verification thereof will rest with NU. We note that the New Hampshire Corridor Proposal explicitly provides that transmission service rights are transferable in whole or in part. 101/

b. Opportunity Cost Pricing For Firm Transmission Service

Opportunity costs, in the context of electricity transmission, are the revenues lost or costs incurred by a utility in providing third-party transmission service when transmission capacity is insufficient to satisfy both a third-party wheeling request and the utility's own use. For example, opportunity costs might include the revenues lost or costs incurred because a utility must reduce its own off-system purchases or sales in order to overcome a constraint on the grid. 102/

The Commission stated in the Opinion with regard to opportunity cost pricing for non-firm transmission service:

> Under the conditions imposed here, however, we are requiring NU to upgrade its

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100/ See generally, Pacific Gas and Electric Company, 53 FERC ¶ 61,145 at 61,505 (1990).

101/ Ex. 154 at 6.

102/ This example obviously is not intended to constitute the universe of possible "opportunity costs." However, as discussed below, opportunity costs must be legitimate, verifiable costs incurred by a utility and clearly must not include monopoly rents. As even NU acknowledges, "[l]egitimate lost opportunity costs do not include the loss of revenues that result from losing a wholesale sale because of competition and do not include foregone revenues from purchase and resale (brokering) transactions such as those condemned in Utah Power & Light." NU Request for Rehearing at 23 (emphasis in original).

> transmission system when necessary to satisfy requests for firm transmission service and to offer firm transmission service by tariff at a cost-based rate. It is possible that these conditions will sufficiently mitigate NU's market power over transmission customers so as to render the imposition of lost opportunity charges just and reasonable for non-firm service. [103/]

However, the Commission declined to decide the issue until such time as NU filed a specific proposal seeking to recover lost opportunity costs through a non-firm transmission rate. 104/

On rehearing, NU argues that opportunity cost pricing is appropriate for firm transmission service because "it is firm transmission service that the Commission has afforded a priority over non-firm transactions on behalf of native load customers." 105/ In support of its proposal, NU argues that opportunity costs do not represent monopoly profits but merely reimburse NU for real costs resulting from the provision of transmission service. 106/ Furthermore, NU notes that any opportunity costs recovered through third-party firm wheeling service would be flowed back to native load customers to reduce their revenue requirement. 107/

NU argues that the Commission's conditions, unless modified to allow recovery of lost opportunity costs for firm service, will impede the efficient operation of bulk power markets and threaten economic harm to the residences of Connecticut and New Hampshire. 108/ NU asserts that the Commission's conditions would allow a firm wheeling customer to preempt NU's economy trades even when the customer's use of the transmission capacity is less efficient than NU's. As an example, NU hypothesizes that

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103/ 56 FERC at 62,027.

104/ The Commission also noted that the issue of whether lost opportunity costs are properly includable in a rate for non-firm transmission service is currently pending in another section 205 proceeding involving NU. Id. That proceeding, in Docket Nos. ER90-373-000, et al., is being decided concurrently with this one.

105/ NU Request for Rehearing at 18.

106/ Id. at 22.

107/ Id. at 23.

108/ Id. at 19-22.

a customer could be expected to use NU's transmission capacity for any firm wheeling that allows the customer to realize savings greater than NU's wheeling rates, even if those savings are much less than the amount NU could save for its native load by using the capacity for economy trades.

NU also asserts that the recovery of opportunity costs for firm service would not eliminate incentives for NU to expand transmission capacity. 109/ NU notes that, under the GTC, NU must build new transmission capacity when constraints exist. NU suggests alternatively that lost opportunity costs could be capped, after a reasonable period of up to five years to allow expansion of the system, to no more than the incremental cost of expansion.

Connecticut argues that NU should not have to provide firm wheeling when: (1) the capacity is needed to maintain reliability for native load customers; (2) the capacity is needed for reasonably foreseeable economy sales or purchases, unless the wheeling customer pays NU's opportunity costs; or (3) the use of the capacity would impose incremental costs on NU, unless the customer agrees to pay the incremental costs. Connecticut's proposal would require NU to credit to native load rates any revenues received for opportunity costs or incremental costs.

Connecticut suggests that the Commission can cap any transmission rate increases for foregone economic transactions at the competitive price levels set in the New England bulk power markets. Connecticut also suggests that the Commission may consider allowing a wheeling party to elect either: (1) a variable increment to its transmission rate based on purchases or sales actually foregone in the future; or (2) a fixed increment to its transmission rate based on NU's reasonable current estimate of future foregone sales and purchases.

As a result of the concerns raised on rehearing with regard to native load priority under the GTC as modified in Opinion No. 364, the Commission, on January 8, 1992, held oral argument "on the subject of opportunity/incremental cost pricing and immutable constraint procedures . . . ." 110/ While the Commission did

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109/ Id. at 24-25.

110/ See Northeast Utilities Service Company (Re. Public Service Company of New Hampshire), et al., 57 FERC ¶ 61,340, mimeo at 2, Ordering Paragraph (A) (Dec. 10, 1991). In the December 10 order, the Commission also scheduled oral argument on these topics in Northeast Utilities Service Company, Docket Nos. ER90-373-003, et al. However, while oral argument on both cases was held sequentially on January 8, the Commission did not consolidate the proceedings.

not limit the substantive scope of either the written or oral presentations by the parties on these subjects, the Commission did request that the parties address Staff's Proposed Transmission Pricing Proposal (and seven identified questions), which were attached to the December 10 order. 111/

Certain parties, including NU and the Connecticut and New Hampshire Commissions, supported the adoption of Staff's proposal, with certain clarifications/modifications. Other parties, including the other New England state commissions, opposed the adoption of Staff's proposal. These parties raised a variety of objections, including due process concerns, discrimination concerns, and potential administrative problems with implementing the specific pricing principles set forth in Staff's proposal.

We are now confronted with the need to provide NU with enough specificity regarding what it will be allowed to propose for the pricing of future third-party wheeling service, so that the company can decide whether to proceed with the merger. We also cannot ignore the need to act as expeditiously as possible given the commercial realities and time pressures presented in corporate matters subject to our jurisdiction, 112/ and in particular the need to resolve a bankruptcy situation. 113/ At the same time, we are confronted with the need to ensure an adequate record on pricing issues and to afford all parties an adequate opportunity to voice their objections.

Balancing these respective needs, we conclude that the best course is to provide guidance on pricing issues, but to defer specific pricing issues to the compliance phase of this proceeding, or to subsequent cases where the Commission may consider specific proposals from NU in a concrete, factual

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111/ Id., mimeo at 1 and Attachment B.

112/ Gulf States Utilities Co. v. FPC, 411 U.S. 747, 762-63 (1973).

113/ While PSNH is now operating on a stand-alone basis, it is still subject to the continuing jurisdiction of the bankruptcy court, and PSNH's bankruptcy will not be resolved until necessary regulatory approvals are received. We also note that this proceeding presents the differing interests of various state commissions actively representing the interests of their respective stakeholders. While much has been said about a possible Regional Transmission Arrangement (RTA) that is being negotiated in New England, the simple fact is that we have not yet been presented with such a document. We nevertheless encourage the respective interests in New England to complete this undertaking.

setting and with a more developed record. 114/ At this time, the Commission believes it is appropriate to announce certain basic goals that will guide our subsequent deliberations.

We find the three broad goals stated in the Staff's pricing proposal 115/ to be appropriate in deciding pricing for NU's transmission service. First, the native load customers of the utility providing transmission service should be held harmless. 116/ Second, transmission customers should be charged the lowest reasonable cost-based rate for third party firm transmission service. Third, the pricing should prevent the collection of monopoly rents by the transmission owner and promote efficient transmission decisions. In ruling on specific proposed rates, we will balance these three goals in light of the facts and circumstances presented at that time.

We believe that these pricing goals are fully consistent with our statutory responsibility to ensure that NU's transmission commitments, 117/ as modified by this Commission, fully mitigate the increased market power of the merged company. We do not believe that mitigating NU's market power over transmission involves establishing transmission rates that do not fully compensate NU for legitimate and verifiable costs that it may incur to provide transmission service.

114/ This is the basic approach that the Commission has followed in other recent section 203 cases. See, e.g., Utah, 45 FERC at 61,292; Kansas Power and Light Co., 54 FERC ¶ 61,077 at 61,252 (1991); Utilicorp United, Inc., 56 FERC ¶ 61,031 at 61,119, reh'g denied and clarification granted, 56 FERC ¶ 61,427 at 62,528-29 (1991). We note that we addressed the issue of opportunity cost pricing for non-firm transmission services and so-called out-of-rate charges for firm transmission services in Docket Nos. ER90-373-003, et al., issued concurrently with this order.

115/ 57 FERC ¶ 61,340, Attachment B, mimeo at 4.

116/ See Section V.B.1.a, supra, for the definition of native load customers. NU concedes that holding native load harmless does not include pricing which allows collection of monopoly rents. Oral Argument of January 8, 1992, Tr. 183.

117/ These commitments include those set forth in NU's January 14, 1992 supplemental filing, as well as its agreement to permit reassignment of firm transmission service. See supra at ____, mimeo at 3, 27. To avoid any misunderstanding, we specifically condition our approval of the merger on these commitments, in addition to the other conditions set forth in Opinion No. 364 and in this order.

In announcing these transmission pricing goals, we do not foreclose the possibility that there may be different costing methodologies that meet the three basic goals. Accordingly, NU on compliance may propose rates which include legitimate, verifiable opportunity costs, or any methodology it believes will meet the three goals. If NU does file a proposal to recover opportunity costs, it should address the following issues: (1) whether opportunity costs should be capped by incremental expansion costs or any other cap; (2) whether current wheeling and wholesale requirements customers should be treated differently from future wheeling and wholesale requirements customers, e.g., by receiving "grandfather" rights to embedded cost rates for the amount of transmission capacity they already use; (3) how NU will identify those customers responsible for growth on its system and what particular new facilities are necessary to accommodate that growth; (4) whether and how third parties should be protected from uncertainty regarding fluctuations in opportunity costs; (5) how the proposed rates will prevent the collection of monopoly rents; and (6) how the proposed opportunity costs will be verified. 118/ On compliance, NU shall file a pricing proposal which will meet the above goals and general pricing approach and address the enumerated issues, and others may oppose NU's proposal as they see fit.

c. Tie line Adjustment Charges

Connecticut argues on rehearing that tie line adjustment charges represent a cost to NU associated with providing firm transmission service over the New York tie line. 119/ Accordingly, Connecticut suggests that NU should be allowed to recover these charges, as well as other costs from wheeling customers. However, in light of the limited record developed so far on these charges, we decline to rule on the merits of these

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118/ We note that in the oral argument and in written comments filed before the oral argument, certain parties argued that opportunity cost pricing would be inconsistent with the non-discriminatory pricing the Commission has required of pipelines transporting natural gas. On January 14, 1992, NU filed a commitment, discussed supra at ____, mimeo at 3 n.6, in response to these arguments. However, we need not address these arguments at this time. In its compliance filing, NU must specifically show how its commitment will work with regard to non-discriminatory pricing and non-discriminatory terms and conditions of service. At that time, parties may raise discrimination arguments.

119/ Connecticut Request for Rehearing at 31-33.

charges at this time. 120/ Rather, NU may propose the recovery of such costs in its compliance filing, with NU bearing the burden of proof, and all affected customers will have the right to challenge these claimed costs.

2. New Transmission Capacity

a. Cost Responsibility and Pricing for Transmission Upgrades

The Commission ruled in the Opinion that the merged company may be allowed in certain circumstances to charge its transmission customers the incremental costs of the specific facilities used to provide service. 121/ The Commission generally described the test as a "but for" test under which incremental cost pricing would be appropriate when firm wheeling across a particular interface would degrade reliability absent upgrades. The Commission declined to decide certain other pricing issues, including the issue of whether NU may charge a wheeling customer both a pro-rata charge for particular facilities and a rolled-in rate for the rest of NU's transmission system. The Commission stated that the proper forum to decide the details of cost responsibility issues is a section 205 rate case. The Commission stated that, in such cases, NU must justify any direct assignments of costs and support any arguments that reliability is degraded by a particular firm transmission service.

NU construes the Opinion as requiring embedded cost pricing unless the transmission upgrades are: (1) built in order to serve wheeling loads (the "but for" test) and (2) shown to be needed for "reliability" purposes. 122/ NU argues that the "reliability" limitation was not suggested in any testimony and is not based on any economic efficiency principle of which NU is aware. NU argues that the "reliability" limitation is simply a proposed subsidy to independent power producers (IPPs) and other firm third-party users of transmission.

MASSPOWER argues that the Commission erred by deferring certain cost issues and, particularly, by not deciding that NU should only be allowed to charge new transmission users either a

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120/ We also note that the appropriateness of NU's tie line adjustment charges is being more fully litigated in another pending proceeding. See Northeast Utilities Service Company, 52 FERC ¶ 61,077, reh'g denied, 53 FERC ¶ 61,159 (1990).

121/ 56 FERC at 62,028-32.

122/ NU Request for Rehearing at 25-26.

rolled-in rate or an incremental rate, but not both. 123/ MASSPOWER asserts that, while particular questions of cost attribution may be deferred until those questions arise in an actual controversy, NU should not now be allowed to impose an "anticompetitive" ratemaking methodology, particularly where deferral will likely lead to excessive litigation and additional market uncertainty. MASSPOWER asks the Commission to either define the kinds of costs that NU may charge a new transmission user or prohibit NU from deviating from a rolled-in methodology absent future Commission approval.

In asserting that NU should not be allowed to charge both an incremental rate for upgrades and a rolled-in rate for its base system, MASSPOWER argues that NU's approach inconsistently applies two different pricing theories. Specifically, MASSPOWER argues that NU supports an incremental rate for upgrades by arguing that new wheeling customers cause the need for the facilities, yet NU supports a rolled-in rate for its base system by arguing that (regardless of causation) new wheeling customers use the base system. MASSPOWER argues that both upgrades and the base system must be priced consistently on either a "causation" test or a "use" test. MASSPOWER also argues that NU's approach anticompetitively favors NU's surplus sales, since NU does not price its surplus sales to include both an incremental rate and an embedded rate. MASSPOWER argues that in no event should NU be allowed to charge more than the greater of: (1) the incremental cost of upgrades needed when the customer's new transmission load is added; or (2) the rolled-in cost of NU's entire system, including any upgrades.

Bangor/Maine argue that the Commission's precedent requires roll-in of the cost of upgrades that provide a systemwide benefit. 124/ They assert that, even when facilities were constructed at the request of one customer, the Commission has required roll-in because the facilities benefitted all customers. 125/ Moreover, they contend that the clarification they seek was previously granted in PSI Energy, Inc., 126/ where the Commission stated that "the cost of facilities should be paid for by all customers that benefit from the use of those facilities."

123/ MASSPOWER Request for Rehearing at 9-19.

124/ Bangor/Maine Request for Rehearing at 13-17.

125/ Bangor/Maine cite Great Lakes Gas Transmission Co., 45 FERC ¶ 61,237 at 61,700 (1988).

126/ Opinion No. 349, 51 FERC ¶ 61,367, order on reh'g, Opinion No. 349-A, 52 FERC ¶ 61,260, order on clarification, 53 FERC ¶ 61,131 (1990), appeal filed, No. 90-1528 (D.C. Cir., filed November 19, 1990) (PSI Energy).

They argue that the Commission has offered no explanation for departing from its precedent.

We are unpersuaded by the arguments on rehearing that we need to modify the basic principles adopted in the Opinion regarding cost responsibility and pricing for transmission upgrades. We continue to believe that:

> transmission upgrades necessitated by third-party, firm-transmission use should be paid for by the requesting party and not by native load customers. [127/]

We accepted NU's "but for" criterion as a framework for establishing and assigning cost responsibility for a particular transmission expansion project or upgrade. On rehearing, a number of parties are urging the Commission to definitively answer the "rolled-in versus incremental" rate issue without the benefit of a specific rate proposal or a specific upgrade before us. We will not. However, we will articulate more fully how we envision that pricing for transmission upgrades will work, by specifically adopting Core Condition 5 as recommended by MASSPOWER and other intervenors. Core Condition 5 provides that:

> In any rate proposed under the Merger Tariff, the NU Companies shall not propose to collect from any transmission customer at any time an amount exceeding the greater of (1) the incremental cost of new network facilities required at the time the customer's new transmission load is added or (2) the rolled-in cost of all network facilities required to serve the combined transmission loads of the NU Companies, including any required transmission additions. [128/]

This pricing rule "does not preclude particularized cost allocations to specific customers where appropriate," e.g., distribution facilities, generation leads. 129/ But where transmission facilities are fully integrated and support the entire transmission system, NU will not be permitted to charge both an embedded cost rate and an incremental cost rate for firm wheeling service, since charging both rates would unjustifiably require a wheeling customer to pay rates for part of NU's costs

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127/ 56 FERC at 62,030.

128/ See Consolidated Statement of Conditions of Principal Intervenors, Condition 5, dated September 21, 1990.

129/ 53 FERC at 65,222 (citations omitted).

based on cost causation while paying rates for other costs based on use of the system. See supra at p. ____ (mimeo at 35).

If the rates based on the incremental cost of an upgrade are less than the rates based on NU's embedded costs, NU will be allowed to recover a traditional, embedded cost rate. Conversely, if the rates based on the incremental cost of the upgrade exceed the rates based on NU's embedded costs, and NU can demonstrate that the facilities would not have been needed "but for" the third-party wheeling request, NU will be allowed to recover a pro rata contribution to the incremental cost of the upgrade. If the upgrade would have been needed and built eventually to satisfy native load requirements and the third-party wheeling request merely accelerates the construction schedule, the incremental cost rate should reflect only the cost differential associated with building the upgrade sooner. 130/ These pricing principles will adequately protect NU's native load customers where NU must upgrade its system to satisfy a third-party request for firm wheeling. Furthermore, where NU is able to support assigning the incremental cost of expanding its system to the third party requesting service, an incremental cost rate will provide an efficient price signal to the entity responsible for the transmission expansion.

These incremental pricing principles represent a departure from the rolled-in approach that the Commission has traditionally used for pricing transmission service. 131/ In the past, however, utilities generally have not had an obligation, voluntary or involuntary, to build transmission facilities in order to wheel for third parties. Where, as here, a utility undertakes the obligation to provide third-party transmission service -- including the obligation to build any transmission facilities needed to provide service -- the incremental cost responsibility for upgrading the transmission system properly belongs to the party that causes the need for the transmission upgrade.

While we adopt the pricing principle that a wheeling customer may be charged the higher of embedded cost rates or incremental cost rates, the threshold issue to be determined even before this principle is applied is whether incremental pricing

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130/ See Opinion No. 364, 56 FERC at 62,031 (emphasis in original), where this method was explained as being based on the "difference in NU's revenue requirements assuming NU does and does not provide the third-party service."

131/ But see Utah, 45 FERC at 61,291 n.163 ("[w]here additional capacity is needed to meet a request, rates may be designed to specifically assign the cost of that capacity addition to the party requesting service").

is justified for a specific customer. Our decision today in no way affects NU's burden of proof to justify specifically assigning the incremental cost of upgrades to a third party requesting wheeling service. As stated in the Opinion:

> While the Commission is willing to accept incremental-cost pricing for third-party transmission service, we believe the proper forum to decide the details of cost responsibility questions is a separate section 205 rate case. In such a case, NU must justify any direct assignment of costs and support any arguments that reliability is degraded by a particular firm transmission service. No presumption is created by NU's "but for" criterion that firm wheeling customers always cause the need for upgrades. [132/]

Where transmission upgrades are necessary, NU has agreed to identify the specific upgrades needed and to provide an initial cost estimate of expanding the system. Under the terms of the GTC:

> NU shall have the obligation: (1) to identify, prior to the time of contracting, the constraints on its transmission system that it anticipates reasonably could require the construction of additional facilities during the term of the wheeling contract, (2) to provide its best estimate of the maximum cost to that wheeling customer (in then-current dollars) to remove each identified potential constraint, and (3) to include in its planning adequate provision for wheeling services (other than non-firm wheeling) which NU has contracted to provide for others. [133/]

As noted in Opinion No. 364, NU has committed to cap the third-party transmission customer's incremental cost responsibility by this initial expansion cost estimate. 134/ Where NU intends

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132/ 56 FERC at 62,031.

133/ Ex. 178 at 5-6.

134/ However, as noted in the Opinion, NU may "seek recovery through a rate filing where construction costs exceed its original estimate due to major unforeseen events which are beyond the merged company's control." 56 FERC at 62,032.

to directly assign the incremental cost of new network facilities to a third party requesting firm wheeling service, NU will be required to file the incremental cost rate, including all necessary cost support, with the Commission. If necessary, questions regarding NU's initial estimate or allocation of expansion costs, or reliance upon the "but for" test, may be explored at that time.

b. Immutable Constraints

In the Opinion, the Commission stated its intent to construe very strictly NU's commitment to build additional transmission facilities to accommodate wheeling requests. 135/ However, the terms of the GTC require NU to build additional transmission facilities only where:

> (1) NU is able feasibly to construct these additional facilities, consistent with local and regional reliability and siting considerations, and with the orderly and efficient expansion of the existing transmission grid; and
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> (2) NU, after using reasonable best efforts, is able to obtain all regulatory approvals required for such construction to take place on terms that do not impair the feasibility of the project. [136/]

The complaint procedures established in the Opinion specified that, if NU's defense for not providing firm wheeling service was that a transmission constraint was "immutable," the Commission would convene a technical conference at which NU, all affected customers, and all affected state commissions could address the issues of whether the constraint was immutable and, if so, how to allocate NU's existing capacity most efficiently and equitably. The Commission indicated that it would accord substantial weight to an agreement by all affected state commissions that a transmission constraint was truly immutable. Similarly, the Commission stated:

> if all affected state commissions agree on the most efficient and equitable allocation of existing transmission capacity on the NU system, the Commission will accord

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135/ Id. at 62,024.

136/ Ex. 178 at 5-9.

> substantial weight to their agreement.
> [137/]

However, the Commission unequivocally established that NU would never be required to satisfy a request for firm third-party wheeling out of existing capacity if providing such service would degrade reliability of service to NU's native load customers. 138/

On rehearing, New Hampshire asserts that the Commission's "immutable constraint" procedures are unprecedented, lack any record support, and are unrelated to the merger's effect on competition. 139/ NU, Connecticut and New Hampshire argue that the immutable constraint procedures must be revised to hold NU's native load customers harmless if NU is unable to obtain the requisite state or Federal authorization for transmission construction. 140/ Connecticut claims that the situation in New England is not analogous to that which was present in Utah, supra, where a single state had "strategic regulatory control" over the authorization of transmission expansion. Connecticut and NU claim that in the New England region "the key interfaces where constraints might arise -- particularly the Eastern REMVEC interface and the North-South interface -- require regulatory approvals from all states affected in order to relieve constraints." 141/

New Hampshire predicts that the Commission's immutable constraint procedures may actually discourage the construction of additional transmission capacity. 142/ NU argues that the procedure wrongly requires state regulators to "bring their negative transmission siting decisions to the FERC for federal review" to have those decisions "second-guessed by federal regulators." 143/ NU argues that such a procedure inappropriately subordinates the environmental and land use

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137/ 56 FERC at 62,024.

138/ Id. at 62,021, 62,024.

139/ New Hampshire Request for Rehearing at 18-19.

140/ NU Request for Rehearing at 9 and 33; Connecticut Request for Rehearing at 6 and 24-25; New Hampshire Request for Rehearing at 17-18.

141/ Connecticut Request for Rehearing at 19-20; NU Request for Rehearing at 68.

142/ New Hampshire Request for Rehearing at 17.

143/ NU Request for Rehearing at 31-33.

concerns involved in a siting decision to the Commission's desire to foster third-party transmission access for bulk power sales.

NU and Connecticut further argue that the procedure infringes improperly on legitimate state authority. 144/ In support, NU cites the statement in section 201 of the FPA that federal regulation extends "only to those matters which are not subject to regulation by the States." 145/ NU also cites to the FPA's legislative history and to a Supreme Court decision indicating that the FPA's purpose was to regulate matters beyond state authority "but not to impair or diminish the powers of any State commission." 146/ Finally, New Hampshire suggests that if existing transmission capacity on NU's system were to be "reallocated" as suggested in the Opinion, it would require the abrogation of contracts of NU's customers and would therefore contravene the Mobile-Sierra doctrine. 147/

We note that a considerable amount of time and effort has been expended in this proceeding on the issue of what happens if a particular transmission corridor or interface is somehow "immutably constrained." The use of this term is unfortunate because it suggests that a transmission constraint cannot be eliminated in any manner or at any cost. Certainly, this Commission has neither the intention (nor the power) to mandate the impossible. However, we would like to focus the discussion on what we believe is the relevant inquiry in most situations: at what cost can NU expand its transmission [illegible] to satisfy a third-party wheeling request?

In some cases, the incremental cost of upgrading NU's system to accommodate a firm wheeling request may be substantially higher than in other cases. In many cases, there may be any number of ways to upgrade the transmission system to satisfy a particular request. Local siting or environmental considerations may prohibit what would otherwise be the most efficient and economical way to upgrade the system. To the extent the most efficient and economical upgrade planned to remove a constraint cannot be constructed, an alternative upgrade, albeit more expensive and perhaps less efficient, may need to be considered

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144/ Id. at 33; Connecticut Request for Rehearing at 23.

145/ 16 U.S.C. § 824(a) (1988).

146/ Sen. Rep. No. 621, 74th Cong., 1st Sess., quoted in Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 526 (1945).

147/ United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

in order to provide the requested wheeling service. Most, if not all, constraints that arise can be eliminated at <u>some</u> cost of expansion, although the cost of such expansion may be so high as to render the proposed wheeling transaction uneconomical.

As discussed above, we proposed to establish a technical conference, including all affected state commissions, to help determine the most efficient and equitable "allocation" of existing transmission capacity in the face of an immutable constraint. Upon further consideration, we have decided not to convene technical conferences for the purpose of reallocating transmission capacity. Under the transmission access conditions we have imposed, NU is already obligated to provide firm transmission service to third parties out of transmission capacity which is not required for purposes of system reliability. 148/ Furthermore, the Commission has clearly stated that it would never allocate transmission capacity that would adversely affect reliability of service to native load. 149/ Nor does the Commission intend to abrogate existing contracts as alleged by certain parties on rehearing. See n.93, supra.

Accordingly, we now believe that convening a technical conference to debate issues of "immutability" and "reallocation" of existing transmission capacity would be of little value and would serve only to divert attention and resources away from the legitimate issue of determining the incremental cost of an expansion to NU's transmission system that <u>can</u> alleviate a particular constraint. As noted above, where NU must build new transmission capacity in order to meet a third-party wheeling request, NU will be permitted to propose a rate to recover the incremental cost of expanding its transmission system to alleviate the transmission constraint. 150/ Thus, our central focus should be on determining what is the incremental cost of expansion.

148/ The Commission stated that it would not "permit NU to deny a request for firm wheeling service based upon a reservation of additional transmission capacity solely for purposes of engaging in <u>economy</u> trades." 56 FERC at 62,021.

149/ Id. at 62,024.

150/ We are in no way modifying the criteria adopted in the Opinion for assigning incremental cost responsibility to a third party. In order to support an incremental transmission rate, NU must satisfy the "but for" test and demonstrate that the need for such expansion is caused or accelerated by the third-party wheeling request.

We recognize that NU's identification of the facilities that need to be expanded as well as its initial estimate of the cost of expansion may be controversial and may be the subject of a proceeding before the Commission. NU, any affected customer, and all affected state commissions (including any regional transmission association or relevant multistate resource planning organization) will be afforded the opportunity to participate in such a proceeding. Such a proceeding will provide a reasonable basis (and a fully developed record) upon which this Commission can derive an appropriate incremental cost. We emphasize that the purpose of any proceeding regarding NU's estimate of the incremental cost of upgrading its transmission system to eliminate a constraint is not to second-guess legitimate state or local siting decisions. To the contrary, the proceeding will provide a forum in which all affected state commissions may participate in order to ensure that NU's estimate of the incremental cost of expansion is factored into transmission pricing in a reasonable manner and relates to a transmission upgrade which can realistically be built.

In disallowing NU's proposal to include a 25 percent contingency factor in its estimate of expansion costs, the Commission stated its intention "to allow NU to seek recovery through a rate filing where construction costs exceed its original estimate due to major unforeseen events which are beyond the affected company's control." 151/ We envision that NU's initial estimate of the incremental cost of expansion to eliminate a constraint will be part of the transmission rate which must be filed with the Commission under the individual service agreement or transmission rate schedule between NU and the third party that has requested firm wheeling service. Consequently, any subsequent rate filing under section 205 to change the incremental cost of expansion in a rate schedule on file with the Commission could likewise be the subject of a proceeding where all affected state commissions could participate. As noted in the Opinion, "the burden of proof in demonstrating both the unexpected nature of the expense and the determination of which customer(s) should bear the associated cost responsibility, will be upon NU." 152/ Any third-party wheeling customer will have the right to file a complaint under section 206 if it believes that the incremental cost of expanding NU's transmission system that is on file in its transmission service agreement is too high.

151/ 56 FERC at 62,032.

152/ Id.

3. When May NU Consummate the Merger?

The Commission ruled in the Opinion that NU may consummate the merger when NU submits its compliance filing. 153/ The Commission ordered NU, within 60 days of the Opinion's issuance or within 15 days of the Commission's decision on any requests for rehearing, to make its compliance filing, including a statement accepting or rejecting the Commission's merger conditions. 154/

NU asks the Commission to modify the provision requiring NU to make its compliance filing within 15 days after the Commission's decision on rehearing. 155/ NU argues that it cannot respond to the order on rehearing until state regulators in Connecticut and New Hampshire take final action on the merger. Also, NU argues that it will need more than 15 days to revise its compliance filing to reflect any changes on rehearing. Thus, NU asks to change the deadline for its compliance filing to 15 days after final action on the merger by all applicable regulatory agencies. NU states that, since the Commission barred NU from consummating the merger until NU makes its compliance filing, the proposed change should have no adverse effect on the public interest.

The NE States and Utilities argue that the Commission should not allow consummation of the merger until NU's compliance filing has been found to be in substantial compliance with the Opinion. 156/ Specifically, these intervenors ask the Commission to bar the merger's consummation until the Commission issues notice of NU's filing, receives public comment, completes its initial review and finds that the filing substantially complies with the Commission's rulings. The intervenors assert that such a review should take no longer than six to seven weeks. The intervenors argue that the Commission's ruling in the Opinion could allow NU to consummate the merger upon filing a single piece of paper captioned "Compliance Filing." The intervenors argue that their proposed procedure is supported by a recent Commission ruling requiring Commission approval of a pipeline company's compliance filing before certain certificates to implement a gas inventory charge would be allowed to become effective. 157/

153/ Id. at 62,024-25.

154/ Id. at 62,054.

155/ NU Request for Rehearing at 91-92.

156/ NE States and Utilities Request for Rehearing at 39-42.

157/ ANR Pipeline Company, 56 FERC ¶ 61,293 at 62,201 (1991).

Other intervenors assert that consummation of the merger should not be allowed until the Commission accepts NU's compliance tariff. 158/ They argue that NU's General Transmission Commitments are too vague to ensure that NU's compliance tariff will adequately mitigate the merger's anticompetitive effects. 159/ They note that, in two recent cases, the compliance filings differed from the Commission's mandates so much that the Commission required the refiling of the tariffs. 160/ They argue that compliance tariff rates are effective when accepted by the Commission, not when filed by the utility. 161/ They assert that delaying merger consummation until acceptance of the compliance filing will not involve substantial delay because, assuming NU's filing is satisfactory, the Commission's rules allow acceptance within 60 days of filing. 162/ They also assert that the Commission has ruled that the "cure" should be coterminous with an expected exercise of market power. 163/ In any event, they assert that any concern for delay in consummating the merger is outweighed by the public interest in preventing anticompetitive harm.

MASSPOWER argues that, if the Commission does not reconsider its decision to approve the merger upon receipt of NU's compliance filing, the Commission should at least set a hearing schedule immediately upon receipt of NU's filing to expeditiously consider the filing and issue an order by a date certain. 164/

158/ E.g., Com/Electric Request for Rehearing; Boston Edison Request for Rehearing at 6. See also MASSPOWER Request for Rehearing at 4 (consummation should be allowed only after the Commission accepts and approves NU's compliance filing).

159/ Com/Electric Request for Rehearing at 3.

160/ Id. The cases they cite are Utah Power & Light Co., 46 FERC ¶ 61,086 (1989), and Transmission Agency of Northern California v. Pacific Gas and Electric Co., 56 FERC ¶ 61,325 (1991).

161/ In support, they cite Electric District No. 1 v. FERC, 774 F.2d 490 (D.C. Cir. 1985).

162/ See 18 C.F.R. § 35.3 (1991).

163/ In support, they cite PSI Energy, 51 FERC at 62,193-94.

164/ MASSPOWER Request for Rehearing at 5.

Bangor/Maine argue that the Commission erred in the Opinion by not addressing transmission rate issues. 165/ They assert that, without limits on the transmission rates NU may charge, NU's duty to wheel for others cannot by itself eliminate the proposed merger's anticompetitive effects. They argue that NU will likely price its transmission service so high that the offer of service will be meaningless.

Bangor/Maine also argue that the Commission, and not NU, must set the initial transmission rate charged by NU, i.e., the rate charged until the Commission rules on NU's proposed rates. 166/ Otherwise, they argue, the rates filed by NU for this initial period will be in effect for several years after the merger's consummation (while litigation on these rates proceeds) and may be high enough to exclude competition. If so, they argue, the promise of eventual refunds would not mitigate this harm. Thus, they assert, the Commission must establish an initial rate that will ensure meaningful transmission commitments until the Commission rules on permanent transmission rates. They argue that such an interim rate approach is consistent with the Supreme Court's and the Commission's recognition in natural gas cases of the need to set reasonable interim rates when a rate proceeding will likely take a long time. 167/ They contend that an appropriate interim rate would be NEPOOL's Section 13 rate, $[illegible].45 per kW per year.

Bangor/Maine further argue that the Commission must require that any transmission rates set in future proceedings for service under the transmission commitments be set at a level which promotes competition and allows the transmission commitments to be effective as a check against NU's exercise of its market power. 168/

Boston Edison argues that the Commission should require NU's compliance filing to reflect the multiple types of service NU should offer to transmission customers, e.g., separate tariffs for transactions crossing only the New Hampshire or Connecticut parts of the merged company's transmission system. 169/ Boston Edison also argues that NU's filing should avoid the

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165/ Bangor/Maine Request for Rehearing at 5-8.

166/ Id. at 8-12.

167/ They cite Atlantic Refining Co. v. Public Service Comm'n of New York, 360 U.S. 378, 390 (1959).

168/ Bangor/Maine Request for Rehearing at 12-13.

169/ Boston Edison Request for Rehearing at 7.

possibility of pancaking rates for crossing multiple interconnections within the NU system.

Boston Edison asserts that the Commission should clarify how the compliance tariffs should address the directional nature of each transaction, i.e., whether a reservation of 100 megawatts of firm transmission allows service that is mono-directional, bi-directional (wheeling in or out) or multi-directional (for any purpose from any source). 170/

Holyoke argues that the Commission should require the compliance tariffs (including the TDU tariff) to offer service over the merged company's combined system at a single [illegible] on the costs of the combined facilities, instead of service at the higher of two tariff rates, one for PSNH and the other for pre-merger NU. 171/

The NE States and Utilities argue that certain [illegible] changes to the compliance tariffs should be filed and reviewed under section 203 of the FPA. 172/ Specifically, they assert that, in order to ensure the merged company's adherence to the policies underlying the conditions imposed by the Commission, the section 203 standard of review should extend beyond the compliance phase and apply to any future proposed changes to the remedial provisions of the compliance tariffs.

In response to these arguments on rehearing, the Commission will modify the Opinion in the following respects. As noted by NU, the regulatory commissions in both New Hampshire and Connecticut are expected to review the merger to consider the effects of this order. Therefore, NU asserts that the earliest it could submit a compliance filing in this proceeding would be within 15 days of the final action by the two state commissions. 173/ As NU correctly notes, the Commission has prohibited the merger's consummation until NU submits its compliance filing to the Commission. Therefore, this extension of time should not harm the public interest. Accordingly, for good cause shown, we will require NU to submit its compliance filing within 15 days after final action by the state commissions in New Hampshire and Connecticut.

Several parties ask the Commission on rehearing to not allow the merger's consummation before the Commission accepts NU's

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170/ Id. at 7-8.

171/ Holyoke Request for Rehearing at 12-13.

172/ NE States and Utilities Request for Rehearing at 42-43.

173/ NU Request for Rehearing at 91-92.

compliance filing. These parties speculate that failure to accept the compliance filing before allowing the merger's consummation may not adequately mitigate the merger's anticompetitive effects. This argument ignores the statement in the Opinion:

> In reviewing NU's filing to ensure compliance with this Opinion, we will hold NU to a very high standard. As NU itself states, '[i]f NU fails to comply with the letter or spirit of such [Commission] requirement, NU would be subject to summary judgment with respect to any aspect of its compliance filing.' [174/]

We believe that the merger's anticompetitive effects are adequately mitigated through the conditions imposed in the Opinion, as modified herein. Furthermore, we will issue any appropriate summary judgment, to ensure that the submittal substantially complies with our decision. We are not persuaded to alter our position as stated in the Opinion:

> We believe that NU and PSNH are entitled to a prompt and fair resolution of this proceeding. At the same time, the intervenors are entitled to have service begin as soon as practical, together with a fair resolution of any disputes raised regarding NU's compliance filing. Accordingly, we believe that it is in the best interests of all parties to allow NU to consummate the merger when it submits its compliance filing. We shall also require NU to begin honoring requests for transmission service under the GTC, as modified herein, at that time. [175/]

Therefore, we see no reason to delay the merger's consummation until the Commission has accepted NU's compliance filing.

Bangor/Maine argue that NU may file an initial rate on compliance so high as to exclude competition. Therefore, Bangor/Maine ask the Commission to establish an interim rate to ensure meaningful transmission service until the Commission establishes a permanent rate. We note that Core Condition 4 of the Staff/Intervenor merger tariff (supported by Bangor/Maine) proposes an interim rate, to be superseded by a rate proposed by

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174/ 56 FERC at 62,025.

175/ Id.

NU within 60 days of the Commission's approval of the merger. In light of NU's right to immediately file a proposed replacement rate for any interim rate ordered herein, or NU's obligation under Core Condition 4 to supersede the interim rate within 60 days, we fail to see how an interim rate will prevent the harm alleged by Bangor/Maine. We believe that the primary goal of adopting an interim rate was to ensure the commencement of transmission service by NU as soon as possible, a goal we have achieved in the Opinion by requiring service to commence concurrently with the filing of NU's compliance submittal. Furthermore, as noted in the Opinion, NU's initial transmission rate proposal will be subject to refund without a refund floor, i.e., the refund floor will be the rate ultimately found to be just and reasonable by the Commission.

Boston Edison asks the Commission on rehearing to clarify that the rates to be filed by NU under the merger tariff will avoid the possibility of pancaking rates for the use of both the PSNH and the NU systems. 176/ Boston Edison's concern, however, appears to have been addressed as NU has already committed on this record that, "[t]ransmission service rates for service using both systems [NU and PSNH] will be based on the higher of the two system rates." 177/

Finally, several intervenors also ask the Commission on rehearing to provide [illegible] details regarding the transmission rates, terms and conditions of the merger tariff to be filed by NU on compliance. As discussed above, however, we decline to decide the bulk of the details of NU's post-merger transmission tariff until NU submits its compliance filing and others have had an opportunity to review and respond to that filing. Accordingly, the parties raising these issues on rehearing will be free to renew their arguments when NU submits its merger tariff in compliance with this Opinion.

C. New Hampshire Corridor Proposal

1. Eligibility

The Commission ruled in the Opinion that eligibility under the New Hampshire Corridor Proposal (NH Corridor Proposal) should extend not only to southern New England utilities (as proposed by NU and NEPCO) but also to northern New England utilities and to qualifying facilities and independent power producers (QFs/IPPs). 178/ The Commission ruled, however, that the northern utilities would

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176/ Boston Edison Request for Rehearing at 7.

177/ Ex. 123 at 182.

178/ Id. at 62,039-41.

be eligible only through a "second-tier" offering, in order to prevent any short-term inefficiencies that NEPCO argued might be caused by seller control of Corridor capacity (since most north/south bulk power sales in New England in the near future are expected to involve northern sellers and southern buyers). The Commission ruled that QFs would be eligible only if they waived their PURPA right to require a utility to buy from them and purchase their output at avoided cost.

NEPCO argues on rehearing that QFs/IPPs should not be directly eligible for Corridor capacity. Alternatively, NEPCO argues that QFs/IPPs should be eligible only in the second tier and only if they have a bona fide transaction to sell their capacity.

NEPCO argues that the NH Corridor is, and is likely to remain, a constrained path for power flowing north to south. 179/ NEPCO expresses concern that the Corridor should be used to its fullest extent to benefit all of New England's customers and argues that QFs/IPPs may not use their share of the Corridor once they acquire such rights. NEPCO asserts that only utilities, and not QFs/IPPs, have an incentive to use or assign their Corridor rights in order to avoid prudence-based rate disallowances. NEPCO argues that, because a QF/IPP with a definite buyer may obtain Corridor rights through the buyer's eligibility or through brokering, the only QFs/IPPs affected by a lack of direct eligibility are those without a buyer, for whom the need for transmission is thus speculative. NEPCO contends that direct eligibility would allow such QFs/IPPs to improve the marketability of, or price obtained for, their generation by locking up scarce transmission capacity and excluding competitors. NEPCO argues that this harm may be long-term because, despite NU's and NEPCO's commitment to expand the Corridor, additional capacity will not become available until expansion is economically justified, all regulatory approvals are obtained and the facilities are built. NEPCO further argues that eligible utilities will acquire essentially a "lease" on Corridor capacity, usable when needed for any current or future transaction. NEPCO argues that this type of arrangement was not designed to be used by QFs/IPPs and cannot be used by QFs/IPPs as efficiently as NU and NEPCO intended. For all of these reasons, NEPCO argues that direct eligibility for QFs/IPPs, if allowed, should be conditioned on "the existence of a viable project or other demonstrable evidence that the NUG [QF/IPP] will actually use its rights." 180/ NEPCO also argues that QFs/IPPs should be included in the second tier (if at all), along with northern

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179/ NEPCO Request for Rehearing at 2.

180/ NEPCO Request for Rehearing at 6.

utilities, for the same reasons NEPCO initially suggested a second tier.

The QF Supporters argue that there is no legal basis for conditioning a QF's eligibility on the waiver of its rights under PURPA. 181/ They assert that the Commission's rationale for restricting or qualifying QF access was recently rejected by the D.C. Circuit Court of Appeals in Environmental Action, Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991). In the passages quoted by the QF Supporters, the D.C. Circuit: (1) rejected the argument that mandatory access would give QFs an unwarranted competitive edge over sellers lacking PURPA rights, stating that the purpose of antitrust policy is not to make competitors equal but to protect competition and that any advantage given to QFs by PURPA was a direct result of Congressional policy; (2) rejected the argument that QFs may distort a market by forcing sales at above-market prices, stating that, because the price for such sales must be the buying utility's avoided cost, a QF must be as efficient as its competition or must sell below its own costs; and (3) rejected the argument that QF access was not needed to mitigate Pacificorp's market power, stating that, unless obligated to wheel for QFs, Pacificorp could anticompetitively increase prices to consumers by preventing lower priced competitors from reaching the market.

The QF Supporters contend that the Commission has [illegible] the rationale for its decision by inconsistently allowing QFs only conditional access to the NH Corridor, but approving unconditional QF access when such access was offered in PSI Energy, supra, and, in this case, by NU under its General Transmission Commitments. 182/ The QF Supporters also argue that the Commission's treatment of QFs under the NH Corridor Proposal constitutes undue discrimination because there is no record evidence of factual differences between QFs and other power producers.

The QF Supporters assert that competitive bidding programs are widespread in New England and limit QFs, if they are to make a sale, to charging the buyer's avoided cost, e.g., the lowest price for power available to the buyer. 183/ Thus, the QF Supporters contend, unconditional QF access to the NH Corridor cannot lead to forced sales at above-market rates. The QF Supporters also assert that the Commission has previously

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181/ QF Supporters Request for Rehearing at 2-6.

182/ QF Supporters Request for Rehearing at 6-7.

183/ Id. at 10-11.

accepted competitively-bid avoided cost QF rates as market-based rates that are just and reasonable for a non-QF. 184/

The QF Supporters argue that unconditional QF access to the NH Corridor is supported by the same arguments and policy that support such access for northern utilities. Finally, the QF Supporters contend that the Commission has a statutory obligation to encourage the development of QFs, a duty Congress imposed in order to promote the use of efficient and renewable fuel technologies and thus reduce the country's dependence on foreign oil and foster a cleaner environment.

In their answer to NEPCO's motion for clarification, the QF Supporters argue that requiring proof of a bona fide transaction only from QFs would disfavor QFs/IPPs compared to northern utilities. 185/ The QF Supporters assert that this proposal by NEPCO rests on the unsupported premise that, while utilities will act rationally and not reserve Corridor capacity they do not need, QFs/IPPs may irrationally reserve Corridor capacity whether they intend to use it or not. The QF Supporters contend to the contrary that, since QFs/IPPs are generally financed on a non-recourse basis, QFs/IPPs can hardly afford to imprudently pay to reserve transmission capacity they do not need. The QF Supporters argue that NEPCO, by arguing that the Corridor Proposal was not designed to be used by QFs/IPPs, has simply admitted its intent to unduly discriminate against QFs/IPPs.

Vermont argues that the Commission should clarify that, as part of the second-tier offering of Corridor capacity, Vermont entities will be eligible for access to the entire New Hampshire Corridor. 186/ Vermont states that the merging companies have offered Vermont entities access to the Corridor only as far south as the Vermont Yankee nuclear power plant, at the edge of PSNH's current system. Vermont argues that Vermont entities need access to the entire Corridor in order to reach buyers and sellers in Eastern REMVEC. Vermont asserts that, without such access, Vermont entities will be unable to compete fairly with the merged company's off-system sales.

184/ The QF Supporters cite Doswell Limited Partnership, 50 FERC ¶ 61,251 (1990).

185/ We will accept the QF Supporters' answer to NEPCO's motion for clarification. While parties are not permitted to file an answer to a request for rehearing, see 18 C.F.R. §§ 385.213(a)(2) and 385.713(d)(1), parties may file an answer to a request for clarification. Blue Ridge Power Agency, Opinion No. 363-A, 57 FERC ¶ 61,400 at _____, slip op. at 2 (1991).

186/ Vermont Request for Rehearing at 2.

In responding to the arguments on rehearing, we will distinguish between IPPs and QFs, since different outcomes are appropriate for these two groups of power suppliers. First, as to IPPs, we reject NEPCO's argument that IPPs should not be eligible under the NH Corridor Proposal. 187/ NEPCO argues that IPPs might seek to raise the sale price for their generation capacity by reserving, but not using, Corridor transmission capacity. We are unpersuaded, however, that IPPs would pay for unused transmission capacity in the hope of recovering the cost through an increased sale price for their power. This sort of fiscal speculation is particularly unlikely for IPPs financed on a non-recourse basis. Contrary to NEPCO's argument, we believe that IPPs are less likely than regulated utilities to take such investment risks, since regulated utilities have the opportunity to prove the prudence of such investments based on long-term needs and thus may potentially recover such costs from ratepayers.

We also reject NEPCO's alternate argument that IPPs should be eligible only if they demonstrate that they will actually use the Corridor capacity. This argument rests on NEPCO's same faulty premise that IPPs may reserve, but not use, Corridor capacity. Since IPPs are even less likely than regulated utilities to engage in such behavior, there is no basis for imposing NEPCO's proposed requirement on IPPs alone.

We will, however, adopt NEPCO's proposal to place IPPs in the second tier, along with northern utilities. As noted above the Commission placed northern utilities in a second tier in order to prevent any short-term inefficiencies that might be caused by seller control of Corridor capacity (since most north/south bulk power sales in New England in the near future are expected to involve northern sellers and southern buyers). Since IPPs, by definition, are sellers, the same reasoning warrants their placement in the second tier.

As to QFs, we reach a different conclusion on rehearing than we did in the Opinion. In the Opinion, the Commission ruled that QFs would be eligible only if they waived their PURPA right to require a utility to buy from them and purchase their output at avoided cost. Since issuing the Opinion, we have reexamined the Commission's authority to require wheeling for QFs. 188/ Based on our analysis in the Utah Remand, which we incorporate by

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187/ We distinguish between IPPs and QFs based primarily on their different legal rights under the FPA to seek mandatory wheeling, and not based on NEPCO's arguments about the economic motivations and behavior of the two groups.

188/ Utah Power & Light Company, 57 FERC ¶ 61,363 (1991) (Utah Remand).

reference herein, and our review of the record in this case, we conclude that requiring NU and NEPCO to wheel for QFs under the NH Corridor Proposal is neither within our authority nor required in order to mitigate the merger's likely anticompetitive harms and make the merger consistent with the public interest.

First, as we concluded in the <u>Utah Remand</u>, the Commission has no statutory authority under PURPA to force utilities to wheel for QFs. Congress excluded QFs from the group of entities that may seek a wheeling order from the Commission under section 211 of the FPA. 189/ In promulgating regulations to implement PURPA, the Commission acknowledged this statutory exclusion by concluding that wheeling for QFs "can only occur with the consent of the utility to which energy or capacity from the qualifying facility is made available. Thus, no utility is forced to wheel." 190/ While we have approved voluntary offers by utilities in other cases to wheel for QFs, including NU's voluntary offer to include QFs under the GTC, we cannot ignore the statutory scheme and nonetheless impose a mandatory duty on unwilling utilities to wheel for QFs.

Second, mandatory QF access is not needed to remedy any anticompetitive effects of the merger. The QF Supporters have not demonstrated, and in our view could not demonstrate, that the merger's likely anticompetitive effects could affect QFs. Absent the merger, QFs have no right to mandatory wheeling. Thus, conditioning the merger on mandatory QF wheeling on the NH Corridor would exceed the Commission's authority under section 203(a) of the FPA to mitigate the merger's likely anticompetitive harms.

While the QF Supporters claim that mandatory QF access is needed to prevent undue discrimination, Congress' exclusion of QFs from those entities that can seek to obtain involuntary access under the FPA provides a rational basis for treating QFs differently than other power suppliers.

Furthermore, mandatory QF access is not justified by the Commission's responsibility to protect consumer interests. While the interests of consumers must be protected, such protection may

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189/ 16 U.S.C. § 824j (1988). In contrast, Congress in the same legislation allowed QFs to seek an interconnection order under section 210 of the FPA. 16 U.S.C. § 824i (1988).

190/ FERC Statutes and Regulations, Regs. Preambles 1977-81 at 30,872. This order was appealed in American Electric Power Service Corp. v. FERC, 675 F.2d 1226 (1982), <u>reversed in part</u>, American Paper Institute v. American Electric Power Corp., 461 U.S. 402 (1983). However, the regulation that led to the quoted language was not raised on appeal.

be provided only within the statutory framework of the FPA and PURPA. Based on our analysis of the statutory scheme, we have no discretion to order mandatory QF access in this case. However, consumer interests are protected to the maximum extent allowed by the FPA and PURPA in that utilities may subscribe to Corridor capacity in order to buy from QFs. Consumers benefit by the ability of their local utility, acting as their agent, to buy the QF power on their behalf when doing so is economical.

Moreover, even if the Commission had the authority to require mandatory QF access, such access would not necessarily protect consumers to the maximum extent. As one court noted, PURPA's guaranteed price (avoided cost) may be not only equal to but even greater than, the price that would be received in a competitive market in certain circumstances. 191/ In other words, a state regulatory authority's or non-regulated electric utility's administrative determination of avoided cost may not equal the market price. 192/ Unconditioned transmission access for QFs would only exacerbate potential problems inherent in administrative determinations of avoided cost that do not rely on competitive markets. 193/ Since the transmission conditions in this case are long-term, mandatory QF access would require the Commission to constantly monitor whether administratively determined avoided costs in New England were, in fact, equal to then current market prices, in order to ensure that consumers were protected to the maximum extent. 194/ The administrative burden of such an undertaking would be enormous. Only QF access conditioned upon QFs waiving their mandatory purchase rights under PURPA, such that consumers would be served with the QF power only if it were competitive with other supply options, would protect against this potential in an administratively acceptable fashion. If we had the requisite

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191/ See Greensboro Lumber Company v. Georgia Power Company, 643 F. Supp. 1345, 1373 (N.D. Ga. 1986), aff'd, 844 F.2d at 1538 (11th Cir. 1988).

192/ See generally Docket No. RM88-6-000, IV FERC Statutes and Regulations ¶ 32,457, 53 Fed. Reg. 9331 (March 22, 1988).

193/ In addition, administratively determined avoided cost can only represent an approximation of market price at the time of decision and, particularly over time can only equal market price at any moment by chance.

194/ While the QF Supporters argue that competitive market conditions in New England prevent forced sales of QF power at above-market avoided cost rates, they undermine their argument by seeking to obtain access to Corridor capacity without having to waive this supposedly meaningless right.

authority to order this type of access, we would do so because we believe it would best protect consumers' interests.

For all of these reasons, we will not expand eligibility under the NU Corridor Proposal to include QFs. However, while a facility may meet the requirements for QF status, its owner nevertheless may elect to be an electric utility as defined in section 3(22) of the FPA 195/ rather than have the facility be treated as a QF. If such a facility sells electric energy at wholesale in interstate commerce, the owner is also a public utility. 196/ If the owner of the facility elects electric utility status, it may then request wheeling under section 211 of the FPA. 197/ Thus, a QF owner has the option to remain a QF and seek voluntary transmission from its local utility or in effect to waive its PURPA rights by electing to be an electric utility and thereby obtaining the ability to seek involuntary wheeling under the FPA. If a facility in New England that would otherwise be a QF elects electric utility status, it would then be eligible under the NH Corridor Proposal. 198/

The final issue on eligibility for Corridor capacity is Vermont's request for clarification that, in the second-tier offering of Corridor capacity, Vermont entities will be eligible for access to the entire length of the Corridor. Vermont explains that, consistent with the proposal by NU and NEPCO, Vermont entities are eligible in the first tier for only a truncated portion of the Corridor. As we understand Vermont's request, Vermont seeks assurance that Vermont entities, like other northern utilities, will also be eligible for the full

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195/ Under section 3(22) of the FPA an "'electric utility' means any person or State agency which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any federal power marketing agency." 16 U.S.C. § 796(22) (1988).

196/ See 16 U.S.C. § 824(b)(1) and (e) (1988).

197/ We are not aware of any requirement in PURPA that facilities that meet the definition of a QF must sell power as QFs.

198/ Upon electing such status, the facility would relinquish all rights given to QFs by PURPA and the Commission's regulations and, if they engage in a sale for resale in interstate commerce, would have to comply with all of the statutory and regulatory obligations imposed on public utilities, including various filing requirements. In contrast, under the approach accepted in Opinion No. 364, QFs would have had to waive only their PURPA rights to mandatory purchase and avoided cost rates.

length of the Corridor in the second tier of eligibility. We see no reason for allowing other northern utilities to subscribe to all of the Corridor in the second tier, but limiting Vermont entities to only a segment of the second tier capacity. Thus, we will grant Vermc t's request for clarification.

2. Deadline for Subscribing

The Commission required NU and NEPCO to allow first-tier and second-tier "initial offering" subscription periods (each three months long) for Corridor capacity. 199/ Vermont argues that the Commission needs to clarify the parties' subscription rights from the end of the second-tier initial offering period until the end of the entire subscription period, i.e., May 1, 1995. Vermont asserts that the merged company could interpret the Opinion as allowing it to subscribe to all capacity remaining after the second-tier initial offering period. Vermont argues that the Opinion should be clarified so that the second-tier period continues until May 1, 1995.

We reject Vermont's argument. In the Opinion, the Commission described the subscription rights under the NH Corridor Proposal as follows:

> If the Corridor capacity is undersubscribed in the initial offering, NEPCO has reserved the first right to claim any remaining Corridor capacity on NU's system "above and beyond the 200 MW initially allocated to it." Any Corridor capacity remaining on either NU or NEPCO's system, which is not subsequently committed by either party for its own system use or for service to others, will be made available to subscribing parties on a first-come, first-served basis. [200/]

Vermont's purported clarification would nullify these provisions of the NH Corridor Proposal's subscription scheme. Vermont has offered no persuasive argument for this restructuring of the NH Corridor Proposal. The NH Corridor Proposal requires NU and NEPCO to make 200 megawatts of Corridor capacity available during the initial offering periods before reserving more for themselves. In our view, that is adequate.

199/ 56 FERC at 62,041.

200/ Id. at 62,036 (footnote omitted). See Ex. 154 at 5.

D. Regional Transmission Arrangement and NARUC

The Opinion imposed a condition requiring NU, within six months after consummating the merger, to submit to NEPOOL a proposed regional transmission arrangement (RTA), prepared after consultation with other NEPOOL members, state regulators, and other potential transmission customers. 201/ The Commission also explained that NEPOOL's members are free to negotiate and file an RTA that would expressly seek to supersede the Commission's merger conditions. The Commission noted, however, that any such RTA would be subject to the Commission's review and approval.

On rehearing, NARUC asks the Commission to clarify that it does not intend to exercise broad authority over transmission siting, access and pricing, but instead will defer to the efforts of the New England states to develop an RTA. 202/ NARUC argues that the states retain substantial authority over the certification and siting of transmission facilities, as well as the retail rate recovery of residual transmission costs. NARUC asserts that, given the overlapping authority of this Commission and the states on transmission issues, all parties should support the use of consensus building procedures such as the RTA. NARUC argues that the alternative to cooperative development of an RTA is likely to be years of acrimonious litigation between this Commission and the states, and between the states.

NARUC argues in particular that the Opinion's immutable constraints procedure would allow the Commission, while expressing an intent to consider state commission views, to ultimately decide the need for transmission capacity, the availability of sites for new corridors and other issues that NARUC argues are within the states' jurisdiction. NARUC asserts that, as an alternative to this possibly preemptive procedure, the New England commissions should be given an opportunity to develop their own consensus-based solutions to siting, access and pricing issues through an RTA.

We do not believe that the Opinion contradicts the spirit of NARUC's arguments on the importance of Federal/state cooperation and the desirability of a regional consensus on transmission issues. As noted above, we welcome and encourage the efforts of the New England state commissions to develop a regional approach to transmission issues. If an RTA is developed and submitted to the Commission, we would give due deference to the parties' agreement, to the extent possible consistent with our responsibilities under the FPA. For New England transmission

201/ 56 FERC at 62,042-43.

202/ NARUC Request for Rehearing at 3.

issues, a comprehensive, consensual approach is preferable to the case-by-case approach otherwise necessary. To date, however, the parties have not yet reached such an agreement. Pending such an agreement, the Commission must decide the merits of this case on the record presented and cannot dictate in this case the optimal resolution of all transmission issues for all of New England. Consistent with the FPA, we have sought to ensure that approval of the merger is consistent with the public interest. In light of the Commission's responsibilities under the FPA, we can do no less than is ordered here.

I. NEPOOL Voting

The Commission conditioned the merger to prohibit NU, during the first 90 days after consummation of the merger, from using its post-merger voting power to block proposed amendments to the NEPOOL Agreement which may limit NU's ability to veto NEPOOL's Management Committee decisions. 203/

NU argues that this condition cannot be justified by any market power NU gains by the merger because the Commission has conditioned the merger in other ways to prevent an enhancement of NU's market power. 204/ NU also argues that the Commission wrongly implied that NEPOOL's members may implement this condition by the 75 percent vote needed for affirmative action by NEPOOL's Management Committee, instead of by the 85 percent vote needed for amending the NEPOOL Agreement. Finally, NU argues that this condition must at least be limited so that NU's vote cannot be reduced below the share that would be calculated, at the time of a particular vote, for the pre-merger NU system. This exception would allow NU's voting power to reflect any increased share warranted by its own non-merger load growth.

The Commission rejects NU's argument that the NEPOOL voting condition is unjustified by any change in NU's market power. A veto would allow NU to block or handicap other generation or transmission options requiring NEPOOL approval. 205/ This power under NEPOOL, in and of itself, would be a form of enhanced market power attributable to the merger. The NEPOOL voting condition is a direct response to this form of enhanced market power. To the extent the NEPOOL voting condition prevents NU from using its veto power to block competition, the NEPOOL voting condition will also prevent NU from limiting the effectiveness of the other conditions imposed to mitigate NU's enhanced market power. Thus, the NEPOOL voting condition may help to ensure that

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203/ 56 FERC at 62,043-45.

204/ NU Request for Rehearing at 88-90.

205/ Ex. 603 at 76-78; Ex. 277 at 10-11, 23; Ex. 477 at 16-19.

the merged company's enhanced market power is fully mitigated, and remains so, to render the proposed merger consistent with the public interest.

As to NU's argument that an 85 percent vote is needed to implement the NEPOOL voting condition, the Commission intended no inference in the Opinion that a 75 percent vote would suffice. On the other hand, we did not rule in the Opinion, nor do we rule here, that an 85 percent vote is needed. We decline to decide this issue at this time, since we find the issue inadequately addressed in the record. We also find this issue not ripe for decision, since there is no indication that the other NEPOOL members will actually vote to implement this condition or that the outcome of such a vote may depend on whether an 85 percent vote is needed instead of a 75 percent vote. Until then, this issue is only hypothetical.

Finally, we reject NU's proposed modification to allow NU to vote whatever share its own non-PSNH load growth would warrant. While this proposal has the superficial merit of allowing NU the same voting share it would be entitled to absent the merger, the argument ignores the merger's effects. The merger will create an entirely new company, one with a much larger territory, much more control of vital transmission paths and a dominant share of short-term surplus capacity. This new company will have dramatically enhanced incentives to use that power. A veto power in the hands of this larger and stronger company is more potent and threatening than a veto power in the hands of pre-merger NU. Thus, the merger's anticompetitive effects justify the 90-day veto limitation, even if the smaller and weaker pre-merger NU would have had a sufficient voting share for a veto.

VI. <u>Return on Equity</u>

In the Opinion, the Commission decided the proper return on equity for the Capacity Interchange Agreements and the Seabrook Power Contract. For the Capacity Interchange Agreements, the Commission summarily affirmed the presiding judge's adoption of the Trial Staff's recommended 13.5 percent return on equity, rejecting the 14.5 percent return proposed in the agreements. 206/ The Commission also updated the 13.5 percent return to reflect recent capital market conditions, setting a 13.17 percent return for the period before the Opinion's issuance and a 12.93 percent return for the period after the Opinion's issuance.

For the Seabrook Power Contract's first ten years, the Commission adopted the Trial Staff's recommended 13.1 percent return on equity, instead of the 13.75 percent return set in the

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206/ 56 FERC at 61,993, 62,050-51.

contract. 207/ The Commission also updated the 13.1 percent return, setting a 12.53 percent return for the period after the Opinion's issuance. (Since the Seabrook Power Contract becomes effective on the date the merger is consummated, the 13.1 percent return was not effective before the Opinion's issuance.) The Commission also summarily affirmed the presiding judge's rejection of a provision automatically adjusting the return on equity after the contract's first ten years. 208/

On rehearing, NU first contends that the Commission should not have required any changes to the Seabrook Power Contract. 209/ NU asserts that the Seabrook Power Contract is part of an interrelated package negotiated to resolve PSNH's bankruptcy. NU asserts that the Seabrook Power Contract will affect only PSNH's ratepayers and that their interests were represented by New Hampshire's Governor, Attorney General and Legislature. NU concedes that the Commission is not bound by the parties' agreement, but argues that the Commission should uphold the proposed rates if those rates are within a zone of reasonableness. NU argues that the reasonableness of the Seabrook Power Contract, including the 13.75 percent return on equity, is persuasively evidenced by the decisions of both the United States Bankruptcy Court for the District of New Hampshire and the New Hampshire Public Utility Commission to approve the contract.

NU next argues that the Commission should have approved the 13.75 percent return on equity proposed in the Seabrook Power Contract and should not have relied upon the traditional discounted cash flow (DCF) analysis presented by Trial Staff. 210/ NU contends that this case's unique aspects preclude the use of a DCF analysis and instead require the Commission to consider the Seabrook Power Contract's unprecedented nature. For example, NU states that investors will recover only one-half of their Seabrook investment, and that the part recovered under the Seabrook Power Contract will be phased in over six years. NU states that the Seabrook Power Contract bars North Atlantic (the NU subsidiary taking title to PSNH's share of Seabrook and selling Seabrook's power to PSNH) from seeking a change in the return on equity for the contract's first ten years. NU also argues that North Atlantic will be unable to pay dividends for at least two to three years, and that its sole customer, PSNH, will

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207/ Id. at 62,051-54.

208/ Id. at 61,993.

209/ NU Request for Rehearing at 75-77.

210/ Id. at 78-88.

while North Atlantic received provisional ratings for its debt securities that were below investment grade. NU characterizes Trial Staff's adjustment as "nothing more than Staff's opinion based exclusively on prior precedent," and notes that the presiding judge rejected the adjustment.

NU also challenges the Commission's updating of the return on equity to reflect current market conditions. 216/ NU argues that short-term adjustments are inappropriate here because the Seabrook Power Contract's return on equity is fixed for ten years. NU asserts that updating is particularly unfair here because interest rates have reached a nadir as a result of the recession and Federal Reserve Board actions to lower interest rates. NU further argues that updating wrongly assumes a direct correlation between U.S. Government obligations and equity costs. NU asserts that the Commission's generic benchmark rate of return declined by only 34 basis points during the update period, instead of the Opinion's 57 basis point update. NU argues that any updating should at least be limited to 34 basis points. 217/

NU also argues that the Commission should not have rejected the Seabrook Power Contract's provision automatically adjusting the return on equity after the contract's first ten years. 218/ NU argues that the Commission's decision is contrary to the settlement nature of the Seabrook Power Contract. NU points out that the provision was inserted at the State of New Hampshire's request. NU contends that the Commission's past rulings rejecting such provisions are all distinguishable in light of the unique facts of this case.

Finally, for the same reasons discussed above, NU asserts that the Trial Staff's DCF analysis does not justify a change in the return on equity for the Capacity Interchange Agreements. 219/ In addition, NU argues that the Capacity Interchange Agreements reflect unique risks that Trial Staff did not account for in performing its DCF analysis.

We are unpersuaded by NU's arguments on rehearing. NU argues on rehearing that the Commission is not obligated to

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216/ Id. at 86-88.

217/ NU incorrectly determined that the change in the Commission's generic rate of return during the update period was a decrease of 34 basis points when in fact the change was a 34 basis point increase.

218/ Id. at 78 n.52.

219/ Id. at 86 n.55.

be highly leveraged and, with limited exceptions, cannot seek a retail rate increase for seven years.

NU also argues that the six-year phase-in will reduce North Atlantic's actual return on equity, that North Atlantic will not be financially self-supporting for two years and that North Atlantic has marginal financial indicators for at least its first seven years. 211/ NU also cites testimony by its chief financial officer that Trial Staff's proposed return on equity presents serious concerns about whether the transaction can be financed.

NU argues that the claimed 13.75 percent return on equity is justified by PSNH's $1.5 billion write-off of Seabrook investment that will not be recovered from ratepayers. 212/ NU asserts that the Commission wrongly ignored this write-off and the extent to which it is reflected in the claimed return on equity as part of an overall settlement package.

NU asserts that Trial Staff's DCF analysis is flawed because it produces a negative risk premium, with a recommended return on equity 60 basis points below North Atlantic's debt costs. 213/ NU states that Trial Staff's own witness testified that a positive risk premium of 200 to 300 basis points is typical. NU also argues that Trial Staff's DCF analysis improperly assumed that NU's stock price fully reflected the risks of the PSNH acquisition; adopted an unreasonably low growth rate for NU; failed fully to consider the unusual circumstances of NU, North Atlantic and PSNH; improperly adjusted the cost of equity for flotation costs; and would not produce reasonable financial indicators for North Atlantic. 214/

NU also attacks Trial Staff's downward adjustment to its NU-based DCF results to reflect the lower risk of North Atlantic compared with NU. 215/ NU argues that, after the merger, it will be a large, diversified utility serving over 1.5 million customers in three states, while North Atlantic will be a highly leveraged start-up company owning a lone asset (Seabrook) with a troubled and controversial history and having a lone customer (PSNH) with its own marginal financial indicators. NU also argues that NU has bond ratings for its subsidiaries of BBB+,

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211/ Id. at 80-81.

212/ Id. at 81-82.

213/ Id.

214/ Id. at 85.

215/ Id. at 83-84.

review North Atlantic's proposed return on equity using a traditional DCF analysis. Rather, NU suggests that the Commission should consider the entire set of bankruptcy/merger agreements as a "package" rather than reviewing the reasonableness of the Seabrook Power Contract in isolation. This argument ignores the fact that the Commission summarily affirmed the presiding judge's rejection of NU's "untouchable package" argument. 220/ In fact, as noted in the Initial Decision, 221/ the Commission has rejected the same argument both on rehearing of the original hearing order 222/ and again in a later order granting clarification. 223/ On rehearing, NU has raised no new facts or material warranting a reversal of our decision on this issue.

NU asserts that less than one-fourth of the Seabrook investment is being recovered under the Seabrook Power Contract. 224/ NU also suggests that the asserted write-off of approximately $1.5 billion of Seabrook justifies a return on equity in excess of that supported through Staff's DCF analysis. NU appears to be seeking recovery, in the form of an inflated equity return, of "investment" dollars related to Seabrook. However, an NU witness explained that NU's $2.3 billion acquisition price of PSNH could be broken down into three segments of approximately: (1) $700 million for Seabrook in the Seabrook Power Contract; (2) $900 million for an acquisition premium; and (3) $700 million for PSNH's non-Seabrook assets. 225/ NU admits that both the acquisition premium and PSNH's non-Seabrook assets will be recovered through retail rates. 226/ Accordingly, NU will be given the opportunity to earn a return on equity on every dollar of its $2.3 billion investment in PSNH. Furthermore, as we concluded in the Opinion, North Atlantic is not entitled to claim a rate base greater than its $700 million investment in Seabrook as reflected in the Seabrook Power Contract.

NU argues that North Atlantic's only source of revenue is PSNH, which is just emerging from bankruptcy, is highly

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220/ 56 FERC at 61,993.

221/ 53 FERC at 65,234.

222/ 51 FERC at 61,481-82, 61,484-85.

223/ 52 FERC ¶ 61,046.

224/ NU Request for Rehearing at 79.

225/ Ex. 9 at 24, 30; Ex. 239A at 52-53, 64 and 73.

226/ Tr. 1711, Ex. 9 at 24 and Ex. 1 at 49.

leveraged, and is prohibited for seven years from filing for return on equity changes in retail rates. Accordingly, NU asserts that North Atlantic faces more, not less, risk than NU. We disagree. NU's assertion that PSNH's questionable financial position in some way diminishes North Atlantic's guarantee of recovering all of its costs is refuted by the terms of the Seabrook Power Contract. The contract provides that PSNH's obligation to pay North Atlantic for Seabrook is:

> [illegible] not be affected by any circumstances, including, without limitation, (i) any insolvency, [illegible], reorganization, arrangement, liquidation or similar proceedings relating to Buyer, Seller, and other Joint Owner of the Unit, or any affiliate thereof . . . . [227/]

The absolute obligation under the Seabrook Power Contract for PSNH to pay all of North Atlantic's costs pursuant to a cost-of-service formula was also described in the New Hampshire Public Utility Commission proceeding as a 'bullet-proof' obligation. 228/ Regarding NU's claim that PSNH's financial ratios will be below industry averages, NU witness Busch explained that:

> the weaker financial ratios of [North Atlantic and PSNH] in the early years following reorganization are not cause for alarm because of the contractual protections available to PSNH and North Atlantic and because the [financial] ratios will be strengthened over time . . . . [229/]

NU also asserts that North Atlantic faces more risk than NU because it has only one customer as its sole source of revenues, unlike the Yankee companies which sell their output to several purchasers. However, NU ignores the Commission's precedent of recognizing the reduced risk of a single asset generating company due to its contractual guarantee of recovering all of its expenses through the sale of all of its output to a single affiliated purchaser. 230/ Also, as discussed in the

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227/ Seabrook Power Contract at 9 (emphasis added).

228/ Ex. 239-A at 101.

229/ Ex. 1 at 49-50 and Ex. 209 at 3.

230/ South Carolina Generating Company, Opinion No. 280, 40 FERC ¶ 61,116 (1987). See also Consumer Advocate Division of the (continued...)

Opinion, PSNH's financial viability is further bolstered by PSNH's guaranteed 5.5 percent annual increase in retail rates for each of the next seven years under PSNH's retail rate agreement with the State of New Hampshire. 231/ Accordingly, we are not persuaded that the reduced risk faced by North Atlantic due to their contractual guarantee of recovering all of their costs is diminished by the financial condition of PSNH.

The Initial Decision compared the pre-tax coverage ratio typically needed by utilities to the ratio resulting from Staff's recommendation and concluded that Staff's equity return results in a ratio that is too low. 232/ Similarly, on rehearing NU maintains that the Staff's return on equity will result in unreasonable pre-tax coverage ratios for North Atlantic. 233/ However, there is only a slight difference between North Atlantic's pre-tax coverage ratio of 1.42 resulting from Staff's return on equity, 234/ and the pre-tax coverage ratio of 1.45 resulting from NU's requested 13.75 percent return on equity. 235/ In fact, according to NU witness Olson, both coverage ratios (including that ratio produced by NU's own 13.75 percent rate of return on equity proposal) would be associated with bonds that are below investment grade. 236/ Therefore, there is no significant difference between the financial indicators produced by Trial Staff's recommended return and NU's own proposed return. Furthermore, as NU witness Busch explained:

> [S]ince all of North Atlantic's costs will be billed to PSNH and those billings will flow through the new PSNH fuel clause, Seabrook's operating costs will be directly recoverable

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230/ (...continued)
West Virginia Public Service Comm'n and the Maryland People's Counsel v. Allegheny Generating Co., Opinion No. 281, 40 FERC ¶ 61,117 (1987), order on reh'g, 42 FERC ¶ 61,248 (1988) (involving only three affiliated purchasers).

231/ 56 FERC at 62,053.

232/ 53 FERC at 65,234.

233/ Ex. 207 at 28-34. As explained by Staff witness Watson, the pre-tax interest coverage of long-term debt shows the number of times total annual interest is covered by pre-tax income. Ex. 623 at 19U.

234/ Tr. 6695.

235/ Ex. 207 at 29.

236/ Id. at 30.

> from ratepayers for at least ten years without the need to recover them in separate general rate proceedings. . . . [Therefore], the weaker financial ratios of [North Atlantic and PSNH] in the early years following reorganization are not cause for alarm because of the contractual protections available to PSNH and North Atlantic and because the [financial] ratios will be strengthened over time so that the utilities are healthy when conventional rate regulation resumes. [237/]

NU also claims that Staff's DCF analysis is fatally flawed because it produces a recommended return on equity that is 60 basis points below North Atlantic's supposed debt costs, or what has been referred to as a negative risk premium. 238/ Staff explained that "[North Atlantic] has a higher debt cost because during the negotiations of the bankruptcy [North Atlantic] was financed with below-investment grade bonds" rated "BB." 239/ Staff noted that, "[North Atlantic]'s financial condition is expected to improve during the 1990-98 period to a level where its bonds could be upgraded to 'BBB' and thus allow North Atlantic to further reduce its debt cost." 240/ As Staff explained, North Atlantic is not prohibited from refinancing its initial embedded debt cost if lower interests rates are available in the future. Also, NU cites Staff's discovery response that a risk premium of 200 - 300 basis points is typical and NU asserts that this same risk premium range should be adopted for North

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237/ Ex. 1 at 49-50 and Ex. 209 at 3.

238/ The record demonstrates that, in fact, North Atlantic's estimated debt cost as of June 1, 1990, is actually 12.70 percent. Ex. 207 at 30-31. When compared with Staff's recommended return on equity of 13.10 percent for North Atlantic, the result is a positive, rather than a negative, risk premium. NU cites to record evidence indicating that interest rates on 30-year Treasury bonds have increased by approximately 100 basis points since NU prepared its case-in-chief on about January or February 1990 due to "very turbulent market conditions" caused by the Persian Gulf crisis. Tr. 6124. Therefore, NU's use of a 13.70 percent debt cost reflects the addition of about 100 basis points for increased debt costs during the hearing in this case.

239/ Tr. 6681 and Ex. 209 at 1-2.

240/ Id. See also Ex. 1 at 48.

Atlantic. 241/ However, NU itself included a risk premium of only 105 basis points in its proposed rate of return on equity. 242/ Accordingly, we conclude that the record evidence indicates that the risk premium associated with North Atlantic's return on equity will also improve over time.

On rehearing, NU also claims that the Commission failed to consider record evidence indicating that Staff's DCF analysis was flawed. 243/ All of NU's record citations refer to the rebuttal testimony of NU witness [illegible]. However, NU fails to acknowledge that Staff witness Watson revised her direct testimony during the hearing to incorporate an updated return on equity analysis performed after witness Olson's rebuttal testimony. 244/ Ms. Watson's revised testimony moots a number of NU's arguments.

First, NU asserted that Staff's analysis did not fully reflect the risks of the PSNH acquisition. Specifically, NU's witness stated that "even the risks reflected in NU's final plan are not reflected in Ms. Watson's dividend yield, since more than half of the period over which she calculated the yield had elapsed prior to mid-December [1989] when the plan was finalized." 245/ However, Staff's updated dividend yield analysis used the six-month period from March to August 1990. 246/ Second, NU alleges that Staff improperly adjusted its return on equity for flotation costs. 247/ However, Staff updated its proposed flotation cost adjustment from the 0.[illegible] percent amount referred to in Dr. Olson's rebuttal testimony to 0.18 percent. 248/ Third, NU asserts that Staff adopted an unreasonably low expected growth rate of 3.01 percent in its

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241/ We note that no party in this proceeding performed an actual "risk premium" analysis to determine the equity return premium that should be allowed above North Atlantic's debt costs.

242/ This amount represents the difference between the proposed 13.75 percent return on equity and the 12.70 percent North Atlantic debt cost. Tr. 6682.

243/ NU Request For Rehearing at 85-86.

244/ Tr. 6644.

245/ Ex. 207 at 9.

246/ Tr. 6647-48.

247/ Ex. 207 at 23-28.

248/ Ex. 623 at 38U.

analysis. Again, NU failed to consider Staff's updated analysis, using a 3.42 percent expected growth rate. 249/ Fourth, Dr. Olson alleged in his rebuttal testimony that several flaws existed in Staff's comparative risk analysis. 250/ Again, NU fails to consider important changes incorporated in Staff's updated analysis including: criteria for selection of comparable utilities; size of the comparable group; and, substitution of post-reorganization data for pre-reorganization data. 251/

NU also cites to testimony by NU witness Busch raising concerns about the ability to finance North Atlantic based on Staff's recommended return on equity. Again, the testimony cited by NU refers to Staff's original rate of return on equity recommendation. Staff's updated analysis raised the recommended return on equity for North Atlantic considerably from the 11.25 percent return referred to in NU's cited testimony 252/ to 13.1 percent. 253/ Accordingly, NU has failed to raised any valid concerns on rehearing that would lead us to question the accuracy of Staff's analysis and the resulting recommended return on equity of 13.10 percent.

We also reject NU's argument that, because the Seabrook Power Contract bars North Atlantic for ten years from seeking a change in its equity return, the Commission's update of the return on equity to reflect recent changes in financial market conditions is inappropriate. The Commission's policy on updating the return on equity has been consistently applied in recent cases to reflect post-record changes in capital markets and has withstood judicial review. 254/ Contrary to NU's argument, the ten-year contractual restriction on NU's ability to file for a change in return on equity under the Seabrook Power Contract _supports_ the adoption of a forward-looking return on equity. We believe that Staff's recommended return on equity, which reflects the only return on equity study conducted in this record, should be updated to reflect current market conditions.

249/ _Id._ at 32U.

250/ Ex. 207 at 15-23.

251/ Ex. 623 at 13U-16U, 33U.

252/ Ex. 6 at 56-58.

253/ Tr. 6648.

254/ Boston Edison Company, Opinion No. 299, 42 FERC ¶ 61,374, _reh'g denied in relevant part_, Opinion No. 299-A, 43 FERC ¶ 61,309, _aff'd_, 885 F.2d 962 (1st Cir. 1989); Public Service Company of New Mexico v. FERC, 832 F.2d 1201, 1210 (10th Cir. 1987).

Finally, NU argues that the basis for the Commission's return on equity update inappropriately assumes a direct correlation between ten-year constant maturity U.S. Treasury Bonds and equity costs. NU asserts that "[s]uch a one-for-one correlation clearly does not exist in this case where interest rates have been volatile." 255/

The Commission has long endorsed the use of ten-year constant maturity U.S. Treasury bonds as providing a "good financial indicator of trends in market costs of capital." 256/ Moreover, with one exception, 257/ we have consistently used the ten-year constant maturity U.S. Treasury bonds to update the cost of equity capital only within the zone of reasonableness established based on record evidence. Additionally, as one court noted:

> [E]ven if we assume, for the sake of argument, that changes in reasonable utility share returns do not exactly track changes in bond interest rates, the Supreme Court has made clear that 'infirmities' in Commission methodology are 'not . . . important,' provided that the 'result reached,' the 'impact of the rate order,' cannot 'be said to be unjust and unreasonable.' Federal Power Commission v. Hope Natural Gas Company, 320 U.S. at 602. [258/]

We believe our updated return on equity of 12.53 percent results in a just and reasonable equity return for North Atlantic in the Seabrook Power Contract when compared to the range of reasonableness used by Staff. Trial Staff did not determine a separate range of reasonableness for North Atlantic, but used a range of reasonable returns on equity for NU of 11.61 to 13.55

255/ NU Request for Rehearing at 87.

256/ South Carolina Generating Company, Inc., Opinion No. 280, 43 FERC ¶ 61,217 at 61,562-54, reh'g denied, Opinion No. 280-A, 44 FERC ¶ 61,008 at 61,038-39 (1988); New York State Electric and Gas Corp., Opinion No. 254, 37 FERC ¶ 61,151 at 61,377-78 (1986). While NU proffers the Commission's generic rate of return as a better measure for this purpose than ten-year constant maturity U.S. Treasury bonds, the Commission has since decided to abolish the generic rate of return. 58 FERC ¶ 61,013 (1992).

257/ Union Electric Co. v. FERC, 890 F.2d 1193 (D.C. Cir. 1989).

258/ Boston Edison Co. v. FERC, 885 F.2d 962 (1st Cir. 1989).

percent. 259/ Adjusting this NU-specific range by the 40 basis point adjustment for North Atlantic's lower risk produces a range for North Atlantic of 11.21 to 13.15 percent, a range encompassing our updated North Atlantic return on equity of 12.53 percent.

NU also claims that the Commission should not modify the proposed return on equity in the Capacity Interchange Agreements. However, we note that NU has raised no issues on rehearing that have not been either rejected above in the Seabrook Power Contract discussion, or been adequately addressed in the Initial Decision and summarily affirmed in the Opinion. Accordingly, we will deny NU's request for rehearing regarding this issue.

The Commission orders:

(A) NARUC's late motion to intervene is hereby granted for good cause shown, as discussed in the body of this order.

(B) The requests for rehearing of Opinion No. 364 are hereby granted in part and denied in part as set forth in the body of this order.

(C) Within 15 days after final action by the state commissions in New Hampshire and Connecticut, Northeast Utilities Service Company shall make a compliance filing with the Commission, including a statement either accepting or rejecting the terms and conditions set forth in the Opinion, as modified in the body of this order. If within the aforementioned period no compliance filing accepting the conditions set forth in the Opinion, as modified in the body of this order, has been made, Commission approval shall be deemed denied.

By the Commission. Commissioner Trabandt dissented in part with a separate statement to be issued later. Commissioner Moler dissented in part with a separate statement attached.

(S E A L)

Lois D. Cashell

Lois D. Cashell,
Secretary.

259/ Tr. 6648.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northeast Utilities Service Company (Re Public Service Company of New Hampshire)) Docket Nos. EC90-10-004, ER90-143-004, ER90-144-004, ER90-145-004 and EL90-9-004

(Issued January 29, 1992)

MOLER, Commissioner, dissenting in part:

I dissent from that part of the Commission's opinion excluding Qualified Facilities from the wheeling requirements of the New Hampshire Corridor Proposal. I do so for the same reasons expressed in my dissent in the Utah Power case. 1/

Elizabeth A. Moler
Elizabeth Anne Moler
Commissioner

1/ Utah Power & Light Company, 57 FERC ¶ 61,363 at 62,196-62,200 (1991)(Moler, dissenting in part).