SEABROOK NUCLEAR STATION, UNIT 1

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

DOCKET NO. 50-443A

STAFF RECOMMENDATION

NO POST OL SIGNIFICANT ANTITRUST CHANGES

AUGUST 1991

CONTENTS

I. THE SEABROOK AMENDMENT APPLICATIONS

By letters dated November 13, 1990, the Nuclear Regulatory Commission (NRC or Commission) staff (staff) received post Operating License (OL) amendment applications requesting two license changes: 1) to transfer operating responsibility and management of the Seabrook facility from New Hampshire Yankee, the current operator, to a proposed entity called North Atlantic Energy Service Company (NAESCO); and 2) to authorize the ownership transfer of approximately 35 percent of the Seabrook facility from Public Service Company of New Hampshire (PSNH) to a proposed entity called North Atlantic Energy Corporation (NAEC). Both NAESCO and NAEC will be wholly owned subsidiaries of Northeast Utilities (NU) and formed solely to operate Seabrook and own PSNH's share of the facility respectively. The transfer of operating responsibility to NAESCO and the proposed transfer of PSNH'S ownership in Seabrook to NAEC introduce new entities associated with the Seabrook facility.

The applicant and the licensee suggest that no antitrust review of these proposed changes is required by the Atomic Energy Act. The staff believes the legislative history and reading of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, require the staff at least to review new owners of nuclear power production facilities for the purpose of determining whether the adding of the new owner to the license will constitute a significant change. The staff recommends that the Director of the Office of Nuclear Reactor

Regulation conclude from the staff's analysis herein and consultation with the Department of Justice (Department or DOJ) that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license. The basis for staff's recommendation and determination are provided herein.

II. APPLICABLE STATUTE AND REGULATIONS

Section 105 of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, designates when and how antitrust issues may be raised. *See Houston Lighting & Power Co.*, (South Texas Project), CLI-77-13, 5 NRC 1303, 1317 (1977). In connection with the legislation to remove the need to make a finding of practical value before issuing a commercial license,[1] in 1970, the Joint Committee

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[1] Before the amendment, the Commission could issue a commercial license for a production or utilization facility only after it had made a finding of "practical value" of the facility for industrial or commercial purposes. Public Law 91-560 (84 Stat. 1472)(1970), section 3, amended section 102 of the Atomic Energy Act (AEA). Prior to the amendment, section 102 of the AEA read as follows:

> SEC.102. FINDING OF PRACTICAL VALUE.-Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or

(continued...)

on Atomic Energy also examined section 105c. Before the 1970 amendment, section 105c provided that whenever the Commission proposed to issue a commercial license, it would notify the Attorney General of the proposed license and the proposed terms and conditions thereof. The Attorney General would then be obliged to advise the Commission "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws and such advice will be published in the *Federal Register*."[2] The Joint Committee, recognizing that the language and potential effect of the existing section 105c were not sufficiently clear, decided to amend section 105c to clarify and revise this phase of the Commission's licensing process. *See* 116 Cong. Rec. S19253.

Subsection 105c(1), as amended, requires the Commission to transmit, to the Attorney General, a copy of any license application to construct or operate a nuclear facility for the

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[1](...continued)
commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.

[2] Prior to the 1970 amendment, antitrust review could occur only following a Commission finding, under section 102 of the Atomic Energy Act, that a type of facility had been sufficiently developed to be of "practical value" for industrial or commercial purposes. Because the Commission never made such a finding, no antitrust reviews occurred. Power reactor construction permits and operating licenses before 1970 were issued pursuant to section 104b, which applied to facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Attorney General's advice as to whether the grant of an application will create or maintain a situation inconsistent with the antitrust laws. Subsection 105c(2) provides an exception to the requirements of subsection 105c(1) for a license to operate a nuclear facility for which a construction permit was issued under section 103, unless the Commission determines that such review is advisable on the ground that "significant changes" in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission in connection with the construction permit for the facility.

The Commission has promulgated regulations regarding the submittal of information in connection with the prelicensing antitrust review of facilities and the forwarding of antitrust information to the Attorney General. *See* 10 C.F.R. §§ 2.101, 2.102, and 50.33a. Section 50.33a requires the submission of the information specified in 10 C.F.R. Part 50, Appendix L (Information Requested By The Attorney General For Antitrust Review Facility License Applications). The publication in the *Federal Register* of a notice of the docketing of the antitrust information required by Part 50, Appendix L is required by 10 C.F.R. § 2.101(c). Subsections 2.101(e) and 2.102(d) address the situation in which an antitrust review has been conducted as part of the application for a construction permit and the application for an operating license is now before the Commission. Related to this, the Commission has delegated to the Director of Nuclear Reactor Regulation (NRR) or

the Director of Nuclear Material Safety and Safeguards (NMSS), as appropriate, its authority under subsection 105c(2) of the AEA to make the determination in connection with an application for an operating license as to whether "significant changes" in the licensee's activities, or proposed activities under its license have occurred subsequent to the antitrust review conducted in connection with the construction permit application. *See* 10 C.F.R. §§ 2.101(e)(1) and 2.102(d)(2).[3]

On October 22, 1979, the Commission amended 10 C.F.R. § 55.33a to reduce or eliminate the requirements for submission of antitrust information in certain *de minimis* instances. In publishing the rule, the Commission stated its conclusion that applicants whose generating capacity at the time of the application is 200 MW(e) or less are not required to submit the information specified in Appendix L of Part 50, unless specifically requested to do so. The

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[3] In connection with the delegation, the Commission approved procedures to be used until such time as regulations implementing the procedures were adopted. Although never formally published, the procedures are available as attachments to SECY-79-353 (May 24, 1979) and SECY-81-43 (January 19, 1981). On March 9, 1982, the Commission amended its regulations to incorporate final procedures implementing the Commission's delegation of authority to make the "significant changes" determination to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate. 47 Fed. Reg. 9963, March 9, 1982. The amended regulation provides that the Director, NRR or NMSS, as appropriate, after inviting the public to submit comments regarding antitrust aspects of the application and after reviewing any comments received, is authorized to make a significant change determination and, depending on his determination, either refer the antitrust information to the Attorney General or publish a finding of no significant changes in the *Federal Register* with an opportunity for requesting reevaluation of the finding.

Commission further stated that it believed that utilities smaller than these generally would have a negligible effect on competition. Fed. Reg. 60715, October 22, 1979.

All applicants for an NRC utilization facility license who are not determined by the staff to be *de minimis* applicants, undergo an extensive antitrust review at the construction permit (CP) stage and a review at the operating license (OL) stage. The CP review is an in depth analysis of the applicant's competitive activities conducted by the DOJ in conjunction with the staff. The competitive analysis associated with the OL stage of review is conducted by the staff, in consultation with the Department, and is focused on significant changes in the applicant's activities since the completion of the CP antitrust review (or any subsequent review). In each of these reviews, both the staff and the Department concentrate on the applicant's activities and determine whether the applicant's conduct or changes in applicant's conduct creates or maintains a situation inconsistent with the antitrust laws.

III. POST INITIAL OPERATING LICENSE ANTITRUST REVIEWS

A. General

As indicated *supra*, the NRC has established procedures by which prospective licensees of nuclear production facilities are reviewed

during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. The AEA does not specifically address the addition of new owners or operators after the initial licensing process. The legislative history discusses, to a limited extent, some types of amendments.[4] However, neither section 105c of the AEA or the Commission's regulations deal directly with applications to change ownership of facilities with operating licenses.[5] Indeed, in its *South Texas* decision, the Commission stated that, "we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment ... where an application for transfer of control of a license has been made ..." *South Texas Project*, 5 NRC at

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[4] The report by the Joint Committee on Atomic Energy notes that:

> The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for the purposes of triggering subsection 105 c., other applications which may be filled during the licensing process.

H. Rep. 91-1470, 91st Cong. 2d Sess., at 29 (1970).

[5] Applications for construction permits, for amendment of construction permits, and applications for initial operating licenses are not included here.

1318. The Commission went on to note that "[a]uthority [for antitrust review of a license transfer], not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b)."[6] *Id.* Unfortunately, the Commission did not explain how its regulations could grant authority not given by the statute.

The Commission has considered, however, the matter of adding a licensee after issuance of a construction permit, but before issuance of the initial operating license. In *Detroit Edison, et al.*, (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978) *aff'd* ALAB-475, 7 NRC 752, 755-56 n.7 (1978), the Licensing Board denied a petition to intervene and request for an antitrust hearing by a member/ratepayer of the distribution cooperative that purchased all of its power from a cooperative that would become a co-licensee of the power plant. In considering a jurisdictional argument, the Board, relying on the Congressional intent and purpose behind section 105c of the AEA cited in n.4 *supra*, stated that "[s]ince the two cooperatives in this case are required to submit an application to become co-licensees, these constitute *their* 'initial application for a construction permit'"

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[6]10 C.F.R. § 50.80(b) provides in part that an application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and *if the license to be issued is a class 103 license, the information required by § 50.33a* (Information requested by the Attorney General for antitrust review).

(emphasis in original). *Id.*, at 588. In *Summer*, the Commission referred to *Fermi* for the proposition that the addition of a co-owner as a co-licensee was, in effect, an *initial application* of the co-owner and as such required formal antitrust consideration, stating, "[t]hat decision was based on the necessity for an in-depth review at the CP stage of *all applicants*, lest any applicant escape statutory antitrust review" (emphasis added). *South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 831 (1980).

The legislative history of section 105c and the Commission's guidance in *South Texas* might be read to indicate that Commission antitrust review, if not limited to the initial licensing process, is at least an unsettled question regarding operating license amendments. However, *Fermi* and *Summer* stand for the proposition that new license applicants are initial applicants for purposes of a section 105c antitrust review. Further, the Commission indicated in *Summer* that in such situations a formal antitrust inquiry is required. *See Id.*, at 830-31. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests.

The staff has received applications for operating license amendments that 1) request the addition of a new owner or seek Commission permission to transfer control from an existing to a new

owner or 2) request placing a non-owner operator on a license. The action the NRC Staff has taken has been particular to each situation. In general, post initial operating license amendment applications involving a change in ownership have included an antitrust review by the staff and consultation with the Attorney General. The review by the staff focuses on significant changes in the competitive market caused by the proposed change in ownership since the last antitrust review for the facility and its licensees. The staff review takes into account related proceedings and reviews in other federal agencies (e.g. FERC, SEC, or DOJ).

B. Change In Ownership

Although not specifically addressed by regulation, the staff has evolved a process for meeting the Commission's direction in the *Summer* decision to conduct an antitrust inquiry for license amendments after issuance of the operating license. The receipt of an application to add a new owner to an operating license or to seek Commission permission to transfer control from an existing to a new owner, for section 103 utilization facilities which have undergone antitrust review during the initial licensing process, is noticed in the *Federal Register*, inviting the public to express views relating to any antitrust issues raised by the application, and advising the public that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensees' activities or proposed activities have

occurred since the completion of the previous antitrust review. The staff's awareness of any related federal agency reviews of the request (e.g. FERC, SEC, or DOJ) and the staff's intention to consider those related proceedings are also noted in the *Federal Register* notice. The staff reviews the application after the comment period, so that the staff can perform the review with benefit of public comment, if any, and consultation with the Attorney General. If the Director, NRR, finds no significant change, the finding is published in the *Federal Register* with an opportunity for the public to request reconsideration as provided for in 10 C.F.R. § 2.101(e) for initial license applicants. If the Director, NRR finds significant change, the matter is referred to the Attorney General for formal antitrust review.

In conducting the significant change review, the staff uses the criteria and guidance provided by the Commission in its two *Summer* decisions for making the significant change determination for OL applicants.[7]

> The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are attributable to the licensee(s); and (3) have

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[7] In CLI-80-28, the Commission enunciated the criteria, but deferred its actual decision regarding the petition to make a significant changes determination that was before it. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980). In CLI-81-14, the Commission denied the petition. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

> anti-trust implications that would most likely warrant some Commission remedy.

Summer, 11 NRC at 824. To warrant an affirmative significant change finding, thereby triggering a formal OL antitrust review that seeks the advice of the Department of Justice on whether a hearing should be held, the particular change(s) must meet all three of these criteria. In its second *Summer* decision, the Commission provided guidance regarding the criteria and, in particular, the meaning of the third criterion in determining the significance of a change.

> As the staff recognized, "this third criterion appropriately focuses, in several ways, on what may be 'significant' about any changes since the last...review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive *or have de minimis anticompetitive effects*." (Emphasis provided) The staff correctly discerned that the third criterion has a further analytical aspect regarding remedy: "Not only does [it] require an assessment of whether the *changes* would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes by their nature would require." The third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance.

South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862, 872-73 (1981).

C. Change In Or Addition Of Non-Owner Operator

Changes in a nuclear plant operator, without any change in ownership, may also carry the potential of abuse of market power by the operator. However, the staff has determined that a plant operator who has no control over the marketing of the power or energy produced from the facility will not, under normal circumstances, be in a position to exert any significant amount of market power in the bulk power services market associated with the facility. The staff makes an effort in these cases to reach agreement on a license condition requiring new plant operators to agree to be divorced from the marketing or brokering of power or energy from the facility in question and hold existing owners accountable for the operator's actions. If the prospective new operator and the owners agree to appropriate license conditions that reduce the potential for impact on plant ownership or entitlement to power output, as determined by the staff, the application to add or change a non-owner operator is viewed as an application falling within the *de minimis* exception for submitting antitrust information provided for in 10 C.F.R. § 50.33a.

The Commission has exempted *de minimis* applicants from the requirements to submit antitrust information and, therefore, the publication for comment of such information, unless specifically requested by the Commission. *See* 10 C.F.R. § 50.33a. The Commission has determined that such applicants generally would have a negligible effect on competition. *See* 44 Fed. Reg. 60715, October 22, 1979. The staff has determined that, with an

appropriate license condition regarding the marketing and brokering of power, the potential for a non-owner operator to have an affect on competition in the bulk power market is effectively mitigated. Therefore, such an operator is, as a practical matter, the same as a *de minimis* applicant with respect to its ability to affect competition. Normally, no further antitrust review of the non-owner operator will be conducted by the staff.

IV. PREVIOUS SEABROOK NRC ANTITRUST REVIEWS

A. Construction Permit Review

By letter dated December 4, 1973, the Attorney General issued advice to the Atomic Energy Commission pursuant to Public Service Company of New Hampshire's (PSNH), the lead applicant,[8] application for a construction permit for the Seabrook Nuclear Power Station Units No. 1 and No. 2. In its advice letter, the Department expressed concern over several allegations by smaller power systems in the New England bulk power services market that they were unable to gain access to low cost bulk power supply on the same basis as

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[8]PSNH was the majority owner with 50% of the plant at the time the time of the Department's advice letter in 1973. Since this initial review, there have been several changes in ownership and ownership shares in Seabrook. Existing owners are as follows: PSNH (35.56942%); United Illuminating (17.5%); EUA Power Corporation (12.1324%) Connecticut Light & Power Company (4.05985%); Hudson Light & Power Department (0.07737%); Vermont Electric Generation and Transmission Corporative, Inc. (0.41259%); Montaup Electric Company (2.89989%); Canal Electric Company (3.52317%); New England Power Company (11.59340%); Taunton Municipal Lighting Plant (0.10034%); and New Hampshire Electric Cooperative, Inc. (2.17391%)

larger systems in the area. The advice letter stated that as a result of a settlement agreement reached between the privately owned and publicly owned systems in New England that there had been a "dramatic improvement in the relations among the various segments of the electric power industry in New England...." The Department emphasized the importance of the development of the New England Power Pool (NEPOOL) as a regional planning body that would enable participation in bulk power services by all types of power entities throughout New England. The Department concluded,

> ... that the creation of a truly open, non-exclusive NEPOOL means that all systems can have a dependable framework within which to obtain fair and non-discriminatory access to economical and reliable bulk power supply. (December 4, 1973 advice letter, p. 4)

As a result of its review, the Department advised the Atomic Energy Commission that there was no need for an antitrust hearing pursuant to the construction permit application for Seabrook.

B. Operating License Review

As noted above, a prospective operating licensee is not required to undergo a formal antitrust review unless the staff determines that there have been "significant changes" in the licensee's activities or proposed activities subsequent to the review by the Department of Justice and the staff at the construction permit stage. The staff completed its OL antitrust review of Seabrook in January

1986. The staff analysis indicated that,

> ...NEPOOL, which was only two years old at the time when the CP antitrust review was performed, appears to have evolved into a framework ensuring access to reliable and economical bulk power supply for all New England utilities. Two provisions of the original pool agreement were found to be discriminatory against smaller utilities and have since been removed. Further, because Seabrook 1 has been designated as a pool-planned unit, access to Seabrook 1 over pool transmission facilities of members is guaranteed for all participants under the terms of NEPOOL.[9]

Based in large part upon the successful formation and operation of NEPOOL, the staff concluded that the changes in the licensees' activities as well as any proposed changes in licensees' activities do not represent "significant changes" as identified in the *Summer* decision and recommended that no formal OL antitrust review be conducted. The staff's antitrust OL review was completed in February 1986 and the Seabrook full power license was issued on March 15, 1990.

C. EUA Power Review

By letter dated March 26, 1986, New Hampshire Yankee, acting as agent for the Seabrook licensees, requested the staff to amend the

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[9]Staff review of Seabrook licensees' changed activity, "Seabrook Station, Unit 1, Public Services Company of New Hampshire, et al, Docket No. 50-443A, Finding of No Significant Antitrust Changes," p. 57.

Seabrook construction permits (Units 1 and 2) to reflect the purchase and transfer of an approximate 12 percent ownership share in the Seabrook facility to EUA Power Corporation (EUA Power), a wholly owned subsidiary of Eastern Utility Associates of Boston, Massachusetts. The amendment requested the transfer of 12 percent ownership to EUA Power and deletion of the following owners as Seabrook licensees: Bangor-Hydro-Electric Company (2.17391%); Central Maine Power Company (6.04178%); Central Vermont Public Service Corporation (1.59096%); Fitchburg Gas and Electric Light Company (0.86519%); and Maine Public Service Company (1.46056%).

Even though a sister company, Montaup Electric Company (both are wholly owned by Eastern Utilities Associates), had previously undergone an antitrust review in conjunction with its participation in Seabrook, EUA Power represented a new owner prior to issuance of the Seabrook full power operating licensee and was required to undergo a formal antitrust review by the Department of Justice. Accordingly, EUA Power submitted pertinent 10 C.F.R. Part 50, Appendix L information to the staff regarding its operations and competitive activity. A notice of receipt of this information, which provided the opportunity for a 60 day comment period on the antitrust issues regarding the proposed ownership transfer, was published in the *Federal Register* on May 23, 1986.

By letter dated July 1, 1986 the Department advised the staff that there was,

> ... no evidence that the proposed participation by EUA Power Company in the Seabrook Units would either create or maintain a situation inconsistent with the antitrust laws under Section 105(c). We do not, therefore, believe it is necessary for the Commission to hold an antitrust hearing in this matter. (Department of Justice advice letter, p.1)

The Department's letter was published in the *Federal Register* on July 17, 1986 and provided for interested persons to request a hearing and file petitions to intervene. There were no such requests and the staff issued an amendment (No. 9) to the Seabrook construction permits authorizing the transfer of ownership effective upon completion of the transfer of ownership shares which was consummated on November 26, 1986. In this instance, there was no need to apply the significant change threshold criteria to the EUA Power amendment review and address the issue of whether the Department of Justice should conduct the review or the staff should issue a significant change determination because the request for ownership change occurred prior to issuance of the full power operating license and consequently, the review involved an amendment to the construction permit and followed construction permit review procedures.

V. CHANGES AT SEABROOK AFTER ISSUANCE OF THE INITIAL OL

The instant amendment requests to transfer PSNH'S ownership in Seabrook to a proposed new entity, NAEC, and change the plant operator from New Hampshire Yankee to a proposed new operating

entity, NAESCO, represent direct outgrowths of the bankruptcy proceeding initiated by PSNH in January 1988. Though the bankruptcy proceeding and PSNH's financial status are not the focus of the instant review, it is significant to note that PSNH is dependent upon Seabrook as its principal source of generating capacity and operating revenue. This dependence on one source of operating revenue left PSNH highly susceptible to fluctuations in the business cycle that affect different regions of the country at different periods in the cycle. During the mid 1980's commerce and industry in New England were growing dramatically. Economic growth exceeded projections for planned electric generating capacity.[10] However, as rapidly as the New England economy advanced in the mid 1980's, it declined equally a fast in the late 1980's. PSNH filed for bankruptcy in January 1988 and EUA Power Corporation, another Seabrook co-owner heavily dependent upon the sale of Seabrook power and energy, filed for bankruptcy in early 1991.

There were other factors that contributed to PSNH'S financial difficulties in the 1980's, e.g., development and approval of emergency evacuation plans for Seabrook and state regulatory proceedings involving allowance of Seabrook costs in PSNH'S rate

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[10]EUA Associates, parent company of Montaup Electric Company, a co-owner of Seabrook, formed EUA Power Corporation specifically to purchase a 12 percent ownership share in Seabrook to meet an unexpected strong demand for electric power in New England during the late 1980's and 1990's. John F.G. Eichorn, chairman of EUA Associates, was quoted by the Providence, Rhode Island Journal newspaper, as citing NEPOOL electricity demand estimates showing "a serious shortfall developing in New England, which we at EUA are determined to help eliminate." Journal, April 10, 1986.

base. All of these factors culminated in PSNH filing for bankruptcy and the resultant proposal by NU to acquire PSNH. The proposals adding a new owner and a new operator of the Seabrook facility are the principal changes the staff must address in its post OL significant change antitrust review. The staff must determine whether the new owner or the new operator will create or maintain a situation inconsistent with the antitrust laws.

VI. FERC AND SEC REVIEWS

Pursuant to the requirements and jurisdiction of both the Federal Power Act and the Public Utilities Holding Company Act of 1935, NU filed applications with the Federal Energy Regulatory Commission (FERC), on January 5, 1990, and the Securities and Exchange Commission (SEC), on October 5, 1989, respectively, seeking approval of its proposed merger with PSNH. In light of the fact that similar competitive issues are currently being addressed in proceedings at the FERC and SEC and that the findings reached in the FERC and SEC proceedings will be considered by the staff, a brief synopsis of these proceedings follows.

A. FERC Proceeding

Northeast Utilities, acting through a service company called NUSCO, sought approval under Section 203 of the Federal Power Act (enforced by the FERC) to acquire the jurisdictional assets of

PSNH. Section 203 of the Federal Power Act (FPA) requires the FERC to make a determination as to whether the proposed acquisition or merger will be consistent with the public interest. Though the FPA does not specifically charge the FERC with weighing the competitive implications of the merger or acquisition in terms of injury to competition or the competitive process in identifiable markets, in the recent past, the FERC has considered these competitive concerns as inputs to its ultimate determination as to whether the combination creates more benefits than costs, i.e., is in the public interest.

On March 2, 1990, the FERC issued an order granting intervention by all requesting parties and also granted a NU motion to expedite the hearing schedule by requiring that an initial decision be issued no later than December 31, 1990. After extensive discovery, depositions and oral argument, the FERC administrative law judge (ALJ), Jerome Nelson, issued an initial decision on December 20, 1990.[11]

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[11]"On March 7, 1990, NU submitted its direct case, which consisted of the prepared testimony and exhibits of six witnesses. After extensive discovery, including numerous depositions of NU, Staff, intervenor and third party witnesses, the Staff and intervenors filed their respective direct cases on May 25, 1990. The direct cases of staff and intervenors included the prepared testimony and exhibits of 49 witnesses. On June 25, 1990, Staff and intervenors filed cross-rebuttal cases through the prepared testimony and exhibits of 19 witnesses. On July 20, 1990, NU filed its rebuttal case through the prepared testimony and exhibits of 12 witnesses. Twenty-five days of hearings were held during August and September of 1990. Thirty-five witnesses were cross-examined, and 809 exhibits were admitted into evidence. Briefs and reply briefs were filed in October of 1990. Four days of oral argument ended on November 13, 1990." (ALJ Initial Decision, p. 6).

The ALJ made several findings in his initial decision, however, the findings most relevant to the NRC post OL amendment review concern the effect the merger will have on the New England bulk power services market. The ALJ's initial decision indicated that without a detailed set of merger conditions, the "NU-PSNH merger would have anti-competitive consequences." The ALJ found that,

> the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts). (*Id.*, p.15)

The ALJ indicated that the merged company will control 92 percent of the transmission capacity presently serving New England.

> This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices. (*Id.*, p. 16)

The ALJ concluded that merged NU-PSNH will control the principal transmission access routes from northern New England to southern New England as well as 72 percent of the New York, New England transmission corridor path.

> Because PSNH "controls the only transmission lines linking Maine and New Brunswick to the rest of New England"..., Eastern REMVEC utilities will necessarily have to deal with the merged company in order to get power from those areas. The merged company's control

> would also extend to access from New York... NU controls 72% of the New York-New England "interface"... and needs only a small portion of that share for its own use. (*Id.*)

The ALJ's initial decision recommended that the FERC approve the merger only if specific merger conditions were agreed upon by the merging parties. There are two principal conditions discussed by the ALJ designed specifically to address the new NU-PSNH's market power and particularly any potential for abuse of this newly created market power vis-a-vis other power systems in New England. The first condition is basically a rework of a proposal initially offered by NU-PSNH dealing with the merged company's policy regarding transmission over its power grid. A set of General Transmission Commitments was developed by the ALJ which dealt with various degrees of priority access and time horizons depending upon the individual power supply situation in question. This policy commitment, according to the ALJ, would reassure non-dominant power systems in New England a form of meaningful access to the transmission facilities required to fulfill their bulk power supply requirements.

The second major condition that addresses the transmission dominance of the new NU-PSNH is termed the, "New Hampshire Corridor Proposal." This proposal serves to open up the flow of power from Canada to New England and from northern New England to the heavily populated southeastern portion of New England. The Corridor Proposal allocated a total of 400 MW of transmission capacity with

200 MW allocated to New England Power Company and 200 MW allocated to southern New England utilities. These two transmission proposals recommended by the FERC ALJ are the most relevant to the staff's review of New Hampshire Yankee's requests to change ownership and the operator of the Seabrook facility.

On August 9, 1991, the FERC conditionally approved the NU merger with PSNH. To mitigate the merger's likely anticompetitive effects, the FERC strengthened NU's General Transmission Commitment and noted that it will construe NU's voluntary commitment very strictly. NU can not give higher priority to its own non-firm use than to third party requests for firm wheeling in allocating existing transmission capacity. The FERC also ruled that independent power producers and qualifying facilities are eligible for transmission access on the New Hampshire Corridor. *See Northeast Utilities Service Company* (Re Public Service Company of New Hampshire) FERC slip op. No. 364 (August 9, 1991).

B. SEC Proceeding

NU filed an application with the SEC for approval under the Public Utility Holding Company Act of 1935 (PUHCA) of its proposed merger with PSNH. The SEC issued a notice of the filing of the application on February 2, 1990 (Holding Co. Act Release No. 25032). Fourteen hearing requests from 41 separate entities were received and four of these requests, representing 21 entities, were

subsequently withdrawn. Moreover, eight entities filed comments or notices of appearance. The segment of the SEC review most relevant to staff's post OL amendment review revolves around Section 10(b)(1) of the PUHCA that requires the SEC to consider possible anticompetitive effects of the proposed NU-PSNH acquisition. The SEC in a Memorandum Opinion dated December 21, 1990 approved NU's proposed acquisition of PSNH--indicating that all PUHCA requirements, including Section 10(b)(1), had been fulfilled. In its initial decision, the SEC stated that,

> Given the approximate size of the Northeast--PSNH system and the resultant economic benefits discussed herein..., we conclude that the Acquisition does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied. (SEC Initial Decision, p. 40)

The SEC's analysis, as reflected in its initial decision, considers the economic benefits associated with a merged NU-PSNH and not so much the potential for abuse of market power that may be enhanced by the merger. The initial decision states that the,

> transfer to North Atlantic will merely move the asset from one Northeast subsidiary to another and should have no impact on competitive conditions. (*Id.*, p.58)

The SEC order approving the merger was appealed by two intervenors in the SEC proceeding--the City of Holyoke Gas and Electric

Department and the Massachusetts Municipal Wholesale Electric Company (petitioners). Petitioners filed a request for rehearing of the initial decision, arguing that the SEC erred in approving the NU-PSNH acquisition by failing to provide sufficient analysis of the anticompetitive effects of the acquisition. Petitioners based much of their argument for rehearing upon the FERC ALJ's December 20, 1990 decision which indicated that an unconditioned NU-PSNH merger would have significant anticompetitive effects upon the New England bulk power services market.

In a Supplemental Memorandum Opinion and Order (Supplemental Memorandum) dated March 15, 1991, the SEC granted petitioners a reconsideration of the SEC's initial decision.

> In our December order, we recognized that the Acquisition would decrease competition, but concluded that the Acquisition's benefits would outweigh its anticompetitive effects. The petitioners challenge this determination, arguing that the Commission ignored the anticompetitive effects of the merged company's control of transmission facilities and surplus power. (Supplemental Memorandum, p.3)

The SEC's Supplemental Memorandum indicated that its initial decision focused more on the size and corporate structure of NU-PSNH rather than the merged company's ability to control access to transmission or excess capacity. The Supplemental Memorandum stated that even though the SEC's principal focus was on the size and structure of the merged company, the competitive access issues

were considered and the SEC concluded that, "The merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior." (Supplemental Memorandum, p.5) However, the SEC relied upon the transmission commitments made by NU to mitigate any possible anticompetitive effects of the merger.[12]

The Supplemental Memorandum recognized that both the SEC and the FERC "have statutory responsibilities with respect to the anticompetitive consequences of mergers in the public-utility industry". (*Id.*, p.6). However, the SEC also recognized that the focus of the Federal Power Act and the Public Utility Holding Company Act are different in that each agency pursues administration of each act with different goals for regulating members of the electric utility industry. As a result, the SEC deferred the question of anticompetitive consequences and its ultimate approval of the proposed merger to the FERC.

> Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the Commission, [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look

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[12] The initial FERC decision found the commitments made by NU to be insufficient to remedy the potential anticompetitive effects of the merger and recommended additional terms and conditions be imposed upon the merged company as a condition for FERC approval of the merger.

> to the FERC's expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the acquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the FPA. (*Id.*, p.9)

VII. AMENDMENT APPLICATIONS COMMENTS RECEIVED BY THE STAFF

The staff, in accordance with 10 C.F.R. § 2.101(e)(1), published receipt of New Hampshire Yankee's request to amend the Seabrook OL in the *Federal Register* and provided interested parties the opportunity to comment on the antitrust issues raised by the proposed acquisition on February 28, 1991.[13] The staff received comments from the following entities or their representatives: 1) New Hampshire Electric Cooperative (April 1, 1991,); 2) Massachusetts Municipal Wholesale Electric Company (April 1, 1991); 3) City of Holyoke Gas and Electric Department (April 1, 1991); 4) Hudson Light and Power Department (April 4, 1991); and 5) Taunton Municipal Lighting Plant (April 10, 1991). By letter dated April 22, 1991, counsel for Connecticut Light and Power Company and PSNH responded to these comments.[14] The comments from participants in the FERC and SEC proceeding by and large mirrored the positions taken by the commenters in those proceedings. The comments

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[13] A similar notice regarding the change in operator from New Hampshire Yankee to NAESCO, was published in the *Federal Register* on March 6, 1991.

[14] By letter dated June 13, 1991, City of Holyoke Gas and Electric Department (HG&E) replied to the Connecticut Light and Power (CL&P) and PSNH response. By letter dated July 9, 1991, CL&P and PSNH responded to the HG&E reply. By letter dated July 22, 1991, HG&E replied to the CL&P and PSNH July 9, 1991 response.

received are summarized below with the staff analysis of each comment.

A. New Hampshire Electric Cooperative (NHEC)

Comment

NHEC is a transmission dependent utility (TDU), i.e., "entirely dependent on NU or PSNH for their bulk power transmission needs". NHEC states that without access to NU's or PSNH's transmission facilities it cannot actively compete in the New England wholesale bulk power services market. NHEC asserts that the proposed acquisition of PSNH by NU will concentrate its only source of essential transmission service in the hands of its principal competitor. NHEC cites the initial FERC decision as evidence that the proposed merger, if unconditioned, will have an adverse impact on the competitive process in the New England bulk power services market. NHEC also states that recent developments which have not been a part of the FERC record are relevant to the NRC review associated with the Seabrook post OL amendment applications.

NHEC wishes to purchase partial requirements power from another supplier, New England Power Company (NEP), rather than PSNH. NHEC and NEP entered into a long-term power supply contract on January 9, 1991; however, NHEC needs access to PSNH's transmission grid to receive the NEP power. PSNH has indicated that NHEC is contractually prohibited from taking any other off system power purchases during the term of its power supply contract with PSNH

and as a result PSNH would not approve use of its transmission grid until the contractual dispute between PSNH and NHEC is resolved.

NHEC contends that the proposed acquisition of PSNH by NU is anticompetitive and under the NRC's *Summer* criteria, represents a "significant change". NHEC seeks relief by requiring NU to,

> . . . commit before this Commission that it will provide NHEC all transmission needed for NHEC to purchase power from other sources . . . .

Staff Analysis

The staff believes that the issue described by NHEC in its April 1, 1991 filing to the staff primarily involves a contract dispute with PSNH and NU over transmission rights pertaining to power purchases by NHEC from New Brunswick. Presently, NHEC is taking partial requirements wholesale power from PSNH under a 1981 contract. A dispute has arisen between NHEC and PSNH (now NU, given its proposed acquisition of PSNH) regarding the terms under which the contract can be terminated. PSNH states that the contract requires NHEC to provide five years notice prior to cancelling the contract and switching to a different supplier. NHEC states that the contract provides for termination upon NHEC joining NEPOOL and that the recent NHEC-NEP purchase agreement and NHEC's ownership interest in Seabrook provide the basis for NEPOOL membership.

This contract dispute, which forms the linchpin for NHEC's argument

that it is dependent upon NU's transmission grid is presently being interpreted before the FERC. The staff believes that it is appropriate for this dispute to be resolved under the auspices of the FERC's jurisdiction over wholesale power and transmission tariffs and the terms and conditions associated with such agreements. The staff sees no need for the NRC to enter into a contract dispute that is under review by the FERC. Should the PSNH-NHEC contract dispute be resolved in NHEC's favor, i.e., enabling NHEC to terminate the contract without giving a five year notice, the merger condition recommended by the FERC ALJ and commitments made by NU to provide transmission dependent utilities transmission services (cf., PSNH and Connecticut Power & Light Compan·· Comments to NRC staff dated April 22, 1991, pp. 29-30), should adequately resolve the competitive concerns raised by NHEC.

B. Massachusetts Municipal Wholesale Electric Company (MMWEC)

Comment

MMWEC is a co-owner (11.5934%) of the Seabrook plant. In its comments to the NRC, MMWEC states that the proposed acquisition of PSNH by NU is anticompetitive, notwithstanding the merger conditions recommended by the FERC ALJ, and suggests that the Director of the Office of Nuclear Reactor Regulation find, pursuant to *Summer*, that significant changes have occurred since the Attorney General's advice letter was issued in December 1973.

MMWEC contends that the standard of review of mergers required by

the FERC under the FPA is different than that required by the NRC under the Atomic Energy Act. MMWEC states that this difference permits anticompetitive acquisitions under the FPA if it is determined that the public interest is served by the acquisition (or merger), whereas the NRC must address the competitive implications of activities of licensees "irrespective of any compelling public interest." (MMWEC comments, p.3)

Moreover, MMWEC requests the NRC to address the anticompetitive aspects of NU's management and operation of Seabrook--an area not covered in the FERC ALJ's initial decision. According to MMWEC,

> NU is executing a plan whereby it has separated the Seabrook management function and ownership function from each other and utilized its market power to insulate itself, those functions and its other affiliates from any liability, except liability imposed by willful misconduct. (*Id.*, p.5)

MMWEC's concerns revolve around a July 19, 1990 agreement reached among Seabrook owners holding approximately 70 percent of the facility. This agreement provides for the transfer of the managing and operating agent from New Hampshire Yankee to a proposed wholly owned NU subsidiary, NAESCO. An exculpatory clause in the July 19, 1990 agreement, according to MMWEC,

> . . . would not only free NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. MMWEC cannot insure any

> reckless or negligent conduct of the Managing Agent or its affiliates. (*Id.*)

MMWEC requests the NRC to act to prevent NU from maintaining a situation inconsistent with the antitrust laws. MMWEC suggests that the NRC condition the approval of the license transfer to "require appropriate amendment of the Joint Ownership Agreement and to prohibit NAECO, & NAESCO and their affiliates from freeing themselves from liability for misconduct." (*Id.*, p.6)

Staff Analysis

MMWEC's principal concern is that NU used its market power in an anticompetitive manner in formulating a July 19, 1990 agreement that established parameters by which the Seabrook facility would be managed and operated. Moreover, MMWEC asserts that this agreement frees,

> . . .NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. (MMWEC comments, p. 5)

MMWEC has failed to show how NU has used (abused) its market power in bulk power services in formulating an agreement to install a new managing agent for Seabrook. MMWEC asks the NRC to condition the license transfer by requiring amendment of the Seabrook "Joint Ownership Agreement", to, effectively, make NAECO and NAESCO more accountable for their actions pursuant to their ownership and operation of the Seabrook facility respectively. Based upon the

data available to the staff, it appears as though the July 19, 1990 agreement was consummated in conformance with the Seabrook Joint Ownership Agreement, as amended, and not as a result of any abuse of market power on the part of NU. The staff believes MMWEC's concerns over the degree of liability it must absorb should NAESCO in any way mismanage Seabrook are concerns of a contractual, not competitive, nature and should be raised and addressed before an appropriate forum for these matters, not the NRC.

Moreover, as recognized by MMWEC at page three of its comments, the staff considered the possibility of a new plant operator having an influence over competitive options of the new owners of Seabrook. For this reason, after discussions with the staff, NAESCO agreed to a license condition divorcing itself from the marketing or brokering of power or energy produced by Seabrook. The license condition was designed to eliminate NAESCO's ability to exercise any market power, if evident, and obviated the need to conduct a further competitive review of NAESCO. For the reasons stated above, MMWEC's request to condition the Seabrook license that frees it from NAESCO's liability should be denied.

C. City Of Holyoke Gas & Electric Department (HG&E)

Comment

HG&E is a municipally owned electric system serving primarily western Massachusetts. "HG&E lies within the service territory of Western Massachusetts Electric Company ("WMECO"), a wholly-owned

subsidiary of NU." (HG&E comments, p.2) HG&E generates no power on its own and relies heavily on the transmission facilities of PSNH to supply approximately 36 percent of its load from the Point Lepreau nuclear plant in New Brunswick, Canada. According to HG&E,

> The increase in control that the merged entity will exercise over generation (including power from Seabrook) and transmission capacity in New England represents a "significant change" from the activities of the current licensee--an independent PSNH. (HG&E comments, p.3)

HG&E contends that NU-PSNH will wield significantly more market power than a stand alone PSNH and given the existing competitive relationship between HG&E and NU, the merged entity, without adequate license conditions and structural alterations in the market, will be able to severely restrict or at a minimum, control the cost effectiveness of a large portion of its power supply that presently flows over PSNH's transmission facilities from New Brunswick.

> Control over generation capacity greatly reduces the opportunities available to purchase power from other utilities in the region; control over transmission capacity eliminates or reduces the ability of HG&E and others to purchase power from utilities outside of New England. (*Id.*, p. 6)

Moreover, HG&E asserts that many of the benefits associated with NEPOOL operation--identified by the Department of Justice and the staff in previous reviews--may be negated by the merged company's "sufficient veto voting power" over proposals put forth by the

NEPOOL Management Committee. HG&E characterizes this change in market power as a "significant change" requiring a full review of the antitrust impacts of the proposed merger, including an analysis by the Attorney General of the antitrust impact of the proposed license transfer.

HG&E addresses ongoing reviews of NU's proposed acquisition of PSNH before other federal agencies and concludes that NRC's antitrust review mandate in Section 105c of the Atomic Energy Act more clearly relates to review of anticompetitive conduct whereas the reviews at the FERC and SEC seem to be more public interest oriented. Consequently, HG&E asserts that the NRC should not assume that these other reviews will adequately condition the proposed merger to remedy the serious competitive issues that the merger would create. HG&E urges the NRC to deny the proposed merger, yet if approved, suggests that NRC require prior approval by the FERC and SEC, and in addition, 1) require NU-PSNH to transmit Point Lepreau power to HG&E for the term of any extended HG&E/Point Lepreau power supply contract with equivalent terms to its current contract, and 2) require NU to divest its subsidiary, Holyoke Water Power Company (HWP) or consolidate HWP into another NU subsidiary, Western Massachusetts Electric Company, thereby subjecting HWP to state regulation as a public utility.

Staff Analysis

HG&E asks the NRC to initiate a full antitrust review of the proposed merger, considering all of the antitrust effects of the

proposed merger pursuant to Section 105c of the Atomic Energy Act. "Such review would include an analysis by the Attorney General of the antitrust impact of the proposed license transfer. 42 U.S.C. SEC.2135" (HG&G comments, P.3) At the conclusion of such a review, HG&E recommends that the NRC deny the proposed license transfer or approve the transfer with license conditions over and above those recommended by the FERC ALJ.

As indicated *supra* (cf., Section III herein), the staff takes into consideration the record establised during related federal agency reviews of the change in ownership. The FERC proceeding and the accompanying recommendations for competition enhancing merger conditions were factors the staff considered in evaluating the instant proposals under the significant change criteria. The staff believes the presence of license conditions recommended by the FERC mitigates the possibility of anticompetitive effects ensuing from such a merger as well as the need for a more formal antitrust review by the Department of Justice. For the reasons stated above, the staff recommends denying HG&E's requests to deny the proposed merger or initiate a formal antitrust review that incorporates an analysis by the Attorney General.

Considering the license conditions associated with the proposed acquisition of PSNH by NU, the staff recommends denying in part and approving in part HG&E's request to attach the FERC and SEC merger conditions and impose two additional conditions as a requirement

for consummation of the acquisition. The staff has relied heavily on the record established to date in the FERC proceeding and in light of the procompetitive merger conditions proposed by the FERC ALJ would recommend approval of the license transfer. The SEC in its Supplemental Memorandum Opinion dated March 21, 1991 deferred its ruling on the competitive aspects of the proposed merger to the FERC.

The staff recommends denying HG&E's request to the NRC to condition the license transfer upon two additional requirements, one providing, in effect, a life of service transmission contract for HG&E's Point Lepreau power and another requiring NU to divest a wholly owned subsidiary in competition with HG&E. There has been nothing established in the FERC record or in the instant proceeding that indicates that HG&E would have been able to renew its transmission contract with PSNH or its power supply contract with New Brunswick upon termination of the existing contracts in 1994. NU, as PSNH's parent company, has not indicated that it plans to deny HG&E transmission capacity to New Brunswick after the proposed merger is consummated. NU has stated that this transmission corridor to New Brunswick will be offered to "all comers," as it were. It appears as though HG&E will be in competition with other potential buyers of Point Lepreau power for both transmission and power and energy. The staff sees no reason to assist HG&E over any other competitor in this regard. Should HG&E enter into a transmission contract with NU-PSNH and find the terms and

conditions in any way anticompetitive, the staff believes the FERC is the proper forum for resolution of tariff issues. The FERC initial decision recognized the increase in market power resulting from the NU-PSNH acquisition, yet recommended conditions to mitigate any abuse of this newfound power.

> The merged company -- with vast power over transmission and control of surplus power -- must offer viable wheeling service in order to alleviate potential anti-competitive consequences. (FERC Initial Division, p. 48) [Emphasis added].

Moreover, the FERC ALJ approved the request by HG&E to require NU to establish the position of "ombudsman" to review NU's service and eliminate the possibility of any anticompetitive consequences resulting from NU's substantial market power in transmission and surplus power in the New England market. Additionally, the FERC ALJ indicated that,

> The ombudsman is not the only avenue for dissatisfied customers. The Commission's Enforcement Task Force maintains a "hotline" ... through which complaints can be received. (FERC Initial Decision, p. 49)

The staff believes these actions taken by the FERC adequately address HG&E's concerns over abuse of NU's post merger market power. For this reason, the staff does not believe that HG&E has established a basis for the staff to conclude that there is a significant change warranting an antitrust review. Furthermore, there is no basis for the staff unilaterally to impose conditions

on the transfer of the license providing for a life of service transmission contract.

Regarding HG&E's second condition, the staff believes that no record has been established to justify HG&E's request to divest Holyoke Water Power Company from NU. According to the FERC initial decision, "The City [HG&E] is covered by the protection given the TDUs, and is entitled to no more in this regard." (FERC Initial Decision, p. 50) Accordingly, divestiture of HWP does not seem warranted solely to, "eliminate NU's incentive to eliminate injury to HG&E...." (HG&E comments, p. 10; emphasis added). The staff recommends denying HG&E's request to divest HWP from NU.

D. Hudson and Taunton

Comment

The Taunton Municipal Lighting Plant (Taunton) and the Hudson Light and Power Department (Hudson) are both owners of the Seabrook facility. Taunton and Hudson are both members of the Massachusetts Municipal Wholesale Electric Company and both have requested the NRC to adopt MMWEC's comments submitted to the NRC via letter dated April 1, 1991.

Staff Analysis

As indicated *supra*, the staff recommended denying MMWEC's request to further condition the Seabrook operating license to free MMWEC from any liability to existing owners that may result from the proposed license transfer. In light of the fact that Hudson and

Taunton adopted MMWEC's comments, the staff also recommends that their requests be denied.

VIII. NRC STAFF FINDINGS

A. Change In Ownership

The ownership transfer of over 35 percent of Seabrook potentially represents a change in the degree of control over the operation of the nuclear facility. However, as indicated *supra*, the FERC has considered the anticompetitive consequences of the proposed merger and a set of extensive merger conditions was proposed by the FERC administrative law judge regarding New Hampshire Yankee's proposals to transfer ownership and operation of the Seabrook facility. In this regard, the staff has relied heavily upon the record established in the FERC initial decision in its review of the instant amendment applications. The FERC merger conditions were designed specifically to mitigate any potential competitive problems associated with the proposed acquisition of PSNH by NU.

The staff has reviewed the proposed transfer of ownership share in the Seabrook facility from PSNH to NU for significant change since the last antitrust review of the Seabrook licensees, using the criteria discussed by the Commission in *Summer*. (*Cf.* Section III herein) The amendment request was dated November 13, 1990, after the previous antitrust review of the facility and therefore the

first *Summer* criterion, that the change has occurred since the last antitrust review, is satisfied. The second *Summer* criterion is satisfied in that the change is the result of the bankruptcy proceeding initiated by PSNH in January 1988 and as such is "reasonably attributable to the licensee[s] in the sense that the licensee[s] ha[ve] had sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review." *Summer*, 13 NRC at 871.

This leaves for consideration the third *Summer* criterion, that the change has antitrust implications that would be likely to warrant Commission remedy. The Commission in *Summer* adopted the staff's view that application of the third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have *de minimis* anticompetitive effects. *See Id.* at 872. The Commission further stated "the third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance." *Id.*

The staff believes that the record developed in the FERC proceeding involving the NU-PSNH acquisition adequately portrays the competitive situation in the New England bulk power services market and that the anticompetitive aspects of the proposed changes are being addressed in the FERC proceeding. The staff further

believes that the actions being taken by the FERC will adequately address concerns regarding the anticompetitive effects of NU's post merger market power such that the change in ownership as approved by the FERC will not have implications that warrant a Commission remedy. Consequently, the third *Summer* criterion has not been satisfied.

Each of the significant change criteria discussed in *Summer* must be met to make an affirmative significant change finding. In this instance, the third criterion has not been met.

B. Addition Of Non-Owner Operator

In light of the license condition developed by the staff and agreed to by NU, NAESCO (the proposed new plant operator), and the other Seabrook licensees, prohibiting NAESCO from marketing or brokering power or energy produced from the Seabrook plant and holding all other Seabrook licensees responsible for NAESCO's actions pursuant to marketing or brokering of Seabrook power, the staff believes the change in plant operator from New Hampshire Yankee to NAESCO will not have antitrust relevance.

IX. CONCLUSION

For the reasons discussed above, and after consultation with the DOJ, the staff recommends that the Director of the Office of

Nuclear Reactor Regulation conclude that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license.

February 13, 1992

Docket No. 50-443A

Alan J. Roth, Esq.
Spiegel and McDiarmid
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Roth:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result from this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

(original signed by)
William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 13, 1992

Docket No. 50-443A

Alan J. Roth, Esq.
Spiegel and McDiarmid
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005

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This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

W. M. Lambe

William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

[7590-01]

NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50-443A

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.

SEABROOK NUCLEAR STATION, UNIT 1

PROPOSED OWNERSHIP TRANSFER

NOTICE OF NO SIGNIFICANT ANTITRUST CHANGES

AND TIME FOR FILING REQUESTS FOR REEVALUATION

The Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2135, that no significant (antitrust) changes in the licensees' activities or proposed activities have occurred as a result of the proposed change in ownership of Unit 1 of the Seabrook Nuclear Station (Seabrook) detailed in the licensee's amendment application dated November 13, 1991. The finding is as follows:

> Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides that an application for a license to operate a utilization facility for which a construction permit was issued under section 103 shall not undergo an antitrust review unless the Commission determines that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous antitrust review by the Attorney General and the Commission in connection with the construction permit for the facility. The Commission has delegated the authority to make

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the "significant change" determination to the Director, Office of Nuclear Reactor Regulation.

By application dated November 13, 1991, the Public Service Company of New Hampshire (PSNH or licensee), through its New Hampshire Yankee division, pursuant to 10 CFR 50.90, requested the transfer of its 35.56942% ownership interest in the Seabrook Nuclear Power Station, Unit 1 (Seabrook) to a newly formed, wholly owned subsidiary of Northeast Utilities (NU). This newly formed subsidiary will be called the North Atlantic Energy Corporation (NAEC). The Seabrook construction permit antitrust review was completed in 1973 and the operating license antitrust review of Seabrook was completed in 1986. The staffs of the Policy Development and Technical Support Branch, Office of Nuclear Reactor Regulation and the Office of the General Counsel, hereinafter referred to as the "staff", have jointly concluded, after consultation with the Department of Justice, that the proposed change in ownership is not a significant change under the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14).

On February 28, 1991, the staff published in the Federal Register (56 Fed. Reg. 8373) receipt of the licensee's request to transfer its 35.56942% ownership interest in Seabrook to NAEC. This amendment request is directly related to the proposed merger between NU and PSNH. The notice indicated the

reason for the transfer, stated that there were no anticipated significant safety hazards as a result of the proposed transfer and provided an opportunity for public comment on any antitrust issues related to the proposed transfer. The staff received comments from several interested parties -- all of which have been condidered and factored into this significant change finding.

The staff reviewed the proposed transfer of PSNH's ownership in the Seabrook facility to a wholly owned subsidiary of NU for significant changes since the last antitrust review of Seabrook, using the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14). The staff believes that the record developed to date in the proceeding at the Federal Energy Regulatory Commission (FERC) involving the proposed NU/PSNH merger adequately portrays the competitive situation(s) in the markets served by the Seabrook facility and that any anticompetitive aspects of the proposed changes have been adequately addressed in the FERC proceeding. Moreover, merger conditions designed to mitigate possible anticompetitive effects of the proposed merger have been developed in the FERC proceeding. The staff further believes that the FERC proceeding addressed the issue of adequately protecting the interests of competing power systems and the competitive process in the area served by the Seabrook facility such that the changes will not have implications that

warrant a Commission remedy. In reaching this conclusion, the staff considered the structure of the electric utility industry in New England and adjacent areas and the events relevant to the Seabrook Nuclear Power Station and Millstone Nuclear Power Station, Unit 3 construction permit and operating license reviews. For these reasons, and after consultation with the Department of Justice, the staff recommends that a no affirmative "significant change" determination be made regarding the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1991.

Based upon the staff analysis, it is my finding that there have been no "significant changes" in the licensees' activities or proposed activities since the completion of the previous antitrust review.

Signed on February 9, 1992 by Thomas E. Murley, Director, of the Office of Nuclear Reactor Regulation.

Any person whose interest may be affected by this finding may file, with full particulars, a request for reevaluation with the Director of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission , Washington, DC 20555 within 30 days of the initial publication of this notice in the Federal Register. Requests for reevaluation of the no significant change

determination shall be accepted after the date when the Director's finding becomes final, but before the issuance of the operating license amendment, only if they contain new information , such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

Dated at Rockville, Maryland, this 11th day of February 1992.

FOR THE NUCLEAR REGULATORY COMMISSION

Anthony T. Cody, Chief
Policy Development and Technical
Support Branch
Program Management, Policy Development,
and Analysis Staff
Office of Nuclear Reactor Regulation

SEABROOK NUCLEAR STATION, UNIT 1

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

DOCKET NO. 50-443A

STAFF RECOMMENDATION

NO POST OL SIGNIFICANT ANTITRUST CHANGES

AUGUST 1991

CONTENTS

I. THE SEABROOK AMENDMENT APPLICATIONS

By letters dated November 13, 1990, the Nuclear Regulatory Commission (NRC or Commission) staff (staff) received post Operating License (OL) amendment applications requesting two license changes: 1) to transfer operating responsibility and management of the Seabrook facility from New Hampshire Yankee, the current operator, to a proposed entity called North Atlantic Energy Service Company (NAESCO); and 2) to authorize the ownership transfer of approximately 35 percent of the Seabrook facility from Public Service Company of New Hampshire (PSNH) to a proposed entity called North Atlantic Energy Corporation (NAEC). Both NAESCO and NAEC will be wholly owned subsidiaries of Northeast Utilities (NU) and formed solely to operate Seabrook and own PSNH's share of the facility respectively. The transfer of operating responsibility to NAESCO and the proposed transfer of PSNH'S ownership in Seabrook to NAEC introduce new entities associated with the Seabrook facility.

The applicant and the licensee suggest that no antitrust review of these proposed changes is required by the Atomic Energy Act. The staff believes the legislative history and reading of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, require the staff at least to review new owners of nuclear power production facilities for the purpose of determining whether the adding of the new owner to the license will constitute a significant change. The staff recommends that the Director of the Office of Nuclear Reactor

Regulation conclude from the staff's analysis herein and consultation with the Department of Justice (Department or DOJ) that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license. The basis for staff's recommendation and determination are provided herein.

II. APPLICABLE STATUTE AND REGULATIONS

Section 105 of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, designates when and how antitrust issues may be raised. *See Houston Lighting & Power Co.*, (South Texas Project), CLI-77-13, 5 NRC 1303, 1317 (1977). In connection with the legislation to remove the need to make a finding of practical value before issuing a commercial license,[1] in 1970, the Joint Committee

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[1] Before the amendment, the Commission could issue a commercial license for a production or utilization facility only after it had made a finding of "practical value" of the facility for industrial or commercial purposes. Public Law 91-560 (84 Stat. 1472)(1970), section 3, amended section 102 of the Atomic Energy Act (AEA). Prior to the amendment, section 102 of the AEA read as follows:

> SEC.102. FINDING OF PRACTICAL VALUE.-Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or

(continued...)

on Atomic Energy also examined section 105c. Before the 1970 amendment, section 105c provided that whenever the Commission proposed to issue a commercial license, it would notify the Attorney General of the proposed license and the proposed terms and conditions thereof. The Attorney General would then be obliged to advise the Commission "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws and such advice will be published in the *Federal Register*."[2] The Joint Committee, recognizing that the language and potential effect of the existing section 105c were not sufficiently clear, decided to amend section 105c to clarify and revise this phase of the Commission's licensing process. *See* 116 Cong. Rec. S19253.

Subsection 105c(1), as amended, requires the Commission to transmit, to the Attorney General, a copy of any license application to construct or operate a nuclear facility for the

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[1](...continued)
commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.

[2] Prior to the 1970 amendment, antitrust review could occur only following a Commission finding, under section 102 of the Atomic Energy Act, that a type of facility had been sufficiently developed to be of "practical value" for industrial or commercial purposes. Because the Commission never made such a finding, no antitrust reviews occurred. Power reactor construction permits and operating licenses before 1970 were issued pursuant to section 104b, which applied to facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Attorney General's advice as to whether the grant of an application will create or maintain a situation inconsistent with the antitrust laws. Subsection 105c(2) provides an exception to the requirements of subsection 105c(1) for a license to operate a nuclear facility for which a construction permit was issued under section 103, unless the Commission determines that such review is advisable on the ground that "significant changes" in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission in connection with the construction permit for the facility.

The Commission has promulgated regulations regarding the submittal of information in connection with the prelicensing antitrust review of facilities and the forwarding of antitrust information to the Attorney General. *See* 10 C.F.R. §§ 2.101, 2.102, and 50.33a. Section 50.33a requires the submission of the information specified in 10 C.F.R. Part 50, Appendix L (Information Requested By The Attorney General For Antitrust Review Facility License Applications). The publication in the *Federal Register* of a notice of the docketing of the antitrust information required by Part 50, Appendix L is required by 10 C.F.R. § 2.101(c). Subsections 2.101(e) and 2.102(d) address the situation in which an antitrust review has been conducted as part of the application for a construction permit and the application for an operating license is now before the Commission. Related to this, the Commission has delegated to the Director of Nuclear Reactor Regulation (NRR) or

the Director of Nuclear Material Safety and Safeguards (NMSS), as appropriate, its authority under subsection 105c(2) of the AEA to make the determination in connection with an application for an operating license as to whether "significant changes" in the licensee's activities, or proposed activities under its license have occurred subsequent to the antitrust review conducted in connection with the construction permit application. *See* 10 C.F.R. §§ 2.101(e)(1) and 2.102(d)(2).[3]

On October 22, 1979, the Commission amended 10 C.F.R. § 55.33a to reduce or eliminate the requirements for submission of antitrust information in certain *de minimis* instances. In publishing the rule, the Commission stated its conclusion that applicants whose generating capacity at the time of the application is 200 MW(e) or less are not required to submit the information specified in Appendix L of Part 50, unless specifically requested to do so. The

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[3] In connection with the delegation, the Commission approved procedures to be used until such time as regulations implementing the procedures were adopted. Although never formally published, the procedures are available as attachments to SECY-79-353 (May 24, 1979) and SECY-81-43 (January 19, 1981). On March 9, 1982, the Commission amended its regulations to incorporate final procedures implementing the Commission's delegation of authority to make the "significant changes" determination to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate. 47 Fed. Reg. 9963, March 9, 1982. The amended regulation provides that the Director, NRR or NMSS, as appropriate, after inviting the public to submit comments regarding antitrust aspects of the application and after reviewing any comments received, is authorized to make a significant change determination and, depending on his determination, either refer the antitrust information to the Attorney General or publish a finding of no significant changes in the *Federal Register* with an opportunity for requesting reevaluation of the finding.

Commission further stated that it believed that utilities smaller than these generally would have a negligible effect on competition. Fed. Reg. 60715, October 22, 1979.

All applicants for an NRC utilization facility license who are not determined by the staff to be *de minimis* applicants, undergo an extensive antitrust review at the construction permit (CP) stage and a review at the operating license (OL) stage. The CP review is an in depth analysis of the applicant's competitive activities conducted by the DOJ in conjunction with the staff. The competitive analysis associated with the OL stage of review is conducted by the staff, in consultation with the Department, and is focused on significant changes in the applicant's activities since the completion of the CP antitrust review (or any subsequent review). In each of these reviews, both the staff and the Department concentrate on the applicant's activities and determine whether the applicant's conduct or changes in applicant's conduct creates or maintains a situation inconsistent with the antitrust laws.

III. POST INITIAL OPERATING LICENSE ANTITRUST REVIEWS

A. General

As indicated *supra*, the NRC has established procedures by which prospective licensees of nuclear production facilities are reviewed

during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. The AEA does not specifically address the addition of new owners or operators after the initial licensing process. The legislative history discusses, to a limited extent, some types of amendments.[4] However, neither section 105c of the AEA or the Commission's regulations deal directly with applications to change ownership of facilities with operating licenses.[5] Indeed, in its *South Texas* decision, the Commission stated that, "we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment ... where an application for transfer of control of a license has been made ..." *South Texas Project*, 5 NRC at

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[4] The report by the Joint Committee on Atomic Energy notes that:

> The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for the purposes of triggering subsection 105 c., other applications which may be filled during the licensing process.

H. Rep. 91-1470, 91st Cong. 2d Sess., at 29 (1970).

[5] Applications for construction permits, for amendment of construction permits, and applications for initial operating licenses are not included here.

1318. The Commission went on to note that "[a]uthority [for antitrust review of a license transfer], not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b)."[6] *Id.* Unfortunately, the Commission did not explain how its regulations could grant authority not given by the statute.

The Commission has considered, however, the matter of adding a licensee after issuance of a construction permit, but before issuance of the initial operating license. In *Detroit Edison, et al.*, (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978) *aff'd* ALAB-475, 7 NRC 752, 755-56 n.7 (1978), the Licensing Board denied a petition to intervene and request for an antitrust hearing by a member/ratepayer of the distribution cooperative that purchased all of its power from a cooperative that would become a co-licensee of the power plant. In considering a jurisdictional argument, tne Board, relying on the Congressional intent and purpose behind section 105c of the AEA cited in n.4 *supra*, stated that "[s]ince the two cooperatives in this case are required to submit an application to become co-licensees, these constitute *their* 'initial application for a construction permit'"

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[6]10 C.F.R. § 50.80(b) provides in part that an application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and *if the license to be issued is a class 103 license, the information required by § 50.33a* (Information requested by the Attorney General for antitrust review).

(emphasis in original). *Id.*, at 588. In *Summer*, the Commission referred to *Fermi* for the proposition that the addition of a co-owner as a co-licensee was, in effect, an *initial application* of the co-owner and as such required formal antitrust consideration, stating, "[t]hat decision was based on the necessity for an in-depth review at the CP stage of *all applicants*, lest any applicant escape statutory antitrust review" (emphasis added). *South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 831 (1980).

The legislative history of section 105c and the Commission's guidance in *South Texas* might be read to indicate that Commission antitrust review, if not limited to the initial licensing process, is at least an unsettled question regarding operating license amendments. However, *Fermi* and *Summer* stand for the proposition that new license applicants are initial applicants for purposes of a section 105c antitrust review. Further, the Commission indicated in *Summer* that in such situations a formal antitrust inquiry is required. *See Id.*, at 830-31. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests.

The staff has received applications for operating license amendments that 1) request the addition of a new owner or seek Commission permission to transfer control from an existing to a new

owner or 2) request placing a non-owner operator on a license. The action the NRC Staff has taken has been particular to each situation. In general, post initial operating license amendment applications involving a change in ownership have included an antitrust review by the staff and consultation with the Attorney General. The review by the staff focuses on significant changes in the competitive market caused by the proposed change in ownership since the last antitrust review for the facility and its licensees. The staff review takes into account related proceedings and reviews in other federal agencies (e.g. FERC, SEC, or DOJ).

B. Change In Ownership

Although not specifically addressed by regulation, the staff has evolved a process for meeting the Commission's direction in the *Summer* decision to conduct an antitrust inquiry for license amendments after issuance of the operating license. The receipt of an application to add a new owner to an operating license or to seek Commission permission to transfer control from an existing to a new owner, for section 103 utilization facilities which have undergone antitrust review during the initial licensing process, is noticed in the *Federal Register*, inviting the public to express views relating to any antitrust issues raised by the application, and advising the public that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensees' activities or proposed activities have

occurred since the completion of the previous antitrust review. The staff's awareness of any related federal agency reviews of the request (e.g. FERC, SEC, or DOJ) and the staff's intention to consider those related proceedings are also noted in the *Federal Register* notice. The staff reviews the application after the comment period, so that the staff can perform the review with benefit of public comment, if any, and consultation with the Attorney General. If the Director, NRR, finds no significant change, the finding is published in the *Federal Register* with an opportunity for the public to request reconsideration as provided for in 10 C.F.R. § 2.101(e) for initial license applicants. If the Director, NRR finds significant change, the matter is referred to the Attorney General for formal antitrust review.

In conducting the significant change review, the staff uses the criteria and guidance provided by the Commission in its two *Summer* decisions for making the significant change determination for OL applicants.[7]

> The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are attributable to the licensee(s); and (3) have

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[7] In CLI-80-28, the Commission enunciated the criteria, but deferred its actual decision regarding the petition to make a significant changes determination that was before it. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980). In CLI-81-14, the Commission denied the petition. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

> anti-trust implications that would most likely warrant some Commission remedy.

Summer, 11 NRC at 824. To warrant an affirmative significant change finding, thereby triggering a formal OL antitrust review that seeks the advice of the Department of Justice on whether a hearing should be held, the particular change(s) must meet all three of these criteria. In its second *Summer* decision, the Commission provided guidance regarding the criteria and, in particular, the meaning of the third criterion in determining the significance of a change.

> As the staff recognized, "this third criterion appropriately focuses, in several ways, on what may be 'significant' about any changes since the last...review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive *or have de minimis anticompetitive effects*." (Emphasis provided) The staff correctly discerned that the third criterion has a further analytical aspect regarding remedy: "Not only does [it] require an assessment of whether the *changes* would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes by their nature would require." The third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance.

South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862, 872-73 (1981).

C. Change In Or Addition Of Non-Owner Operator

Changes in a nuclear plant operator, without any change in ownership, may also carry the potential of abuse of market power by the operator. However, the staff has determined that a plant operator who has no control over the marketing of the power or energy produced from the facility will not, under normal circumstances, be in a position to exert any significant amount of market power in the bulk power services market associated with the facility. The staff makes an effort in these cases to reach agreement on a license condition requiring new plant operators to agree to be divorced from the marketing or brokering of power or energy from the facility in question and hold existing owners accountable for the operator's actions. If the prospective new operator and the owners agree to appropriate license conditions that reduce the potential for impact on plant ownership or entitlement to power output, as determined by the staff, the application to add or change a non-owner operator is viewed as an application falling within the *de minimis* exception for submitting antitrust information provided for in 10 C.F.R. § 50.33a.

The Commission has exempted *de minimis* applicants from the requirements to submit antitrust information and, therefore, the publication for comment of such information, unless specifically requested by the Commission. *See* 10 C.F.R. § 50.33a. The Commission has determined that such applicants generally would have a negligible effect on competition. *See* 44 Fed. Reg. 60715, October 22, 1979. The staff has determined that, with an

appropriate license condition regarding the marketing and brokering of power, the potential for a non-owner operator to have an affect on competition in the bulk power market is effectively mitigated. Therefore, such an operator is, as a practical matter, the same as *a de minimis* applicant with respect to its ability to affect competition. Normally, no further antitrust review of the non-owner operator will be conducted by the staff.

IV. PREVIOUS SEABROOK NRC ANTITRUST REVIEWS

A. Construction Permit Review

By letter dated December 4, 1973, the Attorney General issued advice to the Atomic Energy Commission pursuant to Public Service Company of New Hampshire's (PSNH), the lead applicant,[8] application for a construction permit for the Seabrook Nuclear Power Station Units No. 1 and No. 2. In its advice letter, the Department expressed concern over several allegations by smaller power systems in the New England bulk power services market that they were unable to gain access to low cost bulk power supply on the same basis as

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[8]PSNH was the majority owner with 50% of the plant at the time the time of the Department's advice letter in 1973. Since this initial review, there have been several changes in ownership and ownership shares in Seabrook. Existing owners are as follows: PSNH (35.56942%); United Illuminating (17.5%); EUA Power Corporation (12.1324%) Connecticut Light & Power Company (4.05985%); Hudson Light & Power Department (0.07737%); Vermont Electric Generation and Transmission Corporative, Inc. (0.41259%); Montaup Electric Company (2.89989%); Canal Electric Company (3.52317%); New England Power Company (11.59340%); Taunton Municipal Lighting Plant (0.10034%); and New Hampshire Electric Cooperative, Inc. (2.17391%)

larger systems in the area. The advice letter stated that as a result of a settlement agreement reached between the privately owned and publicly owned systems in New England that there had been a "dramatic improvement in the relations among the various segments of the electric power industry in New England...." The Department emphasized the importance of the development of the New England Power Pool (NEPOOL) as a regional planning body that would enable participation in bulk power services by all types of power entities throughout New England. The Department concluded,

> ... that the creation of a truly open, non-exclusive NEPOOL means that all systems can have a dependable frame- work within which to obtain fair and non-discriminatory access to economical and reliable bulk power supply.(December 4, 1973 advice letter, p. 4)

As a result of its review, the Department advised the Atomic Energy Commission that there was no need for an antitrust hearing pursuant to the construction permit application for Seabrook.

B. Operating License Review

As noted above, a prospective operating licensee is not required to undergo a formal antitrust review unless the staff determines that there have been "significant changes" in the licensee's activities or proposed activities subsequent to the review by the Department of Justice and the staff at the construction permit stage. The staff completed its OL antitrust review of Seabrook in January

1986. The staff analysis indicated that,

> ...NEPOOL, which was only two years old at the time when the CP antitrust review was performed, appears to have evolved into a framework ensuring access to reliable and economical bulk power supply for all New England utilities. Two provisions of the original pool agreement were found to be discriminatory against smaller utilities and have since been removed. Further, because Seabrook 1 has been designated as a pool-planned unit, access to Seabrook 1 over pool transmission facilities of members is guaranteed for all participants under the terms of NEPOOL.[9]

Based in large part upon the successful formation and operation of NEPOOL, the staff concluded that the changes in the licensees' activities as well as any proposed changes in licensees' activities do not represent "significant changes" as identified in the *Summer* decision and recommended that no formal OL antitrust review be conducted. The staff's antitrust OL review was completed in February 1986 and the Seabrook full power license was issued on March 15, 1990.

C. EUA Power Review

By letter dated March 26, 1986, New Hampshire Yankee, acting as agent for the Seabrook licensees, requested the staff to amend the

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[9]Staff review of Seabrook licensees' changed activity, "Seabrook Station, Unit 1, Public Services Company of New Hampshire, et al, Docket No. 50-443A, Finding of No Significant Antitrust Changes," p. 57.

Seabrook construction permits (Units 1 and 2) to reflect the purchase and transfer of an approximate 12 percent ownership share in the Seabrook facility to EUA Power Corporation (EUA Power), a wholly owned subsidiary of Eastern Utility Associates of Boston, Massachusetts. The amendment requested the transfer of 12 percent ownership to EUA Power and deletion of the following owners as Seabrook licensees: Bangor-Hydro-Electric Company (2.17391%); Central Maine Power Company (6.04178%); Central Vermont Public Service Corporation (1.59096%); Fitchburg Gas and Electric Light Company (0.86519%); and Maine Public Service Company (1.46056%).

Even though a sister company, Montaup Electric Company (both are wholly owned by Eastern Utilities Associates), had previously undergone an antitrust review in conjunction with its participation in Seabrook, EUA Power represented a new owner prior to issuance of the Seabrook full power operating licensee and was required to undergo a formal antitrust review by the Department of Justice. Accordingly, EUA Power submitted pertinent 10 C.F.R. Part 50, Appendix L information to the staff regarding its operations and competitive activity. A notice of receipt of this information, which provided the opportunity for a 60 day comment period on the antitrust issues regarding the proposed ownership transfer, was published in the *Federal Register* on May 23, 1986.

By letter dated July 1, 1986 the Department advised the staff that there was,

> ... no evidence that the proposed participation by EUA Power Company in the Seabrook Units would either create or maintain a situation inconsistent with the antitrust laws under Section 105(c). We do not, therefore, believe it is necessary for the Commission to hold an antitrust hearing in this matter. (Department of Justice advice letter, p.1)

The Department's letter was published in the *Federal Register* on July 17, 1986 and provided for interested persons to request a hearing and file petitions to intervene. There were no such requests and the staff issued an amendment (No. 9) to the Seabrook construction permits authorizing the transfer of ownership effective upon completion of the transfer of ownership shares which was consummated on November 26, 1986. In this instance, there was no need to apply the significant change threshold criteria to the EUA Power amendment review and address the issue of whether the Department of Justice should conduct the review or the staff should issue a significant change determination because the request for ownership change occurred prior to issuance of the full power operating license and consequently, the review involved an amendment to the construction permit and followed construction permit review procedures.

V. CHANGES AT SEABROOK AFTER ISSUANCE OF THE INITIAL OL

The instant amendment requests to transfer PSNH'S ownership in Seabrook to a proposed new entity, NAEC, and change the plant operator from New Hampshire Yankee to a proposed new operating

entity, NAESCO, represent direct outgrowths of the bankruptcy proceeding initiated by PSNH in January 1988. Though the bankruptcy proceeding and PSNH's financial status are not the focus of the instant review, it is significant to note that PSNH is dependent upon Seabrook as its principal source of generating capacity and operating revenue. This dependence on one source of operating revenue left PSNH highly susceptible to fluctuations in the business cycle that affect different regions of the country at different periods in the cycle. During the mid 1980's commerce and industry in New England were growing dramatically. Economic growth exceeded projections for planned electric generating capacity.[10] However, as rapidly as the New England economy advanced in the mid 1980's, it declined equally a fast in the late 1980's. PSNH filed for bankruptcy in January 1988 and EUA Power Corporation, another Seabrook co-owner heavily dependent upon the sale of Seabrook power and energy, filed for bankruptcy in early 1991.

There were other factors that contributed to PSNH'S financial difficulties in the 1980's, e.g., development and approval of emergency evacuation plans for Seabrook and state regulatory proceedings involving allowance of Seabrook costs in PSNH'S rate

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[10]EUA Associates, parent company of Montaup Electric Company, a co-owner of Seabrook, formed EUA Power Corporation specifically to purchase a 12 percent ownership share in Seabrook to meet an unexpected strong demand for electric power in New England during the late 1980's and 1990's. John F.G. Eichorn, chairman of EUA Associates, was quoted by the Providence, Rhode Island Journal newspaper, as citing NEPOOL electricity demand estimates showing "a serious shortfall developing in New England, which we at EUA are determined to help eliminate." Journal, April 10, 1986.

base. All of these factors culminated in PSNH filing for bankruptcy and the resultant proposal by NU to acquire PSNH. The proposals adding a new owner and a new operator of the Seabrook facility are the principal changes the staff must address in its post OL significant change antitrust review. The staff must determine whether the new owner or the new operator will create or maintain a situation inconsistent with the antitrust laws.

VI. FERC AND SEC REVIEWS

Pursuant to the requirements and jurisdiction of both the Federal Power Act and the Public Utilities Holding Company Act of 1935, NU filed applications with the Federal Energy Regulatory Commission (FERC), on January 5, 1990, and the Securities and Exchange Commission (SEC), on October 5, 1989, respectively, seeking approval of its proposed merger with PSNH. In light of the fact that similar competitive issues are currently being addressed in proceedings at the FERC and SEC and that the findings reached in the FERC and SEC proceedings will be considered by the staff, a brief synopsis of these proceedings follows.

A. FERC Proceeding

Northeast Utilities, acting through a service company called NUSCO, sought approval under Section 203 of the Federal Power Act (enforced by the FERC) to acquire the jurisdictional assets of

PSNH. Section 203 of the Federal Power Act (FPA) requires the FERC to make a determination as to whether the proposed acquisition or merger will be consistent with the public interest. Though the FPA does not specifically charge the FERC with weighing the competitive implications of the merger or acquisition in terms of injury to competition or the competitive process in identifiable markets, in the recent past, the FERC has considered these competitive concerns as inputs to its ultimate determination as to whether the combination creates more benefits than costs, i.e., is in the public interest.

On March 2, 1990, the FERC issued an order granting intervention by all requesting parties and also granted a NU motion to expedite the hearing schedule by requiring that an initial decision be issued no later than December 31, 1990. After extensive discovery, depositions and oral argument, the FERC administrative law judge (ALJ), Jerome Nelson, issued an initial decision on December 20, 1990.[11]

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[11]"On March 7, 1990, NU submitted its direct case, which consisted of the prepared testimony and exhibits of six witnesses. After extensive discovery, including numerous depositions of NU, Staff, intervenor and third party witnesses, the Staff and intervenors filed their respective direct cases on May 25, 1990. The direct cases of staff and intervenors included the prepared testimony and exhibits of 49 witnesses. On June 25, 1990, Staff and intervenors filed cross-rebuttal cases through the prepared testimony and exhibits of 19 witnesses. On July 20, 1990, NU filed its rebuttal case through the prepared testimony and exhibits of 12 witnesses. Twenty-five days of hearings were held during August and September of 1990. Thirty-five witnesses were cross-examined, and 809 exhibits were admitted into evidence. Briefs and reply briefs were filed in October of 1990. Four days of oral argument ended on November 13, 1990." (ALJ Initial Decision, p. 6).

The ALJ made several findings in his initial decision, however, the findings most relevant to the NRC post OL amendment review concern the effect the merger will have on the New England bulk power services market. The ALJ's initial decision indicated that without a detailed set of merger conditions, the "NU-PSNH merger would have anti-competitive consequences." The ALJ found that,

> the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts). (*Id.*, p.15)

The ALJ indicated that the merged company will control 92 percent of the transmission capacity presently serving New England.

> This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices. (*Id.*, p. 16)

The ALJ concluded that merged NU-PSNH will control the principal transmission access routes from northern New England to southern New England as well as 72 percent of the New York, New England transmission corridor path.

> Because PSNH "controls the only transmission lines linking Maine and New Brunswick to the rest of New England"..., Eastern REMVEC utilities will necessarily have to deal with the merged company in order to get power from those areas. The merged company's control

> would also extend to access from New York... NU controls 72% of the New York-New England "interface"... and needs only a small portion of that share for its own use. (*Id.*)

The ALJ's initial decision recommended that the FERC approve the merger only if specific merger conditions were agreed upon by the merging parties. There are two principal conditions discussed by the ALJ designed specifically to address the new NU-PSNH's market power and particularly any potential for abuse of this newly created market power vis-a-vis other power systems in New England. The first condition is basically a rework of a proposal initially offered by NU-PSNH dealing with the merged company's policy regarding transmission over its power grid. A set of General Transmission Commitments was developed by the ALJ which dealt with various degrees of priority access and time horizons depending upon the individual power supply situation in question. This policy commitment, according to the ALJ, would reassure non-dominant power systems in New England a form of meaningful access to the transmission facilities required to fulfill their bulk power supply requirements.

The second major condition that addresses the transmission dominance of the new NU-PSNH is termed the, "New Hampshire Corridor Proposal." This proposal serves to open up the flow of power from Canada to New England and from northern New England to the heavily populated southeastern portion of New England. The Corridor Proposal allocated a total of 400 MW of transmission capacity with

200 MW allocated to New England Power Company and 200 MW allocated to southern New England utilities. These two transmission proposals recommended by the FERC ALJ are the most relevant to the staff's review of New Hampshire Yankee's requests to change ownership and the operator of the Seabrook facility.

On August 9, 1991, the FERC conditionally approved the NU merger with PSNH. To mitigate the merger's likely anticompetitive effects, the FERC strengthened NU's General Transmission Commitment and noted that it will construe NU's voluntary commitment very strictly. NU can not give higher priority to its own non-firm use than to third party requests for firm wheeling in allocating existing transmission capacity. The FERC also ruled that independent power producers and qualifying facilities are eligible for transmission access on the New Hampshire Corridor. *See Northeast Utilities Service Company* (Re Public Service Company of New Hampshire) FERC slip op. No. 364 (August 9, 1991).

B. SEC Proceeding

NU filed an application with the SEC for approval under the Public Utility Holding Company Act of 1935 (PUHCA) of its proposed merger with PSNH. The SEC issued a notice of the filing of the application on February 2, 1990 (Holding Co. Act Release No. 25032). Fourteen hearing requests from 41 separate entities were received and four of these requests, representing 21 entities, were

subsequently withdrawn. Moreover, eight entities filed comments or notices of appearance. The segment of the SEC review most relevant to staff's post OL amendment review revolves around Section 10(b)(1) of the PUHCA that requires the SEC to consider possible anticompetitive effects of the proposed NU-PSNH acquisition. The SEC in a Memorandum Opinion dated December 21, 1990 approved NU's proposed acquisition of PSNH--indicating that all PUHCA requirements, including Section 10(b)(1), had been fulfilled. In its initial decision, the SEC stated that,

> Given the approximate size of the Northeast--PSNH system and the resultant economic benefits discussed herein..., we conclude that the Acquisition does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied. (SEC Initial Decision, p. 40)

The SEC's analysis, as reflected in its initial decision, considers the economic benefits associated with a merged NU-PSNH and not so much the potential for abuse of market power that may be enhanced by the merger. The initial decision states that the,

> transfer to North Atlantic will merely move the asset from one Northeast subsidiary to another and should have no impact on competitive conditions. (*Id.*, p.58)

The SEC order approving the merger was appealed by two intervenors in the SEC proceeding--the City of Holyoke Gas and Electric

Department and the Massachusetts Municipal Wholesale Electric Company (petitioners). Petitioners filed a request for rehearing of the initial decision, arguing that the SEC erred in approving the NU-PSNH acquisition by failing to provide sufficient analysis of the anticompetitive effects of the acquisition. Petitioners based much of their argument for rehearing upon the FERC ALJ's December 20, 1990 decision which indicated that an unconditioned NU-PSNH merger would have significant anticompetitive effects upon the New England bulk power services market.

In a Supplemental Memorandum Opinion and Order (Supplemental Memorandum) dated March 15, 1991, the SEC granted petitioners a reconsideration of the SEC's initial decision.

> In our December order, we recognized that the Acquisition would decrease competition, but concluded that the Acquisition's benefits would outweigh its anticompetitive effects. The petitioners challenge this determination, arguing that the Commission ignored the anticompetitive effects of the merged company's control of transmission facilities and surplus power. (Supplemental Memorandum, p.3)

The SEC's Supplemental Memorandum indicated that its initial decision focused more on the size and corporate structure of NU-PSNH rather than the merged company's ability to control access to transmission or excess capacity. The Supplemental Memorandum stated that even though the SEC's principal focus was on the size and structure of the merged company, the competitive access issues

were considered and the SEC concluded that, "The merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior." (Supplemental Memorandum, p.5) However, the SEC relied upon the transmission commitments made by NU to mitigate any possible anticompetitive effects of the merger.[12]

The Supplemental Memorandum recognized that both the SEC and the FERC "have statutory responsibilities with respect to the anticompetitive consequences of mergers in the public-utility industry". (*Id.*, p.6). However, the SEC also recognized that the focus of the Federal Power Act and the Public Utility Holding Company Act are different in that each agency pursues administration of each act with different goals for regulating members of the electric utility industry. As a result, the SEC deferred the question of anticompetitive consequences and its ultimate approval of the proposed merger to the FERC.

> Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the Commission, [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look

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[12] The initial FERC decision found the commitments made by NU to be insufficient to remedy the potential anticompetitive effects of the merger and recommended additional terms and conditions be imposed upon the merged company as a condition for FERC approval of the merger.

> to the FERC's expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the acquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the FPA. (*Id.*, p.9)

VII. AMENDMENT APPLICATIONS COMMENTS RECEIVED BY THE STAFF

The staff, in accordance with 10 C.F.R. § 2.101(e)(1), published receipt of New Hampshire Yankee's request to amend the Seabrook OL in the *Federal Register* and provided interested parties the opportunity to comment on the antitrust issues raised by the proposed acquisition on February 28, 1991.[13] The staff received comments from the following entities or their representatives: 1) New Hampshire Electric Cooperative (April 1, 1991,); 2) Massachusetts Municipal Wholesale Electric Company (April 1, 1991); 3) City of Holyoke Gas and Electric Department (April 1, 1991); 4) Hudson Light and Power Department (April 4, 1991); and 5) Taunton Municipal Lighting Plant (April 10, 1991). By letter dated April 22, 1991, counsel for Connecticut Light and Power Company and PSNH responded to these comments.[14] The comments from participants in the FERC and SEC proceeding by and large mirrored the positions taken by the commenters in those proceedings. The comments

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[13] A similar notice regarding the change in operator from New Hampshire Yankee to NAESCO, was published in the *Federal Register* on March 6, 1991.

[14] By letter dated June 13, 1991, City of Holyoke Gas and Electric Department (HG&E) replied to the Connecticut Light and Power (CL&P) and PSNH response. By letter dated July 9, 1991, CL&P and PSNH responded to the HG&E reply. By letter dated July 22, 1991, HG&E replied to the CL&P and PSNH July 9, 1991 response.

received are summarized below with the staff analysis of each comment.

A. New Hampshire Electric Cooperative (NHEC)

Comment

NHEC is a transmission dependent utility (TDU), i.e., "entirely dependent on NU or PSNH for their bulk power transmission needs". NHEC states that without access to NU's or PSNH's transmission facilities it cannot actively compete in the New England wholesale bulk power services market. NHEC asserts that the proposed acquisition of PSNH by NU will concentrate its only source of essential transmission service in the hands of its principal competitor. NHEC cites the initial FERC decision as evidence that the proposed merger, if unconditioned, will have an adverse impact on the competitive process in the New England bulk power services market. NHEC also states that recent developments which have not been a part of the FERC record are relevant to the NRC review associated with the Seabrook post OL amendment applications.

NHEC wishes to purchase partial requirements power from another supplier, New England Power Company (NEP), rather than PSNH. NHEC and NEP entered into a long-term power supply contract on January 9, 1991; however, NHEC needs access to PSNH's transmission grid to receive the NEP power. PSNH has indicated that NHEC is contractually prohibited from taking any other off system power purchases during the term of its power supply contract with PSNH

and as a result PSNH would not approve use of its transmission grid until the contractual dispute between PSNH and NHEC is resolved.

NHEC contends that the proposed acquisition of PSNH by NU is anticompetitive and under the NRC's *Summer* criteria, represents a "significant change". NHEC seeks relief by requiring NU to,

> . . . commit before this Commission that it will provide NHEC all transmission needed for NHEC to purchase power from other sources . . . .

Staff Analysis

The staff believes that the issue described by NHEC in its April 1, 1991 filing to the staff primarily involves a contract dispute with PSNH and NU over transmission rights pertaining to power purchases by NHEC from New Brunswick. Presently, NHEC is taking partial requirements wholesale power from PSNH under a 1981 contract. A dispute has arisen between NHEC and PSNH (now NU, given its proposed acquisition of PSNH) regarding the terms under which the contract can be terminated. PSNH states that the contract requires NHEC to provide five years notice prior to cancelling the contract and switching to a different supplier. NHEC states that the contract provides for termination upon NHEC joining NEPOOL and that the recent NHEC-NEP purchase agreement and NHEC's ownership interest in Seabrook provide the basis for NEPOOL membership.

This contract dispute, which forms the linchpin for NHEC's argument

that it is dependent upon NU's transmission grid is presently being interpreted before the FERC. The staff believes that it is appropriate for this dispute to be resolved under the auspices of the FERC's jurisdiction over wholesale power and transmission tariffs and the terms and conditions associated with such agreements. The staff sees no need for the NRC to enter into a contract dispute that is under review by the FERC. Should the PSNH-NHEC contract dispute be resolved in NHEC's favor, i.e., enabling NHEC to terminate the contract without giving a five year notice, the merger condition recommended by the FERC ALJ and commitments made by NU to provide transmission dependent utilities transmission services (cf., PSNH and Connecticut Power & Light Company Comments to NRC staff dated April 22, 1991, pp. 29-30), should adequately resolve the competitive concerns raised by NHEC.

B. Massachusetts Municipal Wholesale Electric Company (MMWEC)

Comment

MMWEC is a co-owner (11.5934%) of the Seabrook plant. In its comments to the NRC, MMWEC states that the proposed acquisition of PSNH by NU is anticompetitive, notwithstanding the merger conditions recommended by the FERC ALJ, and suggests that the Director of the Office of Nuclear Reactor Regulation find, pursuant to *Summer*, that significant changes have occurred since the Attorney General's advice letter was issued in December 1973.

MMWEC contends that the standard of review of mergers required by

the FERC under the FPA is different than that required by the NRC under the Atomic Energy Act. MMWEC states that this difference permits anticompetitive acquisitions under the FPA if it is determined that the public interest is served by the acquisition (or merger), whereas the NRC must address the competitive implications of activities of licensees "irrespective of any compelling public interest." (MMWEC comments, p.3)

Moreover, MMWEC requests the NRC to address the anticompetitive aspects of NU's management and operation of Seabrook--an area not covered in the FERC ALJ's initial decision. According to MMWEC,

> NU is executing a plan whereby it has separated the Seabrook management function and ownership function from each other and utilized its market power to insulate itself, those functions and its other affiliates from any liability, except liability imposed by willful misconduct. (*Id.*, p.5)

MMWEC's concerns revolve around a July 19, 1990 agreement reached among Seabrook owners holding approximately 70 percent of the facility. This agreement provides for the transfer of the managing and operating agent from New Hampshire Yankee to a proposed wholly owned NU subsidiary, NAESCO. An exculpatory clause in the July 19, 1990 agreement, according to MMWEC,

> . . . would not only free NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. MMWEC cannot insure any

> reckless or negligent conduct of the Managing Agent or its affiliates. (*Id.*)

MMWEC requests the NRC to act to prevent NU from maintaining a situation inconsistent with the antitrust laws. MMWEC suggests that the NRC condition the approval of the license transfer to "require appropriate amendment of the Joint Ownership Agreement and to prohibit NAECO, & NAESCO and their affiliates from freeing themselves from liability for misconduct." (*Id.*, p.6)

Staff Analysis

MMWEC's principal concern is that NU used its market power in an anticompetitive manner in formulating a July 19, 1990 agreement that established parameters by which the Seabrook facility would be managed and operated. Moreover, MMWEC asserts that this agreement frees,

> . . .NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. (MMWEC comments, p. 5)

MMWEC has failed to show how NU has used (abused) its market power in bulk power services in formulating an agreement to install a new managing agent for Seabrook. MMWEC asks the NRC to condition the license transfer by requiring amendment of the Seabrook "Joint Ownership Agreement", to, effectively, make NAECO and NAESCO more accountable for their actions pursuant to their ownership and operation of the Seabrook facility respectively. Based upon the

data available to the staff, it appears as though the July 19, 1990 agreement was consummated in conformance with the Seabrook Joint Ownership Agreement, as amended, and not as a result of any abuse of market power on the part of NU. The staff believes MMWEC's concerns over the degree of liability it must absorb should NAESCO in any way mismanage Seabrook are concerns of a contractual, not competitive, nature and should be raised and addressed before an appropriate forum for these matters, not the NRC.

Moreover, as recognized by MMWEC at page three of its comments, the staff considered the possibility of a new plant operator having an influence over competitive options of the new owners of Seabrook. For this reason, after discussions with the staff, NAESCO agreed to a license condition divorcing itself from the marketing or brokering of power or energy produced by Seabrook. The license condition was designed to eliminate NAESCO's ability to exercise any market power, if evident, and obviated the need to conduct a further competitive review of NAESCO. For the reasons stated above, MMWEC's request to condition the Seabrook license that frees it from NAESCO's liability should be denied.

C. City Of Holyoke Gas & Electric Department (HG&E)

Comment

HG&E is a municipally owned electric system serving primarily western Massachusetts. "HG&E lies within the service territory of Western Massachusetts Electric Company ("WMECO"), a wholly-owned

subsidiary of NU." (HG&E comments, p.2) HG&E generates no power on its own and relies heavily on the transmission facilities of PSNH to supply approximately 36 percent of its load from the Point Lepreau nuclear plant in New Brunswick, Canada. According to HG&E,

> The increase in control that the merged entity will exercise over generation (including power from Seabrook) and transmission capacity in New England represents a "significant change" from the activities of the current licensee--an independent PSNH. (HG&E comments, p.3)

HG&E contends that NU-PSNH will wield significantly more market power than a stand alone PSNH and given the existing competitive relationship between HG&E and NU, the merged entity, without adequate license conditions and structural alterations in the market, will be able to severely restrict or at a minimum, control the cost effectiveness of a large portion of its power supply that presently flows over PSNH's transmission facilities from New Brunswick.

> Control over generation capacity greatly reduces the opportunities available to purchase power from other utilities in the region; control over transmission capacity eliminates or reduces the ability of HG&E and others to purchase power from utilities outside of New England. (*Id.*, p. 6)

Moreover, HG&E asserts that many of the benefits associated with NEPOOL operation--identified by the Department of Justice and the staff in previous reviews--may be negated by the merged company's "sufficient veto voting power" over proposals put forth by the

NEPOOL Management Committee. HG&E characterizes this change in market power as a "significant change" requiring a full review of the antitrust impacts of the proposed merger, including an analysis by the Attorney General of the antitrust impact of the proposed license transfer.

HG&E addresses ongoing reviews of NU's proposed acquisition of PSNH before other federal agencies and concludes that NRC's antitrust review mandate in Section 105c of the Atomic Energy Act more clearly relates to review of anticompetitive conduct whereas the reviews at the FERC and SEC seem to be more public interest oriented. Consequently, HG&E asserts that the NRC should not assume that these other reviews will adequately condition the proposed merger to remedy the serious competitive issues that the merger would create. HG&E urges the NRC to deny the proposed merger, yet if approved, suggests that NRC require prior approval by the FERC and SEC, and in addition, 1) require NU-PSNH to transmit Point Lepreau power to HG&E for the term of any extended HG&E/Point Lepreau power supply contract with equivalent terms to its current contract, and 2) require NU to divest its subsidiary, Holyoke Water Power Company (HWP) or consolidate HWP into another NU subsidiary, Western Massachusetts Electric Company, thereby subjecting HWP to state regulation as a public utility.

Staff Analysis

HG&E asks the NRC to initiate a full antitrust review of the proposed merger, considering all of the antitrust effects of the

proposed merger pursuant to Section 105c of the Atomic Energy Act. "Such review would include an analysis by the Attorney General of the antitrust impact of the proposed license transfer. 42 U.S.C. SEC.2135" (HG&G comments, P.3) At the conclusion of such a review, HG&E recommends that the NRC deny the proposed license transfer or approve the transfer with license conditions over and above those recommended by the FERC ALJ.

As indicated *supra* (cf., Section III herein), the staff takes into consideration the record establised during related federal agency reviews of the change in ownership. The FERC proceeding and the accompanying recommendations for competition enhancing merger conditions were factors the staff considered in evaluating the instant proposals under the significant change criteria. The staff believes the presence of license conditions recommended by the FERC mitigates the possibility of anticompetitive effects ensuing from such a merger as well as the need for a more formal antitrust review by the Department of Justice. For the reasons stated above, the staff recommends denying HG&E's requests to deny the proposed merger or initiate a formal antitrust review that incorporates an analysis by the Attorney General.

Considering the license conditions associated with the proposed acquisition of PSNH by NU, the staff recommends denying in part and approving in part HG&E's request to attach the FERC and SEC merger conditions and impose two additional conditions as a requirement

for consummation of the acquisition. The staff has relied heavily on the record established to date in the FERC proceeding and in light of the procompetitive merger conditions proposed by the FERC ALJ would recommend approval of the license transfer. The SEC in its Supplemental Memorandum Opinion dated March 21, 1991 deferred its ruling on the competitive aspects of the proposed merger to the FERC.

The staff recommends denying HG&E's request to the NRC to condition the license transfer upon two additional requirements, one providing, in effect, a life of service transmission contract for HG&E's Point Lepreau power and another requiring NU to divest a wholly owned subsidiary in competition with HG&E. There has been nothing established in the FERC record or in the instant proceeding that indicates that HG&E would have been able to renew its transmission contract with PSNH or its power supply contract with New Brunswick upon termination of the existing contracts in 1994. NU, as PSNH's parent company, has not indicated that it plans to deny HG&E transmission capacity to New Brunswick after the proposed merger is consummated. NU has stated that this transmission corridor to New Brunswick will be offered to "all comers," as it were. It appears as though HG&E will be in competition with other potential buyers of Point Lepreau power for both transmission and power and energy. The staff sees no reason to assist HG&E over any other competitor in this regard. Should HG&E enter into a transmission contract with NU-PSNH and find the terms and

conditions in any way anticompetitive, the staff believes the FERC is the proper forum for resolution of tariff issues. The FERC initial decision recognized the increase in market power resulting from the NU-PSNH acquisition, yet recommended conditions to mitigate any abuse of this newfound power.

> The merged company -- with vast power over transmission and control of surplus power -- must offer viable wheeling service in order to alleviate potential anti-competitive consequences. (FERC Initial Division, p. 48) [Emphasis added].

Moreover, the FERC ALJ approved the request by HG&E to require NU to establish the position of "ombudsman" to review NU's service and eliminate the possibility of any anticompetitive consequences resulting from NU's substantial market power in transmission and surplus power in the New England market. Additionally, the FERC ALJ indicated that,

> The ombudsman is not the only avenue for dissatisfied customers. The Commission's Enforcement Task Force maintains a "hotline" ... through which complaints can be received. (FERC Initial Decision, p. 49)

The staff believes these actions taken by the FERC adequately address HG&E's concerns over abuse of NU's post merger market power. For this reason, the staff does not believe that HG&E has established a basis for the staff to conclude that there is a significant change warranting an antitrust review. Furthermore, there is no basis for the staff unilaterally to impose conditions

on the transfer of the license providing for a life of service transmission contract.

Regarding HG&E's second condition, the staff believes that no record has been established to justify HG&E's request to divest Holyoke Water Power Company from NU. According to the FERC initial decision, "The City [HG&E] is covered by the protection given the TDUs, and is entitled to no more in this regard." (FERC Initial Decision, p. 50) Accordingly, divestiture of HWP does not seem warranted solely to, "eliminate NU's incentive to eliminate injury to HG&E...." (HG&E comments, p. 10; emphasis added). The staff recommends denying HG&E's request to divest HWP from NU.

D. Hudson and Taunton

Comment

The Taunton Municipal Lighting Plant (Taunton) and the Hudson Light and Power Department (Hudson) are both owners of the Seabrook facility. Taunton and Hudson are both members of the Massachusetts Municipal Wholesale Electric Company and both have requested the NRC to adopt MMWEC's comments submitted to the NRC via letter dated April 1, 1991.

Staff Analysis

As indicated *supra*, the staff recommended denying MMWEC's request to further condition the Seabrook operating license to free MMWEC from any liability to existing owners that may result from the proposed license transfer. In light of the fact that Hudson and

Taunton adopted MMWEC's comments, the staff also recommends that their requests be denied.

VIII. NRC STAFF FINDINGS

A. Change In Ownership

The ownership transfer of over 35 percent of Seabrook potentially represents a change in the degree of control over the operation of the nuclear facility. However, as indicated *supra*, the FERC has considered the anticompetitive consequences of the proposed merger and a set of extensive merger conditions was proposed by the FERC administrative law judge regarding New Hampshire Yankee's proposals to transfer ownership and operation of the Seabrook facility. In this regard, the staff has relied heavily upon the record established in the FERC initial decision in its review of the instant amendment applications. The FERC merger conditions were designed specifically to mitigate any potential competitive problems associated with the proposed acquisition of PSNH by NU.

The staff has reviewed the proposed transfer of ownership share in the Seabrook facility from PSNH to NU for significant change since the last antitrust review of the Seabrook licensees, using the criteria discussed by the Commission in *Summer*. (*Cf.* Section III herein) The amendment request was dated November 13, 1990, after the previous antitrust review of the facility and therefore the

first *Summer* criterion, that the change has occurred since the last antitrust review, is satisfied. The second *Summer* criterion is satisfied in that the change is the result of the bankruptcy proceeding initiated by PSNH in January 1988 and as such is "reasonably attributable to the licensee[s] in the sense that the licensee[s] ha[ve] had sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review." *Summer*, 13 NRC at 871.

This leaves for consideration the third *Summer* criterion, that the change has antitrust implications that would be likely to warrant Commission remedy. The Commission in *Summer* adopted the staff's view that application of the third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have *de minimis* anticompetitive effects. *See Id.* at 872. The Commission further stated "the third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance." *Id.*

The staff believes that the record developed in the FERC proceeding involving the NU-PSNH acquisition adequately portrays the competitive situation in the New England bulk power services market and that the anticompetitive aspects of the proposed changes are being addressed in the FERC proceeding. The staff further

believes that the actions being taken by the FERC will adequately address concerns regarding the anticompetitive effects of NU's post merger market power such that the change in ownership as approved by the FERC will not have implications that warrant a Commission remedy. Consequently, the third *Summer* criterion has not been satisfied.

Each of the significant change criteria discussed in *Summer* must be met to make an affirmative significant change finding. In this instance, the third criterion has not been met.

B. Addition Of Non-Owner Operator

In light of the license condition developed by the staff and agreed to by NU, NAESCO (the proposed new plant operator), and the other Seabrook licensees, prohibiting NAESCO from marketing or brokering power or energy produced from the Seabrook plant and holding all other Seabrook licensees responsible for NAESCO's actions pursuant to marketing or brokering of Seabrook power, the staff believes the change in plant operator from New Hampshire Yankee to NAESCO will not have antitrust relevance.

IX. CONCLUSION

For the reasons discussed above, and after consultation with the DOJ, the staff recommends that the Director of the Office of

Nuclear Reactor Regulation conclude that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook licens.

February 13, 1992

Docket No. 50-443A

Alan J. Roth, Esq.
Spiegel and McDiarmid
1350 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Roth:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result from this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

(original signed by)
William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

DISTRIBUTION: [ROTH]
Docket File 50-443A
PTSB Reading File
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 13, 1992

Docket No. 50-443A

Alan J. Roth, Esq.
Spiegel and McDiarmid
1350 New York Avenue, N.W.
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Sincerely,

W. M. Lambe

William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

[7590-01]

NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50-443A

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.

SEABROOK NUCLEAR STATION, UNIT 1

PROPOSED OWNERSHIP TRANSFER

NOTICE OF NO SIGNIFICANT ANTITRUST CHANGES

AND TIME FOR FILING REQUESTS FOR REEVALUATION

The Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2135, tha no significant (antitrust) changes in the licensees' activities or proposed activities have occurred as a result of the proposed change in ownership of Unit 1 of the Seabrook Nuclear Station (Seabrook) detailed in the licensee's amendment application dated November 13, 1991. The finding is as follows:

> Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides that an application for a license to operate a utilization facility for which a construction permit was issued under section 103 shall not undergo an antitrust review unless the Commission determines that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous antitrust review by the Attorney General and the Commission in connection with the construction permit for the facility. The Commission has delegated the authority to make

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the "significant change" determination to the Director, Office of Nuclear Reactor Regulation.

By application dated November 13, 1991, the Public Service Company of New Hampshire (PSNH or licensee), through its New Hampshire Yankee division, pursuant to 10 CFR 50.90, requested the transfer of its 35.56942% ownership interest in the Seabrook Nuclear Power Station, Unit 1 (Seabrook) to a newly formed, wholly owned subsidiary of Northeast Utilities (NU). This newly formed subsidiary will be called the North Atlantic Energy Corporation (NAEC). The Seabrook construction permit antitrust review was completed in 1973 and the operating license antitrust review of Seabrook was completed in 1986. The staffs of the Policy Development and Technical Support Branch, Office of Nuclear Reactor Regulation and the Office of the General Counsel, hereinafter referred to as the "staff", have jointly concluded, after consultation with the Department of Justice, that the proposed change in ownership is not a significant change under the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14).

On February 28, 1991, the staff published in the Federal Register (56 Fed. Reg. 8373) receipt of the licensee's request to transfer its 35.56942% ownership interest in Seabrook to NAEC. This amendment request is directly related to the proposed merger between NU and PSNH. The notice indicated the

reason for the transfer, stated that there were no anticipated significant safety hazards as a result of the proposed transfer and provided an opportunity for public comment on any antitrust issues related to the proposed transfer. The staff received comments from several interested parties -- all of which have been condidered and factored into this significant change finding.

The staff reviewed the proposed transfer of PSNH's ownership in the Seabrook facility to a wholly owned subsidiary of NU for significant changes since the last antitrust review of Seabrook, using the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14). The staff believes that the record developed to date in the proceeding at the Federal Energy Regulatory Commission (FERC) involving the proposed NU/PSNH merger adequately portrays the competitive situation(s) in the markets served by the Seabrook facility and that any anticompetitive aspects of the proposed changes have been adequately addressed in the FERC proceeding. Moreover, merger conditions designed to mitigate possible anticompetitive effects of the proposed merger have been developed in the FERC proceeding. The staff further believes that the FERC proceeding addressed the issue of adequately protecting the interests of competing power systems and the competitive process in the area served by the Seabrook facility such that the changes will not have implications that

warrant a Commission remedy. In reaching this conclusion, the staff considered the structure of the electric utility industry in New England and adjacent areas and the events relevant to the Seabrook Nuclear Power Station and Millstone Nuclear Power Station, Unit 3 construction permit and operating license reviews. For these reasons, and after consultation with the Department of Justice, the staff recommends that a no affirmative "significant change" determination be made regarding the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1991.

Based upon the staff analysis, it is my finding that there have been no "significant changes" in the licensees' activities or proposed activities since the completion of the previous antitrust review.

Signed on .ebruary 9, 1992 by Thomas E. Murley, Director, of the Office of Nuclear Reactor Regulation.

Any person whose interest may be affected by this finding may file, with full particulars, a request for reevaluation with the Director of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission , Washington, DC 20555 within 30 days of the initial publication of this notice in the Federal Register. Requests for reevaluation of the no significant change

determination shall be accepted after the date when the Director's finding becomes final, but before the issuance of the operating license amendment, only if they contain new information , such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

Dated at Rockville, Maryland, this 11th day of February 1992.

FOR THE NUCLEAR REGULATORY COMMISSION

Anthony T. Gody, Chief
Policy Development and Technical
Support Branch
Program Management, Policy Development,
and Analysis Staff
Office of Nuclear Reactor Regulation

SEABROOK NUCLEAR STATION, UNIT 1

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

DOCKET NO. 50-443A

STAFF RECOMMENDATION

NO POST OL SIGNIFICANT ANTITRUST CHANGES

AUGUST 1991

CONTENTS

I. THE SEABROOK AMENDMENT APPLICATIONS

By letters dated November 13, 1990, the Nuclear Regulatory Commission (NRC or Commission) staff (staff) received post Operating License (OL) amendment applications requesting two license changes: 1) to transfer operating responsibility and management of the Seabrook facility from New Hampshire Yankee, the current operator, to a proposed entity called North Atlantic Energy Service Company (NAESCO); and 2) to authorize the ownership transfer of approximately 35 percent of the Seabrook facility from Public Service Company of New Hampshire (PSNH) to a proposed entity called North Atlantic Energy Corporation (NAEC). Both NAESCO and NAEC will be wholly owned subsidiaries of Northeast Utilities (NU) and formed solely to operate Seabrook and own PSNH's share of the facility respectively. The transfer of operating responsibility to NAESCO and the proposed transfer of PSNH'S ownership in Seabrook to NAEC introduce new entities associated with the Seabrook facility.

The applicant and the licensee suggest that no antitrust review of these proposed changes is required by the Atomic Energy Act. The staff believes the legislative history and reading of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, require the staff at least to review new owners of nuclear power production facilities for the purpose of determining whether the adding of the new owner to the license will constitute a significant change. The staff recommends that the Director of the Office of Nuclear Reactor

Regulation conclude from the staff's analysis herein and consultation with the Department of Justice (Department or DOJ) that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license. The basis for staff's recommendation and determination are provided herein.

II. APPLICABLE STATUTE AND REGULATIONS

Section 105 of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, designates when and how antitrust issues may be raised. *See Houston Lighting & Power Co.*, (South Texas Project), CLI-77-13, 5 NRC 1303, 1317 (1977). In connection with the legislation to remove the need to make a finding of practical value before issuing a commercial license,[1] in 1970 the Joint Committee

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[1] Before the amendment, the Commission could issue a commercial license for a production or utilization facility only after it had made a finding of "practical value" of the facility for industrial or commercial purposes. Public Law 91-560 (84 Stat. 1472)(1970), section 3, amended section 102 of the Atomic Energy Act (AEA). Prior to the amendment, section 102 of the AEA read as follows:

> SEC.102. FINDING OF PRACTICAL VALUE.-Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or

(continued...)

on Atomic Energy also examined section 105c. Before the 1970 amendment, section 105c provided that whenever the Commission proposed to issue a commercial license, it would notify the Attorney General of the proposed license and the proposed terms and conditions thereof. The Attorney General would then be obliged to advise the Commission "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws and such advice will be published in the *Federal Register*."[2] The Joint Committee, recognizing that the language and potential effect of the existing section 105c were not sufficiently clear, decided to amend section 105c to clarify and revise this phase of the Commission's licensing process. *See* 116 Cong. Rec. S19253.

Subsection 105c(1), as amended, requires the Commission to transmit, to the Attorney General, a copy of any license application to construct or operate a nuclear facility for the

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[1](...continued)
commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.

[2] Prior to the 1970 amendment, antitrust review could occur only following a Commission finding, under section 102 of the Atomic Energy Act, that a type of facility had been sufficiently developed to be of "practical value" for industrial or commercial purposes. Because the Commission never made such a finding, no antitrust reviews occurred. Power reactor construction permits and operating licenses before 1970 were issued pursuant to section 104b, which applied to facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Attorney General's advice as to whether the grant of an application will create or maintain a situation inconsistent with the antitrust laws. Subsection 105c(2) provides an exception to the requirements of subsection 105c(1) for a license to operate a nuclear facility for which a construction permit was issued under section 103, unless the Commission determines that such review is advisable on the ground that "significant changes" in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission in connection with the construction permit for the facility.

The Commission has promulgated regulations regarding the submittal of information in connection with the prelicensing antitrust review of facilities and the forwarding of antitrust information to the Attorney General. *See* 10 C.F.R. §§ 2.101, 2.102, and 50.33a. Section 50.33a requires the submission of the information specified in 10 C.F.R. Part 50, Appendix L (Information Requested By The Attorney General For Antitrust Review Facility License Applications). The publication in the *Federal Register* of a notice of the docketing of the antitrust information required by Part 50, Appendix L is required by 10 C.F.R. § 2.101(c). Subsections 2.101(e) and 2.102(d) address the situation in which an antitrust review has been conducted as part of the application for a construction permit and the application for an operating license is now before the Commission. Related to this, the Commission has delegated to the Director of Nuclear Reactor Regulation (NRR) or

the Director of Nuclear Material Safety and Safeguards (NMSS), as appropriate, its authority under subsection 105c(2) of the AEA to make the determination in connection with an application for an operating license as to whether "significant changes" in the licensee's activities, or proposed activities under its license have occurred subsequent to the antitrust review conducted in connection with the construction permit application. *See* 10 C.F.R. §§ 2.101(e)(1) and 2.102(d)(2).[3]

On October 22, 1979, the Commission amended 10 C.F.R. § 55.33a to reduce or eliminate the requirements for submission of antitrust information in certain *de minimis* instances. In publishing the rule, the Commission stated its conclusion that applicants whose generating capacity at the time of the application is 200 MW(e) or less are not required to submit the information specified in Appendix L of Part 50, unless specifically requested to do so. The

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[3] In connection with the delegation, the Commission approved procedures to be used until such time as regulations implementing the procedures were adopted. Although never formally published, the procedures are available as attachments to SECY-79-353 (May 24, 1979) and SECY-81-43 (January 19, 1981). On March 9, 1982, the Commission amended its regulations to incorporate final procedures implementing the Commission's delegation of authority to make the "significant changes" determination to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate. 47 Fed. Reg. 9963, March 9, 1982. The amended regulation provides that the Director, NRR or NMSS, as appropriate, after inviting the public to submit comments regarding antitrust aspects of the application and after reviewing any comments received, is authorized to make a significant change determination and, depending on his determination, either refer the antitrust information to the Attorney General or publish a finding of no significant changes in the *Federal Register* with an opportunity for requesting reevaluation of the finding.

Commission further stated that it believed that utilities smaller than these generally would have a negligible effect on competition. Fed. Reg. 60715, October 22, 1979.

All applicants for an NRC utilization facility license who are not determined by the staff to be *de minimis* applicants, undergo an extensive antitrust review at the construction permit (CP) stage and a review at the operating license (OL) stage. The CP review is an in depth analysis of the applicant's competitive activities conducted by the DOJ in conjunction with the staff. The competitive analysis associated with the OL stage of review is conducted by the staff, in consultation with the Department, and is focused on significant changes in the applicant's activities since the completion of the CP antitrust review (or any subsequent review). In each of these reviews, both the staff and the Department concentrate on the applicant's activities and determine whether the applicant's conduct or changes in applicant's conduct creates or maintains a situation inconsistent with the antitrust laws.

III. POST INITIAL OPERATING LICENSE ANTITRUST REVIEWS

A. General

As indicated *supra*, the NRC has established procedures by which prospective licensees of nuclear production facilities are reviewed

during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. The AEA does not specifically address the addition of new owners or operators after the initial licensing process. The legislative history discusses, to a limited extent, some types of amendments.[4] However, neither section 105c of the AEA or the Commission's regulations deal directly with applications to change ownership of facilities with operating licenses.[5] Indeed, in its *South Texas* decision, the Commission stated that, "we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment ... where an application for transfer of control of a license has been made ..." *South Texas Project*, 5 NRC at

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[4] The report by the Joint Committee on Atomic Energy notes that:

> The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for the purposes of triggering subsection 105 c., other applications which may be filled during the licensing process.

H. Rep. 91-1470, 91st Cong. 2d Sess., at 29 (1970).

[5] Applications for construction permits, for amendment of construction permits, and applications for initial operating licenses are not included here.

1318. The Commission went on to note that "[a]uthority [for antitrust review of a license transfer], not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b)."[6] *Id.* Unfortunately, the Commission did not explain how its regulations could grant authority not given by the statute.

The Commission has considered, however, the matter of adding a licensee after issuance of a construction permit, but before issuance of the initial operating license. In *Detroit Edison, et al.*, (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978) *aff'd* ALAB-475, 7 NRC 752, 755-56 n.7 (1978), the Licensing Board denied a petition to intervene and request for an antitrust hearing by a member/ratepayer of the distribution cooperative that purchased all of its power from a cooperative that would become a co-licensee of the power plant. In considering a jurisdictional argument, the Board, relying on the Congressional intent and purpose behind section 105c of the AEA cited in n.4 *supra*, stated that "[s]ince the two cooperatives in this case are required to submit an application to become co-licensees, these constitute *their* 'initial application for a construction permit'"

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[6] 10 C.F.R. § 50.80(b) provides in part that an application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and *if the license to be issued is a class 103 license, the information required by § 50.33a* (Information requested by the Attorney General for antitrust review).

(emphasis in original). *Id.*, at 588. In *Summer*, the Commission referred to *Fermi* for the proposition that the addition of a co-owner as a co-licensee was, in effect, an *initial application* of the co-owner and as such required formal antitrust consideration, stating, "[t]hat decision was based on the necessity for an in-depth review at the CP stage of *all applicants*, lest any applicant escape statutory antitrust review" (emphasis added). *South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 831 (1980).

The legislative history of section 105c and the Commission's guidance in *South Texas* might be read to indicate that Commission antitrust review, if not limited to the initial licensing process, is at least an unsettled question regarding operating license amendments. However, *Fermi* and *Summer* stand for the proposition that new license applicants are initial applicants for purposes of a section 105c antitrust review. Further, the Commission indicated in *Summer* that in such situations a formal antitrust inquiry is required. *See Id.*, at 830-31. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests.

The staff has received applications for operating license amendments that 1) request the addition of a new owner or seek Commission permission to transfer control from an existing to a new

owner or 2) request placing a non-owner operator on a license. The action the NRC Staff has taken has been particular to each situation. In general, post initial operating license amendment applications involving a change in ownership have included an antitrust review by the staff and consultation with the Attorney General. The review by the staff focuses on significant changes in the competitive market caused by the proposed change in ownership since the last antitrust review for the facility and its licensees. The staff review takes into account related proceedings and reviews in other federal agencies (e.g. FERC, SEC, or DOJ).

B. Change In Ownership

Although not specifically addressed by regulation, the staff has evolved a process for meeting the Commission's direction in the *Summer* decision to conduct an antitrust inquiry for license amendments after issuance of the operating license. The receipt of an application to add a new owner to an operating license or to seek Commission permission to transfer control from an existing to a new owner, for section 103 utilization facilities which have undergone antitrust review during the initial licensing process, is noticed in the *Federal Register*, inviting the public to express views relating to any antitrust issues raised by the application, and advising the public that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensees' activities or proposed activities have

occurred since the completion of the previous antitrust review. The staff's awareness of any related federal agency reviews of the request (e.g. FERC, SEC, or DOJ) and the staff's intention to consider those related proceedings are also noted in the *Federal Register* notice. The staff reviews the application after the comment period, so that the staff can perform the review with benefit of public comment, if any, and consultation with the Attorney General. If the Director, NRR, finds no significant change, the finding is published in the *Federal Register* with an opportunity for the public to request reconsideration as provided for in 10 C.F.R. § 2.101(e) for initial license applicants. If the Director, NRR finds significant change, the matter is referred to the Attorney General for formal antitrust review.

In conducting the significant change review, the staff uses the criteria and guidance provided by the Commission in its two *Summer* decisions for making the significant change determination for OL applicants.[7]

> The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are attributable to the licensee(s); and (3) have

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[7] In CLI-80-28, the Commission enunciated the criteria, but deferred its actual decision regarding the petition to make a significant changes determination that was before it. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980). In CLI-81-14, the Commission denied the petition. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

> anti-trust implications that would most likely warrant some Commission remedy.

Summer, 11 NRC at 824. To warrant an affirmative significant change finding, thereby triggering a formal OL antitrust review that seeks the advice of the Department of Justice on whether a hearing should be held, the particular change(s) must meet all three of these criteria. In its second *Summer* decision, the Commission provided guidance regarding the criteria and, in particular, the meaning of the third criterion in determining the significance of a change.

> As the staff recognized, "this third criterion appropriately focuses, in several ways, on what may be 'significant' about any changes since the last...review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive *or have de minimis anticompetitive effects*." (Emphasis provided) The staff correctly discerned that the third criterion has a further analytical aspect regarding remedy: "Not only does [it] require an assessment of whether the *changes* would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes by their nature would require." The third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance.

South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862, 872-73 (1981).

C. Change In Or Addition Of Non-Owner Operator

Changes in a nuclear plant operator, without any change in ownership, may also carry the potential of abuse of market power by the operator. However, the staff has determined that a plant operator who has no control over the marketing of the power or energy produced from the facility will not, under normal circumstances, be in a position to exert any significant amount of market power in the bulk power services market associated with the facility. The staff makes an effort in these cases to reach agreement on a license condition requiring new plant operators to agree to be divorced from the marketing or brokering of power or energy from the facility in question and hold existing owners accountable for the operator's actions. If the prospective new operator and the owners agree to appropriate license conditions that reduce the potential for impact on plant ownership or entitlement to power output, as determined by the staff, the application to add or change a non-owner operator is viewed as an application falling within the *de minimis* exception for submitting antitrust information provided for in 10 C.F.R. § 50.33a.

The Commission has exempted *de minimis* applicants from the requirements to submit antitrust information and, therefore, the publication for comment of such information, unless specifically requested by the Commission. *See* 10 C.F.R. § 50.33a. The Commission has determined that such applicants generally would have a negligible effect on competition. *See* 44 Fed. Reg. 60715, October 22, 1979. The staff has determined that, with an

appropriate license condition regarding the marketing and brokering of power, the potential for a non-owner operator to have an affect on competition in the bulk power market is effectively mitigated. Therefore, such an operator is, as a practical matter, the same as *a de minimis* applicant with respect to its ability to affect competition. Normally, no further antitrust review of the non-owner operator will be conducted by the staff.

IV. PREVIOUS SEABROOK NRC ANTITRUST REVIEWS

A. Construction Permit Review

By letter dated December 4, 1973, the Attorney General issued advice to the Atomic Energy Commission pursuant to Public Service Company of New Hampshire's (PSNH), the lead applicant,[8] application for a construction permit for the Seabrook Nuclear Power Station Units No. 1 and No. 2. In its advice letter, the Department expressed concern over several allegations by smaller power systems in the New England bulk power services market that they were unable to gain access to low cost bulk power supply on the same basis as

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[8]PSNH was the majority owner with 50% of the plant at the time the time of the Department's advice letter in 1973. Since this initial review, there have been several changes in ownership and ownership shares in Seabrook. Existing owners are as follows: PSNH (35.56942%); United Illuminating (17.5%); EUA Power Corporation (12.1324%) Connecticut Light & Power Company (4.05985%); Hudson Light & Power Department (0.07737%); Vermont Electric Generation and Transmission Corporative, Inc. (0.41259%); Montaup Electric Company (2.89989%); Canal Electric Company (3.52317%); New England Power Company (11.59340%); Taunton Municipal Lighting Plant (0.10034%); and New Hampshire Electric Cooperative, Inc. (2.17391%)

larger systems in the area. The advice letter stated that as a result of a settlement agreement reached between the privately owned and publicly owned systems in New England that there had been a "dramatic improvement in the relations among the various segments of the electric power industry in New England...." The Department emphasized the importance of the development of the New England Power Pool (NEPOOL) as a regional planning body that would enable participation in bulk power services by all types of power entities throughout New England. The Department concluded,

> ... that the creation of a truly open, non-exclusive NEPOOL means that all systems can have a dependable frame- work within which to obtain fair and non-discriminatory access to economical and reliable bulk power supply.{December 4. 1973 advice letter, p. 4}

As a result of its review, the Department advised the Atomic Energy Commission that there was no need for an antitrust hearing pursuant to the construction permit application for Seabrook.

B. Operating License Review

As noted above, a prospective operating licensee is not required to undergo a formal antitrust review unless the staff determines that there have been "significant changes" in the licensee's activities or proposed activities subsequent to the review by the Department of Justice and the staff at the construction permit stage. The staff completed its OL antitrust review of Seabrook in January

1986. The staff analysis indicated that,

> ...NEPOOL, which was only two years old at the time when the CP antitrust review was performed, appears to have evolved into a framework ensuring access to reliable and economical bulk power supply for all New England utilities. Two provisions of the original pool agreement were found to be discriminatory against smaller utilities and have since been removed. Further, because Seabrook 1 has been designated as a pool-planned unit, access to Seabrook 1 over pool transmission facilities of members is guaranteed for all participants under the terms of NEPOOL.[9]

Based in large part upon the successful formation and operation of NEPOOL, the staff concluded that the changes in the licensees' activities as well as any proposed changes in licensees' activities do not represent "significant changes" as identified in the *Summer* decision and recommended that no formal OL antitrust review be conducted. The staff's antitrust OL review was completed in February 1986 and the Seabrook full power license was issued on March 15, 1990.

C. EUA Power Review

By letter dated March 26, 1986, New Hampshire Yankee, acting as agent for the Seabrook licensees, requested the staff to amend the

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[9]Staff review of Seabrook licensees' changed activity, "Seabrook Station, Unit 1, Public Services Company of New Hampshire, et al, Docket No. 50-443A, Finding of No Significant Antitrust Changes," p. 57.

Seabrook construction permits (Units 1 and 2) to reflect the purchase and transfer of an approximate 12 percent ownership share in the Seabrook facility to EUA Power Corporation (EUA Power), a wholly owned subsidiary of Eastern Utility Associates of Boston, Massachusetts. The amendment requested the transfer of 12 percent ownership to EUA Power and deletion of the following owners as Seabrook licensees: Bangor-Hydro-Electric Company (2.17391%); Central Maine Power Company (6.04178%); Central Vermont Public Service Corporation (1.59096%); Fitchburg Gas and Electric Light Company (0.86519%); and Maine Public Service Company (1.46056%).

Even though a sister company, Montaup Electric Company (both are wholly owned by Eastern Utilities Associates), had previously undergone an antitrust review in conjunction with its participation in Seabrook, EUA Power represented a new owner prior to issuance of the Seabrook full power operating licensee and was required to undergo a formal antitrust review by the Department of Justice. Accordingly, EUA Power submitted pertinent 10 C.F.R. Part 50, Appendix L information to the staff regarding its operations and competitive activity. A notice of receipt of this information, which provided the opportunity for a 60 day comment period on the antitrust issues regarding the proposed ownership transfer, was published in the *Federal Register* on May 23, 1986.

By letter dated July 1, 1986 the Department advised the staff that there was,

> ... no evidence that the proposed participation by EUA Power Company in the Seabrook Units would either create or maintain a situation inconsistent with the antitrust laws under Section 105(c). We do not, therefore, believe it is necessary for the Commission to hold an antitrust hearing in this matter. (Department of Justice advice letter, p.1)

The Department's letter was published in the *Federal Register* on July 17, 1986 and provided for interested persons to request a hearing and file petitions to intervene. There were no such requests and the staff issued an amendment (No. 9) to the Seabrook construction permits authorizing the transfer of ownership effective upon completion of the transfer of ownership shares which was consummated on November 26, 1986. In this instance, there was no need to apply the significant change threshold criteria to the EUA Power amendment review and address the issue of whether the Department of Justice should conduct the review or the staff should issue a significant change determination because the request for ownership change occurred prior to issuance of the full power operating license and consequently, the review involved an amendment to the construction permit and followed construction permit review procedures.

V. CHANGES AT SEABROOK AFTER ISSUANCE OF THE INITIAL OL

The instant amendment requests to transfer PSNH'S ownership in Seabrook to a proposed new entity, NAEC, and change the plant operator from New Hampshire Yankee to a proposed new operating

entity, NAESCO, represent direct outgrowths of the bankruptcy proceeding initiated by PSNH in January 1988. Though the bankruptcy proceeding and PSNH's financial status are not the focus of the instant review, it is significant to note that PSNH is dependent upon Seabrook as its principal source of generating capacity and operating revenue. This dependence on one source of operating revenue left PSNH highly susceptible to fluctuations in the business cycle that affect different regions of the country at different periods in the cycle. During the mid 1980's commerce and industry in New England were growing dramatically. Economic growth exceeded projections for planned electric generating capacity.[10] However, as rapidly as the New England economy advanced in the mid 1980's, it declined equally a fast in the late 1980's. PSNH filed for bankruptcy in January 1988 and EUA Power Corporation, another Seabrook co-owner heavily dependent upon the sale of Seabrook power and energy, filed for bankruptcy in early 1991.

There were other factors that contributed to PSNH'S financial difficulties in the 1980's, e.g., development and approval of emergency evacuation plans for Seabrook and state regulatory proceedings involving allowance of Seabrook costs in PSNH'S rate

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[10]EUA Associates, parent company of Montaup Electric Company, a co-owner of Seabrook, formed EUA Power Corporation specifically to purchase a 12 percent ownership share in Seabrook to meet an unexpected strong demand for electric power in New England during the late 1980's and 1990's. John F.G. Eichorn, chairman of EUA Associates, was quoted by the Providence, Rhode Island Journal newspaper, as citing NEPOOL electricity demand estimates showing "a serious shortfall developing in New England, which we at EUA are determined to help eliminate." Journal, April 10, 1986.

base. All of these factors culminated in PSNH filing for bankruptcy and the resultant proposal by NU to acquire PSNH. The proposals adding a new owner and a new operator of the Seabrook facility are the principal changes the staff must address in its post OL significant change antitrust review. The staff must determine whether the new owner or the new operator will create or maintain a situation inconsistent with the antitrust laws.

VI. FERC AND SEC REVIEWS

Pursuant to the requirements and jurisdiction of both the Federal Power Act and the Public Utilities Holding Company Act of 1935, NU filed applications with the Federal Energy Regulatory Commission (FERC), on January 5, 1990, and the Securities and Exchange Commission (SEC), on October 5, 1989, respectively, seeking approval of its proposed merger with PSNH. In light of the fact that similar competitive issues are currently being addressed in proceedings at the FERC and SEC and that the findings reached in the FERC and SEC proceedings will be considered by the staff, a brief synopsis of these proceedings follows.

A. FERC Proceeding

Northeast Utilities, acting through a service company called NUSCO, sought approval under Section 203 of the Federal Power Act (enforced by the FERC) to acquire the jurisdictional assets of

PSNH. Section 203 of the Federal Power Act (FPA) requires the FERC to make a determination as to whether the proposed acquisition or merger will be consistent with the public interest. Though the FPA does not specifically charge the FERC with weighing the competitive implications of the merger or acquisition in terms of injury to competition or the competitive process in identifiable markets, in the recent past, the FERC has considered these competitive concerns as inputs to its ultimate determination as to whether the combination creates more benefits than costs, i.e., is in the public interest.

On March 2, 1990, the FERC issued an order granting intervention by all requesting parties and also granted a NU motion to expedite the hearing schedule by requiring that an initial decision be issued no later than December 31, 1990. After extensive discovery, depositions and oral argument, the FERC administrative law judge (ALJ), Jerome Nelson, issued an initial decision on December 20, 1990.[11]

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[11]"On March 7, 1990, NU submitted its direct case, which consisted of the prepared testimony and exhibits of six witnesses. After extensive discovery, including numerous depositions of NU, Staff, intervenor and third party witnesses, the Staff and intervenors filed their respective direct cases on May 25, 1990. The direct cases of staff and intervenors included the prepared testimony and exhibits of 49 witnesses. On June 25, 1990, Staff and intervenors filed cross-rebuttal cases through the prepared testimony and exhibits of 19 witnesses. On July 20, 1990, NU filed its rebuttal case through the prepared testimony and exhibits of 12 witnesses. Twenty-five days of hearings were held during August and September of 1990. Thirty-five witnesses were cross-examined, and 809 exhibits were admitted into evidence. Briefs and reply briefs were filed in October of 1990. Four days of oral argument ended on November 13, 1990." (ALJ Initial Decision, p. 6).

The ALJ made several findings in his initial decision, however, the findings most relevant to the NRC post OL amendment review concern the effect the merger will have on the New England bulk power services market. The ALJ's initial decision indicated that without a detailed set of merger conditions, the "NU-PSNH merger would have anti-competitive consequences." The ALJ found that,

> the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts). (*Id.*, p.15)

The ALJ indicated that the merged company will control 92 percent of the transmission capacity presently serving New England.

> This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices. (*Id.*, p. 16)

The ALJ concluded that merged NU-PSNH will control the principal transmission access routes from northern New England to southern New England as well as 72 percent of the New York, New England transmission corridor path.

> Because PSNH "controls the only transmission lines linking Maine and New Brunswick to the rest of New England"..., Eastern REMVEC utilities will necessarily have to deal with the merged company in order to get power from those areas. The merged company's control

> would also extend to access from New York... NU controls 72% of the New York-New England "interface"... and needs only a small portion of that share for its own use. (*Id.*)

The ALJ's initial decision recommended that the FERC approve the merger only if specific merger conditions were agreed upon by the merging parties. There are two principal conditions discussed by the ALJ designed specifically to address the new NU-PSNH's market power and particularly any potential for abuse of this newly created market power vis-a-vis other power systems in New England. The first condition is basically a rework of a proposal initially offered by NU-PSNH dealing with the merged company's policy regarding transmission over its power grid. A set of General Transmission Commitments was developed by the ALJ which dealt with various degrees of priority access and time horizons depending upon the individual power supply situation in question. This policy commitment, according to the ALJ, would reassure non-dominant power systems in New England a form of meaningful access to the transmission facilities required to fulfill their bulk power supply requirements.

The second major condition that addresses the transmission dominance of the new NU-PSNH is termed the, "New Hampshire Corridor Proposal." This proposal serves to open up the flow of power from Canada to New England and from northern New England to the heavily populated southeastern portion of New England. The Corridor Proposal allocated a total of 400 MW of transmission capacity with

200 MW allocated to New England Power Company and 200 MW allocated to southern New England utilities. These two transmission proposals recommended by the FERC ALJ are the most relevant to the staff's review of New Hampshire Yankee's requests to change ownership and the operator of the Seabrook facility.

On August 9, 1991, the FERC conditionally approved the NU merger with PSNH. To mitigate the merger's likely anticompetitive effects, the FERC strengthened NU's General Transmission Commitment and noted that it will construe NU's voluntary commitment very strictly. NU can not give higher priority to its own non-firm use than to third party requests for firm wheeling in allocating existing transmission capacity. The FERC also ruled that independent power producers and qualifying facilities are eligible for transmission access on the New Hampshire Corridor. *See Northeast Utilities Service Company* (Re Public Service Company of New Hampshire) FERC slip op. No. 364 (August 9, 1991).

B. SEC Proceeding

NU filed an application with the SEC for approval under the Public Utility Holding Company Act of 1935 (PUHCA) of its proposed merger with PSNH. The SEC issued a notice of the filing of the application on February 2, 1990 (Holding Co. Act Release No. 25032). Fourteen hearing requests from 41 separate entities were received and four of these requests, representing 21 entities, were

subsequently withdrawn. Moreover, eight entities filed comments or notices of appearance. The segment of the SEC review most relevant to staff's post OL amendment review revolves around Section 10(b)(1) of the PUHCA that requires the SEC to consider possible anticompetitive effects of the proposed NU-PSNH acquisition. The SEC in a Memorandum Opinion dated December 21, 1990 approved NU's proposed acquisition of PSNH--indicating that all PUHCA requirements, including Section 10(b)(1), had been fulfilled. In its initial decision, the SEC stated that,

> Given the approximate size of the Northeast--PSNH system and the resultant economic benefits discussed herein..., we conclude that the Acquisition does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied. (SEC Initial Decision, p. 40)

The SEC's analysis, as reflected in its initial decision, considers the economic benefits associated with a merged NU-PSNH and not so much the potential for abuse of market power that may be enhanced by the merger. The initial decision states that the,

> transfer to North Atlantic will merely move the asset from one Northeast subsidiary to another and should have no impact on competitive conditions. (*Id.*, p.58)

The SEC order approving the merger was appealed by two intervenors in the SEC proceeding--the City of Holyoke Gas and Electric

Department and the Massachusetts Municipal Wholesale Electric Company (petitioners). Petitioners filed a request for rehearing of the initial decision, arguing that the SEC erred in approving the NU-PSNH acquisition by failing to provide sufficient analysis of the anticompetitive effects of the acquisition. Petitioners based much of their argument for rehearing upon the FERC ALJ's December 20, 1990 decision which indicated that an unconditioned NU-PSNH merger would have significant anticompetitive effects upon the New England bulk power services market.

In a Supplemental Memorandum Opinion and Order (Supplemental Memorandum) dated March 15, 1991, the SEC granted petitioners a reconsideration of the SEC's initial decision.

> In our December order, we recognized that the Acquisition would decrease competition, but concluded that the Acquisition's benefits would outweigh its anticompetitive effects. The petitioners challenge this determination, arguing that the Commission ignored the anticompetitive effects of the merged company's control of transmission facilities and surplus power. (Supplemental Memorandum, p.3)

The SEC's Supplemental Memorandum indicated that its initial decision focused more on the size and corporate structure of NU-PSNH rather than the merged company's ability to control access to transmission or excess capacity. The Supplemental Memorandum stated that even though the SEC's principal focus was on the size and structure of the merged company, the competitive access issues

were considered and the SEC concluded that, "The merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior." (Supplemental Memorandum, p.5) However, the SEC relied upon the transmission commitments made by NU to mitigate any possible anticompetitive effects of the merger.[12]

The Supplemental Memorandum recognized that both the SEC and the FERC "have statutory responsibilities with respect to the anticompetitive consequences of mergers in the public-utility industry". (*Id.*, p.6). However, the SEC also recognized that the focus of the Federal Power Act and the Public Utility Holding Company Act are different in that each agency pursues administration of each act with different goals for regulating members of the electric utility industry. As a result, the SEC deferred the question of anticompetitive consequences and its ultimate approval of the proposed merger to the FERC.

> Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the Commission, [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look

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[12] The initial FERC decision found the commitments made by NU to be insufficient to remedy the potential anticompetitive effects of the merger and recommended additional terms and conditions be imposed upon the merged company as a condition for FERC approval of the merger.

> to the FERC's expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the acquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the FPA. (*Id.*, p.9)

VII. AMENDMENT APPLICATIONS COMMENTS RECEIVED BY THE STAFF

The staff, in accordance with 10 C.F.R. § 2.101(e)(1), published receipt of New Hampshire Yankee's request to amend the Seabrook OL in the *Federal Register* and provided interested parties the opportunity to comment on the antitrust issues raised by the proposed acquisition on February 28, 1991.[13] The staff received comments from the following entities or their representatives: 1) New Hampshire Electric Cooperative (April 1, 1991,); 2) Massachusetts Municipal Wholesale Electric Company (April 1, 1991); 3) City of Holyoke Gas and Electric Department (April 1, 1991); 4) Hudson Light and Power Department (April 4, 1991); and 5) Taunton Municipal Lighting Plant (April 10, 1991). By letter dated April 22, 1991, counsel for Connecticut Light and Power Company and PSNH responded to these comments.[14] The comments from participants in the FERC and SEC proceeding by and large mirrored the positions taken by the commenters in those proceedings. The comments

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[13] A similar notice regarding the change in operator from New Hampshire Yankee to NAESCO, was published in the *Federal Register* on March 6, 1991.

[14] By letter dated June 13, 1991, City of Holyoke Gas and Electric Department (HG&E) replied to the Connecticut Light and Power (CL&P) and PSNH response. By letter dated July 9, 1991, CL&P and PSNH responded to the HG&E reply. By letter dated July 22, 1991, HG&E replied to the CL&P and PSNH July 9, 1991 response.

received are summarized below with the staff analysis of each comment.

A. New Hampshire Electric Cooperative (NHEC)

Comment

NHEC is a transmission dependent utility (TDU), i.e., "entirely dependent on NU or PSNH for their bulk power transmission needs". NHEC states that without access to NU's or PSNH's transmission facilities it cannot actively compete in the New England wholesale bulk power services market. NHEC asserts that the proposed acquisition of PSNH by NU will concentrate its only source of essential transmission service in the hands of its principal competitor. NHEC cites the initial FERC decision as evidence that the proposed merger, if unconditioned, will have an adverse impact on the competitive process in the New England bulk power services market. NHEC also states that recent developments which have not been a part of the FERC record are relevant to the NRC review associated with the Seabrook post OL amendment applications.

NHEC wishes to purchase partial requirements power from another supplier, New England Power Company (NEP), rather than PSNH. NHEC and NEP entered into a long-term power supply contract on January 9, 1991; however, NHEC needs access to PSNH's transmission grid to receive the NEP power. PSNH has indicated that NHEC is contractually prohibited from taking any other off system power purchases during the term of its power supply contract with PSNH

and as a result PSNH would not approve use of its transmission grid until the contractual dispute between PSNH and NHEC is resolved.

NHEC contends that the proposed acquisition of PSNH by NU is anticompetitive and under the NRC's *Summer* criteria, represents a "significant change". NHEC seeks relief by requiring NU to,

> . . . commit before this Commission that it will provide NHEC all transmission needed for NHEC to purchase power from other sources . . . .

Staff Analysis

The staff believes that the issue described by NHEC in its April 1, 1991 filing to the staff primarily involves a contract dispute with PSNH and NU over transmission rights pertaining to power purchases by NHEC from New Brunswick. Presently, NHEC is taking partial requirements wholesale power from PSNH under a 1981 contract. A dispute has arisen between NHEC and PSNH (now NU, given its proposed acquisition of PSNH) regarding the terms under which the contract can be terminated. PSNH states that the contract requires NHEC to provide five years notice prior to cancelling the contract and switching to a different supplier. NHEC states that the contract provides for termination upon NHEC joining NEPOOL and that the recent NHEC-NEP purchase agreement and NHEC's ownership interest in Seabrook provide the basis for NEPOOL membership.

This contract dispute, which forms the linchpin for NHEC's argument

that it is dependent upon NU's transmission grid is presently being interpreted before the FERC. The staff believes that it is appropriate for this dispute to be resolved under the auspices of the FERC's jurisdiction over wholesale power and transmission tariffs and the terms and conditions associated with such agreements. The staff sees no need for the NRC to enter into a contract dispute that is under review by the FERC. Should the PSNH-NHEC contract dispute be resolved in NHEC's favor, i.e., enabling NHEC to terminate the contract without giving a five year notice, the merger condition recommended by the FERC ALJ and commitments made by NU to provide transmission dependent utilities transmission services (cf., PSNH and Connecticut Power & Light Company Comments to NRC staff dated April 22, 1991, pp. 29-30), should adequately resolve the competitive concerns raised by NHEC.

B. Massachusetts Municipal Wholesale Electric Company (MMWEC)

Comment

MMWEC is a co-owner (11.5934%) of the Seabrook plant. In its comments to the NRC, MMWEC states that the proposed acquisition of PSNH by NU is anticompetitive, notwithstanding the merger conditions recommended by the FERC ALJ, and suggests that the Director of the Office of Nuclear Reactor Regulation find, pursuant to *Summer*, that significant changes have occurred since the Attorney General's advice letter was issued in December 1973.

MMWEC contends that the standard of review of mergers required by

the FERC under the FPA is different than that required by the NRC under the Atomic Energy Act. MMWEC states that this difference permits anticompetitive acquisitions under the FPA if it is determined that the public interest is served by the acquisition (or merger), whereas the NRC must address the competitive implications of activities of licensees "irrespective of any compelling public interest." (MMWEC comments, p.3)

Moreover, MMWEC requests the NRC to address the anticompetitive aspects of NU's management and operation of Seabrook--an area not covered in the FERC ALJ's initial decision. According to MMWEC,

> NU is executing a plan whereby it has separated the Seabrook management function and ownership function from each other and utilized its market power to insulate itself, those functions and its other affiliates from any liability, except liability imposed by willful misconduct. (*Id.*, p.5)

MMWEC's concerns revolve around a July 19, 1990 agreement reached among Seabrook owners holding approximately 70 percent of the facility. This agreement provides for the transfer of the managing and operating agent from New Hampshire Yankee to a proposed wholly owned NU subsidiary, NAESCO. An exculpatory clause in the July 19, 1990 agreement, according to MMWEC,

> . . . would not only free NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. MMWEC cannot insure any

> reckless or negligent conduct of the Managing Agent or its affiliates. (*Id.*)

MMWEC requests the NRC to act to prevent NU from maintaining a situation inconsistent with the antitrust laws. MMWEC suggests that the NRC condition the approval of the license transfer to "require appropriate amendment of the Joint Ownership Agreement and to prohibit NAECO, & NAESCO and their affiliates from freeing themselves from liability for misconduct." (*Id.*, p.6)

Staff Analysis

MMWEC's principal concern is that NU used its market power in an anticompetitive manner in formulating a July 19, 1990 agreement that established parameters by which the Seabrook facility would be managed and operated. Moreover, MMWEC asserts that this agreement frees,

> . . .NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. (MMWEC comments, p. 5)

MMWEC has failed to show how NU has used (abused) its market power in bulk power services in formulating an agreement to install a new manag.ng agent for Seabrook. MMWEC asks the NRC to condition the license transfer by requiring amendment of the Seabrook "Joint Ownership Agreement", to, effectively, make NAECO and NAESCO more accountable for their actions pursuant to their ownership and operation of the Seabrook facility respectively. Based upon the

data available to the staff, it appears as though the July 19, 1990 agreement was consummated in conformance with the Seabrook Joint Ownership Agreement, as amended, and not as a result of any abuse of market power on the part of NU. The staff believes MMWEC's concerns over the degree of liability it must absorb should NAESCO in any way mismanage Seabrook are concerns of a contractual, not competitive, nature and should be raised and addressed before an appropriate forum for these matters, not the NRC.

Moreover, as recognized by MMWEC at page three of its comments, the staff considered the possibility of a new plant operator having an influence over competitive options of the new owners of Seabrook. For this reason, after discussions with the staff, NAESCO agreed to a license condition divorcing itself from the marketing or brokering of power or energy produced by Seabrook. The license condition was designed to eliminate NAESCO's ability to exercise any market power, if evident and obviated the need to conduct a further competitive review of NAESCO. For the reasons stated above, MMWEC's request to condition the Seabrook license that frees it from NAESCO's liability should be denied.

C. City Of Holyoke Gas & Electric Department (HG&E)

Comment

HG&E is a municipally owned electric system serving primarily western Massachusetts. "HG&E lies within the service territory of Western Massachusetts Electric Company ("WMECO"), a wholly-owned

subsidiary of NU." (HG&E comments, p.2) HG&E generates no power on its own and relies heavily on the transmission facilities of PSNH to supply approximately 36 percent of its load from the Point Lepreau nuclear plant in New Brunswick, Canada. According to HG&E,

> The increase in control that the merged entity will exercise over generation (including power from Seabrook) and transmission capacity in New England represents a "significant change" from the activities of the current licensee--an independent PSNH. (HG&E comments, p.3)

HG&E contends that NU-PSNH will wield significantly more market power than a stand alone PSNH and given the existing competitive relationship between HG&E and NU, the merged entity, without adequate license conditions and structural alterations in the market, will be able to severely restrict or at a minimum, control the cost effectiveness of a large portion of its power supply that presently flows over PSNH's transmission facilities from New Brunswick.

> Control over generation capacity greatly reduces the opportunities available to purchase power from other utilities in the region; control over transmission capacity eliminates or reduces the ability of HG&E and others to purchase power from utilities outside of New England. (*Id.*, p. 6)

Moreover, HG&E asserts that many of the benefits associated with NEPOOL operation--identified by the Department of Justice and the staff in previous reviews--may be negated by the merged company's "sufficient veto voting power" over proposals put forth by the

NEPOOL Management Committee. HG&E characterizes this change in market power as a "significant change" requiring a full review of the antitrust impacts of the proposed merger, including an analysis by the Attorney General of the antitrust impact of the proposed license transfer.

HG&E addresses ongoing reviews of NU's proposed acquisition of PSNH before other federal agencies and concludes that NRC's antitrust review mandate in Section 105c of the Atomic Energy Act more clearly relates to review of anticompetitive conduct whereas the reviews at the FERC and SEC seem to be more public interest oriented. Consequently, HG&E asserts that the NRC should not assume that these other reviews will adequately condition the proposed merger to remedy the serious competitive issues that the merger would create. HG&E urges the NRC to deny the proposed merger, yet if approved, suggests that NRC require prior approval by the FERC and SEC, and in addition, 1) require NU-PSNH to transmit Point Lepreau power to HG&E for the term of any extended HG&E/Point Lepreau power supply contract with equivalent terms to its current contract, and 2) require NU to divest its subsidiary, Holyoke Water Power Company (HWP) or consolidate HWP into another NU subsidiary, Western Massachusetts Electric Company, thereby subjecting HWP to state regulation as a public utility.

Staff Analysis

HG&E asks the NRC to initiate a full antitrust review of the proposed merger, considering all of the antitrust effects of the

proposed merger pursuant to Section 105c of the Atomic Energy Act. "Such review would include an analysis by the Attorney General of the antitrust impact of the proposed license transfer. 42 U.S.C. SEC.2135" (HG&G comments, P.3) At the conclusion of such a review, HG&E recommends that the NRC deny the proposed license transfer or approve the transfer with license conditions over and above those recommended by the FERC ALJ.

As indicated *supra* (cf., Section III herein), the staff takes into consideration the record establised during related federal agency reviews of the change in ownership. The FERC proceeding and the accompanying recommendations for competition enhancing merger conditions were factors the staff considered in evaluating the instant proposals under the significant change criteria. The staff believes the presence of license conditions recommended by the FERC mitigates the possibility of anticompetitive effects ensuing from such a merger as well as the need for a more formal antitrust review by the Department of Justice. For the reasons stated above, the staff recommends denying HG&E's requests to deny the proposed merger or initiate a formal antitrust review that incorporates an analysis by the Attorney General.

Considering the license conditions associated with the proposed acquisition of PSNH by NU, the staff recommends denying in part and approving in part HG&E's request to attach the FERC and SEC merger conditions and impose two additional conditions as a requirement

for consummation of the acquisition. The staff has relied heavily on the record established to date in the FERC proceeding and in light of the procompetitive merger conditions proposed by the FERC ALJ would recommend approval of the license transfer. The SEC in its Supplemental Memorandum Opinion dated March 21, 1991 deferred its ruling on the competitive aspects of the proposed merger to the FERC.

The staff recommends denying HG&E's request to the NRC to condition the license transfer upon two additional requirements, one providing, in effect, a life of service transmission contract for HG&E's Point Lepreau power and another requiring NU to divest a wholly owned subsidiary in competition with HG&E. There has been nothing established in the FERC record or in the instant proceeding that indicates that HG&E would have been able to renew its transmission contract with PSNH or its power supply contract with New Brunswick upon termination of the existing contracts in 1994. NU, as PSNH's parent company, has not indicated that it plans to deny HG&E transmission capacity to New Brunswick after the proposed merger is consummated. NU has stated that this transmission corridor to New Brunswick will be offered to "all comers," as it were. It appears as though HG&E will be in competition with other potential buyers of Point Lepreau power for both transmission and power and energy. The staff seer no reason to assist HG&E over any other competitor in this regard. Should HG&E enter into a transmission contract with NU-PSNH and find the terms and

conditions in any way anticompetitive, the staff believes the FERC is the proper forum for resolution of tariff issues. The FERC initial decision recognized the increase in market power resulting from the NU-PSNH acquisition, yet recommended conditions to mitigate any abuse of this newfound power.

> The merged company -- with vast power over transmission and control of surplus power -- must offer viable wheeling service in order to alleviate potential anti-competitive consequences. (FERC Initial Division, p. 48) [Emphasis added].

Moreover, the FERC ALJ approved the request by HG&E to require NU to establish the position of "ombudsman" to review NU's service and eliminate the possibility of any anticompetitive consequences resulting from NU's substantial market power in transmission and surplus power in the New England market. Additionally, the FERC ALJ indicated that,

> The ombudsman is not the only avenue for dissatisfied customers. The Commission's Enforcement Task Force maintains a "hotline" ... through which complaints can be received. (FERC Initial Decision, p. 49)

The staff believes these actions taken by the FERC adequately address HG&E's concerns over abuse of NU's post merger market power. For this reason, the staff does not believe that HG&E has established a basis for the staff to conclude that there is a significant change warranting an antitrust review. Furthermore, there is no basis for the staff unilaterally to impose conditions

on the transfer of the license providing for a life of service transmission contract.

Regarding HG&E's second condition, the staff believes that no record has been established to justify HG&E's request to divest Holyoke Water Power Company from NU. According to the FERC initial decision, "The City [HG&E] is covered by the protection given the TDUs, and is entitled to no more in this regard." (FERC Initial Decision, p. 50) Accordingly, divestiture of HWP does not seem warranted solely to, "eliminate NU's incentive to eliminate injury to HG&E...." (HG&E comments, p. 10; emphasis added). The staff recommends denying HG&E's request to divest HWP from NU.

D. Hudson and Taunton

Comment

The Taunton Municipal Lighting Plant (Taunton) and the Hudson Light and Power Department (Hudson) are both owners of the Seabrook facility. Taunton and Hudson are both members of the Massachusetts Municipal Wholesale Electric Company and both have requested the NRC to adopt MMWEC's comments submitted to the NRC via letter dated April 1, 1991.

Staff Analysis

As indicated *supra*, the staff recommended denying MMWEC's request to further condition the Seabrook operating license to free MMWEC from any liability to existing owners that may result from the proposed license transfer. In light of the fact that Hudson and

Taunton adopted MMWEC's comments, the staff also recommends that their requests be denied.

VIII. NRC STAFF FINDINGS

A. Change In Ownership

The ownership transfer of over 35 percent of Seabrook potentially represents a change in the degree of control over the operation of the nuclear facility. However, as indicated *supra*, the FERC has considered the anticompetitive consequences of the proposed merger and a set of extensive merger conditions was proposed by the FERC administrative law judge regarding New Hampshire Yankee's proposals to transfer ownership and operation of the Seabrook facility. In this regard, the staff has relied heavily upon the record established in the FERC initial decision in its review of the instant amendment applications. The FERC merger conditions were designed specifically to mitigate any potential competitive problems associated with the proposed acquisition of PSNH by NU.

The staff has reviewed the proposed transfer of ownership share in the Seabrook facility from PSNH to NU for significant change since the last antitrust review of the Seabrook licensees, using the criteria discussed by the Commission in *Summer*. (*Cf.* Section III herein) The amendment request was dated November 13, 1990, after the previous antitrust review of the facility and therefore the

first *Summer* criterion, that the change has occurred since the last antitrust review, is satisfied. The second *Summer* criterion is satisfied in that the change is the result of the bankruptcy proceeding initiated by PSNH in January 1988 and as such is "reasonably attributable to the licensee[s] in the sense that the licensee[s] ha[ve] had sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review." *Summer*, 13 NRC at 871.

This leaves for consideration the third *Summer* criterion, that the change has antitrust implications that would be likely to warrant Commission remedy. The Commission in *Summer* adopted the staff's view that application of the third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have *de minimis* anticompetitive effects. *See Id.* at 872. The Commission further stated "the third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance." *Id.*

The staff believes that the record developed in the FERC proceeding involving the NU-PSNH acquisition adequately portrays the competitive situation in the New England bulk power services market and that the anticompetitive aspects of the proposed changes are being addressed in the FERC proceeding. The staff further

believes that the actions being taken by the FERC will adequately address concerns regarding the anticompetitive effects of NU's post merger market power such that the change in ownership as approved by the FERC will not have implications that warrant a Commission remedy. Consequently, the third *Summer* criterion has not been satisfied.

Each of the significant change criteria discussed in *Summer* must be met to make an affirmative significant change finding. In this instance, the third criterion has not been met.

B. Addition Of Non-Owner Operator

In light of the license condition developed by the staff and agreed to by NU, NAESCO (the proposed new plant operator), and the other Seabrook licensees, prohibiting NAESCO from marketing or brokering power or energy produced from the Seabrook plant and holding all other Seabrook licensees responsible for NAESCO's actions pursuant to marketing or brokering of Seabrook power, the staff believes the change in plant operator from New Hampshire Yankee to NAESCO will not have antitrust relevance.

IX. CONCLUSION

For the reasons discussed above, and after consultation with the DOJ, the staff recommends that the Director of the Office of

Nuclear Reactor Regulation conclude that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license.

February 13, 1992

Docket No. 50-443A

Mr. Joseph M. Blain, General Manager
Municipal Light Commission
P.O. Box 870
Faunton, MA 02780-0870

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Blain:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result irom this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

(ORIGINAL SIGNED BY)
William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

DISTRIBUTION: [BLAIR]
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 13, 1992

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Municipal Light Commission
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Sincerely,

W. M. Lambe

William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

[7590-01]

NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50-443A

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.

SEABROOK NUCLEAR STATION, UNIT 1

PROPOSED OWNERSHIP TRANSFER

NOTICE OF NO SIGNIFICANT ANTITRUST CHANGES

AND TIME FOR FILING REQUESTS FOR REEVALUATION

The Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2135, that no significant (antitrust) changes in the licensees' activities or proposed activities have occurred as a result of the proposed change in ownership of Unit 1 of the Seabrook Nuclear Station (Seabrook) detailed in the licensee's amendment application dated November 13, 1991. The finding is as follows:

> Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides that an application for a license to operate a utilization facility for which a construction permit was issued under section 103 shall not undergo an antitrust review unless the Commission determines that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous antitrust review by the Attorney General and the Commission in connection with the construction permit for the facility. The Commission has delegated the authority to make

the "significant change" determination to the Director, Office of Nuclear Reactor Regulation.

By application dated November 13, 1991, the Public Service Company of New Hampshire (PSNH or licensee), through its New Hampshire Yankee division, pursuant to 10 CFR 50.90, requested the transfer of its 35.56942% ownership interest in the Seabrook Nuclear Power Station, Unit 1 (Seabrook) to a newly formed, wholly owned subsidiary of Northeast Utilities (NU). This newly formed subsidiary will be called the North Atlantic Energy Corporation (NAEC). The Seabrook construction permit antitrust review was completed in 1973 and the operating license antitrust review of Seabrook was completed in 1986. The staffs of the Policy Development and Technical Support Branch, Office of Nuclear Reactor Regulation and the Office of the General Counsel, hereinafter referred to as the "staff", have jointly concluded, after consultation with the Department of Justice, that the proposed change in ownership is not a significant change under the criteria discussed by the Commission in its Summer decisions (CLI-80-28 and CLI-81-14).

On February 28, 1991, the staff published in the Federal Register (56 Fed. Reg. 8373) receipt of the licensee's request to transfer its 35.56942% ownership interest in Seabrook to NAEC. This amendment request is directly related to the proposed merger between NU and PSNH. The notice indicated the

reason for the transfer, stated that there were no anticipated significant safety hazards as a result of the proposed transfer and provided an opportunity for public comment on any antitrust issues related to the proposed transfer. The staff received comments from several interested parties -- all of which have been condidered and factored into this significant change finding.

The staff reviewed the proposed transfer of PSNH's ownership in the Seabrook facility to a wholly owned subsidiary of NU for significant changes since the last antitrust review of Seabrook, using the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14). The staff believes that the record developed to date in the proceeding at the Federal Energy Regulatory Commission (FERC) involving the proposed NU/PSNH merger adequately portrays the competitive situation(s) in the markets served by the Seabrook facility and that any anticompetitive aspects of the proposed changes have been adequately addressed in the FERC proceeding. Moreover, merger conditions designed to mitigate possible anticompetitive effects of the proposed merger have been developed in the FFRC proceeding. The staff further believes that the FERC proceeding addressed the issue of adequately protecting the interests of competing power systems and the competitive process in the area served by the Seabrook facility such that the changes will not have implications that

warrant a Commission remedy. In reaching this conclusion, the staff considered the structure of the electric utility industry in New England and adjacent areas and the events relevant to the Seabrook Nuclear Power Station and Millstone Nuclear Power Station, Unit 3 construction permit and operating license reviews. For these reasons, and after consultation with the Department of Justice, the staff recommends that a no affirmative "significant change" determination be made regarding the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1991.

Based upon the staff analysis, it is my finding that there have been no "significant changes" in the licensees' activities or proposed activities since the completion of the previous antitrust review.

Signed on February 9, 1992 by Thomas E. Murley, Director, of the Office of Nuclear Reactor Regulation.

Any person whose interest may be affected by this finding may file, with full particulars, a request for reevaluation with the Director of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission , Washington, DC 20555 within 30 days of the initial publication of this notice in the Federal Register. Requests for reevaluation of the no significant change

determination shall be accepted after the date when the Director's finding becomes final, but before the issuance of the operating license amendment, only if they contain new information , such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

Dated at Rockville, Maryland, this 11th day of February 1992.

FOR THE NUCLEAR REGULATORY COMMISSION

Anthony T. Cody, Chief
Policy Development and Technical
Support Branch
Program Management, Policy Development,
and Analysis Staff
Office of Nuclear Reactor Regulation

SEABROOK NUCLEAR STATION, UNIT 1

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

DOCKET NO. 50-443A

STAFF RECOMMENDATION

NO POST OL SIGNIFICANT ANTITRUST CHANGES

AUGUST 1991

CONTENTS

I. THE SEABROOK AMENDMENT APPLICATIONS

By letters dated November 13, 1990, the Nuclear Regulatory Commission (NRC or Commission) staff (staff) received post Operating License (OL) amendment applications requesting two license changes: 1) to transfer operating responsibility and management of the Seabrook facility from New Hampshire Yankee, the current operator, to a proposed entity called North Atlantic Energy Service Company (NAESCO); and 2) to authorize the ownership transfer of approximately 35 percent of the Seabrook facility from Public Service Company of New Hampshire (PSNH) to a proposed entity called North Atlantic Energy Corporation (NAEC). Both NAESCO and NAEC will be wholly owned subsidiaries of Northeast Utilities (NU) and formed solely to operate Seabrook and own PSNH's share of the facility respectively. The transfer of operating responsibility to NAESCO and the proposed transfer of PSNH'S ownership in Seabrook to NAEC introduce new entities associated with the Seabrook facility.

The applicant and the licensee suggest that no antitrust review of these proposed changes is required by the Atomic Energy Act. The staff believes the legislative history and reading of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, require the staff at least to review new owners of nuclear power production facilities for the purpose of determining whether the adding of the new owner to the license will constitute a significant change. The staff recommends that the Director of the Office of Nuclear Reactor

Regulation conclude from the staff's analysis herein and consultation with the Department of Justice (Department or DOJ) that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license. The basis for staff's recommendation and determination are provided herein.

II. APPLICABLE STATUTE AND REGULATIONS

Section 105 of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, designates when and how antitrust issues may be raised. *See Houston Lighting & Power Co.*, (South Texas Project), CLI-77-13, 5 NRC 1303, 1317 (1977). In connection with the legislation to remove the need to make a finding of practical value before issuing a commercial license,[1] in 1970, the Joint Committee

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[1] Before the amendment, the Commission could issue a commercial license for a production or utilization facility only after it had made a finding of "practical value" of the facility for industrial or commercial purposes. Public Law 91-560 (84 Stat. 1472)(1970), section 3, amended section 102 of the Atomic Energy Act (AEA). Prior to the amendment, section 102 of the AEA read as follows:

> SEC.102. FINDING OF PRACTICAL VALUE.-Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or

(continued...)

on Atomic Energy also examined section 105c. Before the 1970 amendment, section 105c provided that whenever the Commission proposed to issue a commercial license, it would notify the Attorney General of the proposed license and the proposed terms and conditions thereof. The Attorney General would then be obliged to advise the Commission "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws and such advice will be published in the *Federal Register*."[2] The Joint Committee, recognizing that the language and potential effect of the existing section 105c were not sufficiently clear, decided to amend section 105c to clarify and revise this phase of the Commission's licensing process. *See* 116 Cong. Rec. S19253.

Subsection 105c(1), as amended, requires the Commission to transmit, to the Attorney General, a copy of any license application to construct or operate a nuclear facility for the

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[1](...continued)
commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.

[2] Prior to the 1970 amendment, antitrust review could occur only following a Commission finding, under section 102 of the Atomic Energy Act, that a type of facility had been sufficiently developed to be of "practical value" for industrial or commercial purposes. Because the Commission never made such a finding, no antitrust reviews occurred. Power reactor construction permits and operating licenses before 1970 were issued pursuant to section 104b, which applied to facilicies involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Attorney General's advice as to whether the grant of an application will create or maintain a situation inconsistent with the antitrust laws. Subsection 105c(2) provides an exception to the requirements of subsection 105c(1) for a license to operate a nuclear facility for which a construction permit was issued under section 103, unless the Commission determines that such review is advisable on the ground that "significant changes" in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission in connection with the construction permit for the facility.

The Commission has promulgated regulations regarding the submittal of information in connection with the prelicensing antitrust review of facilities and the forwarding of antitrust information to the Attorney General. *See* 10 C.F.R. §§ 2.101, 2.102, and 50.33a. Section 50.33a requires the submission of the information specified in 10 C.F.R. Part 50, Appendix L (Information Requested By The Attorney General For Antitrust Review Facility License Applications). The publication in the *Federal Register* of a notice of the docketing of the antitrust information required by Part 50, Appendix L is required by 10 C.F.R. § 2.101(c). Subsections 2.101(e) and 2.102(d) address the situation in which an antitrust review has been conducted as part of the application for a construction permit and the application for an operating license is now before the Commission. Related to this, the Commission has delegated to the Director of Nuclear Reactor Regulation (NRR) or

the Director of Nuclear Material Safety and Safeguards (NMSS), as appropriate, its authority under subsection 105c(2) of the AEA to make the determination in connection with an application for an operating license as to whether "significant changes" in the licensee's activities, or proposed activities under its license have occurred subsequent to the antitrust review conducted in connection with the construction permit application. *See* 10 C.F.R. §§ 2.101(e)(1) and 2.102(d)(2).[3]

On October 22, 1979, the Commission amended 10 C.F.R. § 55.33a to reduce or eliminate the requirements for submission of antitrust information in certain *de minimis* instances. In publishing the rule, the Commission stated its conclusion that applicants whose generating capacity at the time of the application is 200 MW(e) or less are not required to submit the information specified in Appendix L of Part 50, unless specifically requested to do so. The

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[3] In connection with the delegation, the Commission approved procedures to be used until such time as regulations implementing the procedures were adopted. Although never formally published, the procedures are available as attachments to SECY-79-353 (May 24, 1979) and SECY-81-43 (January 19, 1981). On March 9, 1982, the Commission amended its regulations to incorporate final procedures implementing the Commission's delegation of authority to make the "significant changes" determination to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate. 47 Fed. Reg. 9963, March 9, 1982. The amended regulation provides that the Director, NRR or NMSS, as appropriate, after inviting the public to submit comments regarding antitrust aspects of the application and after reviewing any comments received, is authorized to make a significant change determination and, depending on his determination, either refer the antitrust information to the Attorney General or publish a finding of no significant changes in the *Federal Register* with an opportunity for requesting reevaluation of the finding.

Commission further stated that it believed that utilities smaller than these generally would have a negligible effect on competition. Fed. Reg. 60715, October 22, 1979.

All applicants for an NRC utilization facility license who are not determined by the staff to be *de minimis* applicants, undergo an extensive antitrust review at the construction permit (CP) stage and a review at the operating license (OL) stage. The CP review is an in depth analysis of the applicant's competitive activities conducted by the DOJ in conjunction with the staff. The competitive analysis associated with the OL stage of review is conducted by the staff, in consultation with the Department, and is focused on significant changes in the applicant's activities since the completion of the CP antitrust review (or any subsequent review). In each of these reviews, both the staff and the Department concentrate on the applicant's activities and determine whether the applicant's conduct or changes in applicant's conduct creates or maintains a situation inconsistent with the antitrust laws.

III. POST INITIAL OPERATING LICENSE ANTITRUST REVIEWS

A. General

As indicated *supra*, the NRC has established procedures by which prospective licensees of nuclear production facilities are reviewed

during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. The AEA does not specifically address the addition of new owners or operators after the initial licensing process. The legislative history discusses, to a limited extent, some types of amendments.[4] However, neither section 105c of the AEA or the Commission's regulations deal directly with applications to change ownership of facilities with operating licenses.[5] Indeed, in its *South Texas* decision, the Commission stated that, "we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment ... where an application for transfer of control of a license has been made ..." *South Texas Project*, 5 NRC at

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[4] The report by the Joint Committee on Atomic Energy notes that:

> The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for the purposes of triggering subsection 105 c., other applications which may be filled during the licensing process.

H. Rep. 91-1470, 91st Cong. 2d Sess., at 29 (1970).

[5] Applications for construction permits, for amendment of construction permits, and applications for initial operating licenses are not included here.

1318. The Commission went on to note that "[a]uthority [for antitrust review of a license transfer], not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b)."[6] *Id.* Unfortunately, the Commission did not explain how its regulations could grant authority not given by the statute.

The Commission has considered, however, the matter of adding a licensee after issuance of a construction permit but before issuance of the initial operating license. In *Detroit Edison, et al.*, (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978) *aff'd* ALAB-475, 7 NRC 752, 755-56 n.7 (1978), the Licensing Board denied a petition to intervene and request for an antitrust hearing by a member/ratepayer of the distribution cooperative that purchased all of its power from a cooperative that would become a co-licensee of the power plant. In considering a jurisdictional argument, the Board, relying on the Congressional intent and purpose behind section 105c of the AEA cited in n.4 *supra*, stated that "[s]ince the two cooperatives in this case are required to submit an application to become co-licensees, these constitute *their* 'initial application for a construction permit'"

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[6] 10 C.F.R. § 50.80(b) provides in part that an application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and *if the license to be issued is a class 103 license, the information required by § 50.33a* (Information requested by the Attorney General for antitrust review).

(emphasis in original). *Id.*, at 588. In *Summer*, the Commission referred to *Fermi* for the proposition that the addition of a co-owner as a co-licensee was, in effect, an *initial application* of the co-owner and as such required formal antitrust consideration, stating, "[t]hat decision was based on the necessity for an in-depth review at the CP stage of *all applicants*, lest any applicant escape statutory antitrust review" (emphasis added). *South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 831 (1980).

The legislative history of section 105c and the Commission's guidance in *South Texas* might be read to indicate that Commission antitrust review, if not limited to the initial licensing process, is at least an unsettled question regarding operating license amendments. However, *Fermi* and *Summer* stand for the proposition that new license applicants are initial applicants for purposes of a section 105c antitrust review. Further, the Commission indicated in *Summer* that in such situations a formal antitrust inquiry is required. *See Id.*, at 830-31. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests.

The staff has received applications for operating license amendments that 1) request the addition of a new owner or seek Commission permission to transfer control from an existing to a new

owner or 2) request placing a non-owner operator on a license. The action the NRC Staff has taken has been particular to each situation. In general, post initial operating license amendment applications involving a change in ownership have included an antitrust review by the staff and consultation with the Attorney General. The review by the staff focuses on significant changes in the competitive market caused by the proposed change in ownership since the last antitrust review for the facility and its licensees. The staff review takes into account related proceedings and reviews in other federal agencies (e.g. FERC, SEC, or DOJ).

B. Change In Ownership

Although not specifically addressed by regulation, the staff has evolved a process for meeting the Commission's direction in the *Summer* decision to conduct an antitrust inquiry for license amendments after issuance of the operating license. The receipt of an application to add a new owner to an operating license or to seek Commission permission to transfer control from an existing to a new owner, for section 103 utilization facilities which have undergone antitrust review during the initial licensing process, is noticed in the *Federal Register*, inviting the public to express views relating to any antitrust issues raised by the application, and advising the public that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensees' activities or proposed activities have

occurred since the completion of the previous antitrust review. The staff's awareness of any related federal agency reviews of the request (e.g. FERC, SEC, or DOJ) and the staff's intention to consider those related proceedings are also noted in the *Federal Register* notice. The staff reviews the application after the comment period, so that the staff can perform the review with benefit of public comment, if any, and consultation with the Attorney General. If the Director, NRR, finds no significant change, the finding is published in the *Federal Register* with an opportunity for the public to request reconsideration as provided for in 10 C.F.R. § 2.101(e) for initial license applicants. If the Director, NRR finds significant change, the matter is referred to the Attorney General for formal antitrust review.

In conducting the significant change review, the staff uses the criteria and guidance provided by the Commission in its two *Summer* decisions for making the significant change determination for OL applicants.[7]

> The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are attributable to the licensee(s); and (3) have

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[7] In CLI-80-28, the Commission enunciated the criteria, but deferred its actual decision regarding the petition to make a significant changes determination that was before it. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980). In CLI-81-14, the Commission denied the petition. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

> anti-trust implications that would most likely warrant some Commission remedy.

Summer, 11 NRC at 824. To warrant an affirmative significant change finding, thereby triggering a formal OL antitrust review that seeks the advice of the Department of Justice on whether a hearing should be held, the particular change(s) must meet all three of these criteria. In its second *Summer* decision, the Commission provided guidance regarding the criteria and, in particular, the meaning of the third criterion in determining the significance of a change.

> As the staff recognized, "this third criterion appropriately focuses, in several ways, on what may be 'significant' about any changes since the last...review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive *or have de minimis anticompetitive effects*." (Emphasis provided) The staff correctly discerned that the third criterion has a further analytical aspect regarding remedy: "Not only does [it] require an assessment of whether the *changes* would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes by their nature would require." The third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance.

South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862, 872-73 (1981).

C. Change In Or Addition Of Non-Owner Operator

Changes in a nuclear plant operator, without any change in ownership, may also carry the potential of abuse of market power by the operator. However, the staff has determined that a plant operator who has no control over the marketing of the power or energy produced from the facility will not, under normal circumstances, be in a position to exert any significant amount of market power in the bulk power services market associated with the facility. The staff makes an effort in these cases to reach agreement on a license condition requiring new plant operators to agree to be divorced from the marketing or brokering of power or energy from the facility in question and hold existing owners accountable for the operator's actions. If the prospective new operator and the owners agree to appropriate license conditions that reduce the potential for impact on plant ownership or entitlement to power output, as determined by the staff, the application to add or change a non-owner operator is viewed as an application falling within the *de minimis* exception for submitting antitrust information provided for in 10 C.F.R. § 50.33a.

The Commission has exempted *de minimis* applicants from the requirements to submit antitrust information and, therefore, the publication for comment of such information, unless specifically requested by the Commission. *See* 10 C.F.R. § 50.33a. The Commission has determined that such applicants generally would have a negligible effect on competition. *See* 44 Fed. Reg. 60715, October 22, 1979. The staff has determined that, with an

appropriate license condition regarding the marketing and brokering of power, the potential for a non-owner operator to have an affect on competition in the bulk power market is effectively mitigated. Therefore, such an operator is, as a practical matter, the same as *a de minimis* applicant with respect to its ability to affect competition. Normally, no further antitrust review of the non-owner operator will be conducted by the staff.

IV. PREVIOUS SEABROOK NRC ANTITRUST REVIEWS

A. Construction Permit Review

By letter dated December 4, 1973, the Attorney General issued advice to the Atomic Energy Commission pursuant to Public Service Company of New Hampshire's (PSNH), the lead applicant,[8] application for a construction permit for the Seabrook Nuclear Power Station Units No. 1 and No. 2. In its advice letter, the Department expressed concern over several allegations by smaller power systems in the New England bulk power services market that they were unable to gain access to low cost bulk power supply on the same basis as

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[8]PSNH was the majority owner with 50% of the plant at the time the time of the Department's advice letter in 1973. Since this initial review, there have been several changes in ownership and ownership shares in Seabrook. Existing owners are as follows: PSNH (35.56942%); United Illuminating (17.5%); EUA Power Corporation (12.1324%) Connecticut Light & Power Company (4.05985%); Hudson Light & Power Department (0.07737%); Vermont Electric Generation and Transmission Corporative, Inc. (0.41259%); Montaup Electric Company (2.89989%); Canal Electric Company (3.52317%); New England Power Company (11.59340%); Taunton Municipal Lighting Plant (0.10034%); and New Hampshire Electric Cooperative, Inc. (2.17391%)

larger systems in the area. The advice letter stated that as a result of a settlement agreement reached between the privately owned and publicly owned systems in New England that there had been a "dramatic improvement in the relations among the various segments of the electric power industry in New England...." The Department emphasized the importance of the development of the New England Power Pool (NEPOOL) as a regional planning body that would enable participation in bulk power services by all types of power entities throughout New England. The Department concluded,

> ... that the creation of a truly open, non-exclusive NEPOOL means that all systems can have a dependable frame- work within which to obtain fair and non-discriminatory access to economical and reliable bulk power supply. (December 4, 1973 advice letter, p. 4)

As a result of its review, the Department advised the Atomic Energy Commission that there was no need for an antitrust hearing pursuant to the construction permit application for Seabrook.

B. Operating License Review

As noted above, a prospective operating licensee is not required to undergo a formal antitrust review unless the staff determines that there have been "significant changes" in the licensee's activities or proposed activities subsequent to the review by the Department of Justice and the staff at the construction permit stage. The staff completed its OL antitrust review of Seabrook in January

1986. The staff analysis indicated that,

> ...NEPOOL, which was only two years old at the time when the CP antitrust review was performed, appears to have evolved into a framework ensuring access to reliable and economical bulk power supply for all New England utilities. Two provisions of the original pool agreement were found to be discriminatory against smaller utilities and have since been removed. Further, because Seabrook 1 has been designated as a pool-planned unit, access to Seabrook 1 over pool transmission facilities of members is guaranteed for all participants under the terms of NEPOOL.[9]

Based in large part upon the successful formation and operation of NEPOOL, the staff concluded that the changes in the licensees' activities as well as any proposed changes in licensees' activities do not represent "significant changes" as identified in the *Summer* decision and recommended that no formal OL antitrust review be conducted. The staff's antitrust OL review was completed in February 1986 and the Seabrook full power license was issued on March 15, 1990.

C. EUA Power Review

By letter dated March 26, 1986, New Hampshire Yankee, acting as agent for the Seabrook licensees, requested the staff to amend the

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[9]Staff review of Seabrook licensees' changed activity, "Seabrook Station, Unit 1, Public Services Company of New Hampshire, et al, Docket No. 50-443A, Finding of No Significant Antitrust Changes," p. 57.

Seabrook construction permits (Units 1 and 2) to reflect the purchase and transfer of an approximate 12 percent ownership share in the Seabrook facility to EUA Power Corporation (EUA Power), a wholly owned subsidiary of Eastern Utility Associates of Boston, Massachusetts. The amendment requested the transfer of 12 percent ownership to EUA Power and deletion of the following owners as Seabrook licensees: Bangor-Hydro-Electric Company (2.17391%); Central Maine Power Company (6.04178%); Central Vermont Public Service Corporation (1.59096%); Fitchburg Gas and Electric Light Company (0.86519%); and Maine Public Service Company (1.46056%).

Even though a sister company, Montaup Electric Company (both are wholly owned by Eastern Utilities Associates), had previously undergone an antitrust review in conjunction with its participation in Seabrook, EUA Power represented a new owner prior to issuance of the Seabrook full power operating licensee and was required to undergo a formal antitrust review by the Department of Justice. Accordingly, EUA Power submitted pertinent 10 C.F.R. Part 50, Appendix L information to the staff regarding its operations and competitive activity. A notice of receipt of this information, which provided the opportunity for a 60 day comment period on the antitrust issues regarding the proposed ownership transfer, was published in the *Federal Register* on May 23, 1986.

By letter dated July 1, 1986 the Department advised the staff that there was,

> ... no evidence that the proposed participation by EUA Power Company in the Seabrook Units would either create or maintain a situation inconsistent with the antitrust laws under Section 105(c). We do not, therefore, believe it is necessary for the Commission to hold an antitrust hearing in this matter. (Department of Justice advice letter, p.1)

The Department's letter was published in the *Federal Register* on July 17, 1986 and provided for interested persons to request a hearing and file petitions to intervene. There were no such requests and the staff issued an amendment (No. 9) to the Seabrook construction permits authorizing the transfer of ownership effective upon completion of the transfer of ownership shares which was consummated on November 26, 1986. In this instance, there was no need to apply the significant change threshold criteria to the EUA Power amendment review and address the issue of whether the Department of Justice should conduct the review or the staff should issue a significant change determination because the request for ownership change occurred prior to issuance of the full power operating license and consequently, the review involved an amendment to the construction permit and followed construction permit review procedures.

V. CHANGES AT SEABROOK AFTER ISSUANCE OF THE INITIAL OL

The instant amendment requests to transfer PSNH'S ownership in Seabrook to a proposed new entity, NAEC, and change the plant operator from New Hampshire Yankee to a proposed new operating

entity, NAESCO, represent direct outgrowths of the bankruptcy proceeding initiated by PSNH in January 1988. Though the bankruptcy proceeding and PSNH's financial status are not the focus of the instant review, it is significant to note that PSNH is dependent upon Seabrook as its principal source of generating capacity and operating revenue. This dependence on one source of operating revenue left PSNH highly susceptible to fluctuations in the business cycle that affect different regions of the country at different periods in the cycle. During the mid 1980's commerce and industry in New England were growing dramatically. Economic growth exceeded projections for planned electric generating capacity.[10] However, as rapidly as the New England economy advanced in the mid 1980's, it declined equally a fast in the late 1980's. PSNH filed for bankruptcy in January 1988 and EUA Power Corporation, another Seabrook co-owner heavily dependent upon the sale of Seabrook power and energy, filed for bankruptcy in early 1991.

There were other factors that contributed to PSNH'S financial difficulties in the 1980's, e.g., development and approval of emergency evacuation plans for Seabrook and state regulatory proceedings involving allowance of Seabrook costs in PSNH'S rate

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[10]EUA Associates, parent company of Montaup Electric Company, a co-owner of Seabrook, formed EUA Power Corporation specifically to purchase a 12 percent ownership share in Seabrook to meet an unexpected strong demand for electric power in New England during the late 1980's and 1990's. John F.G. Eichorn, chairman of EUA Associates, was quoted by the Providence, Rhode Island Journal newspaper, as citing NEPOOL electricity demand estimates showing "a serious shortfall developing in New England, which we at EUA are determined to help eliminate." Journal, April 10, 1986.

base. All of these factors culminated in PSNH filing for bankruptcy and the resultant proposal by NU to acquire PSNH. The proposals adding a new owner and a new operator of the Seabrook facility are the principal changes the staff must address in its post OL significant change antitrust review. The staff must determine whether the new owner or the new operator will create or maintain a situation inconsistent with the antitrust laws.

VI. FERC AND SEC REVIEWS

Pursuant to the requirements and jurisdiction of both the Federal Power Act and the Public Utilities Holding Company Act of 1935, NU filed applications with the Federal Energy Regulatory Commission (FERC), on January 5, 1990, and the Securities and Exchange Commission (SEC), on October 5, 1989, respectively, seeking approval of its proposed merger with PSNH. In light of the fact that similar competitive issues are currently being addressed in proceedings at the FERC and SEC and that the findings reached in the FERC and SEC proceedings will be considered by the staff, a brief synopsis of these proceedings follows.

A. FERC Proceeding

Northeast Utilities, acting through a service company called NUSCO, sought approval under Section 203 of the Federal Power Act (enforced by the FERC) to acquire the jurisdictional assets of

PSNH. Section 203 of the Federal Power Act (FPA) requires the FERC to make a determination as to whether the proposed acquisition or merger will be consistent with the public interest. Though the FPA does not specifically charge the FERC with weighing the competitive implications of the merger or acquisition in terms of injury to competition or the competitive process in identifiable markets, in the recent past, the FERC has considered these competitive concerns as inputs to its ultimate determination as to whether the combination creates more benefits than costs, i.e., is in the public interest.

On March 2, 1990, the FERC issued an order granting intervention by all requesting parties and also granted a NU motion to expedite the hearing schedule by requiring that an initial decision be issued no later than December 31, 1990. After extensive discovery, depositions and oral argument, the FERC administrative law judge (ALJ), Jerome Nelson, issued an initial decision on December 20, 1990.[11]

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[11]"On March 7, 1990, NU submitted its direct case, which consisted of the prepared testimony and exhibits of six witnesses. After extensive discovery, including numerous depositions of NU, Staff, intervenor and third party witnesses, the Staff and intervenors filed their respective direct cases on May 25, 1990. The direct cases of staff and intervenors included the prepared testimony and exhibits of 49 witnesses. On June 25, 1990, Staff and intervenors filed cross-rebuttal cases through the prepared testimony and exhibits of 19 witnesses. On July 20, 1990, NU filed its rebuttal case through the prepared testimony and exhibits of 12 witnesses. Twenty-five days of hearings were held during August and September of 1990. Thirty-five witnesses were cross-examined, and 809 exhibits were admitted into evidence. Briefs and reply briefs were filed in October of 1990. Four days of oral argument ended on November 13, 1990." (ALJ Initial Decision, p. 6).

The ALJ made several findings in his initial decision, however, the findings most relevant to the NRC post OL amendment review concern the effect the merger will have on the New England bulk power services market. The ALJ's initial decision indicated that without a detailed set of merger conditions, the "NU-PSNH merger would have anti-competitive consequences." The ALJ found that,

> the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts). (*Id.*, p.15)

The ALJ indicated that the merged company will control 92 percent of the transmission capacity presently serving New England.

> This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices. (*Id.*, p. 16)

The ALJ concluded that merged NU-PSNH will control the principal transmission access routes from northern New England to southern New England as well as 72 percent of the New York, New England transmission corridor path.

> Because PSNH "controls the only transmission lines linking Maine and New Brunswick to the rest of New England"..., Eastern REMVEC utilities will necessarily have to deal with the merged company in order to get power from those areas. The merged company's control

> would also extend to access from New York... NU controls 72% of the New York-New England "interface"... and needs only a small portion of that share for its own use. (*Id.*)

The ALJ's initial decision recommended that the FERC approve the merger only if specific merger conditions were agreed upon by the merging parties. There are two principal conditions discussed by the ALJ designed specifically to address the new NU-PSNH's market power and particularly any potential for abuse of this newly created market power vis-a-vis other power systems in New England. The first condition is basically a rework of a proposal initially offered by NU-PSNH dealing with the merged company's policy regarding transmission over its power grid. A set of General Transmission Commitments was developed by the ALJ which dealt with various degrees of priority access and time horizons depending upon the individual power supply situation in question. This policy commitment, according to the ALJ, would reassure non-dominant power systems in New England a form of meaningful access to the transmission facilities required to fulfill their bulk power supply requirements.

The second major condition that addresses the transmission dominance of the new NU-PSNH is termed the, "New Hampshire Corridor Proposal." This proposal serves to open up the flow of power from Canada to New England and from northern New England to the heavily populated southeastern portion of New England. The Corridor Proposal allocated a total of 400 MW of transmission capacity with

200 MW allocated to New England Power Company and 200 MW allocated to southern New England utilities. These two transmission proposals recommended by the FERC ALJ are the most relevant to the staff's review of New Hampshire Yankee's requests to change ownership and the operator of the Seabrook facility.

On August 9, 1991, the FERC conditionally approved the NU merger with PSNH. To mitigate the merger's likely anticompetitive effects, the FERC strengthened NU's General Transmission Commitment and noted that it will construe NU's voluntary commitment very strictly. NU can not give higher priority to its own non-firm use than to third party requests for firm wheeling in allocating existing transmission capacity. The FERC also ruled that independent power producers and qualifying facilities are eligible for transmission access on the New Hampshire Corridor. *See Northeast Utilities Service Company* (Re Public Service Company of New Hampshire) FERC slip op. No. 364 (August 9, 1991).

B. SEC Proceeding

NU filed an application with the SEC for approval under the Public Utility Holding Company Act of 1935 (PUHCA) of its proposed merger with PSNH. The SEC issued a notice of the filing of the application on February 2, 1990 (Holding Co. Act Release No. 25032). Fourteen hearing requests from 41 separate entities were received and four of these requests, representing 21 entities, were

subsequently withdrawn. Moreover, eight entities filed comments or notices of appearance. The segment of the SEC review most relevant to staff's post OL amendment review revolves around Section 10(b)(1) of the PUHCA that requires the SEC to consider possible anticompetitive effects of the proposed NU-PSNH acquisition. The SEC in a Memorandum Opinion dated December 2', 1990 approved NU's proposed acquisition of PSNH--indicating that all PUHCA requirements, including Section 10(b)(1), had been fulfilled. In its initial decision, the SEC stated that,

> Given the approximate size of the Northeast--PSNH system and the resultant economic benefits discussed herein..., we conclude that the Acquisition does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied. (SEC Initial Decision, p. 40)

The SEC's analysis, as reflected in its initial decision, considers the economic benefits associated with a merged NU-PSNH and not so much the potential for abuse of market power that may be enhanced by the merger. The initial decision states that the,

> transfer to North Atlantic will merely move the asset from one Northeast subsidiary to another and should have no impact on competitive conditions. (*Id.*, p.58)

The SEC order approving the merger was appealed by two intervenors in the SEC proceeding--the City of Holyoke Gas and Electric

Department and the Massachusetts Municipal Wholesale Electric Company (petitioners). Petitioners filed a request for rehearing of the initial decision, arguing that the SEC erred in approving the NU-PSNH acquisition by failing to provide sufficient analysis of the anticompetitive effects of the acquisition. Petitioners based much of their argument for rehearing upon th[illegible] FERC ALJ's December 20, 1990 decision which indicated that an unconditioned NU-PSNH merger would have significant anticompetitive effects upon the New England bulk power services market.

In a Supplemental Memorandum Opinion and Order (Supplemental Memorandum) dated March 15, 1991, the SEC granted petitioners a reconsideration of the SEC's initial decision.

> In our December order, we recognized that the Acquisition would decrease competition, but concluded that the Acquisition's benefits would outweigh its anticompetitive effects. The petitioners challenge this determination, arguing that the Commission ignored the anticompetitive effects of the merged company's control of transmission facilities and surplus power. (Supplemental Memorandum, p.3)

The SEC's Supplemental Memorandum indicated that its initial decision focused more on the size and corporate structure of NU-PSNH rather than the merged company's ability to control access to transmission or excess capacity. The Supplemental Memorandum stated that even though the SEC's principal focus was on the size and structure of the merged company, the competitive access issues

were considered and the SEC concluded that, "The merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior." (Supplemental Memorandum, p.5) However, the SEC relied upon the transmission commitments made by NU to mitigate any possible anticompetitive effects of the merger.[12]

The Supplemental Memorandum recognized that both the SEC and the FERC "have statutory responsibilities with respect to the anticompetitive consequences of mergers in the public-utility industry". (*Id.*, p.6). However, the SEC also recognized that the focus of the Federal Power Act and the Public Utility Holding Company Act are different in that each agency pursues administration of each act with different goals for regulating members of the electric utility industry. As a result, the SEC deferred the question of anticompetitive consequences and its ultimate approval of the proposed merger to the FERC.

> Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the Commission, [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look

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[12] The initial FERC decision found the commitments made by NU to be insufficient to remedy the potential anticompetitive effects of the merger and recommended additional terms and conditions be imposed upon the merged company as a condition for FERC approval of the merger.

> to the FERC's expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the acquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the FPA. (*Id.*, p.9)

VII. AMENDMENT APPLICATIONS COMMENTS RECEIVED BY THE STAFF

The staff, in accordance with 10 C.F.R. § 2.101(e)(1), published receipt of New Hampshire Yankee's request to amend the Seabrook OL in the *Federal Register* and provided interested parties the opportunity to comment on the antitrust issues raised by the proposed acquisition on February 28, 1991.[13] The staff received comments from the following entities or their representatives: 1) New Hampshire Electric Cooperative (April 1, 1991,); 2) Massachusetts Municipal Wholesale Electric Company (April 1, 1991); 3) City of Holyoke Gas and Electric Department (April 1, 1991); 4) Hudson Light and Power Department (April 4, 1991); and 5) Taunton Municipal Lighting Plant (April 10, 1991). By letter dated April 22, 1991, counsel for Connecticut Light and Power Company and PSNH responded to these comments.[14] The comments from participants in the FERC and SEC proceeding by and large mirrored the positions taken by the commenters in those proceedings. The comments

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[13] A similar notice regarding the change in operator from New Hampshire Yankee to NAESCO, was published in the *Federal Register* on March 6, 1991.

[14] By letter dated June 13, 1991, City of Holyoke Gas and Electric Department (HG&E) replied to the Connecticut Light and Power (CL&P) and PSNH response. By letter dated July 9, 1991, CL&P and PSNH responded to the HG&E reply. By letter dated July 22, 1991, HG&E replied to the CL&P and PSNH July 9, 1991 response.

received are summarized below with the staff analysis of each comment.

A. New Hampshire Electric Cooperative (NHEC)

Comment

NHEC is a transmission dependent utility (TDU), i.e., "entirely dependent on NU or PSNH for their bulk power transmission needs". NHEC states that without access to NU's or PSNH's transmission facilities it cannot actively compete in the New England wholesale bulk power services market. NHEC asserts that the proposed acquisition of PSNH by NU will concentrate its only source of essential transmission service in the hands of its principal competitor. NHEC cites the initial FERC decision as evidence that the proposed merger, if unconditioned, will have an adverse impact on the competitive process in the New England bulk power services market. NHEC also states that recent developments which have not been a part of the FERC record are relevant to the NRC review associated with the Seabrook post OL amendment applications.

NHEC wishes to purchase partial requirements power from another supplier, New England Power Company (NEP), rather than PSNH. NHEC and NEP entered into a long-term power supply contract on January 9, 1991; however, NHEC needs access to PSNH's transmission grid to receive the NEP power. PSNH has indicated that NHEC is contractually prohibited from taking any other off system power purchases during the term of its power supply contract with PSNH

and as a result PSNH would not approve use of its transmission grid until the contractual dispute between PSNH and NHEC is resolved.

NHEC contends that the proposed acquisition of PSNH by NU is anticompetitive and under the NRC's *Summer* criteria, represents a "significant change". NHEC seeks relief by requiring NU to,

> . . . commit before this Commission that it will provide NHEC all transmission needed for NHEC to purchase power from other sources . . . .

Staff Analysis

The staff believes that the issue described by NHEC in its April 1, 1991 filing to the staff primarily involves a contract dispute with PSNH and NU over transmission rights pertaining to power purchases by NHEC from New Brunswick. Presently, NHEC is taking partial requirements wholesale power from PSNH under a 1981 contract. A dispute has arisen between NHEC and PSNH (now NU, given its proposed acquisition of PSNH) regarding the terms under which the contract can be terminated. PSNH states that the contract requires NHEC to provide five years notice prior to cancelling the contract and switching to a different supplier. NHEC states that the contract provides for termination upon NHEC joining NEPOOL and that the recent NHEC-NEP purchase agreement and NHEC's ownership interest in Seabrook provide the basis for NEPOOL membership.

This contract dispute, which forms the linchpin for NHEC's argument

that it is dependent upon NU's transmission grid is presently being interpreted before the FERC. The staff believes that it is appropriate for this dispute to be resolved under the auspices of the FERC's jurisdiction over wholesale power and transmission tariffs and the terms and conditions associated with such agreements. The staff sees no need for the NRC to enter into a contract dispute that is under review by the FERC. Should the PSNH-NHEC contract dispute be resolved in NHEC's favor, i.e., enabling NHEC to terminate the contract without giving a five year notice, the merger condition recommended by the FERC ALJ and commitments made by NU to provide transmission dependent utilities transmission services (cf., PSNH and Connecticut Power & Light Company Comments to NRC staff dated April 22, 1991, pp. 29-30), should adequately resolve the competitive concerns raised by NHEC.

B. Massachusetts Municipal Wholesale Electric Company (MMWEC)

Comment

MMWEC is a co-owner (11.5934%) of the Seabrook plant. In its comments to the NRC, MMWEC states that the proposed acquisition of PSNH by NU is anticompetitive, notwithstanding the merger conditions recommended by the FERC ALJ, and suggests that the Director of the Office of Nuclear Reactor Regulation find, pursuant to *Summer*, that significant changes have occurred since the Attorney General's advice letter was issued in December 1973.

MMWEC contends that the standard of review of mergers required by

the FERC under the FPA is different than that required by the NRC under the Atomic Energy Act. MMWEC states that this difference permits anticompetitive acquisitions under the FPA if it is determined that the public interest is served by the acquisition (or merger), whereas the NRC must address the competitive implications of activities of licensees "irrespective of any compelling public interest." (MMWEC comments, p.3)

Moreover, MMWEC requests the NRC to address the anticompetitive aspects of NU's management and operation of Seabrook--an area not covered in the FERC ALJ's initial decision. According to MMWEC,

> NU is executing a plan whereby it has separated the Seabrook management function and ownership function from each other and utilized its market power to insulate itself, those functions and its other affiliates from any liability, except liability imposed by willful misconduct. (*Id.*, p.5)

MMWEC's concerns revolve around a July 19, 1990 agreement reached among Seabrook owners holding approximately 70 percent of the facility. This agreement provides for the transfer of the managing and operating agent from New Hampshire Yankee to a proposed wholly owned NU subsidiary, NAESCO. An exculpatory clause in the July 19, 1990 agreement, according to MMWEC,

> . . . would not only free NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. MMWEC cannot insure any

> reckless or negligent conduct of the Managing Agent or its affiliates. (*Id.*)

MMWEC requests the NRC to act to prevent NU from maintaining a situation inconsistent with the antitrust laws. MMWEC suggests that the NRC condition the approval of the license transfer to "require appropriate amendment of the Joint Ownership Agreement and to prohibit NAECO, & NAESCO and their affiliates from freeing themselves from liability for misconduct." (*Id.*, p.6)

Staff Analysis

MMWEC's principal concern is that NU used its market power in an anticompetitive manner in formulating a July 19, 1990 agreement that established parameters by which the Seabrook facility would be managed and operated. Moreover, MMWEC asserts that this agreement frees,

> . . .NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. (MMWEC comments, p. 5)

MMWEC has failed to show how NU has used (abused) its market power in bulk power services in formulating an agreement to install a new managing agent for Seabrook. MMWEC asks the NRC to condition the license transfer by requiring amendment of the Seabrook "Joint Ownership Agreement", to, effectively, make NAECO and NAESCO more accountable for their actions pursuant to their ownership and operation of the Seabrook facility respectively. Based upon the

data available to the staff, it appears as though the July 19, 1990 agreement was consummated in conformance with the Seabrook Joint Ownership Agreement, as amended, and not as a result of any abuse of market power on the part of NU. The staff believes MMWEC's concerns over the degree of liability it must absorb should NAESCO in any way mismanage Seabrook are concerns of a contractual, not competitive, nature and should be raised and addressed before an appropriate forum for these matters, not the NRC.

Moreover, as recognized by MMWEC at page three of its comments, the staff considered the possibility of a new plant operator having an influence over competitive options of the new owners of Seabrook. For this reason, after discussions with the staff, NAESCO agreed to a license condition divorcing itself from the marketing or brokering of power or energy produced by Seabrook. The license condition was designed to eliminate NAESCO's ability to exercise any market power, if evident, and obviated the need to conduct a further competitive review of NAESCO. For the reasons stated above, MMWEC's request to condition the Seabrook license that frees it from NAESCO's liability should be denied.

C. City Of Holyoke Gas & Electric Department (HG&E)

Comment

HG&E is a municipally owned electric system serving primarily western Massachusetts. "HG&E lies within the service territory of Western Massachusetts Electric Company ("WMECO"), a wholly-owned

subsidiary of NU." (HG&E comments, p.2) HG&E generates no power on its own and relies heavily on the transmission facilities of PSNH to supply approximately 36 percent of its load from the Point Lepreau nuclear plant in New Brunswick, Canada. According to HG&E,

> The increase in control that the merged entity will exercise over generation (including power from Seabrook) and transmission capacity in New England represents a "significant change" from the activities of the current licensee--an independent PSNH. (HG&E comments, p.3)

HG&E contends that NU-PSNH will wield significantly more market power than a stand alone PSNH and given the existing competitive relationship between HG&E and NU, the merged entity, without adequate license conditions and structural alterations in the market, will be able to severely restrict or at a minimum, control the cost effectiveness of a large portion of its power supply that presently flows over PSNH's transmission facilities from New Brunswick.

> Control over generation capacity greatly reduces the opportunities available to purchase power from other utilities in the region; control over transmission capacity eliminates or reduces the ability of HG&E and others to purchase power from utilities outside of New England. (*Id.*, p. 6)

Moreover, HG&E asserts that many of the benefits associated with NEPOOL operation--identified by the Department of Justice and the staff in previous reviews--may be negated by the merged company's "sufficient veto voting power" over proposals put forth by the

NEPOOL Management Committee. HG&E characterizes this change in market power as a "significant change" requiring a full review of the antitrust impacts of the proposed merger, including an analysis by the Attorney General of the antitrust impact of the proposed license transfer.

HG&E addresses ongoing reviews of NU's proposed acquisition of PSNH before other federal agencies and concludes that NRC's antitrust review mandate in Section 105c of the Atomic Energy Act more clearly relates to review of anticompetitive conduct whereas the reviews at the FERC and SEC seem to be more public interest oriented. Consequently, HG&E asserts that the NRC should not assume that these other reviews will adequately condition the proposed merger to remedy the serious competitive issues that the merger would create. HG&E urges the NRC to deny the proposed merger, yet if approved, suggests that NRC require prior approval by the FERC and SEC, and in addition, 1) require NU-PSNH to transmit Point Lepreau power to HG&E for the term of any extended HG&E/Point Lepreau power supply contract with equivalent terms to its current contract, and 2) require NU to divest its subsidiary, Holyoke Water Power Company (HWP) or consolidate HWP into another NU subsidiary, Western Massachusetts Electric Company, thereby subjecting HWP to state regulation as a public utility.

Staff Analysis

HG&E asks the NRC to initiate a full antitrust review of the proposed merger, considering all of the antitrust effects of the

proposed merger pursuant to Section 105c of the Atomic Energy Act. "Such review would include an analysis by the Attorney General of the antitrust impact of the proposed license transfer. 42 U.S.C. SEC.2135" (HG&G comments, P.3) At the conclusion of such a review, HG&E recommends that the NRC deny the proposed license transfer or approve the transfer with license conditions over and above those recommended by the FERC ALJ.

As indicated *supra* (cf., Section III herein), the staff takes into consideration the record establised during related federal agency reviews of the change in ownership. The FERC proceeding and the accompanying recommendations for competition enhancing merger conditions were factors the staff considered in evaluating the instant proposals under the significant change criteria. The staff believes the presence of license conditions recommended by the FERC mitigates the possibility of anticompetitive effects ensuing from such a merger as well as the need for a more formal antitrust review by the Department of Justice. For the reasons stated above, the staff recommends denying HG&E's requests to deny the proposed merger or initiate a formal antitrust review that incorporates an analysis by the Attorney General.

Considering the license conditions associated with the proposed acquisition of PSNH by NU, the staff recommends denying in part and approving in part HG&E's request to attach the FERC and SEC merger conditions and impose two additional conditions as a requirement

for consummation of the acquisition. The staff has relied heavily on the record established to date in the FERC proceeding and in light of the procompetitive merger conditions proposed by the FERC ALJ would recommend approval of the license transfer. The SEC in its Supplemental Memorandum Opinion dated March 21, 1991 deferred its ruling on the competitive aspects of the proposed merger to the FERC.

The staff recommends denying HG&E's request to the NRC to condition the license transfer upon two additional requirements, one providing, in effect, a life of service transmission contract for HG&E's Point Lepreau power and another requiring NU to divest a wholly owned subsidiary in competition with HG&E. There has been nothing established in the FERC record or in the instant proceeding that indicates that HG&E would have been able to renew its transmission contract with PSNH or its power supply contract with New Brunswick upon termination of the existing contracts in 1994. NU, as PSNH's parent company, has not indicated that it plans to deny HG&E transmission capacity to New Brunswick after the proposed merger is consummated. NU has stated that this transmission corridor to New Brunswick will be offered to "all comers," as it were. It appears as though HG&E will be in competition with other potential buyers of Point Lepreau power for both transmission and power and energy. The staff sees no reason to assist HG&E over any other competitor in this regard. Should HG&E enter into a transmission contract with NU-PSNH and find the terms and

conditions in any way anticompetitive, the staff believes the FERC is the proper forum for resolution of tariff issues. The FERC initial decision recognized the increase in market power resulting from the NU-PSNH acquisition, yet recommended conditions to mitigate any abuse of this newfound power.

> The merged company -- with vast power over transmission and control of surplus power -- must offer viable wheeling service in order to alleviate potential anti-competitive consequences. (FERC Initial Division, p. 48) [Emphasis added].

Moreover, the FERC ALJ approved the request by HG&E to require NU to establish the position of "ombudsman" to review NU's service and eliminate the possibility of any anticompetitive consequences resulting from NU's substantial market power in transmission and surplus power in the New England market. Additionally, the FERC ALJ indicated that,

> The ombudsman is not the only avenue for dissatisfied customers. The Commission's Enforcement Task Force maintains a "hotline" ... through which complaints can be received. (FERC Initial Decision, p. 49)

The staff believes these actions taken by the FERC adequately address HG&E's concerns over abuse of NU's post merger market power. For this reason, the staff does not believe that HG&E has established a basis for the staff to conclude that there is a significant change warranting an antitrust review. Furthermore, there is no basis for the staff unilaterally to impose conditions

on the transfer of the license providing for a life of service transmission contract.

Regarding HG&E's second condition, the staff believes that no record has been established to justify HG&E's request to divest Holyoke Water Power Company from NU. According to the FERC initial decision, "The City [HG&E] is covered by the protection given the TDUs, and is entitled to no more in this regard." (FERC Initial Decision, p. 50) Accordingly, divestiture of HWP does not seem warranted solely to, "eliminate NU's incentive to eliminate injury to HG&E...." (HG&E comments, p. 10; emphasis added). The staff recommends denying HG&E's request to divest HWP from NU.

D. Hudson and Taunton

Comment

The Taunton Municipal Lighting Plant (Taunton) and the Hudson Light and Power Department (Hudson) are both owners of the Seabrook facility. Taunton and Hudson are both members of the Massachusetts Municipal Wholesale Electric Company and both have requested the NRC to adopt MMWEC's comments submitted to the NRC via letter dated April 1, 1991.

Staff Analysis

As indicated *supra*, the staff recommended denying MMWEC's request to further condition the Seabrook operating license to free MMWEC from any liability to existing owners that may result from the proposed license transfer. In light of the fact that Hudson and

Taunton adopted MMWEC's comments, the staff also recommends that their requests be denied.

VIII. NRC STAFF FINDINGS

A. Change In Ownership

The ownership transfer of over 35 percent of Seabrook potentially represents a change in the degree of control over the operation of the nuclear facility. However, as indicated *supra*, the FERC has considered the anticompetitive consequences of the proposed merger and a set of extensive merger conditions was proposed by the FERC administrative law judge regarding New Hampshire Yankee's proposals to transfer ownership and operation of the Seabrook facility. In this regard, the staff has relied heavily upon the record established in the FERC initial decision in its review of the instant amendment applications. The FERC merger conditions were designed specifically to mitigate any potential competitive problems associated with the proposed acquisition of PSNH by NU.

The staff has reviewed the proposed transfer of ownership share in the Seabrook facility from PSNH to NU for significant change since the last antitrust review of the Seabrook licensees, using the criteria discussed by the Commission in *Summer*. (*Cf.* Section III herein) The amendment request was dated November 13, 1990, after the previous antitrust review of the facility and therefore the

first *Summer* criterion, that the change has occurred since the last antitrust review, is satisfied. The second *Summer* criterion is satisfied in that the change is the result of the bankruptcy proceeding initiated by PSNH in January 1988 and as such is "reasonably attributable to the licensee[s] in the sense that the licensee[s] ha[ve] had sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review." *Summer*, 13 NRC at 871.

This leaves for consideration the third *Summer* criterion, that the change has antitrust implications that would be likely to warrant Commission remedy. The Commission in *Summer* adopted the staff's view that application of the third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have *de minimis* anticompetitive effects. *See Id.* at 872. The Commission further stated "the third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance." *Id.*

The staff believes that the record developed in the FERC proceeding involving the NU-PSNH acquisition adequately portrays the competitive situation in the New England bulk power services market and that the anticompetitive aspects of the proposed changes are being addressed in the FERC proceeding. The staff further

believes that the actions being taken by the FERC will adequately address concerns regarding the anticompetitive effects of NU's post merger market power such that the change in ownership as approved by the FERC will not have implications that warrant a Commission remedy. Consequently, the third *Summer* criterion has not been satisfied.

Each of the significant change criteria discussed in *Summer* must be met to make an affirmative significant change finding. In this instance, the third criterion has not been met.

B. Addition Of Non-Owner Operator

In light of the license condition developed by the staff and agreed to by NU, NAESCO (the proposed new plant operator), and the other Seabrook licensees, prohibiting NAESCO from marketing or brokering power or energy produced from the Seabrook plant and holding all other Seabrook licensees responsible for NAESCO's actions pursuant to marketing or brokering of Seabrook power, the staff believes the change in plant operator from New Hampshire Yankee to NAESCO will not have antitrust relevance.

IX. CONCLUSION

For the reasons discussed above, and after consultation with the DOJ, the staff recommends that the Director of the Office of

Nuclear Reactor Regulation conclude that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license.

February 13, 1992

Docket No. 50-443A

Mr. Joseph M. Blain, General Manager
Municipal Light Commission
P.O. Box 870
Taunton, MA 02780-0870

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Blain:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result from this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

(ORIGINAL SIGNED BY)
William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

DISTRIBUTION: [BLAIR]
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 13, 1992

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Municipal Light Commission
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Sincerely,

W. M. Lambe

William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

[7590-01]

NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50-443A

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.

SEABROOK NUCLEAR STATION, UNIT 1

PROPOSED OWNERSHIP TRANSFER

NOTICE OF NO SIGNIFICANT ANTITRUST CHANGES

AND TIME FOR FILING REQUESTS FOR REEVALUATION

The Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2135, that no significant (antitrust) changes in the licensees' activities or proposed activities have occurred as a result of the proposed change in ownership of Unit 1 of the Seabrook Nuclear Station (Seabrook) detailed in the licensee's amendment application dated November 13, 1991. The finding is as follows:

> Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides that an application for a license to operate a utilization facility for which a construction permit was issued under section 103 shall not undergo an antitrust review unless the Commission determines that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous antitrust review by the Attorney General and the Commission in connection with the construction permit for the facility. The Commission has delegated the authority to make

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the "significant change" determination to the Director, Office of Nuclear Reactor Regulation.

By application dated November 13, 1991, the Public Service Company of New Hampshire (PSNH or licensee), through its New Hampshire Yankee division, pursuant to 10 CFR 50.90, requested the transfer of its 35.56942% ownership interest in the Seabrook Nuclear Power Station, Unit 1 (Seabrook) to a newly formed, wholly owned subsidiary of Northeast Utilities (NU). This newly formed subsidiary will be called the North Atlantic Energy Corporation (NAEC). The Seabrook construction permit antitrust review was completed in 1973 and the operating license antitrust review of Seabrook was completed in 1986. The staffs of the Policy Development and Technical Support Branch, Office of Nuclear Reactor Regulation and the Office of the General Counsel, hereinafter referred to as the "staff", have jointly concluded, after consultation with the Department of Justice, that the proposed change in ownership is not a significant change under the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14).

On February 28, 1991, the staff published in the Federal Register (56 Fed. Reg. 8373) receipt of the licensee's request to transfer its 35.56942% ownership interest in Seabrook to NAEC. This amendment request is directly related to the proposed merger between NU and PSNH. The notice indicated the

reason for the transfer, stated that there were no anticipated significant safety hazards as a result of the proposed transfer and provided an opportunity for public comment on any antitrust issues related to the proposed transfer. The staff received comments from several interested parties -- all of which have been condidered and factored into this significant change finding.

The staff reviewed the proposed transfer of PSNH's ownership in the Seabrook facility to a wholly owned subsidiary of NU for significant changes since the last antitrust review of Seabrook, using the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14). The staff believes that the record developed to date in the proceeding at the Federal Energy Regulatory Commission (FERC) involving the proposed NU/PSNH merger adequately portrays the competitive situation(s) in the markets served by the Seabrook facility and that any anticompetitive aspects of the proposed changes have been adequately addressed in the FERC proceeding. Moreover, merger conditions designed to mitigate possible anticompetitive effects of the proposed merger have been developed in the FERC proceeding. The staff further believes that the FERC proceeding addressed the issue of adequately protecting the interests of competing power systems and the competitive process in the area served by the Seabrook facility such that the changes will not have implications that

warrant a Commission remedy. In reaching this conclusion, the staff considered the structure of the electric utility industry in New England and adjacent areas and the events relevant to the Seabrook Nuclear Power Station and Millstone Nuclear Power Station, Unit 3 construction permit and operating license reviews. For these reasons, and after consultation with the Department of Justice, the staff recommends that a no affirmative "significant change" determination be made regarding the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1991.

Based upon the staff analysis, it is my finding that there have been no "significant changes" in the licensees' activities or proposed activities since the completion of the previous antitrust review.

Signed on February 9, 1992 by Thomas E. Murley, Director, of the Office of Nuclear Reactor Regulation.

Any person whose interest may be affected by this finding may file, with full particulars, a request for reevaluation with the Director of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission , Washington, DC 20555 within 30 days of the initial publication of this notice in the Federal Register. Requests for reevaluation of the no significant change

determination shall be accepted after the date when the Director's finding becomes final, but before the issuance of the operating license amendment, only if they contain new information , such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

Dated at Rockville, Maryland, this 11th day of February 1992.

FOR THE NUCLEAR REGULATORY COMMISSION

Anthony T. Gody, Chief
Policy Development and Technical
Support Branch
Program Management, Policy Development,
and Analysis Staff
Office of Nuclear Reactor Regulation

SEABROOK NUCLEAR STATION, UNIT 1

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

DOCKET NO. 50-443A

STAFF RECOMMENDATION

NO POST OL SIGNIFICANT ANTITRUST CHANGES

AUGUST 1991

CONTENTS

I. THE SEABROOK AMENDMENT APPLICATIONS

By letters dated November 13, 1990, the Nuclear Regulatory Commission (NRC or Commission) staff (staff) received post Operating License (OL) amendment applications requesting two license changes: 1) to transfer operating responsibility and management of the Seabrook facility from New Hampshire Yankee, the current operator, to a proposed entity called North Atlantic Energy Service Company (NAESCO); and 2) to authorize the ownership transfer of approximately 35 percent of the Seabrook facility from Public Service Company of New Hampshire (PSNH) to a proposed entity called North Atlantic Energy Corporation (NAEC). Both NAESCO and NAEC will be wholly owned subsidiaries of Northeast Utilities (NU) and formed solely to operate Seabrook and own PSNH's share of the facility respectively. The transfer of operating responsibility to NAESCO and the proposed transfer of PSNH'S ownership in Seabrook to NAEC introduce new entities associated with the Seabrook facility.

The applicant and the licensee suggest that no antitrust review of these proposed changes is required by the Atomic Energy Act. The staff believes the legislative history and reading of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, require the staff at least to review new owners of nuclear power production facilities for the purpose of determining whether the adding of the new owner to the license will constitute a significant change. The staff recommends that the Director of the Office of Nuclear Reactor

Regulation conclude from the staff's analysis herein and consultation with the Department of Justice (Department or DOJ) that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license. The basis for staff's recommendation and determination are provided herein.

II. APPLICABLE STATUTE AND REGULATIONS

Section 105 of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, designates when and how antitrust issues may be raised. *See Houston Lighting & Power Co.*, (South Texas Project), CLI-77-13, 5 NRC 1303, 1317 (1977). In connection with the legislation to remove the need to make a finding of practical value before issuing a commercial license,[1] in 1970, the Joint Committee

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[1] Before the amendment, the Commission could issue a commercial license for a production or utilization facility only after it had made a finding of "practical value" of the facility for industrial or commercial purposes. Public Law 91-560 (84 Stat. 1472)(1970), section 3, amended section 102 of the Atomic Energy Act (AEA). Prior to the amendment, section 102 of the AEA read as follows:

> SEC.102. FINDING OF PRACTICAL VALUE.-Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or

(continued...)

on Atomic Energy also examined section 105c. Before the 1970 amendment, section 105c provided that whenever the Commission proposed to issue a commercial license, it would notify the Attorney General of the proposed license and the proposed terms and conditions thereof. The Attorney General would then be obliged to advise the Commission "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws and such advice will be published in the *Federal Register*."[2] The Joint Committee, recognizing that the language and potential effect of the existing section 105c were not sufficiently clear, decided to amend section 105c to clarify and revise this phase of the Commission's licensing process. *See* 115 Cong. Rec. S19253.

Subsection 105c(1), as amended, requires the Commission to transmit, to the Attorney General, a copy of any license application to construct or operate a nuclear facility for the

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[1](...continued)
commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.

[2] Prior to the 1970 amendment, antitrust review could occur only following a Commission finding, under section 102 of the Atomic Energy Act, that a type of facility had been sufficiently developed to be of "practical value" for industrial or commercial purposes. Because the Commission never made such a finding, no antitrust reviews occurred. Power reactor construction permits and operating licenses before 1970 were issued pursuant to section 104b, which applied to facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Attorney General's advice as to whether the grant of an application will create or maintain a situation inconsistent with the antitrust laws. Subsection 105c(2) provides an exception to the requirements of subsection 105c(1) for a license to operate a nuclear facility for which a construction permit was issued under section 103, unless the Commission determines that such review is advisable on the ground that "significant changes" in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission in connection with the construction permit for the facility.

The Commission has promulgated regulations regarding the submittal of information in connection with the prelicensing antitrust review of facilities and the forwarding of antitrust information to the Attorney General. *See* 10 C.F.R. §§ 2.101, 2.102, and 50.33a. Section 50.33a requires the submission of the information specified in 10 C.F.R. Part 50, Appendix L (Information Requested By The Attorney General For Antitrust Review Facility License Applications). The publication in the *Federal Register* of a notice of the docketing of the antitrust information required by Part 50, Appendix L is required by 10 C.F.R. § 2.101(c). Subsections 2.101(e) and 2.102(d) address the situation in which an antitrust review has been conducted as part of the application for a construction permit and the application for an operating license is now before the Commission. Related to this, the Commission has delegated to the Director of Nuclear Reactor Regulation (NRR) or

the Director of Nuclear Material Safety and Safeguards (NMSS), as appropriate, its authority under subsection 105c(2) of the AEA to make the determination in connection with an application for an operating license as to whether "significant changes" in the licensee's activities, or proposed activities under its license have occurred subsequent to the antitrust review conducted in connection with the construction permit application. *See* 10 C.F.R. §§ 2.101(e)(1) and 2.102(d)(2).[3]

On October 22, 1979, the Commission amended 10 C.F.R. § 55.33a to reduce or eliminate the requirements for submission of antitrust information in certain *de minimis* instances. In publishing the rule, the Commission stated its conclusion that applicants whose generating capacity at the time of the application is 200 MW(e) or less are not required to submit the information specified in Appendix L of Part 50, unless specifically requested to do so. The

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[3] In connection with the delegation, the Commission approved procedures to be used until such time as regulations implementing the procedures were adopted. Although never formally published, the procedures are available as attachments to SECY-79-353 (May 24, 1979) and SECY-81-43 (January 19, 1981). On March 9, 1982, the Commission amended its regulations to incorporate final procedures implementing the Commission's delegation of authority to make the "significant changes" determination to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate. 47 Fed. Reg. 9963, March 9, 1982. The amended regulation provides that the Director, NRR or NMSS, as appropriate, after inviting the public to submit comments regarding antitrust aspects of the application and after reviewing any comments received, is authorized to make a significant change determination and, depending on his determination, either refer the antitrust information to the Attorney General or publish a finding of no significant changes in the *Federal Register* with an opportunity for requesting reevaluation of the finding.

Commission further stated that it believed that utilities smaller than these generally would have a negligible effect on competition. Fed. Reg. 60715, October 22, 1979.

All applicants for an NRC utilization facility license who are not determined by the staff to be *de minimis* applicants, undergo an extensive antitrust review at the construction permit (CP) stage and a review at the operating license (OL) stage. The CP review is an in depth analysis of the applicant's competitive activities conducted by the DOJ in conjunction with the staff. The competitive analysis associated with the OL stage of review is conducted by the staff, in consultation with the Department, and is focused on significant changes in the applicant's activities since the completion of the CP antitrust review (or any subsequent review). In each of these reviews, both the staff and the Department concentrate on the applicant's activities and determine whether the applicant's conduct or changes in applicant's conduct creates or maintains a situation inconsistent with the antitrust laws.

III. POST INITIAL OPERATING LICENSE ANTITRUST REVIEWS

A. General

As indicated *supra*, the NRC has established procedures by which prospective licensees of nuclear production facilities are reviewed

during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. The AEA does not specifically address the addition of new owners or operators after the initial licensing process. The legislative history discusses, to a limited extent, some types of amendments.[4] However, neither section 105c of the AEA or the Commission's regulations deal directly with applications to change ownership of facilities with operating licenses.[5] Indeed, in its *South Texas* decision, the Commission stated that, "we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment ... where an application for transfer of control of a license has been made ..." *South Texas Project*, 5 NRC at

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[4] The report by the Joint Committee on Atomic Energy notes that:

> The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for the purposes of triggering subsection 105 c., other applications which may be filled during the licensing process.

H. Rep. 91-1470, 91st Cong. 2d Sess., at 29 (1970).

[5] Applications for construction permits, for amendment of construction permits, and applications for initial operating licenses are not included here.

1318. The Commission went on to note that "[a]uthority [for antitrust review of a license transfer], not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b)."[6] *Id.* Unfortunately, the Commission did not explain how its regulations could grant authority not given by the statute.

The Commission has considered, however, the matter of adding a licensee after issuance of a construction permit, but before issuance of the initial operating license. In *Detroit Edison, et al.*, (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978) *aff'd* ALAB-475, 7 NRC 752, 755-56 n.7 (1978), the Licensing Board denied a petition to intervene and request for an antitrust hearing by a member/ratepayer of the distribution cooperative that purchased all of its power from a cooperative that would become a co-licensee of the power plant. In considering a jurisdictional argument, the Board, relying on the Congressional intent and purpose behind section 105c of the AEA cited in n.4 *supra*, stated that "[s]ince the two cooperatives in this case are required to submit an application to become co-licensees, these constitute *their* 'initial application for a construction permit'"

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[6] 10 C.F.R. § 50.80(b) provides in part that an application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and *if the license to be issued is a class 103 license, the information required by § 50.33a* (Information requested by the Attorney General for antitrust review).

(emphasis in original). *Id.*, at 588. In *Summer*, the Commission referred to *Fermi* for the proposition that the addition of a co-owner as a co-licensee was, in effect, an *initial application* of the co-owner and as such required formal antitrust consideration, stating, "[t]hat decision was based on the necessity for an in-depth review at the CP stage of *all applicants*, lest any applicant escape statutory antitrust review" (emphasis added). *South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 831 (1980).

The legislative history of section 105c and the Commission's guidance in *South Texas* might be read to indicate that Commission antitrust review, if not limited to the initial licensing process, is at least an unsettled question regarding operating license amendments. However, *Fermi* and *Summer* stand for the proposition that new license applicants are initial applicants for purposes of a section 105c antitrust review. Further, the Commission indicated in *Summer* that in such situations a formal antitrust inquiry is required. *See Id.*, at 830-31. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests.

The staff has received applications for operating license amendments that 1) request the addition of a new owner or seek Commission permission to transfer control from an existing to a new

owner or 2) request placing a non-owner operator on a license. The action the NRC Staff has taken has been particular to each situation. In general, post initial operating license amendment applications involving a change in ownership have included an antitrust review by the staff and consultation with the Attorney General. The review by the staff focuses on significant changes in the competitive market caused by the proposed change in ownership since the last antitrust review for the facility and its licensees. The staff review takes into account related proceedings and reviews in other federal agencies (e.g. FERC, SEC, or DOJ).

B. Change In Ownership

Although not specifically addressed by regulation, the staff has evolved a process for meeting the Commission's direction in the *Summer* decision to conduct an antitrust inquiry for license amendments after issuance of the operating license. The receipt of an application to add a new owner to an operating license or to seek Commission permission to transfer control from an existing to a new owner, for section 103 utilization facilities which have undergone antitrust review during the initial licensing process, is noticed in the *Federal Register*, inviting the public to express views relating to any antitrust issues raised by the application, and advising the public that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensees' activities or proposed activities have

occurred since the completion of the previous antitrust review. The staff's awareness of any related federal agency reviews of the request (e.g. FERC, SEC, or DOJ) and the staff's intention to consider those related proceedings are also noted in the *Federal Register* notice. The staff reviews the application after the comment period, so that the staff can perform the review with benefit of public comment, if any, and consultation with the Attorney General. If the Director, NRR, finds no significant change, the finding is published in the *Federal Register* with an opportunity for the public to request reconsideration as provided for in 10 C.F.R. § 2.101(e) for initial license applicants. If the Director, NRR finds significant change, the matter is referred to the Attorney General for formal antitrust review.

In conducting the significant change review, the staff uses the criteria and guidance provided by the Commission in its two *Summer* decisions for making the significant change determination for OL applicants.[7]

> The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are attributable to the licensee(s); and (3) have

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[7] In CLI-80-28, the Commission enunciated the criteria, but deferred its actual decision regarding the petition to make a significant changes determination that was before it. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980). In CLI-81-14, the Commission denied the petition. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

> anti-trust implications that would most likely warrant some Commission remedy.

Summer, 11 NRC at 824. To warrant an affirmative significant change finding, thereby triggering a formal OL antitrust review that seeks the advice of the Department of Justice on whether a hearing should be held, the particular change(s) must meet all three of these criteria. In its second *Summer* decision, the Commission provided guidance regarding the criteria and, in particular, the meaning of the third criterion in determining the significance of a change.

> As the staff recognized, "this third criterion appropriately focuses, in several ways, on what may be 'significant' about any changes since the last...review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive *or have de minimis anticompetitive effects*." (Emphasis provided) The staff correctly discerned that the third criterion has a further analytical aspect regarding remedy: "Not only does [it] require an assessment of whether the *changes* would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes by their nature would require." The third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance.

South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862, 872-73 (1981).

C. Change In Or Addition Of Non-Owner Operator

Changes in a nuclear plant operator, without any change in ownership, may also carry the potential of abuse of market power by the operator. However, the staff has determined that a plant operator who has no control over the marketing of the power or energy produced from the facility will not, under normal circumstances, be in a position to exert any significant amount of market power in the bulk power services market associated with the facility. The staff makes an effort in these cases to reach agreement on a license condition requiring new plant operators to agree to be divorced from the marketing or brokering of power or energy from the facility in question and hold existing owners accountable for the operator's actions. If the prospective new operator and the owners agree to appropriate license conditions that reduce the potential for impact on plant ownership or entitlement to power output, as determined by the staff, the application to add or change a non-owner operator is viewed as an application falling within the *de minimis* exception for submitting antitrust information provided for in 10 C.F.R. § 50.33a.

The Commission has exempted *de minimis* applicants from the requirements to submit antitrust information and, therefore, the publication for comment of such information, unless specifically requested by the Commission. *See* 10 C.F.R. § 50.33a. The Commission has determined that such applicants generally would have a negligible effect on competition. *See* 44 Fed. Reg. 60715, October 22, 1979. The staff has determined that, with an

appropriate license condition regarding the marketing and brokering of power, the potential for a non-owner operator to have an affect on competition in the bulk power market is effectively mitigated. Therefore, such an operator is, as a practical matter, the same as *a de minimis* applicant with respect to its ability to affect competition. Normally, no further antitrust review of the non-owner operator will be conducted by the staff.

IV. PREVIOUS SEABROOK NRC ANTITRUST REVIEWS

A. Construction Permit Review

By letter dated December 4, 1973, the Attorney General issued advice to the Atomic Energy Commission pursuant to Public Service Company of New Hampshire's (PSNH), the lead applicant,[8] application for a construction permit for the Seabrook Nuclear Power Station Units No. 1 and No. 2. In its advice letter, the Department expressed concern over several allegations by smaller power systems in the New England bulk power services market that they were unable to gain access to low cost bulk power supply on the same basis as

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[8]PSNH was the majority owner with 50% of the plant at the time the time of the Department's advice letter in 1973. Since this initial review, there have been several changes in ownership and ownership shares in Seabrook. Existing owners are as follows: PSNH (35.56942%); United Illuminating (17.5%); EUA Power Corporation (12.1324%) Connecticut Light & Power Company (4.05985%); Hudson Light & Power Department (0.07737%); Vermont Electric Generation and Transmission Corporative, Inc. (0.41259%); Montaup Electric Company (2.89989%); Canal Electric Company (3.52317%); New England Power Company (11.59340%); Taunton Municipal Lighting Plant (0.10034%); and New Hampshire Electric Cooperative, Inc. (2.17391%)

larger systems in the area. The advice letter stated that as a result of a settlement agreement reached between the privately owned and publicly owned systems in New England that there had been a "dramatic improvement in the relations among the various segments of the electric power industry in New England...." The Department emphasized the importance of the development of the New England Power Pool (NEPOOL) as a regional planning body that would enable participation in bulk power services by all types of power entities throughout New England. The Department concluded,

> ... that the creation of a truly open, non-exclusive NEPOOL means that all systems can have a dependable frame- work within which to obtain fair and non-discriminatory access to economical and reliable bulk power supply.(December 4, 1973 advice letter, p. 4)

As a result of its review, the Department advised the Atomic Energy Commission that there was no need for an antitrust hearing pursuant to the construction permit application for Seabrook.

B. Operating License Review

As noted above, a prospective operating licensee is not required to undergo a formal antitrust review unless the staff determines that there have been "significant changes" in the licensee's activities or proposed activities subsequent to the review by the Department of Justice and the staff at the construction permit stage. The staff completed its OL antitrust review of Seabrook in January

1986. The staff analysis indicated that,

> ...NEPOOL, which was only two years old at the time when the CP antitrust review was performed, appears to have evolved into a framework ensuring access to reliable and economical bulk power supply for all New England utilities. Two provisions of the original pool agreement were found to be discriminatory against smaller utilities and have since been removed. Further, because Seabrook 1 has been designated as a pool-planned unit, access to Seabrook 1 over pool transmission facilities of members is guaranteed for all participants under the terms of NEPOOL.[9]

Based in large part upon the successful formation and operation of NEPOOL, the staff concluded that the changes in the licensees' activities as well as any proposed changes in licensees' activities do not represent "significant changes" as identified in the *Summer* decision and recommended that no formal OL antitrust review be conducted. The staff's antitrust OL review was completed in February 1986 and the Seabrook full power license was issued on March 15, 1990.

C. EUA Power Review

By letter dated March 26, 1986, New Hampshire Yankee, acting as agent for the Seabrook licensees, requested the staff to amend the

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[9]Staff review of Seabrook licensees' changed activity. "Seabrook Station, Unit 1, Public Services Company of New Hampshire, et al, Docket No. 50-443A, Finding of No Significant Antitrust Changes," p. 57.

Seabrook construction permits (Units 1 and 2) to reflect the purchase and transfer of an approximate 12 percent ownership share in the Seabrook facility to EUA Power Corporation (EUA Power), a wholly owned subsidiary of Eastern Utility Associates of Boston, Massachusetts. The amendment requested the transfer of 12 percent ownership to EUA Power and deletion of the following owners as Seabrook licensees: Bangor-Hydro-Electric Company (2.17391%); Central Maine Power Company (6.04178%); Central Vermont Public Service Corporation (1.59096%); Fitchburg Gas and Electric Light Company (0.86519%); and Maine Public Service Company (1.46056%).

Even though a sister company, Montaup Electric Company (both are wholly owned by Eastern Utilities Associates), had previously undergone an antitrust review in conjunction with its participation in Seabrook, EUA Power represented a new owner prior to issuance of the Seabrook full power operating licensee and was required to undergo a formal antitrust review by the Department of Justice. Accordingly, EUA Power submitted pertinent 10 C.F.R. Part 50, Appendix L information to the staff regarding its operations and competitive activity. A notice of receipt of this information, which provided the opportunity for a 60 day comment period on the antitrust issues regarding the proposed ownership transfer, was published in the *Federal Register* on May 23, 1986.

By letter dated July 1, 1986 the Department advised the staff that there was,

> ... no evidence that the proposed participation by EUA Power Company in the Seabrook Units would either create or maintain a situation inconsistent with the antitrust laws under Section 105(c). We do not, therefore, believe it is necessary for the Commission to hold an antitrust hearing in this matter. (Department of Justice advice letter, p.1)

The Department's letter was published in the *Federal Register* on July 17, 1986 and provided for interested persons to request a hearing and file petitions to intervene. There were no such requests and the staff issued an amendment (No. 9) to the Seabrook construction permits authorizing the transfer of ownership effective upon completion of the transfer of ownership shares which was consummated on November 26, 1986. In this instance, there was no need to apply the significant change threshold criteria to the EUA Power amendment review and address the issue of whether the Department of Justice should conduct the review or the staff should issue a significant change determination because the request for ownership change occurred prior to issuance of the full power operating license and consequantly, the review involved an amendment to the construction permit and followed construction permit review procedures.

V. CHANGES AT SEABROOK AFTER ISSUANCE OF THE INITIAL OL

The instant amendment requests to transfer PSNH'S ownership in Seabrock to a proposed new entity, NAEC, and change the plant operator from New Hampshire Yankee to a proposed new operating

entity, NAESCO, represent direct outgrowths of the bankruptcy proceeding initiated by PSNH in January 1988. Though the bankruptcy proceeding and PSNH's financial status are not the focus of the instant review, it is significant to note that PSNH is dependent upon Seabrook as its principal source of generating capacity and operating revenue. This dependence on one source of operating revenue left PSNH highly susceptible to fluctuations in the business cycle that affect different regions of the country at different periods in the cycle. During the mid 1980's commerce and industry in New England were growing dramatically. Economic growth exceeded projections for planned electric generating capacity.[10] However, as rapidly as the New England economy advanced in the mid 1980's, it declined equally a fast in the late 1980's. PSNH filed for bankruptcy in January 1988 and EUA Power Corporation, another Seabrook co-owner heavily dependent upon the sale of Seabrook power and energy, filed for bankruptcy in early 1991.

There were other factors that contributed to PSNH'S financial difficulties in the 1980's, e.g., development and approval of emergency evacuation plans for Seabrook and state regulatory proceedings involving allowance of Seabrook costs in PSNH'S rate

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[10]EUA Associates, parent company of Montaup Electric Company, a co-owner of Seabrook, formed EUA Power Corporation specifically to purchase a 12 percent ownership share in Seabrook to meet an unexpected strong demand for electric power in New England during the late 1980's and 1990's. John F.G. Eichorn, chairman of EUA Associates, was quoted by the Providence, Rhode Island Journal newspaper, as citing NEPOOL electricity demand estimates showing "a serious shortfall developing in New England, which we at EUA are determined to help eliminate." Journal, April 10, 1986.

base. All of these factors culminated in PSNH filing for bankruptcy and the resultant proposal .. NU to acquire PSNH. The proposals adding a new owner and a new operator of the Seabrook facility are the principal changes the staff must address in its post OL significant change antitrust review. The staff must determine whether the new owner or the new operator will create or maintain a situation inconsistent with the antitrust laws.

VI. FERC AND SEC REVIEWS

Pursuant to the requirements and jurisdiction of both the Federal Power Act and the Public Utilities Holding Company Act of 1935, NU filed applications with the Federal Energy Regulatory Commission (FERC), on January 5, 1990, and the Securities and Exchange Commission (SEC), on October 5, 1989, respectively, seeking approval of its proposed merger with PSNH. In light of the fact that similar competitive issues are currently being addressed in proceedings at the FERC and SEC and that the findings reached in the FERC and SEC proceedings will be considered by the staff, a brief synopsis of these proceedings follows.

A. FERC Proceeding

Northeast Utilities, acting through a service company called NUSCO, sought approval under Section 203 of the Federal Power Act (enforced by the FERC) to acquire the jurisdictional assets of

PSNH. Section 203 of the Federal Power Act (FPA) requires the FERC to make a determination as to whether the proposed acquisition or merger will be consistent with the public interest. Though the FPA does not specifically charge the FERC with weighing the competitive implications of the merger or acquisition in terms of injury to competition or the competitive process in identifiable markets, in the recent past, the FERC has considered these competitive concerns as inputs to its ultimate determination as to whether the combination creates more benefits than costs, i.e., is in the public interest.

On March 2, 1990, the FERC issued an order granting intervention by all requesting parties and also granted a NU motion to expedite the hearing schedule by requiring that an initial decision be issued no later than December 31, 1990. After extensive discovery, depositions and oral argument, the FERC administrative law judge (ALJ), Jerome Nelson, issued an initial decision on December 20, 1990.[11]

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[11]"On March 7, 1990, NU submitted its direct case, which consisted of the prepared testimony and exhibits of six witnesses. After extensive discovery, including numerous depositions of NU, Staff, intervenor and third party witnesses, the Staff and intervenors filed their respective direct cases on May 25, 1990. The direct cases of staff and intervenors included the prepared testimony and exhibits of 49 witnesses. On June 25, 1990, Staff and intervenors filed cross-rebuttal cases through the prepared testimony and exhibits of 19 witnesses. On July 20, 1990, NU filed its rebuttal case through the prepared testimony and exhibits of 12 witnesses. Twenty-five days of hearings were held during August and September of 1990. Thirty-five witnesses were cross-examined, and 809 exhibits were admitted into evidence. Briefs and reply briefs were filed in October of 1990. Four days of oral argument ended on November 13, 1990." (ALJ Initial Decision, p. 6).

The ALJ made several findings in his initial decision, however, the findings most relevant to the NRC post OL amendment review concern the effect the merger will have on the New England bulk power services market. The ALJ's initial decision indicated that without a detailed set of merger conditions, the "NU-PSNH merger would have anti-competitive consequences." The ALJ found that,

> the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts). (*Id.*, p.15)

The ALJ indicated that the merged company will control 92 percent of the transmission capacity presently serving New England.

> This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices. (*Id.*, p. 16)

The ALJ concluded that merged NU-PSNH will control the principal transmission access routes from northern New England to southern New England as well as 72 percent of the New York, New England transmission corridor path.

> Because PSNH "controls the only transmission lines linking Maine and New Brunswick to the rest of New England"..., Eastern REMVEC utilities will necessarily have to deal with the merged company in order to get power from those areas. The merged company's control

> would also extend to access from New York... NU controls 72% of the New York-New England "interface"... and needs only a small portion of that share for its own use. (*Id.*)

The ALJ's initial decision recommended that the FERC approve the merger only if specific merger conditions were agreed upon by the merging parties. There are two principal conditions discussed by the ALJ designed specifically to address the new NU-PSNH's market power and particularly any potential for abuse of this newly created market power vis-a-vis other power systems in New England. The first condition is basically a rework of a proposal initially offered by NU-PSNH dealing with the merged company's policy regarding transmission over its power grid. A set of General Transmission Commitments was developed by the ALJ which dealt with various degrees of priority access and time horizons depending upon the individual power supply situation in question. This policy commitment, according to the ALJ, would reassure non-dominant power systems in New England a form of meaningful access to the transmission facilities required to fulfill their bulk power supply requirements.

The second major condition that addresses the transmission dominance of the new NU-PSNH is termed the, "New Hampshire Corridor Proposal." This proposal serves to open up the flow of power from Canada to New England and from northern New England to the heavily populated southeastern portion of New England. The Corridor Proposal allocated a total of 400 MW of transmission capacity with

200 MW allocated to New England Power Company and 200 MW allocated to southern New England utilities. These two transmission proposals recommended by the FERC ALJ are the most relevant to the staff's review of New Hampshire Yankee's requests to change ownership and the operator of the Seabrook facility.

On August 9, 1991, the FERC conditionally approved the NU merger with PSNH. To mitigate the merger's likely anticompetitive effects, the FERC strengthened NU's General Transmission Commitment and noted that it will construe NU's voluntary commitment very strictly. NU can not give higher priority to its own non-firm use than to third party requests for firm wheeling in allocating existing transmission capacity. The FERC also ruled that independent power producers and qualifying facilities are eligible for transmission access on the New Hampshire Corridor. *See Northeast Utilities Service Company* (Re Public Service Company of New Hampshire) FERC slip op. No. 364 (August 9, 1991).

B. SEC Proceeding

NU filed an application with the SEC for approval under the Public Utility Holding Company Act of 1935 (PUHCA) of its proposed merger with PSNH. The SEC issued a notice of the filing of the application on February 2, 1990 (Holding Co. Act Release No. 25032). Fourteen hearing requests from 41 separate entities were received and four of these requests, representing 21 entities, were

subsequently withdrawn. Moreover, eight entities filed comments or notices of appearance. The segment of the SEC review most relevant to staff's post OL amendment review revolves around Section 10(b)(1) of the PUHCA that requires the SEC to consider possible anticompetitive effects of the proposed NU-PSNH acquisition. The SEC in a Memorandum Opinion dated December 21, 1990 approved NU's proposed acquisition of PSNH--indicating that all PUHCA requirements, including Section 10(b)(1), had been fulfilled. In its initial decision, the SEC stated that,

> Given the approximate size of the Northeast--PSNH system and the resultant economic benefits discussed herein..., we conclude that the Acquisition does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied. (SEC Initial Decision, p. 40)

The SEC's analysis, as reflected in its initial decision, considers the economic benefits associated with a merged NU-PSNH and not so much the potential for abuse of market power that may be enhanced by the merger. The initial decision states that the,

> transfer to North Atlantic will merely move the asset from one Northeast subsidiary to another and should have no impact on competitive conditions. (*Id.*, p.58)

The SEC order approving the merger was appealed by two intervenors in the SEC proceeding--the City of Holyoke Gas and Electric

Department and the Massachusetts Municipal Wholesale Electric Company (petitioners). Petitioners filed a request for rehearing of the initial decision, arguing that the SEC erred in approving the NU-PSNH acquisition by failing to provide sufficient analysis of the anticompetitive effects of the acquisition. Petitioners based much of their argument for rehearing upon the FERC ALJ's December 20, 1990 decision which indicated that an unconditioned NU-PSNH merger would have significant anticompetitive effects upon the New England bulk power services market.

In a Supplemental Memorandum Opinion and Order (Supplemental Memorandum) dated March 15, 1991, the SEC granted petitioners a reconsideration of the SEC's initial decision.

> In our December order, we recognized that the Acquisition would decrease competition, but concluded that the Acquisition's benefits would outweigh its anticompetitive effects. The petitioners challenge this determination, arguing that the Commission ignored the anticompetitive effects of the merged company's control of transmission facilities and surplus power. (Supplemental Memorandum, p.3)

The SEC's Supplemental Memorandum indicated that its initial decision focused more on the size and corporate structure of NU-PSNH rather than the merged company's ability to control access to transmission or excess capacity. The Supplemental Memorandum stated that even though the SEC's principal focus was on the size and structure of the merged company, the competitive access issues

were considered and the SEC concluded that, "The merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior." (Supplemental Memorandum, p.5) However, the SEC relied upon the transmission commitments made by NU to mitigate any possible anticompetitive effects of the merger.[12]

The Supplemental Memorandum recognized that both the SEC and the FERC "have statutory responsibilities with respect to ıe anticompetitive consequences of mergers in the public-utility industry". (*Id.*, p.6). However, the SEC also recognized that the focus of the Federal Power Act and the Public Utility Holding Company Act are different in that each agency pursues administration of each act with different goals for regulating members of the electric utility industry. As a result, the SEC deferred the question of anticompetitive consequences and its ultimate approval of the proposed merger to the FERC.

> Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the Commission, [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look

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[12] The initial FERC decision found the commitments made by NU to be insufficient to remedy the potential anticompetitive effects of the merger and recommended additional terms and conditions be imposed upon the merged company as a condition for FERC approval of the merger.

> to the FERC's expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the acquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the FPA. (*Id.*, p.9)

VII. AMENDMENT APPLICATIONS COMMENTS RECEIVED BY THE STAFF

The staff, in accordance with 10 C.F.R. § 2.101(e)(1), published receipt of New Hampshire Yankee's request to amend the Seabrook OL in the *Federal Register* and provided interested parties the opportunity to comment on the antitrust issues raised by the proposed acquisition on February 28, 1991.[13] The staff received comments from the following entities or their representatives: 1) New Hampshire Electric Cooperative (April 1, 1991,); 2) Massachusetts Municipal Wholesale Electric Company (April 1, 1991); 3) City of Holyoke Gas and Electric Department (April 1, 1991); 4) Hudson Light and Power Department (April 4, 1991); and 5) Taunton Municipal Lighting Plant (April 10, 1991). By letter dated April 22, 1991, counsel for Connecticut Light and Power Company and PSNH responded to these comments.[14] The comments from participants in the FERC and SEC proceeding by and large mirrored the positions taken by the commenters in those proceedings. The comments

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[13] A similar notice regarding the change in operator from New Hampshire Yankee to NAESCO, was published in the *Federal Register* on March 6, 1991.

[14] By letter dated June 13, 1991, City of Holyoke Gas and Electric Department (HG&E) replied to the Connecticut Light and Power (CL&P) and PSNH response. By letter dated July 9, 1991, CL&P and PSNH responded to the HG&E reply. By letter dated July 22, 1991, HG&E replied to the CL&P and PSNH July 9, 1991 response.

received are summarized below with the staff analysis of each comment.

A. New Hampshire Electric Cooperative (NHEC)

Comment

NHEC is a transmission dependent utility (TDU), i.e., "entirely dependent on NU or PSNH for their bulk power transmission needs". NHEC states that without access to NU's or PSNH's transmission facilities it cannot actively compete in the New England wholesale bulk power services market. NHEC asserts that the proposed acquisition of PSNH by NU will concentrate its only source of essential transmission service in the hands of its principal competitor. NHEC cites the initial FERC decision as evidence that the proposed merger, if unconditioned, will have an adverse impact on the competitive process in the New England bulk power services market. NHEC also states that recent developments which have not been a part of the FERC record are relevant to the NRC review associated with the Seabrook post OL amendment applications.

NHEC wishes to purchase partial requirements power from another supplier, New England Power Company (NEP), rather than PSNH. NHEC and NEP entered into a long-term power supply contract on January 9, 1991; however, NHEC needs access to PSNH's transmission grid to receive the NEP power. PSNH has indicated that NHEC is contractually prohibited from taking any other off system power purchases during the term of its power supply contract with PSNH

and as a result PSNH would not approve use of its transmission grid until the contractual dispute between PSNH and NHEC is resolved.

NHEC contends that the proposed acquisition of PSNH by NU is anticompetitive and under the NRC's *Summer* criteria, represents a "significant change". NHEC seeks relief by requiring NU to,

> . . . commit before this Commission that it will provide NHEC all transmission needed for NHEC to purchase power from other sources . . . .

Staff Analysis

The staff believes that the issue described by NHEC in its April 1, 1991 filing to the staff primarily involves a contract dispute with PSNH and NU over transmission rights pertaining to power purchases by NHEC from New Brunswick. Presently, NHEC is taking partial requirements wholesale power from PSNH under a 1981 contract. A dispute has arisen between NHEC and PSNH (now NU, given its proposed acquisition of PSNH) regarding the terms under which the contract can be terminated. PSNH states that the contract requires NHEC to provide five years notice prior to cancelling the contract and switching to a different supplier. NHEC states that the contract provides for termination upon NHEC joining NEPOOL and that the recent NHEC-NEP purchase agreement and NHEC's ownership interest in Seabrook provide the basis for NEPOOL membership.

This contract dispute, which forms the linchpin for NHEC's argument

that it is dependent upon NU's transmission grid is presently being interpreted before the FERC. The staff believes that it is appropriate for this dispute to be resolved under the auspices of the FERC's jurisdiction over wholesale power and transmission tariffs and the terms and conditions associated with such agreements. The staff sees no need for the NRC to enter into a contract dispute that is under review by the FERC. Should the PSNH-NHEC contract dispute be resolved in NHEC's favor, i.e., enabling NHEC to terminate the contract without giving a five year notice, the merger condition recommended by the FERC ALJ and commitments made by NU to provide transmission dependent utilities transmission services (cf., PSNH and Connecticut Power & Light Company Comments to NRC staff dated April 22, 1991, pp. 29-30), should adequately resolve the competitive concerns raised by NHEC.

B. Massachusetts Municipal Wholesale Electric Company (MMWEC)

Comment

MMWEC is a co-owner (11.5934%) of the Seabrook plant. In its comments to the NRC, MMWEC states that the proposed acquisition of PSNH by NU is anticompetitive, notwithstanding the merger conditions recommended by the FERC ALJ, and suggests that the Director of the Office of Nuclear Reactor Regulation find, pursuant to *Summer*, that significant changes have occurred since the Attorney General's advice letter was issued in December 1973.

MMWEC contends that the standard of review of mergers required by

the FERC under the FPA is different than that required by the NRC under the Atomic Energy Act. MMWEC states that this difference permits anticompetitive acquisitions under the FPA if it is determined that the public interest is served by the acquisition (or merger), whereas the NRC must address the competitive implications of activities of licensees "irrespective of any compelling public interest." (MMWEC comments, p.3)

Moreover, MMWEC requests the NRC to address the anticompetitive aspects of NU's management and operation of Seabrook--an area not covered in the FERC ALJ's initial decision. According to MMWEC,

> NU is executing a plan whereby it has separated the Seabrook management function and ownership function from each other and utilized its market power to insulate itself, those functions and its other affiliates from any liability, except liability imposed by willful misconduct. (*Id.*, p.5)

MMWEC's concerns revolve around a July 19, 1990 agreement reached among Seabrook owners holding approximately 70 percent of the facility. This agreement provides for the transfer of the managing and operating agent from New Hampshire Yankee to a proposed wholly owned NU subsidiary, NAESCO. An exculpatory clause in the July 19, 1990 agreement, according to MMWEC,

> . . . would not only free NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. MMWEC cannot insure any

> reckless or negligent conduct of the Managing Agent or its affiliates. (*Id.*)

MMWEC requests the NRC to act to prevent NU from maintaining a situation inconsistent with the antitrust laws. MMWEC suggests that the NRC condition the approval of the license transfer to "require appropriate amendment of the Joint Ownership Agreement and to prohibit NAECO, & NAESCO and their affiliates from freeing themselves from liability for misconduct." (*Id.*, p.6)

Staff Analysis

MMWEC's principal concern is that NU used its market power in an anticompetitive manner in formulating a July 19, 1990 agreement that established parameters by which the Seabrook facility would be managed and operated. Moreover, MMWEC asserts that this agreement frees,

> . . .NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. (MMWEC comments, p. 5)

MMWEC has failed to show how NU has used (abused) its market power in bulk power services in formulating an agreement to install a new managing agent for Seabrook. MMWEC asks the NRC to condition the license transfer by requiring amendment of the Seabrook "Joint Ownership Agreement", to, effectively, make NAECO and NAESCO more accountable for their actions pursuant to their ownership and operation of the Seabrook facility respectively. Based upon the

data available to the staff, it appears as though the July 19, 1990 agreement was consummated in conformance with the Seabrook Joint Ownership Agreement, as amended, and not as a result of any abuse of market power on the part of NU. The staff believes MMWEC's concerns over the degree of liability it must absorb should NAESCO in any way mismanage Seabrook are concerns of a contractual, not competitive, nature and should be raised and addressed before an appropriate forum for these matters, not the NRC.

Moreover, as recognized by MMWEC at page three of its comments, the staff considered the possibility of a new plant operator having an influence over competitive options of the new owners of Seabrook. For this reason, after discussions with the staff, NAESCO agreed to a license condition divorcing itself from the marketing or brokering of power or energy produced by Seabrook. The license condition was designed to eliminate NAESCO's ability to exercise any market power, if evident, and obviated the need to conduct a further competitive review of NAESCO. For the reasons stated above, MMWEC's request to condition the Seabrook license that frees it from NAESCO's liability should be denied.

C. City Of Holyoke Gas & Electric Department (HG&E)

Comment

HG&E is a municipally owned electric system serving primarily western Massachusetts. "HG&E lies within the service territory of Western Massachusetts Electric Company ("WMECO"), a wholly-owned

subsidiary of NU." (HG&E comments, p.2) HG&E generates no power on its own and relies heavily on the transmission facilities of PSNH to supply approximately 36 percent of its load from the Point Lepreau nuclear plant in New Brunswick, Canada. According to HG&E,

> The increase in control that the merged entity will exercise over generation (including power from Seabrook) and transmission capacity in New England represents a "significant change" from the activities of the current licensee--an independent PSNH. (HG&E comments, p.3)

HG&E contends that NU-PSNH will wield significantly more market power than a stand alone PSNH and given the existing competitive relationship between HG&E and NU, the merged entity, without adequate license conditions and structural alterations in the market, will be able to severely restrict or at a minimum, control the cost effectiveness of a large portion of its power supply that presently flows over PSNH's transmission facilities from New Brunswick.

> Control over generation capacity greatly reduces the opportunities available to purchase power from other utilities in the region; control over transmission capacity eliminates or reduces the ability of HG&E and others to purchase power from utilities outside of New England. (*Id.*, p. 6)

Moreover, HG&E asserts that many of the benefits associated with NEPOOL operation--identified by the Department of Justice and the staff in previous reviews--may be negated by the merged company's "sufficient veto voting power" over proposals put forth by the

NEPOOL Management Committee. HG&E characterizes this change in market power as a "significant change" requiring a full review of the antitrust impacts of the proposed merger, including an analysis by the Attorney General of the antitrust impact of the proposed license transfer.

HG&E addresses ongoing reviews of NU's proposed acquisition of PSNH before other federal agencies and concludes that NRC's antitrust review mandate in Section 105c of the Atomic Energy Act more clearly relates to review of anticompetitive conduct whereas the reviews at the FERC and SEC seem to be more public interest oriented. Consequently, HG&E asserts that the NRC should not assume that these other reviews will adequately condition the proposed merger to remedy the serious competitive issues that the merger would create. HG&E urges the NRC to deny the proposed merger, yet if approved, suggests that NRC require prior approval by the FERC and SEC, and in addition, 1) require NU-PSNH to transmit Point Lepreau power to HG&E for the term of any extended HG&E/Point Lepreau power supply contract with equivalent terms to its current contract, and 2) require NU to divest its subsidiary, Holyoke Water Power Company (HWP) or consolidate HWP into another NU subsidiary, Western Massachusetts Electric Company, thereby subjecting HWP to state regulation as a public utility.

Staff Analysis

HG&E asks the NRC to initiate a full antitrust review of the proposed merger, considering all of the antitrust effects of the

proposed merger pursuant to Section 105c of the Atomic Energy Act. "Such review would include an analysis by the Attorney General of the antitrust impact of the proposed license transfer. 42 U.S.C. SEC.2135" (HG&G comments, P.3) At the conclusion of such a review, HG&E recommends that the NRC deny the proposed license transfer or approve the transfer with license conditions over and above those recommended by the FERC ALJ.

As indicated *supra* (cf., Section III herein), the staff takes into consideration the record established during related federal agency reviews of the change in ownership. The FERC proceeding and the accompanying recommendations for competition enhancing merger conditions were factors the staff considered in evaluating the instant proposals under the significant change criteria. The staff believes the presence of license conditions recommended by the FERC mitigates the possibility of anticompetitive effects ensuing from such a merger as well as the need for a more formal antitrust review by the Department of Justice. For the reasons stated above, the staff recommends denying HG&E's requests to deny the proposed merger or initiate a formal antitrust review that incorporates an analysis by the Attorney General.

Considering the license conditions associated with the proposed acquisition of PSNH by NU, the staff recommends denying in part and approving in part HG&E's request to attach the FERC and SEC merger conditions and impose two additional conditions as a requirement

for consummation of the acquisition. The staff has relied heavily on the record established to date in the FERC proceeding and in light of the procompetitive merger conditions proposed by the FERC ALJ would recommend approval of the license transfer. The SEC in its Supplemental Memorandum Opinion dated March 21, 1991 deferred its ruling on the competitive aspects of the proposed merger to the FERC.

The staff recommends denying HG&E's request to the NRC to condition the license transfer upon two additional requirements, one providing, in effect, a life of service transmission contract for HG&E's Point Lepreau power and another requiring NU to divest a wholly owned subsidiary in competition with HG&E. There has been nothing established in the FERC record or in the instant proceeding that indicates that HG&E would have been able to renew its transmission contract with PSNH or its power supply contract with New Brunswick upon termination of the existing contracts in 1994. NU, as PSNH's parent company, has not indicated that it plans to deny HG&E transmission capacity to New Brunswick after the proposed merger is consummated. NU has stated that this transmission corridor to New Brunswick will be offered to "all comers," as it were. It appears as though HG&E will be in competition with other potential buyers of Point Lepreau power for both transmission and power and energy. The staff sees no reason to assist HG&E over any other competitor in this regard. Should HG&E enter into a transmission contract with NU-PSNH and find the terms and

conditions in any way anticompetitive, the staff believes the FERC is the proper forum for resolution of tariff issues. The FERC initial decision recognized the increase in market power resulting from the NU-PSNH acquisition, yet recommended conditions to mitigate any abuse of this newfound power.

> The merged company -- with vast power over transmission and control of surplus power -- must offer viable wheeling service in order to alleviate potential anti-competitive consequences. (FERC Initial Division, p. 48) [Emphasis added].

Moreover, the FERC ALJ approved the request by HG&E to require NU to establish the position of "ombudsman" to review NU's service and eliminate the possibility of any anticompetitive consequences resulting from NU's substantial market power in transmission and surplus power in the New England market. Additionally, the FERC ALJ indicated that,

> The ombudsman is not the only avenue for dissatisfied customers. The Commission's Enforcement Task Force maintains a "hotline" ... through which complaints can be received. (FERC Initial Decision, p. 49)

The staff believes these actions taken by the FERC adequately address HG&E's concerns over abuse of NU's post merger market power. For this reason, the staff does not believe that HG&E has established a basis for the staff to conclude that there is a significant change warranting an antitrust review. Furthermore, there is no basis for the staff unilaterally to impose conditions

on the transfer of the license providing for a life of service transmission contract.

Regarding HG&E's second condition, the staff believes that no record has been established to justify HG&E's request to divest Holyoke Water Power Company from NU. According to the FERC initial decision, "The City [HG&E] is covered by the protection given the TDUs, and is entitled to no more in this regard." (FERC Initial Decision, p. 50) Accordingly, divestiture of HWP does not seem warranted solely to, "eliminate NU's incentive to eliminate injury to HG&E...." (HG&E comments, p. 10; emphasis added). The staff recommends denying HG&E's request to divest HWP from NU.

D. Hudson and Taunton

Comment

The Taunton Municipal Lighting Plant (Taunton) and the Hudson Light and Power Department (Hudson) are both owners of the Seabrook facility. Taunton and Hudson are both members of the Massachusetts Municipal Wholesale Electric Company and both have requested the NRC to adopt MMWEC's comments submitted to the NRC via letter dated April 1, 1991.

Staff Analysis

As indicated *supra*, the staff recommended denying MMWEC's request to further condition the Seabrook operating license to free MMWEC from any liability to existing owners that may result from the proposed license transfer. In light of the fact that Hudson and

Taunton adopted MMWEC's comments, the staff also recommends that their requests be denied.

VIII. NRC STAFF FINDINGS

A. Change In Ownership

The ownership transfer of over 35 percent of Seabrook potentially represents a change in the degree of control over the operation of the nuclear facility. However, as indicated *supra*, the FERC has considered the anticompetitive consequences of the proposed merger and a set of extensive merger conditions was proposed by the FERC administrative law judge regarding New Hampshire Yankee's proposals to transfer ownership and operation of the Seabrook facility. In this regard, the staff has relied heavily upon the record established in the FERC initial decision in its review of the instant amendment applications. The FERC merger conditions were designed specifically to mitigate any potential competitive problems associated with the proposed acquisition of PSNH by NU.

The staff has reviewed the proposed transfer of ownership share in the Seabrook facility from PSNH to NU for significant change since the last antitrust review of the Seabrook licensees, using the criteria discussed by the Commission in *Summer*. (*Cf.* Section III herein) The amendment request was dated November 13, 1990, after the previous antitrust review of the facility and therefore the

first *Summer* criterion, that the change has occurred since the last antitrust review, is satisfied. The second *Summer* criterion is satisfied in that the change is the result of the bankruptcy proceeding initiated by PSNH in January 1988 and as such is "reasonably attributable to the licensee[s] in the sense that the licensee[s] ha[ve] had sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review." *Summer*, 13 NRC at 871.

This leaves for consideration the third *Summer* criterion, that the change has antitrust implications that would be likely to warrant Commission remedy. The Commission in *Summer* adopted the staff's view that application of the third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have *de minimis* anticompetitive effects. *See Id.* at 872. The Commission further stated "the third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance." *Id.*

The staff believes that the record developed in the FERC proceeding involving the NU-PSNH acquisition adequately portrays the competitive situation in the New England bulk power services market and that the anticompetitive aspects of the proposed changes are being addressed in the FERC proceeding. The staff further

believes that the actions being taken by the FERC will adequately address concerns regarding the anticompetitive effects of NU's post merger market power such that the change in ownership as approved by the FERC will not have implications that warrant a Commission remedy. Consequently, the third *Summer* criterion has not been satisfied.

Each of the significant change criteria discussed in *Summer* must be met to make an affirmative significant change finding. In this instance, the third criterion has not been met.

B. Addition Of Non-Owner Operator

In light of the license condition developed by the staff and agreed to by NU, NAESCO (the proposed new plant operator), and the other Seabrook licensees, prohibiting NAESCO from marketing or brokering power or energy produced from the Seabrook plant and holding all other Seabrook licensees responsible for NAESCO's actions pursuant to marketing or brokering of Seabrook power, the staff believes the change in plant operator from New Hampshire Yankee to NAESCO will not have antitrust relevance.

IX. CONCLUSION

For the reasons discussed above, and after consultation with the DOJ, the staff recommends that the Director of the Office of

Nuclear Reactor Regulation conclude that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license.

February 13, 1992

Docket No. 50-443A

Mr. H. Huehmer, Manager
Office of Light and Power Department
49 Forest Avenue
Hudson, MA 01749

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Huehmer:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result from this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of tha Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

(original signed by)
William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

DISTRIBUTION: [HUEHNER]
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PTSB Reading File
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PTSB:PMAS	PTSB:PMAS
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 13, 1992

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Office of Light and Power Department
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Hudson, MA 01749

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Sincerely,

W. M. Lambe

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Enclosures:
As stated

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NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50-443A

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.

SEABROOK NUCLEAR STATION, UNIT 1

PROPOSED OWNERSHIP TRANSFER

NOTICE OF NO SIGNIFICANT ANTITRUST CHANGES

AND TIME FOR FILING REQUESTS FOR REEVALUATION

The Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2135, that no significant (antitrust) changes in the licensees' activities or proposed activities have occurred as a result of the proposed change in ownership of Unit 1 of the Seabrook Nuclear Station (Seabrook) detailed in the licensee's amendment application dated November 13, 1991. The finding is as follows:

> Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides that an application for a license to operate a utilization facility for which a construction permit was issued under section 103 shall not undergo an antitrust review unless the Commission determines that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous antitrust review by the Attorney General and the Commission in connection with the construction permit for the facility. The Commission has delegated the authority to make

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the "significant change" determination to the Director, Office of Nuclear Reactor Regulation.

By application dated November 13, 1991, the Public Service Company of New Hampshire (PSNH or licensee), through its New Hampshire Yankee division, pursuant to 10 CFR 50.90, requested the transfer of its 35.56942% ownership interest in the Seabrook Nuclear Power Station, Unit 1 (Seabrook) to a newly formed, wholly owned subsidiary of Northeast Utilities (NU). This newly formed subsidiary will be called the North Atlantic Energy Corporation (NAEC). The Seabrook construction permit antitrust review was completed in 1973 and the operating license antitrust review of Seabrook was completed in 1986. The staffs of the Policy Development and Technical Support Branch, Office of Nuclear Reactor Regulation and the Office of the General Counsel, hereinafter referred to as the "staff", have jointly concluded, after consultation with the Department of Justice, that the proposed change in ownership is not a significant change under the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14).

On February 28, 1991, the staff published in the Federal Register (56 Fed. Reg. 8373) receipt of the licensee's request to transfer its 35.56942% ownership interest in Seabrook to NAEC. This amendment request is directly related to the proposed merger between NU and PSNH. The notice indicated the

reason for the transfer, stated that there were no anticipated significant safety hazards as a result of the proposed transfer and provided an opportunity for public comment on any antitrust issues related to the proposed transfer. The staff received comments from several interested parties -- all of which have been condidered and factored into this significant change finding.

The staff reviewed the proposed transfer of PSNH's ownership in the Seabrook facility to a wholly owned subsidiary of NU for significant changes since the last antitrust review of Seabrook, using the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14). The staff believes that the record developed to date in the proceeding at the Federal Energy Regulatory Commission (FERC) involving the proposed NU/PSNH merger adequately portrays the competitive situation(s) in the markets served by the Seabrook facility and that any anticompetitive aspects of the proposed changes have been adequately addressed in the FERC proceeding. Moreover, merger conditions designed to mitigate possible anticompetitive effects of the proposed merger have been developed in the FERC proceeding. The staff further believes that the FERC proceeding addressed the issue of adequately protecting the interests of competing power systems and the competitive process in the area served by the Seabrook facility such that the changes will not have implications that

warrant a Commission remedy. In reaching this conclusion, the staff considered the structure of the electric utility industry in New England and adjacent areas and the events relevant to the Seabrook Nuclear Power Station and Millstone Nuclear Power Station, Unit 3 construction permit and operating license reviews. For these reasons, and after consultation with the Department of Justice, the staff recommends that a no affirmative "significant change" determination be made regarding the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1991.

Based upon the staff analysis, it is my finding that there have been no "significant changes" in the licensees' activities or proposed activities since the completion of the previous antitrust review.

Signed on February 9, 1992 by Thomas E. Murley, Director, of the Office of Nuclear Reactor Regulation.

Any person whose interest may be affected by this finding may file, with full particulars, a request for reevaluation with the Director of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission , Washington, DC 20555 within 30 days of the initial publication of this notice in the Federal Register. Requests for reevaluation of the no significant change

determination shall be accepted after the date when the Director's finding becomes final, but before the issuance of the operating license amendment, only if they contain new information , such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

Dated at Rockville, Maryland, this 11th day of February 1992.

FOR THE NUCLEAR REGULATORY COMMISSION

Anthony T. Gody, Chief
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SEABROOK NUCLEAR STATION, UNIT 1

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

DOCKET NO. 50-443A

STAFF RECOMMENDATION

NO POST OL SIGNIFICANT ANTITRUST CHANGES

AUGUST 1991

CONTENTS

I. THE SEABROOK AMENDMENT APPLICATIONS

By letters dated November 13, 1990, the Nuclear Regulatory Commission (NRC or Commission) staff (staff) received post Operating License (OL) amendment applications requesting two license changes: 1) to transfer operating responsibility and management of the Seabrook facility from New Hampshire Yankee, the current operator, to a proposed entity called North Atlantic Energy Service Company (NAESCO); and 2) to authorize the ownership transfer of approximately 35 percent of the Seabrook facility from Public Service Company of New Hampshire (PSNH) to a proposed entity called North Atlantic Energy Corporation (NAEC). Both NAESCO and NAEC will be wholly owned subsidiaries of Northeast Utilities (NU) and formed solely to operate Seabrook and own PSNH's share of the facility respectively. The transfer of operating responsibility to NAESCO and the proposed transfer of PSNH'S ownership in Seabrook to NAEC introduce new entities associated with the Seabrook facility.

The applicant and the licensee suggest that no antitrust review of these proposed changes is required by the Atomic Energy Act. The staff believes the legislative history and reading of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, require the staff at least to review new owners of nuclear power production facilities for the purpose of determining whether the adding of the new owner to the license will constitute a significant change. The staff recommends that the Director of the Office of Nuclear Reactor

Regulation conclude from the staff's analysis herein and consultation with the Department of Justice (Department or DOJ) that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license. The basis for staff's recommendation and determination are provided herein.

II. APPLICABLE STATUTE AND REGULATIONS

Section 105 of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, designates when and how antitrust issues may be raised. *See Houston Lighting & Power Co.*, (South Texas Project), CLI-77-13, 5 NRC 1303, 1317 (1977). In connection with the legislation to remove the need to make a finding of practical value before issuing a commercial license,[1] in 1970, the Joint Committee

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[1] Before the amendment, the Commission could issue a commercial license for a production or utilization facility only after it had made a finding of "practical value" of the facility for industrial or commercial purposes. Public Law 91-560 (84 Stat. 1472)(1970), section 3, amended section 102 of the Atomic Energy Act (AEA). Prior to the amendment, section 102 of the AEA read as follows:

> SEC.102. FINDING OF PRACTICAL VALUE.-Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or

(continued...)

on Atomic Energy also examined section 105c. Before the 1970 amendment, section 105c provided that whenever the Commission proposed to issue a commercial license, it would notify the Attorney General of the proposed license and the proposed terms and conditions thereof. The Attorney General would then be obliged to advise the Commission "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws and such advice will be published in the *Federal Register*."[2] The Joint Committee, recognizing that the language and potential effect of the existing section 105c were not sufficiently clear, decided to amend section 105c to clarify and revise this phase of the Commission's licensing process. *See* 116 Cong. Rec. S19253.

Subsection 105c(1), as amended, requires the Commission to transmit, to the Attorney General, a copy of any license application to construct or operate a nuclear facility for the

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[1](...continued)
commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.

[2] Prior to the 1970 amendment, antitrust review could occur only following a Commission finding, under section 102 of the Atomic Energy Act, that a type of facility had been sufficiently developed to be of "practical value" for industrial or commercial purposes. Because the Commission never made such a finding, no antitrust reviews occurred. Power reactor construction permits and operating licenses before 1970 were issued pursuant to section 104b, which applied to facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Attorney General's advice as to whether the grant of an application will create or maintain a situation inconsistent with the antitrust laws. Subsection 105c(2) provides an exception to the requirements of subsection 105c(1) for a license to operate a nuclear facility for which a construction permit was issued under section 103, unless the Commission determines that such review is advisable on the ground that "significant change" in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission in connection with the construction permit for the facility.

The Commission has promulgated regulations regarding the submittal of information in connection with the prelicensing antitrust review of facilities and the forwarding of antitrust information to the Attorney General. *See* 10 C.F.R. §§ 2.101, 2.102, and 50.33a. Section 50.33a requires the submission of the information specified in 10 C.F.R. Part 50, Appendix L (Information Requested By The Attorney General For Antitrust Review Facility License Applications). The publication in the *Federal Register* of a notice of the docketing of the antitrust information required by Part 50, Appendix L is required by 10 C.F.R. § 2.101(c). Subsections 2.101(e) and 2.102(d) address the situation in which an antitrust review has been conducted as part of the application for a construction permit and the application for an operating license is now before the Commission. Related to this, the Commission has delegated to the Director of Nuclear Reactor Regulation (NRR) or

the Director of Nuclear Material Safety and Safeguards (NMSS), as appropriate, its authority under subsection 105c(2) of the AEA to make the determination in connection with an application for an operating license as to whether "significant changes" in the licensee's activities, or proposed activities under its license have occurred subsequent to the antitrust review conducted in connection with the construction permit application. *See* 10 C.F.R. §§ 2.101(e)(1) and 2.102(d)(2).[3]

On October 22, 1979, the Commission amended 10 C.F.R. § 55.33a to reduce or eliminate the requirements for submission of antitrust information in certain *de minimis* instances. In publishing the rule, the Commission stated its conclusion that applicants whose generating capacity at the time of the application is 200 MW(e) or less are not required to submit the information specified in Appendix L of Part 50, unless specifically requested to do so. The

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[3] In connection with the delegation, the Commission approved procedures to be used until such time as regulations implementing the procedures were adopted. Although never formally published, the procedures are available as attachments to SECY-79-353 (May 24, 1979) and SECY-81-43 (January 19, 1981). On March 9, 1982, the Commission amended its regulations to incorporate final procedures implementing the Commission's delegation of authority to make the "significant changes" determination to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate. 47 Fed. Reg. 9963, March 9, 1982. The amended regulation provides that the Director, NRR or NMSS, as appropriate, after inviting the public to submit comments regarding antitrust aspects of the application and after reviewing any comments received, is authorized to make a significant change determination and, depending on his determination, either refer the antitrust information to the Attorney General or publish a finding of no significant changes in the *Federal Register* with an opportunity for requesting reevaluation of the finding.

Commission further stated that it believed that utilities smaller than these generally would have a negligible effect on competition. Fed. Reg. 60715, October 22, 1979.

All applicants for an NRC utilization facility license who are not determined by the staff to be *de minimis* applicants, undergo an extensive antitrust review at the construction permit (CP) stage and a review at the operating license (OL) stage. The CP review is an in depth analysis of the applicant's competitive activities conducted by the DOJ in conjunction with the staff. The competitive analysis associated with the OL stage of review is conducted by the staff, in consultation with the Department, and is focused on significant changes in the applicant's activities since the completion of the CP antitrust review (or any subsequent review). In each of these reviews, both the staff and the Department concentrate on the applicant's activities and determine whether the applicant's conduct o. changes in applicant's conduct creates or maintains a situation inconsistent with the antitrust laws.

III. POST INITIAL OPERATING LICENSE ANTITRUST REVIEWS

A. General

As indicated *supra*, the NRC has established procedures by which prospective licensees of nuclear production facilities are reviewed

during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. The AEA does not specifically address the addition of new owners or operators after the initial licensing process. The legislative history discusses, to a limited extent, some types of amendments.[4] However, neither section 105c of the AEA or the Commission's regulations deal directly with applications to change ownership of facilities with operating licenses.[5] Indeed, in its *South Texas* decision, the Commission stated that, "we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment ... where an application for transfer of control of a license has been made ..." *South Texas Project*, 5 NRC at

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[4] The report by the Joint Committee on Atomic Energy notes that:

> The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for the purposes of triggering subsection 105 c., other applications which may be filled during the licensing process.

H. Rep. 91-1470, 91st Cong. 2d Sess., at 29 (1970).

[5] Applications for construction permits, for amendment of construction permits, and applications for initial operating licenses are not included here.

1318. The Commission went on to note that "[a]uthority [for antitrust review of a license transfer], not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b)."[6] *Id.* Unfortunately, the Commission did not explain how its regulations could grant authority not given by the statute.

The Commission has considered, however, the matter of adding a licensee after issuance of a construction permit, but before issuance of the initial operating license. In *Detroit Edison, et al.*, (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978) *aff'd* ALAB-475, 7 NRC 752, 755-56 n.7 (1978), the Licensing Board denied a petition to intervene and request for an antitrust hearing by a member/ratepayer of the distribution cooperative that purchased all of its power from a cooperative that would become a co-licensee of the power plant. In considering a jurisdictional argument, the Board, relying on the Congressional intent and purpose behind section 105c of the AEA cited in n.4 *supra*, stated that "[s]ince the two cooperatives in this case are required to submit an application to become co-licensees, these constitute *their* 'initial application for a construction permit'"

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[6] 10 C.F.R. § 50.80(b) provides in part that an application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and *if the license to be issued is a class 103 license, the information required by § 50.33a* (Information requested by the Attorney General for antitrust review).

(emphasis in original). *Id.*, at 588. In *Summer*, the Commission referred to *Fermi* for the proposition that the addition of a co-owner as a co-licensee was, in effect, an *initial application* of the co-owner and as such required formal antitrust consideration, stating, "[t]hat decision was based on the necessity for an in-depth review at the CP stage of *all applicants*, lest any applicant escape statutory antitrust review" (emphasis added). *South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 831 (1980).

The legislative history of section 105c and the Commission's guidance in *South Texas* might be read to indicate that Commission antitrust review, if not limited to the initial licensing process, is at least an unsettled question regarding operating license amendments. However, *Fermi* and *Summer* stand for the proposition that new license applicants are initial applicants for purposes of a section 105c antitrust review. Further, the Commission indicated in *Summer* that in such situations a formal antitrust inquiry is required. *See Id.*, at 830-31. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests.

The staff has received applications for operating license amendments that 1) request the addition of a new owner or seek Commission permission to transfer control from an existing to a new

owner or 2) request placing a non-owner operator on a license. The action the NRC Staff has taken has been particular to each situation. In general, post initial operating license amendment applications involving a change in ownership have included an antitrust review by the staff and consultation with the Attorney General. The review by the staff focuses on significant changes in the competitive market caused by the proposed change in ownership since the last antitrust review for the facility and its licensees. The staff review takes into account related proceedings and reviews in other federal agencies (e.g. FERC, SEC, or DOJ).

B. Change In Ownership

Although not specifically addressed by regulation, the staff has evolved a process for meeting the Commission's direction in the *Summer* decision to conduct an antitrust inquiry for license amendments after issuance of the operating license. The receipt of an application to add a new owner to an operating license or to seek Commission permission to transfer control from an existing to a new owner, for section 103 utilization facilities which have undergone antitrust review during the initial licensing process, is noticed in the *Federal Register*, inviting the public to express views relating to any antitrust issues raised by the application, and advising the public that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensees' activities or proposed activities have

occurred since the completion of the previous antitrust review. The staff's awareness of any related federal agency reviews of the request (e.g. FERC, SEC, or DOJ) and the staff's intention to consider those related proceedings are also noted in the *Federal Register* notice. The staff reviews the application after the comment period, so that the staff can perform the review with benefit of public comment, if any, and consultation with the Attorney General. If the Director, NRR, finds no significant change, the finding is published in the *Federal Register* with an opportunity for the public to request reconsideration as provided for in 10 C.F.R. § 2.101(e) for initial license applicants. If the Director, NRR finds significant change, the matter is referred to the Attorney General for formal antitrust review.

In conducting the significant change review, the staff uses the criteria and guidance provided by the Commission in its two *Summer* decisions for making the significant change determination for OL applicants.[7]

> The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are attributable to the licensee(s); and (3) have

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[7] In CLI-80-28, the Commission enunciated the criteria, but deferred its actual decision regarding the petition to make a significant changes determination that was before it. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980). In CLI-81-14, the Commission denied the petition. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

> anti-trust implications that would most likely warrant some Commission remedy.

Summer, 11 NRC at 824. To warrant an affirmative significant change finding, thereby triggering a formal OL antitrust review that seeks the advice of the Department of Justice on whether a hearing should be held, the particular change(s) must meet all three of these criteria. In its second *Summer* decision, the Commission provided guidance regarding the criteria and, in particular, the meaning of the third criterion in determining the significance of a change.

> As the staff recognized, "this third criterion appropriately focuses, in several ways, on what may be 'significant' about any changes since the last...review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive *or have de minimis anticompetitive effects*." (Emphasis provided) The staff correctly discerned that the third criterion has a further analytical aspect regarding remedy: "Not only does [it] require an assessment of whether the *changes* would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes by their nature would require." The third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance.

South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862, 872-73 (1981).

C. Change In Or Addition Of Non-Owner Operator

Changes in a nuclear plant operator, without any change in ownership, may also carry the potential of abuse of market power by the operator. However, the staff has determined that a plant operator who has no control over the marketing of the power or energy produced from the facility will not, under normal circumstances, be in a position to exert any significant amount of market power in the bulk power services market associated with the facility. The staff makes an effort in these cases to reach agreement on a license condition requiring new plant operators to agree to be divorced from the marketing or brokering of power or energy from the facility in question and hold existing owners accountable for the operator's actions. If the prospective new operator and the owners agree to appropriate license conditions that reduce the potential for impact on plant ownership or entitlement to power output, as determined by the staff, the application to add or change a non-owner operator is viewed as an application falling within the *de minimis* exception for submitting antitrust information provided for in 10 C.F.R. § 50.33a.

The Commission has exempted *de minimis* applicants from the requirements to submit antitrust information and, therefore, the publication for comment of such information, unless specifically requested by the Commission. *See* 10 C.F.R. § 50.33a. The Commission has determined that such applicants generally would have a negligible effect on competition. *See* 44 Fed. Reg. 60715, October 22, 1979. The staff has determined that, with an

appropriate license condition regarding the marketing and brokering of power, the potential for a non-owner operator to have an affect on competition in the bulk power market is effectively mitigated. Therefore, such an operator is, as a practical matter, the same as *a de minimis* applicant with respect to its ability to affect competition. Normally, no further antitrust review of the non-owner operator will be conducted by the staff.

IV. PREVIOUS SEABROOK NRC ANTITRUST REVIEWS

A. Construction Permit Review

By letter dated December 4, 1973, the Attorney General issued advice to the Atomic Energy Commission pursuant to Public Service Company of New Hampshire's (PSNH), the lead applicant,[8] application for a construction permit for the Seabrook Nuclear Power Station Units No. 1 and No. 2. In its advice letter, the Department expressed concern over several allegations by smaller power systems in the New England bulk power services market that they were unable to gain access to low cost bulk power supply on the same basis as

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[8]PSNH was the majority owner with 50% of the plant at the time the time of the Department's advice letter in 1973. Since this initial review, there have been several changes in ownership and ownership shares in Seabrook. Existing owners are as follows: PSNH (35.56942%); United Illuminating (17.5%); EUA Power Corporation (12.1324%) Connecticut Light & Power Company (4.05985%); Hudson Light & Power Department (0.07737%); Vermont Electric Generation and Transmission Corporative, Inc. (0.41259%); Montaup Electric Company (2.89989%); Canal Electric Company (3.52317%); New England Power Company (11.59340%); Taunton Municipal Lighting Plant (0.10034%); and New Hampshire Electric Cooperative, Inc. (2.17391%)

larger systems in the area. The advice letter stated that as a result of a settlement agreement reached between the privately owned and publicly owned systems in New England that there had been a "dramatic improvement in the relations among the various segments of the electric power industry in New England...." The Department emphasized the importance of the development of the New England Power Pool (NEPOOL) as a regional planning body that would enable participation in bulk power services by all types of power entities throughout New England. The Department concluded,

> ... that the creation of a truly open, non-exclusive NEPOOL means that all systems can have a dependable frame- work within which to obtain fair and non-discriminatory access to economical and reliable bulk power supply.(December 4, 1973 advice letter, p. 4)

As a result of its review, the Department advised the Atomic Energy Commission that there was no need for an antitrust hearing pursuant to the construction permit application for Seabrook.

B. Operating License Review

As noted above, a prospective operating licensee is not required to undergo a formal antitrust review unless the staff determines that there have been "significant changes" in the licensee's activities or proposed activities subsequent to the review by the Department of Justice and the staff at the construction permit stage. The staff completed its OL antitrust review of Seabrook in January

1986. The staff analysis indicated that,

> ...NEPOOL, which was only two years old at the time when the CP antitrust review was performed, appears to have evolved into a framework ensuring access to reliable and economical bulk power supply for all New England utilities. Two provisions of the original pool agreement were found to be discriminatory against smaller utilities and have since been removed. Further, because Seabrook 1 has been designated as a pool-planned unit, access to Seabrook 1 over pool transmission facilities of members is guaranteed for all participants under the terms of NEPOOL.[9]

Based in large part upon the successful formation and operation of NEPOOL, the staff concluded that the changes in the licensees' activities as well as any proposed changes in licensees' activities do not represent "significant changes" as identified in the *Summer* decision and recommended that no formal OL antitrust review be conducted. The staff's antitrust OL review was completed in February 1986 and the Seabrook full power license was issued on March 15, 1990.

C. EUA Power Review

By letter dated March 26, 1986, New Hampshire Yankee, acting as agent for the Seabrook licensees, requested the staff to amend the

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[9]Staff review of Seabrook licensees' changed activity, "Seabrook Station, Unit 1, Public Services Company of New Hampshire, et al, Docket No. 50-443A, Finding of No Significant Antitrust Changes," p. 57.

Seabrook construction permits (Units 1 and 2) to reflect the purchase and transfer of an approximate 12 percent ownership share in the Seabrook facility to EUA Power Corporation (EUA Power), a wholly owned subsidiary of Eastern Utility Associates of Boston, Massachusetts. The amendment requested the transfer of 12 percent ownership to EUA Power and deletion of the following owners as Seabrook licensees: Bangor-Hydro-Electric Company (2.17391%); Central Maine Power Company (6.04178%); Central Vermont Public Service Corporation (1.59096%); Fitchburg Gas and Electric Light Company (0.86519%); and Maine Public Service Company (1.46056%).

Even though a sister company, Montaup Electric Company (both are wholly owned by Eastern Utilities Associates), had previously undergone an antitrust review in conjunction with its participation in Seabrook, EUA Power represented a new owner prior to issuance of the Seabrook full power operating licensee and was required to undergo a formal antitrust review by the Department of Justice. Accordingly, EUA Power submitted pertinent 10 C.F.R. Part 50, Appendix L information to the staff regarding its operations and competitive activity. A notice of receipt of this information, which provided the opportunity for a 60 day comment period on the antitrust issues regarding the proposed ownership transfer, was published in the *Federal Register* on May 23, 1986.

By letter dated July 1, 1986 the Department advised the staff that there was,

> ... no evidence that the proposed participation by EUA Power Company in the Seabrook Units would either create or maintain a situation inconsistent with the antitrust laws under Section 105(c). We do not, therefore, believe it is necessary for the Commission to hold an antitrust hearing in this matter. (Department of Justice advice letter, p.1)

The Department's letter was published in the *Federal Register* on July 17, 1986 and provided for interested persons to request a hearing and file petitions to intervene. There were no such requests and the staff issued an amendment (No. 9) to the Seabrook construction permits authorizing the transfer of ownership effective upon completion of the transfer of ownership shares which was consummated on November 26, 1986. In this instance, there was no need to apply the significant change threshold criteria to the EUA Power amendment review and address the issue of whether the Department of Justice should conduct the review or the staff should issue a significant change determination because the request for ownership change occurred prior to issuance of the full power operating license and consequently, the review involved an amendment to the construction permit and followed construction permit review procedures.

V. CHANGES AT SEABROOK AFTER ISSUANCE OF THE INITIAL OL

The instant amendment requests to transfer PSNH'S ownership in Seabrook to a proposed new entity, NAEC, and change the plant operator from New Hampshire Yankee to a proposed new operating

entity, NAESCO, represent direct outgrowths of the bankruptcy proceeding initiated by PSNH in January 1988. Though the bankruptcy proceeding and PSNH's financial status are not the focus of the instant review, it is significant to note that PSNH is dependent upon Seabrook as its principal source of generating capacity and operating revenue. This dependence on one source of operating revenue left PSNH highly susceptible to fluctuations in the business cycle that affect different regions of the country at different periods in the cycle. During the mid 1980's commerce and industry in New England were growing dramatically. Economic growth exceeded projections for planned electric generating capacity.[10] However, as rapidly as the New England economy advanced in the mid 1980's, it declined equally a fast in the late 1980's. PSNH filed for bankruptcy in January 1988 and EUA Power Corporation, another Seabrook co-owner heavily dependent upon the sale of Seabrook power and energy, filed for bankruptcy in early 1991.

There were other factors that contributed to PSNH'S financial difficulties in the 1980's, e.g., development and approval of emergency evacuation plans for Seabrook and state regulatory proceedings involving allowance of Seabrook costs in PSNH'S rate

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[10]EUA Associates, parent company of Montaup Electric Company, a co-owner of Seabrook, formed EUA Power Corporation specifically to purchase a 9 percent ownership share in Seabrook to meet an unexpected shortage, demand for electric power in New England during the late 1980's and 1990's. John F.G. Eichorn, chairman of EUA Associates, was quoted by the Providence, Rhode Island Journal newspaper, as citing NEPOOL electricity demand estimates showing "a serious shortfall developing in New England, which we at EUA are determined to help eliminate." Journal, April 10, 1986.

base. All of these factors culminated in PSNH filing for bankruptcy and the resultant proposal by NU to acquire PSNH. The proposals adding a new owner and a new operator of the Seabrook facility are the principal changes the staff must address in its post OL significant change antitrust review. The staff must determine whether the new owner or the new operator will create or maintain a situation inconsistent with the antitrust laws.

VI. FERC AND SEC REVIEWS

Pursuant to the requirements and jurisdiction of both the Federal Power Act and the Public Utilities Holding Company Act of 1935, NU filed applications with the Federal Energy Regulatory Commission (FERC), on January 5, 1990, and the Securities and Exchange Commission (SEC), on October 5, 1989, respectively, seeking approval of its proposed merger with PSNH. In light of the fact that similar competitive issues are currently being addressed in proceedings at the FERC and SEC and that the findings reached in the FERC and SEC proceedings will be considered by the staff, a brief synopsis of these proceedings follows.

A. FERC Proceeding

Northeast Utilities, acting through a service company called NUSCO, sought approval under Section 203 of the Federal Power Act (enforced by the FERC) to acquire the jurisdictional assets of

PSNH. Section 203 of the Federal Power Act (FPA) requires the FERC to make a determination as to whether the proposed acquisition or merger will be consistent with the public interest. Although the FPA does not specifically charge the FERC with weighing the competitive implications of the merger or acquisition in terms of injury to competition or the competitive process in identifiable markets, in the recent past, the FERC has considered these competitive concerns as inputs to its ultimate determination as to whether the combination creates more benefits than costs, i.e., is in the public interest.

On March 2, 1990, the FERC issued an order granting intervention by all requesting parties and also granted a NU motion to expedite the hearing schedule by requiring that an initial decision be issued no later than December 31, 1990. After extensive discovery, depositions and oral argument, the FERC administrative law judge (ALJ), Jerome Nelson, issued an initial decision on December 20, 1990.[11]

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[11]"On March 7, 1990, NU submitted its direct case, which consisted of the prepared testimony and exhibits of six witnesses. After extensive discovery, including numerous depositions of NU, Staff, intervenor and third party witnesses, the Staff and intervenors filed their respective direct cases on May 25, 1990. The direct cases of staff and intervenors included the prepared testimony and exhibits of 49 witnesses. On June 25, 1990, Staff and intervenors filed cross-rebuttal cases through the prepared testimony and exhibits of 19 witnesses. On July 20, 1990, NU filed its rebuttal case through the prepared testimony and exhibits of 12 witnesses. Twenty-five days of hearings were held during August and September of 1990. Thirty-five witnesses were cross-examined, and 809 exhibits were admitted into evidence. Briefs and reply briefs were filed in October of 1990. Four days of oral argument ended on November 13, 1990." (ALJ Initial Decision, p. 6).

The ALJ made several findings in his initial decision, however, the findings most relevant to the NRC post OL amendment review concern the effect the merger will have on the New England bulk power services market. The ALJ's initial decision indicated that without a detailed set of merger conditions, the "NU-PSNH merger would have anti-competitive consequences." The ALJ found that,

> the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts). (*Id.*, p.15)

The ALJ indicated that the merged company will control 92 percent of the transmission capacity presently serving New England.

> This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices. (*Id.*, p. 16)

The ALJ concluded that merged NU-PSNH will control the principal transmission access routes from northern New England to southern New England as well as 72 percent of the New York, New England transmission corridor path.

> Because PSNH "controls the only transmission lines linking Maine and New Brunswick to the rest of New England"..., Eastern REMVEC utilities will necessarily have to deal with the merged company in order to get power from those areas. The merged company's control

> would also extend to access from New York... NU controls 72% of the New York-New England "interface"... and needs only a small portion of that share for its own use. (*Id.*)

The ALJ's initial decision recommended that the FERC approve the merger only if specific merger conditions were agreed upon by the merging parties. There are two principal conditions discussed by the ALJ designed specifically to address the new NU-PSNH's market power and particularly any potential for abuse of this newly created market power vis-a-vis other power systems in New England. The first condition is basically a rework of a proposal initially offered by NU-PSNH dealing with the merged company's policy regarding transmission over its power grid. A set of General Transmission Commitments was developed by the ALJ which dealt with various degrees of priority access and time horizons depending upon the individual power supply situation in question. This policy commitment, according to the ALJ, would reassure non-dominant power systems in New England a form of meaningful access to the transmission facilities required to fulfill their bulk power supply requirements.

The second major condition that addresses the transmission dominance of the new NU-PSNH is termed the, "New Hampshire Corridor Proposal." This proposal serves to open up the flow of power from Canada to New England and from northern New England to the heavily populated southeastern portion of New England. The Corridor Proposal allocated a total of 400 MW of transmission capacity with

200 MW allocated to New England Power Company and 200 MW allocated to southern New England utilities. These two transmission proposals recommended by the FERC ALJ are the most relevant to the staff's review of New Hampshire Yankee's requests to change ownership and the operator of the Seabrook facility.

On August 9, 1991, the FERC conditionally approved the NU merger with PSNH. To mitigate the merger's likely anticompetitive effects, the FERC strengthened NU's General Transmission Commitment and noted that it will construe NU's voluntary commitment very strictly. NU can not give higher priority to its own non-firm use than to third party requests for firm wheeling in allocating existing transmission capacity. The FERC also ruled that independent power producers and qualifying facilities are eligible for transmission access on the New Hampshire Corridor. *See Northeast Utilities Service Company* (Re Public Service Company of New Hampshire) FERC slip op. No. 364 (August 9, 1991).

B. SEC Proceeding

NU filed an application with the SEC for approval under the Public Utility Holding Company Act of 1935 (PUHCA) of its proposed merger with PSNH. The SEC issued a notice of the filing of the application on February 2, 1990 (Holding Co. Act Release No. 25032). Fourteen hearing requests from 41 separate entities were received and four of these requests, representing 21 entities, were

subsequently withdrawn. Moreover, eight entities filed comments or notices of appearance. The segment of the SEC review most relevant to staff's post OL amendment review revolves around Section 10(b)(1) of the PUHCA that requires the SEC to consider possible anticompetitive effects of the proposed NU-PSNH acquisition. The SEC in a Memorandum Opinion dated December 21, 1990 approved NU's proposed acquisition of PSNH--indicating that all PUHCA requirements, including Section 10(b)(1), had been fulfilled. In its initial decision, the SEC stated that,

> Given the approximate size of the Northeast--PSNH system and the resultant economic benefits discussed herein..., we conclude that the Acquisition does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied. (SEC Initial Decision, p. 40)

The SEC's analysis, as reflected in its initial decision, considers the economic benefits associated with a merged NU-PSNH and not so much the potential for abuse of market power that may be enhanced by the merger. The initial decision states that the,

> transfer to North Atlantic will merely move the asset from one Northeast subsidiary to another and should have no impact on competitive conditions. (*Id.*, p.58)

The SEC order approving the merger was appealed by two intervenors in the SEC proceeding--the City of Holyoke Gas and Electric

Department and the Massachusetts Municipal Wholesale Electric Company (petitioners). Petitioners filed a request for rehearing of the initial decision, arguing that the SEC erred in approving the NU-PSNH acquisition by failing to provide sufficient analysis of the anticompetitive effects of the acquisition. Petitioners based much of their argument for rehearing upon the FERC ALJ's December 20, 1990 decision which indicated that an unconditioned NU-PSNH merger would have significant anticompetitive effects upon the New England bulk power services market.

In a Supplemental Memorandum Opinion and Order (Supplemental Memorandum) dated March 15, 1991, the SEC granted petitioners a reconsideration of the SEC's initial decision.

> In our December order, we recognized that the Acquisition would decrease competition, but concluded that the Acquisition's benefits would outweigh its anticompetitive effects. The petitioners challenge this determination, arguing that the Commission ignored the anticompetitive effects of the merged company's control of transmission facilities and surplus power. (Supplemental Memorandum, p.3)

The SEC's Supplemental Memorandum indicated that its initial decision focused more on the size and corporate structure of NU-PSNH rather than the merged company's ability to control access to transmission or excess capacity. The Supplemental Memorandum stated that even though the SEC's principal focus was on the size and structure of the merged company, the competitive access issues

were considered and the SEC concluded that, "The merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior." (Supplemental Memorandum, p.5) However, the SEC relied upon the transmission commitments made by NU to mitigate any possible anticompetitive effects of the merger.[12]

The Supplemental Memorandum recognized that both the SEC and the FERC "have statutory responsibilities with respect to the anticompetitive consequences of mergers in the public-utility industry". (*Id.*, p.6). However, the SEC also recognized that the [illegible] the Federal Power Act and the Public Utility Holding Company Act are different in that each agency pursues administration of each act with different goals for regulating members of the electric utility industry. As a result, the SEC deferred the question of anticompetitive consequences and its ultimate approval of the proposed merger to the FERC.

> Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the Commission, [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look

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[12] The initial FERC decision found the commitments made by NU to be insufficient to remedy the potential anticompetitive effects of the merger and recommended additional terms and conditions be imposed upon the merged company as a condition for FERC approval of the merger.

> to the FERC's expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the acquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the FPA. (*Id.*, p.9)

VII. AMENDMENT APPLICATIONS COMMENTS RECEIVED BY THE STAFF

The staff, in accordance with 10 C.F.R. § 2.101(e)(1), published receipt of New Hampshire Yankee's request to amend the Seabrook OL in the *Federal Register* and provided interested parties the opportunity to comment on the antitrust issues raised by the proposed acquisition on February 28, 1991.[13] The staff received comments from the following entities or their representatives: 1) New Hampshire Electric Cooperative (April 1, 1991,); 2) Massachusetts Municipal Wholesale Electric Company (April 1, 1991); 3) City of Holyoke Gas and Electric Department (April 1, 1991); 4) Hudson Light and Power Department (April 4, 1991); and 5) Taunton Municipal Lighting Plant (April 10, 1991). By letter dated April 22, 1991, counsel for Connecticut Light and Power Company and PSNH responded to these comments.[14] The comments from participants in the FERC and SEC proceeding by and large mirrored the positions taken by the commenters in those proceedings. The comments

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[13] A similar notice regarding the change in operator from New Hampshire Yankee to NAESCO, was published in the *Federal Register* on March 6, 1991.

[14] By letter dated June 13, 1991, City of Holyoke Gas and Electric Department (HG&E) replied to the Connecticut Light and Power (CL&P) and PSNH response. By letter dated July 9, 1991, CL&P and PSNH responded to the HG&E reply. By letter dated July 22, 1991, HG&E replied to the CL&P and PSNH July 9, 1991 response.

received are summarized below with the staff analysis of each comment.

A. New Hampshire Electric Cooperative (NHEC)

Comment

NHEC is a transmission dependent utility (TDU), i.e., "entirely dependent on NU or PSNH for their bulk power transmission needs". NHEC states that without access to NU's or PSNH's transmission facilities it cannot actively compete in the New England wholesale bulk power services market. NHEC asserts that the proposed acquisition of PSNH by NU will concentrate its only source of essential transmission service in the hands of its principal competitor. NHEC cites the initial FERC decision as evidence that the proposed merger, if unconditioned, will have an adverse impact on the competitive process in the New England bulk power services market. NHEC also states that recent developments which have not been a part of the FERC record are relevant to the NRC review associated with the Seabrook post OL amendment applications.

NHEC wishes to purchase partial requirements power from another supplier, New England Power Company (NEP), rather than PSNH. NHEC and NEP entered into a long-term power supply contract on January 9, 1991; however, NHEC needs access to PSNH's transmission grid to receive the NEP power. PSNH has indicated that NHEC is contractually prohibited from taking any other off system power purchases during the term of its power supply contract with PSNH

and as a result PSNH would not approve use of its transmission grid until the contractual dispute between PSNH and NHEC is resolved.

NHEC contends that the proposed acquisition of PSNH by NU is anticompetitive and under the NRC's *Summer* criteria, represents a "significant change". NHEC seeks relief by requiring NU to,

> . . . commit before this Commission that it will provide NHEC all transmission needed for NHEC to purchase power from other sources . . . .

Staff Analysis

The staff believes that the issue described by NHEC in its April 1, 1991 filing to the staff primarily involves a contract dispute with PSNH and NU over transmission rights pertaining to power purchases by NHEC from New Brunswick. Presently, NHEC is taking partial requirements wholesale power from PSNH under a 1981 contract. A dispute has arisen between NHEC and PSNH (now NU, given its proposed acquisition of PSNH) regarding the terms under which the contract can be terminated. PSNH states that the contract requires NHEC to provide five years notice prior to cancelling the contract and switching to a different supplier. NHEC states that the contract provides for termination upon NHEC joining NEPOOL and that the recent NHEC-NEP purchase agreement and NHEC's ownership interest in Seabrook provide the basis for NEPOOL membership.

This contract dispute, which forms the linchpin for NHEC's argument

that it is dependent upon NU's transmission grid is presently being interpreted before the FERC. The staff believes that it is appropriate for this dispute to be resolved under the auspices of the FERC's jurisdiction over wholesale power and transmission tariffs and the terms and conditions associated with such agreements. The staff sees no need for the NRC to enter into a contract dispute that is under review by the FERC. Should the PSNH-NHEC contract dispute be resolved in NHEC's favor, i.e., enabling NHEC to terminate the contract without giving a five year notice, the merger condition recommended by the FERC ALJ and commitments made by NU to provide transmission dependent utilities transmission services (cf., PSNH and Connecticut Power & Light Company Comments to NRC staff dated April 22, 1991, pp. 29-30), should adequately resolve the competitive concerns raised by NHEC.

B. Massachusetts Municipal Wholesale Electric Company (MMWEC)

Comment

MMWEC is a co-owner (11.5934%) of the Seabrook plant. In its comments to the NRC, MMWEC states that the proposed acquisition of PSNH by NU is anticompetitive, notwithstanding the merger conditions recommended by the FERC ALJ, and suggests that the Director of the Office of Nuclear Reactor Regulation find, pursuant to *Summer*, that significant changes have occurred since the Attorney General's advice letter was issued in December 1973.

MMWEC contends that the standard of review of mergers required by

the FERC under the FPA is different than that required by the NRC under the Atomic Energy Act. MMWEC states that this difference permits anticompetitive acquisitions under the FPA if it is determined that the public interest is served by the acquisition (or merger), whereas the NRC must address the competitive implications of activities of licensees "irrespective of any compelling public interest." (MMWEC comments, p.3)

Moreover, MMWEC requests the NRC to address the anticompetitive aspects of NU's management and operation of Seabrook--an area not covered in the FERC ALJ's initial decision. According to MMWEC,

> NU is executing a plan whereby it has separated the Seabrook management function and ownership function from each other and utilized its market power to insulate itself, those functions and its other affiliates from any liability, except liability imposed by willful misconduct. (*Id.*, p.5)

MMWEC's concerns revolve around a July 19, 1990 agreement reached among Seabrook owners holding approximately 70 percent of the facility. This agreement provides for the transfer of the managing and operating agent from New Hampshire Yankee to a proposed wholly owned NU subsidiary, NAESCO. An exculpatory clause in the July 19, 1990 agreement, according to MMWEC,

> . . . would not only free NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. MMWEC cannot insure any

> reckless or negligent conduct of the Managing Agent or its affiliates. (*Id.*)

MMWEC requests the NRC to act to prevent NU from maintaining a situation inconsistent with the antitrust laws. MMWEC suggests that the NRC condition the approval of the license transfer to "require appropriate amendment of the Joint Ownership Agreement and to prohibit NAECO, & NAESCO and their affiliates from freeing themselves from liability for misconduct." (*Id.*, p.6)

Staff Analysis

MMWEC's principal concern is that NU used its market power in an anticompetitive manner in formu?ating a July 19, 1990 agreement that established parameters by which the Seabrook facility would be managed and operated. Moreover, MMWEC asserts that this agreement frees,

> . . .NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. (MMWEC comments, p. 5)

MMWEC has failed to show how NU has used (abused) its market power in bulk power services in formulating an agreement to install a new managing agent for Seabrook. MMWEC asks the NRC to condition the license transfer by requiring amendment of the Seabrook "Joint Ownership Agreement", to, effectively, make NAECO and NAESCO more accountable for their actions pursuant to their ownership and operation of the Seabrook facility respectively. Based upon the

data available to the staff, it appears as though the July 19, 1990 agreement was consummated in conformance with the Seabrook Joint Ownership Agreement, as amended, and not as a result of any abuse of market power on the part of NU. The staff believes MMWEC's concerns over the degree of liability it must absorb should NAESCO in any way mismanage Seabrook are concerns of a contractual, not competitive, nature and should be raised and addressed before an appropriate forum for these matters, not the NRC.

Moreover, as recognized by MMWEC at page three of its comments, the staff considered the possibility of a new plant operator having an influence over competitive options of the new owners of Seabrook. For this reason, after discussions with the staff, NAESCO agreed to a license condition divorcing itself from the marketing or brokering of power or energy produced by Seabrook. The license condition was designed to eliminate NAESCO's ability to exercise any market power, if evident, and obviated the need to conduct a further competitive review of NAESCO. For the reasons stated above, MMWEC's request to condition the Seabrook license that frees it from NAESCO's liability should be denied.

C. City Of Holyoke Gas & Electric Department (HG&E)

Comment

HG&E is a municipally owned electric system serving primarily western Massachusetts. "HG&E lies within the service territory of Western Massachusetts Electric Company ("WMECO"), a wholly-owned

subsidiary of NU." (HG&E comments, p.2) HG&E generates no power on its own and relies heavily on the transmission facilities of PSNH to supply approximately 36 percent of its load from the Point Lepreau nuclear plant in New Brunswick, Canada. According to HG&E,

> The increase in control that the merged entity will exercise over generation (including power from Seabrook) and transmission capacity in New England represents a "significant change" from the activities of the current licensee--an independent PSNH. (HG&E comments, p.3)

HG&E contends that NU-PSNH will wield significantly more market power than a stand alone PSNH and given the existing competitive relationship between HG&E and NU, the merged entity, without adequate license conditions and structural alterations in the market, will be able to severely restrict or at a minimum, control the cost effectiveness of a large portion of its power supply that presently flows over PSNH's transmission facilities from New Brunswick.

> Control over generation capacity greatly reduces the opportunities available to purchase power from other utilities in the region; control over transmission capacity eliminates or reduces the ability of HG&E and others to purchase power from utilities outside of New England. (*Id.*, p. 6)

Moreover, HG&E asserts that many of the benefits associated with NEPOOL operation--identified by the Department of Justice and the staff in previous reviews--may be negated by the merged company's "sufficient veto voting power" over proposals put forth by the

NEPOOL Management Committee. HG&E characterizes this change in market power as a "significant change" requiring a full review of the antitrust impacts of the proposed merger, including an analysis by the Attorney General of the antitrust impact of the proposed license transfer.

HG&E addresses ongoing reviews of NU's proposed acquisition of PSNH before other federal agencies and concludes that NRC's antitrust review mandate in Section 105c of the Atomic Energy Act more clearly relates to review of anticompetitive conduct whereas the reviews at the FERC and SEC seem to be more public interest oriented. Consequently, HG&E asserts that the NRC should not assume that these other reviews will adequately condition the proposed merger to remedy the serious competitive issues that the merger would create. HG&E urges the NRC to deny the proposed merger, yet if approved, suggests that NRC require prior approval by the FERC and SEC, and in addition, 1) require NU-PSNH to transmit Point Lepreau power to HG&E for the term of any extended HG&E/Point Lepreau power supply contract with equivalent terms to its current contract, and 2) require NU to divest its subsidiary, Holyoke Water Power Company (HWP) or consolidate HWP into another NU subsidiary, Western Massachusetts Electric Company, thereby subjecting HWP to state regulation as a public utility.

Staff Analysis

HG&E asks the NRC to initiate a full antitrust review of the proposed merger, considering all of the antitrust effects of the

proposed merger pursuant to Section 105c of the Atomic Energy Act. "Such review would include an analysis by the Attorney General of the antitrust impact of the proposed license transfer. 42 U.S.C. SEC.2135" (HG&G comments, P.3) At the conclusion of such a review, HG&E recommends that the NRC deny the proposed license transfer or approve the transfer with license conditions over and above those recommended by the FERC ALJ.

As indicated *supra* (cf., Section III herein), the staff takes into consideration the record establised during related federal agency reviews of the change in ownership. The FERC proceeding and the accompanying recommendations for competition enhancing merger conditions were factors the staff considered in evaluating the instant proposals under the significant change criteria. The staff believes the presence of license conditions recommended by the FERC mitigates the possibility of anticompetitive effects ensuing from such a merger as well as the need for a more formal antitrust review by the Department of Justice. For the reasons stated above, the staff recommends denying HG&E's requests to deny the proposed merger or initiate a formal antitrust review that incorporates an analysis by the Attorney General.

Considering the license conditions associated with the proposed acquisition of PSNH by NU, the staff recommends denying in part and approving in part HG&E's request to attach the FERC and SEC merger conditions and impose two additional conditions as a requirement

for consummation of the acquisition. The staff has relied heavily on the record established to date in the FERC proceeding and in light of the procompetitive merger conditions proposed by the FERC ALJ would recommend approval of the license transfer. The SEC in its Supplemental Memorandum Opinion dated March 21, 1991 deferred its ruling on the competitive aspects of the proposed merger to the FERC.

The staff recommends denying HG&E's request to the NRC to condition the license transfer upon two additional requirements, one providing, in effect, a life of service transmission contract for HG&E's Point Lepreau power and another requiring NU to divest a wholly owned subsidiary in competition with HG&E. There has been nothing established in the FERC record or in the instant proceeding that indicates that HG&E would have been able to renew its transmission contract with PSNH or its power supply contract with New Brunswick upon termination of the existing contracts in 1994. NU, as PSNH's parent company, has not indicated that it plans to deny HG&E transmission capacity to New Brunswick after the proposed merger is consummated. NU has stated that this transmission corridor to New Brunswick will be offered to "all comers," as it were. It appears as though HG&E will be in competition with other potential buyers of Point Lepreau power for both transmission and power and energy. The staff sees no reason to assist HG&E over any other competitor in this regard. Should HG&E enter into a transmission contract with NU-PSNH and find the terms and

conditions in any way anticompetitive, the staff believes the FERC is the proper forum for resolution of tariff issues. The FERC initial decision recognized the increase in market power resulting from the NU-PSNH acquisition, yet recommended conditions to mitigate any abuse of this newfound power.

> The merged company -- with vast power over transmission and control of surplus power -- must offer viable wheeling service in order to alleviate potential anti-competitive consequences. (FERC Initial Division, p. 48) [Emphasis added].

Moreover, the FERC ALJ approved the request by HG&E to require NU to establish the position of "ombudsman" to review NU's service and eliminate the possibility of any anticompetitive consequences resulting from NU's substantial market power in transmission and surplus power in the New England market. Additionally, the FERC ALJ indicated that,

> The ombudsman is not the only avenue for dissatisfied customers. The Commission's Enforcement Task Force maintains a "hotline" ... through which complaints can be received. (FERC Initial Decision, p. 49)

The staff believes these actions taken by the FERC adequately address HG&E's concerns over abuse of NU's post merger market power. For this reason, the staff does not believe that HG&E has established a basis for the staff to conclude that there is a significant change warranting an antitrust review. Furthermore, there is no basis for the staff unilaterally to impose conditions

on the transfer of the license providing for a life of service transmission contract.

Regarding HG&E's second condition, the staff believes that no record has been established to justify HG&E's request to divest Holyoke Water Power Company from NU. According to the FERC initial decision, "The City [HG&E] is covered by the protection given the TDUs, and is entitled to no more in this regard." (FERC Initial Decision, p. 50) Accordingly, divestiture of HWP does not seem warranted solely to, "eliminate NU's incentive to eliminate injury to HG&E...." (HG&E comments, p. 10; emphasis added). The staff recommends denying HG&E's request to divest HWP from NU.

D. Hudson and Taunton

Comment

The Taunton Municipal Lighting Plant (Taunton) and the Hudson Light and Power Department (Hudson) are both owners of the Seabrook facility. Taunton and Hudson are both members of the Massachusetts Municipal Wholesale Electric Company and both have requested the NRC to adopt MMWEC's comments submitted to the NRC via letter dated April 1, 1991.

Staff Analysis

As indicated *supra*, the staff recommended denying MMWEC's request to further condition the Seabrook operating license to free MMWEC from any liability to existing owners that may result from the proposed license transfer. In light of the fact that Hudson and

Taunton adopted MMWEC's comments, the staff also recommends that their requests be denied.

VIII. NRC STAFF FINDINGS

A. Change In Ownership

The ownership transfer of over 35 percent of Seabrook potentially represents a change in the degree of control over the operation of the nuclear facility. However, as indicated *supra*, the FERC has considered the anticompetitive consequences of the proposed merger and a set of extensive merger conditions was proposed by the FERC administrative law judge regarding New Hampshire Yankee's proposals to transfer ownership and operation of the Seabrook facility. In this regard, the staff has relied heavily upon the record established in the FERC initial decision in its review of the instant amendment applications. The FERC merger conditions were designed specifically to mitigate any potential competitive problems associated with the proposed acquisition of PSNH by NU.

The staff has reviewed the proposed transfer of ownership share in the Seabrook facility from PSNH to NU for significant change since the last antitrust review of the Seabrook licensees, using the criteria discussed by the Commission in *Summer*. (*Cf.* Section III herein) The amendment request was dated November 13, 1990, after the previous antitrust review of the facility and therefore the

first *Summer* criterion, that the change has occurred since the last antitrust review, is satisfied. The second *Summer* criterion is satisfied in that the change is the result of the bankruptcy proceeding initiated by PSNH in January 1988 and as such is "reasonably attributable to the licensee[s] in the sense that the licensee[s] ha[ve] had sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review." *Summer*, 13 NRC at 871.

This leaves for consideration the third *Summer* criterion, that the change has antitrust implications that would be likely to warrant Commission remedy. The Commission in *Summer* adopted the staff's view that application of the third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have *de minimis* anticompetitive effects. *See Id.* at 872. The Commission further stated "the third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance." *Id.*

The staff believes that the record developed in the FERC proceeding involving the NU-PSNH acquisition adequately portrays the competitive situation in the New England bulk power services market and that the anticompetitive aspects of the proposed changes are being addressed in the FERC proceeding. The staff further

believes that the actions being taken by the FERC will adequately address concerns regarding the anticompetitive effects of NU's post merger market power such that the change in ownership as approved by the FERC will not have implications that warrant a Commission remedy. Consequently, the third *Summer* criterion has not been satisfied.

Each of the significant change criteria discussed in *Summer* must be met to make an affirmative significant change finding. In this instance, the third criterion has not been met.

B. Addition Of Non-Owner Operator

In light of the license condition developed by the staff and agreed to by NU, NAESCO (the proposed new plant operator), and the other Seabrook licensees, prohibiting NAESCO from marketing or brokering power or energy produced from the Seabrook plant and holding all other Seabrook licensees responsible for NAESCO's actions pursuant to marketing or brokering of Seabrook power, the staff believes the change in plant operator from New Hampshire Yankee to NAESCO will not have antitrust relevance.

IX. CONCLUSION

For the reasons discussed above, and after consultation with the DOJ, the staff recommends that the Director of the Office of

Nuclear Reactor Regulation conclude that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license.

February 13, 1992

Docket No. 50-443A

Mr. H. Huehmer, Manager
Office of Light and Power Department
49 Forest Avenue
Hudson, MA 01749

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Huehmer:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result from this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

(original signed by)
William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

DISTRIBUTION: [HUEHNER]
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PTSB Reading File
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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 13, 1992

Docket No. 50-443A

Mr. H. Huehmer, Manager
Office of Light and Power Department
49 Forest Avenue
Hudson, MA 01749

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Huehmer:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result from this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

W. M. Lambe

William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

[7590-01]

NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50-443A

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.

SEABROOK NUCLEAR STATION, UNIT 1

PROPOSED OWNERSHIP TRANSFER

NOTICE OF NO SIGNIFICANT ANTITRUST CHANGES

AND TIME FOR FILING REQUESTS FOR REEVALUATION

The Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2135, that no significant (antitrust) changes in the licensees' activities or proposed activities have occurred as a result of the proposed change in ownership of Unit 1 of the Seabrook Nuclear Station (Seabrook) detailed in the licensee's amendment application dated November 13, 1991. The finding is as follows:

> Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides that an application for a license to operate a utilization facility for which a construction permit was issued under section 103 shall not undergo an antitrust review unless the Commission determines that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous antitrust review by the Attorney General and the Commission in connection with the construction permit for the facility. The Commission has delegated the authority to make

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the "significant change" determination to the Director, Office of Nuclear Reactor Regulation.

By application dated November 13, 1991, the Public Service Company of New Hampshire (PSNH or licensee), through its New Hampshire Yankee division, pursuant to 10 CFR 50.90, requested the transfer of its 35.56942% ownership interest in the Seabrook Nuclear Power Station, Unit 1 (Seabrook) to a newly formed, wholly owned subsidiary of Northeast Utilities (NU). This newly formed subsidiary will be called the North Atlantic Energy Corporation (NAEC). The Seabrook construction permit antitrust review was completed in 1973 and the operating license antitrust review of Seabrook was completed in 1986. The staffs of the Policy Development and Technical Support Branch, Office of Nuclear Reactor Regulation and the Office of the General Counsel, hereinafter referred to as the "staff", have jointly concluded, after consultation with the Department of Justice, that the proposed change in ownership is not a significant change under the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14).

On February 28, 1991, the staff published in the Federal Register (56 Fed. Reg. 8373) receipt of the licensee's request to transfer its 35.56942% ownership interest in Seabrook to NAEC. This amendment request is directly related to the proposed merger between NU and PSNH. The notice indicated the

reason for the transfer, stated that there were no anticipated significant safety hazards as a result of the proposed transfer and provided an opportunity for public comment on any antitrust issues related to the proposed transfer. The staff received comments from several interested parties -- all of which have been condidered and factored into this significant change finding.

The staff reviewed the proposed transfer of PSNH's ownership in the Seabrook facility to a wholly owned subsidiary of NU for significant changes since the last antitrust review of Seabrook, using the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14). The staff believes that the record developed to date in the proceeding at the Federal Energy Regulatory Commission (FERC) involving the proposed NU/PSNH merger adequately portrays the competitive situation(s) in the markets served by the Seabrook facility and that any anticompetitive aspects of the proposed changes have been adequately addressed in the FERC proceeding. Moreover, merger conditions designed to mitigate possible anticompetitive effects of the proposed merger have been developed in the FERC proceeding. The staff further believes that the FERC proceeding addressed the issue of adequately protecting the interests of competing power systems and the competitive process in the area served by the Seabrook facility such that the changes will not have implications that

warrant a Commission remedy. In reaching this conclusion, the staff considered the structure of the electric utility industry in New England and adjacent areas and the events relevant to the Seabrook Nuclear Power Station and Millstone Nuclear Power Station, Unit 3 construction permit and operating license reviews. For these reasons, and after consultation with the Department of Justice, the staff recommends that a no affirmative "significant change" determination be made regarding the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1991.

Based upon the staff analysis, it is my finding that there have been no "significant changes" in the licensees' activities or proposed activities since the completion of the previous antitrust review.

Signed on February 9, 1992 by Thomas E. Murley, Director, of the Office of Nuclear Reactor Regulation.

Any person whose interest may be affected by this finding may file, with full particulars, a request for reevaluation with the Director of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission , Washington, DC 20555 within 30 days of the initial publication of this notice in the Federal Register. Requests for reevaluation of the no significant change

determination shall be accepted after the date when the Director's finding becomes final, but before the issuance of the operating license amendment, only if they contain new information , such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

Dated at Rockville, Maryland, this 11th day of February 1992.

FOR THE NUCLEAR REGULATORY COMMISSION

Anthony T. Gody, Chief
Policy Development and Technical
Support Branch
Program Management, Policy Development,
and Analysis Staff
Office of Nuclear Reactor Regulation

SEABROOK NUCLEAR STATION, UNIT 1

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

DOCKET NO. 50-443A

STAFF RECOMMENDATION

NO POST OL SIGNIFICANT ANTITRUST CHANGES

AUGUST 1991

CONTENTS

I. THE SEABROOK AMENDMENT APPLICATIONS

By letters dated November 13, 1990, the Nuclear Regulatory Commission (NRC or Commission) staff (staff) received post Operating License (OL) amendment applications requesting two license changes: 1) to transfer operating responsibility and management of the Seabrook facility from New Hampshire Yankee, the current operator, to a proposed entity called North Atlantic Energy Service Company (NAESCO); and 2) to authorize the ownership transfer of approximately 35 percent of the Seabrook facility from Public Service Company of New Hampshire (PSNH) to a proposed entity called North Atlantic Energy Corporation (NAEC). Both NAESCO and NAEC will be wholly owned subsidiaries of Northeast Utilities (NU) and formed solely to operate Seabrook and own PSNH's share of the facility respectively. The transfer of operating responsibility to NAESCO and the proposed transfer of PSNH'S ownership in Seabrook to NAEC introduce new entities associated with the Seabrook facility.

The applicant and the licensee suggest that no antitrust review of these proposed changes is required by the Atomic Energy Act. The staff believes the legislative history and reading of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, require the staff at least to review new owners of nuclear power production facilities for the purpose of determining whether the adding of the new owner to the license will constitute a significant change. The staff recommends that the Director of the Office of Nuclear Reactor

Regulation conclude from the staff's analysis herein and consultation with the Department of Justice (Department or DOJ) that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license. The basis for staff's recommendation and determination are provided herein.

II. APPLICABLE STATUTE AND REGULATIONS

Section 105 of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, designates when and how antitrust issues may be raised. *See Houston Lighting & Power Co.*, (South Texas Project), CLI-77-13, 5 NRC 1303, 1317 (1977). In connection with the legislation to remove the need to make a finding of practical value before issuing a commercial license,[1] in 1970, the Joint Committee

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[1] Before the amendment, the Commission could issue a commercial license for a production or utilization facility only after it had made a finding of "practical value" of the facility for industrial or commercial purposes. Public Law 91-560 (84 Stat. 1472)(1970), section 3, amended section 102 of the Atomic Energy Act (AEA). Prior to the amendment, section 102 of the AEA read as follows:

> SEC.102. FINDING OF PRACTICAL VALUE.-Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or

(continued...)

on Atomic Energy also examined section 105c. Before the 1970 amendment, section 105c provided that whenever the Commission proposed to issue a commercial license, it would notify the Attorney General of the proposed license and the proposed terms and conditions thereof. The Attorney General would then be obliged to advise the Commission "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws and such advice will be published in the *Federal Register*."[2] The Joint Committee, recognizing that the language and potential effect of the existing section 105c were not sufficiently clear, decided to amend section 105c to clarify and revise this phase of the Commission's licensing process. *See* 116 Cong. Rec. S19253.

Subsection 105c(1), as amended, requires the Commission to transmit, to the Attorney General, a copy of any license application to construct or operate a nuclear facility for the

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[1](...continued)
commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.

[2] Prior to the 1970 amendment, antitrust review could occur only following a Commission finding, under section 102 of the Atomic Energy Act, that a type of facility had been sufficiently developed to be of "practical value" for industrial or commercial purposes. Because the Commission never made such a finding, no antitrust reviews occurred. Power reactor construction permits and operating licenses before 1970 were issued pursuant to section 104b, which applied to facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Attorney General's advice as to whether the grant of an application will create or maintain a situation inconsistent with the antitrust laws. Subsection 105c(2) provides an exception to the requirements of subsection 105c(1) for a license to operate a nuclear facility for which a construction permit was issued under section 103, unless the Commission determines that such review is advisable on the ground that "significant changes" in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission in connection with the construction permit for the facility.

The Commission has promulgated regulations regarding the submittal of information in connection with the prelicensing antitrust review of facilities and the forwarding of antitrust information to the Attorney General. *See* 10 C.F.R. §§ 2.101, 2.102, and 50.33a. Section 50.33a requires the submission of the information specified in 10 C.F.R. Part 50, Appendix L (Information Requested By The Attorney General For Antitrust Review Facility License Applications). The publication in the *Federal Register* of a notice of the docketing of the antitrust information required by Part 50, Appendix L is required by 10 C.F.R. § 2.101(c). Subsections 2.101(e) and 2.102(d) address the situation in which an antitrust review has been conducted as part of the application for a construction permit and the application for an operating license is now before the Commission. Related to this, the Commission has delegated to the Director of Nuclear Reactor Regulation (NRR) or

the Director of Nuclear Material Safety and Safeguards (NMSS), as appropriate, its authority under subsection 105c(2) of the AEA to make the determination in connection with an application for an operating license as to whether "significant changes" in the licensee's activities, or proposed activities under its license have occurred subsequent to the antitrust review conducted in connection with the construction permit application. *See* 10 C.F.R. §§ 2.101(e)(1) and 2.102(d)(2).[3]

On October 22, 1979, the Commission amended 10 C.F.R. § 55.33a to reduce or eliminate the requirements for submission of antitrust information in certain *de minimis* instances. In publishing the rule, the Commission stated its conclusion that applicants whose generating capacity at the time of the application is 200 MW(e) or less are not required to submit the information specified in Appendix L of Part 50, unless specifically requested to do so. The

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[3] In connection with the delegation, the Commission approved procedures to be used until such time as regulations implementing the procedures were adopted. Although never formally published, the procedures are available as attachments to SECY-79-353 (May 24, 1979) and SECY-81-43 (January 19, 1981). On March 9, 1982, the Commission amended its regulations to incorporate final procedures implementing the Commission's delegation of authority to make the "significant changes" determination to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate. 47 Fed. Reg. 9963, March 9, 1982. The amended regulation provides that the Director, NRR or NMSS, as appropriate, after inviting the public to submit comments regarding antitrust aspects of the application and after reviewing any comments received, is authorized to make a significant change determination and, depending on his determination, either refer the antitrust information to the Attorney General or publish a finding of no significant changes in the *Federal Register* with an opportunity for requesting reevaluation of the finding.

Commission further stated that it believed that utilities smaller than these generally would have a negligible effect on competition. Fed. Reg. 60715, October 22, 1979.

All applicants for an NRC utilization facility license who are not determined by the staff to be designated applicants, undergo an extensive antitrust review at the construction permit (CP) stage and a review at the operating license (OL) stage. The CP review is an in depth analysis of the applicant's competitive activities conducted by the DOJ in conjunction with the staff. The competitive analysis associated with the OL stage of review is conducted by the staff, in consultation with the Department, and is focused on significant changes in the applicant's activities since the completion of the CP antitrust review (or any subsequent review). In each of these reviews, both the staff and the Department concentrate on the applicant's activities and determine whether the applicant's conduct or changes in applicant's conduct creates or maintains a situation inconsistent with the antitrust laws.

III. POST INITIAL OPERATING LICENSE ANTITRUST REVIEWS

A. General

As indicated *supra*, the NRC has established procedures by which prospective licensees of nuclear production facilities are reviewed

during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. The AEA does not specifically address the addition of new owners or operators after the initial licensing process. The legislative history discusses, to a limited extent, some types of amendments.[4] However, neither section 105c of the AEA or the Commission's regulations deal directly with applications to change ownership of facilities with operating licenses.[5] Indeed, in its *South Texas* decision, the Commission stated that, "we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment ... where an application for transfer of control of a license has been made ..." *South Texas Project*, 5 NRC at

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[4] The report by the Joint Committee on Atomic Energy notes that:

> The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for the purposes of triggering subsection 105 c., other applications which may be filled during the licensing process.

H. Rep. 91-1470, 91st Cong. 2d Sess., at 29 (1970).

[5] Applications for construction permits, for amendment of construction permits, and applications for initial operating licenses are not included here.

1318. The Commission went on to note that "[a]uthority [for antitrust review of a license transfer], not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b)."[6] *Id.* Unfortunately, the Commission did not explain how its regulations could grant authority not given by the statute.

The Commission has considered, however, the matter of adding a licensee after issuance of a construction permit, but before issuance of the initial operating license. In *Detroit Edison, et al.*, (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978) *aff'd* ALAB-475, 7 NRC 752, 755-56 n.7 (1978), the Licensing Board denied a petition to intervene and request for an antitrust hearing by a member/ratepayer of the distribution cooperative that purchased all of its power from a cooperative that would become a co-licensee of the power plant. In considering a jurisdictional argument, the Board, relying on the Congressional intent and purpose behind section 105c of the AEA cited in n.4 *supra*, stated that "[s]ince the two cooperatives in this case are required to submit an application to become co-licensees, these constitute *their* 'initial application for a construction permit'"

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[6] 10 C.F.R. § 50.80(b) provides in part that an application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and *if the license to be issued is a class 103 license, the information required by § 50.33a* (Information requested by the Attorney General for antitrust review).

(emphasis in original). *Id.*, at 588. In *Summer*, the Commission referred to *Fermi* for the proposition that the addition of a co-owner as a co-licensee was, in effect, an *initial application* of the co-owner and as such required formal antitrust consideration, stating, "[t]hat decision was based on the necessity for an in-depth review at the CP stage of *all applicants*, lest any applicant escape statutory antitrust review" (emphasis added). *South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 831 (1980).

The legislative history of section 105c and the Commission's guidance in *South Texas* might be read to indicate that Commission antitrust review, if not limited to the initial licensing process, is at least an unsettled question regarding operating license amendments. However, *Fermi* and *Summer* stand for the proposition that new license applicants are initial applicants for purposes of a section 105c antitrust review. Further, the Commission indicated in *Summer* that in such situations a formal antitrust inquiry is required. *See Id.*, at 830-31. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests.

The staff has received applications for operating license amendments that 1) request the addition of a new owner or seek Commission permission to transfer control from an existing to a new

owner or 2) request placing a non-owner operator on a license. The action the NRC Staff has taken has been particular to each situation. In general, post initial operating license amendment applications involving a change in ownership have included an antitrust review by the staff and consultation with the Attorney General. The review by the staff focuses on significant changes in the competitive market caused by the proposed change in ownership since the last antitrust review for the facility and its licensees. The staff review takes into account related proceedings and reviews in other federal agencies (e.g. FERC, SEC, or DOJ).

B. Change In Ownership

Although not specifically addressed by regulation, the staff has evolved a process for meeting the Commission's direction in the *Summer* decision to conduct an antitrust inquiry for license amendments after issuance of the operating license. The receipt of an application to add a new owner to an operating license or to seek Commission permission to transfer control from an existing to a new owner, for section 103 utilization facilities which have undergone antitrust review during the initial licensing process, is noticed in the *Federal Register*, inviting the public to express views relating to any antitrust issues raised by the application, and advising the public that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensees' activities or proposed activities have

occurred since the completion of the previous antitrust review. The staff's awareness of any related federal agency reviews of the request (e.g. FERC, SEC, or DOJ) and the staff's intention to consider those related proceedings are also noted in the *Federal Register* notice. The staff reviews the application after the comment period, so that the staff can perform the review with benefit of public comment, if any, and consultation with the Attorney General. If the Director, NRR, finds no significant change, the finding is published in the *Federal Register* with an opportunity for the public to request reconsideration as provided for in 10 C.F.R. § 2.101(e) for initial license applicants. If the Director, NRR finds significant change, the matter is referred to the Attorney General for formal antitrust review.

In conducting the significant change review, the staff uses the criteria and guidance provided by the Commission in its two *Summer* decisions for making the significant change determination for OL applicants.[7]

> The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are attributable to the licensee(s); and (3) have

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[7] In CLI-80-28, the Commission enunciated the criteria, but deferred its actual decision regarding the petition to make a significant changes determination that was before it. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980). In CLI-81-14, the Commission denied the petition. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

> anti-trust implications that would most likely warrant some Commission remedy.

Summer, 11 NRC at 824. To warrant an affirmative significant change finding, thereby triggering a formal OL antitrust review that seeks the advice of the Department of Justice on whether a hearing should be held, the particular change(s) must meet all three of these criteria. In its second *Summer* decision, the Commission provided guidance regarding the criteria and, in particular, the meaning of the third criterion in determining the significance of a change.

> As the staff recognized, "this third criterion appropriately focuses, in several ways, on what may be 'significant' about any changes since the last...review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive *or have de minimis anticompetitive effects*." (Emphasis provided) The staff correctly discerned that the third criterion has a further analytical aspect regarding remedy: "Not only does [it] require an assessment of whether the *changes* would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes by their nature would require." The third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance.

South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862, 872-73 (1981).

C. Change In Or Addition Of Non-Owner Operator

Changes in a nuclear plant operator, without any change in ownership, may also carry the potential of abuse of market power by the operator. However, the staff has determined that a plant operator who has no control over the marketing of the power or energy produced from the facility will not, under normal circumstances, be in a position to exert any significant amount of market power in the bulk power services market associated with the facility. The staff makes an effort in these cases to reach agreement on a license condition requiring new plant operators to agree to be divorced from the marketing or brokering of power or energy from the facility in question and hold existing owners accountable for the operator's actions. If the prospective new operator and the owners agree to appropriate license conditions that reduce the potential for impact on plant ownership or entitlement to power output, as determined by the staff, the application to add or change a non-owner operator is viewed as an application falling within the *de minimis* exception for submitting antitrust information provided for in 10 C.F.R. § 50.33a.

The Commission has exempted *de minimis* applicants from the requirements to submit antitrust information and, therefore, the publication for comment of such information, unless specifically requested by the Commission. *See* 10 C.F.R. § 50.33a. The Commission has determined that such applicants generally would have a negligible effect on competition. *See* 44 Fed. Reg. 60715, October 22, 1979. The staff has determined that, with an

appropriate license condition regarding the marketing and brokering of power, the potential for a non-owner operator to have an affect on competition in the bulk power market is effectively mitigated. Therefore, such an operator is, as a practical matter, the same as *a de minimis* applicant with respect to its ability to affect competition. Normally, no further antitrust review of the non-owner operator will be conducted by the staff.

IV. PREVIOUS SEABROOK NRC ANTITRUST REVIEWS

A. Construction Permit Review

By letter dated December 4, 1973, the Attorney General issued advice to the Atomic Energy Commission pursuant to Public Service Company of New Hampshire's (PSNH), the lead applicant,[8] application for a construction permit for the Seabrook Nuclear Power Station Units No. 1 and No. 2. In its advice letter, the Department expressed concern over several allegations by smaller power systems in the New England bulk power services market that they were unable to gain access to low cost bulk power supply on the same basis as

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[8]PSNH was the majority owner with 50% of the plant at the time the time of the Department's advice letter in 1973. Since this initial review, there have been several changes in ownership and ownership shares in Seabrook. Existing owners are as follows: PSNH (35.56942%); United Illuminating (17.5%); EUA Power Corporation (12.1324%) Connecticut Light & Power Company (4.05985%); Hudson Light & Power Department (0.07737%); Vermont Electric Generation and Transmission Corporative, Inc. (0.41259%); Montaup Electric Company (2.89989%); Canal Electric Company (3.52317%); New England Power Company (11.59340%); Taunton Municipal Lighting Plant (0.10034%); and New Hampshire Electric Cooperative, Inc. (2.17391%)

larger systems in the area. The advice letter stated that as a result of a settlement agreement reached between the privately owned and publicly owned systems in New England that there had been a "dramatic improvement in the relations among the various segments of the electric power industry in New England...." The Department emphasized the importance of the development of the New England Power Pool (NEPOOL) as a regional planning body that would enable participation in bulk power services by all types of power entities throughout New England. The Department concluded,

> ... that the creation of a truly open, non-exclusive NEPOOL means that all systems can have a dependable frame- work within which to obtain fair and non-discriminatory access to economical and reliable bulk power supply.(December 4, 1973 advice letter, p. 4)

As a result of its review, the Department advised the Atomic Energy Commission that there was no need for an antitrust hearing pursuant to the construction permit application for Seabrook.

B. Operating License Review

As noted above, a prospective operating licensee is not required to undergo a formal antitrust review unless the staff determines that there have been "significant changes" in the licensee's activities or proposed activities subsequent to the review by the Department of Justice and the staff at the construction permit stage. The staff completed its OL antitrust review of Seabrook in January

1986. The staff analysis indicated that,

> ...NEPOOL, which was only two years old at the time when the CP antitrust review was performed, appears to have evolved into a framework ensuring access to reliable and economical bulk power supply for all New England utilities. Two provisions of the original pool agreement were found to be discriminatory against smaller utilities and have since been removed. Further, because Seabrook 1 has been designated as a pool-planned unit, access to Seabrook 1 over pool transmission facilities of members is guaranteed for all participants under the terms of NEPOOL.[9]

Based in large part upon the successful formation and operation of NEPOOL, the staff concluded that the changes in the licensees' activities as well as any proposed changes in licensees' activities do not represent "significant changes" as identified in the *Summer* decision and recommended that no formal OL antitrust review be conducted. The staff's antitrust OL review was completed in February 1986 and the Seabrook full power license was issued on March 15, 1990.

C. EUA Power Review

By letter dated March 26, 1986, New Hampshire Yankee, acting as agent for the Seabrook licensees, requested the staff to amend the

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[9]Staff review of Seabrook licensees' changed activity, "Seabrook Station, Unit 1, Public Services Company of New Hampshire, et al, Docket No. 50-443A, Finding of No Significant Antitrust Changes," p. 57.

Seabrook construction permits (Units 1 and 2) to reflect the purchase and transfer of an approximate 12 percent ownership share in the Seabrook facility to EUA Power Corporation (EUA Power), a wholly owned subsidiary of Eastern Utility Associates of Boston, Massachusetts. The amendment requested the transfer of 12 percent ownership to EUA Power and deletion of the following owners as Seabrook licensees: Bangor-Hydro-Electric Company (2.17391%); Central Maine Power Company (6.04178%); Central Vermont Public Service Corporation (1.59096%); Fitchburg Gas and Electric Light Company (0.86519%); and Maine Public Service Company (1.46056%).

Even though a sister company, Montaup Electric Company (both are wholly owned by Eastern Utilities Associates), had previously undergone an antitrust review in conjunction with its participation in Seabrook, EUA Power represented a new owner prior to issuance of the Seabrook full power operating licensee and was required to undergo a formal antitrust review by the Department of Justice. Accordingly, EUA Power submitted pertinent 10 C.F.R. Part 50, Appendix L information to the staff regarding its operations and competitive activity. A notice of receipt of this information, which provided the opportunity for a 60 day comment period on the antitrust issues regarding the proposed ownership transfer, was published in the *Federal Register* on May 23, 1986.

By letter dated July 1, 1986 the Department advised the staff that there was,

> ... no evidence that the proposed participation by EUA Power Company in the Seabrook Units would either create or maintain a situation inconsistent with the antitrust laws under Section 105(c). We do not, therefore, believe it is necessary for the Commission to hold an antitrust hearing in this matter. (Department of Justice advice letter, p.1)

The Department's letter was published in the *Federal Register* on July 17, 1986 and provided for interested persons to request a hearing and file petitions to intervene. There were no such requests and the staff issued an amendment (No. 9) to the Seabrook construction permits authorizing the transfer of ownership effective upon completion of the transfer of ownership shares which was consummated on November 26, 1986. In this instance, there was no need to apply the significant change threshold criteria to the EUA Power amendment review and address the issue of whether the Department of Justice should conduct the review or the staff should issue a significant change determination because the request for ownership change occurred prior to issuance of the full power operating license and consequently, the review involved an amendment to the construction permit and followed construction permit review procedures.

V. CHANGES AT SEABROOK AFTER ISSUANCE OF THE INITIAL OL

The instant amendment requests to transfer PSNH'S ownership in Seabrook to a proposed new entity, NAEC, and change the plant operator from New Hampshire Yankee to a proposed new operating

entity, NAESCO, represent direct outgrowths of the bankruptcy proceeding initiated by PSNH in January 1988. Though the bankruptcy proceeding and PSNH's financial status are not the focus of the instant review, it is significant to note that PSNH is dependent upon Seabrook as its principal source of generating capacity and operating revenue. This dependence on one source of operating revenue left PSNH highly susceptible to fluctuations in the business cycle that affect different regions of the country at different periods in the cycle. During the mid 1980's commerce and industry in New England were growing dramatically. Economic growth exceeded projections for planned electric generating capacity.[10] However, as rapidly as the New England economy advanced in the mid 1980's, it declined equally a fast in the late 1980's. PSNH filed for bankruptcy in January 1988 and EUA Power Corporation, another Seabrook co-owner heavily dependent upon the sale of Seabrook power and energy, filed for bankruptcy in early 1991.

There were other factors that contributed to PSNH'S financial difficulties in the 1980's, e.g., development and approval of emergency evacuation plans for Seabrook and state regulatory proceedings involving allowance of Seabrook costs in PSNH'S rate

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[10]EUA Associates, parent company of Montaup Electric Company, a co-owner of Seabrook, formed EUA Power Corporation specifically to purchase a 12 percent ownership share in Seabrook to meet an unexpected strong demand for electric power in New England during the late 1980's and 1990's. John F.G. Eichorn, chairman of EUA Associates, was quoted by the Providence, Rhode Island Journal newspaper, as citing NEPOOL electricity demand estimates showing "a serious shortfall developing in New England, which we at EUA are determined to help eliminate." Journal, April 10, 1986.

base. All of these factors culminated in PSNH filing for bankruptcy and the resultant proposal by NU to acquire PSNH. The proposals adding a new owner and a new operator of the Seabrook facility are the principal changes the staff must address in its post OL significant change antitrust review. The staff must determine whether the new owner or the new operator will create or maintain a situation inconsistent with the antitrust laws.

VI. FERC AND SEC REVIEWS

Pursuant to the requirements and jurisdiction of both the Federal Power Act and the Public Utilities Holding Company Act of 1935, NU filed applications with the Federal Energy Regulatory Commission (FERC), on January 5, 1990, and the Securities and Exchange Commission (SEC), on October 5, 1989, respectively, seeking approval of its proposed merger with PSNH. In light of the fact that similar competitive issues are currently being addressed in proceedings at the FERC and SEC and that the findings reached in the FERC and SEC proceedings will be considered by the staff, a brief synopsis of these proceedings follows.

A. FERC Proceeding

Northeast Utilities, acting through a service company called NUSCO, sought approval under Section 203 of the Federal Power Act (enforced by the FERC) to acquire the jurisdictional assets of

PSNH. Section 203 of the Federal Power Act (FPA) requires the FERC to make a determination as to whether the proposed acquisition or merger will be consistent with the public interest. Though the FPA does not specifically charge the FERC with weighing the competitive implications of the merger or acquisition in terms of injury to competition or the competitive process in identifiable markets, in the recent past, the FERC has considered these competitive concerns as inputs to its ultimate determination as to whether the combination creates more benefits than costs, i.e., is in the public interest.

On March 2, 1990, the FERC issued an order granting intervention by all requesting parties and also granted a NU motion to expedite the hearing schedule by requiring that an initial decision be issued no later than December 31, 1990. After extensive discovery, depositions and oral argument, the FERC administrative law judge (ALJ), Jerome Nelson, issued an initial decision on December 20, 1990.[11]

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[11]"On March 7, 1990, NU submitted its direct case, which consisted of the prepared testimony and exhibits of six witnesses. After extensive discovery, including numerous depositions of NU, Staff, intervenor and third party witnesses, the Staff and intervenors filed their respective direct cases on May 25, 1990. The direct cases of staff and intervenors included the prepared testimony and exhibits of 49 witnesses. On June 25, 1990, Staff and intervenors filed cross-rebuttal cases through the prepared testimony and exhibits of 19 witnesses. On July 20, 1990, NU filed its rebuttal case through the prepared testimony and exhibits of 12 witnesses. Twenty-five days of hearings were held during August and September of 1990. Thirty-five witnesses were cross-examined, and 809 exhibits were admitted into evidence. Briefs and reply briefs were filed in October of 1990. Four days of oral argument ended on November 13, 1990." (ALJ Initial Decision, p. 6).

The ALJ made several findings in his initial decision, however, the findings most relevant to the NRC post OL amendment review concern the effect the merger will have on the New England bulk power services market. The ALJ's initial decision indicated that without a detailed set of merger conditions, the "NU-PSNH merger would have anti-competitive consequences." The ALJ found that,

> the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts). (*Id.*, p.15)

The ALJ indicated that the merged company will control 92 percent of the transmission capacity presently serving New England.

> This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices. (*Id.*, p. 16)

The ALJ concluded that merged NU-PSNH will control the principal transmission access routes from northern New England to southern New England as well as 72 percent of the New York, New England transmission corridor path.

> Because PSNH "controls the only transmission lines linking Maine and New Brunswick to the rest of New England"..., Eastern REMVEC utilities will necessarily have to deal with the merged company in order to get power from those areas. The merged company's control

> would also extend to access from New York... NU controls 72% of the New York-New England "interface"... and needs only a small portion of that share for its own use. (*Id.*)

The ALJ's initial decision recommended that the FERC approve the merger only if specific merger conditions were agreed upon by the merging parties. There are two principal conditions discussed by the ALJ designed specifically to address the new NU-PSNH's market power and particularly any potential for abuse of this newly created market power vis-a-vis other power systems in New England. The first condition is basically a rework of a proposal initially offered by NU-PSNH dealing with the merged company's policy regarding transmission over its power grid. A set of General Transmission Commitments was developed by the ALJ which dealt with various degrees of priority access and time horizons depending upon the individual power supply situation in question. This policy commitment, according to the ALJ, would reassure non-dominant power systems in New England a form of meaningful access to the transmission facilities required to fulfill their bulk power supply requirements.

The second major condition that addresses the transmission dominance of the new NU-PSNH is termed the, "New Hampshire Corridor Proposal." This proposal serves to open up the flow of power from Canada to New England and from northern New England to the heavily populated southeastern portion of New England. The Corridor Proposal allocated a total of 400 MW of transmission capacity with

200 MW allocated to New England Power Company and 200 MW allocated to southern New England utilities. These two transmission proposals recommended by the FERC ALJ are the most relevant to the staff's review of New Hampshire Yankee's requests to change ownership and the operator of the Seabrook facility.

On August 9, 1991, the FERC conditionally approved the NU merger with PSNH. To mitigate the merger's likely anticompetitive effects, the FERC strengthened NU's General Transmission Commitment and noted that it will construe NU's voluntary commitment very strictly. NU can not give higher priority to its own non-firm use than to third party requests for firm wheeling in allocating existing transmission capacity. The FERC also ruled that independent power producers and qualifying facilities are eligible for transmission access on the New Hampshire Corridor. *See Northeast Utilities Service Company* (Re Public Service Company of New Hampshire), FERC slip op. No. 364 (August 9, 1991).

B. SEC Proceeding

NU filed an application with the SEC for approval under the Public Utility Holding Company Act of 1935 (PUHCA) of its proposed merger with PSNH. The SEC issued a notice of the filing of the application on February 2, 1990 (Holding Co. Act Release No. 25032). Fourteen hearing requests from 41 separate entities were received and four of these requests, representing 21 entities, were

subsequently withdrawn. Moreover, eight entities filed comments or notices of appearance. The segment of the SEC review most relevant to staff's post OL amendment review revolves around Section 10(b)(1) of the PUHCA that requires the SEC to consider possible anticompetitive effects of the proposed NU-PSNH acquisition. The SEC in a Memorandum Opinion dated December 21, 1990 approved NU's proposed acquisition of PSNH--indicating that all PUHCA requirements, including Section 10(b)(1), had been fulfilled. In its initial decision, the SEC stated that,

> Given the approximate size of the Northeast--PSNH system and the resultant economic benefits discussed herein..., we conclude that the Acquisition does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied. (SEC Initial Decision, p. 40)

The SEC's analysis, as reflected in its initial decision, considers the economic benefits associated with a merged NU-PSNH and not so much the potential for abuse of market power that may be enhanced by the merger. The initial decision states that the,

> transfer to North Atlantic will merely move the asset from one Northeast subsidiary to another and should have no impact on competitive conditions. (*Id.*, p.58)

The SEC order approving the merger was appealed by two intervenors in the SEC proceeding--the City of Holyoke Gas and Electric

Department and the Massachusetts Municipal Wholesale Electric Company (petitioners). Petitioners filed a request for rehearing of the initial decision, arguing that the SEC erred in approving the NU-PSNH acquisition by failing to provide sufficient analysis of the anticompetitive effects of the acquisition. Petitioners based much of their argument for rehearing upon the FERC ALJ's December 20, 1990 decision which indicated that an unconditioned NU-PSNH merger would have significant anticompetitive effects upon the New England bulk power services market.

In a Supplemental Memorandum Opinion and Order (Supplemental Memorandum) dated March 15, 1991, the SEC granted petitioners a reconsideration of the SEC's initial decision.

> In our December order, we recognized that the Acquisition would decrease competition, but concluded that the Acquisition's benefits would outweigh its anticompetitive effects. The petitioners challenge this determination, arguing that the Commission ignored the anticompetitive effects of the merged company's control of transmission facilities and surplus power. (Supplemental Memorandum, p.3)

The SEC's Supplemental Memorandum indicated that its initial decision focused more on the size and corporate structure of NU-PSNH rather than the merged company's ability to control access to transmission or excess capacity. The Supplemental Memorandum stated that even though the SEC's principal focus was on the size and structure of the merged company, the competitive access issues

were considered and the SEC concluded that, "The merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior." (Supplemental Memorandum, p.5) However, the SEC relied upon the transmission commitments made by NU to mitigate any possible anticompetitive effects of the merger.[12]

The Supplemental Memorandum recognized that both the SEC and the FERC "have statutory responsibilities with respect to the anticompetitive consequences of mergers in the public-utility industry". (*Id.*, p.6). However, the SEC also recognized that the focus of the Federal Power Act and the Public Utility Holding Company Act are different in that each agency pursues administration of each act with different goals for regulating members of the electric utility industry. As a result, the SEC deferred the question of anticompetitive consequences and its ultimate approval of the proposed merger to the FERC.

> Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the Commission, [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look

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[12] The initial FERC decision found the commitments made by NU to be insufficient to remedy the potential anticompetitive effects of the merger and recommended additional terms and conditions be imposed upon the merged company as a condition for FERC approval of the merger.

> to the FERC's expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the acquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the FPA. (*Id.*, p.9)

VII. AMENDMENT APPLICATIONS COMMENTS RECEIVED BY THE STAFF

The staff, in accordance with 10 C.F.R. § 2.101(e)(1), published receipt of New Hampshire Yankee's request to amend the Seabrook OL in the *Federal Register* and provided interested parties the opportunity to comment on the antitrust issues raised by the proposed acquisition on February 28, 1991.[13] The staff received comments from the following entities or their representatives: 1) New Hampshire Electric Cooperative (April 1, 1991,); 2) Massachusetts Municipal Wholesale Electric Company (April 1, 1991); 3) City of Holyoke Gas and Electric Department (April 1, 1991); 4) Hudson Light and Power Department (April 4, 1991); and 5) Taunton Municipal Lighting Plant (April 10, 1991). By letter dated April 22, 1991, counsel for Connecticut Light and Power Company and PSNH responded to these comments.[14] The comments from participants in the FERC and SEC proceeding by and large mirrored the positions taken by the commenters in those proceedings. The comments

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[13] A similar notice regarding the change in operator from New Hampshire Yankee to NAESCO, was published in the *Federal Register* on March 6, 1991.

[14] By letter dated June 13, 1991, City of Holyoke Gas and Electric Department (HG&E) replied to the Connecticut Light and Power (CL&P) and PSNH response. By letter dated July 9, 1991, CL&P and PSNH responded to the HG&E reply. By letter dated July 22, 1991, HG&E replied to the CL&P and PSNH July 9, 1991 response.

received are summarized below with the staff analysis of each comment.

A. New Hampshire Electric Cooperative (NHEC)

Comment

NHEC is a transmission dependent utility (TDU), i.e., "entirely dependent on NU or PSNH for their bulk power transmission needs". NHEC states that without access to NU's or PSNH's transmission facilities it cannot actively compete in the New England wholesale bulk power services market. NHEC asserts that the proposed acquisition of PSNH by NU will concentrate its only source of essential transmission service in the hands of its principal competitor. NHEC cites the initial FERC decision as evidence that the proposed merger, if unconditioned, will have an adverse impact on the competitive process in the New England bulk power services market. NHEC also states that recent developments which have not been a part of the FERC record are relevant to the NRC review associated with the Seabrook post OL amendment applications.

NHEC wishes to purchase partial requirements power from another supplier, New England Power Company (NEP), rather than PSNH. NHEC and NEP entered into a long-term power supply contract on January 9, 1991; however, NHEC needs access to PSNH's transmission grid to receive the NEP power. PSNH has indicated that NHEC is contractually prohibited from taking any other off system power purchases during the term of its power supply contract with PSNH

and as a result PSNH would not approve use of its transmission grid until the contractual dispute between PSNH and NHEC is resolved.

NHEC contends that the proposed acquisition of PSNH by NU is anticompetitive and under the NRC's *Summer* criteria, represents a "significant change". NHEC seeks relief by requiring NU to,

> . . . commit before this Commission that it will provide NHEC all transmission needed for NHEC to purchase power from other sources . . . .

Staff Analysis

The staff believes that the issue described by NHEC in its April 1, 1991 filing to the staff primarily involves a contract dispute with PSNH and NU over transmission rights pertaining to power purchases by NHEC from New Brunswick. Presently, NHEC is taking partial requirements wholesale power from PSNH under a 1981 contract. A dispute has arisen between NHEC and PSNH (now NU, given its proposed acquisition of PSNH) regarding the terms under which the contract can be terminated. PSNH states that the contract requires NHEC to provide five years notice prior to cancelling the contract and switching to a different supplier. NHEC states that the contract provides for termination upon NHEC joining NEPOOL and that the recent NHEC-NEP purchase agreement and NHEC's ownership interest in Seabrook provide the basis for NEPOOL membership.

This contract dispute, which forms the linchpin for NHEC's argument

that it is dependent upon NU's transmission grid is presently being interpreted before the FERC. The staff believes that it is appropriate for this dispute to be resolved under the auspices of the FERC's jurisdiction over wholesale power and transmission tariffs and the terms and conditions associated with such agreements. The staff sees no need for the NRC to enter into a contract dispute that is under review by the FERC. Should the PSNH-NHEC contract dispute be resolved in NHEC's favor, i.e., enabling NHEC to terminate the contract without giving a five year notice, the merger condition recommended by the FERC ALJ and commitments made by NU to provide transmission dependent utilities transmission services (cf., PSNH and Connecticut Power & Light Company Comments to NRC staff dated April 22, 1991, pp. 29-30), should adequately resolve the competitive concerns raised by NHEC.

B. Massachusetts Municipal Wholesale Electric Company (MMWEC)

Comment

MMWEC is a co-owner (11.5934%) of the Seabrook plant. In its comments to the NRC, MMWEC states that the proposed acquisition of PSNH by NU is anticompetitive, notwithstanding the merger conditions recommended by the FERC ALJ, and suggests that the Director of the Office of Nuclear Reactor Regulation find, pursuant to *Summer*, that significant changes have occurred since the Attorney General's advice letter was issued in December 1973.

MMWEC contends that the standard of review of mergers required by

the FERC under the FPA is different than that required by the NRC under the Atomic Energy Act. MMWEC states that this difference permits anticompetitive acquisitions under the FPA if it is determined that the public interest is served by the acquisition (or merger), whereas the NRC must address the competitive implications of activities of licensees "irrespective of any compelling public interest." (MMWEC comments, p.3)

Moreover, MMWEC requests the NRC to address the anticompetitive aspects of NU's management and operation of Seabrook--an area not covered in the FERC ALJ's initial decision. According to MMWEC,

> NU is executing a plan whereby it has separated the Seabrook management function and ownership function from each other and utilized its market power to insulate itself, those functions and its other affiliates from any liability, except liability imposed by willful misconduct. (*Id.*, p.5)

MMWEC's concerns revolve around a July 19, 1990 agreement reached among Seabrook owners holding approximately 70 percent of the facility. This agreement provides for the transfer of the managing and operating agent from New Hampshire Yankee to a proposed wholly owned NU subsidiary, NAESCO. An exculpatory clause in the July 19, 1990 agreement, according to MMWEC,

> . . . would not only free NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. MMWEC cannot insure any

> reckless or negligent conduct of the Managing Agent or its affiliates. (*Id.*)

MMWEC requests the NRC to act to prevent NU from maintaining a situation inconsistent with the antitrust laws. MMWEC suggests that the NRC condition the approval of the license transfer to "require appropriate amendment of the Joint Ownership Agreement and to prohibit NAECO, & NAESCO and their affiliates from freeing themselves from liability for misconduct." (*Id.*, p.6)

Staff Analysis

MMWEC's principal concern is that NU used its market power in an anticompetitive manner in formulating a July 19, 1990 agreement that established parameters by which the Seabrook facility would be managed and operated. Moreover, MMWEC asserts that this agreement frees,

> . . .NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. (MMWEC comments, p. 5)

MMWEC has failed to show how NU has used (abused) its market power in bulk power services in formulating an agreement to install a new managing agent for Seabrook. MMWEC asks the NRC to condition the license transfer by requiring amendment of the Seabrook "Joint Ownership Agreement", to, effectively, make NAECO and NAESCO more accountable for their actions pursuant to their ownership and operation of the Seabrook facility respectively. Based upon the

data available to the staff, it appears as though the July 19, 1990 agreement was consummated in conformance with the Seabrook Joint Ownership Agreement, as amended, and not as a result of any abuse of market power on the part of NU. The staff believes MMWEC's concerns over the degree of liability it must absorb should NAESCO in any way mismanage Seabrook are concerns of a contractual, not competitive, nature and should be raised and addressed before an appropriate forum for these matters, not the NRC.

Moreover, as recognized by MMWEC at page three of its comments, the staff considered the possibility of a new plant operator having an influence over competitive options of the new owners of Seabrook. For this reason, after discussions with the staff, NAESCO agreed to a license condition divorcing itself from the marketing or brokering of power or energy produced by Seabrook. The license condition was designed to eliminate NAESCO's ability to exercise any market power, if evident, and obviated the need to conduct a further competitive review of NAESCO. For the reasons stated above, MMWEC's request to condition the Seabrook license that frees it from NAESCO's liability should be denied.

C. City Of Holyoke Gas & Electric Department (HG&E)

Comment

HG&E is a municipally owned electric system serving primarily western Massachusetts. "HG&E lies within the service territory of Western Massachusetts Electric Company ("WMECO"), a wholly-owned

subsidiary of NU." (HG&E comments, p.2) HG&E generates no power on its own and relies heavily on the transmission facilities of PSNH to supply approximately 36 percent of its load from the Point Lepreau nuclear plant in New Brunswick, Canada. According to HG&E,

> The increase in control that the merged entity will exercise over generation (including power from Seabrook) and transmission capacity in New England represents a "significant change" from the activities of the current licensee--an independent PSNH. (HG&E comments, p.3)

HG&E contends that NU-PSNH will wield significantly more market power than a stand alone PSNH and given the existing competitive relationship between HG&E and NU, the merged entity, without adequate license conditions and structural alterations in the market, will be able to severely restrict or at a minimum, control the cost effectiveness of a large portion of its power supply that presently flows over PSNH's transmission facilities from New Brunswick.

> Control over generation capacity greatly reduces the opportunities available to purchase power from other utilities in the region; control over transmission capacity eliminates or reduces the ability of HG&E and others to purchase power from utilities outside of New England. (*Id.*, p. 6)

Moreover, HG&E asserts that many of the benefits associated with NEPOOL operation--identified by the Department of Justice and the staff in previous reviews--may be negated by the merged company's "sufficient veto voting power" over proposals put forth by the

NEPOOL Management Committee. HG&E characterizes this change in market power as a "significant change" requiring a full review of the antitrust impacts of the proposed merger, including an analysis by the Attorney General of the antitrust impact of the proposed license transfer.

HG&E addresses ongoing reviews of NU's proposed acquisition of PSNH before other federal agencies and concludes that NRC's antitrust review mandate in Section 105c of the Atomic Energy Act more clearly relates to review of anticompetitive conduct whereas the reviews at the FERC and SEC seem to be more public interest oriented. Consequently, HG&E asserts that the NRC should not assume that these other reviews will adequately condition the proposed merger to remedy the serious competitive issues that the merger would create. HG&E urges the NRC to deny the proposed merger, yet if approved, suggests that NRC require prior approval by the FERC and SEC, and in addition, 1) require NU-PSNH to transmit Point Lepreau power to HG&E for the term of any extended HG&E/Point Lepreau power supply contract with equivalent terms to its current contract, and 2) require NU to divest its subsidiary, Holyoke Water Power Company (HWP) or consolidate HWP into another NU subsidiary, Western Massachusetts Electric Company, thereby subjecting HWP to state regulation as a public utility.

Staff Analysis

HG&E asks the NRC to initiate a full antitrust review of the proposed merger, considering all of the antitrust effects of the

proposed merger pursuant to Section 105c of the Atomic Energy Act. "Such review would include an analysis by the Attorney General of the antitrust impact of the proposed license transfer. 42 U.S.C. SEC.2135" (HG&G comments, P.3) At the conclusion of such a review, HG&E recommends that the NRC deny the proposed license transfer or approve the transfer with license conditions over and above those recommended by the FERC ALJ.

As indicated *supra* (cf., Section III herein), the staff takes into consideration the record establised during related federal agency reviews of the change in ownership. The FERC proceeding and the accompanying recommendations for competition enhancing merger conditions were factors the staff considered in evaluating the instant proposals under the significant change criteria. The staff believes the presence of license conditions recommended by the FERC mitigates the possibility of anticompetitive effects ensuing from such a merger as well as the need for a more formal antitrust review by the Department of Justice. For the reasons stated above, the staff recommends denying HG&E's requests to deny the proposed merger or initiate a formal antitrust review that incorporates an analysis by the Attorney General.

Considering the license conditions associated with the proposed acquisition of PSNH by NU, the staff recommends denying in part and approving in part HG&E's request to attach the FERC and SEC merger conditions and impose two additional conditions as a requirement

for consummation of the acquisition. The staff has relied heavily on the record established to date in the FERC proceeding and in light of the procompetitive merger conditions proposed by the FERC ALJ would recommend approval of the license transfer. The SEC in its Supplemental Memorandum Opinion dated March 21, 1991 deferred its ruling on the competitive aspects of the proposed merger to the FERC.

The staff recommends denying HG&E's request to the NRC to condition the license transfer upon two additional requirements, one providing, in effect, a life of service transmission contract for HG&E's Point Lepreau power and another requiring NU to divest a wholly owned subsidiary in competition with HG&E. There has been nothing established in the FERC record or in the instant proceeding that indicates that HG&E would have been able to renew its transmission contract with PSNH or its power supply contract with New Brunswick upon termination of the existing contracts in 1994. NU, as PSNH's parent company, has not indicated that it plans to deny HG&E transmission capacity to New Brunswick after the proposed merger is consummated. NU has stated that this transmission corridor to New Brunswick will be offered to "all comers," as it were. It appears as though HG&E will be in competition with other potential buyers of Point Lepreau power for both transmission and power and energy. The staff sees no reason to assist HG&E over any other competitor in this regard. Should HG&E enter into a transmission contract with NU-PSNH and find the terms and

conditions in any way anticompetitive, the staff believes the FERC is the proper forum for resolution of tariff issues. The FERC initial decision recognized the increase in market power resulting from the NU-PSNH acquisition, yet recommended conditions to mitigate any abuse of this newfound power.

> The merged company -- with vast power over transmission and control of surplus power -- must offer viable wheeling service in order to alleviate potential anti-competitive consequences. (FERC Initial Division, p. 48) [Emphasis added].

Moreover, the FERC ALJ approved the request by HG&E to require NU to establish the position of "ombudsman" to review NU's service and eliminate the possibility of any anticompetitive consequences resulting from NU's substantial market power in transmission and surplus power in the New England market. Additionally, the FERC ALJ indicated that,

> The ombudsman is not the only avenue for dissatisfied customers. The Commission's Enforcement Task Force maintains a "hotline" ... through which complaints can be received. (FERC Initial Decision, p. 49)

The staff believes these actions taken by the FERC adequately address HG&E's concerns over abuse of NU's post merger market power. For this reason, the staff does not believe that HG&E has established a basis for the staff to conclude that there is a significant change warranting an antitrust review. Furthermore, there is no basis for the staff unilaterally to impose conditions

on the transfer of the license providing for a life of service transmission contract.

Regarding HG&E's second condition, the staff believes that no record has been established to justify HG&E's request to divest Holyoke Water Power Company from NU. According to the FERC initial decision, "The City [HG&E] is covered by the protection given the TDUs, and is entitled to no more in this regard." (FERC Initial Decision, p. 50) Accordingly, divestiture of HWP does not seem warranted solely to, "eliminate NU's incentive to eliminate injury to HG&E...." (HG&E comments, p. 10; emphasis added). The staff recommends denying HG&E's request to divest HWP from NU.

D. Hudson and Taunton

Comment

The Taunton Municipal Lighting Plant (Taunton) and the Hudson Light and Power Department (Hudson) are both owners of the Seabrook facility. Taunton and Hudson are both members of the Massachusetts Municipal Wholesale Electric Company and both have requested the NRC to adopt MMWEC's comments submitted to the NRC via letter dated April 1, 1991.

Staff Analysis

As indicated *supra*, the staff recommended denying MMWEC's request to further condition the Seabrook operating license to free MMWEC from any liability to existing owners that may result from the proposed license transfer. In light of the fact that Hudson and

Taunton adopted MMWEC's comments, the staff also recommends that their requests be denied.

VIII. NRC STAFF FINDINGS

A. Change In Ownership

The ownership transfer of over 35 percent of Seabrook potentially represents a change in the degree of control over the operation of the nuclear facility. However, as indicated *supra*, the FERC has considered the anticompetitive consequences of the proposed merger and a set of extensive merger conditions was proposed by the FERC administrative law judge regarding New Hampshire Yankee's proposals to transfer ownership and operation of the Seabrook facility. In this regard, the staff has relied heavily upon the record established in the FERC initial decision in its review of the instant amendment applications. The FERC merger conditions were designed specifically to mitigate any potential competitive problems associated with the proposed acquisition of PSNH by NU.

The staff has reviewed the proposed transfer of ownership share in the Seabrook facility from PSNH to NU for significant change since the last antitrust review of the Seabrook licensees, using the criteria discussed by the Commission in *Summer*. (*Cf.* Section III herein) The amendment request was dated November 13, 1990, after the previous antitrust review of the facility and therefore the

first *Summer* criterion, that the change has occurred since the last antitrust review, is satisfied. The second *Summer* criterion is satisfied in that the change is the result of the bankruptcy proceeding initiated by PSNH in January 1988 and as such is "reasonably attributable to the licensee[s] in the sense that the licensee[s] ha[ve] had sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review." *Summer*, 13 NRC at 871.

This leaves for consideration the third *Summer* criterion, that the change has antitrust implications that would be likely to warrant Commission remedy. The Commission in *Summer* adopted the staff's view that application of the third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have *de minimis* anticompetitive effects. *See Id.* at 872. The Commission further stated "the third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance." *Id.*

The staff believes that the record developed in the FERC proceeding involving the NU-PSNH acquisition adequately portrays the competitive situation in the New England bulk power services market and that the anticompetitive aspects of the proposed changes are being addressed in the FERC proceeding. The staff further

believes that the actions being taken by the FERC will adequately address concerns regarding the anticompetitive effects of NU's post merger market power such that the change in ownership as approved by the FERC will not have implications that warrant a Commission remedy. Consequently, the third *Summer* criterion has not been satisfied.

Each of the significant change criteria discussed in *Summer* must be met to make an affirmative significant change finding. In this instance, the third criterion has not been met.

B. Addition Of Non-Owner Operator

In light of the license condition developed by the staff and agreed to by NU, NAESCO (the proposed new plant operator), and the other Seabrook licensees, prohibiting NAESCO from marketing or brokering power or energy produced from the Seabrook plant and holding all other Seabrook licensees responsible for NAESCO's actions pursuant to marketing or brokering of Seabrook power, the staff believes the change in plant operator from New Hampshire Yankee to NAESCO will not have antitrust relevance.

IX. CONCLUSION

For the reasons discussed above, and after consultation with the DOJ, the staff recommends that the Director of the Office of

Nuclear Reactor Regulation conclude that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license.

February 13, 1992

Docket No. 50-443A

Daniel I. Davidson, Esq.
Spiegel and McDiarmid
1350 New York Avenue, N.W.
Washington, D.C. 20005

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Davidson:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result from this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

(original signed by)
William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

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GHOLLER, OGC, w/o enclosure
GEDISON w/o enclosure

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 13, 1992

Docket No. 50-443A

Daniel I. Davidson, Esq.
Spiegel and McDiarmid
1350 New York Avenue, N.W.
Washington, D.C. 20005

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Davidson:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result from this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

W. M. Lambe

William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

[7590-01]

NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50-443A

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.

SEABROOK NUCLEAR STATION, UNIT 1

PROPOSED OWNERSHIP TRANSFER

NOTICE OF NO SIGNIFICANT ANTITRUST CHANGES

AND TIME FOR FILING REQUESTS FOR REEVALUATION

The Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2135, that no significant (antitrust) changes in the licensees' activities or proposed activities have occurred as a result of the proposed change in ownership of Unit 1 of the Seabrook Nuclear Station (Seabrook) detailed in the licensee's amendment application dated November 13, 1991. The finding is as follows:

> Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides that an application for a license to operate a utilization facility for which a construction permit was issued under section 103 shall not undergo an antitrust review unless the Commission determines that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous antitrust review by the Attorney General and the Commission in connection with the construction permit for the facility. The Commission has delegated the authority to make

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the "significant change" determination to the Director, Office of Nuclear Reactor Regulation.

By application dated November 13, 1991, the Public Service Company of New Hampshire (PSNH or licensee), through its New Hampshire Yankee division, pursuant to 10 CFR 50.90, requested the transfer of its 35.56942% ownership interest in the Seabrook Nuclear Power Station, Unit 1 (Seabrook) to a newly formed, wholly owned subsidiary of Northeast Utilities (NU). This newly formed subsidiary will be called the North Atlantic Energy Corporation (NAEC). The Seabrook construction permit antitrust review was completed in 1973 and the operating license antitrust review of Seabrook was completed in 1986. The staffs of the Policy Development and Technical Support Branch, Office of Nuclear Reactor Regulation and the Office of the General Counsel, hereinafter referred to as the "staff", have jointly concluded, after consultation with the Department of Justice, that the proposed change in ownership is not a significant change under the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14).

On February 28, 1991, the staff published in the Federal Register (56 Fed. Reg. 8373) receipt of the licensee's request to transfer its 35.56942% ownership interest in Seabrook to NAEC. This amendment request is directly related to the proposed merger between NU and PSNH. The notice indicated the

reason for the transfer, stated that there were no anticipated significant safety hazards as a result of the proposed transfer and provided an opportunity for public comment on any antitrust issues related to the proposed transfer. The staff received comments from several interested parties -- all of which have been condidered and factored into this significant change finding.

The staff reviewed the proposed transfer of PSNH's ownership in the Seabrook facility to a wholly owned subsidiary of NU for significant changes since the last antitrust review of Seabrook, using the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14). The staff believes that the record developed to date in the proceeding at the Federal Energy Regulatory Commission (FERC) involving the proposed NU/PSNH merger adequately portrays the competitive situation(s) in the markets served by the Seabrook facility and that any anticompetitive aspects of the proposed changes have been adequately addressed in the FERC proceeding. Moreover, merger conditions designed to mitigate possible anticompetitive effects of the proposed merger have been developed in the FERC proceeding. The staff further believes that the FERC proceeding addressed the issue of adequately protecting the interests of competing power systems and the competitive process in the area served by the Seabrook facility such that the changes will not have implications that

warrant a Commission remedy. In reaching this conclusion, the staff considered the structure of the electric utility industry in New England and adjacent areas and the events relevant to the Seabrook Nuclear Power Station and Millstone Nuclear Power Station, Unit 3 construction permit and operating license reviews. For these reasons, and after consultation with the Department of Justice, the staff recommends that a no affirmative "significant change" determination be made regarding the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1991.

Based upon the staff analysis, it is my finding that there have been no "significant changes" in the licensees' activities or proposed activities since the completion of the previous antitrust review.

Signed on February 9, 1992 by Thomas E. Murley, Director, of the Office of Nuclear Reactor Regulation.

Any person whose interest may be affected by this finding may file, with full particulars, a request for reevaluation with the Director of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission , Washington, DC 20555 within 30 days of the initial publication of this notice in the Federal Register. Requests for reevaluation of the no significant change

determination shall be accepted after the date when the Director's finding becomes final, but before the issuance of the operating license amendment, only if they contain new information , such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

Dated at Rockville, Maryland, this 11th day of February 1992.

FOR THE NUCLEAR REGULATORY COMMISSION

Anthony T. Gody, Chief
Policy Development and Technical
Support Branch
Program Management, Policy Development,
and Analysis Staff
Office of Nuclear Reactor Regulation

SEABROOK NUCLEAR STATION, UNIT 1

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

DOCKET NO. 50-443A

STAFF RECOMMENDATION

NO POST OL SIGNIFICANT ANTITRUST CHANGES

AUGUST 1991

CONTENTS

I. THE SEABROOK AMENDMENT APPLICATIONS

By letters dated November 13, 1990, the Nuclear Regulatory Commission (NRC or Commission) staff (staff) received post Operating License (OL) amendment applications requesting two license changes: 1) to transfer operating responsibility and management of the Seabrook facility from New Hampshire Yankee, the current operator, to a proposed entity called North Atlantic Energy Service Company (NAESCO); and 2) to authorize the ownership transfer of approximately 35 percent of the Seabrook facility from Public Service Company of New Hampshire (PSNH) to a proposed entity called North Atlantic Energy Corporation (NAEC). Both NAESCO and NAEC will be wholly owned subsidiaries of Northeast Utilities (NU) and formed solely to operate Seabrook and own PSNH's share of the facility respectively. The transfer of operating responsibility to NAESCO and the proposed transfer of PSNH'S ownership in Seabrook to NAEC introduce new entities associated with the Seabrook facility.

The applicant and the licensee suggest that no antitrust review of these proposed changes is required by the Atomic Energy Act. The staff believes the legislative history and reading of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, require the staff at least to review new owners of nuclear power production facilities for the purpose of determining whether the adding of the new owner to the license will constitute a significant change. The staff recommends that the Director of the Office of Nuclear Reactor

Regulation conclude from the staff's analysis herein and consultation with the Department of Justice (Department or DOJ) that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license. The basis for staff's recommendation and determination are provided herein.

II. APPLICABLE STATUTE AND REGULATIONS

Section 105 of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, designates when and how antitrust issues may be raised. *See Houston Lighting & Power Co.*, (South Texas Project), CLI-77-13, 5 NRC 1303, 1317 (1977). In connection with the legislation to remove the need to make a finding of practical value before issuing a commercial license,[1] in 1970, the Joint Committee

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[1] Before the amendment, the Commission could issue a commercial license for a production or utilization facility only after it had made a finding of "practical value" of the facility for industrial or commercial purposes. Public Law 91-560 (84 Stat. 1472)(1970), section 3, amended section 102 of the Atomic Energy Act (AEA). Prior to the amendment, section 102 of the AEA read as follows:

> SEC.102. FINDING OF PRACTICAL VALUE.-Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or

(continued...)

on Atomic Energy also examined section 105c. Before the 1970 amendment, section 105c provided that whenever the Commission proposed to issue a commercial license, it would notify the Attorney General of the proposed license and the proposed terms and conditions thereof. The Attorney General would then be obliged to advise the Commission "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws and such advice will be published in the *Federal Register*."[2] The Joint Committee, recognizing that the language and potential effect of the existing section 105c were not sufficiently clear, decided to amend section 105c to clarify and revise this phase of the Commission's licensing process. *See* 116 Cong. Rec. S19253.

Subsection 105c(1), as amended, requires the Commission to transmit, to the Attorney General, a copy of any license application to construct or operate a nuclear facility for the

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[1](...continued)
commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.

[2] Prior to the 1970 amendment, antitrust review could occur only following a Commission finding, under section 102 of the Atomic Energy Act, that a type of facility had been sufficiently developed to be of "practical value" for industrial or commercial purposes. Because the Commission never made such a finding, no antitrust reviews occurred. Power reactor construction permits and operating licenses before 1970 were issued pursuant to section 104b, which applied to facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Attorney General's advice as to whether the grant of an application will create or maintain a situation inconsistent with the antitrust laws. Subsection 105c(2) provides an exception to the requirements of subsection 105c(1) for a license to operate a nuclear facility for which a construction permit was issued under section 103, unless the Commission determines that such review is advisable on the ground that "significant changes" in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission in connection with the construction permit for the facility.

The Commission has promulgated regulations regarding the submittal of information in connection with the prelicensing antitrust review of facilities and the forwarding of antitrust information to the Attorney General. *See* 10 C.F.R. §§ 2.101, 2.102, and 50.33a. Section 50.33a requires the submission of the information specified in 10 C.F.R. Part 50, Appendix L (Information Requested By The Attorney General For Antitrust Review Facility License Applications). The publication in the *Federal Register* of a notice of the docketing of the antitrust information required by Part 50, Appendix L is required by 10 C.F.R. § 2.101(c). Subsections 2.101(e) and 2.102(d) address the situation in which an antitrust review has been conducted as part of the application for a construction permit and the application for an operating license is now before the Commission. Related to this, the Commission has delegated to the Director of Nuclear Reactor Regulation (NRR) or

the Director of Nuclear Material Safety and Safeguards (NMSS), as appropriate, its authority under subsection 105c(2) of the AEA to make the determination in connection with an application for an operating license as to whether "significant changes" in the licensee's activities, or proposed activities under its license have occurred subsequent to the antitrust review conducted in connection with the construction permit application. *See* 10 C.F.R. §§ 2.101(e)(1) and 2.102(d)(2).[3]

On October 22, 1979, the Commission amended 10 C.F.R. § 55.33a to reduce or eliminate the requirements for submission of antitrust information in certain *de minimis* instances. In publishing the rule, the Commission stated its conclusion that applicants whose generating capacity at the time of the application is 200 MW(e) or less are not required to submit the information specified in Appendix L of Part 50, unless specifically requested to do so. The

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[3] In connection with the delegation, the Commission approved procedures to be used until such time as regulations implementing the procedures were adopted. Although never formally published, the procedures are available as attachments to SECY-79-353 (May 24, 1979) and SECY-81-43 (January 19, 1981). On March 9, 1982, the Commission amended its regulations to incorporate final procedures implementing the Commission's delegation of authority to make the "significant changes" determination to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate. 47 Fed. Reg. 9963, March 9, 1982. The amended regulation provides that the Director, NRR or NMSS, as appropriate, after inviting the public to submit comments regarding antitrust aspects of the application and after reviewing any comments received, is authorized to make a significant change determination and, depending on his determination, either refer the antitrust information to the Attorney General or publish a finding of no significant changes in the *Federal Register* with an opportunity for requesting reevaluation of the finding.

Commission further stated that it believed that utilities smaller than these generally would have a negligible effect on competition. Fed. Reg. 60715, October 22, 1979.

All applicants for an NRC utilization facility license who are not determined by the staff to be *de minimis* applicants, undergo an extensive antitrust review at the construction permit (CP) stage and a review at the operating license (OL) stage. The CP review is an in depth analysis of the applicant's competitive activities conducted by the DOJ in conjunction with the staff. The competitive analysis associated with the OL stage of review is conducted by the staff, in consultation with the Department, and is focused on significant changes in the applicant's activities since the completion of the CP antitrust review (or any subsequent review). In each of these reviews, both the staff and the Department concentrate on the applicant's activities and determine whether the applicant's conduct or changes in applicant's conduct creates or maintains a situation inconsistent with the antitrust laws.

III. POST INITIAL OPERATING LICENSE ANTITRUST REVIEWS

A. General

As indicated *supra*, the NRC has established procedures by which prospective licensees of nuclear production facilities are reviewed

during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. The AEA does not specifically address the addition of new owners or operators after the initial licensing process. The legislative history discusses, to a limited extent, some types of amendments.[4] However, neither section 105c of the AEA or the Commission's regulations deal directly with applications to change ownership of facilities with operating licenses.[5] Indeed, in its *South Texas* decision, the Commission stated that, "we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment ... where an application for transfer of control of a license has been made ..." *South Texas Project*, 5 NRC at

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[4] The report by the Joint Committee on Atomic Energy notes that:

> The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for the purposes of triggering subsection 105 c., other applications which may be filled during the licensing process.

H. Rep. 91-1470, 91st Cong. 2d Sess., at 29 (1970).

[5] Applications for construction permits, for amendment of construction permits, and applications for initial operating licenses are not included here.

1318. The Commission went on to note that "[a]úthority [for antitrust review of a license transfer], not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b)."[6] *Id.* Unfortunately, the Commission did not explain how its regulations could grant authority not given by the statute.

The Commission has considered, however, the matter of adding a licensee after issuance of a construction permit, but before issuance of the initial operating license. In *Detroit Edison, et al.*, (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978) *aff'd* ALAB-475, 7 NRC 752, 755-56 n.7 (1978), the Licensing Board denied a petition to intervene and request for an antitrust hearing by a member/ratepayer of the distribution cooperative that purchased all of its power from a cooperative that would become a co-licensee of the power plant. In considering a jurisdictional argument, the Board, relying on the Congressional intent and purpose behind section 105c of the AEA cited in n.4 *supra*, stated that "[s]ince the two cooperatives in this case are required to submit an application to become co-licensees, these constitute *their* 'initial application for a construction permit'"

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[6] 10 C.F.R. § 50.80(b) provides in part that an application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and *if the license to be issued is a class 103 license, the information required by § 50.33a* (Information requested by the Attorney General for antitrust review).

(emphasis in original). *Id.*, at 588. In *Summer*, the Commission referred to *Fermi* for the proposition that the addition of a co-owner as a co-licensee was, in effect, an *initial application* of the co-owner and as such required formal antitrust consideration, stating, "[t]hat decision was based on the necessity for an in-depth review at the CP stage of *all applicants*, lest any applicant escape statutory antitrust review" (emphasis added). *South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 831 (1980).

The legislative history of section 105c and the Commission's guidance in *South Texas* might be read to indicate that Commission antitrust review, if not limited to the initial licensing process, is at least an unsettled question regarding operating license amendments. However, *Fermi* and *Summer* stand for the proposition that new license applicants are initial applicants for purposes of a section 105c antitrust review. Further, the Commission indicated in *Summer* that in such situations a formal antitrust inquiry is required. *See Id.*, at 830-31. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests.

The staff has received applications for operating license amendments that 1) request the addition of a new owner or seek Commission permission to transfer control from an existing to a new

owner or 2) request placing a non-owner operator on a license. The action the NRC Staff has taken has been particular to each situation. In general, post initial operating license amendment applications involving a change in ownership have included an antitrust review by the staff and consultation with the Attorney General. The review by the staff focuses on significant changes in the competitive market caused by the proposed change in ownership since the last antitrust review for the facility and its licensees. The staff review takes into account related proceedings and reviews in other federal agencies (e.g. FERC, SEC, or DOJ).

B. Change In Ownership

Although not specifically addressed by regulation, the staff has evolved a process for meeting the Commission's direction in the *Summer* decision to conduct an antitrust inquiry for license amendments after issuance of the operating license. The receipt of an application to add a new owner to an operating license or to seek Commission permission to transfer control from an existing to a new owner, for section 103 utilization facilities which have undergone antitrust review during the initial licensing process, is noticed in the *Federal Register*, inviting the public to express views relating to any antitrust issues raised by the application, and advising the public that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensees' activities or proposed activities have

occurred since the completion of the previous antitrust review. The staff's awareness of any related federal agency reviews of the request (e.g. FERC, SEC, or DOJ) and the staff's intention to consider those related proceedings are also noted in the *Federal Register* notice. The staff reviews the application after the comment period, so that the staff can perform the review with benefit of public comment, if any, and consultation with the Attorney General. If the Director, NRR, finds no significant change, the finding is published in the *Federal Register* with an opportunity for the public to request reconsideration as provided for in 10 C.F.R. § 2.101(e) for initial license applicants. If the Director, NRR finds significant change, the matter is referred to the Attorney General for formal antitrust review.

In conducting the significant change review, the staff uses the criteria and guidance provided by the Commission in its two *Summer* decisions for making the significant change determination for OL applicants.[7]

> The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are attributable to the licensee(s); and (3) have

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[7] In CLI-80-28, the Commission enunciated the criteria, but deferred its actual decision regarding the petition to make a significant changes determination that was before it. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980). In CLI-81-14, the Commission denied the petition. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

> anti-trust implications that would most likely warrant some Commission remedy.

Summer, 11 NRC at 824. To warrant an affirmative significant change finding, thereby triggering a formal OL antitrust review that seeks the advice of the Department of Justice on whether a hearing should be held, the particular change(s) must meet all three of these criteria. In its second *Summer* decision, the Commission provided guidance regarding the criteria and, in particular, the meaning of the third criterion in determining the significance of a change.

> As the staff recognized, "this third criterion appropriately focuses, in several ways, on what may be 'significant' about any changes since the last...review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive *or have de minimis anticompetitive effects*." (Emphasis provided) The staff correctly discerned that the third criterion has a further analytical aspect regarding remedy: "Not only does [it] require an assessment of whether the *changes* would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes by their nature would require." The third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance.

South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862, 872-73 (1981).

C. Change In Or Addition Of Non-Owner Operator

Changes in a nuclear plant operator, without any change in ownership, may also carry the potential of abuse of market power by the operator. However, the staff has determined that a plant operator who has no control over the marketing of the power or energy produced from the facility will not, under normal circumstances, be in a position to exert any significant amount of market power in the bulk power services market associated with the facility. The staff makes an effort in these cases to reach agreement on a license condition requiring new plant operators to agree to be divorced from the marketing or brokering of power or energy from the facility in question and hold existing owners accountable for the operator's actions. If the prospective new operator and the owners agree to appropriate license conditions that reduce the potential for impact on plant ownership or entitlement to power output, as determined by the staff, the application to add or change a non-owner operator is viewed as an application falling within the *de minimis* exception for submitting antitrust information provided for in 10 C.F.R. § 50.33a.

The Commission has exempted *de minimis* applicants from the requirements to submit antitrust information and, therefore, the publication for comment of such information, unless specifically requested by the Commission. *See* 10 C.F.R. § 50.33a. The Commission has determined that such applicants generally would have a negligible effect on competition. *See* 44 Fed. Reg. 60715, October 22, 1979. The staff has determined that, with an

appropriate license condition regarding the marketing and brokering of power, the potential for a non-owner operator to have an affect on competition in the bulk power market is effectively mitigated. Therefore, such an operator is, as a practical matter, the same as *a de minimis* applicant with respect to its ability to affect competition. Normally, no further antitrust review of the non-owner operator will be conducted by the staff.

IV. PREVIOUS SEABROOK NRC ANTITRUST REVIEWS

A. Construction Permit Review

By letter dated December 4, 1973, the Attorney General issued advice to the Atomic Energy Commission pursuant to Public Service Company of New Hampshire's (PSNH), the lead applicant,[8] application for a construction permit for the Seabrook Nuclear Power Station Units No. 1 and No. 2. In its advice letter, the Department expressed concern over several allegations by smaller power systems in the New England bulk power services market that they were unable to gain access to low cost bulk power supply on the same basis as

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[8]PSNH was the majority owner with 50% of the plant at the time the time of the Department's advice letter in 1973. Since this initial review, there have been several changes in ownership and ownership shares in Seabrook. Existing owners are as follows: PSNH (35.56942%); United Illuminating (17.5%); EUA Power Corporation (12.1324%) Connecticut Light & Power Company (4.05985%); Hudson Light & Power Department (0.07737%); Vermont Electric Generation and Transmission Corporative, Inc. (0.41259%); Montaup Electric Company (2.89989%); Canal Electric Company (3.52317%); New England Power Company (11.59340%); Taunton Municipal Lighting Plant (0.10034%); and New Hampshire Electric Cooperative, Inc. (2.17391%)

larger systems in the area. The advice letter stated that as a result of a settlement agreement reached between the privately owned and publicly owned systems in New England that there had been a "dramatic improvement in the relations among the various segments of the electric power industry in New England...." The Department emphasized the importance of the development of the New England Power Pool (NEPOOL) as a regional planning body that would enable participation in bulk power services by all types of power entities throughout New England. The Department concluded,

> ... that the creation of a truly open, non-exclusive NEPOOL means that all systems can have a dependable frame- work within which to obtain fair and non-discriminatory access to economical and reliable bulk power supply.(December 4, 1973 advice letter, p. 4)

As a result of its review, the Department advised the Atomic Energy Commission that there was no need for an antitrust hearing pursuant to the construction permit application for Seabrook.

B. Operating License Review

As noted above, a prospective operating licensee is not required to undergo a formal antitrust review unless the staff determines that there have been "significant changes" in the licensee's activities or proposed activities subsequent to the review by the Department of Justice and the staff at the construction permit stage. The staff completed its OL antitrust review of Seabrook in January

1986. The staff analysis indicated that,

> ...NEPOOL, which was only two years old at the time when the CP antitrust review was performed, appears to have evolved into a framework ensuring access to reliable and economical bulk power supply for all New England utilities. Two provisions of the original pool agreement were found to be discriminatory against smaller utilities and have since been removed. Further, because Seabrook 1 has been designated as a pool-planned unit, access to Seabrook 1 over pool transmission facilities of members is guaranteed for all participants under the terms of NEPOOL.[9]

Based in large part upon the successful formation and operation of NEPOOL, the staff concluded that the changes in the licensees' activities as well as any proposed changes in licensees' activities do not represent "significant changes" as identified in the *Summer* decision and recommended that no formal OL antitrust review be conducted. The staff's antitrust OL review was completed in February 1986 and the Seabrook full power license was issued on March 15, 1990.

C. EUA Power Review

By letter dated March 26, 1986, New Hampshire Yankee, acting as agent for the Seabrook licensees, requested the staff to amend the

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[9]Staff review of Seabrook licensees' changed activity, "Seabrook Station, Unit 1, Public Services Company of New Hampshire, et al, Docket No. 50-443A, Finding of No Significant Antitrust Changes," p. 57.

Seabrook construction permits (Units 1 and 2) to reflect the purchase and transfer of an approximate 12 percent ownership share in the Seabrook facility to EUA Power Corporation (EUA Power), a wholly owned subsidiary of Eastern Utility Associates of Boston, Massachusetts. The amendment requested the transfer of 12 percent ownership to EUA Power and deletion of the following owners as Seabrook licensees: Bangor-Hydro-Electric Company (2.17391%); Central Maine Power Company (6.04178%); Central Vermont Public Service Corporation (1.59096%); Fitchburg Gas and Electric Light Company (0.86519%); and Maine Public Service Company (1.46056%).

Even though a sister company, Montaup Electric Company (both are wholly owned by Eastern Utilities Associates), had previously undergone an antitrust review in conjunction with its participation in Seabrook, EUA Power represented a new owner prior to issuance of the Seabrook full power operating licensee and was required to undergo a formal antitrust review by the Department of Justice. Accordingly, EUA Power submitted pertinent 10 C.F.R. Part 50, Appendix L information to the staff regarding its operations and competitive activity. A notice of receipt of this information, which provided the opportunity for a 60 day comment period on the antitrust issues regarding the proposed ownership transfer, was published in the *Federal Register* on May 23, 1986.

By letter dated July 1, 1986 the Department advised the staff that there was,

> ... no evidence that the proposed participation by EUA Power Company in the Seabrook Units would either create or maintain a situation inconsistent with the antitrust laws under Section 105(c). We do not, therefore, believe it is necessary for the Commission to hold an antitrust hearing in this matter. (Department of Justice advice letter, p.1)

The Department's letter was published in the *Federal Register* on July 17, 1986 and provided for interested persons to request a hearing and file petitions to intervene. There were no such requests and the staff issued an amendment (No. 9) to the Seabrook construction permits authorizing the transfer of ownership effective upon completion of the transfer of ownership shares which was consummated on November 26, 1986. In this instance, there was no need to apply the significant change threshold criteria to the EUA Power amendment review and address the issue of whether the Department of Justice should conduct the review or the staff should issue a significant change determination because the request for ownership change occurred prior to issuance of the full power operating license and consequently, the review involved an amendment to the construction permit and followed construction permit review procedures.

V. CHANGES AT SEABROOK AFTER ISSUANCE OF THE INITIAL OL

The instant amendment requests to transfer PSNH'S ownership in Seabrook to a proposed new entity, NAEC, and change the plant operator from New Hampshire Yankee to a proposed new operating

entity, NAESCO, represent direct outgrowths of the bankruptcy proceeding initiated by PSNH in January 1988. Though the bankruptcy proceeding and PSNH's financial status are not the focus of the instant review, it is significant to note that PSNH is dependent upon Seabrook as its principal source of generating capacity and operating revenue. This dependence on one source of operating revenue left PSNH highly susceptible to fluctuations in the business cycle that affect different regions of the country at different periods in the cycle. During the mid 1980's commerce and industry in New England were growing dramatically. Economic growth exceeded projections for planned electric generating capacity.[10] However, as rapidly as the New England economy advanced in the mid 1980's, it declined equally a fast in the late 1980's. PSNH filed for bankruptcy in January 1988 and EUA Power Corporation, another Seabrook co-owner heavily dependent upon the sale of Seabrook power and energy, filed for bankruptcy in early 1991.

There were other factors that contributed to PSNH'S financial difficulties in the 1980's, e.g., development and approval of emergency evacuation plans for Seabrook and state regulatory proceedings involving allowance of Seabrook costs in PSNH'S rate

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[10]EUA Associates, parent company of Montaup Electric Company, a co-owner of Seabrook, formed EUA Power Corporation specifically to purchase a 12 percent ownership share in Seabrook to meet an unexpected strong demand for electric power in New England during the late 1980's and 1990's. John F.G. Eichorn, chairman of EUA Associates, was quoted by the Providence, Rhode Island Journal newspaper, as citing NEPOOL electricity demand estimates showing "a serious shortfall developing in New England, which we at EUA are determined to help eliminate." Journal, April 10, 1986.

base. All of these factors culminated in PSNH filing for bankruptcy and the resultant proposal by NU to acquire PSNH. The proposals adding a new owner and a new operator of the Seabrook facility are the principal changes the staff must address in its post OL significant change antitrust review. The staff must determine whether the new owner or the new operator will create or maintain a situation inconsistent with the antitrust laws.

VI. FERC AND SEC REVIEWS

Pursuant to the requirements and jurisdiction of both the Federal Power Act and the Public Utilities Holding Company Act of 1935, NU filed applications with the Federal Energy Regulatory Commission (FERC), on January 5, 1990, and the Securities and Exchange Commission (SEC), on October 5, 1989, respectively, seeking approval of its proposed merger with PSNH. In light of the fact that similar competitive issues are currently being addressed in proceedings at the FERC and SEC and that the findings reached in the FERC and SEC proceedings will be considered by the staff, a brief synopsis of these proceedings follows.

A. FERC Proceeding

Northeast Utilities, acting through a service company called NUSCO, sought approval under Section 203 of the Federal Power Act (enforced by the FERC) to acquire the jurisdictional assets of

PSNH. Section 203 of the Federal Power Act (FPA) requires the FERC to make a determination as to whether the proposed acquisition or merger will be consistent with the public interest. Though the FPA does not specifically charge the FERC with weighing the competitive implications of the merger or acquisition in terms of injury to competition or the competitive process in identifiable markets, in the recent past, the FERC has considered these competitive concerns as inputs to its ultimate determination as to whether the combination creates more benefits than costs, i.e., is in the public interest.

On March 2, 1990, the FERC issued an order granting intervention by all requesting parties and also granted a NU motion to expedite the hearing schedule by requiring that an initial decision be issued no later than December 31, 1990. After extensive discovery, depositions and oral argument, the FERC administrative law judge (ALJ), Jerome Nelson, issued an initial decision on December 20, 1990.[11]

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[11]"On March 7, 1990, NU submitted its direct case, which consisted of the prepared testimony and exhibits of six witnesses. After extensive discovery, including numerous depositions of NU, Staff, intervenor and third party witnesses, the Staff and intervenors filed their respective direct cases on May 25, 1990. The direct cases of staff and intervenors included the prepared testimony and exhibits of 49 witnesses. On June 25, 1990, Staff and intervenors filed cross-rebuttal cases through the prepared testimony and exhibits of 19 witnesses. On July 20, 1990, NU filed its rebuttal case through the prepared testimony and exhibits of 12 witnesses. Twenty-five days of hearings were held during August and September of 1990. Thirty-five witnesses were cross-examined, and 809 exhibits were admitted into evidence. Briefs and reply briefs were filed in October of 1990. Four days of oral argument ended on November 13, 1990." (ALJ Initial Decision, p. 6).

The ALJ made several findings in his initial decision, however, the findings most relevant to the NRC post OL amendment review concern the effect the merger will have on the New England bulk power services market. The ALJ's initial decision indicated that without a detailed set of merger conditions, the "NU-PSNH merger would have anti-competitive consequences." The ALJ found that,

> the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts). (*Id.*, p.15)

The ALJ indicated that the merged company will control 92 percent of the transmission capacity presently serving New England.

> This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices. (*Id.*, p. 16)

The ALJ concluded that merged NU-PSNH will control the principal transmission access routes from northern New England to southern New England as well as 72 percent of the New York, New England transmission corridor path.

> Because PSNH "controls the only transmission lines linking Maine and New Brunswick to the rest of New England"..., Eastern REMVEC utilities will necessarily have to deal with the merged company in order to get power from those areas. The merged company's control

> would also extend to access from New York... NU controls 72% of the New York-New England "interface"... and needs only a small portion of that share for its own use. (*Id.*)

The ALJ's initial decision recommended that the FERC approve the merger only if specific merger conditions were agreed upon by the merging parties. There are two principal conditions discussed by the ALJ designed specifically to address the new NU-PSNH's market power and particularly any potential for abuse of this newly created market power vis-a-vis other power systems in New England. The first condition is basically a rework of a proposal initially offered by NU-PSNH dealing with the merged company's policy regarding transmission over its power grid. A set of General Transmission Commitments was developed by the ALJ which dealt with various degrees of priority access and time horizons depending upon the individual power supply situation in question. This policy commitment, according to the ALJ, would reassure non-dominant power systems in New England a form of meaningful access to the transmission facilities required to fulfill their bulk power supply requirements.

The second major condition that addresses the transmission dominance of the new NU-PSNH is termed the, "New Hampshire Corridor Proposal." This proposal serves to open up the flow of power from Canada to New England and from northern New England to the heavily populated southeastern portion of New England. The Corridor Proposal allocated a total of 400 MW of transmission capacity with

200 MW allocated to New England Power Company and 200 MW allocated to southern New England utilities. These two transmission proposals recommended by the FERC ALJ are the most relevant to the staff's review of New Hampshire Yankee's requests to change ownership and the operator of the Seabrook facility.

On August 9, 1991, the FERC conditionally approved the NU merger with PSNH. To mitigate the merger's likely anticompetitive effects, the FERC strengthened NU's General Transmission Commitment and noted that it will construe NU's voluntary commitment very strictly. NU can not give higher priority to its own non-firm use than to third party requests for firm wheeling in allocating existing transmission capacity. The FERC also ruled that independent power producers and qualifying facilities are eligible for transmission access on the New Hampshire Corridor. *See Northeast Utilities Service Company* (Re Public Service Company of New Hampshire) FERC slip op. No. 364 (August 9, 1991).

B. SEC Proceeding

NU filed an application with the SEC for approval under the Public Utility Holding Company Act of 1935 (PUHCA) of its proposed merger with PSNH. The SEC issued a notice of the filing of the application on February 2, 1990 (Holding Co. Act Release No. 25032). Fourteen hearing requests from 41 separate entities were received and four of these requests, representing 21 entities, were

subsequently withdrawn. Moreover, eight entities filed comments or notices of appearance. The segment of the SEC review most relevant to staff's post OL amendment review revolves around Section 10(b)(1) of the PUHCA that requires the SEC to consider possible anticompetitive effects of the proposed NU-PSNH acquisition. The SEC in a Memorandum Opinion dated December 21, 1990 approved NU's proposed acquisition of PSNH--indicating that all PUHCA requirements, including Section 10(b)(1), had been fulfilled. In its initial decision, the SEC stated that,

> Given the approximate size of the Northeast--PSNH system and the resultant economic benefits discussed herein..., we conclude that the Acquisition does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied. (SEC Initial Decision, p. 40)

The SEC's analysis, as reflected in its initial decision, considers the economic benefits associated with a merged NU-PSNH and not so much the potential for abuse of market power that may be enhanced by the merger. The initial decision states that the,

> transfer to North Atlantic will merely move the asset from one Northeast subsidiary to another and should have no impact on competitive conditions. (*Id.*, p.58)

The SEC order approving the merger was appealed by two intervenors in the SEC proceeding--the City of Holyoke Gas and Electric

Department and the Massachusetts Municipal Wholesale Electric Company (petitioners). Petitioners filed a request for rehearing of the initial decision, arguing that the SEC erred in approving the NU-PSNH acquisition by failing to provide sufficient analysis of the anticompetitive effects of the acquisition. Petitioners based much of their argument for rehearing upon the FERC ALJ's December 20, 1990 decision which indicated that an unconditioned NU-PSNH merger would have significant anticompetitive effects upon the New England bulk power services market.

In a Supplemental Memorandum Opinion and Order (Supplemental Memorandum) dated March 15, 1991, the SEC granted petitioners a reconsideration of the SEC's initial decision.

> In our December order, we recognized that the Acquisition would decrease competition, but concluded that the Acquisition's benefits would outweigh its anticompetitive effects. The petitioners challenge this determination, arguing that the Commission ignored the anticompetitive effects of the merged company's control of transmission facilities and surplus power. (Supplemental Memorandum, p.3)

The SEC's Supplemental Memorandum indicated that its initial decision focused more on the size and corporate structure of NU-PSNH rather than the merged company's ability to control access to transmission or excess capacity. The Supplemental Memorandum stated that even though the SEC's principal focus was on the size and structure of the merged company, the competitive access issues

were considered and the SEC concluded that, "The merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior." (Supplemental Memorandum, p.5) However, the SEC relied upon the transmission commitments made by NU to mitigate any possible anticompetitive effects of the merger.[12]

The Supplemental Memorandum recognized that both the SEC and the FERC "have statutory responsibilities with respect to the anticompetitive consequences of mergers in the public-utility industry". (*Id.*, p.6). However, the SEC also recognized that the focus of the Federal Power Act and the Public Utility Holding Company Act are different in that each agency pursues administration of each act with different goals for regulating members of the electric utility industry. As a result, the SEC deferred the question of anticompetitive consequences and its ultimate approval of the proposed merger to the FERC.

> Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the Commission, [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look

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[12] The initial FERC decision found the commitments made by NU to be insufficient to remedy the potential anticompetitive effects of the merger and recommended additional terms and conditions be imposed upon the merged company as a condition for FERC approval of the merger.

> to the FERC's expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the acquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the FPA. (*Id.*, p.9)

VII. AMENDMENT APPLICATIONS COMMENTS RECEIVED BY THE STAFF

The staff, in accordance with 10 C.F.R. § 2.101(e)(1), published receipt of New Hampshire Yankee's request to amend the Seabrook OL in the *Federal Register* and provided interested parties the opportunity to comment on the antitrust issues raised by the proposed acquisition on February 28, 1991.[13] The staff received comments from the following entities or their representatives: 1) New Hampshire Electric Cooperative (April 1, 1991,); 2) Massachusetts Municipal Wholesale Electric Company (April 1, 1991); 3) City of Holyoke Gas and Electric Department (April 1, 1991); 4) Hudson Light and Power Department (April 4, 1991); and 5) Taunton Municipal Lighting Plant (April 10, 1991). By letter dated April 22, 1991, counsel for Connecticut Light and Power Company and PSNH responded to these comments.[14] The comments from participants in the FERC and SEC proceeding by and large mirrored the positions taken by the commenters in those proceedings. The comments

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[13] A similar notice regarding the change in operator from New Hampshire Yankee to NAESCO, was published in the *Federal Register* on March 6, 1991.

[14] By letter dated June 13, 1991, City of Holyoke Gas and Electric Department (HG&E) replied to the Connecticut Light and Power (CL&P) and PSNH response. By letter dated July 9, 1991, CL&P and PSNH responded to the HG&E reply. By letter dated July 22, 1991, HG&E replied to the CL&P and PSNH July 9, 1991 response.

received are summarized below with the staff analysis of each comment.

A. New Hampshire Electric Cooperative (NHEC)

Comment

NHEC is a transmission dependent utility (TDU), i.e., "entirely dependent on NU or PSNH for their bulk power transmission needs". NHEC states that without access to NU's or PSNH's transmission facilities it cannot actively compete in the New England wholesale bulk power services market. NHEC asserts that the proposed acquisition of PSNH by NU will concentrate its only source of essential transmission service in the hands of its principal competitor. NHEC cites the initial FERC decision as evidence that the proposed merger, if unconditioned, will have an adverse impact on the competitive process in the New England bulk power services market. NHEC also states that recent developments which have not been a part of the FERC record are relevant to the NRC review associated with the Seabrook post OL amendment applications.

NHEC wishes to purchase partial requirements power from another supplier, New England Power Company (NEP), rather than PSNH. NHEC and NEP entered into a long-term power supply contract on January 9, 1991; however, NHEC needs access to PSNH's transmission grid to receive the NEP power. PSNH has indicated that NHEC is contractually prohibited from taking any other off system power purchases during the term of its power supply contract with PSNH

and as a result PSNH would not approve use of its transmission grid until the contractual dispute between PSNH and NHEC is resolved.

NHEC contends that the proposed acquisition of PSNH by NU is anticompetitive and under the NRC's *Summer* criteria, represents a "significant change". NHEC seeks relief by requiring NU to,

> . . . commit before this Commission that it will provide NHEC all transmission needed for NHEC to purchase power from other sources . . . .

Staff Analysis

The staff believes that the issue described by NHEC in its April 1, 1991 filing to the staff primarily involves a contract dispute with PSNH and NU over transmission rights pertaining to power purchases by NHEC from New Brunswick. Presently, NHEC is taking partial requirements wholesale power from PSNH under a 1981 contract. A dispute has arisen between NHEC and PSNH (now NU, given its proposed acquisition of PSNH) regarding the terms under which the contract can be terminated. PSNH states that the contract requires NHEC to provide five years notice prior to cancelling the contract and switching to a different supplier. NHEC states that the contract provides for termination upon NHEC joining NEPOOL and that the recent NHEC-NEP purchase agreement and NHEC's ownership interest in Seabrook provide the basis for NEPOOL membership.

This contract dispute, which forms the linchpin for NHEC's argument

that it is dependent upon NU's transmission grid is presently being interpreted before the FERC. The staff believes that it is appropriate for this dispute to be resolved under the auspices of the FERC's jurisdiction over wholesale power and transmission tariffs and the terms and conditions associated with such agreements. The staff sees no need for the NRC to enter into a contract dispute that is under review by the FERC. Should the PSNH-NHEC contract dispute be resolved in NHEC's favor, i.e., enabling NHEC to terminate the contract without giving a five year notice, the merger condition recommended by the FERC ALJ and commitments made by NU to provide transmission dependent utilities transmission services (cf., PSNH and Connecticut Power & Light Company Comments to NRC staff dated April 22, 1991, pp. 29-30), should adequately resolve the competitive concerns raised by NHEC.

B. Massachusetts Municipal Wholesale Electric Company (MMWEC)

Comment

MMWEC is a co-owner (11.5934%) of the Seabrook plant. In its comments to the NRC, MMWEC states that the proposed acquisition of PSNH by NU is anticompetitive, notwithstanding the merger conditions recommended by the FERC ALJ, and suggests that the Director of the Office of Nuclear Reactor Regulation find, pursuant to *Summer*, that significant changes have occurred since the Attorney General's advice letter was issued in December 1973.

MMWEC contends that the standard of review of mergers required by

the FERC under the FPA is different than that required by the NRC under the Atomic Energy Act. MMWEC states that this difference permits anticompetitive acquisitions under the FPA if it is determined that the public interest is served by the acquisition (or merger), whereas the NRC must address the competitive implications of activities of licensees "irrespective of any compelling public interest." (MMWEC comments, p.3)

Moreover, MMWEC requests the NRC to address the anticompetitive aspects of NU's management and operation of Seabrook--an area not covered in the FERC ALJ's initial decision. According to MMWEC,

> NU is executing a plan whereby it has separated the Seabrook management function and ownership function from each other and utilized its market power to insulate itself, those functions and its other affiliates from any liability, except liability imposed by willful misconduct. (*Id.*, p.5)

MMWEC's concerns revolve around a July 19, 1990 agreement reached among Seabrook owners holding approximately 70 percent of the facility. This agreement provides for the transfer of the managing and operating agent from New Hampshire Yankee to a proposed wholly owned NU subsidiary, NAESCO. An exculpatory clause in the July 19, 1990 agreement, according to MMWEC,

> . . . would not only free NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. MMWEC cannot insure any

> reckless or negligent conduct of the Managing Agent or its affiliates. (*Id.*)

MMWEC requests the NRC to act to prevent NU from maintaining a situation inconsistent with the antitrust laws. MMWEC suggests that the NRC condition the approval of the license transfer to "require appropriate amendment of the Joint Ownership Agreement and to prohibit NAECO, & NAESCO and their affiliates from freeing themselves from liability for misconduct." (*Id.*, p.6)

Staff Analysis

MMWEC's principal concern is that NU used its market power in an anticompetitive manner in formulating a July 19, 1990 agreement that established parameters by which the Seabrook facility would be managed and operated. Moreover, MMWEC asserts that this agreement frees,

> . . .NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. (MMWEC comments, p. 5)

MMWEC has failed to show how NU has used (abused) its market power in bulk power services in formulating an agreement to install a new managing agent for Seabrook. MMWEC asks the NRC to condition the license transfer by requiring amendment of the Seabrook "Joint Ownership Agreement", to, effectively, make NAECO and NAESCO more accountable for their actions pursuant to their ownership and operation of the Seabrook facility respectively. Based upon the

data available to the staff, it appears as though the July 19, 1990 agreement was consummated in conformance with the Seabrook Joint Ownership Agreement, as amended, and not as a result of any abuse of market power on the part of NU. The staff believes MMWEC's concerns over the degree of liability it must absorb should NAESCO in any way mismanage Seabrook are concerns of a contractual, not competitive, nature and should be raised and addressed before an appropriate forum for these matters, not the NRC.

Moreover, as recognized by MMWEC at page three of its comments, the staff considered the possibility of a new plant operator having an influence over competitive options of the new owners of Seabrook. For this reason, after discussions with the staff, NAESCO agreed to a license condition divorcing itself from the marketing or brokering of power or energy produced by Seabrook. The license condition was designed to eliminate NAESCO's ability to exercise any market power, if evident, and obviated the need to conduct a further competitive review of NAESCO. For the reasons stated above, MMWEC's request to condition the Seabrook license that frees it from NAESCO's liability should be denied.

C. City Of Holyoke Gas & Electric Department (HG&E)

Comment

HG&E is a municipally owned electric system serving primarily western Massachusetts. "HG&E lies within the service territory of Western Massachusetts Electric Company ("WMECO"), a wholly-owned

subsidiary of NU." (HG&E comments, p.2) HG&E generates no power on its own and relies heavily on the transmission facilities of PSNH to supply approximately 36 percent of its load from the Point Lepreau nuclear plant in New Brunswick, Canada. According to HG&E,

> The increase in control that the merged entity will exercise over generation (including power from Seabrook) and transmission capacity in New England represents a "significant change" from the activities of the current licensee--an independent PSNH. (HG&E comments, p.3)

HG&E contends that NU-PSNH will wield significantly more market power than a stand alone PSNH and given the existing competitive relationship between HG&E and NU, the merged entity, without adequate license conditions and structural alterations in the market, will be able to severely restrict or at a minimum, control the cost effectiveness of a large portion of its power supply that presently flows over PSNH's transmission facilities from New Brunswick.

> Control over generation capacity greatly reduces the opportunities available to purchase power from other utilities in the region; control over transmission capacity eliminates or reduces the ability of HG&E and others to purchase power from utilities outside of New England. (*Id.*, p. 6)

Moreover, HG&E asserts that many of the benefits associated with NEPOOL operation--identified by the Department of Justice and the staff in previous reviews--may be negated by the merged company's "sufficient veto voting power" over proposals put forth by the

NEPOOL Management Committee. HG&E characterizes this change in market power as a "significant change" requiring a full review of the antitrust impacts of the proposed merger, including an analysis by the Attorney General of the antitrust impact of the proposed license transfer.

HG&E addresses ongoing reviews of NU's proposed acquisition of PSNH before other federal agencies and concludes that NRC's antitrust review mandate in Section 105c of the Atomic Energy Act more clearly relates to review of anticompetitive conduct whereas the reviews at the FERC and SEC seem to be more public interest oriented. Consequently, HG&E asserts that the NRC should not assume that these other reviews will adequately condition the proposed merger to remedy the serious competitive issues that the merger would create. HG&E urges the NRC to deny the proposed merger, yet if approved, suggests that NRC require prior approval by the FERC and SEC, and in addition, 1) require NU-PSNH to transmit Point Lepreau power to HG&E for the term of any extended HG&E/Point Lepreau power supply contract with equivalent terms to its current contract, and 2) require NU to divest its subsidiary, Holyoke Water Power Company (HWP) or consolidate HWP into another NU subsidiary, Western Massachusetts Electric Company, thereby subjecting HWP to state regulation as a public utility.

Staff Analysis

HG&E asks the NRC to initiate a full antitrust review of the proposed merger, considering all of the antitrust effects of the

proposed merger pursuant to Section 105c of the Atomic Energy Act. "Such review would include an analysis by the Attorney General of the antitrust impact of the proposed license transfer. 42 U.S.C. SEC.2135" (HG&G comments, P.3) At the conclusion of such a review, HG&E recommends that the NRC deny the proposed license transfer or approve the transfer with license conditions over and above those recommended by the FERC ALJ.

As indicated *supra* (cf., Section III herein), the staff takes into consideration the record establised during related federal agency reviews of the change in ownership. The FERC proceeding and the accompanying recommendations for competition enhancing merger conditions were factors the staff considered in evaluating the instant proposals under the significant change criteria. The staff believes the presence of license conditions recommended by the FERC mitigates the possibility of anticompetitive effects ensuing from such a merger as well as the need for a more formal antitrust review by the Department of Justice. For the reasons stated above, the staff recommends denying HG&E's requests to deny the proposed merger or initiate a formal antitrust review that incorporates an analysis by the Attorney General.

Considering the license conditions associated with the proposed acquisition of PSNH by NU, the staff recommends denying in part and approving in part HG&E's request to attach the FERC and SEC merger conditions and impose two additional conditions as a requirement

for consummation of the acquisition. The staff has relied heavily on the record established to date in the FERC proceeding and in light of the procompetitive merger conditions proposed by the FERC ALJ would recommend approval of the license transfer. The SEC in its Supplemental Memorandum Opinion dated March 21, 1991 deferred its ruling on the competitive aspects of the proposed merger to the FERC.

The staff recommends denying HG&E's request to the NRC to condition the license transfer upon two additional requirements, one providing, in effect, a life of service transmission contract for HG&E's Point Lepreau power and another requiring NU to divest a wholly owned subsidiary in competition with HG&E. There has been nothing established in the FERC record or in the instant proceeding that indicates that HG&E would have been able to renew its transmission contract with PSNH or its power supply contract with New Brunswick upon termination of the existing contracts in 1994. NU, as PSNH's parent company, has not indicated that it plans to deny HG&E transmission capacity to New Brunswick after the proposed merger is consummated. NU has stated that this transmission corridor to New Brunswick will be offered to "all comers," as it were. It appears as though HG&E will be in competition with other potential buyers of Point Lepreau power for both transmission and power and energy. The staff sees no reason to assist HG&E over any other competitor in this regard. Should HG&E enter into a transmission contract with NU-PSNH and find the terms and

conditions in any way anticompetitive, the staff believes the FERC is the proper forum for resolution of tariff issues. The FERC initial decision recognized the increase in market power resulting from the NU-PSNH acquisition, yet recommended conditions to mitigate any abuse of this newfound power.

> The merged company -- with vast power over transmission and control of surplus power -- must offer viable wheeling service in order to alleviate potential anti-competitive consequences. (FERC Initial Division, p. 48) [Emphasis added].

Moreover, the FERC ALJ approved the request by HG&E to require NU to establish the position of "ombudsman" to review NU's service and eliminate the possibility of any anticompetitive consequences resulting from NU's substantial market power in transmission and surplus power in the New England market. Additionally, the FERC ALJ indicated that,

> The ombudsman is not the only avenue for dissatisfied customers. The Commission's Enforcement Task Force maintains a "hotline" ... through which complaints can be received. (FERC Initial Decision, p. 49)

The staff believes these actions taken by the FERC adequately address HG&E's concerns over abuse of NU's post merger market power. For this reason, the staff does not believe that HG&E has established a basis for the staff to conclude that there is a significant change warranting an antitrust review. Furthermore, there is no basis for the staff unilaterally to impose conditions

on the transfer of the license providing for a life of service transmission contract.

Regarding HG&E's second condition, the staff believes that no record has been established to justify HG&E's request to divest Holyoke Water Power Company from NU. According to the FERC initial decision, "The City [HG&E] is covered by the protection given the TDUs, and is entitled to no more in this regard." (FERC Initial Decision, p. 50) Accordingly, divestiture of HWP does not seem warranted solely to, "eliminate NU's incentive to eliminate injury to HG&E...." (HG&E comments, p. 10; emphasis added). The staff recommends denying HG&E's request to divest HWP from NU.

D. Hudson and Taunton

Comment

The Taunton Municipal Lighting Plant (Taunton) and the Hudson Light and Power Department (Hudson) are both owners of the Seabrook facility. Taunton and Hudson are both members of the Massachusetts Municipal Wholesale Electric Company and both have requested the NRC to adopt MMWEC's comments submitted to the NRC via letter dated April 1, 1991.

Staff Analysis

As indicated *supra*, the staff recommended denying MMWEC's request to further condition the Seabrook operating license to free MMWEC from any liability to existing owners that may result from the proposed license transfer. In light of the fact that Hudson and

Taunton adopted MMWEC's comments, the staff also recommends that their requests be denied.

VIII. NRC STAFF FINDINGS

A. Change In Ownership

The ownership transfer of over 35 percent of Seabrook potentially represents a change in the degree of control over the operation of the nuclear facility. However, as indicated *supra*, the FERC has considered the anticompetitive consequences of the proposed merger and a set of extensive merger conditions was proposed by the FERC administrative law judge regarding New Hampshire Yankee's proposals to transfer ownership and operation of the Seabrook facility. In this regard, the staff has relied heavily upon the record established in the FERC initial decision in its review of the instant amendment applications. The FERC merger conditions were designed specifically to mitigate any potential competitive problems associated with the proposed acquisition of PSNH by NU.

The staff has reviewed the proposed transfer of ownership share in the Seabrook facility from PSNH to NU for significant change since the last antitrust review of the Seabrook licensees, using the criteria discussed by the Commission in *Summer*. (*Cf.* Section III herein) The amendment request was dated November 13, 1990, after the previous antitrust review of the facility and therefore the

first *Summer* criterion, that the change has occurred since the last antitrust review, is satisfied. The second *Summer* criterion is satisfied in that the change is the result of the bankruptcy proceeding initiated by PSNH in January 1988 and as such is "reasonably attributable to the licensee[s] in the sense that the licensee[s] ha[ve] had sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review." *Summer*, 13 NRC at 871.

This leaves for consideration the third *Summer* criterion, that the change has antitrust implications that would be likely to warrant Commission remedy. The Commission in *Summer* adopted the staff's view that application of the third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have *de minimis* anticompetitive effects. *See Id.* at 872. The Commission further stated "the third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance." *Id.*

The staff believes that the record developed in the FERC proceeding involving the NU-PSNH acquisition adequately portrays the competitive situation in the New England bulk power services market and that the anticompetitive aspects of the proposed changes are being addressed in the FERC proceeding. The staff further

believes that the actions being taken by the FERC will adequately address concerns regarding the anticompetitive effects of NU's post merger market power such that the change in ownership as approved by the FERC will not have implications that warrant a Commission remedy. Consequently, the third *Summer* criterion has not been satisfied.

Each of the significant change criteria discussed in *Summer* must be met to make an affirmative significant change finding. In this instance, the third criterion has not been met.

B. Addition Of Non-Owner Operator

In light of the license condition developed by the staff and agreed to by NU, NAESCO (the proposed new plant operator), and the other Seabrook licensees, prohibiting NAESCO from marketing or brokering power or energy produced from the Seabrook plant and holding all other Seabrook licensees responsible for NAESCO's actions pursuant to marketing or brokering of Seabrook power, the staff believes the change in plant operator from New Hampshire Yankee to NAESCO will not have antitrust relevance.

IX. CONCLUSION

For the reasons discussed above, and after consultation with the DOJ, the staff recommends that the Director of the Office of

Nuclear Reactor Regulation conclude that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license.

February 13, 1992

Docket No. 50-443A

Daniel I. Davidson, Esq.
Spiegel and McDiarmid
1350 New York Avenue, N.W.
Washington, D.C. 20005

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Davidson:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result from this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

(original signed by)
William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 13, 1992

Docket No. 50-443A

Daniel I. Davidson, Esq.
Spiegel and McDiarmid
1350 New York Avenue, N.W.
Washington, D.C. 20005

Re: Seabrook Nuclear Station, Unit 1:
No Significant Antitrust Change Finding

Dear Mr. Davidson:

Pursuant to the antitrust review of the anticipated corporate combination between Northeast Utilities and Public Service Company of New Hampshire and the proposed change in ownership in Seabrook Unit 1 that will result from this combination, the Director of the Office of Nuclear Reactor Regulation has made a finding in accordance with Section 105c(2) of the Atomic Energy Act of 1954, as amended, that no significant antitrust changes have occurred subsequent to the previous antitrust review of Unit 1 of the Seabrook Nuclear Station.

This finding is subject to reevaluation if a member of the public requests same in response to publication of the finding in the Federal Register. A copy of the notice that is being transmitted to the Federal Register and a copy of the Staff Review pursuant to Unit 1 of the Seabrook Nuclear Station are enclosed for your information.

Sincerely,

W. M. Lambe

William M. Lambe
Antitrust Policy Analyst
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

Enclosures:
As stated

[7590-01]

NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50-443A

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.

SEABROOK NUCLEAR STATION, UNIT 1

PROPOSED OWNERSHIP TRANSFER

NOTICE OF NO SIGNIFICANT ANTITRUST CHANGES

AND TIME FOR FILING REQUESTS FOR REEVALUATION

The Director of the Office of Nuclear Reactor Regulation has made a finding in accordance w.th section 105c(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2135, that no significant (antitrust) changes in the licensees' activities or proposed activities have occurred as a result of the proposed change in ownership of Unit 1 of the Seabrook Nuclear Station (Seabrook) detailed in the licensee's amendment application dated November 13, 1991. The finding is as follows:

> Section 105c(2) of the Atomic Energy Act of 1954, as amended, provides that an application for a license to operate a utilization facility for which a construction permit was issued under section 103 shall not undergo an antitrust review unless the Commission determines that such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous antitrust review by the Attorney General and the Commission in connection with the construction permit for the facility. The Commission has delegated the authority to make

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the "significant change" determination to the Director, Office of Nuclear Reactor Regulation.

By application dated November 13, 1991, the Public Service Company of New Hampshire (PSNH or licensee), through its New Hampshire Yankee division, pursuant to 10 CFR 50.90, requested the transfer of its 35.56942% ownership interest in the Seabrook Nuclear Power Station, Unit 1 (Seabrook) to a newly formed, wholly owned subsidiary of Northeast Utilities (NU). This newly formed subsidiary will be called the North Atlantic Energy Corporation (NAEC). The Seabrook construction permit antitrust review was completed in 1973 and the operating license antitrust review of Seabrook was completed in 1986. The staffs of the Policy Development and Technical Support Branch, Office of Nuclear Reactor Regulation and the Office of the General Counsel, hereinafter referred to as the "staff", have jointly concluded, after consultation with the Department of Justice, that the proposed change in ownership is not a significant change under the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14).

On February 28, 1991, the staff published in the Federal Register (56 Fed. Reg. 8373) receipt of the licensee's request to transfer its 35.56942% ownership interest in Seabrook to NAEC. This amendment request is directly related to the proposed merger between NU and PSNH. The notice indicated the

reason for the transfer, stated that there were no anticipated significant safety hazards as a result of the proposed transfer and provided an opportunity for public comment on any antitrust issues related to the proposed transfer. The staff received comments from several interested parties -- all of which have been condidered and factored into this significant change finding.

The staff reviewed the proposed transfer of PSNH's ownership in the Seabrook facility to a wholly owned subsidiary of NU for significant changes since the last antitrust review of Seabrook, using the criteria discussed by the Commission in its *Summer* decisions (CLI-80-28 and CLI-81-14). The staff believes that the record developed to date in the proceeding at the Federal Energy Regulatory Commission (FERC) involving the proposed NU/PSNH merger adequately portrays the competitive situation(s) in the markets served by the Seabrook facility and that any anticompetitive aspects of the proposed changes have been adequately addressed in the FERC proceeding. Moreover, merger conditions designed to mitigate possible anticompetitive effects of the proposed merger have been developed in the FERC proceeding. The staff further believes that the FERC proceeding addressed the issue of adequately protecting the interests of competing power systems and the competitive process in the area served by the Seabrook facility such that the changes will not have implications that

warrant a Commission remedy. In reaching this conclusion, the staff considered the structure of the electric utility industry in New England and adjacent areas and the events relevant to the Seabrook Nuclear Power Station and Millstone Nuclear Power Station, Unit 3 construction permit and operating license reviews. For these reasons, and after consultation with the Department of Justice, the staff recommends that a no affirmative "significant change" determination be made regarding the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1991.

Based upon the staff analysis, it is my finding that there have been no "significant changes" in the licensees' activities or proposed activities since the completion of the previous antitrust review.

Signed on February 9, 1992 by Thomas E. Murley, Director, of the Office of Nuclear Reactor Regulation.

Any person whose interest may be affected by this finding may file, with full particulars, a request for reevaluation with the Director of the Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission , Washington, DC 20555 within 30 days of the initial publication of this notice in the Federal Register. Requests for reevaluation of the no significant change

determination shall be accepted after the date when the Director's finding becomes final, but before the issuance of the operating license amendment, only if they contain new information , such as information about facts or events of antitrust significance that have occurred since that date, or information that could not reasonably have been submitted prior to that date.

Dated at Rockville, Maryland, this 11th day of February 1992.

FOR THE NUCLEAR REGULATORY COMMISSION

Anthony T. Cody Chief
Policy Development and Technical
Support Branch
Program Management, Policy Development,
and Analysis Staff
Office of Nuclear Reactor Regulation

SEABROOK NUCLEAR STATION, UNIT 1

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.

DOCKET NO. 50-443A

STAFF RECOMMENDATION

NO POST OL SIGNIFICANT ANTITRUST CHANGES

AUGUST 1991

CONTENTS

I. THE SEABROOK AMENDMENT APPLICATIONS

By letters dated November 13, 1990, the Nuclear Regulatory Commission (NRC or Commission) staff (staff) received post Operating License (OL) amendment applications requesting two license changes: 1) to transfer operating responsibility and management of the Seabrook facility from New Hampshire Yankee, the current operator, to a proposed entity called North Atlantic Energy Service Company (NAESCO); and 2) to authorize the ownership transfer of approximately 35 percent of the Seabrook facility from Public Service Company of New Hampshire (PSNH) to a proposed entity called North Atlantic Energy Corporation (NAEC). Both NAESCO and NAEC will be wholly owned subsidiaries of Northeast Utilities (NU) and formed solely to operate Seabrook and own PSNH's share of the facility respectively. The transfer of operating responsibility to NAESCO and the proposed transfer of PSNH'S ownership in Seabrook to NAEC introduce new entities associated with the Seabrook facility.

The applicant and the licensee suggest that no antitrust review of these proposed changes is required by the Atomic Energy Act. The staff believes the legislative history and reading of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, require the staff at least to review new owners of nuclear power production facilities for the purpose of determining whether the adding of the new owner to the license will constitute a significant chang . The staff recommends that the Director of the Office of Nuclear Reactor

Regulation conclude from the staff's analysis herein and consultation with the Department of Justice (Department or DOJ) that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license. The basis for staff's recommendation and determination are provided herein.

II. APPLICABLE STATUTE AND REGULATIONS

Section 105 of the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. 2135, designates when and how antitrust issues may be raised. *See Houston Lighting & Power Co.*, (South Texas Project), CLI-77-13, 5 NRC 1303, 1317 (1977). In connection with the legislation to remove the need to make a finding of practical value before issuing a commercial license,[1] in 1970, the Joint Committee

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[1] Before the amendment, the Commission could issue a commercial license for a production or utilization facility only after it had made a finding of "practical value" of the facility for industrial or commercial purposes. Public Law 91-560 (84 Stat. 1472)(1970), section 3, amended section 102 of the Atomic Energy Act (AEA). Prior to the amendment, section 102 of the AEA read as follows:

> SEC.102. FINDING OF PRACTICAL VALUE.-Whenever the Commission has made a finding in writing that any type of utilization or production facility has been sufficiently developed to be of practical value for industrial or

(continued...)

on Atomic Energy also examined section 105c. Before the 1970 amendment, section 105c provided that whenever the Commission proposed to issue a commercial license, it would notify the Attorney General of the proposed license and the proposed terms and conditions thereof. The Attorney General would then be obliged to advise the Commission "whether, insofar as he can determine, the proposed license would tend to create or maintain a situation inconsistent with the antitrust laws and such advice will be published in the *Federal Register*."[2] The Joint Committee, recognizing that the language and potential effect of the existing section 105c were not sufficiently clear, decided to amend section 105c to clarify and revise this phase of the Commission's licensing process. *See* 116 Cong. Rec. S19253.

Subsection 105c(1), as amended, requires the Commission to transmit, to the Attorney General, a copy of any license application to construct or operate a nuclear facility for the

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[1](...continued)
commercial purposes, the Commission may thereafter issue licenses for such type of facility pursuant to section 103.

[2] Prior to the 1970 amendment, antitrust review could occur only following a Commission finding, under section 102 of the Atomic Energy Act, that a type of facility had been sufficiently developed to be of "practical value" for industrial or commercial purposes. Because the Commission never made such a finding, no antitrust reviews occurred. Power reactor construction permits and operating licenses before 1970 were issued pursuant to section 104b, which applied to facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Attorney General's advice as to whether the grant of an application will create or maintain a situation inconsistent with the antitrust laws. Subsection 105c(2) provides an exception to the requirements of subsection 105c(1) for a license to operate a nuclear facility for which a construction permit was issued under section 103, unless the Commission determines that such review is advisable on the ground that "significant changes" in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission in connection with the construction permit for the facility.

The Commission has promulgated regulations regarding the submittal of information in connection with the prelicensing antitrust review of facilities and the forwarding of antitrust information to the Attorney General. *See* 10 C.F.R. §§ 2.101, 2.102, and 50.33a. Section 50.33a requires the submission of the information specified in 10 C.F.R. Part 50, Appendix L (Information Requested By The Attorney General For Antitrust Review Facility License Applications). The publication in the *Federal Register* of a notice of the docketing of the antitrust information required by Part 50, Appendix L is required by 10 C.F.R. § 2.101(c). Subsections 2.101(e) and 2.102(d) address the situation in which an antitrust review has been conducted as part of the application for a construction permit and the application for an operating license is now before the Commission. Related to this, the Commission has delegated to the Director of Nuclear Reactor Regulation (NRR) or

the Director of Nuclear Material Safety and Safeguards (NMSS), as appropriate, its authority under subsection 105c(2) of the AEA to make the determination in connection with an application for an operating license as to whether "significant changes" in the licensee's activities, or proposed activities under its license have occurred subsequent to the antitrust review conducted in connection with the construction permit application. *See* 10 C.F.R. §§ 2.101(e)(1) and 2.102(d)(2).[3]

On October 22, 1979, the Commission amended 10 C.F.R. § 55.33a to reduce or eliminate the requirements for submission of antitrust information in certain *de minimis* instances. In publishing the rule, the Commission stated its conclusion that applicants whose generating capacity at the time of the application is 200 MW(e) or less are not required to submit the information specified in Appendix L of Part 50, unless specifically requested to do so. The

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[3] In connection with the delegation, the Commission approved procedures to be used until such time as regulations implementing the procedures were adopted. Although never formally published, the procedures are available as attachments to SECY-79-353 (May 24, 1979) and SECY-81-43 (January 19, 1981). On March 9, 1982, the Commission amended its regulations to incorporate final procedures implementing the Commission's delegation of authority to make the "significant changes" determination to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate. 47 Fed. Reg. 9963, March 9, 1982. The amended regulation provides that the Director, NRR or NMSS, as appropriate, after inviting the public to submit comments regarding antitrust aspects of the application and after reviewing any comments received, is authorized to make a significant change determination and, depending on his determination, either refer the antitrust information to the Attorney General or publish a finding of no significant changes in the *Federal Register* with an opportunity for requesting reevaluation of the finding.

Commission further stated that it believed that utilities smaller than these generally would have a negligible effect on competition. Fed. Reg. 60715, October 22, 1979.

All applicants for an NRC utilization facility license who are not determined by the staff to be *de minimis* applicants, undergo an extensive antitrust review at the construction permit (CP) stage and a review at the operating license (OL) stage. The CP review is an in depth analysis of the applicant's competitive activities conducted by the DOJ in conjunction with the staff. The competitive analysis associated with the OL stage of review is conducted by the staff, in consultation with the Department, and is focused on significant changes in the applicant's activities since the completion of the CP antitrust review (or any subsequent review). In each of these reviews, both the staff and the Department concentrate on the applicant's activities and determine whether the applicant's conduct or changes in applicant's conduct creates or maintains a situation inconsistent with the antitrust laws.

III. POST INITIAL OPERATING LICENSE ANTITRUST REVIEWS

A. General

As indicated *supra*, the NRC has established procedures by which prospective licensees of nuclear production facilities are reviewed

during the initial licensing process to determine whether the applicant's activities will create or maintain a situation inconsistent with the antitrust laws. The AEA does not specifically address the addition of new owners or operators after the initial licensing process. The legislative history discusses, to a limited extent, some types of amendments.[4] However, neither section 105c of the AEA or the Commission's regulations deal directly with applications to change ownership of facilities with operating licenses.[5] Indeed, in its *South Texas* decision, the Commission stated that, "we need not and do not decide whether antitrust review may be initiated in case of an application for a license amendment ... where an application for transfer of control of a license has been made ..." *South Texas Project*, 5 NRC at

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[4] The report by the Joint Committee on Atomic Energy notes that:

> The committee recognizes that applications may be amended from time to time, that there may be applications to extend or review [sic] a license, and also that the form of an application for a construction permit may be such that, from the applicant's standpoint, it ultimately ripens into the application for an operating license. The phrases "any license application", "an application for a license", and "any application" as used in the clarified and revised subsection 105 c. refer to the initial application for a construction permit, the initial application for operating license, or the initial application for a modification which would constitute a new or substantially different facility, as the case may be, as determined by the Commission. The phrases do not include, for the purposes of triggering subsection 105 c., other applications which may be filled during the licensing process.

H. Rep. 91-1470, 91st Cong. 2d Sess., at 29 (1970).

[5] Applications for construction permits, for amendment of construction permits, and applications for initial operating licenses are not included here.

1318. The Commission went on to note that "[a]úthority [for antitrust review of a license transfer], not explicitly referred to in the statute or its history, could be drawn as an implication from our regulations. 10 CFR §50.80(b)."[6] *Id.* Unfortunately, the Commission did not explain how its regulations could grant authority not given by the statute.

The Commission has considered, however, the matter of adding a licensee after issuance of a construction permit, but before issuance of the initial operating license. In *Detroit Edison, et al.*, (Enrico Fermi Atomic Power Plant, Unit No. 2), 7 NRC 583, 587-89 (1978) *aff'd* ALAB-475, 7 NRC 752, 755-56 n.7 (1978), the Licensing Board denied a petition to intervene and request for an antitrust hearing by a member/ratepayer of the distribution cooperative that purchased all of its power from a cooperative that would become a co-licensee of the power plant. In considering a jurisdictional argument, the Board, relying on the Congressional intent and purpose behind section 105c of the AEA cited in n.4 *supra*, stated that "[s]ince the two cooperatives in this case are required to submit an application to become co-licensees, these constitute *their* 'initial application for a construction permit'"

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[6] 10 C.F.R. § 50.80(b) provides in part that an application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and *if the license to be issued is a class 103 license, the information required by § 50.33a* (Information requested by the Attorney General for antitrust review).

(emphasis in original). *Id.*, at 588. In *Summer*, the Commission referred to *Fermi* for the proposition that the addition of a co-owner as a co-licensee was, in effect, an *initial application* of the co-owner and as such required formal antitrust consideration, stating, "[t]hat decision was based on the necessity for an in-depth review at the CP stage of *all applicants*, lest any applicant escape statutory antitrust review" (emphasis added). *South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817, 831 (1980).

The legislative history of section 105c and the Commission's guidance in *South Texas* might be read to indicate that Commission antitrust review, if not limited to the initial licensing process, is at least an unsettled question regarding operating license amendments. However, *Fermi* and *Summer* stand for the proposition that new license applicants are initial applicants for purposes of a section 105c antitrust review. Further, the Commission indicated in *Summer* that in such situations a formal antitrust inquiry is required. *See Id.*, at 830-31. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests.

The staff has received applications for operating license amendments that 1) request the addition of a new owner or seek Commission permission to transfer control from an existing to a new

owner or 2) request placing a non-owner operator on a license. The action the NRC Staff has taken has been particular to each situation. In general, post initial operating license amendment applications involving a change in ownership have included an antitrust review by the staff and consultation with the Attorney General. The review by the staff focuses on significant changes in the competitive market caused by the proposed change in ownership since the last antitrust review for the facility and its licensees. The staff review takes into account related proceedings and reviews in other federal agencies (e.g. FERC, SEC, or DOJ).

B. Change In Ownership

Although not specifically addressed by regulation, the staff has evolved a process for meeting the Commission's direction in the *Summer* decision to conduct an antitrust inquiry for license amendments after issuance of the operating license. The receipt of an application to add a new owner to an operating license or to seek Commission permission to transfer control from an existing to a new owner, for section 103 utilization facilities which have undergone antitrust review during the initial licensing process, is noticed in the *Federal Register*, inviting the public to express views relating to any antitrust issues raised by the application, and advising the public that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensees' activities or proposed activities have

occurred since the completion of the previous antitrust review. The staff's awareness of any related federal agency reviews of the request (e.g. FERC, SEC, or DOJ) and the staff's intention to consider those related proceedings are also noted in the *Federal Register* notice. The staff reviews the application after the comment period, so that the staff can perform the review with benefit of public comment, if any, and consultation with the Attorney General. If the Director, NRR, finds no significant change, the finding is published in the *Federal Register* with an opportunity for the public to request reconsideration as provided for in 10 C.F.R. § 2.101(e) for initial license applicants. If the Director, NRR finds significant change, the matter is referred to the Attorney General for formal antitrust review.

In conducting the significant change review, the staff uses the criteria and guidance provided by the Commission in its two *Summer* decisions for making the significant change determination for OL applicants.[7]

> The statute contemplates that the change or changes (1) have occurred since the previous antitrust review of the licensee(s); (2) are attributable to the licensee(s); and (3) have

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[7] In CLI-80-28, the Commission enunciated the criteria, but deferred its actual decision regarding the petition to make a significant changes determination that was before it. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28, 11 NRC 817 (1980). In CLI-81-14, the Commission denied the petition. *See South Carolina Electric and Gas Company and South Carolina Public Service Authority*, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981).

> anti-trust implications that would most likely warrant some Commission remedy.

Summer, 11 NRC at 824. To warrant an affirmative significant change finding, thereby triggering a formal OL antitrust review that seeks the advice of the Department of Justice on whether a hearing should be held, the particular change(s) must meet all three of these criteria. In its second *Summer* decision, the Commission provided guidance regarding the criteria and, in particular, the meaning of the third criterion in determining the significance of a change.

> As the staff recognized, "this third criterion appropriately focuses, in several ways, on what may be 'significant' about any changes since the last...review. Application of this third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive *or have de minimis anticompetitive effects*." (Emphasis provided) The staff correctly discerned that the third criterion has a further analytical aspect regarding remedy: "Not only does [it] require an assessment of whether the *changes* would be likely to warrant Commission remedy, but one must also consider the type of remedy which such changes by their nature would require." The third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance.

South Carolina Electric and Gas Company and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862, 872-73 (1981).

C. Change In Or Addition Of Non-Owner Operator

Changes in a nuclear plant operator, without any change in ownership, may also carry the potential of abuse of market power by the operator. However, the staff has determined that a plant operator who has no control over the marketing of the power or energy produced from the facility will not, under normal circumstances, be in a position to exert any significant amount of market power in the bulk power services market associated with the facility. The staff makes an effort in these cases to reach agreement on a license condition requiring new plant operators to agree to be divorced from the marketing or brokering of power or energy from the facility in question and hold existing owners accountable for the operator's actions. If the prospective new operator and the owners agree to appropriate license conditions that reduce the potential for impact on plant ownership or entitlement to power output, as determined by the staff, the application to add or change a non-owner operator is viewed as an application falling within the *de minimis* exception for submitting antitrust information provided for in 10 C.F.R. § 50.33a.

The Commission has exempted *de minimis* applicants from the requirements to submit antitrust information and, therefore, the publication for comment of such information, unless specifically requested by the Commission. *See* 10 C.F.R. § 50.33a. The Commission has determined that such applicants generally would have a negligible effect on competition. *See* 44 Fed. Reg. 60715, October 22, 1979. The staff has determined that, with an

appropriate license condition regarding the marketing and brokering of power, the potential for a non-owner operator to have an affect on competition in the bulk power market is effectively mitigated. Therefore, such an operator is, as a practical matter, the same as *a de minimis* applicant with respect to its ability to affect competition. Normally, no further antitrust review of the non-owner operator will be conducted by the staff.

IV. PREVIOUS SEABROOK NRC ANTITRUST REVIEWS

A. Construction Permit Review

By letter dated December 4, 1973, the Attorney General issued advice to the Atomic Energy Commission pursuant to Public Service Company of New Hampshire's (PSNH), the lead applicant,[8] application for a construction permit for the Seabrook Nuclear Power Station Units No. 1 and No. 2. In its advice letter, the Department expressed concern over several allegations by smaller power systems in the New England bulk power services market that they were unable to gain access to low cost bulk power supply on the same basis as

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[8]PSNH was the majority owner with 50% of the plant at the time the time of the Department's advice letter in 1973. Since this initial review, there have been several changes in ownership and ownership shares in Seabrook. Existing owners are as follows: PSNH (35.56942%); United Illuminating (17.5%); EUA Power Corporation (12.1324%) Connecticut Light & Power Company (4.05985%); Hudson Light & Power Department (0.07737%); Vermont Electric Generation and Transmission Corporative, Inc. (0.41259%); Montaup Electric Company (2.89989%); Canal Electric Company (3.52317%); New England Power Company (11.59340%); Taunton Municipal Lighting Plant (0.10034%); and New Hampshire Electric Cooperative, Inc. (2.17391%)

larger systems in the area. The advice letter stated that as a result of a settlement agreement reached between the privately owned and publicly owned systems in New England that there had been a "dramatic improvement in the relations among the various segments of the electric power industry in New England...." The Department emphasized the importance of the development of the New England Power Pool (NEPOOL) as a regional planning body that would enable participation in bulk power services by all types of power entities throughout New England. The Department concluded,

> ... that the creation of a truly open, non-exclusive NEPOOL means that all systems can have a dependable frame- work within which to obtain fair and non-discriminatory access to economical and reliable bulk power supply.(December 4, 1973 advice letter, p. 4)

As a result of its review, the Department advised the Atomic Energy Commission that there was no need for an antitrust hearing pursuant to the construction permit application for Seabrook.

B. Operating License Review

As noted above, a prospective operating licensee is not required to undergo a formal antitrust review unless the staff determines that there have been "significant changes" in the licensee's activities or proposed activities subsequent to the review by the Department of Justice and the staff at the construction permit stage. The staff completed its OL antitrust review of Seabrook in January

1986. The staff analysis indicated that,

> ...NEPOOL, which was only two years old at the time when the CP antitrust review was performed, appears to have evolved into a framework ensuring access to reliable and economical bulk power supply for all New England utilities. Two provisions of the original pool agreement were found to be discriminatory against smaller utilities and have since been removed. Further, because Seabrook 1 has been designated as a pool-planned unit, access to Seabrook 1 over pool transmission facilities of members is guaranteed for all participants under the terms of NEPOOL.[9]

Based in large part upon the successful formation and operation of NEPOOL, the staff concluded that the changes in the licensees' activities as well as any proposed changes in licensees' activities do not represent "significant changes" as identified in the *Summer* decision and recommended that no formal OL antitrust review be conducted. The staff's antitrust OL review was completed in February 1986 and the Seabrook full power license was issued on March 15, 1990.

C. EUA Power Review

By letter dated March 26, 1986, New Hampshire Yankee, acting as agent for the Seabrook licensees, requested the staff to amend the

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[9]Staff review of Seabrook licensees' changed activity, "Seabrook Station, Unit 1, Public Services Company of New Hampshire, et al, Docket No. 50-443A, Finding of No Significant Antitrust Changes," p. 57.

Seabrook construction permits (Units 1 and 2) to reflect the purchase and transfer of an approximate 12 percent ownership share in the Seabrook facility to EUA Power Corporation (EUA Power), a wholly owned subsidiary of Eastern Utility Associates of Boston, Massachusetts. The amendment requested the transfer of 12 percent ownership to EUA Power and deletion of the following owners as Seabrook licensees: Bangor-Hydro-Electric Company (2.17391%); Central Maine Power Company (6.04178%); Central Vermont Public Service Corporation (1.59096%); Fitchburg Gas and Electric Light Company (0.86519%); and Maine Public Service Company (1.46056%).

Even though a sister company, Montaup Electric Company (both are wholly owned by Eastern Utilities Associates), had previously undergone an antitrust review in conjunction with its participation in Seabrook, EUA Power represented a new owner prior to issuance of the Seabrook full power operating licensee and was required to undergo a formal antitrust review by the Department of Justice. Accordingly, EUA Power submitted pertinent 10 C.F.R. Part 50, Appendix L information to the staff regarding its operations and competitive activity. A notice of receipt of this information, which provided the opportunity for a 60 day comment period on the antitrust issues regarding the proposed ownership transfer, was published in the *Federal Register* on May 23, 1986.

By letter dated July 1, 1986 the Department advised the staff that there was,

> ... no evidence that the proposed participation by EUA Power Company in the Seabrook Units would either create or maintain a situation inconsistent with the antitrust laws under Section 105(c). We do not, therefore, believe it is necessary for the Commission to hold an antitrust hearing in this matter. (Department of Justice advice letter, p.1)

The Department's letter was published in the *Federal Register* on July 17, 1986 and provided for interested persons to request a hearing and file petitions to intervene. There were no such requests and the staff issued an amendment (No. 9) to the Seabrook construction permits authorizing the transfer of ownership effective upon completion of the transfer of ownership shares which was consummated on November 26, 1986. In this instance, there was no need to apply the significant change threshold criteria to the EUA Power amendment review and address the issue of whether the Department of Justice should conduct the review or the staff should issue a significant change determination because the request for ownership change occurred prior to issuance of the full power operating license and consequently, the review involved an amendment to the construction permit and followed construction permit review procedures.

V. CHANGES AT SEABROOK AFTER ISSUANCE OF THE INITIAL OL

The instant amendment requests to transfer PSNH'S ownership in Seabrook to a proposed new entity, NAEC, and change the plant operator from New Hampshire Yankee to a proposed new operating

entity, NAESCO, represent direct outgrowths of the bankruptcy proceeding initiated by PSNH in January 1988. Though the bankruptcy proceeding and PSNH's financial status are not the focus of the instant review, it is significant to note that PSNH is dependent upon Seabrook as its principal source of generating capacity and operating revenue. This dependence on one source of operating revenue left PSNH highly susceptible to fluctuations in the business cycle that affect different regions of the country at different periods in the cycle. During the mid 1980's commerce and industry in New England were growing dramatically. Economic growth exceeded projections for planned electric generating capacity.[10] However, as rapidly as the New England economy advanced in the mid 1980's, it declined equally a fast in the late 1980's. PSNH filed for bankruptcy in January 1988 and EUA Power Corporation, another Seabrook co-owner heavily dependent upon the sale of Seabrook power and energy, filed for bankruptcy in early 1991.

There were other factors that contributed to PSNH'S financial difficulties in the 1980's, e.g., development and approval of emergency evacuation plans for Seabrook and state regulatory proceedings involving allowance of Seabrook costs in PSNH'S rate

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[10]EUA Associates, parent company of Montaup Electric Company, a co-owner of Seabrook, formed EUA Power Corporation specifically to purchase a 12 percent ownership share in Seabrook to meet an unexpected strong demand for electric power in New England during the late 1980's and 1990's. John F.G. Eichorn, chairman of EUA Associates, was quoted by the Providence, Rhode Island Journal newspaper, as citing NEPOOL electricity demand estimates showing "a serious shortfall developing in New England, which we at EUA are determined to help eliminate." Journal, April 10, 1986.

base. All of these factors culminated in PSNH filing for bankruptcy and the resultant proposal by NU to acquire PSNH. The proposals adding a new owner and a new operator of the Seabrook facility are the principal changes the staff must address in its post OL significant change antitrust review. The staff must determine whether the new owner or the new operator will create or maintain a situation inconsistent with the antitrust laws.

VI. FERC AND SEC REVIEWS

Pursuant to the requirements and jurisdiction of both the Federal Power Act and the Public Utilities Holding Company Act of 1935, NU filed applications with the Federal Energy Regulatory Commission (FERC), on January 5, 1990, and the Securities and Exchange Commission (SEC), on October 5, 1989, respectively, seeking approval of its proposed merger with PSNH. In light of the fact that similar competitive issues are currently being addressed in proceedings at the FERC and SEC and that the findings reached in the FERC and SEC proceedings will be considered by the staff, a brief synopsis of these proceedings follows.

A. FERC Proceeding

Northeast Utilities, acting through a service company called NUSCO, sought approval under Section 203 of the Federal Power Act (enforced by the FERC) to acquire the jurisdictional assets of

PSNH. Section 203 of the Federal Power Act (FPA) requires the FERC to make a determination as to whether the proposed acquisition or merger will be consistent with the public interest. Though the FPA does not specifically charge the FERC with weighing the competitive implications of the merger or acquisition in terms of injury to competition or the competitive process in identifiable markets, in the recent past, the FERC has considered these competitive concerns as inputs to its ultimate determination as to whether the combination creates more benefits than costs, i.e., is in the public interest.

On March 2, 1990, the FERC issued an order granting intervention by all requesting parties and also granted a NU motion to expedite the hearing schedule by requiring that an initial decision be issued no later than December 31, 1990. After extensive discovery, depositions and oral argument, the FERC administrative law judge (ALJ), Jerome Nelson, issued an initial decision on December 20, 1990.[11]

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[11]"On March 7, 1990, NU submitted its direct case, which consisted of the prepared testimony and exhibits of six witnesses. After extensive discovery, including numerous depositions of NU, Staff, intervenor and third party witnesses, the Staff and intervenors filed their respective direct cases on May 25, 1990. The direct cases of staff and intervenors included the prepared testimony and exhibits of 49 witnesses. On June 25, 1990, Staff and intervenors filed cross-rebuttal cases through the prepared testimony and exhibits of 19 witnesses. On July 20, 1990, NU filed its rebuttal case through the prepared testimony and exhibits of 12 witnesses. Twenty-five days of hearings were held during August and September of 1990. Thirty-five witnesses were cross-examined, and 809 exhibits were admitted into evidence. Briefs and reply briefs were filed in October of 1990. Four days of oral argument ended on November 13, 1990." (ALJ Initial Decision, p. 6).

The ALJ made several findings in his initial decision, however, the findings most relevant to the NRC post OL amendment review concern the effect the merger will have on the New England bulk power services market. The ALJ's initial decision indicated that without a detailed set of merger conditions, the "NU-PSNH merger would have anti-competitive consequences." The ALJ found that,

> the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts). (*Id.*, p.15)

The ALJ indicated that the merged company will control 92 percent of the transmission capacity presently serving New England.

> This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices. (*Id.*, p. 16)

The ALJ concluded that merged NU-PSNH will control the principal transmission access routes from northern New England to southern New England as well as 72 percent of the New York, New England transmission corridor path.

> Because PSNH "controls the only transmission lines linking Maine and New Brunswick to the rest of New England"..., Eastern REMVEC utilities will necessarily have to deal with the merged company in order to get power from those areas. The merged company's control

> would also extend to access from New York... NU controls 72% of the New York-New England "interface"... and needs only a small portion of that share for its own use. (*Id.*)

The ALJ's initial decision recommended that the FERC approve the merger only if specific merger conditions were agreed upon by the merging parties. There are two principal conditions discussed by the ALJ designed specifically to address the new NU-PSNH's market power and particularly any potential for abuse of this newly created market power vis-a-vis other power systems in New England. The first condition is basically a rework of a proposal initially offered by NU-PSNH dealing with the merged company's policy regarding transmission over its power grid. A set of General Transmission Commitments was developed by the ALJ which dealt with various degrees of priority access and time horizons depending upon the individual power supply situation in question. This policy commitment, according to the ALJ, would reassure non-dominant power systems in New England a form of meaningful access to the transmission facilities required to fulfill their bulk power supply requirements.

The second major condition that addresses the transmission dominance of the new NU-PSNH is termed the, "New Hampshire Corridor Proposal." This proposal serves to open up the flow of power from Canada to New England and from northern New England to the heavily populated southeastern portion of New England. The Corridor Proposal allocated a total of 400 MW of transmission capacity with

200 MW allocated to New England Power Company and 200 MW allocated to southern New England utilities. These two transmission proposals recommended by the FERC ALJ are the most relevant to the staff's review of New Hampshire Yankee's requests to change ownership and the operator of the Seabrook facility.

On August 9, 1991, the FERC conditionally approved the NU merger with PSNH. To mitigate the merger's likely anticompetitive effects, the FERC strengthened NU's General Transmission Commitment and noted that it will construe NU's voluntary commitment very strictly. NU can not give higher priority to its own non-firm use than to third party requests for firm wheeling in allocating existing transmission capacity. The FERC also ruled that independent power producers and qualifying facilities are eligible for transmission access on the New Hampshire Corridor. *See Northeast Utilities Service Company* (Re Public Service Company of New Hampshire) FERC slip op. No. 364 (August 9, 1991).

B. SEC Proceeding

NU filed an application with the SEC for approval under the Public Utility Holding Company Act of 1935 (PUHCA) of its proposed merger with PSNH. The SEC issued a notice of the filing of the application on February 2, 1990 (Holding Co. Act Release No. 25032). Fourteen hearing requests from 41 separate entities were received and four of these requests, representing 21 entities, were

subsequently withdrawn. Moreover, eight entities filed comments or notices of appearance. The segment of the SEC review most relevant to staff's post OL amendment review revolves around Section 10(b)(1) of the PUHCA that requires the SEC to consider possible anticompetitive effects of the proposed NU-PSNH acquisition. The SEC in a Memorandum Opinion dated December 21, 1990 approved NU's proposed acquisition of PSNH--indicating that all PUHCA requirements, including Section 10(b)(1), had been fulfilled. In its initial decision, the SEC stated that,

> Given the approximate size of the Northeast--PSNH system and the resultant economic benefits discussed herein..., we conclude that the Acquisition does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied. (SEC Initial Decision, p. 40)

The SEC's analysis, as reflected in its initial decision, considers the economic benefits associated with a merged NU-PSNH and not so much the potential for abuse of market power that may be enhanced by the merger. The initial decision states that the,

> transfer to North Atlantic will merely move the asset from one Northeast subsidiary to another and should have no impact on competitive conditions. (*Id.*, p.58)

The SEC order approving the merger was appealed by two intervenors in the SEC proceeding--the City of Holyoke Gas and Electric

Department and the Massachusetts Municipal Wholesale Electric Company (petitioners). Petitioners filed a request for rehearing of the initial decision, arguing that the SEC erred in approving the NU-PSNH acquisition by failing to provide sufficient analysis of the anticompetitive effects of the acquisition. Petitioners based much of their argument for rehearing upon the FERC ALJ's December 20, 1990 decision which indicated that an unconditioned NU-PSNH merger would have significant anticompetitive effects upon the New England bulk power services market.

In a Supplemental Memorandum Opinion and Order (Supplemental Memorandum) dated March 15, 1991, the SEC granted petitioners a reconsideration of the SEC's initial decision.

> In our December order, we recognized that the Acquisition would decrease competition, but concluded that the Acquisition's benefits would outweigh its anticompetitive effects. The petitioners challenge this determination, arguing that the Commission ignored the anticompetitive effects of the merged company's control of transmission facilities and surplus power. (Supplemental Memorandum, p.3)

The SEC's Supplemental Memorandum indicated that its initial decision focused more on the size and corporate structure of NU-PSNH rather than the merged company's ability to control access to transmission or excess capacity. The Supplemental Memorandum stated that even though the SEC's principal focus was on the size and structure of the merged company, the competitive access issues

were considered and the SEC concluded that, "The merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior." (Supplemental Memorandum, p.5) However, the SEC relied upon the transmission commitments made by NU to mitigate any possible anticompetitive effects of the merger.[12]

The Supplemental Memorandum recognized that both the SEC and the FERC "have statutory responsibilities with respect to the anticompetitive consequences of mergers in the public-utility industry". (*Id.*, p.6). However, the SEC also recognized that the focus of the Federal Power Act and the Public Utility Holding Company Act are different in that each agency pursues administration of each act with different goals for regulating members of the electric utility industry. As a result, the SEC deferred the question of anticompetitive consequences and its ultimate approval of the proposed merger to the FERC.

> Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the Commission, [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look

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[12] The initial FERC decision found the commitments made by NU to be insufficient to remedy the potential anticompetitive effects of the merger and recommended additional terms and conditions be imposed upon the merged company as a condition for FERC approval of the merger.

> to the FERC's expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the acquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the FPA. (*Id.*, p.9)

VII. AMENDMENT APPLICATIONS COMMENTS RECEIVED BY THE STAFF

The staff, in accordance with 10 C.F.R. § 2.101(e)(1), published receipt of New Hampshire Yankee's request to amend the Seabrook OL in the *Federal Register* and provided interested parties the opportunity to comment on the antitrust issues raised by the proposed acquisition on February 28, 1991.[13] The staff received comments from the following entities or their representatives: 1) New Hampshire Electric Cooperative (April 1. 1991,); 2) Massachusetts Municipal Wholesale Electric Company (April 1, 1991); 3) City of Holyoke Gas and Electric Department (April 1, 1991); 4) Hudson Light and Power Department (April 4, 1991); and 5) Taunton Municipal Lighting Plant (April 10, 1991). By letter dated April 22, 1991, counsel for Connecticut Light and Power Company and PSNH responded to these comments.[14] The comments from participants in the FERC and SEC proceeding by and large mirrored the positions taken by the commenters in those proceedings. The comments

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[13] A similar notice regarding the change in operator from New Hampshire Yankee to NAESCO, was published in the *Federal Register* on March 6, 1991.

[14] By letter dated June 13, 1991, City of Holyoke Gas and Electric Department (HG&E) replied to the Connecticut Light and Power (CL&P) and PSNH response. By letter dated July 9, 1991, CL&P and PSNH responded to the HG&E reply. By letter dated July 22, 1991, HG&E replied to the CL&P and PSNH July 9, 1991 response.

received are summarized below with the staff analysis of each comment.

A. New Hampshire Electric Cooperative (NHEC)

Comment

NHEC is a transmission dependent utility (TDU), i.e., "entirely dependent on NU or PSNH for their bulk power transmission needs". NHEC states that without access to NU's or PSNH's transmission facilities it cannot actively compete in the New England wholesale bulk power services market. NHEC asserts that the proposed acquisition of PSNH by NU will concentrate its only source of essential transmission service in the hands of its principal competitor. NHEC cites the initial FERC decision as evidence that the proposed merger, if unconditioned, will have an adverse impact on the competitive process in the New England bulk power services market. NHEC also states that recent developments which have not been a part of the FERC record are relevant to the NRC review associated with the Seabrook post OL amendment applications.

NHEC wishes to purchase partial requirements power from another supplier, New England Power Company (NEP), rather than PSNH. NHEC and NEP entered into a long-term power supply contract on January 9, 1991; however, NHEC needs access to PSNH's transmission grid to receive the NEP power. PSNH has indicated that NHEC is contractually prohibited from taking any other off system power purchases during the term of its power supply contract with PSNH

and as a result PSNH would not approve use of its transmission grid until the contractual dispute between PSNH and NHEC is resolved.

NHEC contends that the proposed acquisition of PSNH by NU is anticompetitive and under the NRC's *Summer* criteria, represents a "significant change". NHEC seeks relief by requiring NU to,

> . . . commit before this Commission that it will provide NHEC all transmission needed for NHEC to purchase power from other sources . . . .

Staff Analysis

The staff believes that the issue described by NHEC in its April 1, 1991 filing to the staff primarily involves a contract dispute with PSNH and NU over transmission rights pertaining to power purchases by NHEC from New Brunswick. Presently, NHEC is taking partial requirements wholesale power from PSNH under a 1981 contract. A dispute has arisen between NHEC and PSNH (now NU, given its proposed acquisition of PSNH) regarding the terms under which the contract can be terminated. PSNH states that the contract requires NHEC to provide five years notice prior to cancelling the contract and switching to a different supplier. NHEC states that the contract provides for termination upon NHEC joining NEPOOL and that the recent NHEC-NEP purchase agreement and NHEC's ownership interest in Seabrook provide the basis for NEPOOL membership.

This contract dispute, which forms the linchpin for NHEC's argument

that it is dependent upon NU's transmission grid is presently being interpreted before the FERC. The staff believes that it is appropriate for this dispute to be resolved under the auspices of the FERC's jurisdiction over wholesale power and transmission tariffs and the terms and conditions associated with such agreements. The staff sees no need for the NRC to enter into a contract dispute that is under review by the FERC. Should the PSNH-NHEC contract dispute be resolved in NHEC's favor, i.e., enabling NHEC to terminate the contract without giving a five year notice, the merger condition recommended by the FERC ALJ and commitments made by NU to provide transmission dependent utilities transmission services (cf., PSNH and Connecticut Power & Light Company Comments to NRC staff dated April 22, 1991, pp. 29-30), should adequately resolve the competitive concerns raised by NHEC.

B. Massachusetts Municipal Wholesale Electric Company (MMWEC)

Comment

MMWEC is a co-owner (11.5934%) of the Seabrook plant. In its comments to the NRC, MMWEC states that the proposed acquisition of PSNH by NU is anticompetitive, notwithstanding the merger conditions recommended by the FERC ALJ, and suggests that the Director of the Office of Nuclear Reactor Regulation find, pursuant to *Summer*, that significant changes have occurred since the Attorney General's advice letter was issued in December 1973.

MMWEC contends that the standard of review of mergers required by

the FERC under the FPA is different than that required by the NRC under the Atomic Energy Act. MMWEC states that this difference permits anticompetitive acquisitions under the FPA if it is determined that the public interest is served by the acquisition (or merger), whereas the NRC must address the competitive implications of activities of licensees "irrespective of any compelling public interest." (MMWEC comments, p.3)

Moreover, MMWEC requests the NRC to address the anticompetitive aspects of NU's management and operation of Seabrook--an area not covered in the FERC ALJ's initial decision. According to MMWEC,

> NU is executing a plan whereby it has separated the Seabrook management function and ownership function from each other and utilized its market power to insulate itself, those functions and its other affiliates from any liability, except liability imposed by willful misconduct. (*Id.*, p.5)

MMWEC's concerns revolve around a July 19, 1990 agreement reached among Seabrook owners holding approximately 70 percent of the facility. This agreement provides for the transfer of the managing and operating agent from New Hampshire Yankee to a proposed wholly owned NU subsidiary, NAESCO. An exculpatory clause in the July 19, 1990 agreement, according to MMWEC,

> . . . would not only free NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. MMWEC cannot insure any

> reckless or negligent conduct of the Managing Agent or its affiliates. (*Id.*)

MMWEC requests the NRC to act to prevent NU from maintaining a situation inconsistent with the antitrust laws. MMWEC suggests that the NRC condition the approval of the license transfer to "require appropriate amendment of the Joint Ownership Agreement and to prohibit NAECO, & NAESCO and their affiliates from freeing themselves from liability for misconduct." (*Id.*, p.6)

Staff Analysis

MMWEC's principal concern is that NU used its market power in an anticompetitive manner in formulating a July 19, 1990 agreement that established parameters by which the Seabrook facility would be managed and operated. Moreover, MMWEC asserts that this agreement frees,

> . . .NAESCO and its affiliates from harm done directly to MMWEC but also from responsibility for third party claims by others against MMWEC for any harm related to Seabrook. (MMWEC comments, p. 5)

MMWEC has failed to show how NU has used (abused) its market power in bulk power services in formulating an agreement to install a new managing agent for Seabrook. MMWEC asks the NRC to condition the license transfer by requiring amendment of the Seabrook "Joint Ownership Agreement", to, effectively, make NAECO and NAESCO more accountable for their actions pursuant to their ownership and operation of the Seabrook facility respectively. Based upon the

data available to the staff, it appears as though the July 19, 1990 agreement was consummated in conformance with the Seabrook Joint Ownership Agreement, as amended, and not as a result of any abuse of market power on the part of NU. The staff believes MMWEC's concerns over the degree of liability it must absorb should NAESCO in any way mismanage Seabrook are concerns of a contractual, not competitive, nature and should be raised and addressed before an appropriate forum for these matters, not the NRC.

Moreover, as recognized by MMWEC at page three of its comments, the staff considered the possibility of a new plant operator having an influence over competitive options of the new owners of Seabrook. For this reason, after discussions with the staff, NAESCO agreed to a license condition divorcing itself from the marketing or brokering of power or energy produced by Seabrook. The license condition was designed to eliminate NAESCO's ability to exercise any market power, if evident, and obviated the need to conduct a further competitive review of NAESCO. For the reasons stated above, MMWEC's request to condition the Seabrook license that frees it from NAESCO's liability should be denied.

C. City Of Holyoke Gas & Electric Department (HG&E)

Comment

HG&E is a municipally owned electric system serving primarily western Massachusetts. "HG&E lies within the service territory of Western Massachusetts Electric Company ("WMECO"), a wholly-owned

subsidiary of NU." (HG&E comments, p.2) HG&E generates no power on its own and relies heavily on the transmission facilities of PSNH to supply approximately 36 percent of its load from the Point Lepreau nuclear plant in New Brunswick, Canada. According to HG&E,

> The increase in control that the merged entity will exercise over generation (including power from Seabrook) and transmission capacity in New England represents a "significant change" from the activities of the current licensee--an independent PSNH. (HG&E comments, p.3)

HG&E contends that NU-PSNH will wield significantly more market power than a stand alone PSNH and given the existing competitive relationship between HG&E and NU, the merged entity, without adequate license conditions and structural alterations in the market, will be able to severely restrict or at a minimum, control the cost effectiveness of a large portion of its power supply that presently flows over PSNH's transmission facilities from New Brunswick.

> Control over generation capacity greatly reduces the opportunities available to purchase power from other utilities in the region; control over transmission capacity eliminates or reduces the ability of HG&E and others to purchase power from utilities outside of New England. (*Id.*, p. 6)

Moreover, HG&E asserts that many of the benefits associated with NEPOOL operation--identified by the Department of Justice and the staff in previous reviews--may be negated by the merged company's "sufficient veto voting power" over proposals put forth by the

NEPOOL Management Committee. HG&E characterizes this change in market power as a "significant change" requiring a full review of the antitrust impacts of the proposed merger, including an analysis by the Attorney General of the antitrust impact of the proposed license transfer.

HG&E addresses ongoing reviews of NU's proposed acquisition of PSNH before other federal agencies and concludes that NRC's antitrust review mandate in Section 105c of the Atomic Energy Act more clearly relates to review of anticompetitive conduct whereas the reviews at the FERC and SEC seem to be more public interest oriented. Consequently, HG&E asserts that the NRC should not assume that these other reviews will adequately condition the proposed merger to remedy the serious competitive issues that the merger would create. HG&E urges the NRC to deny the proposed merger, yet if approved, suggests that NRC require prior approval by the FERC and SEC, and in addition, 1) require NU-PSNH to transmit Point Lepreau power to HG&E for the term of any extended HG&E/Point Lepreau power supply contract with equivalent terms to its current contract, and 2) require NU to divest its subsidiary, Holyoke Water Power Company (HWP) or consolidate HWP into another NU subsidiary, Western Massachusetts Electric Company, thereby subjecting HWP to state regulation as a public utility.

Staff Analysis

HG&E asks the NRC to initiate a full antitrust review of the proposed merger, considering all of the antitrust effects of the

proposed merger pursuant to Section 105c of the Atomic Energy Act. "Such review would include an analysis by the Attorney General of the antitrust impact of the proposed license transfer. 42 U.S.C. SEC.2135" (HG&G comments, P.3) At the conclusion of such a review, HG&E recommends that the NRC deny the proposed license transfer or approve the transfer with license conditions over and above those recommended by the FERC ALJ.

As indicated *supra* (cf., Section III herein), the staff takes into consideration the record establised during related federal agency reviews of the change in ownership. The FERC proceeding and the accompanying recommendations for competition enhancing merger conditions were factors the staff considered in evaluating the instant proposals under the significant change criteria. The staff believes the presence of license conditions recommended by the FERC mitigates the possibility of anticompetitive effects ensuing from such a merger as well as the need for a more formal antitrust review by the Department of Justice. For the reasons stated above, the staff recommends denying HG&E's requests to deny the proposed merger or initiate a formal antitrust review that incorporates an analysis by the Attorney General.

Considering the license conditions associated with the proposed acquisition of PSNH by NU, the staff recommends denying in part and approving in part HG&E's request to attach the FERC and SEC merger conditions and impose two additional conditions as a requirement

for consummation of the acquisition. The staff has relied heavily on the record established to date in the FERC proceeding and in light of the procompetitive merger conditions proposed by the FERC ALJ would recommend approval of the license transfer. The SEC in its Supplemental Memorandum Opinion dated March 21, 1991 deferred its ruling on the competitive aspects of the proposed merger to the FERC.

The staff recommends denying HG&E's request to the NRC to condition the license transfer upon two additional requirements, one providing, in effect, a life of service transmission contract for HG&E's Point Lepreau power and another requiring NU to divest a wholly owned subsidiary in competition with HG&E. There has been nothing established in the FERC record or in the instant proceeding that indicates that HG&E would have been able to renew its transmission contract with PSNH or its power supply contract with New Brunswick upon termination of the existing contracts in 1994. NU, as PSNH's parent company, has not indicated that it plans to deny HG&E transmission capacity to New Brunswick after the proposed merger is consummated. NU has stated that this transmission corridor to New Brunswick will be offered to "all comers," as it were. It appears as though HG&E will be in competition with other potential buyers of Point Lepreau power for both transmission and power and energy. The staff sees no reason to assist HG&E over any other competitor in this regard. Should HG&E enter into a transmission contract with NU-PSNH and find the terms and

conditions in any way anticompetitive, the staff believes the FERC is the proper forum for resolution of tariff issues. The FERC initial decision recognized the increase in market power resulting from the NU-PSNH acquisition, yet recommended conditions to mitigate any abuse of this newfound power.

> The merged company -- with vast power over transmission and control of surplus power -- must offer viable wheeling service in order to alleviate potential anti-competitive consequences. (FERC Initial Division, p. 48) [Emphasis added].

Moreover, the FERC ALJ approved the request by HG&E to require NU to establish the position of "ombudsman" to review NU's service and eliminate the possibility of any anticompetitive consequences resulting from NU's substantial market power in transmission and surplus power in the New England market. Additionally, the FERC ALJ indicated that,

> The ombudsman is not the only avenue for dissatisfied customers. The Commission's Enforcement Task Force maintains a "hotline" ... through which complaints can be received. (FERC Initial Decision, p. 49)

The staff believes these actions taken by the FERC adequately address HG&E's concerns over abuse of NU s post merger market power. For this reason, the staff does not believe that HG&E has established a basis for the staff to conclude that there is a significant change warranting an antitrust review. Furthermore, there is no basis for the staff unilaterally to impose conditions

on the transfer of the license providing for a life of service transmission contract.

Regarding HG&E's second condition, the staff believes that no record has been established to justify HG&E's request to divest Holyoke Water Power Company from NU. According to the FERC initial decision, "The City [HG&E] is covered by the protection given the TDUs, and is entitled to no more in this regard." (FERC Initial Decision, p. 50) Accordingly, divestiture of HWP does not seem warranted solely to, "eliminate NU's incentive to eliminate injury to HG&E...." (HG&E comments, p. 10; emphasis added). The staff recommends denying HG&E's request to divest HWP from NU.

D. Hudson and Taunton

Comment

The Taunton Municipal Lighting Plant (Taunton) and the Hudson Light and Power Department (Hudson) are both owners of the Seabrook facility. Taunton and Hudson are both members of the Massachusetts Municipal Wholesale Electric Company and both have requested the NRC to adopt MMWEC's comments submitted to the NRC via letter dated April 1, 1991.

Staff Analysis

As indicated *supra*, the staff recommended denying MMWEC's request to further condition the Seabrook operating license to free MMWEC from any liability to existing owners that may result from the proposed license transfer. In light of the fact that Hudson and

Taunton adopted MMWEC's comments, the staff also recommends that their requests be denied.

VIII. NRC STAFF FINDINGS

A. Change In Ownership

The ownership transfer of over 35 percent of Seabrook potentially represents a change in the degree of control over the operation of the nuclear facility. However, as indicated *supra*, the FERC has considered the anticompetitive consequences of the proposed merger and a set of extensive merger conditions was proposed by the FERC administrati e law judge regarding New Hampshire Yankee's proposals to transfer ownership and operation of the Seabrook facility. In this regard, the staff has relied heavily upon the record established in the FERC initial decision in its review of the instant amendment applications. The FERC merger conditions were designed specifically to mitigate any potential competitive problems associated with the proposed acquisition of PSNH by NU.

The staff has reviewed the proposed transfer of ownership share in the Seabrook facility from PSNH to NU for significant change since the last antitrust review of the Seabrook licensees, using the criteria discussed by the Commission in *Summer*. (*Cf.* Section III herein) The amendment request was dated November 13, 1990, after the previous antitrust review of the facility and therefore the

first *Summer* criterion, that the change has occurred since the last antitrust review, is satisfied. The second *Summer* criterion is satisfied in that the change is the result of the bankruptcy proceeding initiated by PSNH in January 1988 and as such is "reasonably attributable to the licensee[s] in the sense that the licensee[s] ha[ve] had sufficient causal relationship to the change that it would not be unfair to permit it to trigger a second antitrust review." *Summer*, 13 NRC at 871.

This leaves for consideration the third *Summer* criterion, that the change has antitrust implications that would be likely to warrant Commission remedy. The Commission in *Summer* adopted the staff's view that application of the third criterion should result in termination of NRC antitrust reviews where the changes are pro-competitive or have *de minimis* anticompetitive effects. *See Id.* at 872. The Commission further stated "the third criterion does not evaluate the change in isolation deciding only whether it is pro or anticompetitive. It also requires evaluation of unchanged aspects of the competitive structure in relation to the change to determine significance." *Id.*

The staff believes that the record developed in the FERC proceeding involving the NU-PSNH acquisition adequately portrays the competitive situation in the New England bulk power services market and that the anticompetitive aspects of the proposed changes are being addressed in the FERC proceeding. The staff further

believes that the actions being taken by the FERC will adequately address concerns regarding the anticompetitive effects of NU's post merger market power such that the change in ownership as approved by the FERC will not have implications that warrant a Commission remedy. Consequently, the third *Summer* criterion has not been satisfied.

Each of the significant change criteria discussed in *Summer* must be met to make an affirmative significant change finding. In this instance, the third criterion has not been met.

B. Addition Of Non-Owner Operator

In light of the license condition developed by the staff and agreed to by NU, NAESCO (the proposed new plant operator), and the other Seabrook licensees, prohibiting NAESCO from marketing or brokering power or energy produced from the Seabrook plant and holding all other Seabrook licensees responsible for NAESCO's actions pursuant to marketing or brokering of Seabrook power, the staff believes the change in plant operator from New Hampshire Yankee to NAESCO will not have antitrust relevance.

IX. CONCLUSION

For the reasons discussed above, and after consultation with the DOJ, the staff recommends that the Director of the Office of

Nuclear Reactor Regulation conclude that further NRC antitrust review of the proposed change in ownership detailed in the licensee's amendment application dated November 13, 1990, is not advisable in that, based on the information received and reviewed, a finding of no significant change is warranted. The staff further has determined that antitrust issues are not raised by the request to add NAESCO as a non-owner operator to the Seabrook license.