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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Director, Office of Nuclear Reactor Regulation

Re: Public Service Company of New Hampshire
Docket No. 50-443

Dear Commission:

The Connecticut Light & Power Company ("CL&P") and Public Service Company of New Hampshire ("PSNH") (collectively "Applicants") hereby respond to the reply filed in this matter by the City of Holyoke Gas Electric Department ("HG&E") on April 1, 1992. HG&E's reply rehashes the same stale arguments previously rejected by the Director (and by the FERC, the SEC, and the United States Department of Justice). HG&E's latest redundant filing serves only to underscore that the Director's February 19, 1991 "no significant changes" finding is correct and should be reaffirmed.

I. The Director's Finding That Duplicative NRC Antitrust Proceedings Are Unwarranted Reflects An Appropriate Analysis And Does Not Merely "Defer" to the FERC

Once again, rather than address the Director's finding or the supporting analysis contained in the Staff Recommendation,

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HG&E's argument consists largely of mischaracterizing the Commission's responsibilities under Section 105c(5) of the Atomic Energy Act ("AEA"). HG&E begins by invoking a truism not in dispute: it says that the Commission does not know whether the FERC conditions are adequate "without examining those conditions and the anticompetitive situation that they are intended to mitigate." HG&E Reply at 2. Having made this unexceptionable observation, however, HG&E leaps to the illogical conclusion that such an examination cannot be performed unless the Commission conducts a full-blown antitrust proceeding. As Applicants pointed out in their initial response, the Commission rejected this notion over a decade ago because it offends both the wording and intendment of Section 105c(5): "[W]e do not believe Congress intended that we conduct a proceeding to ascertain whether to have a proceeding." South Carolina Electric & Gas Co. and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit No. 1), 13 NRC 862, 873 (1981).

The proper criterion for making a "significant changes" determination under Section 105c(5) is whether "the changes have antitrust implications that would be likely to warrant Commission remedy." Id. at 872. To make this determination, the Director need not conduct a full-blown antitrust hearing. He need only take a "sufficiently hard look" to make a judgment whether the

outcome of a full-blown NRC antitrust review would require a significant "alteration or adjustment" of existing conditions. South Carolina Electric & Gas Co. and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit No. 1), 11 NRC 817, 835 (1980).

The Director's finding and the Staff Recommendation show that the requisite hard look was taken more than amply by the Commission here. See Staff Recommendation at 13-14, 20-24, 33-40. Contrary to HG&E's assertions (HG&E Reply at 3), the NRC Staff Recommendation did not merely "defer" to the FERC. Rather it addressed the allegations of HG&E in light of the FERC's factual findings and its remedial conditions to determine whether competitive issues were adequately addressed. For example, as the Director's finding states, the Staff's analysis "considered the structure of the electric utility industry in New England and the adjacent areas" in order to assess the competitive implications of the merger. 57 Fed. Reg. at 6049 (Feb. 19, 1992). In focusing on the post-merger competitive situation, the Staff Recommendation reviewed the findings of the FERC ALJ regarding the ownership of key transmission corridors and the dynamics of bulk power competition (Staff Recommendation at 21-24), and also considered the further analysis of these issues set forth in the FERC's decision on exceptions. Id. at 24. Not only

were the perceived potential competitive problems of the merger addressed, the Staff also considered the remedial conditions adopted by the FERC. Id. at 22-24, 41-43. Based on this examination, the Staff Recommendation concluded:

> [T]he 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 . . . will not have implications that warrant a Commission remedy.

Id. at 42-43. In sum, the Director's "no significant changes" finding embodies precisely the sort of examination and analysis the AEA contemplates.

Grasping for some basis on which to justify duplicative proceedings, HG&E suggests that the Director's finding is defective because it somehow fails to apply the substantive "standard" ingrained in the AEA, and because it does not explicitly refer to the Clayton Act or the Department of Justice Merger Guidelines. HG&E Reply at 2-3. These contentions transparently lack substance. The validity of a "no significant changes" finding does not depend on whether particular "guidelines," "standards," or other talismanic words are incanted in a decision. The statute simply requires that a reasonable assessment be made. For example, the Department of Justice not only has cleared this merger three separate times under its Hart-Scott review, it explicitly advised the NRC that it perceived "no

significant changes" and no basis for an NRC antitrust review of this merger. HG&E apparently now would have the Commission believe that because it did not specifically mention them, the Department of Justice did not take into account its own merger guidelines.

Nor did the NRC Staff ignore its own obligations and merely "assume" that antitrust standards were satisfied," as HG&E alleges. HG&E Reply at 2. Although Holyoke asserts that the Director and Staff failed to analyze the FERC's conditions in the context of the AEA standard (HG&E Reply at 2), as shown above, the Staff performed a conscientious evaluation of the overall competition issues and HG&E's specific contentions. The standard applicable to Commission antitrust assessments is whether there exists a "reasonable probability" that the antitrust laws or policies will be contravened; this has been termed an "incipiency" standard, i.e., a criterion intended to forestall future anticompetitive conduct that otherwise would probably occur. E.g., Consumers Power Company, (Midland Plant Units 1 and 2), ALAB-452, 6 NRC 892, 926 (1977). Though the Staff Recommendation and Director's finding do not intone the specific words "reasonable probability," the Staff's analysis looked toward the future and evaluated the FERC conditions to determine whether they adequately nip in the bud potential anticompetitive

effects of "post merger market power." Staff Recommendation at 43, and passim. Thus, fairly read, the Staff's Recommendation demonstrably embodies an "incipiency" or a "reasonable probability" standard. Employing this standard the Staff Recommendation reviewed the competitive issues and properly concluded that the FERC conditions are adequate. 1/

II. There Is No Reason For The Commission To Enmesh Itself In an Analysis Of Merger Benefits

Not content with arguing that the Commission must undertake a duplicative antitrust review hearing, HG&E next argues that the Commission must duplicate FERC's analysis of the merger benefits flowing from Applicants' nuclear operations.

1/ This was hardly a surprising conclusion given the comprehensive scope of the FERC's analysis and the nature of the competitive problem perceived to be portended by an unconditioned merger. A key part of the analysis conducted by the FERC concerned the status of competition in New England over the long term, i.e., "reasonably probable" future effects. The FERC found that absent the merged company's control over transmission, "buyers could reach and rely on new generating resources, which would then provide buyers with alternatives to purchasing from the merged company." FERC thus concluded that: "[t]he merged company's enhanced control over key transmission corridors is the root of the merger's incremental anticompetitive effects." Northeast Utilities Service Co., Opinion No. 364, 56 FERC ¶ 61,269, at 62,007 (1991). FERC remedied this perceived competitive problem by imposing far-reaching transmission conditions. In short, this merger was perceived to create a transmission access problem absent conditions -- a problem that has now been addressed comprehensively by the federal agency having expertise over electric transmission issues.

HG&E asserts that the FERC's conditions "only mitigate" and do not alleviate the competitive impact of the merger, and that therefore the Commission must assay whether any remaining impact is outweighed by the merger benefits. HG&E Reply at 5.

The short answer is that HG&E's premise is wrong. The FERC did not leave some anticompetitive impact only partly assuaged. 2/ The FERC made this crystal clear in its decision on rehearing while explaining its conditions regarding transmission pricing:

> We believe that these pricing goals are fully consistent with our statutory responsibility to ensure that NU's transmission commitments, as modified by this Commission, fully mitigate the increased market power of the merged company.

Northeast Utilities Service Co., Opinion No. 364-A, 58 FERC ¶ 61,070, at 61,208 (1992) (emphasis added); see also 56 FERC at 62,014. FERC's remedial conditions are thus designed to prevent the merged company from exercising any enhanced market power in the future. HG&E's effort to substitute semantics for substance fails.

Any way one looks at this matter, the same conclusion always presents itself: there is no plausible reason for this

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2/ Even if this were not the case, HG&E's failure to identify any competitive problem warranting an NRC remedy would be fatal to its request for NRC antitrust proceedings.

Commission to undertake a duplicative antitrust review proceeding.

III. HG&E Adds Nothing New Regarding NAESCo's Contractual Arrangements

HG&E also picks up the argument abandoned by MMWEC and cavils about the exculpatory clause in the Management Agent Operating Agreement. HG&E raises nothing new. It fails to address, much less overcome, the Staff's finding that these concerns have nothing to do with competition. And it ignores the fact that the Staff has already obtained NAESCO's acquiescence in a license condition divorcing itself from the marketing or brokering of power or energy produced by Seabrook. Staff Recommendation at 34.

IV. HG&E's Request For Clarification Is Without Merit

Finally, the Director should reject HG&E's so-called request for "clarification." HG&E asks the Director to "clarify" that the license transfer is conditioned upon compliance with current and future conditions that might be imposed by other agencies or upon judicial review. HG&E Reply at 6. This request makes no sense. To the extent HG&E's request asks the Commission to acknowledge that other agencies can enforce their own conditions, it is superfluous. Plainly, if other agencies with jurisdiction over the merger impose conditions, those conditions

will be effective as provided by law. To the extent HG&E's request invites the Commission to assert its own authority to enforce other agencies' conditions, it is presumptuous and without basis. The NRC has never tried to police conditions imposed by other agencies, nor does any warrant exist for doing so.

CONCLUSION

The NRC's issuance of the license amendments sought by Applicants now stands on the critical path to final realization of this major bankruptcy reorganization. This process has involved nearly a hundred parties, including virtually every electric utility in New England, numerous municipalities and electric cooperatives, six States, and various state and federal regulatory authorities. Any delay occasioned by needless duplicative NRC proceedings would adversely impact this delicately balanced bankruptcy reorganization and harm the interests of an entire region. HG&E now stands alone before this Commission among all of the interests affected by the outcome of this matter in urging this unthinkable and unwarranted result. Applicants respectfully ask that the Commission reject HG&E's meritless contentions and issue the requested license amendments as soon as possible.

Respectfully submitted,

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