April 20, 1992

POLICY ISSUE
(Information)

SECY-92-144

For: The Commissioners

From: James M. Taylor
Executive Director for Operations

Subject: FINDING OF NO SIGNIFICANT CHANGE PURSUANT TO THE ANTITRUST POST-OPERATING LICENSE REVIEW OF THE SEABROOK NUCLEAR STATION, UNIT 1

Purpose: To inform the Commission of a completed staff action

Discussion: As a result of the proposed merger between Public Service Company of New Hampshire (PSNH) and Northeast Utilities (NU), the New Hampshire Yankee Division of Public Service Company of New Hampshire submitted two applications dated November 13, 1990 requesting the Commission to amend the Seabrook Nuclear Station, Unit 1 (Seabrook) operating license. Contingent upon approval of the proposed merger, NU would acquire PSNH's 35.56942% ownership interest in and responsibility to operate Seabrook. Two newly formed companies, North Atlantic Energy Corporation (NAEC), the proposed new owner, and North Atlantic Energy Services Company (NAESCO), the proposed new operator, would both be wholly owned subsidiaries of NU.

Pursuant to Section 105c of the Atomic Energy Act of 1954, as amended (Act) and the Commission's Rules and Regulations, the staff is required to conduct an antitrust operating license review to

NOTE: TO BE MADE PUBLICLY AVAILABLE IN 10 WORKING DAYS FROM THE DATE OF THIS PAPER

Contact:
W. Lambe, NRR
504-1277

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determine whether "significant changes" have occurred in the licensee's activities since the construction permit review. The Commission, in its Summer decision (11 NRC 817 (1980)), interpreted its significant change responsibility and delegated the authority to make "significant change" determinations to the staff. In Summer, the Commission also set forth a definite set of criteria the staff must follow in making the determination of whether a "significant change" has occurred. The change or changes, ". . . 1) have occurred since the previous antitrust review of the licensee(s); 2) are reasonably attributable to the licensee(s); and 3) have antitrust implications that would likely warrant some Commission remedy."

Pursuant to procedures set forth by the Commission in delegating authority to the Director of the Office of Nuclear Reactor Regulation and the Director of the Office of Nuclear Material Safety and Safeguards, as appropriate, the Director of the Office of Nuclear Reactor Regulation has made a finding that as a result of the proposed merger, no significant antitrust changes have occurred since the operating license antitrust review of Seabrook.

The Director's finding was published in the Federal Register on February 19, 1992 and provided for requests for reevaluation of the finding by March 20, 1992. A request to reevaluate (Request) the Director's finding was received from counsel representing the City of Holyoke Gas and Electric Department (HG&E) of the City of Holyoke, Massachusetts on March 20, 1992.

Although the Act does not specifically address the addition of new owners or operators after the initial licensing process, the staff has, in analyzing situations where new ownership occurs after issuance of an operating license, applied standards set forth by the Commission in the Summer proceeding in order to determine whether an antitrust review is required. Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests that seek to add new licensees to the license -- the subject of the instant reevaluation request.

Although the actions taken by the staff when faced with operating license amendments that request the addition of a new owner or placing a non-owner operator on a license have been tailored to each particular amendment request, reviews of post-operating license amendment applications involving change in licensees have included an antitrust review by the staff and consultation with the Attorney General. The antitrust review by the staff focuses on significant changes in the licensee's activities since the most recent antitrust review of the facility in question. The staff applied these criteria and procedures established by the Commission for dealing with "significant change" determinations in reaching its No Significant Change Finding for Seabrook.

The concerns raised by HG&E in its Request were thoroughly considered by the staff in its initial evaluation of competitive changes resulting from the proposed merger between PSNH and NU. The information provided by HG&E does not identify any new competitive concerns or any data that were overlooked by the staff in its initial review of the proposed merger. Consequently, it is the determination of the staff that the criteria established by the Commission in Summer to substantiate a "significant change" have not been met. Although the proposed change will take place since the previous antitrust review and can reasonably be attributed to the licensee (Summer criterion 1 and 2), a Commission remedy would not be warranted given the review and merger conditions approved by the Federal Energy Regulatory Commission.

The Commission's Rules and Regulations (2.101(e)(3)) provide for a thirty day period in which the Commission can review a reevaluation of a "significant change" determination. The Director has determined that he will not change his finding that no "significant change" has occurred. That finding will become final thirty days after being made "only in the event that the Commission has not exercised sua sponte review."

Coordination: The finding was concurred in by the Office of the General Counsel.

James M. Taylor
Executive Director
for Operations

Enclosures:
Director's Finding of No
Significant Changes
Director's Reevaluation Finding
HG&E "Request"

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ENCLOSURE 1

SEABROOK NUCLEAR STATION, UNIT NO. 1

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.

FINDING OF NO SIGNIFICANT ANTITRUST CHANGES

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, 1990, 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 No. 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 35.569428 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 considered 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.

Thomas E. Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

ENCLOSURE 2

REEVALUATION AND AFFIRMATION OF NO SIGNIFICANT CHANGE FINDING PURSUANT TO SEABROOK NUCLEAR STATION, UNIT 1 ANTITRUST POST-OPERATING LICENSE REVIEW

By letter dated March 20, 1992 (Request), Mr. David J. Bardin, counsel representing the City of Holyoke Gas and Electric Department (HG&E), requested a reevaluation of my finding of no significant antitrust changes (Finding) pursuant to the anticipated ownership transfer in the Seabrook Nuclear Station, Unit 1 (Seabrook) resulting from the proposed merger of Public Service Company of New Hampshire (PSNH) and Northeast Utilities (NU). This finding was published in the Federal Register on February 19, 1992 (57 Federal Register 6048). For the reasons set forth below, I have decided not to change my Seabrook finding of no significant antitrust changes.

BACKGROUND

As indicated in the Staff Recommendation, the Nuclear Regulatory Commission (NRC or Commission) 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. Although the Atomic Energy Act of 1954, as amended (AEA) does not specifically address the addition of new owners or operators after the initial licensing process, the NRC staff (staff) has, in analyzing

situations where new ownership occurs after issuance of an operating license, applied the standards set forth by the Commission in the Summer proceeding in order to determine whether an antitrust review is required. South Carolina Electric and Gas Company, (Virgil C. Summer Nuclear Station, Unit 1), CLI-80-28 11 NRC 817 (1980). Against this backdrop, the staff has conducted antitrust reviews of operating license amendment requests -- the subject of the instant reevaluation request.

Although the actions taken by the staff, when faced with operating license amendments that request the addition of a new owner or placing a non-owner operator on a license, have been tailored to each particular amendment request, post-operating license amendment applications involving change in ownership have been subjected to a staff review to determine whether there has been a significant change, as well as consultation with the Attorney General. The review by the staff focuses on significant changes in the market(s) in question caused by the proposed change in ownership since the most recent antitrust review of the facility in question. Where appropriate, the staff review takes into account related proceedings and reviews in other federal agencies.

Provisions for Notice

The staff has adopted a review process for post-operating license

changes in plant ownership patterned after the operating license review associated with initial applicants. Receipt of the application to add a new owner to the facility after the operating license has been issued is noticed in the Federal Register with the opportunity extended to the public to express views relating to any antitrust issues raised by the application. The notice states that the Director of the Office of Nuclear Reactor Regulation (NRR) will issue a finding whether significant changes in the licensee's activities or proposed activities have occurred since the completion of the previous antitrust review. As indicated in the Staff Recommendation, "[t]he staff's awareness of any related federal agency reviews of the request (e.g. Federal Energy Regulatory Commission (FERC), Securities and Exchange Commission (SEC), or Department of Justice (DOJ)) and the staff's intention to consider those related proceedings are also noted in the Federal Register notice." (Staff Recommendation, p. 11.) With the benefit of public comment and consultation with the Department of Justice, the staff makes a determination whether the changes in question will require a further antitrust review in order to determine whether the issuance of the license amendment will create or maintain a situation inconsistent with the antitrust laws. If the Director of NRR finds a "significant change," the matter is referred to the Attorney General for a formal antitrust review pursuant to Section 105(c) of the AEA. If the Director finds no significant change, the finding is published in the Federal Register with an

opportunity for the public to request reconsideration of the finding.

DISCUSSION

The Commission delegated its authority to make significant change findings to the staff and in its Summer decision, established a set of criteria the staff must follow in making the determination whether a significant change has occurred. The change or change(s), "... 1) have occurred since the previous antitrust review of the licensee(s); 2) are reasonably attributable to the licensee(s); and 3) have antitrust implications that would likely warrant some Commission remedy." CLI-80-28 at 824. It is within this framework established by the Commission that I made my initial Finding of No Significant Antitrust Changes on February 9, 1992 and it is within this framework that I have analyzed HG&E's request to reevaluate my finding.

Commission regulations providing for public requests for reconsideration of a Director's finding of no significant antitrust changes (10 CFR 2.101(e)(2)) are intended to provide the public the opportunity to present new data or highlight data overlooked by the staff in the deliberative process leading up to the Director's finding. Requests for reevaluation are not intended to provide entities the opportunity to reargue old

arguments or delay the licensing process. The majority of the issues raised by HG&E in its request for reevaluation were not only raised and addressed by the staff during its initial review of the amendment application, but also before the FERC and SEC during reviews of the proposed merger by each of these federal agencies which also considered the competitive implications of the merger. The following reflects my reasons for not changing my initial finding.

FERC Review

HG&E, throughout its Request, expresses concern that the Commission has somehow abrogated its responsibility under the AEA by relying on the findings of the FERC in its review of the proposed merger of PSNH and NU. The staff followed the NU-PSNH merger proceedings at the FERC very closely and was aware of the fact that the review conducted by the FERC staff and testimony filed by all parties covered the major areas of concern raised by the entitles most likely to be affected by the merger. Consequently, the FERC review addressed the major areas of anticompetitive conduct that could have resulted from the proposed merger. The NRC's significant change review dealt with concerns arising from the proposed NU-PSNH merger, focusing on what role the Seabrook facility and attendant transmission facilities would play in any abuse of market power in the New England bulk power services market. The FERC review encompassed

the major areas of anticompetitive effects of the merger -- not just those resulting from any increase in market power associated with Seabrook and its attendant transmission facilities. For this reason, the staff determined that since the FERC was considering the areas of major competitive concern of the merger it was not necessary to duplicate a record that had taken more than a year to develop. The staff reviewed and took into consideration the FERC decision approving the merger and the record developed at FERC as well as the mitigating conditions recommended by the FERC in its Order on Rehearing dated January 29, 1992. The staff determined that the merger conditions recommended by the FERC adequately mitigated the potential for abuse of market power by the surviving firm -- notwithstanding any dispute over anticipated benefits associated with the merger; even though the efficiencies attributed to the merger are important in FERC's section 203 regulatory review, they are not a necessary component of the NRC's regulatory review mandated by section 105c of the AEA. Section 105c reviews are concerned with the use of licenses being issued by the NRC to create or maintain a situation inconsistent with the antitrust laws.

HG&E, at page five and throughout its Request, states that the NRC has failed to employ the Department of Justice merger guidelines or any of the "traditional antitrust" enforcement analytical tools in its analysis of the proposed merger. The FERC identified a pre-merger bulk power market in New England

that if not dominated, is certainly strategically controlled by relatively few electric power systems. Two of these systems, NU and PSNH, primarily through their strategic ownership of transmission facilities, control the movement of power and energy flowing east-west and north-south into and out of the region. A merger resulting in the combination of these two systems could potentially give birth to a much more powerful utility system capable of exercising substantially more market power over its less well situated competitors than stand alone NU and PSNH. The record established during the hearing before the FERC administrative law judge highlighted this pre- and post-merger scenario. The FERC itself in its Order on Rehearing accepted the administrative law judge's decision in this regard. The factual record established before the FERC painted a very bleak picture of the possible anticompetitive effects of the proposed merger on the competitive structure of the New England bulk power services market. The staff considered the FERC findings in this regard. But the staff also considered the merger conditions proposed by the FERC that were designed to mitigate the anticipated control over strategic transmission facilities and allocation of short-term excess capacity that the newly formed NU-PSNH would control. Although in the abstract, the NRC, relying on a record developed at the FERC, has the authority to determine that significant changes have occurred, warranting a full section 105c antitrust review, the staff believes that here such a full-scale review, given the hearing process which has already been developed at the

FERC, would be unnecessary and a less than cost efficient allocation of public resources.

Department of Justice Merger Guidelines

At pages five and seven of its Request, HG&E asks the NRC to use "traditional antitrust enforcement" tools embodied in the Department of Justice (DOJ) merger guidelines. HG&E states that the NRC finding does not even mention the Clayton Act or the DOJ merger guidelines. Indeed, the staff did employ traditional antitrust principles in its review of the proposed merger. The structure-conduct-performance paradigm used by industrial organization analysts to assess the competitive nature of markets was employed by the NRC in its assessment of the effects of the proposed merger upon competition in the bulk power services market in New England. Based upon the record established in the FERC proceeding, the staff believed, as did the FERC, that an unconditioned NU-PSNH merger would substantially increase the market power of the surviving utility in bulk power markets, principally generation and transmission services, which, as established in the FERC hearings, were highly concentrated prior to the proposed merger. This increased market power in a highly concentrated market increases the potential for competitive abuse that could ultimately affect end users or consumers of electric power in New England in terms of higher costs. The merger conditions established by the FERC will mitigate the ability of

merged NU-PSNH to abuse its newly acquired market power resulting from the proposed merger. Provisions for transmission access have been adopted by the FERC that will enable NU-PSNH competitors to shop for alternative sources of power and energy within and outside of the New England bulk power services market. The staff can see no reason, in the context of this case, to initiate a separate review.

The DOJ merger guidelines attempt to refine the traditional approach to the structure-conduct-performance approach to industrial organization analysis. However, the application of the DOJ merger guidelines and the use of the Herfindahl-Hirschman Index to analyze horizontal mergers in regulated markets, such as the electric utility industry, will usually result in denial of the merger in most cases, without some type of merger conditions designed to mitigate the potential abuse of market power.* Application of the DOJ merger guidelines to regulated industries is probably less reliable than a more direct approach to assessing the potential for abuse of market power, i.e., assessment of market share, contractual arrangements and strategic or essential facilities.

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* The DOJ merger guidelines would suggest challenging all mergers resulting in an Herfindahl-Hirschman Index (HHI) of above 1800, i.e, highly concentrated markets. The FERC, in its Opinion No. 364, recognized this as well, ". . . the calculation of an HHI or any market concentration measure must be grounded upon an informed understanding of the institutional, regulatory and structural realities of the markets that are being examined." (Opinion No. 364, at p. 40, August 9, 1991)

Notwithstanding this distinction, it is a matter of record that the Department of Justice has participated in this merger review at the initial stages of the review before the FERC and in the NRC review when the staff consulted with the Department of Justice during formulation of its finding in this proceeding. Thus, the Department of Justice, author of the guidelines, participated in this matter.

NAESCO License Condition

HG&E, at page ten of its Request, states that the NU subsidiary, North Atlantic Energy Service Company (NAESCO), which was formed to operate the Seabrook facility, was formed as a result of NU's abuse of its market power and should be prohibited or annulled by the NRC. HG&E's concern is that NAESCO has no tangible assets and therefore no ultimate liability for mismanagement of the Seabrook facility. HG&E implies that liability for any mismanagement will ultimately be borne by Seabrook owners that do possess assets, e.g., HG&E. As indicated in the Staff Recommendation, at page 34, the staff does not believe HG&E's concerns pursuant to the "exculpatory clause" in NAESCO's operating agreement address areas of concern that fall within the jurisdiction of section 105c. Consequently, this reevaluation does not address this issue at any greater length than previously addressed in the Staff Recommendation.

Approval of the Proposed Merger

The instant review centers around whether the proposed merger between NU and PSNH represents a "significant change" since the previous antitrust review of the Seabrook facility. The linchpin of the staff recommendation that the merger does not represent a significant change warranting a Commission remedy is the set of merger conditions adopted by the FERC in its "Order on Rehearing", dated January 29, 1992 (58 FERC ¶ 61,070). The extensive record developed in the FERC proceeding presented data that indicate that the merger, if unconditioned, would significantly deter competition in the New England bulk power services market. The FERC, in Opinion No. 364, affirmed the administrative law judge's finding, "that an unconditioned merger would likely have serious anticompetitive consequences for New England." (Opinion No.364, at p.22). Regarding HG&E's request for clarification of its proposed conditions, as I indicated in my Finding, the staff recommendation that the proposed merger between NU and PSNH does not constitute a "significant change" is based upon the NRC review of the record developed at the FERC including the approval by the FERC of the merger conditions set forth in its January 29, 1992 Opinion On Rehearing.

My Finding indicated that, given the merger conditions recommended by the FERC, the proposed merger does not represent a "significant change" since the previous antitrust review. The

determination whether to approve the change in ownership of the Seabrook facility is contingent upon the staff's determination that all other applicable requirements have been met.

CONCLUSION

HG&E requested that I reverse my Finding that no significant antitrust changes have occurred since the previous antitrust review of the Seabrook facility. HG&E has presented no new data or cited any data that was overlooked in my Finding. For the reasons stated above, I have decided not to change my Finding of No Significant Antitrust Changes pursuant to the anticipated change in ownership and operation of the Seabrook Nuclear Station, Unit 1 that would result from the proposed merger between NU and PSNH.

Thomas E. Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

ENCLOSURE 3

Arent Fox Kintner Plotkin & Kahn

David J. Bardin
202/857-6089

March 20, 1992

VIA HAND DELIVERY

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

Re: Public Service Company of New Hampshire, Docket No. 50-443A
CITY OF HOLYOKE GAS & ELECTRIC DEPARTMENT REQUEST FOR REEVALUATION OF FINDING OF NO SIGNIFICANT CHANGES REGARDING ANTITRUST ISSUES

Dear Mr. Murley:

The City of Holyoke Gas & Electric Department ("HG&E"), in accordance with the "Notice of No Significant Antitrust Changes and Time for filing Requests for Reevaluation" ("Notice"),[1] hereby requests reevaluation of the Notice finding that no "significant changes" in the activities of the licensee, Public Service Company of New Hampshire ("PSNH"), would result from: (a) the proposed transfer of PSNH's ownership interest in the Seabrook Nuclear Power Station, Unit 1 ("Seabrook"), to North Atlantic Energy Corporation ("NAEC"); and (b) the proposed transfer of operating responsibility and management of Seabrook from New Hampshire Yankee to North Atlantic Energy Service Company ("NAESCO").[2]

1050 Connecticut Avenue, NW
Washington, DC 20036-5339

Telephone: 202/857-6000
Cable: ARFOX
Telex: WU 892672
ITT 440266
Facsimile: 202/857-6395

8000 Towers Crescent Drive
Vienna, Virginia 22182-2738

7475 Wisconsin Avenue
Bethesda, Maryland 20814-3413

45 Rockefeller Plaza
New York, New York 10111

Arent Fox Europe
Budapest, Hungary

[1] The Notice, which was published in 57 Fed. Reg. 6048 on Feb. 19, 1992, adopts the position proposed in the "Staff Recommendation, No Post OL Significant Antitrust Changes," issued in this proceeding and dated August 1991 ("Staff Recommendation").

[2] HG&E herein addresses issues pertinent to the Notice relating both to the transfer of ownership and the transfer of operational responsibility. As described

(continued...)

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Both NAEC and NAESCO are wholly-owned subsidiaries of Northeast Utilities ("NU").

This Request addresses issues relating to the Notice's finding of no significant antitrust impact. Nonetheless, HG&E expects that the Nuclear Regulatory Commission ("Commission"), in accordance with its statutory obligations, will not grant either the ownership transfer application or the operation transfer application until the Commission has fully analyzed all of the implications of PSNH's proposals that NU, through its wholly-owned subsidiaries, operate and partially own Seabrook, including consideration of NU's experiences and expertise in operating multiple nuclear units.

The Commission's Antitrust Standard under the Atomic Energy Act and the Notice's Deferral to FERC of Antitrust Analysis and Conditions

The Staff Recommendation acknowledges the arguments raised by HG&E and the Massachusetts Municipal Wholesale Electric Company ("MMWEC")[2] that the standard of review for mergers under the Atomic Energy Act is different and broader than the FERC and SEC readings of their own statutory

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[2](...continued)
in the testimony of Roger Allen submitted by HG&E to the Commission, HG&E relies on nuclear units for well over two-thirds of its energy supply. For example, 73% of HG&E's 1989 energy supply came from the Pt. Lepreau, Pilgrim 1, Vermont Yankee, Maine Yankee and Millstone 3 units. Today, HG&E also relies on Seabrook. As HG&E explained in its Comments (filed April 1, 1991 and June 13, 1992), HG&E is dependent entirely on transmission by others, notably including NU and PSNH, for access to these nuclear units, both currently and for the foreseeable future.

[3] HG&E is a member of MMWEC.

antitrust standards under the Federal Power Act and Public Utility Holding Company Act, respectively.[4] Neither the Notice, nor the Staff Recommendation, responds to these arguments, however.

Under the Commission's Summer decision,[5] a "significant change" occurred if the change has "anti-trust implications that would most likely warrant some Commission remedy."[6] The Notice concludes that no "significant change" would occur because the FERC conditions will "adequately" protect competition.

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[4] Staff Recommendation at 31-32 & 36. HG&E does not concede that the FERC and SEC are correctly reading their statutory responsibilities. HG&E merely points out that those agencies are not exercising as broad a responsibility as this Commission bears. The Commission's standard of review is broader than the FERC's reading of its own standard in at least three ways: (1) The Atomic Energy Act does not allow the Commission to "balance" other "public interest" factors against the competitive harm of the merger; (2) the Commission may impose conditions "in anticipation of situations which would not, if left to fruition, in fact violate any anti-trust law" (Alabama Power Co. v. N.R.C., 692 F.2d at 1368); and (3) the Commission must look not only at the antitrust laws themselves, but also at the "policies clearly underlying these laws." Id. The SEC's reading of its standard is under judicial review as regards the proposed NU/PSNH merger. City of Holyoke Gas & Electric Dept., et al. v. S.E.C., Nos. 91-1001, et al. (D.C. Cir., argued Nov. 14, 1991).

[5] South Carolina Electric and Gas Co. and South Carolina Public Service Authority, (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-14, 13 NRC 862 (1981). The Summer decision must be read in light of the 1982 Court of Appeals ruling in Alabama Power Co. v. N.R.C., which stated that Congress intended NRC antitrust review to be a "broad inquiry to prevent infringement on the antitrust laws in the nuclear power field.... Here again, a traditional antitrust enforcement scheme is not envisioned, and a wider one is put in place." 692 F.2d 1362, 1368 (11th Cir. 1982), reh. denied 698 F.2d 1238 (1983), cert. denied 464 U.S. 816 (1983).

[6] Staff Recommendation at 11-12. The Staff Recommendation concludes that the other two Summer criteria -- that the changes occurred since the previous antitrust review of the licensee, and that the change is attributable to the licensee -- are met by the proposed acquisition. Id. at 42.

Notice at 3. Given that the FERC only invoked conditions sufficient to satisfy its narrower antitrust standard (as the FERC conceives it), it does not follow that such conditions are sufficient to satisfy the Commission's broader and more definitive antitrust responsibility.[2] Although the Notice claims that "the Staff considered the structure of the electric utility industry in New England and adjacent areas," there is little, if any, analysis of the industry's pre- or post-merger structure in the Staff Recommendation. Notice at 4. Moreover, neither the Notice nor the Staff Recommendation includes any analysis of the adequacy of FERC-imposed conditions to resolve anticompetitive impacts under the Atomic Energy Act.[3]

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[2] Moreover, reliance on FERC to cure any anticompetitive terms of future transmission contracts with NU/PSNH in a future unspecified tariff proceeding not only ignores the Commission's statutory responsibility to "take a forward look toward potential anticompetitive results" (Alabama Power Co. v. N.R.C., 692 F.2d at 1368), but also provides no remedy if HG&E is unable to obtain a transmission contract with NU. Staff Recommendation at 38-39.

[3] As support for its conclusion that "actions taken by the FERC adequately address HG&E's concerns over abuse of NU's post merger market power," the Notice relies, in part, on the FERC Administrative Law Judge's ("ALJ") proposed requirement that NU establish an "ombudsman." Notice at 39; Initial Decision at 48-49, 53 FERC ¶ 63,020 (Dec. 20, 1990). The ombudsman would "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." Id. However, the FERC deleted this condition in its Opinion No. 364 at 104, 56 FERC ¶ 61,269 (Aug. 9, 1991). Moreover, the Notice ignores the subsequent FERC order on rehearing, Opinion No. 364-A, 58 FERC ¶ 61,070 (Jan. 29, 1992), which is itself the subject of a pending request for rehearing (scheduled to be considered by the FERC at its March 25, 1992 agenda meeting).

The Clayton Act and Department of Justice Merger Guidelines

Neither the Notice, nor the Staff Recommendation upon which the Notice is based, employs any of the analytical tools contained in the Department of Justice's ("DOJ") Merger Guidelines. The Merger Guidelines, published at 49 Fed. Reg. 26823 (1984), are the DOJ's enforcement policy for mergers and acquisitions subject to Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 1 of the Sherman Act, 15 U.S.C. § 1. Nonetheless, neither the Notice nor the Staff Recommendation even so much as mentions the Clayton Act or the Merger Guidelines.

Although the Commission's antitrust inquiry must be "broader" than that conducted by other agencies, the "traditional antitrust enforcement scheme," which is based upon Clayton Act principles, is a necessary starting point for the Commission's review into acquisitions involving nuclear units.[9] The failure to analyze the proposed acquisition in light of those principles, which the Merger Guidelines explain, is inconsistent with the Commission's statutory responsibility. By deferring any antitrust analysis of the merger to the FERC, the Notice merely compounds the problem since the FERC's analysis also refused to follow the Merger Guidelines. Opinion 364 at 18. Indeed, the FERC erroneously views the Merger Guidelines as "hostile" to mergers, and assumes that the Merger Guidelines treat mergers as "presumptively harmful." See Opinion 364-A at 5.

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[9] Alabama Power Co. v. N.R.C., 692 F.2d at 1364, 1368 ("The antitrust laws incorporated in Section 105(c)(5) [of the Atomic Energy Act] are the Sherman Act; the Wilson Tariff Act; the Clayton Act; and the Federal Trade Commission Act." (citations omitted)).

HG&E and others presented evidence to the Commission that the proposed acquisition would be anticompetitive[10]. The FERC affirmed the findings of its own ALJ that "the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling and transmitting bulk power in New England...." Initial Decision at 15; Opinion 364 at 40-44. However, the FERC misanalyzed NU's claim that the merger would produce significant benefits, and ruled that such alleged "synergies" (or "efficiencies") could offset part of the anticompetitive harm that the merger would cause. Opinion 364 at 45.

The Merger Guidelines specify the conditions under which DOJ will consent to a merger, which it might otherwise challenge, on the ground that the merger would produce "significant net efficiencies" or savings. Section 3.5 of the Merger Guidelines, 49 Fed. Reg. 26834, prescribes that the efficiencies defense is not applicable "if equivalent or comparable savings can reasonably be achieved by the parties through other means." Id. Despite the unambiguous language of the Merger Guidelines, and the logic of the Clayton Act, the FERC approved the merger based, in significant part, on NU's claim of efficiencies without considering other parties' showings that the claimed savings could be achieved without the merger. Opinion 364 at 16-19.

As discussed in the section below, the Commission is in a unique position to determine whether many of NU's claimed savings are realistic, and if they are, whether they could be achieved without the merger. The Director should closely

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[10] See, e.g., Direct Testimony of Dr. Robert J. Reynolds, former senior economist with the DOJ Antitrust Division, filed by HG&E on April 1, 1991.

examine the antitrust implications of the proposed acquisition using the principles embodied in the Clayton Act and the Merger Guidelines, including specifically the DOJ's standard for applying the efficiencies defense to mergers.

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

The Staff Recommendation relies on the FERC and SEC decisions approving the merger, but those decisions were based, in part, on NU's claim that its superior nuclear operating record and multi-unit efficiencies would produce some $527 million in savings -- the bulk of the benefits from the proposed merger as estimated by NU. The SEC decision, for example, accepted NU's claims at face value:

> With the acquisition of PSNH, the Northeast-PSNH system will become the lead owner of Seabrook. Northeast expects that its multi-unit operation experience and expertise will benefit Seabrook operations and permit cost reductions of PSNH's power generation costs by approximately $188 million on a cumulative net present value basis.... The savings to CL&P and other Joint Owners are projected to be more than $21 million and $318 million, respectively....

SEC Order at 51 n. 84, 47 S.E.C. Docket 1887 (Dec. 21, 1990). See also id. at 62-63. The FERC ALJ likewise accepted NU's claim that hundreds of millions of dollars of savings would result from "NU's proven record of excellence in managing and operating four nuclear generating facilities" and from NU's "management techniques" and efficiencies in operating multiple nuclear units. Initial Decision at 9-11. The FERC "summarily affirmed" the ALJ's finding that the merger would "provide substantial savings related to Seabrook O&M, administrative and general costs and certain other expenses." FERC Opinion 364 at 44-45. Based upon a balancing of

these savings (which constituted most of NU's claimed savings), the FERC and the SEC both approved the merger even though both concluded that the merger, as proposed, was anticompetitive.

The Commission is in a better position than were the FERC and the SEC to judge NU's claims of effectiveness and efficiency in operating nuclear units. This Commission has data, experience and expertise necessary to make an informed determination. Accordingly, the Commission should examine NU's claimed savings from multi-unit nuclear operations for itself, and not rely upon "findings" by the FERC and the SEC.

Unless the Commission is prepared to endorse NU's claimed "record of excellence" in operating nuclear units, the Commission can not rely on the FERC and SEC decisions. Moreover, those agencies balanced claimed savings due to NU's supposedly-unique "excellence" against acknowledged anticompetitive harm from the merger; but such balancing would transgress the standard of the Atomic Energy Act. If the Commission endorses NU's "excellence," the Commission must then decide whether Seabrook could achieve equivalent cost savings by means other than NU's proposed acquisition.

NU's Separation of Seabrook Operation from Ownership and Exculpation of Liability for Own Negligence and Recklessness

The Staff Recommendation discusses the concern, raised by MMWEC, that NU is separating the operation and ownership responsibilities for Seabrook by creating two wholly-owned subsidiaries, NAESCO and NAEC, to operate and to own PSNH's interest in the unit, respectively. The Staff Recommendation dismisses this

concern as "contractual, not competitive" in nature and therefore not a factor to be considered by the Commission. Staff Recommendation at 33-34.

The Staff Recommendation fails to discuss (let alone analyze) two additional facts raised in MMWEC's Comments, however. Other than PSNH's Seabrook interest (which is to be held by NAEC), neither NAEC nor NAESCO possesses any assets whatsoever. As such, the two subsidiaries are essentially shell corporations whose primary purpose is to insulate NU from any liability as a result of its operation or ownership of Seabrook. MMWEC April 1, 1991 Comments at 3-6.

To add yet another layer of insulation, NU bestowed favors using its control over the New England transmission market to obtain consent from two other utilities (constituting, together with NU, a majority of the Seabrook ownership shares) for an exculpatory clause that seeks to free NU from any liability connected to its acquisition of Seabrook, other than liability for willful misconduct.[1] The exculpatory clause purportedly would free NAESCO and its affiliates not only from harm caused by their own negligence, but also from responsibility for third party claims against MMWEC, or MMWEC members, such as HG&E, contracting for a share of Seabrook, for any harm related to Seabrook. Thus, NU is attempting to place operating responsibility for Seabrook in an asset-less corporation through an

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[1] NAEC exculpatory clause is different from the prior PSNH exculpatory clause emanating from the Seabrook Joint Ownership Agreement because NAEC, unlike PSNH, has no assets that would be at risk if NAEC was deemed negligent or reckless.

improper use of NU's market power that should be prohibited by the Commission. Id.

The Notice's attempt to brush this issue away on the ground that it is "contractual, not competitive" misses the point. The fact that anticompetitive market power is exercised by imposing discriminatory or unconscionable contract terms does not excuse the anticompetitive nature of the action. The Commission is the agency which has the statutory obligation to address such anticompetitive issues where they involve the licensing of ownership and operation of nuclear power units.

Moreover, it is not sufficient to rely upon the FERC to resolve this issue. FERC did not address (and was not asked to address) these anti-competitive aspects of NU's ownership and operation of Seabrook because the exculpation clause was adopted in July 1990, after written testimony had already been filed and discovery completed at the FERC.

Nor is it sufficient for the Commission to rely upon its imposition of a license condition barring NAESCO from marketing or brokering of Seabrook power or energy to somehow remedy this problem. See Staff Recommendation at 34. Barring NAESCO from marketing and brokering power has no relevance to the issue of how to mitigate or prevent NU's exercise of market power in insulating itself from liability for its own negligence in operating Seabrook.

Rather than avoiding the issue, the Director should examine the July 19, 1990 exculpatory agreement directly, both to determine its anticompetitive impact and as evidence of NU's use of anticompetitive market power in obtaining the agreement.

Commission Authority to Condition License Transfer

The Staff Recommendation concludes at pages 39-40 that:

> 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.

It is unclear whether the Staff Recommendation means the Commission lacks the legal authority or a factual basis for denying HG&E's proposed condition. If the Staff Recommendation means that HG&E has not shown that there is in fact an anticompetitive problem that needs to be remedied, then the Staff Recommendation fails to explain how it resolves HG&E's contentions -- expressed in documents that HG&E has submitted in this proceeding, including the direct testimony of three HG&E witnesses, the HG&E briefs on and opposing exceptions to the FERC ALJ's Initial Decision, HG&E's Motion for oral argument before FERC, and HG&E's Comments and Reply Comments to this Commission -- that the FERC merger conditions are not adequate to mitigate the anticompetitive impacts of the merger on HG&E. HG&E attaches hereto (for the convenience of the reader) its June 13, 1991 Comments discussing, in part, how the merger will expand NU's ability and incentive to engage in anticompetitive conduct against HG&E (see pages 3-6 of the Comments) and why the NU New Hampshire Corridor Plan, relied upon in the Notice without analysis of the Plan's ability to mitigate effectively actual anticompetitive harm caused by the merger, is inadequate to protect HG&E against such anticompetitive conduct (see pages 7-9 of the Comments).

If the Staff Recommendation means that the Commission lacks a legal basis to impose transmission access conditions, then the Notice misstates the Commission's authority. Section 105(c)(5) states that the Commission has the authority "to issue a license with such conditions as it deems appropriate." The Commission has previously exercised this authority to impose a condition on the issuance of an operating license mandating that the licensee provide transmission access over its facilities for the use of certain smaller electric cooperatives. That decision was affirmed on appeal by the U.S. Court of Appeals for the 11th Circuit:

> ...the approach of Congress reflects the uniqueness of legislative control over nuclear development. Congress determined the need for great expertise and wide powers. Both the responsibility and authority were granted to the Nuclear Regulatory Commission. The imposition of ownership conditions along with conditions providing for access to Alabama Power's transmission facilities is not an abuse of nor beyond that delegated discretion. We AFFIRM the remedy.

Alabama Power Co. v. N.R.C., 692 F.2d at 1369-70 (emphasis added).

Request for Clarification Regarding Conditions Imposed by Commission

The Staff Recommendation states that "the staff recommends denying in part and approving in part" HG&E's proposed conditions. Staff Recommendation at 37. There is no reference to HG&E's proposed conditions in the Notice. HG&E requests that the Director clarify whether the Commission is adopting HG&E's proposed condition that Commission approval be made contingent upon NU and PSNH satisfying all of the conditions imposed by the SEC and FERC. See HG&E April 1, 1991 Comments at 9-10.

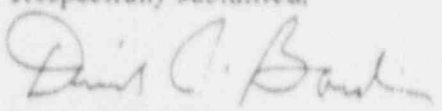
If the Commission has adopted HG&E's proposed condition, then HG&E expects that the condition will apply to any additional conditions that may be imposed on NU or PSNH in the future by either the FERC or the SEC as a result of agency reconsideration, remand from judicial review, or otherwise. HG&E requests that the Director indicate if HG&E's understanding is not correct.

Conclusion

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

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

Respectfully submitted,



David J. Bardin
Eugene J. Meigher
Steven R. Miles

Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6089

Attorneys for the City of Holyoke
Gas & Electric Department

cc: Anthony T. Gody, Chief, Policy Development and Technical Support Branch, NRC Office of Nuclear Reactor Regulation
Gordon Edison, Senior Project Manager, Project Directorate I-3, Division of Reactor Projects-I/II, NRC Office of Nuclear Reactor Regulation
Joseph Rutberg, Esq., NRC Deputy Assistant General Counsel
Thomas T. Martin, NRC Regional Administrator, Region I
Noel Dudley, NRC Senior Resident Inspector
George L. Iverson, Director, Office of Emergency Management
NRC Document Control Desk
Ted C. Feigenbaum, President and Chief Executive Officer, New Hampshire Yankee Division of PSNH
John A. Ritscher, Esq.
Douglas G. Green, Esq., Newman & Holtzinger, P.C.
Alan J. Roth, Esq., Spiegel & McDiarmid

Attachment

Arent Fox Kintner Plotkin & Kahn

June 13, 1991

David J. Bardin
202/857-6089

VIA HAND DELIVERY

Anthony T. Gody, Chief
Policy Development and Technical Support Branch
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Public Service Company of New Hampshire, Docket No. 50-443
REPLY OF CITY OF HOLYOKE GAS & ELECTRIC DEPARTMENT TO THE RESPONSE OF CONNECTICUT LIGHT & POWER COMPANY AND PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE REGARDING ANTITRUST ISSUES

Dear Mr. Gody:

The City of Holyoke Gas & Electric Department ("HG&E") hereby replies to the rerponse of Connecticut Light & Power Company ("CL&P")[1/] and Public Service Company of New Hampshire ("PSNH") (collectively, "Applicants") filed in the above-referenced proceeding on April 22, 1991, concerning antitrust issues ("Response"). For the reasons stated below, the Commission should find that the proposed transfer of PSNH's interest in Seabrook Station, Unit 1, to NU constitutes a "significant change" and, after formal review by the Attorney General, deny the proposed transfer on the grounds that approval would create or maintain a situation inconsistent with antitrust laws and policies. In the alternative, the Commission should condition its approval of the transfer upon NU and PSNH fulfilling the operational and structural conditions stated on pages 9-10 of HG&E's Comments filed April 1, 1991, in this proceeding. Those conditions represent the minimum level of protection adequate to safeguard HG&E from competitive injury resulting from the merger and the license transfer.

1050 Connecticut Avenue, NW
Washington, DC 20036-5339

Telephone 202/857-6000
Cable ARFOX
Telex WU 892672
ITT 440266
Facsimile 202/857-6395

7475 Wisconsin Avenue
Bethesda, Maryland 20814-3413

8000 Towers Crescent Drive
Vienna, Virginia 22182-2738

1/ CL&P is a wholly-owned affiliate of Northeast Utilities ("NU").

I. PSNH's Transfer of its Seabrook License to NU Constitutes a "Significant Change," Requiring Review by the Commission and the Attorney General of the Anticompetitive Impacts of the Transfer

Applicants contend that past and future conduct in bulk power markets is irrelevant to the Commission's review under Section 105c of the Atomic Energy Act ("AEA"), 42 U.S.C. §2135(c), and therefore the transfer of PSNH's Seabrook license to NU lacks "any connection" to the anticompetitive control which the merged firm will wield over wholesale sales of generation and transmission capacity. Response at 18. Although nexus is an important element in the Commission's analysis, Applicants apply the wrong legal standard and attempt to brush aside facts demonstrating the relationship between the transfer of PSNH's Seabrook license and the anticompetitive situation that results.

In support of their contention that bulk power activities are irrelevant to the Commission's responsibilities under Section 105c, Applicants rely upon a 1973 decision of the Atomic Energy Commission[2]. Applicants, however, ignore the 1982 ruling of the United States Court of Appeals in Alabama Power Co. v. N.R.C., 692 F.2d 1362 (11th Cir. 1982), cert. denied 464 U.S. 816 (1983). In its decision (at pages 1367-68), the Court of Appeals affirmed the Commission's imposition of conditions on a utility's nuclear license designed to remedy the utility's past and prospective anticompetitive actions -- including anticompetitive wholesale power sales not involving nuclear power (emphasis added):

> [Applicant] contend[s] that the NRC overstepped its authority in looking past the direct effects of the nuclear plant on the present or prospective competitive situation, and in considering actions of

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2/ Louisiana Power and Light Co., 6 A.E.C. 619 (1973) ("Waterford II").

> Alabama Power which preceded the license application by many years. We do not agree with this argument.
>
> ....The amount of market power held by the applicant and the ways it has been used are relevant inquiries in determining whether there is a "situation" to maintain, and whether issuing this license will maintain it. The statute clearly calls for a broad inquiry and common sense does not allow interpretations to the contrary.

The Commission's Atomic Safety and Licensing Appeal Board similarly imposed conditions upon a utility's operating license for a nuclear power plant for the purpose, in part, of remedying the licensee's anticompetitive actions in denying transmission service to smaller utilities in Consumers Power Co., Nuclear Reg. Rep. (CCH) ¶ 30,263 (1977). The Appeal Board ruled that an antitrust inquiry under Section 105c required consideration not only of the licensee's actions, but of the structural context of the market as well. The proper test for nexus, the Appeal Board ruled, was whether award of the license would be "intertwined with" or would "exacerbate[]" an anticompetitive situation. Id. at p. 28,368 - 28,371.3/

There can be little question that the transfer of PSNH's share of Seabrook to NU will exacerbate the anticompetitive situation between NU and HG&E. HG&E is dependent on purchased power from other entities. By combining PSNH's share of Seabrook with NU's existing share, the merger will reduce the number of competitors selling excess generation capacity. The merged company, with its control over the Seabrook excess generation capacity (which NU has been trying to and continues to try to

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3/ Even the Commission's decisions in Waterford I and II, cited by Applicants, recognize that a proper nexus between anticompetitive actions and "activities under the license" "would not be limited to construction and operation" of the nuclear power plant. Louisiana Power and Light Co., 6 A.E.C. 48 (1973) ("Waterford I").

market throughout New England),[4] will possess the capability to limit access to and dictate terms for generation capacity.

Moreover, the merger will give NU control over the transmission lines needed to import power from outside New England. Currently, over 36% of HG&E's total energy supply is purchased from a competing nuclear power plant in Canada via transmission by PSNH. NU can be expected, if its acquisition of PSNH's Seabrook capacity is approved, to restrict that transmission capacity in order to increase its own control over the wholesale generation market in New England and, therefore, expand its ability to force other utilities to purchase its excess Seabrook power.[5]

4/ Applicants implicitly acknowledge in their Response (at 17) that Seabrook "contributes" to Applicants' excess generating capacity, though they characterize this surplus as "temporary."

5/ Applicants claim that HG&E declined to accept an invitation by the FERC ALJ to produce Dr. Reynolds for questioning at the hearing. Response at 21-22 n.12. As the transcript of the FERC hearing evidences, however, NU's counsel on at least one occasion argued strongly that Dr. Reynolds not be allowed to appear since NU waived cross-examination of him:

> MR. PFUNDER [Counsel for Montaup Elec. Co., joint sponsor of Dr. Reynolds' testimony with HG&E and other parties]: Dr. Reynolds is the expert economist for a number of parties. He is our key witness on anticompetitive effects. He is here in Washington.... We want to make him available here so he is available for you [the Presiding Judge] to question him.
>
> ....
>
> MR. WAX [Counsel for NU]: Your Honor, the problem [with allowing Dr. Reynolds to appear] is as to whether we are going to parade through this hearing room witnesses whom the company and/or the supporting Interveners have concluded they do not want to have any cross-examination of.... As of today, we are 40% of the way through the hearing.
>
> PRESIDING JUDGE: I've heard enough.... Do you want these people to come in here, even though the company [NU] says they don't want to cross them?

(continued...)

As the testimony of Messrs. Leary and Allen demonstrates (copies of which were lodged with the Commission with HG&E's Comments), NU repeatedly has attempted to inflict competitive injury on HG&E in order to benefit NU's affiliate, Holyoke Water Power Company ("HWP"), in its retail competition with HG&E.6/ NU does not deny that it provides wholesale generation and transmission capacity both to its affiliate, HWP, and to HG&E. This relationship creates an inherent incentive and opportunity to disadvantage HG&E, both presently and in the future.

Given the past history of NU's anticompetitive conduct against HG&E, the undeniable incentive for NU to continue to injure HG&E in the future, and the increased ability for NU to engage in such anticompetitive conduct

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5/(...continued)

> MR. PFUNDER: The issue is whether the company should be allowed to, by waiving cross-examination of a key witness like Dr. Reynolds, to abort the opportunity for you to question Dr. Reynolds.
>
> ....
>
> PRESIDING JUDGE: ....Do not waste anybody's time bringing anybody in here whom you know is not going to be cross-examined. Let's structure the schedule that way.

Tr. 3218, 3223-225. In addition, Applicants neither supply nor quote the pages of Prof. Hay's testimony that they claim "devastat[e]" Dr. Reynolds' testimony. HG&E, which supplied this Commission with a complete copy of Dr. Reynolds' testimony on April 1, 1991, would be willing to provide copies of Dr. Hay's prefiled and cross-examination testimony if desired by the Commission. Applicants' self-congratulatory assertions do nothing more than point out the factual controversy regarding the anticompetitive impact of the license transfer and merger which this Commission needs to resolve, either through analysis of the FERC record or otherwise.

6/ Applicants claim that FERC found NU's transmission rates to HG&E to be below NU's cost of service for transmission. Response of 17. The FERC's decision, which was based on the rolled-in cost of NU's transmission facilities, is the subject of a pending appeal filed by HG&E on the ground (in part) that no evidence of NU's rolled-on costs was introduced on the record by any party to the proceeding. City of Holyoke Gas & Elec. Dept. v. FERC, Case No. 90-1565 (D.C.Cir., filed Nov. 26, 1990) (oral argument scheduled for Oct. 25, 1991).

if the transfer of PSNH's Seabrook interest is approved, there can be no doubt that the proposed transfer is "significant" and bears a strong nexus to the likely expansion of NU's anticompetitive actions against HG&E.

II. The Commission may Not Abdicate its Authority to the FERC and SEC to Review the Antitrust Issues of the Nuclear License Transfer

Applicants urge that this Commission surrender its responsibility and authority to review the antitrust issues of the proposed license transfer to other federal agencies, principally the Federal Energy Regulatory Commission ("FERC") and the Securities and Exchange Commission ("SEC"). Response at 19-29. Applicants, however, ignore the clear directive of Section 105c of the AEA, which prescribes that when there is a significant change in the licensee's proposed activities, the Commission "shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws" specified in Section 105a of the AEA. Although the Commission may in its investigation rely upon the factual record developed by another agency, the statute does not allow the Commission to delegate to another agency the Commission's responsibility to analyze the information presented and to render a finding.

Moreover, as the Court of Appeals emphasized in Alabama Power, the Commission's review of antitrust issues is far broader in scope than the traditional antitrust analysis undertaken by FERC and other federal agencies:

> The NRC is to look only for "reasonable probability" of violation. This command may result in the conditioning of licenses in anticipation of situations which would not, if left to fruition, in fact violate any antitrust law. But Congress intended this broad inquiry to prevent infringement on the antitrust laws in the nuclear power field.

> We also not that the Joint Committee Report did not limit the NRC's inquiry to probable contravention of the antitrust laws, but included "or the policies clearly underlying these laws." Here again, a traditional antitrust enforcement scheme is not envisioned, and a wider one is put in place.

692 F.2d at 1368 (emphasis added). Although the Commission may rely upon the record developed at the FERC, it ultimately must reach its own conclusions applying the broader legal standard prescribed by the AEA.

III. Applicants' Transmission Proposal Will Leave HG&E Without Right to Meaningful Transmission Access to its Largest Supplier

NU's response that HG&E can bid for transmission capacity under NU's "New Hampshire Corridor Plan" (Response at 25-27) is no solution at all to the anticompetitive problems created by the proposed transfer and merger. Under NU's New Hampshire Corridor Proposal, HG&E's right to continue using PSNH transmission capacity to purchase 12.2 mW of power from Pt. Lepreau in Canada would be terminated after October 1994, thereby depriving HG&E of access to its largest supplier. Although NU claims that 400 mW of transmission capacity would be made available to replace this lost transmission capacity, the fact is that one-half of any available capacity (200 mW) is already allocated to another utility, New England Power ("NEP"). Since NU proposes to allocate the remaining 200 mW on the basis of each utility's share of regional peak load, HG&E's share of guaranteed transmission capacity could be as low as 1 mW. This would make it virtually impossible for HG&E to continue purchasing needed low-cost power from Pt. Lepreau or elsewhere in Canada or Maine. The sine qua non behind this scheme is NU's need to cut off competition to sales of excess power, which will arise if the transfer application is approved.

Likewise, NU's claim that HG&E can purchase "brokered" transmission capacity from winning bidders is hollow. Since many other utilities likewise will be short of transmission capacity, allowing them to resell their limited capacity at even higher prices offers little benefit. Nor are sales by NEP likely to be of much help. If NEP, the only utility likely to receive a sizeable entitlement of NU transmission capacity, offered its entire 200 mW entitlement for sale to other utilities based upon each utility's share of regional peak load, HG&E's transmission rights would increase to a negligible 2 mW, an amount so small as to force HG&E to replace its Pt. Lepreau power with power from NU.

Moreover, the restrictions placed on the 200 mW NU plans to "offer" are onerous and make it unlikely that this offer will in reality provide much assistance to HG&E. For example, although the offer claims to extend up to thirty years, the restrictions imposed by NU effectively limit the duration of its transmission "offer" to less than ten years (e.g., utilities requesting service beyond the year 2000 are obligated to pay on a pro rata basis for construction of new transmission lines, whether or not the requesting utility would ever need or use those new lines). Thereafter, HG&E and other utilities in New England will be entirely at the mercy of NU which will control virtually all transmission capacity from Canada and Maine to southern New England.

Finally, NU's contention that HG&E can share in the construction of new transmission lines is specious. NU's plan commits it to do nothing more than use their "best efforts" to support new lines and to prepare studies if a majority of NEPOOL members request such a study. This leaves too much discretion in NU's hands. What is particularly unsettling

is that NU and NEP reserve for themselves rights to 50% of the capacity on any new transmission line. While utilities which purchase longer term capacity from NU will be required to pay much of the cost of any new lines (without necessarily obtaining any increase in entitlement), NU and NEP will "roll-in" their share of the costs into the total average transmission costs charged for all other transmission services. This will likely result in utilities who have already contributed directly to the cost of the new transmission line also paying part of NU's share through higher rates on other transmission services. Moreover, as recent decisions rejecting transmission line construction in Maine and elsewhere in New England demonstrate, it is uncertain when (and if) additional high voltage transmission lines will be approved in region. In short, the only guaranteed transmission capacity which HG&E can count on under the NU plan is approximately 1 mW of capacity, and even that is for a limited number of years.7/

Conclusion

Wherefore, for the reasons stated herein and in HG&E's Comments, HG&E respectfully requests that the Commission find that the proposed license transfer constitutes a "significant change" in the licensee's activities and, following formal review by the Attorney General and a

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7/ As this debate shows, the NHCP is a complex document, drafted by NU and NEP, which provides many "escapes" and ambiguities which NU can use to avoid providing meaningful transmission access. Moreover, the FERC ALJ recommended changes to the NHCP which NU is now opposing before the FERC. If nothing else, the debate over the meaning and usefulness of the NHCP demonstrates the need for this Commission to investigate (either by using the FERC record or through its own hearings) the impact of the NHCP in relation to the anticompetitive dangers that would be created by transfer of the Seabrook license and the merger.

hearing into the antitrust issues raised by the proposed transfer, deny the proposed transfer or, in the alternative, impose on the grant of the transfer the conditions stated on pages 9-10 of HG&E's Comments.

Respectfully submitted,

David J. Bardin
Steven R. Miles

Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6089

Attorneys for the City of Holyoke
Gas & Electric Department

cc: Gordon Edison, Senior Project Manager, Project Directorate I-3, Division of Reactor Projects-I/II, NRC Office of Nuclear Reactor Regulation
Joseph Rutberg, NRC Deputy Assistant General Counsel
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John A. Ritscher, Esq.
NRC Document Control Desk