

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 entities 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 Sabrook 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.

HC&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.

* 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

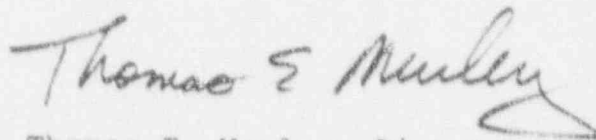
The instant review centers around whether the proposed merger between NU and PSNH represents a "significant change" since the previous antitrust review of the Seabrook facility. The linchpin of the staff recommendation that the merger does not represent a significant change warranting a Commission remedy 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, Director
Office of Nuclear Reactor Regulation