

SPIEGEL & McDIARMID

1350 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-4798

TELEPHONE (202) 879-4000
TELECOPIER (202) 879-4001
TELECOPIER (202) 879-4081

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GEORGE SPIEGEL, PC
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OF COUNSEL
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CARRIE G. COSTELLO

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

ATTENTION: Chief, Policy Development and
Technical Support Branch
Office of Nuclear Reactor Regulation

Re: Public Service Co. of New Hampshire Transfer
of Ownership Interests and Opportunity for Public
Comment on Antitrust Issues, Docket No. 50-443

Gentlemen:

The New Hampshire Electric Cooperative ("NHEC") avails itself of the opportunity for comment as to the competitive aspects of the proposed license transfer described at 56 Fed. Reg. 8373-75 (February 28, 1991). As the Federal Register notice states, the issue before "The Director of the Office of Nuclear Reactor Regulation is the issuance of 'a finding whether significant changes in the licensees' activities or proposed activities have occurred since the completion of the previous antitrust review.'" That notice also points out that Staff is aware of and is closely following the proceeding at the FERC that is addressing competitive aspects of the proposed acquisition of PSNH by NU and that the NRC will consider the FERC proceedings to

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the maximum extent possible in resolving issues brought before the NRC. NHEC submits that a finding that significant changes have occurred since the completion of the previous antitrust review is manifestly required. NHEC further states conditionally that such an antitrust review would be appropriate.

The criteria enunciated and applied by the Commission in South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit No. 1, 11 NRC 817 (1980) ("Summer I") and 13 NRC 382 (1981) ("Summer II") make it very obvious indeed that an affirmative "significant changes" determination is required. The Commission summarized its three criteria (Summer II at 864 n. 3):

. . . the first criterion required that the changes alleged shall have taken place since the previous statutory antitrust review, the second that they should be fairly attributable to the licensee in a causation sense, and the third established that changes would be considered "significant" only when the competitive structure as changed, would likely warrant and be susceptible to greater than de minimis license modification.

The first criterion therefore is whether the change or changes have occurred since the previous antitrust review. The Attorney General's advice letter dealing with Seabrook was issued on December 4, 1973. The Attorney General concluded, largely because of a settlement agreement then recently signed by virtually all of the privately owned companies and most of the publicly owned systems in New England which resolved disputes concerning key portions of the NEPOOL agreement and settled the FPC proceeding relative to NEPOOL that it appeared that the

intense hostility which had given rise to most of the past allegations of anticompetitive behavior in New England had been eliminated. Since all of the changes discussed below have occurred well after December 4, 1973 "those changes on their face meet the criterion that they have occurred since the previous antitrust review." Summer I at 830.

The second criterion is whether the change or changes are reasonably attributable to the applicants. The Joint Committee on Atomic Energy stated that "it would be unfair to penalize the licensee for significant changes not caused by the licensee or for which the licensee could not reasonably be held responsible or answerable." U.S. Code, Congressional Administrative News, 91 Cong., 2d Sess., 4981, 5010 (1970) quoted in Summer I at 833 n. 43.

As the Commission concluded (Summer I at 834), "where there had been changes, otherwise significant, they should not trigger antitrust review when the changes occurred independent of the action of the license applicant." Here, the changes in the structure of the industry occur because of the voluntary decision of NU to acquire PSNH. That action together with the treatment accorded to NHEC of which NHEC here complains is entirely voluntary and certainly cannot be considered to be "independent" of the action of the applicant.

The third criterion is whether the changes have antitrust implications that will be likely to warrant Commission remedy. As the Commission amplified "Like other threshold tests

that require a prediction of outcome, this criterion requires us to take an early look at both the facts and the law. We address two distinct questions (a) whether an antitrust review will be likely to conclude that the situation as changed has negative antitrust implications; and (b) whether the Commission has available remedies." (Summer I at 835) 1/

The obvious and primary change of circumstances will be the acquisition by NU, acting through a service company called NUSCO, of the assets of PSNH. The Federal Energy Regulatory Commission's Initial Decision in Northeast Utilities Service Company (Re: Public Service Company of New Hampshire), 53 FERC ¶ 63,020 (December 20, 1990) found some of the blatant anticompetitive consequences of that acquisition:

An array of experienced utility executives and well-qualified economists testified that the merger would have anticompetitive impacts by giving the merged company vast competitive strength in selling

1/ As to the inquiry concerning available remedies, the Commission found that "in most cases it is presumed that the Commission will be able to tailor some relief." (Summer I at 839) The specific factual setting of the Summer I proceeding required consideration of the availability of a remedy. As the Commission pointed out, "Where there is a state regulatory plan, Parker considerations require us to inquire whether the relief we would provide would be repugnant to the state plan or would be so unnatural under the state plan as to work some other unfairness. If it would, it must be considered to be unavailable." (Summer I at 839) Thus, dealing with allegations that SCE&G and Santee-Cooper do not compete for loads of 750 KW or greater outside of a three county area and that Santee-Cooper had agreed to restrict itself in the wholesale market, the Commission determined that "the activities that are the subject of the alleged 'agreement' are required by the state as part of a state regulatory plan. With respect to them, applicants have no freedom of choice. Thus, they may not be the subject of our license modifications." (Summer II at 876)

and transmitting bulk power in New England, and in a regional submarket called "Eastern REMVEC" (Rhode Island and Eastern Massachusetts). (Id. at p. 65,214)

The Initial Decision accepted the characterization of a Vice President of New England Power Company who testified as to "the fundamental change that will result from the proposed merger: ' . . . combining into one entity control over the single largest source of surplus capacity in New England with control over key transmission facilities necessary to provide access to alternative sources of bulk power in the region'" Id. at p. 65,215.

The Initial Decision found that absent conditions, the merged company would "create a near monopoly over key transmission facilities and corridors" (Id. at p. 65,215). The Initial Decision further found that the merged company will control some 92% of the capacity available for transmission to New England from New York. The merged company "would essentially control access from the southeastern portion of New England in all directions outside, both the north and the east into Maine, into New Hampshire, and west to New York" (Id. at p. 65,215). It further found

This control would give the merged company the power to demand excessive charges for transmission, or to deny it altogether, while favoring its own excess generation at high prices. . . . That the merged company could use its power to force its own extra goods on buyers elsewhere is an especially significant concern because NU-PSNH will have the largest block of surplus capacity in New England (Id. at p. 65,215).

The Initial Decision summarized:

The anticompetitive effects of this merger, if unconditioned, will, therefore, exist over the years immediately following the transaction, and will continue for the foreseeable future -- over the "short-term" and over the "long-term," however these words may be defined. For these reasons, an unconditioned merger would have serious anticompetitive consequences for New England generally and for Eastern REMVEC utilities in particular.

(Id. at p. 65,219)

New Hampshire Electric Cooperative is a Transmission Dependent Utility (TDU) (Id. at p. 65,231). The transmission dependent utilities are "entirely dependent on NU or PSNH for their bulk power transmission needs. . . ." TDUs "are physically unable to engage in any bulk power transaction without using the NU or PSNH transmission systems. Absent economic access to NU's or PSNH's transmission facilities, the TDU cannot survive as an independent entity." The TDUs compete with NU and PSNH in the wholesale bulk power market; each TDU, like NU/PSNH, seeks out attractive sources of supply. TDUs thus "are in an uneasy position of having their only source of essential transmission service in the hands of their principal competitor." Thus, "these small companies, [are] uniquely vulnerable to possible anticompetitive conduct. (Id. at p. 65,233)

Given this unique vulnerability, it is obvious that any denial of transmission by PSNH/NU to NHEC presents grave antitrust problems. NHEC is, of course, participating before the FERC, and will be affected by the decision there. Nonetheless,

there are certain aspects of the situation which have arisen more recently, and which are relevant to this Commission and have not been a part of the record before the FERC. For a considerable period of time New Hampshire Electric Cooperative has been seeking, without success, transmission from PSNH/NU. On January 29, 1991, NHEC and New England Power Company executed a long-term contract under which NEPCO would supply firm power to NHEC. The contract is to become effective on a determination that NHEC is able to take such power from sources other than PSNH. PSNH/NU argues that NHEC is unable to take such power from NEPCO for two reasons: 1) it asserts that NHEC is contractually blocked from taking the power from others than PSNH/NU, and 2) it asserts that NHEC does not have transmission commitments which would permit the delivery of the power from NEPCO. NHEC believes that the first issue is one to be resolved before FERC, where it now is being tried. The second, however, is more troubling. While PSNH/NU has not yet completely refused to provide transmission, it has also not agreed that transmission should be made available unless there is a final determination, agreed to by PSNH/NU, that NHEC is free to leave. Thus NHEC fears that the failure to provide transmission is being used as a means to leverage the position of PSNH/NU on the contractual issue. If NU is willing to commit before this Commission that it will provide NHEC all transmission needed for NHEC to purchase power from other sources, so that the contractual issues could be dealt with on their own merits, then NHEC would withdraw its request that

this Commission find significant change and that this Commission embark upon an antitrust review. In the FERC merger proceeding, NU/PSNH represented that it would offer transmission contracts to all TDU's similar to that it recently entered with Connecticut Municipal Energy Cooperatives ("CMEEC") (Tr. 7789-90 in the merger proceeding at FERC). NHEC has advised NU/PSNH that such a contract would be satisfactory. NU/PSNH has not responded with an unequivocal commitment. If NU/PSNH remains unwilling to make such an unequivocal commitment, that failure should be regarded as confirmation of its intent to continue to deny transmission. It would demonstrate its intent to use its control of transmission to force its expensive surplus capacity upon TDUs. That position would certainly require an affirmative finding of significant change.

There is no question that the instant situation satisfies the "nexus" requirement. "For reasons elaborated in Wolf Creek I, [1 NRC 559 at 596 (1965)] the appropriate test is whether 'anticompetitive situations [are] intertwined with or exacerbated by the award of [the] license to construct or operate a nuclear facility.'" Consumers Power Co., 6 NRC 892, ALAB 452 (1977) at 917.

We have summarized some of the key anticompetitive impacts of the proposed merger as found by the FERC Initial Decision. It is indisputable that that merger will not take place without the transfer of the Seabrook license. Thus, in the largest sense the anticompetitive situation is "intertwined with

ore exacerbated" by the transfer of the license. Moreover that transfer (with its hundreds of megawatts of base load power) clearly is intertwined with and exacerbates the amount of surplus capacity available to NU/PSNH and as noted in the Initial Decision provides added incentive for NU/PSNH to prevent NHEC from dealing with others.

Respectfully submitted,



Robert C. McDiarmid
Daniel I. Davidson

Attorneys for the New Hampshire
Electric Cooperative