UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Northeast Utilities Service Company)	Docket Nos. EC90-10-000,
(Re Public Service Company of New)	ER90-143-000, ER90-144-000
Hampshire))	ER90-145-000, and EL90-9-000

BRIEF OF THE CITY OF HOLYOKE GAS & ELECTRIC DEPARTMENT ON EXCEPTIONS

DAVID J. BARDIN
EUGENE J. MEIGHER
STEVEN R. MILES
NOREEN M. LAVAN
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6089

Attorneys for the City of Holyoke
Gas & Electric Department

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BRIEF OF HG&E ON EXCEPTIONS

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Pursuant to Rule 711 of the Rules of Practice and Procedure, 18 C.F.R. § 385.711, the City of Holyoke Gas & Electric Department ("HG&E") hereby files its brief on exceptions to the December 20, 1990, Initial Decision ("I.D.") of the Presiding Administrative Law Judge ("ALJ").1/

INTRODUCTION

Unregulated corporations may merge unless third parties initiate judicial antitrust proceedings to block the merger. Not so electric utilities. Congress assigned responsibility to this Commission for prior approval of mergers for:

> the purpose of insuring against public disadvantage through the requirement of a showing that mergers ... will not result in detriment to consumers or investors or to other legitimate national interests. [Emphasis added.]

Pacific Power & Light Co. v. FPC, 111 F.2d 1014, 1016 (9th Cir. 1940). Applicant has not made that showing of no detriment to the consumers served by HG&E (or other New England consumers served by utilities other than NU and PSNH). The record does not support or justify a finding of no such detriment from the merger as proposed or as further conditioned by the I.D.

1/ To be reported at 53 FERC ¶ 63,020. Citations herein are to the slip decision, cited as "I.D. at __." In order to avoid needless duplication and simplify Commission consideration of these proceedings, HG&E is joining in four briefs on exceptions. This brief involves HG&E alone; HG&E also joins in three other briefs, presented by multiple parties, as follows: BRIEF OF THE TRANSMISSION DEPENDENT UTILITIES ON EXCEPTIONS, BRIEF OF PRINCIPAL NEW ENGLAND INTERVENORS ON EXCEPTIONS, and BRIEF ON EXCEPTIONS ON BEHALF OF EIGHT MASSACHUSETTS UTILITY SYSTEMS. A summary of this brief is separately bound pursuant to Rule 711(b)(i).

STATEMENT OF THE CASE

A. City of Holyoke Gas & Electric Department ("HG&E")

HG&E is a municipally-owned electric and gas utility which serves over 20,000 electric customers (meters) in the City of Holyoke, Massachusetts. In 1988, HG&E's peak load exceeded 57 MW and its sales exceeded 262,000 MWH. Operating revenues of the Electric Division were $24,750,216 and operating expenses were $22,783,263. Ex. 383.

HG&E maintains over 1100 miles of power lines, including a 115 kV line interconnected at its two extremities with the transmission network of Northeast Utilities Company's ("NU's") operating subsidiaries.[2/] HG&E's 115 kV line operates in parallel with NU's 115 kV lines tying the Mount Tom Generating Station (owned by NU subsidiary Holyoke Water Power Company, "NU-HWP," and located in the City of Holyoke) to the New England grid.[3/]

B. HG&E As a Transmission Dependent Utility ("TDU") of NU

HG&E is not interconnected with any utility other than NU's operating subsidiaries (NU-HWP and Western Massachusetts Electric Company, "WMECO"), and is, therefore, totally dependent on NU for its electrical dealings with the rest of the world. Ex. 381 at 2. Accordingly, HG&E is a transmission dependent utility ("TDU") of NU. See I.D. at 50-51. HG&E has purchased unit power transmission services from NU for about twenty years. HG&E also buys and will continue to need transmission services by Public Service Company of New Hampshire ("PSNH"), as explained below.

2/ As used herein, NU refers either to the parent holding company or, collectively, to the parent and/or the affiliated subsidiaries.

3/ Ex. 127; Ex. 381 at 3; Ex. 383; Ex. 601-A.

HG&E generates only about 5 percent of its total energy supply. Economic efficiency dictates that it buy the rest from other utilities. These suppliers are located in New England, Canada and New York, with NU's generation accounting for only a small fraction of HG&E's supply at this time. Ex. 381 at 1, 2, 3; Ex. 383.

HG&E's resource mix is almost three-quarters nuclear and pumped storage (73 percent, compared to 29 percent for New England as a whole), 11 percent hydro (compared to 5 percent for the region) and only 16 percent fossil fuel (compared to 66 percent for the region), as of 1989. Ex. 383 at 1. HG&E relies on unit contract purchases. These encompass shares in units of NU, PSNH and other utilities.

HG&E's largest single source of supply, which accounted for 36 percent of its energy supply in 1989, is the Point Lepreau nuclear power plant in New Brunswick, Canada, owned by New Brunswick Hydro-Electric Commission. Ex. 383 at 1. Transmission of that economical power to HG&E requires transmission access via five utilities: two utilities in Maine, PSNH, New England Power Company ("NEPCO") and the existing NU.

C. HG&E's Vulnerability to NU's Direct Retail Competition with HG&E Through NU's Subsidiary Holyoke Water Power Company ("NU-HWP")

One of those NU operating companies, NU-HWP, not only generates and transmits bulk power but also sells at retail to industrial customers in the City of Holyoke, in direct competition with HG&E.[4/] Chart A, appended hereto, illustrates NU-HWP's corporate relationship to the parent NU holding company and to the present operating subsidiaries, including Holyoke Power and Electric Company ("NU-HP&E") a wholly-owned subsidiary of NU-HWP's.[5/] Charts B, C and D show the

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4/ Ex. 376 (Leary) at 1, 2, 7-9; Ex. 380.

5/ NU-HP&E transmits and sells for resale. NU-HWP generates, transmits and sells at both retail and for resale. This confusing corporate structure by which NU does

(continued...)

circular web of inter-affiliate transactions of NU-HWP and these other NU companies, as well as its retail sales, based on 1989 Form 1 data of which we ask the Commission to take official notice.6/

NU-HWP's retail rates are neither regulated nor published. Ex. 376 at 7, 8. The retail revenues of NU-HWP exceed $8 million a year. Ex. 378; Chart B.

This unusual situation, involving direct competition by NU-HWP for the largest customers and high load factor loads in HG&E's retail service territory, is particularly dangerous for HG&E. Any enhancement of NU's ability to squeeze HG&E by raising its costs could have severe economic detriments to HG&E. Ex. 376 (Leary) at 8. Such harm could ensue even if HG&E eventually secured judicial or administrative relief, during lag periods before litigation and resolution. Id. at 9.

Past NU actions indicate a readiness to impose abrupt price increases on HG&E. Ex. 381 (Allen) at 4-5; Ex. 376 (Leary) at 5-6. In 1988, on a very short notice, NU unilaterally quadrupled (almost quintupled) NU's transmission rate for its part of the transmission path for HG&E's Point Lepreau power supply. Id.7/

5/(...continued)
business eludes explanation, much less justification. NU's transmission service bills to HG&E come from Connecticut Light & Power Company, with which HG&E is not interconnected, as well as from Northeast Utilities Service Company.

6/ See Ex. 378 for 1988 Form 1 data. Commission ratemaking generally attempts to use a consolidated cost of service of all NU operating companies combined. See Ex. 611 at 3 (Whitfield), Ex. 612 at 2U, Ex. 614 at 1U (Whitfield).

7/ Two years later, with these proceedings pending before the Commission, NU "moderated" its stand and "merely doubled" the pre-1988 rate. Ex. 376 at 6 (lines 19-22). In the interim, HG&E felt obliged to pay what NU demanded (even though NU did not file rate schedule amendments with the Commission) because of the stiff NEPOOL deficiency assessments it would otherwise face if it had no transmission contract with NU. See NEPOOL Agreement, Ex. 603, § 9.4; Ex. 123 (Schultheis) at 53-58, also 46-53; Tr. 2779-88; Ex. 123-TT. The Commission's orders accepting NU's 1990 rate schedule filing do not address the impact on HG&E of the NEPOOL Agreement obligations if HG&E failed to sign a transmission agreement as tendered by NU. Northeast Utils. Serv. Co., 52 FERC ¶ 61,336 (1990), 52 FERC ¶ 61,097
(continued...)

HG&E's current contracts to purchase and transmit Point Lepreau power will expire in 1994. See Ex. 381 at 3. HG&E is negotiating for an extension with its Canadian supplier. Id. Access to the PSNH "New Hampshire corridor" on reasonable terms will be critical to such negotiations.

D. The Application and Procedural History

HG&E adopts the ALJ's "PROCEDURAL HISTORY" (I.D. at 6). Docket No. EC90-10-000 involves review of the disposition of facilities owned by PSNH, under Section 203 of the Federal Power Act (the "Act" or "FPA"), 16 U.S.C. § 824b (1988), at the instance of Northeast Utilities Service Company, which is acting on behalf of its parent's plan of acquisition. As used herein, the "proposed merger" encompasses such disposition.

LIST OF EXCEPTIONS TAKEN

HG&E excepts to the following errors of the I.D.:

Failure to Disapprove the Proposed Merger

A. The conclusions that the proposed merger, as conditioned therein, would be consistent with the public interest and that the application should be conditionally granted.

Failure to Require Divestiture of NU-HWP Retail Sales or Provide Special "Grandfather" Relief As to Continued PSNH's Transmission of Power from New Brunswick, Accounting for 36% HG&E's Energy Supply, upon Contract Renewal

B. The conclusion that no "grandfather" relief need be provided for existing PSNH transmission customers of power from New Brunswick beyond the existing contract expiration date.

7/(...continued)
(1990), petition for rev. filed sub nom City of Holyoke Gas & Elec. Dept. v. FERC, No. 90-1565 (D.C. Cir. appeal filed Nov. 26, 1990).

C. The conclusion that HG&E seeks any condition that is not required to offset the anticompetitive effect of market power accruing to NU in consequence of the merger, in order to would better HG&E's position as compared to the status quo ante the merger.

D. The conclusion that divestiture of NU's retail sales in direct competition with HG&E is not necessary in this proceeding.

E. The conclusion that relief allegedly conferred by the I.D. on all the NU TDUs as a class would obviate the anticompetitive impacts of the merger in relation to NU's direct retail competition with HG&E.

Failure to Implement Relief for TDUs

F. The failure to implement for TDUs as a class the relief necessary to overcome the anticompetitive effects found by the I.D.

G. The reliance on on-going settlement negotiations between certain TDUs of NU and NU as a reason for failure to implement specific relief to their class.

Failure to Provide Adequate Transmission Access for All

H. The failure to provide an assured mechanism by which a merged NU/PSNH will render transmission services to all, consistent with the public interest.

I. The failure to specify an interim tariff or to require that the merger not be consummated until NU has submitted tariff filings pursuant to Sections 203 and 205 of the FPA acceptable to the Commission and placed into effect, subject to refund.

J. The failure to specify that NU's transmission tariff rates be subject to refund without refund floor (or, at the most, to a refund floor equivalent to the transmission rates that would have applied if the transmission were conducted subject to the NEPOOL Agreement).

K. The failure to provide an assured mechanism by which the Commission and all interested parties can readily determine how much NU retail native-load customers pay for NU's transmission services, of various categories of firmness.

Environmental and Other Errors

L. The failure to weigh, or even assess, the environmental impacts of the action of approving the merger (either as proposed or as further conditioned), including cumulative impacts concerning construction and operation of transmission and generation facilities.

M. The conclusion that Subsection 203(b) of the FPA is the only source of conditioning authority applicable to this case.

N. The other errors of commission and omission recited in the exceptions in the other briefs on exceptions in which HG&E joins.

POLICY CONSIDERATIONS WARRANTING COMMISSION REVIEW

NU, the largest utility in New England, proposes to become even larger and achieve new levels of strategic control with the acquisition of PSNH. The I.D. correctly concludes that the proposed merger, as proposed and modified by NU, would lead to concentration of control of critical transmission corridors and surplus generation capacity and likely lead to the exercise of market power by the merged company, to the detriment of the other utilities in New England -- and the public they serve. The I.D. also correctly concluded that TDUs of NU would be especially vulnerable to the exercise of such market power by the merged company as a result of the merger.

HG&E is particularly vulnerable to exercise of such market power because (a) it is a TDU with which NU competes directly at retail, for industrial loads within the City of Holyoke (including the largest, high load factor loads), in addition to the forms of competition with other TDUs (e.g., to acquire new power supplies; to

attract large retail customers to the service territory), and (b) HG&E depends on PSNH for transmission of HG&E's largest unit purchase, which accounts for 36 percent of HG&E's total energy supply.

However, the I.D. failed to discuss, much less acknowldge, HG&E's particular vulnerability and implemented no mitigation whatever for the TDUs as a class (even while finding that class to be more vulnerable than the rest of New England). Moreover, the I.D. inadequately mitigated the harms to New England generally.

This is an unusually complicated merger case, having little in common with merger proceedings recently considered by the Commission. Abbreviated deadlines set for this case make it imperative that the Commission review the I.D. on exceptions.

ARGUMENT

I. THE MERGER APPLICATION SHOULD BE DISAPPROVED

The anticompetitive impacts of the merger established in the record, found by the ALJ and amplified in the briefs on exceptions in which HG&E joins, are so great that the merger should be disapproved. As explained in the PRINCIPAL NEW ENGLAND INTERVENORS' BRIEF ON EXCEPTIONS, Part I.B., conditional approval is unnecessary to get a viable PSNH out of bankruptcy, contrary to the I.D.'s finding. The Commission has no duty to save this merger, and should so hold. As the Supreme Court has declared: "It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7 [of the Clayton Act]."[8/] NU has not met is burden of proving why the normal remedy of forbidding a merger that is against the public interest should not be imposed.

8/ United States v. E.I. duPont de Nemours & Co., 366 U.S. 316, 328, motion denied, 366 U.S. 956 (1961).

II. IF THE MERGER IS TO BE APPROVED, THE PUBLIC INTEREST REQUIRES AS A CONDITION THE DIVESTITURE OF NU's RETAIL BUSINESS WITHIN HG&E's SERVICE TERRITORY AND NEW HAMPSHIRE CORRIDOR RELIEF

HG&E prefers that the merger be disapproved and the status quo maintained. Ex. 376 at 2. In that event, NU would continue to compete with HG&E for large industrial loads in the City of Holyoke but would not gain market power. If, however, the Commission decides to approve the merger conditionally (and NU decides to go ahead with the merger), HG&E asks that this direct retail competition be taken out of the hands of the merged utility on which HG&E will be so dependent and shifted to a utility that would compete on equal terms with HG&E. In that event, the Commission should impose the following condition [Condition HG&E-3] which the ALJ erroneously rejected:

> NU shall either (a) divest its subsidiary Holyoke Water Power Company (HWP) as a whole or (b) dispose of all of the facilities and operations of HWP for the retail sale of electricity (in which case, NU may cause the remaining facilities of HWP to be acquired by its subsidiary Western Massachusetts Electric Company). Within 3 months of the Commission's order herein, NU Companies shall file with the Commission notice of the divestiture plan selected and shall apply for all requisite regulatory approvals. Thereafter, NU Companies shall diligently prosecute such applications.

This condition is necessary because the merger would greatly strengthen NU-HWP's hand against HG&E, as explained below.[9/]

Without discussing HG&E's reasons for that condition, the I.D. ruled against HG&E "[i]nsofar as" it "seeks to bolster its own competitive posture," and held that HG&E "is covered by the protection given the TDUs, and is entitled to no more in

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9/ HG&E has consistently advocated a condition of divesting NU of NU-HWP's electric retail business throughout the proceeding. See Ex. 376 at 2 and 7-9, Ex. 378 at 1, Ex. 379 at 1-4, Ex. 380 at 1-23. The condition recognizes that NU would have to gain approval of other agencies, notably the Securities & Exchange Commission ("SEC") under the Public Utility Holding Company Act of 1935, in order to implement the condition and provides for promptly initiating that process.

this regard." I.D. at 50. Unhappily, the latter point proved chimerical because the ALJ failed to implement any such protection for the TDUs as a class. I.D. at 50-51. As to the first point, HG&E does not seek to bolster its present, pre-merger competitive position; it preference is to preserve that posture rather than have the Commission try to devise mitigating conditions to offset the detriments.[10] In the hurry to get out an initial decision, the ALJ simply overlooked the devastating ways in which the merger would worsen HG&E's present competitive posture. See B., below.

The proposed merger would be so onerous to HG&E, and would impose so grossly unfair an advantage for its competitor at retail, NU-HWP, as to be inconsistent with the public interest. This competition, for large industrial loads, including high load factor, high margin customers, is sensitive to the supplier's costs. After the merger NU would be in a position to exploit market power to increase HG&E's costs (and protect NU's own retail and competitive interests in Holyoke)[11] -- for example, by terms it offers or delays it imposes in rendering New Hampshire Corridor transmission service. The Commission can promote the public interest by eliminating NU's incentive to engage in improper self-dealing. NU should be required to give up its NU-HWP stronghold.

HG&E also asks that the merged company be required to continue to provide, out of its entitlement, transmission by PSNH on a "grandfathered" basis of the New Brunswick unit power, which accounts for 36 percent of HG&E's energy supply, even after the current contract expires in 1994 (as HG&E negotiates power renewals).

10/ Even if such conditions could be designed, implementation would inevitably and most imperfectly depend on good faith of the merged company, ultimately subject to cumbersome and uncertain administrative or judicial proceedings.

11/ Cf. FPC v. Conway Corp., 426 U.S. 271 (1976), as to like concerns even when there is no direct, head-to-head retail competition -- as there is in Holyoke.

A. Legal Standards

The Clayton Act anticompetitive standard applicable to federal reviews of mergers[12] is not whether NU's proposed acquisition will lessen competition. Rather, the relevant standard is whether the effect of the merger "may be substantially to lessen competition, or to tend to create a monopoly."[13] The proposed combination would enable NU to increase HG&E's costs of doing business, would diminish HG&E's competitive effectiveness and would strengthen NU-HWP's opportunities to earn unregulated profits. The result "may be substantially to lessen competition."

NU's propensity to increase market dominence is not speculative. The record demonstrates a past attempt by NU's subsidiary in Holyoke to take over HG&E[14] and a current interest in taking over any and every utility in the region. Ex. 376, p. 8, lines 13-14; see Principal New England Intervenors' Brief on Exceptions, Part II. The FERC should not stand by and watch as the merger further strengthens NU's dominant hand.[15]

Those anticompetitive effects should be neutralized by a suitable antitrust remedy. Divestiture is the classical antitrust remedy.[16] Separating NU-HWP's retail business from the merged company will eliminate NU's incentive to extend market power to this retail market. See United States v. Griffith, 334 U.S. 100 (1948).

12/ Gulf States Utils. Co. v. FPC, 411 U.S. 747, 758-60 (1973), reh'g denied, 412 U.S. 944; Kansas Power & Light Co. v. FPC, 554 F.2d 1178, 1184 (D.C. Cir. 1977).

13/ Section 7 of the Clayton Act, 15 U.S.C. § 18 (emphasis added). See United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

14/ That take over attempt occurred shortly before NU-HWP joined the then-new NU holding company system, with NU absorbing NU-HWP's managers.

15/ See Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

16/ United States v. E. I. Du Pont de Nemours & Co., supra; California v. American Stores Co., ___ U.S. ___ , 110 S. Ct. 1853, 1859-1861 (1990).

B. Changes to HG&E-NU Competition Resulting from the Merger

Continuation of retail competition within the City of Holyoke by a different utility that lacks market power would appropriately prevent the harm that HG&E foresees. Leaving HG&E exposed to retail competition by the swollen and strengthened NU would impose a great detriment on HG&E's customers.

Combining NU and PSNH will cut HG&E's competitive options significantly. The impact will be severe because HG&E depends on purchased power for 95% of its total supply (Ex. 371 at 7) and relies heavily on PSNH transmission of deliveries from non-NEPOOL units in New Brunswick and Maine. The severe impact on HG&E will be compounded by NU's ownership of NU-HWP, a utility unregulated as to retail rates (Ex. 376 at 7; Ex. 379), which competes directly with HG&E at the electric retail load level within the City of Holyoke.17/

The New Hampshire Corridor Plan ("NHCP") confers very limited "grandfather" rights with respect to transmission of 36 percent of HG&E's total energy supply. Once the PSNH contract for such transmission expires, even if New Brunswick Hydro-Electric Commission ("NBHC") were willing to extend the sale on attractive terms beyond 1994, the merged NU/PSNH could exercise market power to HG&E's detriment. The ALJ's rigid limits (e.g., the arbitrary 10-year increments, I.D. at 41-42, and the constrained size, I.D. at 38-39) are liable to deny HG&E direct benefits (for example, if NBHC is amenable to a 4-year extension, but not to a renewal lasting for the 10years of the NHCP). As a result, HG&E may have to

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17/ That unique head-on-head electric sales competition for loads within the City of Holyoke is additional to three other forms of competition by HG&E: yardstick competition in electricity retail sales with other NU subsidiaries limited to retail service territories outside Holyoke; natural gas sold as fuel for cogeneration and self-generation by NU-HWP retail electricity customers; and gas sales to non-utility generators ("NUGs") who may compete with NU's marketing of surplus power at the wholesale level. See, e.g., Ex. 383 at 2; Ex. 380, Item 1, memorandum dated June 18, 1987, to Cagnetta et al.

depend on the merged company's implementation of purchases from NU/PSNH of part of their entitlement, or of waiting for problematical expansions. NU's retail-competition interest in squeezing HG&E will be added to the merged company's stake in selling excess generating capacity at above-market rates as incentives to oppress HG&E, neither of which could have motivated PSNH absent the merger, or, in fact, in past negotiations.

Yen for monopoly rents and fear of yardstick competition may spur NU to injure any nearby electric utility's competitive position. However, HG&E's head-to-head competition with NU-HWP gives NU even stronger incentives to act against HG&E. Ex. 376 at 7.

HG&E's Manager, George E. Leary, testified to ways the merger would make matters worse. Ex. 376 at 8-9. HG&E's ability to provide economical electricity supplies to its customers depends on competition among suppliers of electricity and of transmission service. Ex. 383 at 2. HG&E buys over 95% of the electricity it delivers from other utilities and expects to continue to purchase power. Ex. 381 at 1-3; Ex. 383 at 2. Today, it can and does buy from either NU or PSNH, and it plans to continue doing so in the future. Ex. 383 at 1; Ex. 376 at 5, lines 20-23. As power supply contracts expire, HG&E must extend or replace them, whether or not it experiences load growth.

NU and PSNH, the two largest suppliers of surplus power in New England, dominate power supply and are expected to continue to do so for years to come. Their merger will thus restrict HG&E's competitive options for bulk power purchases.[18/] Indeed, witness Reynolds, who served in the Justice Department's

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18/ Ex. 372 at 22, lines 3-13 (Wilson direct); Ex. 520 at 6, lines 13-22 (Reynolds direct); Ex. 265 at 33, line 24 - p. 34, line 10 (Kamerschen direct). Ex. 261 at 23, line 25 - 24, line 7 (Bigelow); Ex. 381 at 7, lines 22-24 (Allen).

Antitrust Division, suggested that divestiture of surplus generating capacity (as by an auction, without reserve) might be necessary to remedy anticompetitive effects of the merger. Ex. 520 (Tirpak) lines 11-12.

NU's refusal to continue supplying peaking capacity unless HG&E also buys bundled base load service (via "Slice-of-System" sales) illustrates the way in which a strengthened NU may be expected to take advantage of weaker entities such as HG&E. Ex. 376 at 4-5. FERC experience in natural gas regulation illustrates the anticompetitive effects of bundling a variety of utility services (such as sales, storage, and transportation), as does other regulatory experience.19/ NU's recent bundling of services previously offered unbundled (i.e., unit-by-unit) by NU (and other New England utilities) exemplifies a regressive development which NU is likely to extend to PSNH as well, if the merger is approved. See Ex. 376 at 5, lines 19-23.

HG&E now depends on transmission by NU and, in many instances, other utilities, notably PSNH. However, the prices it pays and other terms for transmission service in a competitive market may be more favorable to the purchaser than terms the Commission would permit a provider to impose. That has been the experience in the past. So long as PSNH remains an independent firm, HG&E may be able to negotiate favorable transmission service in the future (as MMWEC has done for PSNH transmission of the Point Lepreau power, Ex. 269 at 24; Tr. 5157 - 5158,

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19/ See, e.g., Columbia Gulf Transmission Co., 39 FERC ¶ 61,335 at 62,042-43 (1987); United Gas Pipe Line Company, 39 FERC ¶ 61,152 at 61,579 (1987); Transcontinental Gas Pipeline Corporation, 38 FERC ¶ 61,165 at 61,510-[illegible] (1987); Texas Eastern Transmission Corporation, 37 FERC ¶ 61,260 at 61,714 (1986); Customer Use of Telex Service, 76 F.C.C.2d 61 (1980) (international record carriers' unitary service rate structure); Second Computer Inquiry, 77 F.C.C. 2d 384, as modified on reconsid., 84 F.C.C.2d 50 (1980), further modified on reconsid., 88 F.C.C. 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

comprising 36% of HG&E's energy supply. Ex. 381 at 2, lines 19-20.). NU control of PSNH transmission would reduce HG&E's competitive opportunities to do so.

HG&E also competes with NU and PSNH from time to time to purchase electricity. The merger will make an expanded NU a much more formidable competitor for purchased power generated in areas dependent on PSNH transmission (such as Maine and New Brunswick). In this regard, HG&E has an interest in NUG development, particularly in Holyoke or nearby in western Massachusetts, as a source of power supply. In order that nearby NUGs may be built at optimal scale, however, they will need access to other markets, especially in Eastern REMVEC, since Holyoke and other small western Massachusetts utilities can offer only a limited incremental demand for any one project.

In all these respects, HG&E seeks a level playing field in which to compete with NU as a whole and NU-HWP in particular. NU's increased economic concentration and leverage will tilt the field in its favor unfairly and illegally. Furthermore, the merger will augment NU's already-awesome economic/political power, to the detriment of local control and local interests such as HG&E's, and will threaten values that antitrust principles have been held to protect. Brown Shoe Co. v. United States, 370 U.S. 294, 315-16 (1962).

HG&E (which is a purchaser in several relevant markets) is also concerned that the merger will allow NU and NU-HWP to extend NU's post-merger market power as a supplier in those markets to exploit HG&E's vulnerability in the retail industrial market within the City of Holyoke.[20/] HG&E is vulnerable because it is unintegrated and small whereas NU is vertically-integrated and very large.

20/ See United States v. Griffith, 334 U.S. 100 (1948).

C. New Hampshire Corridor Plan ("NHCP") Relief

HG&E's unique reliance on PSNH for New Hampshire Corridor transmission for 36 percent of its energy supply demands special relief. The ALJ shrugged off expiring "grandfather" rights to transmission of power from the Pt. LePreau units in New Brunswick, Canada. I.D. at 38-39. In the case of HG&E, however, special relief is warranted. This highly reliable, low-cost source is a mainstay of HG&E's supply which is vital to HG&E's operating efficiently in competition with NU.

Such relief would require to PSNH to transmit, on a "grandfather"-type basis, any extensions beyond 1994 of HG&E purchases from the New Brunswick Hydro-Electric Commission ("NBHC"). These HG&E rights should not be subject to arbitrary limitations, such as the 10-year increments provision (I.D. at 41), but rather should allow HG&E to obtain the transmission service it needs from PSNH to match extensions offered by NBHC. After all, NBHC may offer extensions for different periods. HG&E's rights would come out of NU/PSNH's share of the Corridor, and could be wholly apart from allocations to utilities throughout New England.21/

Absent the merger, HG&E would be negotiating to extend transmission arrangements with PSNH in step with power-supply negotiations with New Brunswick. And PSNH would have no incentive to collude with NU in conducting those negotiations. Indeed, as explained above, past negotiations with PSNH have resulted in a very beneficial transmission agreement now in effect. The merger would alter PSNH's incentives to HG&E's detriment, necessitating the relief in question.

III. IF THE MERGER IS TO BE APPROVED, THE PUBLIC INTEREST REQUIRES AS A CONDITION THE IMPOSITION OF CONDITIONS IMPLEMENTING PROTECTIONS OF TDUs OF NU

HG&E's arguments are set forth in other briefs in which it joins.

21/ There is no need to implicate NEPCO in this special relief.

IV. THE INITIAL DECISION FAILS TO PROVIDE ADEQUATE TRANSMISSION ACCESS FOR ALL AND RELATED PROTECTIONS AS TO TRANSMISSION TARIFF RATES

The I.D. erred by inadequately providing for an assured tariff mechanism by which a merged NU/PSNH will render transmission services to all, consistent with the public interest. Although the I.D. requires NU to file a transmission tariff, it fails to go further to provide either of the following remedies which are necessary to make tariff relief meaningful and timely:

(1) It fails to specify provisions of an interim tariff; and

(2) it fails to require that the merger not be consummated until NU has submitted tariff filings pursuant to Sections 203 and 205 of the FPA acceptable to the Commission and placed such tariff into effect, subject to refund. The foregoing issues are argued in other briefs in which HG&E joins.

A. Inadequacy of Transmission Rate Level Protection

In addition to the foregoing, the I.D. fails to provide adequate protection as to NU's transmission tariff rate levels. These rates should be subject to refund "without refund floor," as the Commission prescribed in Utah Power & Light Co., 45 FERC ¶ 61,095 at 61,303 (1988), 47 FERC ¶ 61,209 (1989), petition for rev. filed sub nom Environmental Action et al. v. FERC, No. 89-1333 et al. (D.C. Cir., argued October 16, 1990).22/

The need for, and sophistication about, adequate NU transmission rate conditions has grown acute during the course of this case. The merger tariff, as

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22/ If the Commission concludes there are grounds here to reject its Utah Power & Light precedent, supra, it should, at the most, establish a refund floor equivalent to the transmission rates that would have applied if the transmission were conducted subject to Section 13 of the NEPOOL Agreement (Ex. 603). Ex. 368 (Russell) at 9, Ex. 477 (Moskovitz) at 29, 15-18, and Ex. 479 (C.Lee) at 21-22 recommend the PTF EHV rate of § 13.4 alone. The present, alternative recommendation, would allow as a refund floor the rates arising under § 13.4 plus §§ 13.3, 13.5 and 13.6, which could be higher.

supported by some of the intervenors and Staff, initially provided a rate of $22.89 per kW-year for firm service and over $11 for non-firm service. It is now clear that firmness of service by NU is not a black-or-white matter. The record establishes, for example, that NEPCO's "non-firm" tariff provides a firmer service than NU offers as "firm" or "preferred" service.[23] There are several gradations of firmness. The Trial Staff has recently presented testimony recommending that proposed NU "cost-based" rates of $26 and $24 per kW-year be reduced, respectively, to $15 and $11 as the appropriate, cost-based rates for those supposedly "firm" NU transmission services.[24] These disparities presage the extent of the disputes to be anticipated as to the correct rate levels under transmission tariffs.

In this proceeding, NU and an intervenor, CMEEC, recently filed (on November 29, 1990) a renegotiated contract (see I.D. at 50) with a cost-based rate; that contract represents at least as firm a service as NU provides to any unaffiliated customer, and is priced at $14.79 per kW-year. The unit costs computed by NU and Staff witnesses in this case were much higher.

The issues as to appropriate transmission tariff rates were not definitively explored on this record. Moreover, New England presents the kind of "tight" power pool that may require a distinct approach to transmission rate making. See Chief Judge Wald's opinion in Fort Pierce Utils. Authority of the City of Fort Pierce v. FERC, 730 F.2d 778, 784 (D.C. Cir. 1984).

23/ NEPCO witness Bigelow indicated that NEPCO provides a higher quality (i.e., firmer) "firm" service than NU's "firm" or "preferred" service (Tr. 4661-62) even though NU charges roughly three times NEPCO's price. Comparing Ex. 123-RR at 2, NOTE 2 ["Preferred Service"] rates ($24.27 per kW-year) with Tr. 4596 ($8-9; Bigelow cross).

24/ See prepared direct testimony of Donald J. Zero filed November 1, 1990, in Northeast Utils. Serv. Co., Docket Nos. ER90-390-000 et al. at 19, 20.

Yet the anticompetitive impacts of this proposed merger cannot be mitigated adequately unless appropriate transmission tariff service is made available, on known and reasonable terms, before consummation of the merger. Ex. 381 at 6; Ex. 477 at 27-29. As HG&E witness Roger Allen testified: "Transmission access can be denied or constrained by excessive transmission rates. .... Efficient planning should be based on reasonable and predictable transmission rates." Ex. 381 at 8. And as NU witness Kalt admitted (Tr. 2148; Ex. 55-F), post-merger transmission rates that are too high will discourage or block efficient transmission, having an anticompetitive effect directly comparable to denial of transmission service.[25]

If the merger is conditionally approved, a subsequent rate proceeding will be necessary to test and implement NU's transmission tariff. Such a proceeding should be conducted promptly, but carefully and thoroughly, with no pre-conceptions as to appropriate rate methods or levels, and with no refund floor.

B. Inadequate Disclosure of Transmission Rates Borne by NU Native Load

One of the most troublesome issues is avoidance of discrimination against NU's FERC protected transmission service customers. Much has been said in this record in the abstract about how much NU's native load customers pay for

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25/ Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 592, 594 (1985) (denial of access found despite defendant's offer to grant access if plaintiff would accept 12.5% split of multi-mountain lift ticket revenues); Consol. Gas Co. of Florida v. City Gas Co., 880 F.2d 297, 299 (11th Cir. 1989), aff'g 665 F. Supp. 1493, 1512 (S.D. Fla. 1987) (refusing to transport gas except at prices in excess of cost amounted to a refusal to deal); Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1301, 1308-09 (5th Cir. 1971), reh'g denied, 1971 Trade Cases ¶ 73,597, cert. denied, 404 U.S. 1047 (1972) (pipeline's refusal to transport natural gas unless an overriding royalty was paid held equivalent to be an absolute refusal); City of Chanute v. Kansas Gas & Elec. Company, 564 F. Supp. 1416, 1419, 1423-34 (D. Kan. 1983), aff'd on this issue, 754 F.2d 310 (10th Cir. 1985) (refusal to wheel unless customer agreed to new contract that provided increased rates treated as a refusal to wheel); Delaware & Hudson Ry. v. Consolidated Rail, 902 F.2d 174, 179-180 (2d Cir. 1990) (applying the essential facilities doctrine, the court held that "there need not be an outright refusal to deal in order to find that denial of an essential facility occurred. It is sufficient if the offer to deal are unreasonable.").

transmission service (see I.D. at 29); however, nothing has actually been demonstrated about the real payments by such retail customers and the bases for their calculation.

A practical disclosure mechanism is essential. Divestiture of the NU transmission facilities in a separate NU operating company (or companies) would assure total "transparency" of the transmission service rates that NU really charges its native load customers. That is because the local distribution utilities would enter into contracts, to be filed as FERC rate schedules, for those services. The I.D. rejected that solution (at 49-50). It failed to discuss, however, HG&E's fall-back position: At the very least, the Commission should prescribe a reporting requirement by which NU would demonstrate exactly how its native load customers are charged for the transmission components (presumably bundled) of the various firm and non-firm retail services offered to them. Then Staff and all interest parties could be appropriately guided in FERC transmission rate cases. This is vital information which the largest utility in New England should be required to provide annually in easily comprehensible and readily available form.

This merger poses a problem of market power. Transmission access, at appropriate pro-competitive, nondiscriminatory rates is one of the essential ingredients to solve that problem. Accordingly, the Commission should not hesitate to impose conditions on NU (if it chooses to merge) that do not apply to other public utilities.

V. THE INITIAL DECISION FAILS TO ASSESS ENVIRONMENTAL IMPACTS

Availability (or unavailability) of transmission will have environmental impacts and costs. NU rebuttal witnesses Sawhill and Kalt called attention to impacts of the decision to be made herein on siting of transmission and location of

generation facilities.[26] And, at oral argument, counsel for NU called attention to environmental costs related to construction of transmission facilities; he qualified a commitment that NU be bound by cost estimates for transmission facility enhancements if state agencies later imposed costly environmental conditions (between the time of the estimate and the time of construction).[27]

The evidentiary record and the I.D. reveal that the issues presented by the application and being decided in this case, including transmission access, NU's commitment to construct transmission facilities, pricing principles for transmission enhancement and sales of excess generation by the merged company, may profoundly affect the location of new generation facilities and the construction of high-voltage transmission facilities in a large region. See, e.g., I.D. at 28, 30-35, 37, 40, 43. Construction of such facilities, and their location, are bound to have significant cumulative environmental impacts.

Yet the I.D. fails to weigh, or even assess, the environmental impacts of this major recommended action approving the merger (either as proposed or as further conditioned). On a case-by-case basis, the Commission may, and does, conduct appropriate environmental reviews in connection with major merger proposals; such reviews may follow the ALJ's decision. Cf. Southern California Edison Co., 49 FERC ¶ 61,091 at 61,361-63 (1989). Approval of the application in this proceeding calls for such a review, because approval of this merger will redraw the future transmission

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26/ Ex. 225 at 16-20, including 17 (lines 21-22), 19 (lines 22-23); Ex. 91 at 173-74, 177.

27/ I.D. at 33; Tr. 7264, 7306-7307, 7308, 7313-7316.

and generation maps of New England.28/ Now is the opportunity to select an environmentally-sensitive and efficient program, with adequate mitigation.

VI. THE INITIAL DECISION TAKES TOO NARROW A VIEW OF THE COMMISSION'S CONDITIONING POWERS

The ALJ identified Subsection 203(b) of the FPA as the only source of conditioning authority applicable to this case. I.D. at 24. That provision is limited to such terms and conditions as the Commission "finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission." However, in addition to Subsection 203(b), the Commission has held that it may save a merger that is not consistent with the public interest by imposing whatever conditions are needed to satisfy the test of Section 203(a) -- even if not based on adequacy of service or coordination. Utah Power & Light Co., 45 FERC ¶ 61,095 at 61,280-83 (1988), 47 FERC ¶ 61,209 (1989), petition for rev. filed sub nom Environmental Action et al. v. FERC, No. 89-1333 et al. (D.C. Cir., argued October 16, 1990). The I.D.'s rejection of intervenor conditions rested on too crabbed an understanding of the Commission's conditioning power.

28/ Indeed, Commission regulations provide for formal reviews in just such unusual instances. 18 C.F.R. § 380.4(b)(1). At the time that NU filed its application, it was probably not readily apparent to the Commission how significantly approval (conditional or unconditional) of the proposal might impact the environment. The development of the record now makes that clear. In the circumstances, the Commission should address these impacts. Cf. Utah Power & Light Co., 47 FERC ¶ 61,209 at 61,734-36 (1989), petition for rev. filed sub nom Environmental Action et al. v. FERC, No. 89-1333 et al. (D.C. Cir., argued October 16, 1990). The Utah opinion does not address the question of timeliness; in contrast, the separate opinion of Trabandt, Commissioner, distinguised between the timeliness of environmental issues raised as to the merger application itself and the issues arising as a result of additional conditions developed during the proceeding. Id. at 61,770-771. Here, both sets of impacts are properly before the Commission in the unusual circumstances of this case. Moreover, here, in contrast to Utah, NU's own commitments, as well as their expansion by the I.D., "require construction." Id. at 61,735.

CONCLUSION

For the foregoing reasons, these exceptions should be granted and the proposed merger should be disapproved or, if the Commission decides to approve the merger, the conditions set forth herein and those incorporated in other briefs on exception in which HG&E joins should be imposed.

Respectfully submitted,

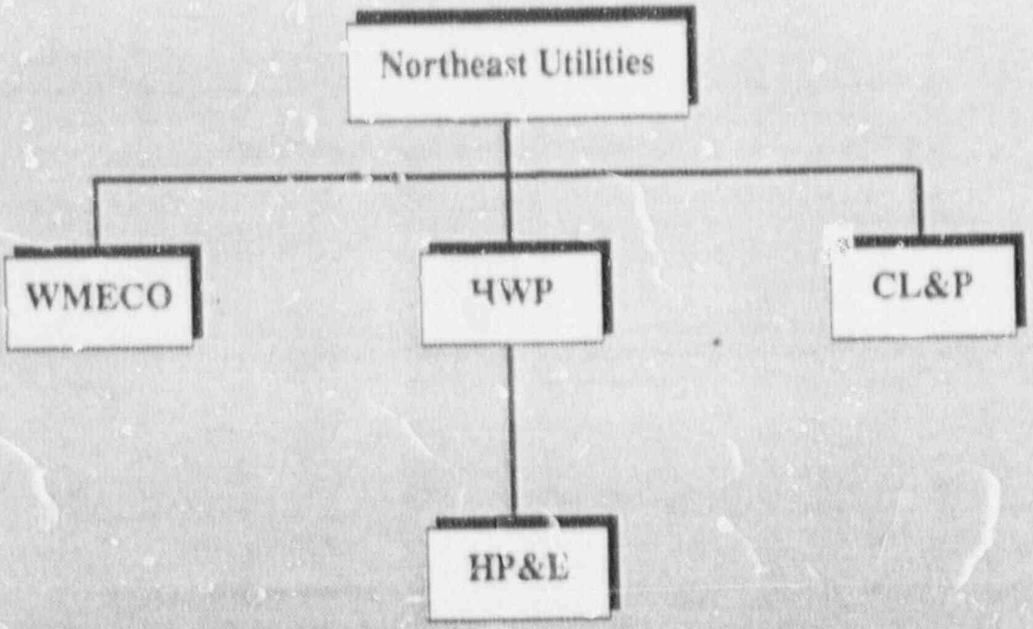
DAVID J. BARDIN
EUGENE J. MEIGHER
STEVEN R. MILES
NOREEN M. LAVAN
Arent, Fox, Kintner, Plotkin & Kahn
Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6089

Attorneys for the City of Holyoke
Gas & Electric Department

Dated: January 9, 1991

NORTHEAST UTILITIES CORPORATE STRUCTURE

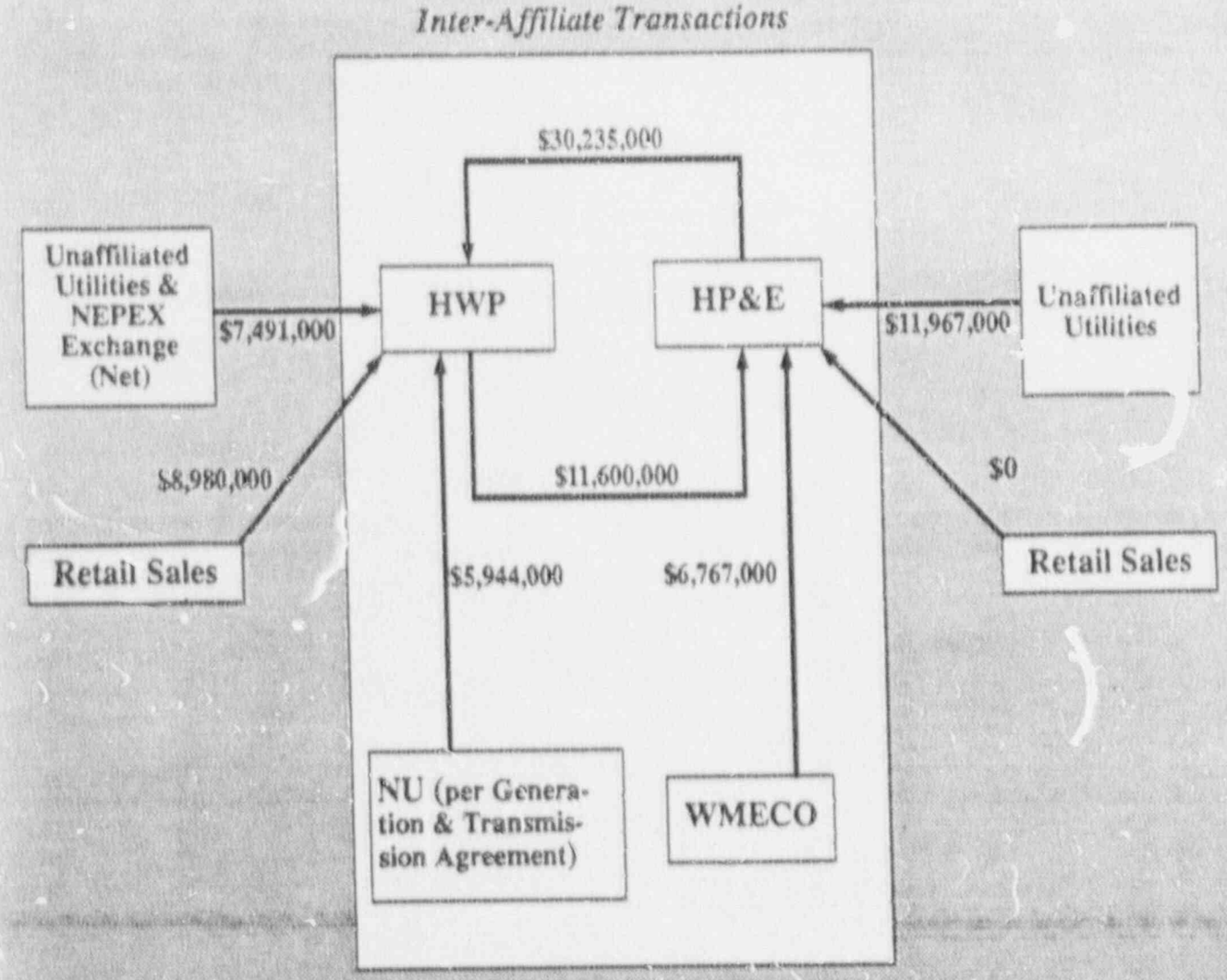
NU Holding Company and Four Operating Companies



WMECO - Western Massachusetts Electric Company
HWP - Holyoke Water Power Company
HP&E - Holyoke Power & Electric Company
CL&P - Connecticut Light & Power Company

HWP/HP&E INTER-AFFILIATE TRANSACTIONS (1989)

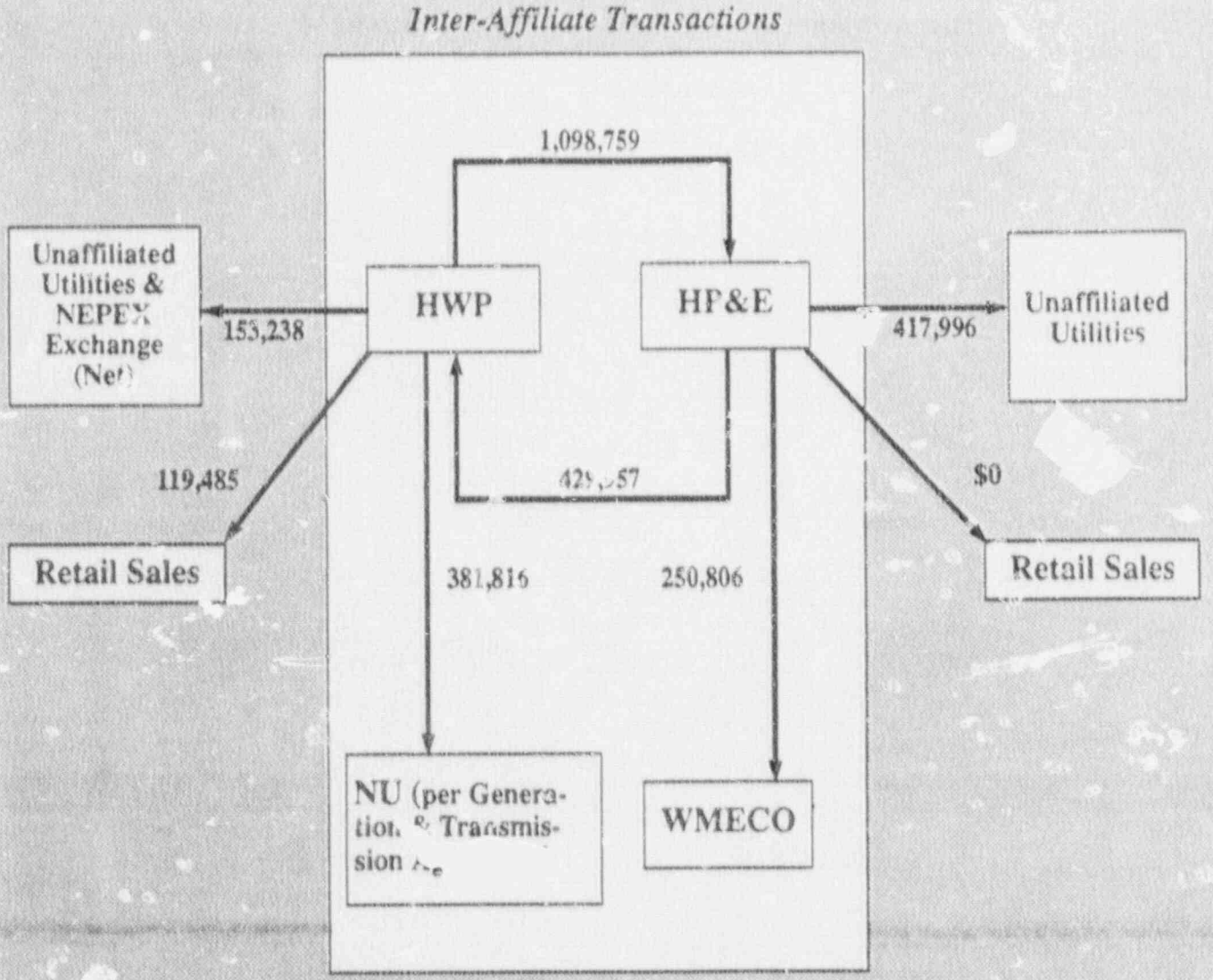
ELECTRIC PURCHASES, SALES AND INTERCHANGES ($)



Source: Holyoke Water Power Co., Form 1 (1989), pp. 310-311, 326-329;
Holyoke Power & Electric Co., Form 1 (1989), pp. 310-311, 326-329.

HWP/HP&E INTER-AFFILIATE TRANSACTIONS (1989)

ELECTRIC PURCHASES, SALES AND INTERCHANGES (MWH)



Source: Holyoke Water Power Co., Form 1 (1989), pp. 310-311, 326-329;
Holyoke Power & Electric Co., Form 1 (1989), pp. 310-311, 326-329.

FERC FORM 1 DATA RELIED ON FOR CHARTS B AND C

HWP 1989 FERC FORM 1

	$	MWH	FORM 1 SOURCE [PAGE;LINE]
Sales to:			
HP&E Sale	796,508	3,961	310-311; 4
HP&E Interchange	29,438,051	1,094,798	328-329; 6
TOTAL HP&E	30,234,559	1,098,759	
NU Interchange	5,943,952	381,816	328-329; 4
Unaffiliated Utilities:			
City of Chicopee	7,505,945	153,545	310-311; 10
NEPEX Exchange (Net)	(14,964)	(307)	328-329; 12
TOTAL	7,490,981	153,238	
Retail Customers	8,979,830	119,485	300-301; 11
Purchases from:			
HP&E	11,599,9[illegible]	429,9[illegible]	326-327; 3

HP&E 1989 FERC FORM 1

	$	MWH	FORM 1 SOURCE [PAGE;LINE]
Sales to:			
HWP Interchange	11,599,958	429,957	328-329; 2
WMECO Interchange	6,766,642	250,806	328-329; 5
Unaffiliated Utilities			
Town of South Hadley	796,508	3,961	310-311; 3
NEPCO Interchange	11,170,346	414,035	328-329; 12
TOTAL	11,966,854	417,996	
Retail Customers	-0-	-0-	300-301; 11
Purchases from:			
HWP	796,508	3,961	326-327; 3
HWP	29,438,051	1,094,798	326-327; 5
TOTAL HWP	30,234,559	1,098,759	326-327; 11

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing **BRIEF OF THE CITY OF HOLYOKE GAS & ELECTRIC DEPARTMENT ON EXCEPTIONS** upon all persons on the Restricted Service List in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Washington, D.C., this 9th day of January 1991.

David J. Bardin
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D. C. 20036-5339

Counsel to City of Holyoke Gas & Electric Department