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Arent Fox Kintner Plotkin & Kahn

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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 response 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.

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

1050 Connecticut Avenue, NW
Washington, DC 20036-5339

Telephone: 202/857-6000
Cable: ARFOX
Telex: WU 89/2672
ITT 440266
Facsimile: 202/857-6395

7475 Wisconsin Avenue
Bethesda, Maryland 20814-3413

8000 Towers Crescent Drive
Vienna, Virginia 22182-2733

Add: Gody, A. 1 LTR 1 ENCL

2999

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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.
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> ....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&F 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.
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> ....
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> 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.
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> 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 t HG&E. This relationship creates an inherent incentive and opportuni 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.
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> ....
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> 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 26-27) 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
Thomas T. Martin, NRC Regional Administrator, Region I
George L. Iverson, Director, Office of Emergency Management
Noel Dudley, NRC Senior Resident Inspector
Ted C. Feigenbaum, President and Chief Executive Officer, New Hampshire Yankee Division of PSNH
John A. Ritscher, Esq.
NRC Document Control Desk