Arent Fox Kintner Plotkin & Kahn

David J. Bardin
202/857-6089

March 20, 1992

VIA HAND DELIVERY

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

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

Dear Mr. Murley:

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

1050 Connecticut Avenue, NW
Washington, DC 20036-5339

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

8000 Towers Crescent Drive
Vienna, Virginia 22182-2733

7475 Wisconsin Avenue
Bethesda, Maryland 20814-3413

45 Rockefeller Plaza
New York, New York 10111

Arent/Fox Europe
Budapest, Hungary

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

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

(continued...)

Rec'd 3/23/92

Z999 1/0

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

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

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

The Staff Recommendation acknowledges the arguments raised by HG&E and the Massachusetts Municipal Wholesale Electric Company ("MMWEC")[3] that the standard of review for mergers under the Atomic Energy Act is different and broader than the FERC and SEC readings of their own statutory

---

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

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

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

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

---

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

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

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

Notice at 3. Given that the FERC only invoked conditions sufficient to satisfy its narrower antitrust standard (as the FERC conceives it), it does not follow that such conditions are sufficient to satisfy the Commission's broader and more definitive antitrust responsibility.[7] Although the Notice claims that "the Staff considered the structure of the electric utility industry in New England and adjacent areas," there is little, if any, analysis of the industry's pre- or post-merger structure in the Staff Recommendation. Notice at 4. Moreover, neither the Notice nor the Staff Recommendation includes any analysis of the adequacy of FERC-imposed conditions to resolve anticompetitive impacts under the Atomic Energy Act.[8]

---

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

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

The Clayton Act and Department of Justice Merger Guidelines

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

Although the Commission's antitrust inquiry must be "broader" than that conducted by other agencies, the "traditional antitrust enforcement scheme," which is based upon Clayton Act principles, is a necessary starting point for the Commission's review into acquisitions involving nuclear units.[2] The failure to analyze the proposed acquisition in light of those principles, which the Merger Guidelines explain, is inconsistent with the Commission's statutory responsibility. By deferring any antitrust analysis of the merger to the FERC, the Notice merely compounds the problem since the FERC's analysis also refused to follow the Merger Guidelines. Opinion 364 at 18. Indeed, the FERC erroneously views the Merger Guidelines as "hostile" to mergers, and assumes that the Merger Guidelines treat mergers as "presumptively harmful." See Opinion 364-A at 5.

---

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

To add yet another layer of insulation, NU bestowed favors using its control over the New England transmission market to obtain consent from two other utilities (constituting, together with NU, a majority of the Seabrook ownership shares) for an exculpatory clause that seeks to free NU from any liability connected to its acquisition of Seabrook, other than liability for willful misconduct.[11] The exculpatory clause purportedly would free NAESCO and its affiliates not only from harm caused by their own negligence, but also from responsibility for third party claims against MMWEC, or MMWEC members, such as HG&E, contracting for a share of Seabrook, for any harm related to Seabrook. Thus, NU is attempting to place operating responsibility for Seabrook in an asset-less corporation through an

---

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

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

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

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

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

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

Commission Authority to Condition License Transfer

The Staff Recommendation concludes at pages 39-40 that:

> Furthermore, there is no basis for the staff unilaterally to impose conditions on the transfer of the license providing for a life of service transmission contract.

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

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

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

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

Request for Clarification Regarding Conditions Imposed by Commission

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

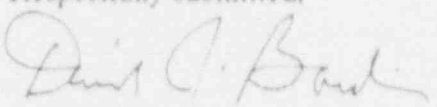
If the Commission has adopted HG&E's proposed condition, then HG&E expects that the condition will apply to any additional conditions that may be imposed on NU or PSNH in the future by either the FERC or the SEC as a result of agency reconsideration, remand from judicial review, or otherwise. HG&E requests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

Conclusion

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

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

Respectfully submitted,



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

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

Attorneys for the City of Holyoke
Gas & Electric Department

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

Arent Fox Kintner Plotkin & Kahn

June 13, 1991

David J. Bardin
202/857-6089

VIA HAND DELIVERY

Anthony T. Gody, Chief
Policy Development and Technical Support Branch
Office of Nuclear Reactor Reguiation
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 892672
ITT 440266
Facsimile: 202/857-6395

7475 Wisconsin Avenue
Bethesda, Maryland 20814-3413

8000 Towers Crescent Drive
Vienna, Virginia 22182-2733

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

---

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

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

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

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

---

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

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

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

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

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

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

(continued...)

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

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

---

5/(...continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

---

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