FINAL BRIEF

SCHEDULED FOR ORAL ARGUMENT
ON NOVEMBER 14, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1001
(includes consolidated Nos. 91-1091,
91-1092, 91-1132, and 91-1220)

CITY OF HOLYOKE GAS & ELECTRIC DEPARTMENT, et al.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of Orders of the
Securities and Exchange Commission

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

The undersigned, counsel of record for the Securities and Exchange Commission, certifies as follows:

(A) Parties and Amici

All parties, intervenors and *amici* appearing before the Securities and Exchange Commission and in this Court are listed in the Joint Brief of Petitioners.

(B) Rulings Under Review

References to the two Orders of the Securities and Exchange Commission under review appear in the Joint Brief of Petitioners.

(C) Related Cases

This case has not previously been before this Court of any other court. There are no related cases currently pending before this Court or any other court of which counsel is aware.

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

COUNTERSTATEMENT OF THE ISSUES

1. Whether the Securities and Exchange Commission, having found that a proposed public utility acquisition would have anticompetitive impacts with respect to control of transmission access and bulk power supply, properly determined to condition its approval on the issuance of an order approving the acquisition by the Federal Energy Regulatory Commission, which has regulatory authority over those matters.

2. Whether the Commission's determinations that the proposed acquisition satisfied certain requirements of the Public Utility Holding Company Act, which included a finding that a utility's emergence from bankruptcy would be in the public interest, should be sustained.

3. Whether the Commission adequately supported and explained its findings of savings attributable to the proposed acquisition.

4. Whether the Commission properly declined to address in this proceeding a complaint that the existence of multiple operating subsidiaries in one state rendered a public utility holding company's structure unduly complicated, when the proposed acquisition would not affect or be affected by the existing holding company structure.

5. Whether the Commission's determination that the securities to be issued in connection with the proposed acquisition were reasonably adapted to earning power, which was based on financial data and projections in the record and guaranteed annual rate increases, was sound.

6. Whether the Commission properly exercised its discretion in determining not to hold an evidentiary hearing when the parties had not raised any issues pertinent to the proposed acquisition that needed to be resolved at a hearing.

STATUTES AND REGULATIONS

Copies of the applicable statutory provisions are set forth in an Addendum to this brief.

PRELIMINARY STATEMENT

The petitioners challenge two orders issued by the Securities and Exchange Commission ("Commission" or "SEC") pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. 79a et seq. ("PUHCA"), in connection with the acquisition of Public Service Company of New Hampshire ("PSNH") by Northeast Utilities ("NU"). In the first order, dated December 21, 1990, the Commission approved the acquisition. In the second order, dated March 15, 1991, the Commission granted petitions for reconsideration by two of the petitioners and modified its first order to take further into account potential anticompetitive effects by conditioning approval upon the entry of an order by the Federal Energy Regulatory Commission ("FERC") approving the acquisition.

The FERC also considered NU's acquisition of the utility assets of PSNH in a related proceeding under the Federal Power Act ("FPA"). On August 8, 1991, the FERC entered an order approving the acquisition subject to specific conditions that are intended to mitigate anticompetitive problems attributable to control by the combined NU/PSNH system over transmission access into and out of New England and available bulk power supplies in the region.

Most of the petitioners are competing utility companies who must make purchases in the bulk power market and rely on transmission lines owned by NU and PSNH for access to power suppliers. The petitioners made substantially identical

arguments to the SEC and the FERC that the proposed NU/PSNH merger would have anticompetitive consequences attributable to control over transmission lines and bulk power supplies. The main thrust of their objections before this Court is that the SEC gave inadequate consideration to the anticompetitive impacts of the merger when it, in part, relied upon the FERC to resolve these issues.

The petitioners fail to understand the nature of the SEC's responsibilities under PUHCA and the FERC's responsibilities under the FPA. Congress gave the SEC, as the agency with expertise in financial transactions, the responsibility of regulating the corporate and capital structure of public utility holding companies. Congress gave the FERC, as the agency with expertise in energy generation, transmission, and distribution, the responsibility of regulating the operational aspects of the public utility industry. Thus, while the SEC considers anticompetitive concerns in approving utility acquisitions, when problems arise that lie within the FERC's area of expertise, the SEC can look to the FERC for a regulatory solution to those problems. In this case, the anticompetitive concerns raised by the petitioners -- control of transmission access and bulk power supply -- are appropriate for resolution by the FERC, which considered these exact problems in its regulatory proceeding and imposed conditions to alleviate them.

The petitioners also charge that the SEC, in its eagerness to resolve PSNH's bankruptcy by approving the acquisition,

disregarded PUHCA requirements. PSNH has recently emerged from Chapter 11 proceedings under a confirmed plan of reorganization that contemplates its merger with NU, subject to regulatory approvals of the SEC, the FERC, and others. While the SEC considered PSNH's emergence from bankruptcy in a strengthened condition to be a benefit of the acquisition, the SEC did not consider this the sole justification for concluding that any statutory requirement was satisfied. As can be seen from the SEC's opinions in this case, the Commission made findings that were based on substantial evidence in the record regarding all of the requirements of PUHCA applicable to this complex transaction and gave reasoned explanations for its determinations.

COUNTERSTATEMENT OF THE CASE

A. Background

PSNH is the largest electric utility in New Hampshire, supplying electricity to approximately 75% of the state's population. JA 217. 1/ PSNH owns 35.6% of the Seabrook nuclear power project. JA 764-65. NU, a public utility holding company registered with the Commission under PUHCA, is the largest electric utility in New England. See JA 342. It provides retail electric service in Connecticut and western Massachusetts through

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1/ "JA --" refers to the Joint Appendix; "R. --" refers to the administrative record, as identified in the Certified List filed with this Court; "Br. --" refers to the petitioners' brief. Citations to the two orders of the Commission in this case are given to the Joint Appendix and to the SEC Docket: "JA -- (-- S.E.C. Dkt. --)".

three wholly-owned operating subsidiaries. 2/ JA 215-16. NU also provides wholesale electric service to five municipal and investor-owned electric systems. JA 315. Both PSNH and NU own transmission facilities that other utilities in the New England area use to transmit power. JA 220-21.

On January 28, 1988, PSNH filed a voluntary petition in the United States Bankruptcy Court for the District of New Hampshire for reorganization under Chapter 11 of the Bankruptcy Code. JA 766. NU seeks to acquire PSNH pursuant to a Joint Plan of Reorganization that was confirmed by the bankruptcy court on April 20, 1990. JA 768.

The acquisition will be effected in a two-step transaction. JA 762-63. In the first step, which has been completed, PSNH was reorganized as an independent company bound by a merger agreement with Northeast Utilities Acquisition Corp. ("NUAC"), a newly-created, wholly-owned subsidiary of NU. JA 762. 3/ In the second step, PSNH and NUAC will be merged, with PSNH the surviving entity. JA 762-63. PSNH will transfer its interest in the Seabrook plant to North Atlantic Energy Corporation ("North Atlantic"), a wholly-owned public utility subsidiary of NU that

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2/ These subsidiaries are Connecticut Light and Power Company, Western Massachusetts Electric Company, and Holyoke Water Power Company.

3/ This step was completed when PSNH emerged from bankruptcy in May 1991. The Wall Street Journal, May 17, 1991, at C8, col. 4.

will be created for this purpose. JA 761-62. The merger will not be consummated unless and until all regulatory approvals are obtained. JA 762-63.

As a condition of its acquisition of PSNH, NU negotiated an agreement with the New Hampshire governor and attorney general that guarantees PSNH seven annual 5.5% rate increases. JA 830-31. The New Hampshire legislature, meeting in special session, has ratified this agreement, and the New Hampshire Public Utilities Commission has ordered the first rate increase. JA 767, 831.

B. The Statutory Scheme: the Public Utility Holding Company Act and the Federal Power Act

NU is required to seek approval for its proposed acquisition of PSNH from two federal agencies, the SEC and the FERC. Regulatory authority over the acquisition of utility companies was given to both agencies by the same legislation, the Public Utility Act of 1935, which provides for federal regulation of holding companies in Title I (the Public Utility Holding Company Act), administered by the SEC, and for federal regulation of electric utilities engaged in interstate commerce in Title II (the Federal Power Act), administered by the FERC.

PUHCA was aimed at eliminating financial abuses among public utility holding companies and their affiliates. Section 1, 15 U.S.C. 79a. Under PUHCA, the SEC regulates the issuance and sale of securities by public utility holding companies (Sections 6 and 7, 15 U.S.C. 79f and 79g), the acquisition of securities and assets by such companies (Sections 9 and 10, 15 U.S.C. 79i and

79j), the corporate structure of such companies (Section 11, 15 U.S.C. 79k), intercompany loans and transactions (Section 12, 15 U.S.C. 79l), and intercompany service, sales, and construction contracts (Section 13, 15 U.S.C. 79m).

The FERC, on the other hand, is charged with regulating the wholesale interstate sale and distribution of electricity. Under the FPA, the FERC is authorized to order a public utility to connect its transmission facilities with other transmission facilities (Section 202, 16 U.S.C. 824a), to approve sales and mergers of public utility facilities (Section 203, 16 U.S.C. 824b), to approve the issuance of securities by public utilities (Section 204, 16 U.S.C. 824c), and to review and set rates for the interstate transmission of electricity and the wholesale interstate sale of electricity (Sections 205, 206, 16 U.S.C. 824d, 824e).

C. Proceedings Before the Securities and Exchange Commission

NU filed an application/declaration with the Commission on October 5, 1989, seeking authority to acquire PSNH and to issue various securities in connection with the acquisition. 4/ The Commission issued a notice of NU's filing on February 2, 1990, describing the application/declaration and giving interested persons the opportunity to comment or request a hearing on it. JA 190-95. Fourteen hearing requests were received from 41

4/ NU subsequently filed 13 amendments to its original application/declaration. The last, dated November 19, 1990, (JA 758 et seq.) incorporates both the original application/declaration and all previous amendments.

separate entities, including all but one of the petitioners. 5/ Eight entities filed comments or notices of appearance. Numerous submissions and cross-submissions were filed by NU, the petitioners, and other interested parties. The record of the proceeding totals well over ten thousand pages.

On December 21, 1990, the Commission issued an opinion and order approving the acquisition and making specific findings with respect to each of the statutory provisions applicable to the transaction. 6/ JA 945-1016 (Northeast Utilities, Holding Co. Act Rel. No. 25221, 47 S.E.C. Dkt. 1887-1958). In the opinion, the Commission determined that the acquisition satisfied the applicable provisions of PUHCA, including: the requirements of Sections 6 and 7 regarding the sale of securities by a registered holding company or subsidiary thereof; the requirements of Sections 9 and 10 regarding the acquisition of securities and utility assets; the requirements of Section 11 regarding corporate structure and the integration of holding company systems; and the requirements of Section 12 regarding intra-system transactions.

5/ Petitioner Maine Public Utilities Commission entered a notice of appearance. Four hearing requests, representing 21 entities, were subsequently withdrawn.

6/ Jurisdiction was reserved on matters involving certain securities issuances, financing agreements, and fees and expenses. JA 1015 (47 S.E.C. Dkt. 1957). The Commission also reserved jurisdiction for further consideration in the event that the rate agreement guaranteeing the seven 5.5 percent annual increases does not go into effect. JA 1016 (47 S.E.C. Dkt. 1958).

Following the issuance of the December 21, 1990 opinion and order, two of the petitioners, the City of Holyoke Gas & Electric Department ("HG&E") and the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), filed petitions for rehearing and reconsideration. The Commission granted the petition for reconsideration and, after having again considered the arguments made by HG&E and MMWEC, entered a supplemental opinion and order on March 15, 1991 that addressed their concerns and made supplemental findings regarding potential anticompetitive effects attributable to the merged company's control over transmission facilities and surplus bulk power. JA 1116-1130 (Northeast Utilities, Holding Co. Act Rel. No. 25273, 48 S.E.C. Dkt. 776-790). Because the resolution of these anticompetitive problems was within the regulatory expertise of the FERC, the Commission conditioned its approval on the entry of an order by the FERC approving the acquisition under the FPA. JA 1123-24 (48 S.E.C. Dkt. 783-84).

The Commission made all of the requisite findings under PUHCA, only some of which have been challenged by the petitioners. With respect to the matters challenged in this review proceeding, the Commission found as follows:

1. Section 10(b)(1)

The Commission determined that no adverse findings were warranted under Section 10(b)(1) of PUHCA, 15 U.S.C. 79j(b)(1), which requires the Commission to approve an acquisition unless it finds that "such acquisition will tend towards interlocking

relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors, or consumers." JA 978-84, 1003-05, 1117-24 (47 S.E.C. Dkt. 1920-26, 1945-47; 48 S.E.C. Dkt. 777-84).

In making its Section 10(b)(1) determination, the Commission first considered the interlocking relations among the companies in the NU holding company system after the merger. The Commission noted that the new companies that would become permanent parts of the NU system, PSNH and North Atlantic, would be first-tier subsidiaries directly owned by NU. JA 978-79 (47 S.E.C. Dkt. 1920-21). PSNH's and North Atlantic's relationships with NU's other subsidiaries would be similar to the existing relationships among NU's subsidiaries. 7/ JA 979 (47 S.E.C. Dkt. 1921). Based upon these findings, the Commission concluded that no adverse findings were warranted with respect to interlocking relations attributable to the acquisition. Id.

Next, the Commission considered whether the acquisition would result in an undue concentration of economic power in terms of its effect on the size of the NU holding company system. JA 979-82 (47 S.E.C. Dkt. 1921-24). The Commission found that the

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7/ The Commission also noted in connection with its analysis of interlocking relationships that PSNH and North Atlantic would be subject to regulation by the New Hampshire Public Utilities Commission and that the public interest would be served by "bringing a prompt end to the PSNH bankruptcy and by providing PSNH with the management, capacity and financial resources to make it viable again." JA 979 (47 S.E.C. Dkt. 1921).

addition of PSNH to the NU system would not significantly change the relationship between the NU system and the rest of the New England electric utility industry. 8/ JA 980 (47 S.E.C. Dkt. 1922). In addition, the Commission found that the combined NU/PSNH system would be within the mid-size range of other registered electric utility holding companies. 9/ JA 981 (47 S.E.C. Dkt. 1923). Based upon these findings, as well as the economic benefits of the transaction, the Commission concluded that the NU/PSNH system would not exceed the economies of scale of current electric generation and transmission technology and would not have undue power or control within the New England region or the electric utility industry. JA 982 (47 S.E.C. Dkt. 1924).

The Commission also examined the potential for anticompetitive practices as part of its evaluation of

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8/ The Commission noted that, on the basis of peak load capacity, NU and the New England Electric System (the next largest public utility system in New England) currently represent approximately 23% and 19% of the region's capacity, while the combined NU/PSNH system would represent approximately 29%. JA 980 (47 S.E.C. Dkt. 1922). Measured by operating revenues, the number of electric customers, and KwH sales, the combined NU/PSNH system would represent less than one-third of the region. JA 980-981 (47 S.E.C. Dkt. 1922-23). Measured by total assets, the combined NU/PSNH system would represent about 37% of the region. JA 981 (47 S.E.C. Dkt. 1923).

9/ When compared with the nine registered electric holding company systems, the combined NU/PSNH system would be fourth in total assets, fifth in operating revenues and electric customers, and seventh in electric KwH sales. JA 981 (47 S.E.C. Dkt. 1923). When compared with the 31 largest investor-owned electric utilities, the combined NU/PSNH system would be in the mid-range. Id.

concentration of control under Section 10(b)(1). JA 983-84, 1003-05, 1120-24 (47 S.E.C. Dkt. 1925-26, 1945-47; 48 S.E.C. Dkt. 780-84). In its first opinion, the Commission considered evidence submitted by entities that opposed the acquisition concerning decreased competition attributable to the combined NU/PSNH system's control of excess generating capacity and transmission corridors into and out of the New England region. JA 1003 (47 S.E.C. Dkt. 1945). 10/ The Commission pointed out that it has approved acquisitions that decrease competition when it concludes that the acquisitions would result in significant benefits. JA 984 (47 S.E.C. Dkt. 1926). The Commission also stated that, while it considers issues like transmission access and allocation of surplus generating power in its Section 10(b)(1) analysis, "[t]o the extent that these matters are specifically regulated, they are properly within the jurisdiction of FERC and the appropriate state commissions." JA 1004 (47 S.E.C. Dkt. 1946). Taking into account the acceptable size and other characteristics of the combined NU/PSNH system and the likely economic benefits of the merger, the Commission concluded that the anticompetitive effects did not, on balance, require disapproval under Section 10(b)(1). JA 1004-05 (47 S.E.C. Dkt. 1946-47).

10/ The Commission also considered the anticompetitive effects of the merger in light of the transmission commitments entered into in connection with the proposed acquisition that will increase the availability of NU's and PSNH's transmission facilities to other New England utilities. JA 1003-04 n.104 (47 S.E.C. Dkt. 1945-46 n.104).

In its second opinion, the Commission reconsidered the evidence of potential anticompetitive effects of the merger and again concluded that "[t]he merged company's control of both transmission lines and surplus bulk power raises the potential for anticompetitive behavior." JA 1120 (48 S.E.C. Dkt. 780). The Commission noted that, while both it and the FERC have statutory responsibilities regarding the anticompetitive consequences of mergers in the public utility industry, the two agencies have different overall statutory responsibilities, and different areas of expertise as a result. JA 1121-22 (48 S.E.C. Dkt. 781-82). The Commission stated that, with its mandate to regulate the corporate structure and financing of public utility holding companies and their affiliates, it has expertise in financial transactions and inter-corporate relationships; the FERC, with its mandate to regulate the wholesale interstate sale and distribution of electricity, has expertise in such matters as the transmission of electricity. JA 1122-23 (48 S.E.C. Dkt. 782-83).

Given this regulatory framework, the Commission concluded that, when it identifies operational concerns with respect to transmission access and the allocation of bulk power supply, it is appropriate to "look to the FERC's expertise for an appropriate resolution of these issues." JA 1123 (48 S.E.C. Dkt. 783). Accordingly, the Commission conditioned its approval of the acquisition upon the FERC's issuance of a final order approving the transaction under the FPA. JA 1123-24 (48 S.E.C.

Dkt. 783-84). In so doing, the Commission noted that it has on-going authority under PUHCA Section 20(a), 15 U.S.C. 79t(a), to rescind or further condition its approval of the transaction. JA 1124 n.15 (48 S.E.C. Dkt. 784 n.15).

2. Sections 10(c)(1) and 11(b)(2)

The Commission determined that the acquisition satisfied Section 10(c)(1) of PUHCA, 15 U.S.C. 79j(c)(1), which requires the Commission to withhold approval of an acquisition that is "detrimental to the carrying out of the provisions of section 11." The provision of Section 11 relevant to this review proceeding is the requirement of Section 11(b)(2), 15 U.S.C. 79k(b)(2), "that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure * * * of such holding-company system." JA 994, 1126-27 (47 S.E.C. Dkt. 1936, 48 S.E.C. Dkt. 786-87).

In making its determination pursuant to these provisions, the Commission first noted that the proposed acquisition and related financing would not unduly complicate the capital structure of NU's holding company system. JA 994 (47 S.E.C. Dkt. 1936). With respect to corporate structure, the Commission found that the three new subsidiaries being added to the NU system were necessary to effectuate the merger. Id. In addition, the Commission noted that placing PSNH's ownership interest in Seabrook in a separate corporation would provide more effective managerial control and regulation. Id. Based on these findings,

the Commission concluded that no adverse determination was required with respect to NU's corporate structure pursuant to Section 10(c)(1). JA 989 (47 S.E.C. Dkt. 1931).

The Commission addressed HG&E's argument that NU's corporate structure was unduly complicated because of its three operating subsidiaries that provide electric service in western Massachusetts in the second opinion. JA 1126-27 (48 S.E.C. Dkt. 786-87). HG&E had urged the Commission either to deny NU's application for approval of the acquisition of PSNH or to condition approval upon NU's elimination of one or more of the subsidiaries. Because the acquisition itself would neither create undue complication in the NU system nor affect the existing situation with respect to the three Massachusetts subsidiaries, the Commission rejected HG&E's request. Id.

3. Section 10(c)(2)

The Commission determined that no adverse findings were required under Section 10(c)(2) of PUHCA, 15 U.S.C. 79j(c)(2), which provides that the Commission shall not approve an acquisition unless it finds that "such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system." JA 995-97, 1006-07, 1127-28 (47 S.E.C. Dkt. 1937-39, 1948-49, 48 S.E.C. Dkt. 787-88).

In making this determination, the Commission noted that NU had estimated $837 million in total savings for the combined NU/PSNH system through the year 2002 and had demonstrated a

potential that these savings would occur. JA 995-97 and nn.84-88, 1007 (47 S.E.C. Dkt. 1937-39 and nn.84-88, 1949). This estimate took into account: (a) savings of $188 million to PSNH and $339 million to other utilities with ownership shares in Seabrook -- including $21 million to NU subsidiary Connecticut Light and Power Company and $318 million to other members of the New England Power Pool ("NEPOOL") 11/ -- attributable to NU's operation of the Seabrook nuclear power plant (n.84); (b) savings of $101 million attributable to improvements in the operation of PSNH's fossil steam generating units (n.85); (c) savings of $218 million attributable to lower energy costs arising from the combination of the two systems (n.86); (d) savings of $146 million attributable to a reduction in the generating capacity the combined system will be required to maintain under the NEPOOL Agreement (n.87); and (e) savings of $163 million resulting from reduced administrative expenses and more advantageous coal purchases (n.88). 12/

11/ NU, PSNH, and most of the petitioners are members of NEPOOL. Pursuant to the NEPOOL Agreement, utilities in the New England region operate their electric facilities as a single system, with power centrally dispatched to meet needs as efficiently as possible (consistent with reliability) over the entire system. JA 323-29. Responsibility for maintaining generating capacity is allocated among the members on the basis of their peak loads. JA 332-41.

12/ The total amount of savings attributable to the merger is $1.155 billion. Subtracting the $318 million in savings that would accrue to other NEPOOL members as a result of savings attributable to NU's operation of Seabrook, the savings for the combined NU/PSNH system would be $837 million.

The Commission also addressed arguments that the savings could be achieved without the acquisition or would come about at the expense of other regional utilities who are members of NEPOOL. See JA 1006-07, 1127-28 (47 S.E.C. Dkt. 1948-49, 48 S.E.C. Dkt. 787-88). The Commission concluded that some of the anticipated savings would be new and could not occur except as a result of the merger, including savings attributable to NU's operation of the Seabrook plant, reductions in administrative and general expenses, and coal purchasing efficiencies. JA 1006-07 (47 S.E.C. Dkt. 1948-49). In addition, the Commission recognized that there could be certain reallocations affecting other NEPOOL members, but concluded that these reallocations would be outweighed by the benefits of the efficiencies and economies attributable to the merger. JA 1007 (47 S.E.C. Dkt. 1949).

4. Section 7(d)(2)

The Commission determined that no adverse findings were warranted under section 7(d)(2) of PUHCA, 15 U.S.C. 79g(d)(2), which requires the Commission to evaluate whether securities proposed to be issued are "reasonably adapted" to the earning power of the acquiring company. JA 974-75 (47 S.E.C. Dkt. 1916-17).

The Commission found that the common stock being issued to form the special purpose corporations required for consummation of the merger would have no current effect on NU's earning power. JA 974 (47 S.E.C. Dkt. 1916). The Commission also found that the notes being issued by North Atlantic, the new subsidiary that

will own Seabrook, were reasonably adapted to North Atlantic's earning power in view of PSNH's agreement with North Atlantic to buy Seabrook power. JA 974-75 (47 S.E.C. Dkt. 1916-17). The Commission further concluded that NU's proposed method of paying dividends relying upon its unrestricted consolidated retained earnings was reasonable. JA 975 (47 S.E.C. Dkt. 1917). Finally, the Commission found that the seven annual 5.5% rate increases, when coupled with the existing financial health of the NU system, should enable the combined NU/PSNH system to meet both the obligations arising from the merger and from the general conduct of its utility business. Id.

The Commission also addressed the financial health of the NU system after the acquisition in connection with its evaluation under Section 10(b)(2), 15 U.S.C. 79j(b)(2), of whether the consideration received by NU was reasonable in light of "the earning capacity of * * * the utility assets underlying the securities to be acquired." JA 984-86 (47 S.E.C. Dkt. 1926-28). This review included an evaluation of NU's testimony and projected financial statements for PSNH and North Atlantic as well as the assumptions on which the statements were based. 13/ JA 985-86 (47 S.E.C. Dkt. 12927-28). The Commission concluded that the projected return on equity for NU's investment in the

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13/ The Commission noted that the financial statements had also been evaluated by the New Hampshire Public Utilities Commission, the Connecticut Department of Public Utility Control (through its consultant, Booz, Allen & Hamilton, Inc.), by NU's accountant, Arthur Andersen & Company, and by three large banks that were potential lenders for the transaction. JA 986 (47 S.E.C. Dkt. 1928).

two companies appeared reasonable for an acquisition of this size and represented an appropriate risk to NU's investors and to the public. JA 986 (47 S.E.C. Dkt. 1928).

5. Denial of requests for an evidentiary hearing

The Commission determined that, because the parties requesting a hearing had failed to raise a genuine issue of material fact that needed to be resolved by a hearing, no evidentiary hearing was warranted. JA 1012-13, 1128-29 (47 S.E.C. Dkt. 1954-55, 48 S.E.C. Dkt. 788-89). This determination was made after an evaluation of the significant issues and arguments made by the parties and after a re-evaluation of the issues raised by HG&E and MMWEC in their petitions for reconsideration. See JA 1003-11, 1128-29 (47 S.E.C. Dkt. 1945-53, 48 S.E.C. Dkt. 788-89).

D. Proceedings Before the Federal Energy Regulatory Commission

NU's service company subsidiary, Northeast Utilities Service Company, filed an application under Section 203 of the Federal Power Act, 16 U.S.C. 824b, on January 8, 1990, seeking authorization for PSNH to dispose of its utility assets. Northeast Utilities Service Co., Docket Nos. EC 90-10-000, ER 90-143-000, ER 90-144-000, ER 90-145-000 and EL 90-9-00, slip op. (FERC August 9, 1991) (available on LEXIS) ("FERC Order"). On March 2, 1990, the FERC ordered a hearing on the application, limiting the scope of the hearing to the merger's effect on the existing competitive situation and on wholesale costs and rate levels. FERC Order at 6.

During August and September 1990, 25 days of hearings were held before a FERC Administrative Law Judge. JA 1060 (Northeast Utilities Service Co., 53 FERC ¶63,020 at 65,210 (Initial Decision December 20, 1990). A total of 35 witnesses were cross-examined and 809 exhibits were admitted into evidence during the hearing. Id. On December 20, 1990, the FERC ALJ issued an initial decision approving the acquisition, subject to conditions designed to mitigate anticompetitive impacts attributable to the merged company's control of transmission lines and surplus bulk power. JA 1055-1115 (53 FERC ¶63,020). 14/

In an opinion and order issued August 9, 1991, the FERC agreed with the ALJ that the merged company's control of key transmission facilities and bulk power supplies posed the threat of anticompetitive conduct. 15/ FERC Order at 37-39. The FERC approved the merger, subject to somewhat stricter conditions on transmission access. The conditions require NU, inter alia, to provide wholesale transmission service for any utility over its transmission system (subject to NU's existing contractual commitments and to certain needs of NU's customers), to construct new transmission facilities to meet transmission needs, and to

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14/ The FERC ALJ's initial decision was issued one day before the SEC's December 21, 1990 order and thus was not considered in connection with the first SEC opinion and order.

15/ The FERC analysis of bulk power transactions includes what the SEC referred to as surplus bulk power. See FERC Order at 37-39.

offer flexible terms with respect to the duration of the transmission contracts it offers. FERC Order, passim.

STANDARD OF REVIEW

The Commission's findings of fact, if supported by substantial evidence, are conclusive. Section 24(a), 15 U.S.C. 79x(a). A reviewing court "must accept [an agency's] findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986), quoting Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951). With respect to questions that involve statutory interpretation, a reviewing court's "inquiry is whether the language of the statute evinces an unambiguously expressed intent of Congress on the points before us; lacking such direction, we are to accept the reasonable interpretations of the administering agency." Wisconsin's Environmental Decade, Inc. v. SEC, 882 F.2d 523, 526 (D.C. Cir. 1989). The standard for determining whether the Commission properly denied the petitioners' request for an evidentiary hearing is abuse of discretion. Association of Massachusetts Consumers, Inc. v. SEC, 516 F.2d 711, 714 (D.C. Cir. 1975), cert. denied, 423 U.S. 1052 (1976).

SUMMARY OF ARGUMENT

I. The Commission evaluated the anticompetitive effects of the NU/PSNH merger pursuant to Section 10(b)(1) of PUHCA and

determined that there were potential problems with respect to transmission access and the allocation of bulk power. The Commission looked to the FERC for a resolution of these problems, which lay within that agency's area of statutory responsibility and expertise. The SEC's decision to do so was appropriate and in accord with this Court's decisions.

II. The Commission appropriately took into account the public interest in having PSNH emerge from bankruptcy in a strengthened condition as one factor, among others, in making several PUHCA determinations that have a "public interest" component. The Commission did not "override" any PUHCA requirements in order to resolve PSNH's bankruptcy.

III. The Commission examined the projected economies and efficiencies attributable to the merger pursuant to Section 10(c)(2) of PUHCA and found it probable that the $837 million in savings projected by NU for the combined NU/PSNH system would result from the acquisition. The Commission's findings were based on a reasoned analysis and supported by evidence in the record.

IV. The remainder of the petitioners' arguments also lack merit. The Commission addressed HG&E's argument that the existence of three NU operating subsidiaries in Massachusetts was contrary to the corporate structure requirements of Sections 10(c)(1) and 11(b)(2) of PUHCA and determined that, since the corporate structure would not affect or be affected by the acquisition, there was no reason to deny the acquisition or to

condition approval on a restructuring. The Commission also properly concluded that the debt securities to be issued were "reasonably adapted" to the earning power of NU, as required by Section 7(d)(2) of PUHCA, based upon an assessment of the projected financial statements of PSNH and North Atlantic, the effect of the annual rate increases approved by the New Hampshire Public Utilities Commission, and NU's financial condition. Finally, the Commission properly determined that there was no need for an evidentiary hearing in this case. All parties had the opportunity to submit the evidence and testimony they deemed appropriate, and there were no issues pertinent to approval of the acquisition that needed to be resolved in a hearing.

ARGUMENT

I. THE COMMISSION CONSIDERED THE POTENTIAL ANTICOMPETITIVE CONCERNS POSED BY THE ACQUISITION PURSUANT TO SECTION 10(b)(1) AND PROPERLY LOOKED TO THE FERC FOR A RESOLUTION OF THOSE CONCERNS.

The Commission, based upon evidence in the record, evaluated the anticompetitive effects of the NU/PSNH merger pursuant to Section 10(b)(1) and determined that there were potential anticompetitive problems with respect to transmission access and the allocation of surplus bulk power. Having made this determination, the Commission appropriately looked to the FERC for a resolution of these problems, which are within the FERC's statutory responsibilities and areas of expertise. The Commission's action in this regard was consistent with this Court's decisions in Municipal Electric Association of

Massachusetts v. SEC, 413 F.2d 1052 (D.C. Cir. 1969), City of Lafayette v. SEC, 454 F.2d 941 (D.C. Cir. 1971), aff'd 411 U.S. 747 (1973), City of Lafayette v. SEC, 481 F.2d 1101 (D.C. Cir. 1973), and Wisconsin's Environmental Decade, Inc. v. SEC, 882 F.2d 523 (D.C. Cir. 1989).

A. The Commission Made Specific Findings Regarding Anticompetitive Effects Based on Evidence in the Record.

The petitioners' assertion that "[t]he SEC orders ignore any facts that are relevant to analyzing anticompetitive effects" (Br. 31) is puzzling. Not only did the Commission consider the anticompetitive effects of the acquisition, it specifically determined, after having considered the evidence in the record 16/, that these anticompetitive effects raised serious problems. The Commission stated in its second opinion that it had:

> considered evidence in this proceeding that the merged company would control key transmission lines that carry bulk power to an entire region of New England and would also be the largest supplier of surplus bulk power in the area. The merged company's control of both

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16/ See, e.g., R. 6973-7013 (testimony of Robert J. Reynolds, economic consultant, submitted by HG&E); R. 7084-7200 (testimony of Dr. Marshal Alan Baughcum, Special Assistant to the Director, Office of Energy Policy, FERC, submitted by MMWEC); R. 7905-8003 (testimony of Dr. John W. Wilson, economic consultant, submitted by MMWEC); R. 5745-5829 (testimony of Matthew I. Kahal and Dale E. Swan, economic consultants), and R. 5832-5868 (testimony of David Moskovitz, former Commissioner, Maine Public Utilities Commission, submitted by Maine Public Utilities Commission, Massachusetts Department of Public Utilities, Vermont Department of Public Service, and Vermont Public Service Board)(the testimony cited in this footnote is not contained in the Joint Appendix, but is part of the administrative record identified in the Certified List filed with this Court).

transmission lines and surplus bulk power raises the potential for anticompetitive behavior.

JA 1120 (48 S.E.C. Dkt. 780) (footnotes omitted). See also JA 1003 (47 S.E.C. Dkt. 1945).

The apparent explanation for this anomaly is that the petitioners concentrate their criticism on the Commission's first opinion and disregard the second opinion, which supplemented the Commission's analysis and findings with respect to the potential anticompetitive impacts of the acquisition. The petitioners claim (Br. 31) that the "only discussion" of anticompetitive impacts appeared in the Commission's first opinion, which they excerpt and reproduce as Addendum B in their brief. They do not mention the Commission's evaluation of anticompetitive effects in its second opinion, where such problems were the main subject of discussion. See JA 1118-24 (48 S.E.C. Dkt. 778-84). 17/.

Thus, it is simply not true that the Commission failed to consider evidence relevant to anticompetitive effects. The Commission evaluated the record evidence in connection with both of its opinions and orders, and made the very finding sought by the petitioners -- that the merger had serious anticompetitive implications.

17/ The petitioners contrast the Commission's discussion of anticompetitive impacts with that of the FERC ALJ and quote approvingly from his opinion -- as though the Commission had completely ignored this analysis. In fact, the Commission's second opinion not only discusses the opinion but quotes the same language quoted by the petitioners. Compare Br. 32-33 with JA 1120 n.10 (48 S.E.C. Dkt. 780 n.10).

B. The Commission Properly Looked to the FERC as the Appropriate Regulatory Agency To Resolve Problems Attributable to the Merged Company's Control of Transmission Access and Bulk Power Supplies.

The Commission's decision to look to the expertise of the FERC for a resolution of the problems attributable to control of transmission access and bulk power is consistent both with this Court's decisions on the Commission's responsibilities under PUHCA and with the overall statutory scheme established by Congress for regulation of the public utility industry.

This Court held in Municipal Electric Association of Massachusetts v. SEC, supra, that the Commission's assessment of whether an acquisition will result in an undue concentration of control under Section 10(b)(1) of PUHCA "must take significant content" from federal antitrust policies. 413 F.2d at 1057. The Court recognized in City of Lafayette v. SEC, supra, however, that when antitrust problems arise concerning operational aspects of public utility regulation, which are assigned to the FERC under the FPA, the SEC's role is circumscribed:

> * * * the general doctrine requiring an agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company. The SEC has no jurisdiction over operations and stands in a different posture from the [Federal Power Commission] which * * * has regulatory jurisdiction over operations * * *.

454 F.2d at 955. As the Court explained, "the SEC's jurisdiction relates to structure rather than directly to operations." Id. at 956. Accord City of Lafayette v. SEC, supra, 481 F.2d at 1105

("the principal thrust of the SEC mandate under [PUHCA] concerns industry structure rather than individual companies' operations"). 18/

Both of this Court's City of Lafayette decisions involved allegations of anticompetitive conduct relating to transmission facilities and power supply. See 481 F.2d at 1104; 454 F.2d at 945. 19/ Thus, when the SEC identified such operational problems

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18/ The respective responsibilities of the SEC and the FERC in regulating the public utility industry were explained by Justice Stevens in his concurring opinion in Arcadia, Ohio v. Ohio Power Co., 111 S.Ct. 415 (1990):

> Congress enacted PUHCA to prevent financial abuses among public utility companies and their affiliates. It entrusted the SEC, the agency with the expertise in financial transactions and corporate finance, with the task of administering the act. The SEC carries out its duties essentially by monitoring inter-affiliate financial transactions and eliminating potential conflicts of interest. Congress enacted the FPA to regulate the wholesale interstate sale and distribution of electricity. It entrusted the administration of the FPA to the FPC and later the FERC as the agency with the proper technical expertise required to regulate energy transmission.

111 S.Ct. at 423 (citations omitted).

19/ In contrast, the anticompetitive concerns raised in Municipal Electric Association of Massachusetts v. SEC, supra, were directly related to corporate and capital structure and thus found by this Court to implicate SEC regulatory concerns. In that case, a group of New England utilities had sought SEC approval to acquire all of the stock of two electric generating companies that were being formed to build and operate the Maine and Vermont Yankee nuclear power plants. The sponsoring utilities, based upon their stock ownership, were entitled to all of the electricity generated by the plants. A group of competing municipal electric utilities objected to the Commission's

(continued...)

in its evaluation of the NU/PSNH merger, it properly concluded that the FERC had the principal statutory responsibility as well as the expertise to resolve these problems. Accordingly, the Commission conditioned approval of NU's acquisition of PSNH upon the issuance by the FERC of a final order under Section 203 of the Federal Power Act. 20/ The Commission expressly noted, however, that it retains jurisdiction under Section 20(a) of PUHCA, 15 U.S.C. 79t(a), to rescind or further condition its approval of the transaction. JA 1124 n.15 (48 S.E.C. Dkt. 784, n.15).

This hardly amounts to an "abdication," as the petitioners argue (Br. 33-34), of the Commission's statutory responsibilities. Indeed, this Court, in reviewing orders under PUHCA, has accepted the Commission's practice of giving

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19/(...continued)
approval of the transaction, arguing that they were being excluded from direct access to the low-cost power produced by the plants and thus placed at a competitive disadvantage to the sponsoring utilities.

The Court found in Municipal Electric Association that the anticompetitive concerns were directly attributable to the stock acquisition: "The plans of Yankees tie to the acquisition of the stock an allocation of power which in the end absorbs all the power. This as we have said is part of sponsors' capital structure." 413 F.2d at 1060. Under these circumstances, the Court held that the Commission should have addressed the municipals' concerns and remanded the case for a hearing and reconsideration. Id. at 1059, 1061.

20/ The petitioners suggest (Br. 11) that the SEC should have stayed the effectiveness of its order pending a final FERC order. There was no need for such a stay, however, since the NU/PSNH merger is conditioned upon the receipt of all necessary regulatory approvals.

consideration to regulatory action by other governmental bodies in assessing whether PUHCA requirements are satisfied. Wisconsin's Environmental Decade, Inc. v. SEC, 882 F.2d 523, 526-27 (D.C. Cir. 1989). 21/

In Wisconsin's Environmental Decade, a public utility holding company sought approval of a corporate restructuring intended to facilitate its diversification into non-utility businesses. The Commission, in determining whether PUHCA requirements were satisfied, gave weight to the state of Wisconsin's legislative judgment regarding diversified investments by utilities and to regulation by the Wisconsin authorities. 22/ Pursuant to state law, the Wisconsin Public

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21/ See Environmental Action, Inc. v. SEC, 895 F.2d 1255, 1261 (9th Cir. 1990) (accepting SEC's consideration of FERC review of wholesale electric rates in connection with SEC review of anticompetitive considerations pursuant to Section 10(b)(1) of PUHCA). See also Wisconsin Electric Power Co., Holding Co. Act Rel. No. 24267, 37 S.E.C. Dkt. 387 (Dec. 18, 1986); New England Electric System, Holding Co. Act Rel. No. 22309, 24 S.E.C. Dkt. 298 (Dec. 9, 1981); Northern States Power Co., 36 S.E.C. 1 (1954).

22/ The holding company in Wisconsin's Environmental Decade was a predominantly intrastate company exempt from many of the requirements of PUHCA under Section 3(a)(1), 15 U.S.C. 79c(a)(1). The Commission noted two grounds for according deference to Wisconsin's determination that diversification by public utilities was beneficial: (1) under the statutory scheme of PUHCA the anti-diversification strictures of PUHCA are not applicable to exempt companies to the same extent as to registered holding companies; and (2) Wisconsin had imposed safeguards designed to limit the potential for adverse consequences from diversification. 882 F.2d at 526. The first ground for deference is not present in this case because NU is a registered public utility holding company. However, the second ground for deference -- the imposition of safeguards by another regulatory authority -- is directly comparable.

Service Commission had imposed a number of conditions on the acquisition relating to the diversified investments. The Commission had approved the transaction subject to the conditions, noting that it had the power to re-examine the issue if abuses arose. This Court, in affirming the Commission's order in part, stated that the petitioners had failed to give "any substantial reason why the SEC's watchful deference to the legislative and administrative judgment of a state regulating an intrastate holding company is not permissible under the Act." 882 F.2d at 527. 23/

The facts in this case also justify such an approach, especially in view of Congress' allocation of responsibility between the SEC and the FERC in regulating the public utility industry. The Commission's looking to the FERC for a resolution of the anticompetitive effects attributable to the combined NU/PSNH system's control over transmission access and surplus bulk power ensured that the agency most knowledgeable about those areas would take the lead in designing protections against those anticompetitive effects.

Thus, the SEC did not "abdicate" its responsibility to consider the anticompetitive impacts of the acquisition, as the petitioners argue (Br. 33). Rather, it determined that the acquisition would have such effects and then looked to the agency

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23/ The case was remanded to the Commission for further proceedings with respect to its findings under Section 10(c)(2) regarding the economies and efficiencies attributable to the corporate restructuring. 882 F.2d at 528.

with the relevant expertise to cure them. The Commission's decision was consistent with this Court's recognition in its City of Lafayette decisions of the division of responsibility between the SEC and the FERC in regulating anticompetitive public utility practices and with the Court's recognition in Wisconsin's Environmental Decade of the Commission's "watchful deference" to other regulatory agencies in making determinations under PUHCA. The Commission's action was based upon a responsible interpretation of PUHCA in an area where the statute does not give clear direction and thus should be affirmed by this Court.

II. THE COMMISSION PROPERLY CONSIDERED THE "PUBLIC INTEREST" IN HAVING PSNH EMERGE FROM BANKRUPTCY IN EVALUATING WHETHER THE ACQUISITION SATISFIED CERTAIN PUHCA REQUIREMENTS.

The Commission appropriately took into account the public interest in having PSNH emerge from bankruptcy in a strengthened condition as one factor in making the determinations required under PUHCA Sections 10(b)(1), 10(b)(3), and 10(c)(2). There is no basis for the petitioners' assertion (Br. 24, 25-30) that the Commission considered the resolution of PSNH's bankruptcy so important that it overrode these PUHCA requirements in approving the acquisition. Nor is there any basis for the petitioners' assertion (Br. 27-29) that, since PSNH could survive without the merger, the Commission's conclusion that the acquisition would make PSNH "viable again" is not supported by substantial evidence.

With regard to PUHCA Sections 10(b)(1), 10(b)(3), and 10(c)(2), each of which includes a "public interest" component, the Commission noted that it was in the public interest for PSNH to emerge from bankruptcy. In each case, however, the fact that the acquisition would result in PSNH's emergence from bankruptcy was only one of the considerations that led the Commission to find that the requirement was satisfied. The Commission did not find that the resolution of PSNH's bankruptcy in and of itself satisfied any PUHCA requirement applicable to approval of the acquisition.

The Commission, in determining that no adverse findings were required under Section 10(b)(1), found that the public interest was served by "bringing a prompt end to the PSNH bankruptcy and by providing PSNH with the management, capacity and financial resources to make it viable again." JA 979 (47 S.E.C. Dkt. 1921). The Commission also found, however, in connection with the evaluation of interlocking relations and concentration of control required under Section 10(b)(1), that: (a) the interlocking relationships produced by the acquisition are needed to integrate PSNH into the NU system; (b) the relationships to NU of the new subsidiaries created by the merger would be similar to the present relationships among NU and its subsidiaries; and (c) the acquisition would not result in an undue concentration of economic power in view of the size of the combined entity in relation to the balance of the New England electric utility industry and in comparison with other electric

utility holding companies. See JA 978-82 (47 S.E.C. Dkt. 1920-24) and discussion in this brief supra pp. 10-12. In addition, the Commission, having determined that there would be the potential for anticompetitive behavior based upon the combined NU/PSNH system's control of transmission access and bulk power supplies, conditioned its approval upon entry of an order by the FERC approving the acquisition under the FPA. See JA 1120, 1123-24 (48 S.E.C. Dkt. 780, 783-84) and discussion in this brief, supra, pp. 12-15 and 24-32.

Likewise, in determining that no adverse findings were required under Section 10(b)(3), 15 U.S.C. 79j(b)(3), with respect to NU's capital structure, the Commission did point out that the merger "will benefit PSNH creditors, shareholders, and consumers by bringing an end to the bankruptcy * * *." 24/ However, the Commission, in concluding that Section 10(b)(3) was satisfied, evaluated the merged company's post-acquisition capital structure. See JA 987-89 (47 S.E.C. Dkt. 1929-31).

And, in its assessment of potential economies and efficiencies pursuant to Section 10(c)(2), the Commission found

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24/ The petitioners quote only the part of the sentence in which this phrase appears. The entire sentence reads:

> The Commission concludes that the Plan will benefit PSNH creditors, shareholders, and consumers by bringing an end to the bankruptcy, providing reasonable payments to creditors and shareholders, and providing consumers with the protection of an agreed limit on post-bankruptcy rate increases.

JA 989 (47 S.E.C. Dkt. 1931).

that "a public utility's emergence from bankruptcy reorganization is a benefit" that may satisfy Section 10(c)(2). See JA 1128 n. 26 (48 S.E.C. Dkt. 788 n.26). This benefit, however, did not constitute the Commission's principal finding on economies and efficiencies, which was based primarily upon savings attributable to more efficient operation of the combined NU/PSNH system. See JA 995-97 (47 S.E.C. Dkt. 1937-39) and discussion in this brief, supra, pp. 16-18 and infra, pp. 37-41.

The petitioners also contend (Br. 27-29) that the Commission found, without an adequate basis in the record, that the acquisition was necessary for a "viable" PSNH. They argue that this finding was unwarranted because PSNH emerged from bankruptcy without the merger. But the Commission did not make such a finding. In its first opinion and order, the Commission concluded that promptly ending the bankruptcy and providing PSNH with the resources "to make it viable again" would be in the public interest. JA 979 (47 S.E.C. Dkt. 1921). In its second opinion and order, the Commission confirmed that, although it could not guarantee the success of PSNH, it was satisfied that "the merged PSNH will be in a stronger financial position than a stand-alone PSNH would be." JA 1128 n.25 (48 S.E.C. Dkt. 788 n.25). 25/

25/ Robert E. Busch, NU's Senior Vice President-Finance, testified, based on projected financial statements, that a stand-alone PSNH would not be as healthy as the merged company. JA 145-51. Evidence in the record shows that the acquisition would produce various savings to PSNH. These (continued...)

Moreover, the Commission's conclusions are not inconsistent with the conclusion of the New Hampshire Public Utilities Commission, as the petitioners claim (Br. 28), or with that of the FERC ALJ. The New Hampshire Public Utilities Commission believed that there would be a "'risk to the public associated with a Stand-alone PSNH,'" even though such an entity would be "'marginally able to support its capitalization'". JA 616-19, 655, quoted by the Commission at JA 1127-28 n.25 (48 S.E.C. Dkt. 787-88 n.25). The FERC ALJ, similarly, found that "[c]ontinuing to maintain a weakened PSNH as a company which would be marginal at best, and indeed could well end up in bankruptcy again, is not 'consistent with the public interest.'" JA 1062-63 (53 FERC at 65,211). 26/ Thus, notwithstanding whether a stand-alone PSNH would be viable, the Commission correctly concluded that the acquisition would create a stronger PSNH that poses less risk to the public interest.

25/(...continued)
savings, not including the savings to NU and others, are estimated at $516 million (JA 613, 728) and would make the merged PSNH a stronger entity.

26/ The petitioners claim (Br. 28 n.44) that the FERC ALJ misread the New Hampshire Public Utility Commission decision. This is not so. The ALJ did not state, as the petitioners imply, that the New Hampshire Commission had found that the stand-alone entity would not be "viable." Rather, the ALJ stated that the New Hampshire Commission had "expressed 'substantial concern' about the validity of the plan without a merger, and said that a 'stand alone' PSNH would leave ratepayers 'at risk'". JA 1062 (53 F.E.R.C. at 65,211).

III. THE COMMISSION PROVIDED REASONED EXPLANATIONS AND CONCLUSIONS FOR ITS FINDINGS PURSUANT TO SECTION 10(c)(2) WITH RESPECT TO ECONOMIES AND EFFICIENCIES.

The Commission examined the economies and efficiencies attributable to the merger, based on the evidence in the record, and found it probable that the acquisition would result in the $837 million in savings to the combined NU/PSNH system projected by NU. Thus, the petitioners' criticism (Br. 35) of the Commission's findings as to economies and efficiencies under Section 10(c)(2) is unfounded.

In this regard, Section 10(c)(2) does not require a precise quantification of merger benefits. A "demonstrated potential" for economies and efficiencies is sufficient. Environmental Action, Inc. v. SEC, 895 F.2d 1255, 1265 (9th Cir. 1990), quoting Centerior Energy Corp., Holding Co. Act Rel. No. 24073, 35 S.E.C. Dkt. 1002, 1004 (Apr. 29, 1986); American Electric Power Co., 46 S.E.C. 1299, 1320 (1978). See also SEC v. New England Electric System, 390 U.S. 207, 211 (1981) (economic forecasting calls on SEC expertise and "[j]udicial review of that expert judgment is necessarily a limited one").

A. The Commission's Findings Regarding Savings Attributable to the Merger Were Based on a Reasoned Analysis and Supported by Evidence in the Record.

The savings projected by NU fell into five general categories: Seabrook operations and maintenance savings, fossil fuel steam unit availability savings, energy expense savings, peak load savings, and administrative expense and coal purchasing savings. The Commission made findings with respect to each of

these potential savings, based upon NU's projections and the evidence in the record. 27/

Seabrook Operations and Maintenance Savings. There would be an estimated savings of $188 million to PSNH and $339 million to the other Seabrook owners attributable to NU's operation of the Seabrook nuclear power plant. JA 995-96 n.84 (47 S.E.C. Dkt. 1937-38 n.84). Record evidence supports the Commission's finding with respect to these potential savings, which were based on NU's multi-unit nuclear operation expertise. 28/ This experience should both lower the cost of operating the Seabrook plant and reduce PSNH's power generation costs.

Fossil Steam Unit Availability Savings. There would be estimated savings of $101 million attributable to improvements in the operation of PSNH's fossil steam generating units. JA 996 n.85 (47 S.E.C. Dkt. 1938 n.85). Record evidence supports the Commission's finding with respect to this potential saving, which

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27/ The New Hampshire Public Utilities Commission, which analyzed benefits to PSNH alone and not to the combined NU/PSNH system, agreed with NU's projections of savings for PSNH, finding that NU, if allowed to acquire PSNH, should be able to achieve estimated savings of $516 million for PSNH. JA 602-13.

28/ See JA 226-56 (testimony of John F. Opeka, NU Executive Vice President of Engineering and Operations, regarding NU's experience in operating nuclear facilities and its plans for operating Seabrook); JA 728 (summary of synergies). Since 1986, NU has operated Millstone 3, a nuclear plant that is similar in design to Seabrook. JA 231, 238.

was based upon NU's experience in operating its fossil steam generating plants efficiently. 29/

Energy Expense Savings. There would be estimated savings of $218 million attributable to decreased energy expenses for the NU/PSNH system. See JA 996 n.86 (47 S.E.C. Dkt. 1938 n.86). Record evidence supports the Commission's finding with respect to these potential savings, which was based on NU's assessment of the combined system's ability to satisfy its load more effectively, thereby reducing energy expenses. 30/ However, the Commission acknowledged that, since the facilities of NEPOOL members are operated as a single system, these savings will result in an equivalent increase in energy costs to other members of NEPOOL. Id. See JA 804. (See discussion of reallocation of energy expense savings to other NEPOOL members, infra, pp. 42-44.)

29/ See JA 262-74 (testimony of Opeka on projected availability of PSNH's fossil steam units under NU's management); JA 806-07. PSNH's fossil steam generating plants currently are operating at availability rates below those of comparable units in New England; NU's fossil steam generating plants, on the other hand, operate at availability rates above those of comparable units. JA 262-74. NU expects to improve the availability rates of PSNH's fossil steam generating units, thereby reducing costs, in two ways: (1) through a reduction in energy costs for the fossil steam units; and (2) through a reduction in the amount of generating capacity that the combined NU/PSNH system is required to maintain under the NEPOOL Agreement. JA 806-07.

30/ See JA 185-88 (testimony of Frank P. Sabatino, Director of Intercompany Arrangements for Northeast Utilities Service Company, regarding expenses of combined system); JA 728 (summary of synergies); JA 609-12 (New Hampshire Public Utilities Commission decision).

Peak Load Diversity Savings. There would be estimated savings of $146 million attributable to a reduction in the generating capacity that the combined NU/PSNH system will be required to maintain under the NEPOOL Agreement. JA 997 n.87 (47 S.E.C. Dkt. 1939 n.87). Record evidence supports the Commission's finding with respect to these savings, which was based on NU's assessment that the combined NU/PSNH system will be required to provide approximately 100 megawatts less capacity to meet its obligations under the NEPOOL agreement. 31/ (See discussion of reallocation of generating capacity savings to other NEPOOL members, infra, pp. 42-44.

Administrative and General Expense and Coal Purchasing Savings. There would be estimated savings of $124 million attributable to reduced administrative expenses and $39 million attributable to more advantageous coal purchases. JA 997 n.88

31/ See JA 184-85, 291-93 (testimony of Sabatino); JA 728 (summary of synergies); JA 591-612 (New Hampshire Public Utilities Commission Decision); JA 802-03. The generating capacity for which each member of NEPOOL is responsible is determined on the basis of two components that relate to peak load -- one component (70%) consisting of the member's peak load during a 16-month rolling period and the other component (30%) consisting of the member's average monthly peak load in a 12-month period. The peak loads of NU and PSNH occur at different times of the year -- that of NU in the summer, due to air-conditioning needs in Connecticut, and that of PSNH in the winter, due to heating needs in New Hampshire. Consequently, when NU and PSNH combine, the new system will have a peak load for any 16-month period that is lower than the sum of the annual peak loads of the separate systems. This will result in a reduction of the generating capacity for which the combined system will be responsible under the NEPOOL Agreement. JA 184-85, 291-93 (testimony of Sabatino); JA 338-40 (testimony of Walter T. Schulteis, Vice President for Power Supply Planning and Research for various NU subisidiaries).

(47 S.E.C. Dkt. 1939 n.88). Record evidence supports the Commission's finding with respect to these savings, which was based upon the consolidation of corporate administrative functions and the ability of the combined system to obtain volume discounts that are unavailable to PSNH alone. 32/

* * *

In sum, the Commission's analysis of savings attributable to the merger was supported by substantial evidence in the record. There is no basis for the petitioners' challenge to the Commission's determinations under Section 10(c)(2).

B. The Commission Took into Account the Petitioners' Objections with Respect to Savings Attributable to the Acquisition.

There is also no merit in the petitioners' assertions (Br. 36-39) that the Commission did not adequately address their objections to NU's assessment of savings. The Commission specifically addressed the objection that some of the probable savings were obtainable without the acquisition as well as the objection that the projected savings would increase costs for other NEPOOL members.

In response to the first objection, the Commission found that several of the savings were in fact new "and could not result except from the Acquisition," including reduced costs in operating Seabrook due to NU's experience with multi-unit nuclear operations, and savings in administrative costs and coal

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32/ JA 305-09 (testimony of John W. Noyes, Vice President for Regulatory Relations for various NU subsidiaries); JA 728 (summary of synergies).

purchases. See JA 1006-07, 1127-28 n.25 (47 S.E.C. Dkt. 1948-49, 48 S.E.C. Dkt. 787-88 n.25). 33/ The Commission expressly rejected the petitioners' contention (Br. 38) that the Seabrook savings should not be counted because these savings could be achieved through a contractual arrangement between NU and PSNH. JA 1127-28 n.25 (48 S.E.C. Dkt. 787-88 n.25). In rejecting this argument, the Commission pointed out that without the acquisition NU would not be subject to the PUHCA requirement that affiliated companies must provide services at cost and thus the savings would not necessarily occur under a contractual arrangement. Id. 34/

In response to the second objection, the Commission did acknowledge that certain savings attributable to the merger could result in reallocations of costs to other NEPOOL members -- i.e., the reallocation of $218 million due to reduced NU/PSNH energy expenses and the reallocation of $146 million due to reduced NU/PSNH generating capacity requirements. JA 1007 (47 S.E.C. Dkt. 1949); see also JA 996 n.86, 997 n.87 (47 S.E.C. Dkt. 1938

33/ In response to the Commission's determination that the Seabrook savings would not necessarily be achieved without the acquisition, the petitioners argue (Br. 38-39) that savings could accrue to a stand-alone PSNH because of the lessons learned during NU's interim management. However, the petitioners do not attempt to quantify the value of savings that might occur in this way. The speculative possibility of such savings does not detract from the Commission's finding that NU's projected benefits from the more efficient operation of the Seabrook plant are attributable to the acquisition.

34/ The FERC also rejected this argument, ruling that benefits were attributable to the merger even if they might be achieved by other means, such as a contractual arrangement. FERC Order at 16-17.

n.86, 1939 n.87). However, those reallocations would be largely offset by savings due to NU's operation of the Seabrook nuclear plant, which would amount to $318 million for owners of Seabrook other than NU's operating subsidiaries. JA 995-96 n.84 (47 S.E.C. Dkt. 1937-38 n.84).

In addition, the $46 million in reallocations to other NEPOOL members remaining after the offset 35/ must be considered in light of a transaction that is projected to produce $837 million in savings to the NU/PSNH system, as well as the benefit of PSNH's emergence from bankruptcy. JA 995, 1128 n.26 (47 S.E.C. Dkt. 1937, 48 S.E.C. Dkt. 788 n.26). Moreover, the shifting of costs to other NEPOOL members as a result of mergers is a direct consequence of the terms of the NEPOOL Agreement and was contemplated by the NEPOOL members when they entered into the Agreement. 36/

Since the Commission made findings with regard to the costs that would be reallocated to other utilities under the terms of the NEPOOL agreement and the benefits of the acquisition that

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35/ The $218 million attributable to energy expense savings and $146 million attributable to peak load savings that would be subject to reallocation to other NEPOOL members would be offset by $318 million in savings to NEPOOL members through NU's operation of Seabrook.

36/ The drafters of the agreement were aware of the possibility of mergers and took it into account. See JA 1067 (testimony of Robert O. Bigelow, Vice President, New England Electric System and a NEPOOL founder: "It was recognized that [mergers] could happen in the future and we spelled out the ground rules and recognized that that would happen when it happened. And the people who didn't like it got something else for it.")

outweigh these costs, there is no basis for the petitioners' claim that the Commission failed adequately to address costs shifted to other NEPOOL members. 37/

IV. THE PETITIONERS' REMAINING ARGUMENTS ARE WITHOUT MERIT.

A. The Commission Addressed HG&E's Complaint That the Acquisition Would Result in an Unduly Complicated Structure.

HG&E argued before the Commission that the existence of three NU operating subsidiaries that provide electric service in Massachusetts constituted an unduly complicated corporate structure. 38/ HG&E urged the Commission either to reject the acquisition or to order restructuring of the Massachusetts subsidiaries. The Commission denied HG&E's requests on the grounds that the acquisition would neither create undue complication in the NU system nor have any effect on the existing corporate structure of NU's operations in Massachusetts. JA 1126-27 (48 S.E.C. Dkt. 786-87).

The Commission's decision in this regard was correct. The acquisition of PSNH by NU was a complex transaction requiring

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37/ The petitioners' argument (Br. 20, nn.29 & 30) that savings due to the acquisition would be "swamped" by the societal costs of lessened competition is also unfounded. In making this argument, the petitioners appear to have assumed that the acquisition would not be conditioned to decrease anticompetitive effects. However, the acquisition as approved by the Commission is conditioned on approval by the FERC, which has imposed extensive measures specifically directed at mitigating potential anticompetitive effects.

38/ HG&E competes directly with an NU operating company in providing retail electricity to businesses in Holyoke, Massachusetts. Br. 6.

consideration of numerous PUHCA provisions. There was no need for the Commission to consider the questions raised by HG&E about NU's Massachusetts operations, which have existed in this form since 1967, in this proceeding. As the petitioners acknowledge (Br. 43, n.67), this issue could be dealt with in another proceeding. In approving the acquisition, the Commission has not taken any action that would affect such a future determination. 39/

B. The Commission's Conclusion that the Securities To Be Issued in Connection with the Acquisition Were "Reasonably Adapted" to NU's Earning Power Was Sound.

The Commission based its findings with respect to earning capacity upon its assessment of NU's existing financial condition and projected financial data through 1996 for PSNH and North Atlantic, the two principal new operating subsidiaries being added to the NU holding company system. See JA 974-75, 984-86 (47 S.E.C. Dkt. 1916-17, 1926-28). 40/ The evidence considered

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39/ The petitioners' argument (Br. 42-43) that the acquisition could be detrimental to simplification of NU's Massachusetts corporate structure in the future is unfounded. They claim that NU's need for income from its subsidiaries to pay down debt incurred as a result of the acquisition could preclude the Commission from ordering consolidation or divestiture. But it is unlikely that NU will need income from its other subsidiaries to pay down the debt incurred for the acquisition of PSNH in view of the 5.5% annual rate increases guaranteed NU by the New Hampshire legislature and the New Hampshire Public Service Commission. Furthermore, the petitioners have made no showing of how a need for income, if it did exist, could interfere with consolidation or divestiture of NU's Massachusetts subsidiaries.

40/ Earning capacity was examined both in connection with the Commission's evaluation under Section 7(d)(2) of whether a (continued...)

by the Commission included NU's and PSNH's current financial statements and projected income statements, balance sheets, and cash flow for PSNH and North Atlantic through 1996. 41/ Thus, it is not true, as the petitioners assert (Br. 44), that the Commission failed to analyze the data needed to support its findings on earning capacity.

The Commission found that the projected return on investment for NU appeared to be reasonable and represented an appropriate risk to NU's investors and the public. JA 986 (47 S.E.C. Dkt. 1928). In making its findings, the Commission relied in large part upon the seven annual 5.5 per cent rate increases approved by New Hampshire authorities. See JA 975 (47 S.E.C. Dkt. 1917). 42/ The Commission concluded that the rate increases, when coupled with the existing financial health of the NU system, would

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40/(...continued)
security is "reasonably adapted to the earning power of the declarant" and under Section 10(b)(2) of whether the consideration for the securities acquired is reasonable in light of "the earning capacity of * * * the utility assets underlying the securities to be acquired."

41/ See JA 750-57 (NU balance sheets and income statements, per books and pro forma, as of June 30, 1990); JA 125-51, 152-80 (Busch testimony with attached projected income statements, balance sheets and cash flow for PSNH and North Atlantic through 1996).

42/ The rate increases were considered so important to the financial health of the combined system that the Commission reserved jurisdiction for further consideration in the event the rate agreement between NU and the New Hampshire authorities did not go into effect. See JA 1016 (47 S.E.C. Dkt. 1958). The Commission also noted in its opinion that the New Hampshire Public Utilities Commission had considered the financing needed to consummate the acquisition and their effect on PSNH's financial structure. JA 973 (47 S.E.C. Dkt. 1915).

provide sufficient earnings for the combined system to satisfy its obligations arising from the acquisition. Id. 43/

C. An Evidentiary Hearing Was Not Warranted.

There was no reason for the Commission to hold an evidentiary hearing in this case. The Commission gave all parties the opportunity to submit whatever evidence and testimony they deemed appropriate, including testimony submitted in the parallel proceeding before the FERC. The petitioners took advantage of this opportunity and submitted a large volume of evidence, including extensive testimony that was also submitted to the FERC. 44/ The Commission, after having examined the evidence in the record, determined that there was no purpose to be served by a hearing. As the Commission pointed out, it is "'not required to hold a hearing if the issues before it would

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43/ Contrary to the petitioners' assertion (Br. 44), the Commission did take into account the effect of the acquisition on NU's debt structure. The Commission evaluated the debt structure of the combined NU/PSNH system in its consideration of Section 7(d)(1), 11 U.S.C. 79 g(d)(1), which prohibits approval of the issuance and sale of a security that is not "reasonably adapted to the security structure of the declarant and other companies in the same holding company system." JA 971-74 (47 S.E.C. Dkt. 1913-16). The Commission noted that the pro forma consolidated capital structure of NU and PSNH showed a ratio of equity to total capital of approximately 28% at the time of the acquisition and 33% two years thereafter. JA 973 and n.49 (47 S.E.C. Dkt. 1915 and n.49). See JA 189. While the Commission generally requires an equity to total capitalization ratio of not less than 30%, it approved the acquisition because of the need to resolve the bankruptcy proceedings in an efficient and expeditious manner and the projected increase to a ratio exceeding 30% within two years. JA 974 (47 S.E.C. Dkt. 1916).

44/ The material submitted by the petitioners for the record totalled well over 3,000 pages.

not be further developed in a hearing.'" JA 1012 (47 S.E.C. Dkt. 1954) (citation omitted).

Significantly, the petitioners do not identify with specificity any issue that would have been further developed in a hearing. 45/ This is not surprising since the issues at stake do not involve unresolved factual questions but rather the conclusions that the Commission is entitled to draw from the facts. 46/

45/ The petitioners claim (Br. 46-47) that eight errors "'appear to flow from the absence of an evidentiary record,'" citing a brief submitted to the Commission by one of the petitioners. But the eight "errors" that the petitioners allege turn out to be no more than variations of two familiar issues with regard to which copious evidence was submitted and which the Commission did address -- the Commission's alleged failure to consider anticompetitive effects and the Commission's alleged mistakes with regard to economies and efficiencies. See JA 1017-22.

46/ These issues are:

- whether the Commission properly looked to the FERC for a resolution of the anticompetitive problems caused by the NU/PSNH merger;

- whether the Commission properly concluded that the savings due to NU's operation of Seabrook should be considered an economy attributable to the merger despite the petitioners' claim that these savings could also be achieved by contract;

- whether the Commission properly concluded that the $318 million in Seabrook savings to utilities other than PSNH could be deemed to offset all but $46 million of the costs to other utilities;

- whether the Commission properly concluded that the projected savings of $837 million due to the acquisition outweighed the remaining costs of $46 million to other utilities;

- whether the Commission properly rejected HG&E's request

(continued...)

The Commission's determination that no hearing was warranted is consistent with Association of Massachusetts Consumers, Inc. v. SEC, supra, 516 F.2d at 715, in which this Court held that a hearing is necessary only if a party can show that the resolution of the issue requires a hearing and that the denial of a hearing was an "abuse of discretion." See also Wisconsin's Environmental Decade, Inc. v. SEC, supra, 882 F.2d at 526 (a hearing is required only to settle "a genuine issue of material fact"); Vermont Department of Public Service v. Federal Energy Regulatory Commission, 817 F.2d 127, 140 (D.C. Cir. 1987) (absent a showing of an abuse of discretion, court will "defer to an agency's determination that a controversy raises no [issue requiring a hearing]"). The record before the Commission was adequate to resolve the issues raised by the petitioners. Thus, the Commission did not abuse its discretion when it denied the petitioners' requests for a hearing.

46/(...continued)

that it order a restructuring of NU's Massachusetts subsidiaries when the situation would have no effect upon and would not be affected by the acquisition; and

- whether the Commission properly concluded that the securities issued in connection with the acquisition were reasonably adapted to NU/PSNH's earning power, based upon projected earnings of PSNH and North Atlantic, the 5.5 percent annual rate increases, and NU's existing financial health.

CONCLUSION

For the foregoing reasons, the opinions and orders of the Securities and Exchange Commission dated December 21, 1990 and March 15, 1991 should be affirmed.

Respectfully submitted,

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STATUTORY ADDENDUM

Pertinent Statutes

Index

STATUTES:

§ 79a. Necessity for control of holding companies

(a) Interstate nature of holding companies

Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Protection of investors and interests of consumers

Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Energy and Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) Declaration of policy of chapter

When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is declared to be the policy of this chapter, in accordance with which policy all the provisions of this chapter shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this chapter.

(Aug. 26, 1935, ch. 687, title I, § 1, 49 Stat. 803; Mar. 25, 1980, H. Res. 549.)

Section 7(d) of the PUHCA, 15 U.S.C. 79g(d)

(d) Conditions having permission of effectiveness

If the requirements of subsections (c) and (g) of this section are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;

(2) the security is not reasonably adapted to the earning power of the declarant;

(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or

(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

Sections 10(b) and (c) of the PUHCA, 15 U.S.C. 79j(b) and (c)

(b) Conditions affecting approval

If the requirements of subsection (f) of this section are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

The Commission may condition its approval of the acquisition of securities of another company upon such a fair offer to purchase such of the other securities of the company whose security is to be acquired as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

(c) Conditions barring approval

Notwithstanding the provisions of subsection (b) of this section, the Commission shall not approve—

(1) an acquisition of securities or utility assets, or of any other interest, which is unlawful under the provisions of section 79h of this title or is detrimental to the carrying out of the provisions of section 79k of this title; or

(2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commission finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system. This paragraph shall not apply to the acquisition of securities or utility assets of a public-utility company operating exclusively outside the United States.

(b) Limitations on operations of holding company systems

It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system. *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 79x of this title.

Section 20(a) of the PUHCA, 15 U.S.C. 79t(a)

§ 79t. Rules, regulations, and orders

(a) Authority of Commission to make

The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this chapter, including rules and regulations defining accounting, technical, and trade terms used in this chapter. Among other things, the Commission shall have authority, for the purposes of this chapter, to prescribe the form or forms in which information required in any statement, declaration, application, report, or other document filed with the Commission shall be set forth, the items or details to be shown in balance sheets, profit and loss statements, and surplus accounts, the manner in which the cost of all assets, whenever determinable, shall be shown in regard to such statements, declarations, applications, reports, and other documents filed with the Commission, or accounts required to be kept by the rules, regulations, or orders of the Commission, and the methods to be followed in the keeping of accounts and cost-accounting procedures and the preparation of reports, in the segregation and allocation of costs, in the determination of liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the keeping or preparation, where the Commission deems it necessary or appropriate, of separate or consolidated balance sheets or profit and loss statements for any companies in the same holding-company system.

§ 79x. Court review of orders

(a) Petition; jurisdiction; findings of Commission; additional evidence; finality

Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided*, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further*, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy; regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e) of this section.

(g) Continuance of service

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to—

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting—

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall—

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage.

(June 10, 1920, ch. 285, § 202, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 848, and amended Aug. 7, 1953, ch. 343, 67 Stat. 461; Nov. 9, 1978, Pub. L. 95-617, title II, § 206(a), 92 Stat. 3141.)

§ 824b. Disposition of property; consolidations; purchase of securities

(a) Authorizations

No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

(b) Orders of Commission

The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it 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. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

(June 10, 1920, ch. 285, § 203, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 849.)

§ 824c. Issuance of securities; assumption of liabilities

(a) Authorization by Commission

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

(b) Application approval or modification; supplemental orders

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78l, and 78m of title 15.

(June 10, 1920, ch. 285, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851, and amended Nov. 9, 1978, Pub. L. 95-617, title II, §§ 207(a), 208, 92 Stat. 3142.)

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(June 10, 1920, ch. 285, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852, and amended Oct. 6, 1988, Pub. L. 100-473, § 2, 102 Stat. 2299.)