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BEFORE THE

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

* * * * * *

Re: Joint Petition of Public Service Co. of New Hampshire,
Northeast Utilities and Consolidated Edison Company
for Approval of Merger

Docket No. DE-00-009

* * * * * *

INITIAL BRIEF

OF

SAVE OUR HOMES ORGANIZATION (SOHO)

August 11, 2000

SUMMARY OF SOHO ARGUMENT

Save Our Homes Organization (SOHO) presents a traditional merger analysis in this proceeding. Under this analysis, the New Hampshire Public Utilities Commission (NHPUC) must begin its analysis of the pending merger by defining the markets that will be affected by the merger. After those markets are defined, the NHPUC must then determine whether the benefits of the merger are appropriately "passed-on" within each market. If, within a defined market, the merger results in adverse impacts which impede the passing-on of the benefits, or if the benefits of the merger are inappropriately passed-on to that market, the NHPUC must impose appropriate mitigation measures if the merger is to be approved.

In the pending proceeding, neither the Company nor the Commission staff sought to define appropriate markets. Indeed, the Company concedes that it did *not* consider the impacts of the merger on any particular market, but rather simply on the Company as a whole. The merger cannot be approved on such a record.

In contrast, SOHO supported its identification of low-income consumers as a separate market. SOHO used the traditional factors that go into market definition, including demand elasticity (or its surrogates) and the "practical indicia" articulated by the U.S. Supreme Court in *Brown Shoe*. SOHO then supported its conclusion that the merger will *both* result in adverse impacts to the low-income market that will impede the passing-on of benefits *and* inequitably pass-on benefits to the low-income market. Either of these results standing alone, and certainly the two results in combination, support the proposed mitigation measures SOHO offers through the proposed Community Energy Partnership Program (CEPP).

SOHO's CEPP is a mechanism designed to remediate the two results which SOHO found adversely affected the low-income market. The CEPP involves a package of remedies that includes energy efficiency, arrearage forgiveness, low-income advocacy funding, adjunct community offices, and a deployment of the BOSS / Chronicles software program. In addition, SOHO proposed a reporting system through which specifically defined low-income universal service outcomes can be measured in a post-merger environment.

STATEMENT OF LEGAL PRINCIPLES

The First Step in Any Merger Analysis Involves Defining the Relevant Markets

In assessing any utility merger that comes before it for approval, a state utility regulatory commission must both: (1) delineate what the relevant markets are, and (2) determine the impacts of the merger on each market. The *first* step in assessing merger impacts, however, is a delineation of the relevant markets.

> The significance of the market definition issue is straightforward; a court must have a frame of reference within which to isolate and examine competitive effect. That

> frame of reference is a market--a place where buyers and sellers meet to engage in exchange.[1]

Establishing this "frame of reference" is not just good policy, it is legally required. The U.S. Supreme Court has held that "proper definition of the market is a *'necessary predicate'* to an examination of the competition that may be affected by the horizontal aspects of the merger,"[2] and a sound appraisal of the immediate and future impact of this merger must be based on a "firm understanding of the structure of the relevant market."[3] "Without a definition of the relevant market, there is no way to measure [the]. . . ability [of the challenged transaction] to lessen or destroy competition."[4] Time after time, the Supreme Court (amongst others) has held that the definition of relevant markets is the critical first step in assessing the impacts of a proposed merger.[5]

Defining Markets is Not Simply an Antitrust Process but Must be Done by State Utility Regulators as Well.

While market definition is obviously ubiquitous in antitrust analysis, it not confined exclusively to antitrust litigation. State and federal utility regulators must engage in a market definition, as well, in assessing the impacts of proposed mergers under utility regulatory law. It is not a revolutionary concept that utilities serve multiple markets today. And, utility regulators routinely face the task of defining what those markets are in order to properly assess the appropriateness of mergers (or the need to qualify merger approval on regulatorily-imposed conditions). In the telecommunications industry, for example, distinction has been made between the intraLATA toll and local usage markets, as well as between residential and business markets. *Re. GTE Corporation*, Docket No. 98-0866, Slip Opinion (Illinois Commerce Commission, October 29, 1999). For merger evaluation purposes, distinction has also been made between the wholesale and retail markets, as well as between markets involving local access and advanced services. *Re. Qwest Communications Corp.*, Docket No. D99.8.200, Order No. 6199d, Slip Opinion (Montana Public Service Commission, May 9, 2000). The Public Utilities Commission of Ohio distinguished, in its merger evaluation, between the market consisting of competitive business services and the market consisting of basic local residential services. *Re. SBC Communications*, Case No. 98-1082-TP-AMT (PUCO, April 8, 1999).

\1\ Dunfee, *et al.*, "Bounding Markets in Merger Cases: Identifying the Relevant Competitors," 78 ***Nw. U. L. Rev.*** 733 (1984) (citations omitted).

\2\ ***Brown Shoe Co. v. United States***, 370 U.S. 294, 335, 82 S.Ct. 1502, 1529, 8 L.Ed.2d 510 (1962).

\3\ ***United States v. Philadelphia Nat'l Bank***, 374 U.S. 321, 362, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963).

\4\ ***Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.***, 382 U.S. 172, 177, 86 S.Ct. 347, 350, 15 L.Ed.2d 247 (1965).

\5\ *See e.g.*, ***Walker, Inc. v. Food Machinery***, 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965); *see also*, ***Joe Westbrook, Inc. v. Chrysler Corp.***, 419 F.Supp. 824, 844 (N.D.Ga.1976); ***Southern Concrete Co. v. United States Steel Corp.***, 394 F.Supp. 362, 379 (N.D.Ga.1975), *aff'd*, 535 F.2d 313 (5th Cir. 1976), cert. denied, 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543 (1977).

Distinguishing between different markets is not unique to telecommunications, however. In its assessment of the impacts of the proposed merger application of Utah Power and Light, the Utah Public Service Commission recognized a market consisting of interruptible power customers, and considered how the merger would uniquely affect that market. *Re. Utah Power and Light Company*, Utah Public Service Commission, 97 P.U.R.4th 79 (Sept. 1999). FERC routinely recognizes the different markets which a utility serves when it considers merger proposals. In assessing the Utah Power and Light merger proposal, FERC recognized nonfirm transmission service as a separate market. *Re. Utah Power and Light Company*, 47 FERC para. 61,209 (May 12, 1989). FERC further recognized the distinction between the markets consisting of transmission service and bulk power supply. *Re. Utah Power and Light Company*, 45 FERC para. 61,095 (October 26, 1988), *accord*, *Re. Southern California Edison Company (SCE)*, Decision 91-05-028, 40 C.P.U.C.2d 159 (California PUC, May 8, 1991) (recognizing the distinction between transmission and bulk power market). The Connecticut Department of Public Utility Control, in assessing the proposed merger of Energy East Corporation, in assessing natural gas commodity markets, recognized a distinction between the commercial and industrial markets (in which there was existing competition) and the residential market (where there was none). *Re. Energy East Corporation*, Docket No. 99-08-09, slip opinion (Conn. DPUC, January 19,2000).

In brief, just as SOHO has argued in this proceeding, the Illinois Commerce Commission hit the nail on the head, in stating: “The first step in any merger analysis is to define the relevant markets. Identifying markets correctly is fundamental to any merger analysis because if they are not correctly identified, the Commission has no basis (or a faulty basis) on which to undertake its merger analysis.” *Re. SBC Communications*, Docket No. 98-0555 (September 23, 1999).

Having established the requirement -- not merely the need, but the requirement -- to define the relevant markets for purposes of a utility commission's merger analysis, it is necessary next to assess the legal principles applicable to defining the market.

“Markets” are to be Demarcated Using Established Legal Principles

“Markets” are not demarcated by cost causation principles that go into defining customer classes for ratemaking purposes. Instead, the delineation of an economically relevant market involves an assessment of the degree of product substitutability. A market is an “area of trading,” which can be defined geographically or in terms of product differential.[6] For goods or service to be in the same “product market,” they must be reasonably interchangeable in price, use and quality.[7] According to one commentator, “a market simply defined is an area within which a group of sellers compete for the patronage of a common group of buyers.”[8] The first two fundamental characteristics of market definition thus involve: (1) that there be a rivalry for the purchase decisions of buyers; and (2) that

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\6\ Clarke, ***Competition as a Dynamic Process***, at 105 (1961).

\7\ Lipson, "Monopolization: Traditional Standards and Future Directions," 47 ***Antitrust Law Journal*** 1115, 1117 (1978).

\8\ Pace, "Relevant Markets and the Nature of Competition in the Electric Utility Industry," 16 ***Antitrust Bulletin*** 725, 725 (1971).

there be a *commonality amongst the sought-after buyers*. SOHO focuses on the second part of this inquiry.

The Use of Elasticity and Functional Interchangeability

Differences in markets are often determined through the application of two closely-related tests: functional interchangeability and demand elasticity.[9] Market differences can be determined through an evaluation of the elasticity of consumer demand.[10] It is this elasticity through which one can measure the extent to which the market offers close substitutes.[11] Elasticity can serve as a surrogate measure for a number of different situations. It can indicate a lack of meaningful alternatives.[12] It can indicate the presence of high search costs associated with gains of uncertain magnitude or duration.[13] It can indicate brand loyalty, habit buying or significant product differentiation.

A second test for a market is whether the services provided are interchangeable between two groups of customers.[14] If they are not, the customers are not in the same market. A leading antitrust case defining the relevant "market" is *United States v. E.I. DuPont De Nemours*.[15] In *DuPont*, the United States charged the company with monopolizing or attempting to monopolize in the cellophane industry. The relevant market, the *DuPont* Court said, "depends upon the availability of alternative commodities for buyers: *i.e.*, whether there is a cross-elasticity of demand between cellophane and the other wrappings." The interchangeability, the Court continued, "is largely gauged by the purchase of competing products for similar uses considering the price, characteristics

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\9\ These are the principal tests that have been adopted by the Supreme Court, *see e.g.*, ***Brown Shoe Co. v. United States***, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523-1524, 8 L.Ed.2d 510 (1962); ***United States v. E.I. DuPont de Nemours & Co.***, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956) ("Cellophane case"); ***United States v. Continental Can Co.***, 378 U.S. 441, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964); by the Eighth Circuit, ***United States v. Empire Gas Corp.***, 537 F.2d 296, 303-04 (8th Cir.1976), cert. denied, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1987); ***General Industries Corp. v. Hartz Mountain Corp.***, 810 F.2d 795 (8th Cir.1987); ***Schaben v. Samuel Moore & Co.***, 462 F.Supp. 1321, 1334 (S.D.Iowa 1978), aff'd, 606 F.2d 831 (8th Cir.1979); by other courts of appeals, ***American Crystal Sugar Co. v. Cuban-American Sugar Co.***, 259 F.2d 524 (2d Cir.1958); ***SmithKline Corp. v. Eli Lilly & Co.***, 575 F.2d 1056 (3d Cir.), cert. denied, 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978).

\10\ ***United States v. Archer-Daniels-Midland and Nabisco Brands, Inc.***, 695 F.Supp. 1000 (S.D. Iowa 1987).

\11\ Cochrane and Bell, ***The Economics of Consumption***, at 329 (New York 1956); see, Note, "The Market: A Concept in Antitrust," 54 ***Columbia Law Review*** 580 (1954).

\12\ *See e.g.*, Pace, "Relevant Markets and the Nature of Competition in the Electric Utility Industry," 16 ***Antitrust Bulletin*** 725, 728 - 734 (1971). (Residential energy users lack meaningful alternatives).

\13\ *See e.g.*, Hanson, *et al.*, ***Monitoring Competition: A Means of Regulating The Property and Liability Insurance Business***, at 124 - 125, National Association of Insurance Commissioners (May 1974) (search costs for least-cost property and casualty insurance are high.)

\14\ ***United States v. Empire Gas Corp.***, 537 F.2d 296, 303 (8th Cir.1976).

\15\ 351 U.S. 377 (1956).

and adaptability of the competing commodities."[16] A "market," the Court concluded, is "composed of products that have reasonable interchangeability for the purpose for which they were produced--price, use and qualities considered."[17]

The Alternative Use of the *Brown Shoe* "Practical Indicia" of Markets

As an alternative to the use of demand elasticity and functional interchangeability as the tests to define markets, the U.S. Supreme Court established a series of "practical indicia" through its seminal *Brown Shoe* decision.[18] Among the practical indicia recognized by the Supreme Court as appropriate for defining a market were factors such as:

- An industry or public recognition of the market as a separate economic unit.
- A product's peculiar characteristics.
- Distinct customers.

These "practical indicia" can stand as surrogates for the use of demand elasticity analysis.

"Ratepayers" and "Markets" are not the Same.

Customer classes for utility ratemaking purposes are not synonymous with markets for purposes of evaluating mergers. Customer classes are utility ratemaking mechanisms designed to provide cost recovery for a utility. These classes are designed based primarily upon cost-causation characteristics. These characteristics include energy, demand, customers and other characteristics associated with cost causation.

The fact that these cost-causation characteristics are not the same characteristics to be used in defining markets can be illustrated by reference, if nothing else, to one simple fact. The most common, though by no means exclusive, test for determining a market is the elasticity of demand.[19] The use of demand elasticity for ratemaking purposes, however, has a specific name: value-of-service pricing.[20] Cost-of-service ratemaking principles used in a state such as New Hampshire stand in sharp contrast to value-of-service pricing principles.

\16\ *Id.*, at 380 - 381.

\17\ *Id.*, at 404.

\18\ ***Brown Shoe v. United States***, 370 U.S. 294, 325 (1962).

\19\ *See*, notes 9-17, *supra*, and accompanying text.

\20\ No less an authority than James Bonbright states: "In the literature of economics, the value-of-service principle is taken most frequently to mean that principle of pricing under which the differences in the prices charged by a given enterprise for its various products are based not just on differences in the costs of production, but also on differences in the urgency (i.e., direct price elasticity) of demand." James Bonbright, *et al.* (1988). ***Principles of Public Utility Rates*** (2d ed.), at 135, Public Utility Reports: Arlington (VA).

As can be seen, the definition of markets cannot be reconciled with the definition of customer classes. The very factor that is used primarily as the mechanism to define a "market" (elasticity) is a factor that has been explicitly rejected as a basis for cost-of-service ratemaking.

Merger Litigation Can Appropriately Consider Impacts on Subsets of Markets.

It is not necessary, in assessing whether merger savings are passed on to all customers, to lump all ratepayers together into one group for evaluation. A detailed discussion was presented above on how different ratepayers, taking different types of service, are considered to be in separate markets. Even within a single market, however, there can be sub-markets. In the SBC-Ameritech merger proceeding in Ohio, for example, one Commissioner noted that:

> the Commission stated in its October 15 entry that. . .the joint applicants needed to clarify how the issue of cost savings would be addressed in the future for those customer classes or the areas of Ohio where competition has not developed as the tool for the pass-through of cost savings. The Commission's staff concluded that, as long as the joint applicants continue to have captive ratepayers without competitive alternatives, such ratepayers should benefit from any increased synergies resulting from the merger.[\21\]

This decision recognizes both subsets of ratepayers and subsets of geographic areas. In addition to this Ohio decision, it is established law that even within a market, there can be a variety of submarkets that merit separate consideration.[\22\] "It is clear that these seven [*Brown Shoe*] criteria are litmus paper tests that must be held up against the proposed submarket in order to determine whether a relevant submarket exists. *If a sufficient number of those indicia are present, a valid submarket has been established*."[\23\]

Whether or not SOHO has established low-income consumers as a separate "market," or whether low-income consumers are merely a "sub-market" of the broader residential market, has no legal consequence for the analysis that SOHO has presented.

New Hampshire's Utility Merger Statute Explicitly Requires the Passing-On of Benefits.

New Hampshire's merger statute articulates the basic principles to be applied in assessing whether to approve any proposed merger. The statute articulates two tests:

\21\ ***Re. SBC Communications, Inc.***, Case No. 98-1082-TP-AMT, 193 P.U.R.4th 86 (Jones dissent) (PUCO, April 8, 1999).

\22\ ***Brown Shoe***, *supra*.

\23\ ***Harnishfeger Corp. v. Paccar, Inc.***, 474 F.Supp. 1151, 1155 (E.D. Wis.), *aff'd without opinion*, 624 F.2d 1103 (7th Cir. 1979). (emphasis added).

1. ". . .the merger, acquisition, or sale shall be approved only if it is shown to be in the public interest." RSA 369-B:3, IV(b)(4)(A).
2. "The commission may approve such a merger if such approval results in the receipt by PSNH customers of a just and reasonable amount of cost savings that result from such merger, acquisition or sale." RSA 369-B:3, IV(b)(4)(B).

SOHO will focus on the second statutory standard. This standard places New Hampshire in the group of states that apply a "consumer welfare" standard of merger analysis. Moreover, the statute explicitly creates a "passing-on" requirement to be implemented as part of the merger consideration process by the NHPUC.

The Consumer Welfare Standard Requires a "Passing-On" of Merger Savings.

As with any other type of horizontal merger, utility mergers are argued to benefit society because they generate "efficiencies." These efficiencies arise as a result of the synergies created by a combination of two or more firms. In this case, SOHO addresses certain issues raised by these claimed synergies.

The goals of a merger review can be broken down into two primary schools of thought. On the one hand, some economists adopt an "allocative efficiency" view of the world. Under this view, a merger should be approved if the transaction creates net positive efficiencies, thus increasing total wealth on a societal basis. On the other hand, there is the "consumer welfare" approach to evaluating mergers. This model asserts that the purpose of merger reviews is to prevent increases in consumer prices due to the exercise of market power.[\24\] The New Hampshire statute quoted above firmly places New Hampshire into the consumer welfare model.[\25\]

To recognize efficiencies, the consumer welfare model demands that efficiency benefits be passed-on to consumers. The Federal Trade Commission (FTC) first articulated a passing-on requirement in American Medical International.[\26\] AMI sought to significantly increase its market share by merging with French Hospital. AMI claimed the merger would generate efficiencies of 5.6%. In holding the efficiencies did not outweigh any increase in market power, the FTC said that "assuming that these cost savings can be realized, AMI does not establish that they will necessarily inure to the benefit of consumers. . ."[\27\] The requirement that merger efficiencies be passed-on to consumers has been repeatedly applied since.[\28\] Typical is the district court's reaction to the United

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\24\ Fisher and Lande, "Efficiency Considerations in Merger Enforcement," 71 ***California L.Rev***. 1580, 1592 (1983).

\25\ When courts require that benefits be passed-on to consumers, they are adopting a consumer welfare standard. Thomas Greaney, "Regulating for Efficiency in Health Care through the Antitrust Laws," 1995 ***Utah L.Rev.*** 465, 495 (1995).

\26\ 104 FTC 1 (1984).

\27\ *Id.*, at 219; *accord*, ***U.S. v. Rockford Memorial Corp.***, 717 F.Supp. 1251 (N.D.Ill. 1989).

\28\ *See e.g.*, ***FTC v. University Health***, 938 F.2d 1206 (11th Cir. 1991); ***FTC v. Staples Inc.***, 970 F.Supp. 1066 (D.D.C. 1997); ***U.S. v. Mercy Health Services***, 902 F.Supp. 968, 987 (N.D. Iowa 1995), *vacated*, 107 F.3d

Tote's claim that the merger of two manufacturers of off-track betting equipment would yield efficiencies in research and development, ability to raise capital, and managerial practices. ". . .even if the merger resulted in efficiency gains, there are no guarantees that these savings would be passed-on to the consuming public."[\29\] So, too, is the district court's holding in *Staples* typical. In approving the FTC's request for a temporary injunction, the district court found that "the defendants' projected pass through rate --the amount of projected savings that the combined company expects to pass on to consumers in the form of lower prices–is unrealistic."[\30\]

The function of the passing-on requirement is to mandate that consumers benefit directly from a merger. While the passing-on requirement takes on different forms of statement in various legal opinions, the commonality within all opinions is the mandate that the mergers must "benefit" consumers[\31\] or that they must result in a "net economic benefit" to consumers.[\32\]

Passing-on Analysis Must Take a Merger's Impacts on Services into Account.

Any analysis of how a merged firm will pass-on merger benefits to consumers must take into account the impacts which the merger has on the provision of service. The service impacts resulting from a merger are referred to, in merger law, as "non-price attributes" of the merger.

It is not merely the "quality" of service which is to be taken into account. What is to be taken into account involves the type, number, level and quality of service. Antitrust law consistently recognizes this notion of service-adjusted prices.[\33\]

Impacts on Service Need Not Affect All Customers to Require Consideration in Merger Proceedings.

No question exists but that the impact which a merger has on the number, type, level and quality of service need not affect all consumers to become a factor to consider in an assessment of merger impacts. Consider, for example, the case of *Nelson v. Monroe Regional Center*.[\34\] In *Monroe Regional,* plaintiffs challenged a merger which allowed the merged firm to refuse to treat them except on an emergency basis. This result, according to the 7th Circuit Court of Appeals, was a reduction in output (denying non-emergency care to plaintiffs). According to the court, the antitrust

(..continued)
632 (8th Cir. 1997); ***U.S. v. United Tote, Inc.***, 768 F.Supp. 1064 (D.Del. 1991).

\29\ 768 F.Supp. 1064.

\30\ ***FTC v. Staples Inc.***, 970 F.Supp. 1066, 1090 (D.D.C. 1997).

\31\ ***FTC v. University Health., Inc.***, 938 F.2d 1206, 1223 (11th Cir. 1991).

\32\ ***U.S. v. Long Island Jewish Medical Center***, 983 F.Supp. 121, 146, 149 (E.D.N.Y. 1997).

\33\ *See e.g.*, ***Roland Mach. Co. v. Dresser Indus.***, 749 F.2d 380, 395 (7th Cir. 1984); ***Little Caeser Enter. v. Smith***, 1997-1 Trade Cases (CCH) para. 71,817, at 79,755 (E.D.Mich. 1997).

\34\ 925 F.2d 1555 (7th Cir. 1991).

analysis would take cognizance of this injury. Judge Cudahy's concurrence specifically states that turning away this "high maintenance," less profitable, more demanding client, represented "the very essence of antitrust injury. Although perhaps not a matter of major moment in dollars and cents, the merger and the related refusal to deal strike at the very heart of the evils addressed by the antitrust laws."[35]

Nelson presents the identical types of harms that have been identified with the PSNH merger. As one commentator noted, "*Nelson* implicitly recognizes that even though mergers and other forms of competitive collaboration can achieve important benefits for the majority of consumers, they can also create providers that can safely ignore the needs of the uninsured and the hard-to-treat."[36] In considering the passing-on of benefits for PSNH, these sub-markets of "high maintenance," less profitable, more demanding clients must be addressed, as SOHO discusses in this brief.

DISCUSSION OF THE RECORD EVIDENCE

One piece of record evidence stands out above all else in assessing the propriety of the merger now pending before the NHPUC.

> The review of impacts arising from the proposed merger has taken place to date with no consideration of the differences in the markets served (SOHO-1-017, SOHO-1-018, SOHO-2-023, SOHO-2-024). The analysis in the direct case has assumed that the merger impacts would arise in the same fashion, and perhaps even to the same degree, for all markets served.

(Colton Direct, Exhibit 22, at 8). Given that concession by the Company, (*see* Tr. Day 1, 7/10/00, p. 76), the *only* record evidence on the definition of markets, and on the impacts which the merger has on those markets, is that introduced by SOHO.

Low-Income Customers Represent a Separate Market

SOHO established that low-income consumers represent a separate market, whether one uses the legal test of elasticity or whether one uses the "practical indicia" articulated by *Brown Shoe*.

Elasticity and the low-income market: It is generally recognized that the elasticity of demand is positively associated with the income of consumers. SOHO witness Colton testified:

> Residential elasticity of demand differs substantially from the elasticity of demand for other customer classes. Demand elasticity is one of the primary measures by which to distinguish different markets. The elasticity of demand measures the extent to which consumers can, and will, turn to substitutes if the price of a product increases. It considers, for example, the ability of consumers to turn to reasonable alternatives to the product in question. It considers the price sensitivity of the product

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[35] 925 F.2d at 1568 (Cudahy concurring).

[36] Jacobs, "Rural Health Care and State Antitrust Reform," 47 ***Mercer L.Rev.*** 1045, 1048 (1996).

> in question as well. There can be no serious dispute that residential customers generally, and low-income customers in particular, have fewer alternatives, and lower price sensitivity, than large user customers in the commercial and industrial classes. . .
>
> The elasticity of demand helps to define a market even within the monopoly situation of a distribution electric utility. Low-income customers are less likely to fuel switch. They are less likely to have dual fuel capabilities. They are less likely to reduce consumption. As a result, higher rates and lower levels of service can be imposed with less likelihood to the monopoly utility that consumers will respond by reducing their usage or moving to alternative fuels or fuel suppliers.

(Colton Direct, Exhibit 22 at 10 - 12). Even aside from a direct measure of demand elasticity, however, Colton testified that the surrogates used for elasticity support the conclusion that low-income consumers are a separate market as well.

> Elasticity can serve as a surrogate measure for a number of different market characteristics. Low elasticity can indicate a lack of meaningful alternatives. It can indicate the presence of high search costs associated with gains of uncertain magnitude or duration. It can indicate high hurdle rates. Demand elasticity is one of the primary measures by which to distinguish different markets. While the Company has performed no specific elasticity study for low-income consumers (SOHO-3-001), we know that hurdle rates for low-income consumers are higher than for other consumers. We know further that search costs relative to the potential gains from switching energy suppliers are higher for low-income consumers. Each of these elements indicate a distinct market.

(Colton Direct, Exhibit 22 at 10 - 11). The elasticity of demand measures the extent to which consumers can and will turn to substitutes if the price of a product increases. It considers, for example, the ability of consumers to turn to reasonable alternatives to the product in question. It considers the price sensitivity of the product in question as well. There can be no serious dispute that residential customers generally, and low-income customers in particular, have fewer alternatives, and lower price sensitivity, than large user customers in the commercial and industrial classes.

The "practicial indicia" of Brown Shoe: Aside from elasticity and product interchangeability, the U.S. Supreme Court's *Brown Shoe* decision and its progeny have recognized several "practical indicia" of separate markets (or sub-markets). SOHO demonstrated that low-income utility consumers meet these "practical indicia," including:

- An industry or public recognition of the market as a separate economic unit. This is certainly true in New Hampshire for low-income consumers. There is an industry and public recognition of low-income consumers as a separate market (or as a sub-market). The very existence of the New Hampshire EAP is evidence of this. This recognition is further evidenced by the existence of programs not only such as EAP, but such as LIHEAP and the

federal Weatherization Assistance Program (WAP) as well. (Colton Direct, Exhibit 22, at 12; Colton Rebuttal, Exhibit 49 at 5).

- A product's peculiar characteristics. As SOHO established, the service demanded by low-income consumers is different from the service demanded by residential consumers generally. It would be easy to conclude that the "service" provided by an electric utility is solely the "service" of providing kWh to the consumer. This approach, however, is too narrow standing alone. (Colton Direct, Exhibit 22 at 11). Colton testified:

> There are multiple service components that low-income consumers use that distinguish them from the residential market generally. The services provided through the Company involving the treatment of payment-troubles are more likely to be used by low-income consumers than by residential customers as a whole. The services provided through the Company involving the need to make personal contact with the Company, whether to deal with payment-troubles or to make monthly payments, distinguish low-income customers from the residential class generally. The services involving the provision of information about public bill-paying assistance distinguish low-income customers from the residential class generally. (Colton Direct, Exhibit 22 at 13).

- Distinct customers. The reason that there is public and industry recognition of low-income consumers as a separate market, as well as unique characteristics to the service offered to low-income consumers is because low-income consumers are distinct consumers. SOHO established: "We know that low-income customers served in New Hampshire routinely face unaffordable electric bills. We know that, at the average 1998 residential bill for PSNH ($924), reduced to account for low-income status ($702), a LIHEAP recipient with an annual income of $6,000 would bear an electric burden of 12%; with an income of $4,000, the electric burden would be 18%. These are simply electric burdens. Home heating burdens are in addition to these electric burdens. These energy burdens tend to lead to payment-troubles with the corresponding need for low-income customers to avail themselves of Company services." (Colton Direct, Exhibit 22 at 13).

In sum, low-income consumers represent a separate market for merger analysis. Since in order to appropriately review the impacts that will arise as a result of this proposed merger, it is necessary for the NHPUC to consider all of the relevant markets, the NHPUC must consider the impacts on the low-income market. In reviewing the proposed merger, therefore, the PUC must: (1) assess whether the merger will generate adverse impacts that impede, at best, the passing-on of merger-related savings in the low-income market; and (2) consider whether the mechanism which the Company has proposed to distribute the dollars of synergy-induced savings disproportionately fails to distribute those savings to the low-income market. We next turn to a review of the record evidence on these issues.

Low-Income Consumers Will be Adversely Affected by the Proposed Merger

The proposed merger of NU with Consolidated Edison will unquestionably have an adverse impact on the services offered to PSNH low-income consumers.[37] According to PSNH, 70% of its customers who receive fuel assistance through the federal Low-Income Home Energy Assistance Program (LIHEAP) have arrears. (Colton Direct, Exhibit 22 at 42). These arrears average $213 per participant. (Colton Direct, Exhibit 22 at 42). The low-income customers of PSNH are in substantial need of services provided through PSNH customer service representatives.

The Problem of Consolidation

Irrespective of whether PSNH closes its New Hampshire call center, one result of the merger is that NU and Consolidated Edison will combine their information systems and require their customer service representatives to use uniform platforms through which to interact with their customers. (Tr. Day 4, 7/17//00, pp. 145-150). As SOHO witness Colton noted, the Company's synergy study makes clear the fact that PSNH will abandon its own data processing platform and move to using a uniform platform provided by Consolidated Edison.

SOHO's witness put a name on this merger impact. He called it "consolidation."

> Consolidation refers to the process of combining functions and offices so that a larger geographic area can be served with a smaller staff in fewer offices. As a company --be it health care, financial services, or electric utility-- expands its geographic service territory, however, the customer and institutional base to whom it is accountable becomes bigger as well. The larger group to which the firm is

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\37\ SOHO recognizes the agreement that no closure of the call center will occur without Commission review. To that extent, the problems SOHO identified with closure of the New Hampshire call center have been temporarily addressed. It should be noted, however, that contrary to Mr. Gelineau's assertion that the New Hamnpshire call center would *not* be closed (Tr. Day 2, 7/12/00, pp.12, 13) , the CEOs testifying in this case refused to make that commitment. (Tr. Day 3, 7/13/00, pp. 121, 122). Moreover, the Company refused to make that commitment in discovery responses. As Colton noted:

> The Company could not provide specifics on its post-merger operations. For example, the Company acknowledged that it would use a "service company structure" in its post-merger plans, but indicated that "it has yet to be determined which services would be provided by a service company in the new CEI structure, which services might be outsourced, and which services would be internalized in the various operating subsidiaries." (Staff-2-141). The Company refused to make a commitment to retaining, in New Hampshire, the "operating functions that are *currently* performed in New Hampshire" (Staff-1-027--emphasis added) ("until the transition teams complete their reviews and formulate their recommendations, and until decisions are made with respect to those recommendations, it is not possible to affirmatively state where various functions will be performed.") The only commitment made is to retain the PSNH headquarters in New Hampshire (Staff-1-127) and to "continue to have its operational *senior management* located in New Hampshire." (GECS-1-029) (emphasis added). The Company refused, however, to make a commitment that services currently provided by PSNH employees will not be "centralized." (Staff-1-048) (". . .At this time, the transition teams have not determined whether specific PSNH employee functions will be centralized.")

(Colton Direct, Exhibit 22 at 24 - 25).

> accountable is less focused on specific services responding to individualized or localized needs.

(Colton Direct, Exhibit 22 at 17). SOHO did more than identify the problem of consolidation. SOHO witness Colton testified, and was never disputed by any Company or Staff witness, that one impact of consolidation into the uniform information system of the merged companies will be to take discretion away from whatever PSNH customer service representatives remain to deliver the very services which that 70% of the low-income population rely upon. Colton noted that the merger's consolidation of information systems, by its very nature, takes away many of the consumer protections that the NHPUC has granted to New Hampshire payment-troubled customers. As Colton noted:

> Whenever you move from two companies having two different systems to one company having a single system where there is the ability to exercise discretion at the local level in the past, then the consolidation of those systems, whether it's an information system or a billing and collection system, that discretion is constrained. (Tr. Day 4, 7/17/00, pp 145, 146).

Colton cited a litany of consumer protections granted by PUC regulations to New Hampshire customers that will be impeded by the consolidation of the information systems. Whenever the PUC regulations require an exercise of discretion in New Hampshire, the required use of the uniform consolidated data processing system will constrain that discretion. (Tr. Day 4, 7/17/00, p 145 - 146). Colton noted that this discretion is constrained in any one of a number of situations:

1. **Decisions within a range:** NHPUC consumer protection regulations require PSNH customer service representatives to exercise discretion within ranges. Words such as "up to," "at least," and "not to exceed" confer upon New Hampshire customers a legal right to have decisions made based upon their individual circumstances, and confer upon PSNH customer service representatives a legal obligation to exercise their discretion based upon a consideration of those individual circumstances. Consider, for example, NHPUC regulations regarding cash security deposits. The regulations allow the company to impose a deposit equal to no more than two months of billing, excluding the highest billing month. PUC 1203.03(i)(1)(b). After the merger, however, the exercise of this discretion (within the range of $0 up to no more than 2 times the higher monthly bill) will be constrained by the choices which the uniform data processing system allows.[38]

2. **Enabled, not mandatory, actions:** Colton also identified areas in which NHPUC regulations *allow* discretionary decisions to be made about which actions or inactions should occur on the part of PSNH customer service representatives. The NHPUC regulations, for example, allow but do not require service termination in the event of nonpayment. PUC 1203.11(c). The regulations allow, but do not require, the imposition of cash security deposits after nonpayment or consistent late payment. PUC 1203.03(d)(1). The regulations

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\38\ A deposit may still meet the letter of the law, in that it does not exceed two months of billing. What has been taken away is the exercise of local PSNH discretion on whether, and if so by how much, the deposit should be below the maximum.

also permit a utility to negotiate a payment plan for a security deposit over a period longer than the three month period provided for in the Rules. *See* PUC 1203.03 (i)(1)(b). The decision on whether to exercise the discretion rests with a consideration of the individualized circumstances of the New Hampshire customer. After the merger, however, the discretion of the PSNH customer service representative is constrained by the uniform data processing system.

3. **Exercise of judgment:** Colton also identified consumer protections granted by New Hampshire PUC regulations that require the exercise of judgment based upon individualized circumstances. Under NHPUC regulations, for example, the terms of deferred payment plans are to be based upon a consideration of the individual's "ability to pay." PUC 1203.07 (c)(6). In addition, whether a cash deposit is to be required is to be based upon "satisfactory proof" of creditworthiness. PUC 1203.03(a). Whether a person can be exempt from an impending service termination is based upon whether there is a "medical emergency." PUC 1203.11(d)(4). In such case, the regulations require "additional flexibility" in the negotiation of a payment arrangement. PUC 1203.07(b). The merger constrains the rights conferred upon New Hampshire customers (to have their individualized circumstances taken into account) and imposes upon PSNH customer service representatives the obligation to instead work within the constraints of a standardized multi-state data processing system. After the merger, PSNH customer service representatives may be in no violation of any particular NHPUC rule or regulation. That does not detract from the observation made by SOHO, however, that payment-troubled New Hampshire consumers, who are disproportionately low-income, will be harmed because their right to have their individual circumstances taken into account will have been reduced.

In sum, as Colton noted:

> An increase in the geographic scope of the markets served by the merged utility can reasonably be expected to lead to a reduced emphasis on, and focus upon, the specific needs of New Hampshire standing alone, as well as the localities and the local norms of treating payment-troubled customers. My work with local providers of service to low-income utility customers has found this to be true in areas such as negotiating payment plan terms, establishing creditworthiness, and responding to inability to pay.
>
> Indeed, my experience with the utility industry is the same as that identified above with health care and financial services. Local utilities offer more than energy. Increased consolidation has decreased utility attention on the needs of particular local populations and how those needs affect the interface between the company and its customers. These local needs range, for example, from the closing of a major employer (thus putting substantial numbers of customers out of work), to the quality of housing, and the prevalence of fixed income older customers in a community. My work with utilities around the nation has found that local communities can have very localized needs that go into the calculus of how the utility best interacts with the community. These localized needs are precisely the needs that are less well-served by a merged company.

(Colton Direct, Exhibit 22 at 18).

Local and individualized customer needs can only be met if there is sufficient staff to address these needs. Even if the call center remains in New Hampshire the Chairmen of NU and Con Ed could make no commitment that the call center would be fully staffed. (Tr. Day 3, 7/13/00, pp. 122, 123.) It is of concern to SOHO that the call center is already understaffed, and in fact, has been understaffed for the past three years. (See Exhibit 10.) Any further reduction in call center staff will exacerbate the adverse impact of the merger on customer service in New Hampshire. Indeed, Ms. Noonan stated that Commission Staff would be concerned about a reduction in the number of PSNH customer service employees even if the call center remains in New Hampshire. (Tr. Day 3, 7/13/00, pp. 236, 237.) Ms. Noonan further acknowledged that while the Settlement Agreement (Exhibit 1) sets certain performance standards it does not require a minimum number of PSNH customer service representatives. (Tr. Day 3, 7/13/00, p. 238.)

The Problem of Dilution

Aside from the problems associated with consolidation, SOHO identified harms accruing to low-income payment-troubled customers as a result of dilution as well. The problem arises in one of two ways. The proposed merger will dilute the resources available to low-income payment-troubled customers of PSNH as the blending of low-income and customer service resources will divert resources from PSNH low-income customers. (Colton Direct, Exhibit 22 at 21 - 22).

There is no question but that the merger is intended to result in a reduced number of customer service representatives serving ratepayers. One of the primary sources of merger savings is in the area of customer service staff. According to the Company's synergy study, Confidential Exhibit 8, (Staff-1-3), the merger is projected to result in a reduction of ____(**confidential**) customer service positions (Synergy Study, Exhibit 8 at 9, 10, 12). An additional loss of ____(**confidential**) staff to attrition prior to the merger, which staff will not be replaced, is also expected (Synergy Study, Exhibit 8 at 11). Whether this reduction occurs through direct layoffs, or through attrition and reassignment does not change the impacts on New Hampshire's low-income customers should the reductions occur in New Hampshire. (Colton Direct, Exhibit 22 at 25 - 26).

Reductions in customer service representatives will result in harms to payment-troubled customers, who are disproportionately low-income, according to SOHO witness Colton. "Personal contact with low-income customers is almost always initiated by the Company in the event of nonpayment. Payment troubles give rise to the customer initiating contact with the utility, either to obtain information about public assistance or to work out payment arrangements. In these situations, information is provided to low-income customers during the collection process." (Colton Direct, Exhibit 22 at 22).

In addition to this staff reduction, dilution of resources available to low-income PSNH ratepayers will occur because the low-income customers in PSNH communities tend to face lesser energy burdens than their counterparts with Consolidated Edison. It is generally accepted that energy burdens are good predictors of payment-troubles. (Colton Direct, Exhibit 22 at 23). The differences between the two companies are significant. A 1994 study of state-by-state summer electric bills

found that while LIHEAP recipients in the PSNH service territory would face electric burdens of 18.3%, LIHEAP recipients in the Consolidated Edison service territory face electric burdens of 27.3%. That same study found that while PSNH consumers with incomes less than $15,000 would face electric burdens of 18.0%, Consolidated Edison consumers would face electric burdens of 24.9%. (Colton Direct, Exhibit 22 at 23).

The conclusion is inescapable. The merged company will be devoting fewer resources to its payment-troubled population. At the same time these resource reductions are occurring, PSNH is being combined with a company that has substantially greater affordability problems and substantially more significant payment-troubles. As a result of the combined effect of this reduction in resources directed toward an increase in payment-troubles, the resources available to deal with the existing PSNH payment troubles will be diluted. "To the extent that two companies are merged, therefore, with one company's customers facing greater payment troubles, that company will receive a higher level of resources and attention." (Colton Direct, Exhibit 22 at 22).

Summary of Harms That Will Impede the Passing-On of Benefits.

The harms identified above have legal consequences within the context of a merger proceeding. The passing-on requirement, discussed in detail above, and explicitly imposed upon the NHPUC by New Hampshire law, dictates that the review of a proposed merger consider whether the merger will result in *adverse* impacts that will impede the passing-on of benefits to particular markets. This is precisely the situation with the proposed merger now pending before the PUC. The proposed merger will result in adverse impacts that impede the passing-on of merger-related benefits to the low-income market. Indeed, the proposed merger will generate specific affirmative harms to the detriment of low-income consumers.

Low-income consumers frequently require assistance in dealing with their payment troubles. Low-income consumers rely upon the company to deliver a variety of services, taking into account their individual circumstances, including, but not limited to, the negotiation of payment plans, the negotiation of deposits, and the avoidance of service disconnections for nonpayment. For all of the reasons outlined above, the merger will necessarily reduce the legal rights conferred upon payment-troubled customers, and have an adverse impact on low-income payment-troubled customers. These harms, standing alone, but certainly in combination with the added merger effect of disproportionately denying low-income consumers their fair share of merger benefits, justify the implementation of CEPP as described below.

Low-Income Consumers Receive a Disproportionately Small Share of the Efficiencies Generated by the Proposed Merger

SOHO conclusively established in its testimony that due to the unique attributes of low-income consumers, these consumers will receive a disproportionately small share of the merger benefits unless specific actions are taken to capture and distribute those benefits. The merger proposal initially involves "sharing" the savings generated by the merger with customers through the mechanism of a rate freeze. This mechanism, in effect, allocates merger savings back to individual customers on a per unit of energy basis. If a customer uses more energy, under the theory of distributing benefits via a rate freeze (or a rate rollback in the longer-term), which the Company

claims will happen, a customer receives a higher proportion of the savings returned to him or her in the form of a bill that is lower than it would have been without the merger.

Low-Income Consumers Receive a Disproportionately Small Share of Merger Savings.

According to the company's synergy study (Confidential Exhibit 8) submitted in response to Staff Data Request No. 1-3, major areas of synergy savings include corporate and administrative programs, corporate and administrative labor, field labor, and administrative and general variable overhead.[\39\]

A distribution of these savings on a per unit of energy basis provides a disproportionately small benefit to low-income consumers.

> Customer service costs are incurred as a function of numbers of customers (see generally, SOHO-2-016--"customer service" refers to the interface with the customer). Indeed, the allocation of customer service costs on the basis of both usage (in units of energy) and sales (in dollars of revenue) are inappropriate as cost allocators for customer service costs. In addition, the proper cost allocation for IS projects involves the number of customer bills. The proper allocation of IS savings involving distribution and delivery is the number of customers. If benefits are produced based on numbers of customers or customer bills, but distributed on a per unit of energy basis, those customers (or classes of customers) with higher consumption will receive a disproportionately *high* share of the benefits and those customers with lower consumption will receive a disproportionately *low* share. . .
>
> Clearly, if you have a certain sum of benefits that are causally related to numbers of customers and you distribute those benefits *between* customer classes (*e.g.*, industrial, commercial) on the basis of units of energy, some "residential" benefits will be distributed to the high use industrial and commercial customers. The same is true between companies. The same is true *within* a ratepayer class as well. If you have residential savings (such as customer service savings) that are produced on the basis of numbers of customers, and if you then distribute those benefits on the basis of units of energy consumption, there will be a disproportionate distribution of benefits to high use customers.

(Colton Direct, Exhibit 22 at 27 - 28).

It is universally found that low-income customers use less energy on a per household basis than do average residential customers. Consider, for example, the Residential Energy Consumption Survey (RECS) prepared by the Energy Information Administration of the U.S. Department of Energy (EIA/DOE). The RECS reports that for the New England Census Division of the Northeast Census Region --this is the Census Division of which New Hampshire is a part-- energy consumption by

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\39\ A year-by-year accumulation of such savings, the underlying costs of which are generally considered to be customer-related, was contained in Confidential Exhibit 23, Attachment RDC-3.

low-income households is less than that for the average household. According to the annual report to Congress by the Low-Income Home Energy Assistance Program (LIHEAP), a program within the Administration for Children and Families of the U.S. Department of Health and Human Services (ACF/HHS), energy consumption by low-income consumers is only 87% as high as for the average household. (Colton Direct, Exhibit 22 at 28, and Attachments RDC-4 and RDC-5.).

This disparity in merger savings has a direct adverse impact on low-income consumers.

> . . .one can thus compare the low-income "share" of merger savings *generated* as a function of numbers of customers but which are, in fact, *distributed* on a per unit of energy basis. Low-income customers represent 13.5% of all PSNH customers, while they represent only 5.1% of all electric use. On a per thousand dollar basis, therefore, if benefits are distributed on the basis of usage (5.1%) rather than numbers of customers (13.5%), low-income customers will "lose" roughly $85.

(Colton Direct, Exhibit 22 at 29).

Summary of Harms Resulting from Inequitable Allocation of Savings.

The distribution of a disproportionately small share of the merger synergy savings distributed to low income customers violates the mandate of RSA 369-B:3,IV(b)(4)(B) that all PSNH customers receive a "just and reasonable" amount of the merger savings.

SOHO'S PROPOSED COMMUNITY ENERGY PARTNERSHIP PROGRAM (CEPP) MITIGATES THE ADVERSE IMPACTS FOUND TO RESULT FROM THIS PROPOSED MERGER.

SOHO's CEPP is a mechanism designed to remediate the two results which SOHO found adversely affected the low-income market. The CEPP involves a package of remedies that includes energy efficiency, arrearage forgiveness, low-income advocacy funding, adjunct community offices, and a deployment of the BOSS / Chronicles software program. In addition, SOHO proposed a reporting system through which specifically defined low-income universal service outcomes can be measured in a post-merger environment. (Tr. Day 4, 7/17/00, p. 206).

The CEPP components are all specifically designed to remediate the two issues identified by SOHO: (1) the creation of affirmative harms, and (2) the misallocation of benefits. Indeed, as Colton noted, the energy efficiency and arrearage forgiveness components of CEPP "will have. . .remediation impacts which extend far into the future even after the expenditures are finished." (Tr. Day 4, 7/17/00, pp. 206-207). What the CEPP accomplishes is to "break the line of causation." As SOHO witness Colton testified: ". . .there is the merger, the harm, then the remediations which try to break. . .the line of causation between the merger and the harm. . ." (Tr. Day 4, 7/17/00, p. 207).

The impacts of the CEPP components are to reduce the need for relying on the merged Company's customer service network and mitigate the problems associated with consolidation, remoteness and dilution. (Tr. Day 4, 7/17/00, pp. 210-211).

Programs for Low Income Customers as a Part of Restructuring of the Electric Utility

Industry Are Not Relevant to the Need for Programmatic Remedies Designed to Address the Adverse Impacts of the Merger.

Mr. Gelineau, on behalf of PSNH, argues that there is no need for a programmatic remedy to address merger-related harms since programs for low income customers are being designed as part of electric restructuring. (See Exhibit 21, page 3, lines 10-19.) Mr. Gelineau further argues that he believes that all of PSNH's low income customers will be assisted by the proposed state-wide Electric Assistance Program (EAP). (See Exhibit 21, page 12, lines 9, 10.) The record in this case is clearly to the contrary.

First, the EAP was designed to serve only one-half of the low income households in New Hampshire. (See Exhibit 24, page 9, first paragraph). At the time the EAP Policy Recommendations Report was filed in August, 1998 the number of low income households was believed to be approximately 50,000 statewide. (See Exhibit 24, page 9.) We now know that there are over 57,000 low income households in PSNH's service territory alone. (See Exhibit 49, page 2, line 11.) Secondly, the average EAP credit has been calculated by the Energy Efficiency Working Group to be $525 per participant per year. (See Exhibit 25, page A-37, line 10.) This is significantly higher than that suggested by Mr. Gelineau. (Tr. Day 5, 7/18/00, page 201.) Third, the Energy Efficiency Working Group estimated that it would take approximately 20 years to address the energy efficiency needs of low income households in New Hampshire, and this assumes that the recommended low income energy efficiency program will be fully funded. (See Exhibit 25, page A-40.) Finally, the legislature recently reduced the total system benefits charge that PSNH can collect for low income and energy efficiency programs. The math shows that there are simply not enough funds to address the affordability and energy efficiency needs of low income households in New Hampshire.

Aside from the fact that low income electric restructuring programs are seriously underfunded, the programs are also not designed to address the adverse impacts of the merger. Electric restructuring and the merger are separate events and raise different issues for low income customers. As Mr. Colton explained, the programmatic remedies proposed by SOHO are intended to address the unique harms caused by the merger and its adverse impacts on low income customers. (See Tr. Day 4, 7/17/00, page 107, lines 3-15; Exhibit 49, page 6, lines 3-9.) These harms would not exist in the absence of the merger. (See Exhibit 22, page 59, lines 3-4.) Accordingly, the yet to be implemented EAP and energy efficiency programs are not relevant to a merger analysis and to specific programmatic remedies designed to address the adverse impacts of the merger.

Programmatic Remedies are Common in Merger Cases.

Programmatic merger conditions such as those advocated by SOHO in this proceeding are a common response to the types of problems identified by SOHO. In California, for example, the SBC/Pacific Bell merger was specifically conditioned on the implementation of a Community Partnership Commitment, under which PacBell promised to fund $80+ million in education and community technology projects over the next ten years. (A description of the Community Partnership Commitment was provided at Colton Direct, Exhibit 22, Attachment RDC-8.) Similarly, in Ohio, based on testimony regarding the disproportionate sharing of merger savings for the poor,

the stipulated agreement endorsing the proposed SBC/Ameritech merger was conditioned on Ameritech's funding a $12+ million commitment to consumer education, technology diffusion, and community computer centers.[40]

These telecommunication merger agreements were specific responses to specific adverse impacts that would have been caused or substantially exacerbated by the proposed mergers. The mergers were explicitly proposed as one mechanism to facilitate the development and distribution of high technology telecommunication services. The information presented in the merger proceedings, however, demonstrated the existing and widening technology gap for low-income consumers. As a result, the benefits of the merger were found to be largely denied to low-income consumers. The Community Partnership Agreement, as well as the Ameritech-Ohio programmatic commitments, were the mechanisms for assuring that the adverse effects of each merger, which impeded the passing-on of merger benefits, were redressed.

The programmatic responses have not been confined to telecommunications cases. For example, in February, 2000, the Colorado Public Utilities Commission (PUC) approved a settlement between Public Service Company of Colorado (PSCO) and low-income groups addressing a host of low-income issues. The settlement of the PSCO merger included funding for (1) low income energy assistance, (2) low income energy efficiency programs, (3) computers and training to energy assistance agencies to review a client’s account, determine an appropriate assistance amount, and communicate financial commitments to PSCO customer services staff, (4) a pilot low-income rate affordability project directed toward testing cost-effective means of delivering rate assistance to low-income consumers. In addition, the settlement required the company to make annual reports on low-income payment troubles, including termination of service, payment agreements, arrears, PUC complaints, energy efficiency and rate affordability program impacts.

Finally, as SOHO witness Colton noted, programmatic remedies are common responses to adverse impacts that adversely affect distinct markets in a merger setting. Consider, for example, the recent merger of Butterworth Health Corporation with Blodgett Memorial Medical Center in Michigan.[41] In that proposed merger, the principal claim of “efficiency savings” involved claims of “capital avoidance.” Concerns were raised, however, that the capital avoidance really involved excluding the offer of products and services that consumers would otherwise demand from an unmerged hospital.

In response to these concerns, the federal court hearing a challenge to the merger required the merging hospitals to enter into a consent decree to implement a “Community Commitment” plan proposed by the hospitals as a condition of allowing the merger to proceed. The Community Commitment provided a binding commitment by the hospitals “not to raise prices *or otherwise injure the community. . .*” (emphasis added). The Community Commitment has five elements: (1) a freeze on prices and charges; (2) a freeze on prices to managed care plans to pre-merger levels; (3) a

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[40] I/M/O Joint Application of SBC Communications Inc, SBC Delaware, Inc., Ameritech Corporation and Ameritech Ohio for Consent and Approval of a Change of Control, Case No. 98-1082-TP-UNC, Public Utility Commission of Ohio (1999).

[41] 946 F.Supp. 1285 (W.D. Mich. 1996), *aff'd per curiam*, No. 96-2440 (6th Cir. July 8, 1997).

commitment to limit margins; (4) a commitment to the medically underserved and needy;[42] and (5) a commitment to governance of the merged hospitals with community input. In the decision approving the merger, the court found that the hospitals' Community Commitment plan *partially* described how efficiencies achieved would benefit all consumers. The court required the merging hospitals to enter into the consent decree partially to ensure that they complied with the plan's commitment to pass along benefits to consumers.

Similarly, the merger of two corporate parents of three hospitals in central Pennsylvania was only allowed by the Pennsylvania Attorney General's office on the condition that the merged entity pass on at least 80% of the net savings to consumers through reduced prices (or limited actual price increases for existing services), and low-cost or no-cost health care programs for the indigent;[43] In addition, Massachusetts settled its objections to the merger of that state's second and third largest HMOs on the latters' agreement to freeze group rates for one year, double enrollment in the Medicare risk program, and spend $4 million on services placed at risk by the merger, such as health care for the homeless, violence prevention, and AIDS prevention.[44]

A "Wait and See" Option Does Not Address the Adverse Merger Impacts Identified by SOHO.

Some suggestion was made that the appropriate response to SOHO's concerns is to "wait and see" what happens as a result of the merger, and then to adopt an appropriate response at a later date. (Tr. Day 4, 7/17/00, p. 189). SOHO opposes such an approach for several reasons.

First, as SOHO witness Colton noted:

> . . .if you adopt a wait and see approach, what that implies is that there is some series of metrics that you can use to measure what it is that you're looking for and that series of metrics doesn't exist. The series of metrics to look at what happens when. . .the companies merge their data processing systems and there is a uniform system for deciding upon deposits that are to be no more than 2 times the highest monthly bill. Well, how do you measure the impact of that? I think that you would be saying let's take a wait and see approach without any way of seeing or measuring and therefore seeing what you're looking for.

(Tr. Day 4, 7/17/00, p. 190). ". . .it doesn't work. That's the bottom line." (Tr. Day 4, 7/17/00, p.190).

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[42] The merged company will provide a minimum of $6.0 million each fiscal year to assist the underserved and general community. The funds are distributed through 30 specific programs to address specific locally-identified needs.

[43] Pennsylvania v. Providence Health Sys., No. 4CV-94-772, 1994 WL 374424, at 2-3 (M.D. Pa. May 26, 1994); *see also*, Pennsylvania v. Capital Health Sys. Servs., No. CIV.A.4:CV-95-2096, 1995 WL 787534 (M.D.Pa. Dec. 15, 1995).

[44] Merging HMOs Agree to State Plan on Social Spending, Contract Approvals, 4 Health L. Rep. (BNA) 6 (Jan. 20, 1995).

Second, as discussed in detail above, the CEPP serves two functions. Only one function is to correct the misallocation of benefits through the use of kWh (or revenue) as the basis for passing on benefits. One of the primary functions of CEPP is to redress the low-income harms that will be generated by the merger. Since those harms arise irrespective of the three-year quiet period for rates, it would be inappropriate to fail to implement the remedies for those harms during the initial three years of the merger. (Colton Direct, Exhibit 22 at 60). A wait and see approach can't "retroactively undo the harm." (Tr. Day 4, 7/17/00, p. 190).

Third, it is well-established that low-income consumers are disproportionately more mobile than are higher income consumers. According to the 1998 Current Population Survey, for example, while 15.6% of all households moved within the previous year, 25.7% of all households with incomes below $5,000 moved. As a matter of arithmetic, if the average mobility rate is 15.6% and the low-income mobility rate is higher than average, the higher income mobility rate must be lower than average. Indeed, by the time incomes reach $40,000, the mobility rate decreased to 13.9%; by the time incomes reached $65,000, the mobility rate decreased to 12.6%; by the time incomes reached $100,000, the mobility rate decreased to 9.3%. In contrast, when incomes reach $10,000, the mobility is still 19.7%; when the incomes reach $15,000, the mobility rate is still 17.7% per year. (Colton Direct, Exhibit 22 at 60).

A failure to immediately implement the proposed CEPP thus forces low-income consumers to absorb the adverse impacts of the merger identified by SOHO with no hope of experiencing the benefits (fairly allocated or otherwise) if those benefits are delayed for three years. An immediate implementation of the CEPP is appropriate irrespective of how proposals for a quiet period for rates are decided by regulators. (Colton Direct, Exhibit 22 at 60 - 61).

While SOHO Has Proposed that the Costs be Netted Against Merger Savings, That is Not the Only Mechanism for Treating the Expenses Associated with SOHO's Proposed CEPP.

SOHO has proposed a three-year Community Energy Partnership Program (CEPP) with the costs of the CEPP to be paid out of merger savings for those three years. (Tr. Day 4, 7/17/00, p. 122). This process, however, is not the exclusive process that can be used as a mechanism for paying for the programmatic costs. An additional mechanism, for example, would be to capitalize the costs and amortize those costs over a longer period of time. (Tr. Day 4, 7/17/00, pp. 109, 110).

> . . .it would be possible to, if you didn't want to put the full $7 million in the first three years, to spend the $7 million in the first three years, capitalize it, and amortize it over ten years if you wanted each year of expenditures to be less. . .there would be ways to amortize it over a multi-year period to take advantage of the savings in future years if you didn't want to take the entire cost of the program out of the three years of savings. (Tr. Day 4, 7/17/00, p. 181).

Amortizing the costs of the CEPP in this fashion makes eminent sense. The affirmative harms generated by the merger can be viewed as economic externalities arising as a result of the merger. (Tr. Day 4, 7/17/00, p. 205). When viewed in this fashion, the costs of the CEPP are merely remediation costs, or part of the costs to achieve the merger savings. ". . .the cost of programs to

remediate the externalities could be considered costs to achieve and could be amortized over some period of time." (Tr. Day 4, 7/17/00, p.205).

It would be possible, even, to allow the Company to defer netting the CEPP program costs against merger savings until *after* the 3-year rate freeze. In this fashion, the Company is allowed to keep the merger savings in those three years as a means of recouping its acquisition premium. Moreover, the deferred costs could be amortized over a reasonable period of time, the length of which could be a litigated issue (if need be) in the rate case at the end of the 33 month stayout period.

The Commission could, of course, also choose to condition approval of the merger on adoption of some, but not all, of the CEPP. (*See* Tr. Day 4, 7/17/00, p. 189, ll. 17-19). Should the Commission adopt this funding mechanism, it may be recalled that Mr. Colton testified that the energy efficiency and arrearage forgiveness components of CEPP " will have remediation impacts which extend far into the future even after the expenditures are finished." (Tr. Day 4, 7/17/00, pp. 206, 207).

SUMMARY AND CONCLUSIONS.

Merger analysis requires defining the markets that will be affected by the merger and determining the impacts of the merger on those markets. SOHO has demonstrated that there is a distinct low income market (or submarket). SOHO has further demonstrated that the merger will cause adverse impacts on the low income market. These adverse impacts impede the passing-on of merger savings to the low income market.

SOHO has further demonstrated that merger synergy savings are not being fairly allocated to the low income market. The distribution of such a disproportionately small share of savings violates the New Hampshire statutory requirement that a "just and reasonable" amount of savings be received by all PSNH customers.

The harms resulting from the adverse impacts of the merger and the unfair allocation of merger benefits to low income customers provide independent grounds for the programmatic merger remedies proposed by SOHO. The Commission should therefore condition approval of the merger on the adoption, in whole or in part, of SOHO's proposed Community Energy Partnership Program.

Respectfully submitted,

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