REPORT OF THE COMMITTEE ON REGULATIONS—PARTS II AND III OF THE FEDERAL POWER ACT

I. Introduction

1980 has been as notable for what didn't happen as for what did at the FERC with respect to electric wholesale rate regulation. Certainly one of the most troublesome and time-consuming issues in many current wholesale cases is the price-squeeze problem. The rulemakings on this subject in RM79-79 and RM79-80, pending at the beginning of the period covered by this report, were still pending at the end of the period. Similarly, no final action appeared in rulemaking proceeding RM79-49, dealing with cash working capital allowances, nor has the dispute over Order 530-B been disposed of, leaving the interim procedures of June 8, 1974 in Docket Nos. R-424 and R-446 controlling the normalization controversy. Nevertheless, significant matters were discussed and decided in formal Opinions and Orders. The following reports on those of general interest issued between March 1, 1980 and December 31, 1980.

II. Rulemaking Proceedings

The Federal Energy Regulatory Commission's increasingly crowded rulemaking calendar included in 1980 and early 1981 a number of significant items affecting or potentially affecting electric utilities. Also in the works presently are two significant Staff position papers which may serve as the basis for future Commission actions: one dealing with new procedural rules, the other a revival of the proposal to set allowable rates of return for the Commission's jurisdictional electrics generically by the rulemaking process.

The Commission's rulemaking efforts were, and continue to be, in the direction of lightening the regulatory burden, with the notable exception (to be discussed) of the decision made in Order No. 84 to erect new regulatory requirements for electric transmission services. The two Staff papers likewise are designed in part to streamline the regulatory process.

An interesting extrinsic consideration is the fact that President Reagan will have the opportunity to appoint *four* new members to the Commission as of October of this year; there is currently one vacancy and the terms of Chairman Georgiana Sheldon and Commissioners George Hall and Matthew Holden each expires under the DOE Organization Act in October, 1981.

The first example of an effort by the Commission to smooth the regulatory process was its decision in Order No. 70 (Docket No. RM79-54) to decline to require owners of potential PURPA cogenerating facilities and small power production facilities to seek certification of eligibility on a case-by-case basis from the Commission, although an optional certification procedure is established. A facility automatically "qualifies" by meeting the criteria set forth in the Regulations (Part 292). In a series of Orders (70-B, 70-C and 70-D) the Commission has dealt with the further problem of whether it would permit certification of a cogeneration facility or a small power production facility owned by a public utility holding company. The initial rule set out in Order No. 70-B allows certification if the

holding company has no electric utility subsidiaries. The possibility of additional rules on this problem is mentioned and is the subject of Orders Nos. 70-C and 70-D.

As mentioned above, the "odd man out" in the cast of 1980 electric utility rulemaking decisions is the Commission's initiative to regulate electric interchange rates more closely. The new regulations promulgated in Orders Nos. 84, 84-A and 84-B (Docket No. RM79-29) set dollar limits on so-called "percentage adders" included in rates charged by a utility for transmission services. In Order No. 84, the Commission found unacceptable, as a matter of principle, any non-cost-based adders, particularly the kind which is based upon the transmitting utility's purchased power cost. However, it has established a miscellaneous adder category to cover "hard to quantify" costs, in the amount of 1 mill per kwh. This measure is similar to the automatic 1 cent per MMBtu allowance permitted for natural gas transportation services performed pursuant to Title III of the NGPA.

The Commission has required, without addressing the *Sierra-Mobile* doctrine, the filing of new rate schedules to comply with the Order No. 84 principles, and, following the filing and suspension of many of these rate schedules, a consolidated rate proceeding has begun and is in the prehearing stage (Docket Nos. ER80-592, *et al.*). This proceeding illustrates sharp disagreement among the Commission Staff over how to interpret and apply Order 84. The effort to examine the justification for the sometimes difficult-to-quantify, although real, costs sought to be recovered by adders and incurred by transmitting utilities may prove unwieldy.

RM79-29 had a companion rulemaking, RM79-28, dealing with transmission adders for services rendered during a declared "emergency" under § 202(c) of the F.P.A. That docket is still pending.

Another conceptually closely-related "rulemaking" was the Commission's consolidated settlement proceeding known as Docket Nos. ER78-229 *et al.*, the "energy conservation rate" proceedings. These cases in the wake of the 1978 Coal Strike Report (ER78-367) in late 1979, and a review of fuel clause and fuel procurement practices in IN79-6, to establish (as the Commission put it) "a framework of comprehensible and comprehensive interchange arrangements under which crisis related transactions should take place." The real subject was conservation energy—both generation and transmission. In the "statement of principles" adopted in that proceeding on May 7, 1980, the Commission prescribed a set of limitations on "acceptable" conservation energy rates, including: a one-mill cap on transmission adders; a two-mill cap on generation variable (A&G) costs other than fuel, and a requirement that generation rates reflect fixed charges for the units used, not average production investment. This "statement of principles" has been applied in subsequent decisions to utilities not a party to ER78-229 *et al.*, and even to other interchange rates—short term, emergency, etc.—so it may have *de facto* rulemaking status. See, *e.g.*, ER80-484, Order of August 21, 1980.

One interchange-rates rulemaking has been conspicuous by its absence. In its transmittal to the public of the Coal Strike Report and again in its Order commencing RM79-29, the Commission hinted that the time might have come to examine the economy "split-the-savings" rate. But that hint died quietly, in the presence of a sensational attempt to force the issue. On March 21, 1980, General Public Utilities (GPU) complained to the Commission that the application of

split-savings pricing to its purchases from other PJM power pool members, to replace its lost Three Mile Island capacity and energy, was unjust and unreasonable under § 206 of the Act where such a major base-load casualty had occurred. The complaint asked for a full investigation of split-savings and interim relief for GPU, with rates tied to the seller's incremental production costs. The Commission granted only a limited investigation of "split-the-savings" as it was *then* operating *within PJM*; but even this investigation terminated with settlement of the docket, No. EL80-22, by all parties other than D.C. People's Counsel. Staff agreed to forego the investigation, as the Commission noted in Opinion No. 97, accepting the settlement on October 1, 1980. The settlement does provide a special, limited term rate for GPU's purchases within the pool, tied to its TMI outages. One party, D.C. People's Counsel, applied late for rehearing but was rejected as out of time (as well as substantively) by the Commission. D.C. People's Counsel has appealed this order under the Natural Gas Policy Act, which at this writing baffles all observers.

A more typical recent Commission action is its decision in Order No. 91 (Docket No. RM79-64) to revise the requirements as to the kind of cost-of-service data needed to be filed with proposed changes in electric rate schedules. Although the new requirements are more detailed than previous requirements, the Commission found that by requiring more data "up front", particularly the kind of data the Staff normally needs to evaluate the rate filing and prepare "top sheets", which often serve as the basis for settlement, the litigation process will be expedited. An additional cited benefit of the revised requirements is that it is anticipated they will allow the Commission to make its initial "suspension" determination with greater confidence. The Commission cited in Order No. 91 former Chairman Charles Curtis' Report to Congress on decisional delay in electric utility wholesale rate cases (issued January 23, 1980) for the proposition that the sooner typically crucial data is brought forth, the better. In Order No. 91-A the Commission rejected criticisms of the refined definitions of Period I and Period II, finding that the necessary meaningful comparison of data between these Periods has been preserved.

Another item indicating the Commission's desire to eliminate unnecessary regulatory requirements is the issuance of a notice of proposed rulemaking in Docket No. RM80-55 in which the Commission proposes revisions to its Form No. 1 data requirements, which apply to Class A and Class B electric utilities. By order issued September 11, 1980, the Commission directs utilities to file Form 1's for 1980 (due March 31, 1981) in accordance with present requirements. The proposed revisions will apply beginning with 1981 Form 1's. In its Notice in Docket No. RM80-55 the Commission states its intent to pare down Form 1 data requirements with the goal of collecting only that information needed to discharge its statutory responsibilities. The Commission also invited the Energy Information Administration to submit comments in the event the E.I.A. determines that the proposed deletions (set out in the NOPR) may contain information which E.I.A. seeks to obtain.

These electric rulemakings are consistent with other significant, recent actions of the Commission to eliminate unnecessary regulation. For example, in Order No. 106 (Docket No. RM80-65) the Commission established procedures for exempting small hydroelectric power projects from Federal Power Act regulation,

pursuant to the Energy Security Act of 1980 (94 Stat. 611).

In Order No. 90 the Commission amended its Rules of Practice and Procedure to provide a mechanism for the appointment (by the Commission or the Chief ALJ) of a settlement judge to preside over settlement negotiations. This use of a settlement judge is designed to supplement other settlement procedures (contained in Section 1.18 of the Regulations). While this optional procedure is new and has been little-used, it has potential significance as a means of expediting cases. One little-recognized opportunity for use of the Order No. 90 settlement judge procedure is the situation where a matter is pending before the Commission after an Initial Decision. Given the huge backlog of contested cases at the Commission level, this option should be considered.

Also of interest is Order No. 82 (RM80-26), which specifies the procedures for filing interlocutory appeals to the Commission from rulings of presiding officers. Under the rule, appeals from the ALJ may be taken only where a request to the ALJ to refer his ruling to the Commission is denied, and the party aggrieved files an appeal within seven days of the denial.

Before concluding this discussion of rulemakings, mention should again be made of two FERC Staff papers proposing future rulemakings. On November 21, 1980 the staff issued a draft of proposed Section 385 of the Regulations containing revised Rules of Practice and Procedure, which are currently contained in Section 1. The proposed changes in procedural rules are evidently aimed at both smoothing out and expediting the litigation process, but certain of the new procedures, not previously in the Commission's rules, may prove controversial. For example, proposed Section 385.505 (to be designated as Rule 505) would give a presiding officer the authority to limit the number of attorneys representing a "similar interest" who will be permitted to cross-examine witnesses and make and argue motions and objections. This provision may lead to a due process challenge. However, the lack of any definition of what constitutes a "similar interest" may take the force out of this provision since counsel can be expected to argue for differences in interests. Another potentially controversial provision may be proposed Section 385.704 (Rule 704) under which a presiding officer would have the authority to limit the number of parties entitled to file briefs or make oral arguments. As of the present time, no notice of proposed rulemaking has been issued.

On December 15, 1980, a Staff Study Group issued a discussion paper in Docket No. RM80-36 concerning proposed new approaches, each utilizing a generic rulemaking, to establishing rates of return on equity for jurisdictional electric utilities. In a Preface to the discussion paper, Commissioner George Hall stated his view that the paper makes a "powerful case" for moving from case-by-case adjudication of the rate of return issue to a rulemaking approach. The Staff paper contains the observation that the Commission's rate of return opinions indicate a willingness to be flexible in utilizing varying methods to analyze the appropriate rate of return. It seems likely that any proposed generic rule would have considerable flexibility built into it, both in terms of procedures and methods. The major impetus for this generic approach may simply be based upon the view that the litigation process *per se* has not proven adequate.

However, the effort to set generic rates of return may backfire and lead to unwieldy rulemaking proceedings and numerous "exceptions" hearings, as occurred when the Commission attempted to establish area-wide natural gas pro-

ducer rates in the pre-NGPA era. The generic rate of return proposal also brings to mind a second analogous and equally nightmarish regulatory history surrounding the Commission's effort to promulgate natural gas pipeline curtailment plans; an effort that continues today, a decade after the first shortages, for some pipeline companies.

III. Commission Opinions

A. Rate Base

1. Treatment of Nuclear Fuel Investment

The Commission in *Indiana-Michigan Electric Company,* Opinion No. 79, rejected the utility's contention that a portion of its investment in nuclear fuel should be treated as equivalent to a spare nuclear fuel core and included in rate base. Because the fuel was still in the process of fabrication, the Commission limited the Company to AFUDC treatment on the investment. Upon completion of fabrication, the spare core could properly be classified as nuclear fuel and included in rate base.

2. Cash Working Capital

In Opinion No. 102, *Connecticut Yankee Atomic Power Company,* the ALJ's allowance of an amount for cash working capital related to nuclear fuel expense was reversed. The Commission held that amounts in Account 518, representing the amortization of nuclear fuel not yet burned in the reactor, should be excluded from the cash working capital allowance, because the utility owned the fuel under long-term financing arrangements which did not require "cash for day-to-day operations."

In Opinions No. 86 and 87, *Minnesota Power and Light Company,* No. 89, *Pennsylvania Power Company,* and No. 94, *Union Electric Company,* the Commission emphasizd that the "45-day" rule must be utilized in calculating cash working capital allowances absent admission of a "fully developed and reliable" lead-lag study developed in accordance with the principles established in Opinion No. 19.

3. Construction Work in Progress

The FERC agreed with the ALJ's conclusion in *El Paso Electric Company,* Opinion No. 85, that, despite the fact that the Texas State Commission had approved a settlement agreement which included CWIP relief, EPEC failed to present evidence supporting its claim of severe financial difficulty, a requirement for rate base recognitions of CWIP by FERC.

Using the same standard, the Commission denied Louisiana Power & Light Company's request for inclusion of CWIP in its rate base, holding that no clear and convincing evidence had been presented justifying such special relief. The FERC found that LPL's ability to sell common stock at reasonable rates required an analysis of the financial condition of its parent, Mid-South Utilities. And, although it disclaimed any intention to make a determination on the merits of Mid-South's condition, the Commission found that the extremely limited and

pre-1978 evidence of record concerning Mid-South precluded any findings that LPL was experiencing severe financial difficulty. Commissioner Hall dissented, arguing that the Commission could properly take official notice that Mid-South could not alleviate LPL's financial problems and cautioning against what he viewed as a Commission departure from its practice of looking at utilities on a "stand-alone basis." *Louisiana Power & Light Company*, Opinion No. 104.

A detailed discussion of the appropriate rate base elements for development of a wheeling rate can be found in Opinion No. 93. See Part G—Wheeling Rate.

B. Expenses

1. Normalization

A number of opinions confirmed that, pending the Commission's re-examination of Order 530-B pursuant to *Public Systems v. FERC*, 606 F.2d 973 (D.C. Cir. 1979), utilities are permitted to "retain subject to refund that portion of the rate increase which reflects the effects of timing differences encompassed by 530-B". *Connecticut Light and Power Company*, Opinion No. 103; *Otter Tail Power Company*, Opinion No. 93; *Pennsylvania Power Company*, Opinion No. 89; *Minnesota Power & Light Company*, Opinion No. 86. The Commission reserved the possibility of review if and when it formulates a new policy under 530-B.

2. Interest Synchronization

In *Union Electric Company*, Opinion No. 94, the Commission elaborated on its decisions in prior cases that it will not agree that the Staff's treatment of the portion of rate base financed by investment tax credits results in an amount of "fictional interest" which, in turn, results in an understatement of the company's tax allowance. The Commission adopted Staff's position that tax expense should be "synchronized" by multiplying the weighted cost of long term debt times the percentage of rate base equal to the percentage of long term debt in the capital structure, in order to calculate tax deductible interest expense. The Commission believes this will ensure a fair apportionment of the benefits of investment tax credit financing between the investors and the rate payers.

3. Nuclear Plant Decommissioning

Of three acceptable methods of decommissioning nuclear units, the utility chose the "entombment" method, the intermediate method in cost. In Opinion No. 103, *Connecticut Light and Power*, the Commission denied the Company the right to recover negative net salvage based upon that method. Instead, the Commission agreed that the measure of negative net salvage should be based on the least expensive, or "mothballing" method, for a variety of reasons, including the uncertainty of the actual method ultimately to be used.

4. Negative Net Salvage

Also in Opinion No. 103, the Commission disallowed *any* provision for negative net salvage for a pump storage plant. The ALJ had allowed a 10% value,

the staff had recommended a 5% negative net salvage. The Commission believed the project's useful life might be extended, that the project might be economically viable at the end of its life, perhaps for recreational purposes, and that as a matter of policy, negative net salvage would be recognized only in "extraordinary circumstances." No provision was allowed.

C. Rate of Return

In Opinion No. 81, *Central Illinois Light Company*, the Commission affirmed the ALJ's finding of a 9.20 percent overall rate of return, which included a 13.0 percent return on common equity. The Commission, however, disagreed with the ALJ's finding that risk factors associated with the company's gas operations were irrelevant to fixing the rate of return on electric operations, pointing out that the risks on other operations may properly be considered for the limited purpose of ensuring that the rate of return to be recommended reflects only that portion of the business under consideration.

A 13% return on equity was found to be appropriate in Opinion No. 82, *Missouri Utilities Company*, after the Commission took official notice of the rising trend of interest rates after the close of the record. As in Opinion No. 81, the Commission recognized the appropriateness of a risk analysis which focuses on the service for which rates are being established, but found insufficient evidence of record to establish a reduced risk and cost associated with wholesale electric service.

In *Otter Tail Power Company*, Opinion No. 93, the utility argued that it was similar to Minnesota Power & Light and sought a 15% rate of return on equity. The Commission rejected that contention, noting that what was given to another company is not pertinent in determining the capital attraction capabilities and risk factor of the particular utility. The Commission granted 13.25% on equity, which was higher than the 12.40% set by the ALJ, primarily because of the significant increase in the level of interest rates since the close of the record. Again, the Commission noted that it had insufficient evidence before it on which to distinguish the cost of equity for the Company as whole from that which might be associated with the transmission service at issue.

A 13% rate of return was granted to *Union Electric Company* in Opinion No. 94. The Commission took into account the 13% return for Missouri Utilities Company, a subsidiary of Union Electric, and noted that the record revealed no significant differences between MU and UE in regard to risk or rate of return.

Using a DCF approach, the Commission in *Minnesota Power & Light Company*, Opinion No. 86, adjusted downward the ALJ's recommended 14% rate of return to 13.3%. The opinion underscored the Commission's desire to avoid lengthy inquiry into rate of return where any change from previously established levels would be minor. Noting that the decision was the third opportunity in slightly more than two years in which it had conducted a "searching examination" of rate of return for MPL, the Commission refused to adjust the rate found reasonable in the most recent case involving the same company. The Commission noted that similar reluctance to adjust rate of return would be exhibited toward other companies for which it had recently "engaged in a major investigative consideration leading to the fixing of a proper allowance on equity." Consistent

with this warning, the Commission again in Opinion No. 87, *Minnesota Power & Light Company*, adhered to the 13.3% return, since it found that there were no "significant intervening events" which would warrant review of the rate of return.

D. *Rate Design*

1. Ratchets

In three Opinions, No. 79, *Indiana and Michigan Electric Company*, No. 81, *Central Illinois Light Company*, and No. 86, *Minnesota Power & Light Company*, the Commission rejected proposed demand ratchets. In each instance, the Commission stated that where use of the 12-CP method of demand allocation has been found to be appropriate, the utility must prove that any benefits from use of the demand ratchet will outweigh the disadvantages the ratchet would impose on the consumer.

In Opinion No. 94, *Union Electric Company*, the Commission affirmed the ALJ's disapproval of a demand ratchet in the context of a 12-CP demand cost allocation for Union's W-3 customers and Missouri Power & Light. However, the Commission stated that "the combination of a demand ratchet and a 12-CP demand cost allocator is not *per se* unreasonable and might be approved when such outweighing advantages are shown or when all affected parties agree to a demand ratchet." These considerations justified an increase from an 80% ratchet to a 100% ratchet for one large customer, Missouri Utilities, since the 80% ratchet had provided that utility and its own customers substantial savings and customer satisfaction in the past.

2. KVA Billing

In *Central Illinois Light Company*, Opinion No. 81, the Commission affirmed the ALJ's finding that KVA billing had not been "cost-justified". The billing proposed by CILCO did not distinguish between those customers who had paid for installation of their own capacitators and those customers who had not. The utility was ordered to develop a billing method based on separate KW demand and reactive demand charges.

Finding special circumstances in *Pennsylvania Power Company*, Opinion No. 89, the Commission approved the use of KVA billing and, in doing so, reversed the ALJ. The record indicated that Pennsylvania's wholesale customers had adapted to KVA billing and the Commission concluded KVA billing provided an incentive to customers to improve power factors.

E. *Price Squeeze*

After examining the price squeeze issue in *Minnesota Power & Light Company*, Opinion No. 86, the Commission directed MP&L, as part of its compliance filing, to include a rate of return analysis based upon the retail rates ultimately established by the state commission. Similarly, the Commission deferred any price squeeze determination until the utility made a similar analysis as part of its compliance filing. In the later case, Opinion No. 87, *Minnesota Power & Light Company*, the FERC noted that review of price discrimination claims *does* require an evaluation of costs as well as rates, contrary to the finding of the ALJ.

The Commission also required *Union Electric Company*, in Opinion No. 94 and *Kansas Gas and Electric Company*, in Opinion No. 80, to file along with its compliance filng a cost of service analysis of the effective retail rate, and indicated that any price squeeze determination would be made based upon the resulting figures.

F. Contract Discrimination

In *Kansas Gas and Electric Company*, Opinion No. 80, the Commission affirmed the ALJ's finding of contract discrimination in regard to one city, Erie, that signed a new contract which incorporated by reference a rate schedule explicitly permitting unilateral rate increases. The Commission found that absence of an explicit agreement between Erie and KGE precluded any difference in treatment between Erie and other cities with contracts containing protections against unilateral increases. The Commission also affirmed the ALJ's conclusion that there was no discrimination against another city, Augusta, and denied both *Norwood* relief in the absence of any evidence of discrimination in the contract formation phase and *per se* treatment in the absence of evidence of hardship and injury to Augusta.

In Opinion No. 82, *Missouri Utilities Company*, the FERC rejected the ALJ's interpretation of *Public Service Company of Indiana v. FERC*, 575 F.2d 1204 (1978), as requiring a showing of anticompetitive effect to support a finding of undue discrimination. However, the Commission held that that case requires a showing of *substantial* disparity in rates before the burden to justify the difference in rates shifts to the utility.

G. Wheeling Rate

In Opinion No. 93, *Otter Tail Power Company*, the Commission issued its long-awaited decision in the now famous "Otter Tail" matter. See *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973). In addition to detailed treatment of a number of cost of service issues dealing with the appropriate rate base allocations for a wheeling rate and the proper cost of service treatment of various matters (including the reasonableness of Period II estimates), there is a lengthy analysis of the wheeling rate design.

The Commission adopted the customer-proposed alternative rate design, rejecting the treatment proposed by Otter Tail. A monthly transmission rate was established, developing the unit charge by dividing the test period costs allocated to the customers by their test period non-coincident 15-minute peak loads. Customer billing is to be done on the basis of meter readings for the current month or 90% of the customer's peak demand during the preceding month, whichever is greater.

H. Service Agreements

In Opinion No. 95, *Indiana & Michigan Electric Company*, the Commission dealt with three provisions of I&M's service agreements with the cities of Anderson and Mishawaka, Indiana. The Commission characterized the issues as "relatively minor," and chastised the parties for pursuing them through the full Commission decisional process.

With respect to the term of the agreements, the Commission approved a company proposal for a three year term automatically renewable for successive three year terms, unless one year's notice of intent to terminate is filed. The Commission believed this, and its authority over abandonment (coupled with the boiler-plate language permitting the unilateral filing of rate changes), provided fairly for economic change and for any potential capacity shortages, and rejected a longer term earlier urged by the cities and in the Initial Decision. The Commission also approved a clarification of contract capacity limitation language for the purpose of establishing that the limitation is to be applicable only for calculating minimum billing demands, and not as authority for limiting service. Finally, the Commission affirmed the ALJ's removal of capacity limitations, on the Company's duty to serve. The decision was based on a finding that I&M has "existing facilities ... adequate to handle any reasonably anticipated load growth" by Mishawaka and a new facility adequate to serve Anderson "over the foreseeable future."

IV. Appellate Review

A. Papago Tribal Utility Authority v. FERC, *628 F.2d 235 (D.C. Cir. 1980)*

In December 1978, Arizona Public Service Company filed new wholesale rates with the FERC. Papago filed in opposition. In response to Papago's motion, Arizona adjusted its proposed rates in certain aspects. The remaining disputed issues were to be resolved by FERC at full hearing. In February 1979, the Commission accepted the proposed schedule and denied petitioner's motion in opposition. Papago moved for rehearing. The motion was denied by FERC, which set the matter for full hearing.

The question addressed in this case is whether an order of FERC denying a motion to reject a rate filing or accepting a rate filing is reviewable under § 313(b) of the Federal Power Act. In order to make the determination, the Court asked the following questions: 1) whether the order is final for purposes of judicial review; 2) if review is denied, would it inflict irreparable injury; and 3) whether judicial review would invade the province reserved to the discretion of the agency?

The Court determined that the FERC orders in question were not in fact reviewable under the Act. Using the same tests, the Court purported to distinguish the reviewability of *Sierra-Mobile* orders. Finally, the Court distinguished its earlier decisions supporting review, explaining that those decisions preceded the Supreme Court's holding in *Southern Railway Co. v. Seaboard Allied Mining Corp.*, 422 U.S. 658 (1965). The Court dismissed the petition for review, stating "[W]e consider it important to reaffirm our traditionally limited approach to reviewability of nonfinal agency orders."

B. Indiana Municipal Electric Association v. FERC, *629 F.2d 480 (7th Cir. 1980)*

The Public Service Company of Indiana applied to FERC for a rate increase in September 1975. By October 1976, when the hearings commenced, the actual data for Period II was available. That data showed that the company had already

received more revenues from short term power sales than it had projected. The Indiana Municipal Electric Association objected, and sought an adjustment of $3,273,406 in the Company's short-term purchased power expense estimate.

The company introduced evidence showing that the larger than projected revenues were the result of a sale to Tennessee Valley Authority, whose generating units had been damaged by fire. Therefore, the sales were atypical, and not necessarily a reflection of normal operations. The Commission rejected the Association's claim, and found that the company's estimated purchase expense was reasonable when made. In its petition for review, the Association asked that the Commission be reversed.

The court affirmed, finding that the company's actual costs were in fact atypical; that the Commission had employed proper ratemaking procedures when it relied on projected costs; and that the Association had failed to show that the revenue figures were so "substantially" in error (as per Opinion 783-A) to be indicative of *male fides.*

C. Lockhart Power Co. v. FERC, *No. 79-1026 and 80-1029 (4th Cir. July 22, 1980)*

Lockhart Power is a small electric utility which generates a portion of its power at its own hydroelectric plant. It purchases the remainder from Duke Power Company, and thereby engages in interstate sales. Lockhart has only one wholesale customer, the city of Union. Before 1972, Lockhart's rates had been regulated by the South Carolina Public Service Commission (SCPSC). Lockhart was informed in 1972 by the FPC that its rates were "very likely subject to federal regulations." However, not until 1975 did the FPC assert jurisdiction over Lockhart.

In 1974, Lockhart filed new rates with the SCPSC; the rates were approved in January, 1975. In April, the FPC notified Lockhart that it was required to file its rates with it, which it did. Lockhart's rate schedule contains a Purchased Power Adjustment Clause (PPAC) which passes on increases made by Duke Power to Lockhart's customers. The Commission approved the rate increase, but determined that Lockhart had not justified use of the PPAC. Lockhart was ordered to refund all money collected from PPAC adjustments between 1974 and 1978. The Fourth Circuit heard the case as an appeal from the Commission's Order denying rehearing.

The Court found that the Commission had abused its discretion by refusing to hear further evidence justifying the PPAC adjustments. It stated "[T]he Commission's overly technical adherence to procedural niceties seemingly led it to overlook the practicalities of this proceeding." The case was remanded for the Commission's further consideration of whether the rates collected under the PPAC were justified, notwithstanding the further use of the clause.

D. Connecticut Light and Power Company v. FERC, *627 F.2d 467 (D.C. Cir. 1980)*

Connecticut Light and Power filed a petition for review of FERC's order suspending its proposed rate schedule for five months. Before the case was heard, CL&P filed a joint motion of the parties for permission to withdraw the case, since

an offer of settlement had been filed with the Commission.

The Court determined that the settlement offer did not moot the petition for two reasons: 1) the offer did not resolve all the issues before the Court, and 2) the case fit within the "capable of repetition, yet evading review" doctrine of *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911) (looks at the "likelihood of repetition of the controversy and the public interest in assuring appellate review.")

The Court could not find that the Commission had used any standard or rationale for imposing a 5-month suspension as opposed to any other length of time. The Court interpreted § 205(e) of the Federal Power Act as requiring the Commission to provide a statement of reasons not only for the suspension, but its reasons for determining the length of the suspension. Further, it stated that "if there are no reasons for choosing different periods, then the choice is completely arbitrary." As a result, the Court set aside the Commission's order and remanded.

Subsequent to this decision, in a number of cases, the Commission has announced and followed a policy of generally suspending rate filings for the maximum period permitted by statute. Where preliminary study leads the Commission to believe the filing may be unjust, unreasonable or otherwise improper, shorter periods of suspension will be ordered only on a showing by the utility that suspension for the maximum period will be harsh and lead to inequitable results. See, e.g., *Boston Edison Co.*, ER80-508 (Aug. 29, 1980); *Alabama Power Co.*, ER80-506 (Aug. 29, 1980); *Cleveland Electric Illuminating Co.*, ER80-488 (Aug. 22, 1980).

E. Public Service Co. of New Mexico v. FERC, *628 F.2d 1267 (10th Cir. 1980)*

This case is a consolidation of three matters involving Public Service Company of New Mexico. In 78-2007, the FERC, pursuant to § 35.14 of Commission regulations, required the company to file its contract covering coal purchases from Western Coal Company. That section calls for the filing of a contract "where the utility purchases fuel from a company-owned or controlled source . . ." The Court found that although the record showed that New Mexico owned 50% of the stock of Western Coal, it did not show evidence of New Mexico's "control" of that company. Therefore, the Commission's order directing the filing of the contract was set aside.

In Cases 79-1275 and 79-1276, the Commission concluded that the contract between New Mexico and the city of Gallup was not a fixed rate contract. Therefore, it applied the standard for Section 206 hearings when considering new rates, rather than the *Sierra* burden for fixed rate contracts. The Court found that the Commission was correct in this application, and that the City of Gallup's claim of a fixed rate contract was not justified.

The City of Gallup also made price squeeze claims in this case. The Court said that the city failed to prove that there was competition at the retail level, and that the rate schedule was higher than PNM retail rates. The Court upheld the Commission's decisions because the city could not even suggest a significant difference in cost of service.

F. New York State Electric & Gas Corp. v.
Federal Energy Regulation Commission,
____ F.2d ____, (2d Cir. September 30, 1980)

New York State Electric & Gas ("NYSEG") appealed from a Commission decision invalidating portions of NYSEG contracts with the Power Authority of the State of New York ("PASNY") and the Village of Penn Yan, New York. NYSEG argued that the Commission had no jurisdiction over its contract with PASNY, and that the Commission's order impermissibly required it to wheel power from PASNY to Penn Yan and other municipalities.

The Court rejected the argument that PASNY's status as a state agency deprived the Commission of jurisdiction over NYSEG's contracts. Similarly, the Court upheld the Commission's right to conduct an antitrust analysis of the arrangement, finding nothing in PASNY's status to preclude such an analysis. However, the Court disagreed with the Commission's summary disposition of the anticompetitive questions arising from NYSEG's position with respect to wheeling, hold that the record disclosed public interest questions best resolved after hearings. Finally, the Court agreed with NYSEG that the Commission's order modifying the contracts amounted to an expansion of prior voluntary commitment to wheel. It held that such a significant modification could only be made after the Commission makes the necessary determinations in accordance with § 211 and 212 of the Act.

Judge Goettel dissented from the finding that modification of the contract amounted to requiring wheeling.

Paul T. Ruxin, *Chairman*
Edward A. Caine, *Vice-Chairman*

Albert V. Carr, Jr.
Herbert B. Cohn
James N. Horwood
Brian J. McManus
Michael J. Manning
William E. Marx
J.K. Mitchell
Joseph C. Swidler
James F. Walsh, III
Daniel J. Wright