

ENERGY LAW JOURNAL

Volume 17, No. 2

1996

REQUIEM FOR THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: THE "OLD" FEDERALISM AND STATE REGULATION OF INTER-STATE HOLDING COMPANIES

by
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It usually takes a hundred years to make a law; and then, after it has done its work, it usually takes a hundred years to get rid of it.

Henry Ward Beecher, 1858

I. INTRODUCTION: THE NEW FEDERALISM

In October 1995, Senator Alfonse M. D'Amato (R.-N.Y.) introduced S. 1317,¹ the Public Utility Holding Company Act of 1995,² which would repeal the Public Utility Holding Company Act of 1935 (PUHCA).³ PUHCA is administered by the U.S. Securities and Exchange Commission (SEC), which proposed the repeal of PUHCA in June 1995.⁴

Under PUHCA, the SEC regulates public utility holding companies and their public utility and non-utility subsidiaries.⁵ The Federal Energy Regulatory Commission (FERC), under the Federal Power Act,⁶ regulates

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1. S. 1317, 104th Cong., 1st Sess. (1995).

2. 141 Cong. Rec. S 15,118 (daily ed. Oct. 12, 1995)(introduction of S. 1317).

3. 15 U.S.C. §§ 79-79z-6 (1996).

4. SEC, THE REGULATION OF PUBLIC-UTILITY HOLDING COMPANIES (1995) [hereinafter PUHCA Report].

5. 15 U.S.C. §§ 79-79z-6.

6. 16 U.S.C. §§ 791-828c (1996) (§ 791 has been repealed).

electric and gas public utility companies, which also are subject to state regulation.

Because S. 1317 would repeal PUHCA one year after its enactment, the bill would eliminate, to a large extent, federal regulation of holding companies.⁷ S. 1317, however, also would enact the Public Utility Holding Company Act of 1995,⁸ which would increase to a large extent state regulation of holding companies. For example, the states would be authorized to examine the books and records of holding companies and their non-utility subsidiaries.⁹ The FERC similarly would be authorized to examine the books and records of holding companies and their non-utility subsidiaries.¹⁰

The bill in this critical respect appears to epitomize the New Federalism embodied in the political agenda of the Republican-controlled 104th Congress.¹¹ In numerous statements on this political agenda,¹² and through, for example, the Unfunded Mandates Reform Act of 1995, which was the first significant legislation enacted in 1995, the U.S. Congress has expressed a commitment to decreased federal regulation and to authorize increased state regulation.

Enacted in March 1995, the Unfunded Mandates Reform Act of 1995,¹³ which addresses a principal element of the Contract with America,¹⁴ is intended to "end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal govern-

7. S. 1317, *supra* note 1, § 102. "[PUHCA] was intended to facilitate the work of State . . . regulators by placing certain constraints on the activities of holding company systems. Developments since 1935 . . . have called into question the continued relevance of the model of regulation established by the statute." S. 1317, *supra* note 1, § 101(a).

8. S. 1317, *supra* note 1, §§ 201-13.

9. "Upon the written request of a State commission having jurisdiction to regulate a public utility company in a holding company system . . . a holding company or its associate company or affiliate thereof, wherever located, shall produce for inspection such books and records as have been identified in reasonable detail . . ." S. 1317, *supra* note 1, § 205(a).

10. S. 1317, *supra* note 1, § 204(a). "Limited Federal regulation is necessary to supplement the work of State commissions for the continued rate protection of electric and gas utility consumers. This Act is intended to address these concerns by providing for Federal and State access to books and records of all companies in a holding company system . . ." S. 1317, *supra* note 1, § 201.

11. "New Federalism is back. Again. But this time — the third try — may be the charm. New schemes to take power away from the federal government and give it to states and localities are mostly retreads from the Nixon and Reagan Administrations. It's everything else that makes this time different." Stanfield, *The New Federalism*, 27 *THE NAT'L L.J.* 226 (1995).

12. "If I have one goal for the 104th Congress, it is this: That we will dust off the 10th amendment and restore it to its rightful place in the Constitution." 141 *Cong. Rec. S. 12* (daily ed. Jan. 4, 1995)(statement of Senate Majority Leader Robert J. Dole), *reprinted in* 61 *VITAL SPEECHES OF THE DAY* 230 (1995). "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, or to the people." U.S. CONST. amend. X. "Republicans welcome the support of like-thinking Democrats as we work to put a leash on our Government by restoring the 10th amendment . . ." 141 *Cong. Rec.* at S13.

13. Pub. L. No. 104-4, 109 Stat. 48 (1995).

14. "Unfunded federal mandates remove the ability of state and local governments to direct their tax dollars toward the communities' established priorities. They also impose one-size-fits-all policies on areas as diverse as New York City and rural Iowa." REPUBLICAN NATIONAL COMMITTEE, *CONTRACT WITH AMERICA* 133 (1994).

ments without adequate Federal funding, in a manner that may displace other essential State, local and tribal governmental priorities."¹⁵ When he signed the legislation into law, President Clinton appeared to acknowledge the wisdom of the New Federalism.¹⁶

The Speaker of the U.S. House of Representatives of the Republican-controlled 104th Congress is a principal proponent of the New Federalism,¹⁷ which is premised on the belief that the states are able and prepared to accept increased regulation.¹⁸ In addition, the U.S. Supreme Court has bolstered the legal foundation for the New Federalism.¹⁹ For example, in a

15. 109 Stat. 48, § 2. "The purpose of S. 1 . . . is to strengthen the partnership between Federal, State, local and tribal governments by ensuring that the impact of legislative and regulatory proposals on those governments are given full consideration in Congress and the Executive Branch before they are acted upon." S. REP. NO. 1, 104TH CONG., 1ST SESS. 2 (1995). "The primary purpose of S. 1 . . . is to start the process of redefining the relationship between the Federal government and State, local and tribal governments." S. REP. NO. 2, 104TH CONG., 1ST SESS. 2 (1995). See, e.g., *Legislative Initiatives on Unfunded Federal Mandates: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Government Operations*, 103rd Cong., 2nd Sess. (1994); *Impact of Unfunded Mandates on State and Local Governments: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Government Operations*, 103rd Cong., 2nd Sess. (1994); *The Impact of Federal Mandates on State and Local Governments: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations of the House Comm. on Government Operations*, 103rd Cong., 1st Sess. (1993).

16. "We are recognizing that the pendulum had swung too far, and that we have to rely on the initiative, the creativity, the determination, and the decisionmaking of people at the State and local level to carry much of the load for America as we move into the 21st century." *Remarks on Signing the Unfunded Mandates Reform Act of 1995*, 31 WKLY. COMP. PRES. DOC. 453, 455 (1995). "This time around, New Federalism isn't only a Republican thing; it's also a central feature of the New Democrat theology. Sorting out intergovernmental responsibilities is a key item on an alternative contract with America developed by the Democratic Leadership Council." Stanfield, *supra* note 11, at 227. See, e.g., Balz, *Centrist Group Offers Reply To GOP 'Contract'; DLC Also Distances Itself From Clinton*, WASH. POST, Dec. 6, 1994, at A-21 ("Like the Republicans, the [Democratic Leadership Council] called for a significant shift in governmental responsibility from Washington to the states and cities. But rather than outline specific programs . . . the DLC urged Clinton to convene a "Federalism Convention" to develop a plan for decentralizing power."); Lambro, *Democratic Centrists Advise Dumping New Deal Policies*, WASH. TIMES, Dec. 6, 1994, at 6 ("But yesterday the [Democratic Leadership Council] appeared to go further than it has gone before in calling for more decentralization of domestic programs and transferring more decision-making to the state and local level."). *Id.*

17. "The last sixty years has seen so much centralization in Washington that at this point the best we can do is to start by shifting power back to the state capitals. Power in fifty different cities is better than power centralized in one city." NEWT GINGRICH, TO RENEW AMERICA 104 (1995). "This country is too big and too diverse for Washington to have the knowledge to make the right decision on local matters; we've got to return power back to you — to your families, your neighborhoods, your local and state governments." 61 VITAL SPEECHES OF THE DAY 423, 425 (1995).

18. "On a policy level, the states have demonstrated over the past decade that they can manage problems as well as or better than the federal government." Stanfield, *supra* note 11, at 227. "States are up to the job. Setting aside both liberal and conservative orthodoxies, shifting of responsibility to states is now possible and attractive not only because citizens prefer it but because states have earned it." Jensen & Henle, *Not Made-In-Washington; This Time, The New Federalism Could Actually Work*, WASH. POST, Jan. 1, 1995, at C-2.

19. See, e.g., *United States v. Lopez*, 115 S.Ct. 1624 (1995) (holding Gun-Free School Zones Act of 1990 unconstitutional under Commerce Clause). "While the intrusion on state sovereignty may not be as severe . . . as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection . . . with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed . . ." 115 S.Ct. at 1642

recent decision decided under the Tenth Amendment, the Court commented on "federal action [that] would 'commandeer' state governments into the service of federal regulatory purposes, and [that] would for this reason be inconsistent with the Constitution's division of authority between federal and state governments."²⁰

Because S. 1317 would decrease federal regulation and authorize increased state regulation of holding companies, the bill appears to reflect the New Federalism. The proposed repeal of PUHCA, however, is an idea that was conceived well before the 104th Congress. For example, the SEC urged the U.S. Congress to repeal PUHCA in 1982.²¹

But the proposed repeal of PUHCA is an idea that also was conceived even before 1982. In fact, the idea might have been conceived in 1935,²² when the legislation was enacted with provisions that provide for state regulation of holding companies and that contemplate decreased federal regulation and increased state regulation. For this reason, the proposed repeal of PUHCA is consistent not with the New Federalism of the 104th Congress alone but with an "old" federalism. In the past decade, this idea, with assistance from the U.S. Congress,²³ the federal courts,²⁴ and, in particular, the SEC, has gained significant momentum. PUHCA, it appears, is now ripe for repeal.

Part I of this article will provide an overview of regulation under PUHCA. It will address, in particular, the provisions of the legislation that provide for state regulation of holding companies and the congressional

(concurrence of Associate Justice Kennedy). "But is *Lopez* just a false dawn? In the past we have seen the High Court start down the road of federalism, only to retrace its steps to the path of expanded federal power." du Pont, *Pleading the Tenth*, NAT'L REV., Nov. 27, 1995, at 51.

20. *New York v. United States*, 505 U.S. 144, 175 (1992)(holding certain provision of Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutional under Tenth Amendment). See generally *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981)(holding Surface Mining Control and Reclamation Act of 1977 not unconstitutional under Tenth Amendment). "[T]here can be no suggestion that the [Surface Mining Control and Reclamation Act] commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 452 U.S. at 288.

21. See generally S. 1977, 97th Cong., 2nd Sess. (1982)(to repeal PUHCA); H.R. 5465, 97th Cong., 2nd Sess. (1982)(to repeal PUHCA); H.R. 6134, 97th Cong., 2nd Sess. (1982)(to repeal PUHCA); *Public Utility Holding Company Act Amendments: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 2nd Sess. (1982); *Utility Holding Company Act: Hearing Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 97th Cong., 2nd Sess. (1982). See also *Public Utility Holding Company Act Amendments of 1983: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 1st Sess. (1983). "The [SEC] over the past year and a half or so has consistently taken the position, following a meeting in December 1981, that the goal of [PUHCA] has in fact been largely accomplished. Having reached that conclusion, the [SEC] has favored repeal of [PUHCA] in its entirety . . ." *Public Utility Holding Company Act Amendments: Hearing Before the Subcomm. on Energy Conservation and Power and the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 237 (1983) (statement of James C. Treadway, Jr., Commissioner, SEC).

22. In this sense, the legislation might be compared to "sunset provisions" contained in numerous federal statutes. See, e.g., 42 U.S.C. §§ 7351-52 (Department of Energy sunset provisions).

23. See, e.g., Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

24. See, e.g., *Wisconsin's Environmental Decade, Inc. v. SEC*, 882 F.2d 523 (D.C. Cir. 1989).

intent behind those provisions. Part II will discuss the Energy Policy Act of 1992,²⁵ which resulted in increased state regulation of holding companies under PUHCA. It also will discuss the SEC regulations promulgated thereunder.

Part III of this article will explore federal court decisions that have in the past decade resulted in decreased federal regulation and increased state regulation of holding companies. Part III also will explore the development and promulgation of SEC regulations in the past decade that also have resulted in increased state regulation. Part IV will discuss a federal court decision that resulted in SEC statements on the relationship between PUHCA and state regulation of holding companies.²⁶

Finally, Part V of this article will discuss the development of the SEC report issued in June 1995 that proposed the repeal of PUHCA. It also will discuss the reception this report received in the U.S. Congress. Part VII will describe the progress of S. 1317 in the 104th Congress. In particular, it will summarize a June 1996 congressional hearing on the bill.

Finally, the article will conclude, in Part VIII that the proposed repeal of PUHCA is not the product of the Republican-controlled 104th Congress alone but is, in fact, the ultimate and long-awaited product of the SEC, the federal courts, and the Democrat-controlled 74th Congress that enacted the legislation sixty years ago.

For eight months after its introduction, S. 1317, which would repeal PUHCA, has languished in the Senate Committee on Banking, Housing, and Urban Affairs, to which the bill was referred. For several months, the bill was the victim of the federal budget battles that raged in Washington, D.C. and that resulted in "the longest and most disruptive federal shutdown in the nation's history."²⁷ In addition, the bill could become a hostage to congressional consideration of comprehensive legislation relative to electric utility companies in general.²⁸ Nonetheless, this article will conclude that the 104th Congress should proceed with enactment of S. 1317 and that now is the time for repeal of PUHCA.

II. REGULATION OF INTER-STATE HOLDING COMPANIES

A. Regulation Under PUHCA

PUHCA establishes an extensive and complex regime for the regulation of public utility holding companies.²⁹ The purpose of the regime is to

25. Pub. L. No. 102-486, 106 Stat. 2776 (1992).

26. *Ohio Power Co. v. FERC*, 954 F.2d 779 (1992), *cert. denied*, 113 S. Ct. 483 (1992).

27. Devroy, *Bill Signed to Fully Reopen Government; Clinton Submits 7-Year Budget Plan*, WASH. POST, Jan. 7, 1996, at A-1.

28. "[A] bipartisan consensus seemed to emerge . . . that Congress should act on PUHCA in the context of comprehensive legislation designed to speed deregulation and boost competition in the electricity industry." Lobsenz, *PUHCA Will Be Changed, Question Is How — Schaefer*, ENERGY DAILY, Oct. 17, 1995, at 1. See generally *Electric Industry Restructuring: Hearings Before the Subcomm. on Energy and Power of the House Comm. on Commerce*, 104th Cong., 1st Sess. (1995).

29. The regime withstood a significant constitutional challenge in *Electric Bond and Share Co. v. SEC*, 303 U.S. 419 (1938).

prevent a recurrence of the financial abuses for which the electric and gas utility industries, and their holding companies, were notorious in the two decades prior to enactment of PUHCA.³⁰ The abuses that PUHCA is intended to prevent are enumerated therein.³¹ Those abuses also are detailed in the extensive legislative history of PUHCA.³²

All public utility holding companies, in the absence of an exemption from PUHCA,³³ are subject to four general requirements. First, each public utility holding company is required to register with the SEC.³⁴ In October 1995, there were fifteen public utility holding companies registered with the SEC.³⁵

Second, PUHCA establishes several procedures and requirements for prior SEC approval of sales of securities, and of acquisitions of securities and of utility assets, by registered holding companies and their subsidiaries. Section 6 prohibits the issuance and sale of securities by such companies except in accordance with Section 7,³⁶ which requires a description of the proposed transaction to be filed with the SEC in a declaration.³⁷ The declaration will become effective, and the proposed transaction will thus be authorized, in one month unless the SEC issues an order to show cause and provides an opportunity for an administrative hearing.³⁸ The conditions under which the SEC is to allow the declaration to become effective are detailed in several provisions of Section 7.³⁹

The SEC also must approve acquisitions of securities and of utility assets by registered holding companies and their subsidiaries. Section 9 prohibits the acquisition of securities or of utility assets, as well as of interests in other businesses, by such companies except in accordance with Section 10,⁴⁰ which requires a description of the proposed transaction to be

30. 15 U.S.C. § 79a(c). "The purpose of [PUHCA] was to eliminate the evils then existing in public utility holding companies, and to protect the public from the abuses inherent in them as they were then constituted." *American Natural Gas Co. v. U.S.*, 279 F.2d 220, 224 (Ct.Cl. 1960), *cert. denied*, 383 U.S. 968 (1961). "The object sought by [PUHCA] is the elimination of abuses in the public utility holding company field." *North American Co. v. SEC*, 133 F.2d 148, 154 (2nd Cir. 1943), *aff'd*, 327 U.S. 686 (1944).

31. 15 U.S.C. § 79a(b).

32. *See, e.g.*, U.S. FEDERAL TRADE COMMISSION, UTILITY CORPORATIONS, S. DOC. NO. 92, 74TH CONG., 1ST SESS. (1935); REPORT OF NATIONAL POWER POLICY COMMITTEE, H.R. DOC. NO. 137, 74TH CONG., 1ST SESS. (1935); H.R. REP. NO. 827, 74TH CONG., 1ST SESS. (1935).

33. *See generally* 15 U.S.C. § 79c.

34. 15 U.S.C. § 79e.

35. Allegheny Power System, Inc.; American Electric Power Co., Inc.; Central and South West Corp.; Cinergy Corp.; Columbia Gas System, Inc.; Consolidated Natural Gas Co.; Eastern Utilities Associates; Entergy Corp.; General Public Utilities Corp.; National Fuel Gas Co.; New England Electric System; Northeast Utilities; Philadelphia Electric Power Co.; Southern Co.; and Unitil Corp. *See generally* SEC, HOLDING COMPANIES REGISTERED UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 (1995)[hereinafter REGISTERED HOLDING COMPANIES].

36. 15 U.S.C. § 79f(a).

37. *Id.* § 79g(a).

38. *Id.* § 79g(b).

39. *Id.* §§ 79g(c)-(d).

40. *Id.* § 79i(a).

filed with the SEC in an application.⁴¹ The SEC will issue an order that either approves or denies the application but will provide the applicant with an opportunity for an administrative hearing before it denies the application.⁴² The conditions under which the SEC is to approve or reject the application are detailed in several provisions of Section 10.⁴³

Third, PUHCA establishes numerous requirements for prior SEC approval of certain financial transactions between registered holding companies and their subsidiaries as well as between subsidiaries within the same registered holding company system. Section 12 prohibits loans to registered holding companies from their subsidiaries.⁴⁴ The statute also prohibits direct or indirect loans, without prior SEC approval, between companies within the same registered holding company system.⁴⁵

Section 12 prohibits the payment of dividends, and the redemption of securities, by registered holding companies and their subsidiaries without prior SEC approval.⁴⁶ In addition, the statute prohibits the sale by registered holding companies of securities in or assets of public utility subsidiaries without prior SEC approval.⁴⁷

Section 13 establishes requirements for prior SEC approval of service, sales, and construction contracts between companies within the same registered holding company system. It imposes an absolute prohibition on contracts with registered holding companies for the performance of services or construction for, or for sale of goods to, their public utility subsidiaries.⁴⁸ Section 13 also prohibits service, construction or sales contracts between companies within the same registered holding company system without prior SEC approval.⁴⁹ The SEC has determined, in general, that the cost of service, sales, and construction contracts is fair and equitable if it is equal to the actual cost of performance.⁵⁰

Finally, PUHCA establishes a fundamental requirement for registered holding company systems to be simple and uncomplicated. Section 11 of PUHCA authorizes the SEC to require the simplification of registered holding company systems — through, for example, divestment of subsidiaries unrelated to the operations of public utility systems — in order to limit the operations of registered holding company systems to single and “inte-

41. *Id.* § 79j(a).

42. *Id.* § 79j(d).

43. *Id.* §§ 79j(b)-(c).

44. *Id.* § 79l(a). The purpose of the prohibition is “to prevent undesirable upstream loans being made to a top holding company of an operating utility system by its subsidiaries and the consequent milking of the latter.” *In re Midland United Co.*, 58 F. Supp. 667, 680-81 (D.Del. 1944).

45. 15 U.S.C. § 79l(b).

46. *Id.* § 79l(c).

47. *Id.* § 79l(d). The prohibition is “designed to protect investors against any sacrifice of their equity in the sale of their assets.” *In re North Continent Utilities Corp.*, 61 F. Supp. 419, 421 (D.Del. 1945).

48. 15 U.S.C. § 79m(a).

49. This approval is intended “to insure [*sic*] that such contracts are performed economically and efficiently for the benefit of such . . . companies at cost, fairly and equitably allocated among such companies.” *Id.* § 79m(b).

50. See generally 17 C.F.R. § 250.90 (1996)(contracts limited to cost).

grated" public utility systems.⁵¹ The requirement for simplification of the registered holding company systems that dominated the electric and gas utility industries in the first half of the twentieth century is the cornerstone of PUHCA.⁵² It also is the requirement that precipitated numerous constitutional challenges against PUHCA.⁵³

Between 1935 and 1958, the SEC, for the most part, completed the simplification of the colossal holding company systems in existence prior to 1935.⁵⁴ Section 11 continues, however, to prohibit the diversification of registered holding companies in the future into unintegrated public utility systems.⁵⁵ The statute, therefore, is applicable to SEC review and approval of acquisitions of securities and utility assets by registered holding companies under Sections 9 and 10.⁵⁶ Section 11 would thus prohibit, for example, the acquisition of securities by registered holding companies in hotels or casinos, which are neither "reasonably incidental" nor "economically necessary or appropriate" to electric or gas utility systems.

PUHCA affords public utility holding companies several exemptions with which to avoid its extensive and complex regime. Five exemptions are for holding companies.⁵⁷ A sixth exemption is for their foreign public utility subsidiaries.⁵⁸ An exemption, however, is subject to revocation.⁵⁹

51. 15 U.S.C. § 79k(b). Section 11 required the SEC to examine registered holding company systems to assess the extent to which the systems could be and should be simplified. *Id.* § 79k(a). It also authorized the SEC to require the simplification of registered holding company systems, through, for example, divestment, reorganization, and recapitalization, to limit their operations to "integrated" public utility systems and to "such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated" systems. *Id.* § 79k(b)(1). Under the statute, for example, the SEC thus required a registered holding company system with an integrated gas utility system to divest itself of oil production and distribution subsidiaries because the subsidiaries, the SEC concluded, were neither "reasonably incidental" nor "economically necessary or appropriate" to the gas utility system. *Arkansas Natural Gas Co. v. SEC*, 154 F.2d 597 (5th Cir.), *cert. denied*, 329 U.S. 738 (1946).

52. Section 11 "is therefore the very heart of [PUHCA], the section most essential to the accomplishment of [its] purposes . . ." S. REP. NO. 621, 74TH CONG., 1ST SESS. 11 (1935). *See, e.g., SEC v. New England Elec. Sys.*, 384 U.S. 176, 180 (1966)(interpreting Section 11).

53. *See, e.g., American Power & Light Co. v. SEC*, 329 U.S. 90 (1946)(holding section 11 constitutional under commerce clause and due process clause; section 11 not an ex post facto law); *North American Co. v. SEC*, 327 U.S. 686 (1946)(holding section 11 constitutional under commerce clause); *Northern States Power Co. v. SEC*, 164 F.2d 810 (3rd Cir. 1947)(holding section 11 constitutional under due process clause); *United Gas Improvement Co. v. SEC*, 138 F.2d 1010 (3rd Cir. 1943)(holding section 11 not an unconstitutional delegation to SEC of legislative powers); *Commonwealth and Southern Corp. v. SEC*, 134 F.2d 747 (3rd Cir. 1943)(section 11 constitutional under commerce clause).

54. *See, e.g., SEC, TWENTY-FOURTH ANNUAL REPORT* 109 (1958)("[M]ost of the Section 11 problems existing at the time of the passage of the Act have been resolved . . .").

55. *But see* Pub. L. No. 101-572, § 2(a), 104 Stat. 2810 (1990)("The acquisition by a registered company of any interest in any natural gas company or of any interest in any company organized to participate in activities involving the transportation or storage of natural gas, shall be deemed, for purposes of section 11(b)(1) of [PUHCA], to be reasonably incidental or economically necessary or appropriate to the operation of such gas utility companies.")

56. 15 U.S.C. §§ 79i-79j. *See, e.g., Wisconsin's Environmental Decade, Inc. v. SEC*, 882 F.2d 523 (D.C. Cir. 1989).

57. 15 U.S.C. §§ 79c(a)(1)-(5).

58. *Id.* § 79c(b).

In September 1993, there were over 100 public utility holding companies with exemptions from regulation under PUHCA granted by the SEC.⁶⁰ The SEC is to issue, within a reasonable time after the submission of an application for an exemption, an order that either grants the application or, after an opportunity for an administrative hearing, denies the application.⁶¹ The SEC is authorized, however, to issue blanket exemptions, in the form of SEC regulations, for entire classes of subsidiaries of holding companies.⁶²

Section 3 establishes five exemptions for holding companies and their subsidiaries that otherwise would be required to register and would be subject to regulation under PUHCA.⁶³ First, the statute provides an exemption for holding companies that are "predominantly intrastate in character and carry on their businesses substantially in a single state . . ." ⁶⁴ Numerous large holding companies with large public utility subsidiaries have qualified for this exemption.⁶⁵

Second, Section 3 provides an exemption for holding companies that are "predominantly" engaged in public utility operations, the scope of which is confined to their states of incorporation and the states contiguous thereto.⁶⁶ Numerous large public utility companies with public utility subsidiaries have qualified for this exemption.⁶⁷

Third, the statute provides an exemption for "incidental" holding companies that "primarily" are interested in non-utility companies and that derive no material income from public utility subsidiaries.⁶⁸ The exemption often is granted, for example, to large industrial facilities with electric generation facilities to provide their own electric power needs.⁶⁹ Fourth, Section 3 provides an exemption for holding companies with public utility subsidiaries that merely are the result of acquisitions of securities for purposes of liquidations or distributions in connection with debts.⁷⁰ The use of the exemption is infrequent.⁷¹

59. *Id.* § 79c(c).

60. See generally SEC, HOLDING COMPANIES EXEMPT FROM THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 (1993)[hereinafter EXEMPT COMPANIES].

61. 15 U.S.C. § 79c(c).

62. *Id.* § 79c(d).

63. *Id.* §§ 79c(a)(1)-(5).

64. *Id.* § 79c(a)(1).

65. For example, Centerior Energy Corp. of Ohio, a public utility holding company with two electric public utility subsidiaries (Cleveland Electric Illuminating Co. and Toledo Edison Co.), four non-utility subsidiaries, and total holding company system assets in excess of \$11.5 billion, has qualified for this exemption. EXEMPT COMPANIES, *supra* note 60, at 7.

66. 15 U.S.C. § 79c(a)(2).

67. For example, Commonwealth Edison Co. of Illinois, a public utility holding company with one electric public utility subsidiary (Commonwealth Edison Co. of Indiana), six non-utility subsidiaries, and total holding company system assets in excess of \$17.5 billion, has qualified for this exemption. EXEMPT COMPANIES, *supra* note 60, at 59.

68. 15 U.S.C. § 79c(a)(3).

69. See, e.g., *In re James River Corp.*, Holding Co. Act Release No. 22608 (Aug. 19, 1982); *In re American Can Co.* Holding Co. Act Release No. 21156 (July 24, 1979).

70. 15 U.S.C. § 79c(a)(4).

71. See, e.g., *In re Blyth & Co., Inc.*, Holding Co. Act Release No. 11959 (June 1, 1953).

Fifth, the statute provides an exemption to holding companies that are not "principally" engaged in public utility operations in the United States and that derive no material income from public utility subsidiaries that operate in the United States.⁷² The SEC has granted numerous exemptions to holding companies under this provision.⁷³ Finally, Section 3 establishes a sixth exemption for foreign public utility subsidiaries of holding companies. The statute provides an exemption for such subsidiaries that derive no material income from sources within the United States and that are not engaged in public utility operations in the United States.⁷⁴ The SEC has granted numerous exemptions under this provision.⁷⁵

B. State Regulation Under PUHCA

The ineffectiveness of state regulation of inter-state holding companies necessitated the enactment of PUHCA. Section 1 states that the activities of inter-state holding companies "extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies."⁷⁶

The financial abuses of inter-state holding companies that PUHCA is intended to prevent are enumerated in Section 1 thereof.⁷⁷ Those abuses are associated with ineffective state regulation of inter-state holding companies.⁷⁸ The purpose of PUHCA is to prevent those abuses in part through the restoration of effective state regulation. "Congress hoped to

72. 15 U.S.C. § 79c(a)(5).

73. See, e.g., *In re Entergy Corp.*, Holding Co. Act Release No. 25705, International Series Release No. 511 (Dec. 14, 1992); *In re Entergy Corp.*, Holding Co. Act Release No. 25673, International Series Release No. 487 (Nov. 10, 1992); *In re Southern Co.*, Holding Co. Act Release No. 25639, International Series Release No. 460 (Sept. 23, 1992).

74. 15 U.S.C. § 79c(b).

75. See, e.g., *In re Seagull Energy Corp.*, Holding Co. Act Release No. 25603, International Series Release No. 434 (August 11, 1992); *In re Dominion Resources, Inc.*, Holding Co. Act Release No. 25598, International Series Release No. 431 (August 3, 1992); *In re Duke Power Co.*, Holding Co. Act Release No. 25595, International Series Release No. 431 (July 31, 1992); *In re Houston Industries, Inc.*, Holding Co. Act Release No. 25590, International Series Release No. 428 (July 24, 1992); *In re PSI Resources, Inc.*, Holding Co. Act Release No. 25570, International Series Release No. 408 (July 2, 1992); *In re SCE Corp.*, Holding Company Act Release No. 25564, International Series Release No. 405 (June 29, 1992).

76. 15 U.S.C. § 79a(a)(5).

77. *Id.* § 79a(b).

78. *Id.* § 79a(b)(1)("[W]hen securities [of inter-state public utility holding companies] are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies"); *Id.* § 79a(b)(2)("[W]hen service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States"); *Id.* § 79a(b)(3)("[W]hen control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies").

. . . restore effective state regulation . . . which had been seriously impaired by the existence and practices of nation-wide holding company systems.”⁷⁹

Conversely, PUHCA acknowledges the effectiveness of state regulation of intra-state holding companies and thus provides an exemption for such holding companies from the extensive and complex requirements of PUHCA.⁸⁰ Similarly, PUHCA provides a second exemption for holding companies “predominantly” engaged in public utility operations that are confined to single states and those states contiguous thereto.⁸¹

Because PUHCA is intended to restore effective state regulation of inter-state holding companies, the regime it establishes for federal regulation of registered holding companies is not intended to preempt state regulation of inter-state holding companies.⁸² Indeed, if PUHCA was intended to preempt state regulation, then the restoration thereof would be impossible because the legislation would have “left no room for the States to supplement it” or would have “preclude[d] enforcement of state laws on the same subject.”⁸³ Indeed, PUHCA provides a role for state regulation, and for federal deference to state regulation, of inter-state holding companies.

First, although Section 6 prohibits the issuance and sale of securities by registered holding companies and their subsidiaries except in accordance with Section 7,⁸⁴ Section 6 directs the SEC to exempt from this prohibition the issuance and sale of securities by subsidiaries of registered holding companies if the securities are intended “solely” to finance the business of the subsidiaries and are “expressly authorized by the State . . . in which [each] subsidiary . . . is organized and doing business”⁸⁵ Section 6 contemplates a partnership of state and federal regulation of securities.⁸⁶

79. *North American Co. v. SEC*, 327 U.S. 686, 704 (1946). “[T]he purpose of [PUHCA] is simply to provide a mechanism to create conditions under which effective . . . State regulation will be possible.” S. REP. NO. 621, 74TH CONG., 1ST SESS. 11 (1935).

80. 15 U.S.C. § 79c(a)(1). “A holding company whose interests and business are predominantly intrastate need not register even though it makes use of the mails and the channels of interstate commerce.” *Electric Bond and Share Co. v. SEC*, 92 F.2d 580, 586, *aff’d*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936 (1938).

81. 15 U.S.C. § 79c(a)(2).

82. “The purpose of the Public Utility Holding Company Act, as shown by its legislative history, was to supplement state regulation — not to supplant it.” *Alabama Electric Cooperative, Inc. v. SEC*, 353 F.2d 905, 907 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 968, 86 S.Ct. 1273, 16 L.Ed.2d 309 (1965).

83. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1143, 91 L.Ed. 1447 (1947). *See generally* *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm.*, 461 U.S. 190 (1983); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941)(preemption decisions).

84. 15 U.S.C. § 79f(a).

85. *Id.* § 79f(b).

86. “[PUHCA] contains a clear expression of congressional intent not to remove from the states power over the securities of local subsidiary operating companies as exercised through the state public service commissions. State commissions have not been divested of all jurisdiction over the securities of these companies.” *Indiana & Michigan Power Co. v. Public Service Commission*, 275 N.W.2d 450, 454 (1979).

Second, although Section 7 requires a description of a proposed issuance or sale of securities to be filed with the SEC in a declaration,⁸⁷ the declaration is to include information on "compliance with such State laws as may apply"⁸⁸ Third, although the conditions under which the SEC is to allow the declaration to become effective are detailed in several provisions of Section 7,⁸⁹ the statute directs the SEC not to allow the declaration to become effective if "a State . . . shall inform the Commission . . . that State laws applicable to the [securities] in question have not been complied with"⁹⁰

Fourth, Section 8 of PUHCA prohibits the ownership by registered holding companies or their subsidiaries, without express state approval, of electric and gas public utility companies within the same service territories if the ownership of such companies is prohibited or regulated under state law.⁹¹

Fifth, Section 9 prohibits the acquisition of securities or of utility assets, and of interests in other businesses, by registered holding companies and their subsidiaries except in accordance with Section 10.⁹² Section 9, however, provides an exemption for state-approved acquisitions, by public utility subsidiaries of registered holding companies, of utility assets and of securities of their own public utility subsidiaries "provided that both such public-utility companies and all other public-utility companies in the same holding-company system are organized in the same State"⁹³

Sixth, Section 9 also provides an exemption for acquisitions by registered holding companies and their subsidiaries of state-issued or state-guaranteed securities and of securities issued or guaranteed by the federal government and by local governments.⁹⁴ The exemption authorizes the acquisition by such companies of, for example, pollution control and industrial development bonds.⁹⁵

Seventh, although Section 10 requires a description of a proposed acquisition of securities or of utility assets to be filed with the SEC in an application,⁹⁶ the application is to include information on "compliance with such State laws as may apply"⁹⁷ Eighth, although the conditions under which the SEC is to approve or reject the application are detailed in several provisions of Section 10,⁹⁸ the statute directs the SEC not to approve the

87. 15 U.S.C. § 79g(a).

88. *Id.* § 79g(a)(2).

89. *Id.* §§ 79g(c)-(d).

90. *Id.* §§ 79g(g).

91. *Id.* § 79h. "Section 8 of [PUHCA] does not prohibit a holding company from acquiring interests in both electric and gas companies serving the same territory, unless the acquisition would violate the law of a State." *Philadelphia Co. v. SEC*, 177 F.2d 720, 723 (D.C. Cir. 1949).

92. 15 U.S.C. § 79i(a).

93. *Id.* § 79i(b).

94. *Id.* § 79i(c)(1).

95. *See, e.g., In re Alabama Power Co., Holding Co.* Act Release No. 25751 (Feb. 26, 1993).

96. 15 U.S.C. § 79j(a).

97. *Id.* § 79j(a)(1)(A).

98. *Id.* §§ 79j(b)-(c).

application "unless it appears to the satisfaction of the [SEC] that such State laws as may apply in respect of such acquisition have been complied with" ⁹⁹

Thus Section 9 and Section 10, relative to prior SEC approval of acquisitions of securities and of utility assets by registered holding companies and their subsidiaries, like Section 6 and Section 7, relative to prior SEC approval of sales of securities by such companies, contemplate a partnership of state and federal regulation of securities. ¹⁰⁰

Ninth, Section 13 establishes requirements for prior SEC approval of service, sales, and construction contracts between and among companies within the same registered holding company system. ¹⁰¹ The statute authorizes the SEC to regulate, in particular, the allocation, among such companies, of contract costs as well as the duration of contracts. ¹⁰² Section 13 also authorizes the creation of mutual service companies within registered holding company systems to perform service, sales, and construction contracts "for [system] companies, at cost fairly and equitably allocated among such [system] companies, at a reasonable saving to [system] companies over the cost to such companies of comparable contracts performed by independent persons." ¹⁰³

To regulate the fair and equitable allocation of costs, ¹⁰⁴ Section 13 authorizes the SEC, upon the request of a state, to "require a reallocation or reapportionment of costs among [system] companies . . . if it finds the existing allocation inequitable" ¹⁰⁵

99. *Id.* § 79j(f).

100. *But see* Ellis v. Illinois Commerce Commission, 255 N.E.2d 417 (1970). "[L]ooking to the express language of [Section 10] of [PUHCA], we believe that, insofar as investor protection is concerned, the Federal government has preempted the field and has caused the jurisdiction of the SEC to be exclusive to that extent" 255 N.E.2d at 421-22.

101. 15 U.S.C. § 79m.

102. *Id.* § 79m(c).

103. *Id.* § 79m(d). *See generally* Uniform System of Accounts for Mutual Service Companies and Subsidiary Service Companies, 17 C.F.R. Part 256. For example, in May 1995, the SEC authorized Central and South West Corporation (CSW), a registered holding company, to re-organize Central and South West Services, Inc. (CSW Services). *In re Central and South West Corp., Holding Co.* Act Release No. 26293 (May 18, 1995). CSW Services is a mutual service company created in 1969 to provide administrative and other support services for the four electric public utility companies within the CSW holding company system. *In re Central and South West Corp., Holding Co.* Act Release No. 16317 (March 20, 1969). Under the re-organization, CSW Services was to provide human resources services, procurement services, information resources services, system process improvement services, business development services, and other administrative and support services.

104. *See also* 17 C.F.R. § 250.91 ("[A] transaction shall be deemed to be performed at not more than cost if the price . . . does not exceed a fair and equitable allocation of expenses . . . plus reasonable compensation for necessary capital procured through the issuance of capital stock . . .").

105. 15 U.S.C. § 79m(d). *See, e.g.,* *Entergy Corp., Holding Co.* Act Release No. 26322, at 10 (June 30, 1995)("[I]f the operation of the cost allocation plan does not result in a fair and equitable allocation of . . . costs among . . . companies receiving services . . . the [SEC] has the right to require, after notice and opportunity for hearing, prospective adjustments and, to the extent it appears feasible and equitable, retroactive adjustments of such cost allocations."); *Northeast Nuclear Energy Co., Holding Co.* Act Release No. 25950, at 8-9 (Dec. 16, 1993)("In the event that the operation of . . . cost allocation methods does not result in a fair and equitable allocation of its costs among the serviced companies, the [SEC] may reserve the right to require, after notice and opportunity for a hearing, prospective

Tenth, Section 18 of PUHCA authorizes the SEC to investigate possible violations of the statutes and the regulations promulgated thereunder and to advise the states of possible violations.¹⁰⁶ The statute also authorizes the SEC, upon the request of a state, to "investigate, or obtain any information regarding the business, financial condition, or practices of any registered holding company or subsidiary company thereof" ¹⁰⁷ Of course, Section 18 is not intended to preempt state investigation of registered holding companies.¹⁰⁸

Eleventh, Section 19 directs the SEC to admit interested states to administrative hearings conducted under PUHCA.¹⁰⁹ Twelfth, Section 20 of PUHCA authorizes the SEC to promulgate regulations on the methods with which to keep books and accounts.¹¹⁰ Those regulations, however, "shall not be inconsistent with" state-prescribed requirements on the methods with which to keep books and accounts and shall not relieve public utility companies from their obligations with respect to those requirements.¹¹¹

Finally, Section 21 states that "[n]othing [under PUHCA] shall affect . . . the jurisdiction of any other commission, board, agency, or officer . . . of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of [PUHCA] or any rule, regulation, or order thereunder."¹¹² Section 21 appears to confirm that the purpose of PUHCA is to supplement, but not to supplant, state regulation.

C. Congressional Intent and Due Process

The legislative history of PUHCA confirms that the U.S. Congress intended to supplement, but not to supplant, state regulation and to restore effective state regulation. This intent in large measure evolved in response to fears of preemption expressed by the states.

adjustments and, to the extent it appears feasible and equitable, retroactive adjustments of such cost allocations.").

106. 15 U.S.C. § 79r(a).

107. *Id.* § 79r(b).

108. "[N]othing in the Public Utility Holding Company Act of 1935 preempts the authority of the [Rhode Island] commission . . . to investigate contracts, arrangements, purchases, or sales between . . . companies [within the same holding company system] and disallow such transactions if found to be unreasonable." *Blackstone Valley Electric Co. v. Public Utilities Commission*, 486 A.2d 617, 618-19 (R.I. 1985).

109. 15 U.S.C. § 79s.

110. *Id.* § 79t(a). See generally *Uniform System of Accounts for Mutual Service Companies and Subsidiary Service Companies*, 17 C.F.R. Part 256. "The legislative authority found in [Section] 20(a) for the regulation by the [SEC] of the accounting methods of registered holding companies and their subsidiaries is sufficient sanction for the adoption by the [SEC] . . . of the Uniform System of Accounts." *American Power & Light Co. v. SEC*, 158 F.2d 771, 779 (1st Cir. 1946), *cert. denied*, 331 U.S. 827 (1946).

111. 15 U.S.C. § 79t(b).

112. 15 U.S.C. § 79u.

A bill to enact PUHCA and amend the Federal Water Power Act,¹¹³ was introduced in the U.S. Senate in February 1935.¹¹⁴ A similar bill in the U.S. House of Representatives also was introduced in February 1935.¹¹⁵ Both bills reflected numerous recommendations of the National Power Policy Committee established by President Roosevelt in 1934.¹¹⁶ In congressional hearings before the House Committee on Interstate and Foreign Commerce conducted in 1935,¹¹⁷ the National Association of Railroad and Utilities Commissioners, an association of state public utility commissions, argued for "strict and adequate regulation by the States to the full extent of their power and by the federal Government only to the extent that the power of the States cannot control."¹¹⁸ The organization also reiterated and emphasized the statements of numerous witnesses in the congressional hearings that "the avowed purpose of this legislation is and not to supplant, supersede, or duplicate the regulation within the power of the States in any respect."¹¹⁹

The organization supported the enactment of a federal holding company statute but offered numerous amendments to the bill to preclude federal preemption of state regulation.¹²⁰ Congressman Rayburn acknowledged but dismissed this fear of preemption. "[Y]our concern is . . . to protect the States in their rights to regulate things that they can regulate. But it is not a question of preventing them from doing that; it is a question of providing regulations where they do not regulate and in those instances where they cannot regulate."¹²¹

A revised bill was introduced in the Senate in May 1935.¹²² In a report on this bill, the Senate Committee on Interstate Commerce indicated that

113. Pub. L. No. 66-280, 41 Stat. 1063 (1921).

114. S. 1725, 74th Cong., 1st Sess. (1935).

115. H.R. 5423, 74th Cong., 1st Sess. (1935).

116. See generally Report of National Power Policy Committee, H.R. Doc. No. 137, 74th Cong., 1st Sess. 1 (1935). "By 1932 thirteen large holding groups controlled three-fourths of the entire privately owned electric utility industry . . ." *Id.* at 4. "Holding company operations are too extensive, State commission powers and funds too limited, to make thorough and effective State action possible." *Id.* at 7.

117. *Public Utility Holding Companies: Hearings Before the House Committee on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. (1935).

118. *Id.* at 1610 (statement of H. Lester Hooker, Chairman, Legislative Committee, National Association of Railroad and Utilities Commissioners).

119. *Id.* at 1611. "[T]he sponsors of this legislation tell you that it is not their desire to supplant State regulation . . ." *Id.* at 1615.

120. *Id.* at 1659-60 (amendments). "We, however, have presented to [the bill] amendments which we think will fully protect State powers if [the bill] is enacted as presented." *Id.* at 1652 (statement of John E. Benton, General Solicitor, National Association of Railroad and Utilities Commissioners). "There was agreement that Federal regulation to end the evils of holding companies was desirable, and that the association should go on record in favor of such legislation, with such amendments, as should fully protect the jurisdiction and power of the States." *Id.* at 1643.

121. *Id.* at 1694.

122. S. 2796, 74th Cong., 1st Sess. (1935).

PUHCA was intended to restore effective state regulation.¹²³ Section 11 of PUHCA, in particular, the report observed, was intended to "provide a mechanism to create conditions under which effective Federal and State regulation will be possible."¹²⁴

In June 1935, the Senate approved this bill,¹²⁵ which was then introduced in the House. After the House Committee on Interstate and Foreign Commerce issued a report,¹²⁶ the House approved the bill in July.¹²⁷ In August, after the issuance of conference report,¹²⁸ the U.S. Congress enacted the Public Utility Act,¹²⁹ Title I which enacted PUHCA.¹³⁰ Title II amended the Federal Water Power Act.¹³¹

The U.S. Congress enacted PUHCA to restore effective state regulation of inter-state holding companies just about the time when the U.S. Supreme Court began to abandon the doctrine of economic substantive due process, under which the Court, for thirty years, had declared much state regulation of business unconstitutional. In 1905, the Court, under the Due Process Clause of the Fourteenth Amendment,¹³² declared a New York state labor statute unconstitutional.¹³³ The decision ushered in the so-called *Lochner* era of economic substantive due process, which in retrospect appeared to be hostile to state economic and social regulation.¹³⁴ The *Lochner* decision concluded that the labor statute violated the Fourteenth Amendment because it was "an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as

123. "Realistic regulation requires the readjustment of holding companies to a size and power, and to a changed relationship to their operating subsidiaries and the communities served thereby, which will give regulation a chance to be effective . . ." S. REP. NO. 621, 74th Cong., 1st Sess. 4 (1935).

124. *Id.* at 11.

125. 79 Cong. Rec. S9040-65 (1935).

126. H.R. REP. NO. 1318, 74th Cong., 1st Sess. (1935).

127. 79 Cong. Rec. H10,640 (1935).

128. H.R. REP. NO. 1903, 74th Cong., 1st Sess. (1935).

129. Pub. L. No. 74-333, 49 Stat. 803 (1935).

130. *Id.* § 33, 49 Stat. at 838.

131. *Id.* § 213, 49 Stat. at 847.

132. "[N]or shall any state deprive any person of life, liberty or property without due process of law . . ." U.S. Const. amend. XIV. In 1887, the Court, in a due process challenge to a Kansas state liquor statute, observed that "[i]f . . . a [state] statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects . . . it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)(statute constitutional). In 1897, in a due process challenge to a Louisiana state insurance statute, the Court observed that "[t]he liberty mentioned [in the Due process Clause] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties . . ." *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)(statute unconstitutional).

133. *Lochner v. New York*, 198 U.S. 45 (1905).

134. "The rise of substantive due process review was associated with the individualism and laissez-faire philosophies of the nineteenth century, although its origins border on being ancient." McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 414 (1993).

they think best . . ."¹³⁵ or about the next three decades, the Court declared unconstitutional numerous state economic and social welfare statutes with respect to, for example, minimum wages,¹³⁶ legal protection for labor unions,¹³⁷ consumer protection,¹³⁸ and job requirements.¹³⁹ Other, if not most, state social welfare statutes enacted between 1905 and 1935 survived constitutional challenges.¹⁴⁰ Indeed, "while economic substantive due process was a significant obstacle to government regulation, at best it merely slowed the welfare state's advance."¹⁴¹

In 1934, the year before the U.S. Congress enacted PUHCA, the Court declared constitutional under the Due Process Clause a state requirement on retail milk prices.¹⁴² In 1936, however, it again invoked the doctrine of economic substantive due process and declared a New York state statute on minimum wages for women unconstitutional.¹⁴³ Finally, in 1937, in a decision that signalled the abandonment of the doctrine,¹⁴⁴ the Court declared constitutional a Washington state statute on minimum wages for women.¹⁴⁵ The Court observed that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."¹⁴⁶ The decision eliminated a significant constitutional obstacle to the development of state economic and social welfare regulation and, in particular, of effective state regulation of inter-state holding companies.¹⁴⁷

III. ENERGY POLICY ACT OF 1992

A. Exempt Facilities

In October 1992, President Bush signed into law the Energy Policy Act of 1992 (EPAAct),¹⁴⁸ which implemented in large measure the National

135. 198 U.S. at 61. "So hostile was [the Court] to government regulation, in fact, that [it] did not (or could not) see the statute as a health measure at all." Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 273.

136. *Morehead v. New York*, 298 U.S. 587 (1936).

137. *Coppage v. Kansas*, 236 U.S. 1 (1915)(state prohibition on anti-union employment contracts unconstitutional).

138. *Fairmont Creamery v. Minnesota*, 274 U.S. 1 (1927)(state prohibition on price discrimination unconstitutional).

139. *Smith v. Texas*, 233 U.S. 630 (1914)(state job requirements for railroad employees unconstitutional).

140. See, e.g., *Bunting v. Oregon*, 243 U.S. 426 (1917)(state hours of service statute constitutional); *Muller v. Oregon*, 208 U.S. 412 (1908)(state hours of service statute for women constitutional).

141. Phillips, *supra* note 135, at 274.

142. *Nebbia v. New York*, 291 U.S. 502 (1934).

143. *Morehead v. New York*, 298 U.S. 587 (1936).

144. "The demise of the doctrine was associated with the growth of collective action and welfare economies of the twentieth century." McCormack, *supra* note 134, at 415.

145. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

146. 300 U.S. at 391.

147. "What occurred thereafter was a fifty-year line of decisions rendering economic substantive due process a virtual nullity." Phillips, *supra* note 135, at 282.

148. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992). See generally *Statement on Signing the Energy Policy Act of 1992*, 28 WKLY COMP. PRES. DOC. 2094 (1992).

Energy Strategy proposed by the U.S. Department of Energy in February 1991.¹⁴⁹ Subtitle A of Title VII of EPACT amended PUHCA.¹⁵⁰ In particular, Section 711 of EPACT added Section 32 to PUHCA to authorize registered and exempt holding companies to invest in electric generation facilities that would not be subject to regulation under PUHCA.¹⁵¹ Section 715 of EPACT added Section 33 to PUHCA to authorize registered and exempt holding companies to invest in foreign public utility companies that also would not be subject to regulation under PUHCA.¹⁵²

Section 32 is intended to promote the construction and operation throughout the United States of new and efficient electric power plants for independent power production.¹⁵³ The statute establishes an exemption from the requirements of PUHCA for electric generation facilities constructed and operated for the production of wholesale, but not of retail,¹⁵⁴ electric power (Exempt Facilities).¹⁵⁵ Section 32 authorizes exempt holding companies to acquire Exempt Facilities "without condition or limitation" under PUHCA.¹⁵⁶ It also authorizes registered holding companies to acquire Exempt Facilities without prior SEC approval.¹⁵⁷

Section 32, however, provides no exemption from the requirements of Section 6 and Section 7 of PUHCA relative to the issuance and sale of securities by registered holding companies and their subsidiaries to finance the acquisition of Exempt Facilities.¹⁵⁸ Those statutes continue to regulate securities issued and sold by such companies to acquire Exempt Facilities. In addition, Section 32 prohibits contracts for the purchase of wholesale electric power between Exempt Facilities and electric public utility companies within the same holding company system.¹⁵⁹

149. U.S. DEPARTMENT OF ENERGY, NATIONAL ENERGY STRATEGY: POWERFUL IDEAS FOR AMERICA (1991).

150. Pub. L. No. 102-486, §§ 711-15, 106 Stat. at 2985-14.

151. 15 U.S.C. § 79z-5a.

152. *Id.* § 79z-5b.

153. "[Section 32] is intended to remove the corporate obstacles to independent power production contained in [PUHCA]." S. REP. NO. 72, 102ND CONG., 1ST SESS. 354 (1991). "One overriding constraint on the development of . . . independent power is [PUHCA]." H.R. REP. NO. 474, 102ND CONG., 1ST SESS. 139 (1991). See generally *National Energy Security Act of 1991 (Title XV): Hearings Before the Senate Comm. on Energy and Natural Resources*, 102nd Cong., 1st Sess. (1991); *National Energy Strategy (Part IV): Hearings Before the Subcomm. on Energy and Power of the House Comm. on Energy and Commerce*, 102nd Cong., 1st Sess. (1991); *Legislation to Amend the Public Utility Holding Company Act of 1935: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102nd Cong., 1st Sess. (1991); H.R. REP. NO. 1018, 102ND CONG., 2ND SESS. (1992)(conference committee report). See also U.S. CONGRESSIONAL RESEARCH SERVICE, ELECTRICITY: A NEW REGULATORY ORDER? (1991); U.S. GENERAL ACCOUNTING OFFICE, ELECTRICITY SUPPLY: POTENTIAL EFFECTS OF AMENDING THE PUBLIC UTILITY HOLDING COMPANY ACT (1992).

154. 15 U.S.C. § 79z-5a(a) (definitions).

155. *Id.* § 79z-5a(e).

156. *Id.* § 79z-5a(f).

157. *Id.* § 79z-5a(g).

158. *Id.* § 79z-5a(h).

159. 15 U.S.C. §§ 79z-5a(a), 79z-5a(k)(1).

Thus Section 32 continues to subject Exempt Facilities to a limited degree of federal regulation. The statute also provides a role for state regulation, and for federal deference to state regulation, of Exempt Facilities. First, it authorizes electric generation facilities constructed and in operation prior to EPAct to become Exempt Facilities if the states with rate jurisdiction over those facilities determine that the application of this grandfather clause “(1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law.”¹⁶⁰

Second, because Section 6 and Section 7 of PUHCA continue to regulate securities issued and sold by registered holding companies and their subsidiaries to acquire Exempt Facilities, Section 32 directs the SEC to promulgate regulations to ensure that the issuance and sale of securities for the acquisition by such companies of Exempt Facilities “has no adverse impact on any utility subsidiary or its customers, or on the ability of State commissions to protect such subsidiary or customers”¹⁶¹

Finally, although Section 32 prohibits contracts for the purchase of wholesale electric power between Exempt Facilities and electric public utility companies within the same holding company system,¹⁶² the statute authorizes such contracts if the states with rate jurisdiction over such companies determine that their resources and their access to the books and records of the electric public utility companies are sufficient to “exercise [their] duties under [Section 32]” and that the contracts for the purchase of wholesale electric power “(I) will benefit consumers, (II) do not violate any State law . . . (III) would not provide the [Exempt Facilities] any unfair competitive advantage . . . and (IV) [are] in the public interest.”¹⁶³

In October 1993,¹⁶⁴ the SEC, under Section 32, promulgated Rule 53 under PUHCA.¹⁶⁵ Proposed in March 1993,¹⁶⁶ Rule 53 is intended to ensure that the issuance and sale of securities for the acquisition by registered holding companies and their subsidiaries of Exempt Facilities “has no adverse impact on any utility subsidiary or its customers, or on the ability of State commissions to protect such subsidiary or customers”¹⁶⁷ The regulation parallels Section 32 to the extent that it provides for federal deference to state regulation of Exempt Facilities.

Rule 53 establishes a presumption that the issuance and sale of securities for the acquisition by a registered holding company system of Exempt Facilities will have no adverse impact on state regulation if: (i) the aggregate investment by the system in Exempt Facilities is not in excess of 50% of the consolidated retained earnings of the system;¹⁶⁸ (ii) the system maintains books and records on investments in and revenues from Exempt

160. *Id.* § 79z-5a(c).

161. *Id.* § 79z-5a(h)(6).

162. *Id.* § 79z-5a(k)(1).

163. *Id.* § 79z-5a(k)(2).

164. 58 Fed. Reg. 51,488 (1993).

165. 17 C.F.R. § 250.53.

166. 58 Fed. Reg. 13,719 (1993).

167. 15 U.S.C. § 79z-5a(h)(6).

168. 17 C.F.R. § 250.53(a)(1).

Facilities;¹⁶⁹ (iii) the number of employees from electric public utility companies within the system that provide services to Exempt Facilities is not in excess of 2% of the total number of employees that work for such companies (2% Standard);¹⁷⁰ and (iv) the system provides specified reports and certifications on Exempt Facilities to "every federal, state or local regulator having jurisdiction over the retail rates of any [system] public-utility company."¹⁷¹

Rule 53 also establishes three conditions that rebut the presumption that the issuance and sale of securities for the acquisition by a registered holding company system of Exempt Facilities will have no adverse impact.¹⁷² For example, the presumption is rebutted if the system "has been the subject of a bankruptcy or similar proceeding, unless a plan of reorganization has been confirmed in such proceeding."¹⁷³ If the presumption is rebutted, then the system must "affirmatively demonstrate" that the issuance and sale of securities for the acquisition of Exempt Facilities will have no adverse impact.¹⁷⁴

Proposed in March 1993, Rule 53 would have coupled the 2% Standard with the additional requirement that the states with rate jurisdiction over the electric public utility companies approve the services.¹⁷⁵ This additional requirement was excluded from the final regulation. The SEC had concluded that "[i]t . . . appears that the proposed requirement could burden the state commissions . . . without adding any significant protection for consumers."¹⁷⁶

Upon its promulgation, Rule 53 was subjected to an unsuccessful legal challenge. The National Association of Regulatory Utility Commissioners (NARUC), an association of state public utility commissions, filed a petition for review of the regulation with the U.S. Court of Appeals for the D.C. Circuit because, it argued, Rule 53 was inconsistent with, and based on an erroneous interpretation of, Section 32.¹⁷⁷ The D.C. Circuit disagreed. In accordance with U.S. Supreme Court precedent,¹⁷⁸ the court reviewed the SEC interpretation of the statute, on which the regulation was based, and concluded that it was reasonable. "In our view, the Commission's interpretation is a permissible construction of an ambiguous statute."¹⁷⁹ The petition for review was denied.

169. *Id.* § 250.53(a)(2).

170. *Id.* § 250.53(a)(3).

171. *Id.* § 250.53(a)(4).

172. 17 C.F.R. §§ 250.53(b)(1)-(3).

173. *Id.* § 250.53(b)(1).

174. *Id.* § 250.53(c).

175. 58 Fed. Reg. at 13,727. "The [SEC] believes that a state public-utility commission is best able to assess the potential impact of the assignment of utility personnel, particularly managers and technical staff, on an operating company." *Id.* at 13,722.

176. 58 Fed. Reg. at 51,497.

177. National Ass'n of Regulatory Util. Comm'rs v. SEC, 63 F.3d 1123 (D.C. Cir. 1995).

178. "If . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

179. 63 F.3d at 1127.

B. Foreign Companies

Section 33 of PUHCA is intended to promote and facilitate an expansion and increase in U.S. investment in foreign public utility companies.¹⁸⁰ The statute establishes an exemption from the requirements of PUHCA for foreign public utility companies¹⁸¹ — electric public utility companies, engaged in the production, transmission, or retail distribution of electric power, and for gas public utility companies, engaged in the retail distribution of natural gas — if the companies own or operate no electric generation facilities or gas distribution facilities in the United States, derive no material income from public utility operations within the United States, and are not engaged in public utility operations in the United States (Foreign Companies).¹⁸²

The exemption is unavailable, however, to foreign public utility subsidiaries of exempt holding companies unless each state with rate jurisdiction over U.S. public utility companies within the same exempt holding company system “has certified to the [SEC] that it has the authority and resources to protect ratepayers subject to its jurisdiction and that it intends to exercise its authority.”¹⁸³

Section 33 authorizes exempt holding companies to acquire Foreign Companies “without condition or limitation” under PUHCA.¹⁸⁴ It also authorizes registered holding companies to acquire Foreign Companies without prior SEC approval but subject to regulations. The statute directs the SEC to promulgate regulations that “shall provide for the protection of the customers of a public utility company [within the same registered holding company system] and the maintenance of the financial integrity of the registered holding company system.”¹⁸⁵

Section 33, however, provides no exemption from the requirements of Section 6 and Section 7 of PUHCA relative to the issuance and sale of securities by registered holding companies and their subsidiaries to finance the acquisition of Foreign Companies.¹⁸⁶ In this respect, the statute is similar to Section 32.¹⁸⁷ In addition, Section 33 provides that each state with rate jurisdiction over U.S. public utility companies within the same registered holding company system “may make such recommendations to the [SEC] regarding the registered holding company’s relationship to [Foreign

180. “Around the world, countries are privatizing and upgrading their energy networks, often seeking bids from U.S. companies to build and maintain these systems. We do not want to impose Government barriers to these historic opportunities.” 138 CONG. REC. S17,629 (daily ed. Oct. 8, 1992)(statement of Sen. Riegle). See generally PALMER BELLEVUE CORPORATION, GLOBAL CHALLENGES IN ENERGY AND THE ENVIRONMENT: AN AMERICAN OPPORTUNITY THROUGH PUHCA REFORM (1992).

181. 15 U.S.C. § 79z-5b(a)(1).

182. *Id.* § 79z-5b(a)(3).

183. *Id.* § 79z-5b(a)(2).

184. *Id.* § 79z-5b(b).

185. *Id.* § 79z-5b(c)(1).

186. 15 U.S.C. § 79z-5b(c)(2).

187. *Id.* § 79z-5a(h).

Companies] and the [SEC] shall reasonably and fully consider such State recommendation."¹⁸⁸

The statute also prohibits the issuance and sale of securities by U.S. public utility companies to finance the acquisition of Foreign Companies¹⁸⁹ — unless each state with rate jurisdiction over those companies that are “predominantly” engaged in public utility operations “expressly permits” the issuance and sale of such securities.¹⁹⁰

Section 33 is not intended to preempt state regulation of U.S. public utility companies. The statute states that it shall not “be deemed or construed to limit the authority of any State . . . with respect to (A) any public utility company or holding company subject to such State’s jurisdiction; or (B) any transaction between any [Foreign Companies] . . . and any public utility company or holding company subject to such State’s jurisdiction.”¹⁹¹ Finally, Section 33 requires the states to be advised of acquisitions of Foreign Companies.¹⁹²

Section 33, therefore, contemplates an indirect role for state regulation of foreign public utility subsidiaries of registered and exempt holding companies.¹⁹³ The statute directs the SEC to promulgate regulations relative to Foreign Companies. Thus the SEC, in March 1993, proposed Rule 55 under PUHCA.¹⁹⁴ The regulation would authorize a registered holding company system to acquire Foreign Companies without prior SEC approval if the system complied with the requirements and conditions of Rule 53¹⁹⁵ — if, for example, the aggregate investment by the system in Foreign Companies was not in excess of 50% of the consolidated retained earnings of the system.¹⁹⁶ Rule 55 would authorize the system to acquire Foreign Companies if the system provided specified reports and certifications on Foreign Companies to “every federal, state or local regulator having jurisdiction over the retail rates of any [system] public-utility company.”¹⁹⁷

Because it would incorporate the requirements and conditions of Rule 53, Rule 55 thus also would provide for federal deference to state regulation of Foreign Companies. The SEC, however, has not promulgated Rule 55. When it promulgated Rule 53, the SEC stated that “[i]n light of the

188. *Id.* § 79z-5b(c)(2).

189. *Id.* § 79z-5b(f)(1).

190. *Id.* § 79z-5b(f)(2).

191. 15 U.S.C. § 79z-5b(d).

192. *Id.* § 79z-5b(e)(2).

193. “[EPA] assigns state regulators significant responsibility for the protection of consumers of domestic public-utility companies.” 58 Fed. Reg. at 13,720 (1993).

194. *Id.*

195. “A registered holding company shall be permitted, without the need to apply for or receive [SEC] approval, to acquire and hold the securities or an interest in the business of, one or more foreign utility companies, if [Section] 250.53(a) and (b) are satisfied.” 58 Fed. Reg. at 13,727.

196. 17 C.F.R. § 250.53(a)(1).

197. *Id.* § 250.53(a)(4).

comments and upon our own review of this matter, we have decided to defer action on proposed [Rule 55] pending further consideration."¹⁹⁸

When it promulgated Rule 53, the SEC also proposed an amendment to Rule 87,¹⁹⁹ which implements Section 13 of PUHCA.²⁰⁰ Rule 87 authorizes mutual service companies and specified other companies within the same system to perform service, sales, and construction contracts for public utility companies and other system companies without prior SEC approval.²⁰¹ The proposed amendment to the regulation would exclude from its authorization service, sales, and construction contracts for or from Exempt Facilities and Foreign Companies.²⁰²

Thus the proposed amendment would require prior SEC approval for service, sales, and construction contracts for or from Exempt Facilities and Foreign Companies.²⁰³ Finally, the proposed amendment, which is still under consideration, would require an application for prior SEC approval to be "simultaneously submitted to every State, local and federal commission having jurisdiction over the retail rates of any affected public-utility company."²⁰⁴

Thus EPAAct and the regulations promulgated and proposed thereunder contemplate an indirect role for state regulation, and for federal deference to state regulation, of inter-state public utility holding companies relative to their acquisitions of Exempt Facilities and Foreign Companies. Section 32 authorizes states to approve Exempt Facilities under its grandfather clause,²⁰⁵ which directs the SEC to promulgate regulations for the protection of state regulation,²⁰⁶ and authorizes states to approve contracts for the purchase of wholesale electric power between Exempt Facilities and electric public utility companies within the same holding company system.²⁰⁷ Rule 53 establishes numerous requirements and conditions, relative to the issuance and sale of securities for the acquisition by registered holding companies and their subsidiaries of Exempt Facilities, to protect state regulation.²⁰⁸ The proposed regulation would have authorized states

198. 58 Fed. Reg. 51,488 (1993).

199. 58 Fed. Reg. 51,488, at 51,508.

200. Section 13 establishes requirements for prior SEC approval of service, sales, and construction contracts between and among companies within the same registered holding company system. 15 U.S.C. § 79m.

201. 17 C.F.R. § 250.87.

202. 58 Fed. Reg. 51,508. "The proposed amendment is intended to ensure that necessary personnel and other resources are not improperly shifted from the system's core utility business to [Exempt Facilities and Foreign Companies] and that the operating utility companies do not subsidize these new activities." *Id.*

203. *Id.* at 51,510. "[T]he requirement of [SEC] approval under the amended rule will help to ensure that management and highly trained technical personnel do not render services to [Exempt Facilities and Foreign Companies] to the detriment of the registered holding company's ratepayers." *Id.* at 51,509.

204. 58 Fed. Reg. at 51,510.

205. 15 U.S.C. § 79z-5a(c).

206. *Id.* § 79z-5a(h)(6).

207. *Id.* § 79z-5a(k)(2).

208. 17 C.F.R. § 250.53.

to approve services from electric public utility companies to Exempt Facilities within the same registered holding company system.²⁰⁹

Section 33 authorizes states to advise the SEC on the relationship of registered holding companies to their foreign public utility subsidiaries,²¹⁰ is not intended to preempt state regulation of transactions between Foreign Companies and registered holding companies²¹¹ and requires states to be advised of acquisitions of Foreign Companies.²¹² Rule 55 would incorporate the requirements and conditions of Rule 53 for the protection of state regulation.²¹³

IV. JUDICIAL DECISIONS AND SEC REGULATIONS

A. *Watchful Deference*

The U.S. Congress and the SEC have expanded the role of state regulation of inter-state holding companies. The SEC promulgated Rule 53 and proposed Rule 55 in accordance with EPAct. Even prior to EPAct, however, the SEC amended regulations under PUHCA to increase the participation of the states in the regulation of such companies. The expanded role of state regulation through these amended regulations has resulted in increased federal deference to state regulation. Since EPAct, the SEC has continued to amend regulations under PUHCA in this regard.

The ineffectiveness of state regulation of inter-state holding companies necessitated the enactment of PUHCA.²¹⁴ This ineffectiveness would appear to caution against federal deference to state regulation. Nonetheless, in the past decade, the SEC has not been reluctant to defer to states with rate jurisdiction over public utility companies of inter-state holding companies.

In 1989, the U.S. Court of Appeals for the D.C. Circuit provided a significant impetus to SEC deference to state regulation.²¹⁵ The decision involved not a registered holding company but an exempt holding company. Nonetheless, the SEC has relied upon the decision to increase its deference to state regulation of inter-state holding companies. Indeed, the decision originated a catchphrase — “watchful deference” — that in the past decade has become a mantra of the SEC regulation under PUHCA.

In June 1987, WPL Holdings, Inc. (WPL), a new public utility holding company, submitted an application to the SEC, under Section 9 of PUHCA,²¹⁶ (i) for approval to acquire the securities of Wisconsin Power and Light Company, an electric public utility company, and, under Section 3 of PUHCA,²¹⁷ (ii) for an exemption from regulation.²¹⁸ Although a pub-

209. 58 Fed. Reg. at 13,727.

210. 15 U.S.C. § 79z-5b(c)(2).

211. *Id.* § 79z-5b(d).

212. *Id.* § 79z-5b(e)(2).

213. 58 Fed. Reg. at 13,727.

214. 15 U.S.C. § 79a(a)(5).

215. *Wisconsin's Envtl. Decade, Inc. v. SEC*, 882 F.2d 523 (D.C. Cir. 1989).

216. 15 U.S.C. § 79i(a).

217. *Id.* § 79c(a).

lic interest organization opposed the application, the SEC approved the acquisition and granted the exemption.²¹⁹ The order was consistent with recent SEC precedent.²²⁰

The SEC is not to grant an exemption under Section 3 if "it finds the exemption detrimental to the public interest or the interest of investors or consumers" ²²¹ In addition, the conditions under which the SEC is to approve or reject an application under Section 9 for an acquisition of securities or of utility assets are detailed in several provisions of Section 10.²²² For example, the SEC is not to approve such an acquisition that "is detrimental to the carrying out of the provisions of" Section 11,²²³ which authorizes the SEC to limit the operations of registered holding company systems to single and "integrated" public utility systems.²²⁴

The public interest organization opposed the the WPL application filed with the D.C. Circuit a petition for review of the SEC order. The petition argued, first, that the exemption was detrimental to the public interest,²²⁵ and, second, that the acquisition of Wisconsin Power and Light Company was detrimental to the provisions of Section 11.²²⁶ To grant the exemption and approve the acquisition, however, the SEC had deferred to some extent to the State of Wisconsin.²²⁷

With respect to the exemption,²²⁸ the SEC concluded that the public interest would be protected in part because "there is . . . comprehensive Wisconsin law governing the formation and operations of utility holding companies."²²⁹ With respect to the acquisition, the SEC concluded that there would be no detriment to the provisions of Section 11 in part because the Public Service Commission of Wisconsin had approved the formation of WPL in April 1987 and because the legislature of the State of Wisconsin "has determined that the local public interest is served by the formation of a new holding company such as [WPL] Holdings" ²³⁰

The D.C. Circuit agreed that the SEC could defer to the State of Wisconsin to conclude that the exemption would not be detrimental to the

218. Public Utility Holding Co. Act of 1935, Release No. 24418 (June 25, 1987)(notice of application).

219. *In re WPL Holdings, Inc.*, Holding Co. Act Release No. 24590 (Feb. 26, 1988).

220. *In re Wisconsin Energy Corp.*, Holding Co. Act Release No. 24267 (Dec. 18, 1986).

221. 15 U.S.C. § 79c(a).

222. *Id.* §§ 79j(b)-(c).

223. *Id.* § 79j(c)(1).

224. *Id.* § 79k(b).

225. 882 F.2d at 526-27.

226. 882 F.2d at 527.

227. "[T]he judgment of a state's legislature and public service commission as to what will benefit their constituents is entitled to considerable deference when not in conflict with the policies of [PUHCA]" Holding Co. Act Release No. 24590, *supra* note 219, at 20 (citation omitted).

228. "[I]t is proper to give weight to the views of the state commission where the issue arises not under Section 11 but under the more general standard of Section 3" See *supra* note 219, at 26 (citation omitted).

229. See *supra* note 219, at 32. "One such reality is the protection afforded to investors, consumers, and the public by the existence of vigorous state regulation." See *supra* note 219, at 27.

230. See *supra* note 219, at 27.

public interest.²³¹ The D.C. Circuit also agreed that the SEC could defer to the State of Wisconsin to conclude that the acquisition of Wisconsin Power and Light Company would be detrimental to the provisions of Section 11.²³²

Nonetheless, the D.C. Circuit granted the petition for review, on other grounds, and remanded the SEC order.²³³ On remand, the SEC supplemented, modified, and affirmed the original order and again approved the acquisition and granted the exemption.²³⁴

The use and application of "watchful deference" in the regulation of public utility holding companies have expanded well beyond the specific circumstances of the D.C. Circuit decision that originated the expression. WPL was not a registered holding company but an exempt holding company. Nonetheless, the SEC has relied upon "watchful deference" to regulate registered holding companies as well.

For example, in December 1990, the SEC approved the acquisition by Northeast Utilities (Northeast), a registered holding company, of Public Service Company of New Hampshire (PSNH), an electric public utility company.²³⁵ Under Section 10, the SEC is not to approve such an acquisition that "tend[s] towards . . . the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers."²³⁶ This condition requires that the acquisition not result in a federal anti-trust violation.²³⁷ The SEC concluded, however, that the acquisition by Northeast of PSNH would not "tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers" ²³⁸

Almost simultaneously, an administrative law judge for the Federal Energy Regulatory Commission (FERC) issued an initial decision that also approved the acquisition by Northeast of PSNH.²³⁹ Under Section 203 of the Federal Power Act,²⁴⁰ the FERC is not to approve such an acquisition

231. "[W]e are not prepared to say that the [SEC] abdicates its duty in an exemption determination by deciding to rely, watchfully, on the course of state regulation." 882 F.2d at 526-27.

232. "Nor has [the public interest organization] given any substantial reason why the SEC's watchful deference to the legislative and administrative judgment of a state regulating an intrastate holding company is not permissible under [PUHCA]." 882 F.2d at 527.

233. 882 F.2d at 527-28.

234. *In re WPL Holdings, Inc.*, Holding Co. Act Release No. 25096 (May 25, 1990); *In the Matter of WPL Holdings, Inc.*, Holding Co. Act Release No. 25377 (Sept. 18, 1991).

235. *In re Northeast Utilities*, HCAR No. 25221 (Dec. 21, 1990).

236. 15 U.S.C. § 79j(b)(1).

237. *Environmental Action, Inc. v. SEC*, 895 F.2d 1255, 1260 (9th Cir. 1990)(interpretation of statute); *City of Lafayette v. SEC*, 481 F.2d 1101, 1103 (D.C. Cir. 1973)(interpretation of statute); *Municipal Electric Association of Massachusetts v. SEC*, 413 F.2d 1052, 1056-57 (D.C. Cir. 1969)(interpretation of statute).

238. *In re Northeast Util.*, *supra* note 236, at 40.

239. *In re Northeast Utilities Service Co.*, 53 FERC ¶ 63,020 (1990).

240. 16 U.S.C. § 824b.

without consideration for potential federal anti-trust violations.²⁴¹ The initial decision, however, concluded that “[a]n unconditioned [Northeast]-PSNH merger would have anticompetitive consequences.”²⁴² For this reason, the initial decision imposed several pro-competitive conditions on the acquisition.²⁴³ In August 1991, the FERC affirmed the initial decision and affirmed the imposition of pro-competitive conditions on the otherwise approved acquisition because “an unconditioned merger would likely have serious anticompetitive consequences for New England.”²⁴⁴ The U.S. Court of Appeals for the First Circuit upheld the FERC-approved acquisition.²⁴⁵

The SEC as well as the FERC had approved the acquisition by Northeast of PSNH. The SEC had concluded that the acquisition would not be anti-competitive and thus had imposed no conditions. The FERC had concluded that the acquisition could be anti-competitive and thus had imposed several pro-competitive conditions. This difference in conclusions was the basis for a petition for reconsideration of the SEC order.

The SEC granted the petition but reached the same conclusion and again approved the acquisition.²⁴⁶ The SEC again concluded that the acquisition would not be anti-competitive because, it now reasoned, the FERC had imposed several pro-competitive conditions.²⁴⁷ Thus the SEC deferred to the FERC on the potential for the acquisition to result in a federal anti-trust violation.

The D.C. Circuit agreed that it was permissible for the SEC to defer to the FERC in this regard.²⁴⁸ “[W]hen the SEC and another regulatory agency both have jurisdiction over a particular transaction, the SEC may ‘watchfully defer[]’ to the proceedings held before, and the result reached by — that other agency.”²⁴⁹

241. *In re Commonwealth Edison Co.*, 36 F.P.C. 927 (1966), *aff'd*, *Utility Users League v. FPC*, 394 F.2d 16 (7th Cir.), *cert. denied*, 393 U.S. 953 (1968); *Kansas Power & Light Co. v. FPC*, 554 F.2d 1178 (D.C. Cir. 1977)(interpretation of statute relative to federal anti-trust policies).

242. 53 FERC at 65,219.

243. “[T]he Commission has broad authority under section 203 to condition approval of a merger that would not, but for such conditions, be consistent with the public interest.” *In the Matter of Utah Power & Light Co.*, Opinion No. 318, 45 FERC ¶ 61,095, 61,282, 96 P.U.R.4th 325 (1988).

244. *In re Northeast Utilities Service Co.*, Opinion No. 364, 56 FERC ¶ 61,269, 61,998, *aff'd*, Opinion No. 364-A, 58 FERC ¶ 61,070 (1991), *petition for reh'g denied*, Opinion No. 364-B, 59 FERC ¶ 61,042 (1992).

245. *Northeast Utilities Co. v. FERC*, 993 F.2d 939 (1st Cir. 1993).

246. *In re Northeast Utilities*, HCAR No. 25273 (March 15, 1991).

247. “When the [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look to the FERC’s expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the [a]cquisition upon . . . FERC . . . approving the merger” HCAR No. 25273 at 8 (notes omitted).

248. *City of Holyoke Gas & Electric Department v. SEC*, 972 F.2d 358 (D.C. Cir. 1992). “[I]t does not follow that the SEC must pretend that it is the only agency addressing the issue when it is not; that would only lead it to conduct a wasteful, duplicative proceeding.” 972 F.2d at 363 (citation omitted).

249. 972 F.2d at 363-64 (citation omitted).

The SEC, therefore, has watchfully defered to the states in the regulation of intra-state holding companies.²⁵⁰ The SEC also has watchfully defered to the FERC in the regulation of inter-state holding companies. Finally, the SEC, it appears, has watchfully defered to the states in the promulgation of regulations applicable to inter-state holding companies. In the past decade, the SEC has amended regulations under PUHCA to expand the role of the states in the regulation of inter-state holding companies. These amended regulations have resulted in increased federal deference to state regulation.

B. State-Approved Securities

Although Section 6(a) of PUHCA prohibits the issuance and sale of securities by registered holding companies and their subsidiaries except in accordance with Section 7,²⁵¹ Section 6(b) directs the SEC to exempt from this prohibition the issuance and sale of securities by subsidiaries of registered holding companies if the securities are intended "solely" to finance the business of the subsidiaries and are "expressly authorized by the State . . . in which [each] subsidiary . . . is organized and doing business"²⁵² For fifty-five years, the SEC administered PUHCA without a specific regulation to implement this exemption under Section 6(b). Then, in March 1990,²⁵³ in response to a petition submitted by a task force of registered holding companies,²⁵⁴ the SEC promulgated Rule 52 under PUHCA.²⁵⁵

Rule 52 implements this exemption from the requirements of Section 6 and Section 7 for the issuance and sale of securities by subsidiaries of registered holding companies.²⁵⁶ The regulation, like Section 6(b), is available for securities intended "solely" to finance the business of the subsidiaries.²⁵⁷ Rule 52, however, applies not to all subsidiaries of registered holding companies but just to public utility subsidiaries.²⁵⁸ In addition, the regulation requires the interest rates of debt securities issued and sold to companies within the same registered holding company system to "parallel the effective cost of capital" of those companies.²⁵⁹

250. See also Non-Utility Diversification by Intrastate Public-Utility Holding Companies, Holding Co. Act Release No. 24815, 54 Fed. Reg. 6701 (1989)(proposed regulations). "[T]he [SEC] . . . shall not deem holding-company direct or indirect interests in non-utility businesses to be detrimental to the public interest . . . if . . . [t]he State of organization of the holding company has enacted a statute governing the formation and/or operations of intrastate public-utility holding companies and their affiliates." 54 Fed. Reg. at 6706-07 (proposed Rule 17). The SEC has not promulgated Rule 17.

251. 15 U.S.C. § 79f(a).

252. *Id.* § 79f(b).

253. 55 Fed. Reg. 11,362 (1990).

254. 54 Fed. Reg. 22,314 (1989)(notice of proposed regulation).

255. 17 C.F.R. § 250.52.

256. *Id.* § 250.52(a).

257. *Id.* § 250.52(a)(1).

258. "Any registered holding-company subsidiary which is itself a public utility company shall be exempt from section 6(a) of [PUHCA] and rules thereunder with respect to the issue and sale of any common stock, preferred stock, bond, note or other form of indebtedness, of which it is the issuer" *Id.* § 250.52(a) (emphasis added).

259. *Id.* § 250.52(a)(3).

The purpose of the exemption under Section 6(b) for state-approved securities is "to exempt the issue of securities by subsidiary companies in cases where holding company abuses are unlikely to exist."²⁶⁰ The SEC promulgated Rule 52 to "give effect" to the statute and to "ease the regulatory burden" on registered holding companies.²⁶¹

Rule 52 imposed six additional conditions for the exemption to be available for state-approved securities.²⁶² For example, the regulation required the issuance of first mortgage bonds to conform with the SEC Statement of Policy Regarding First Mortgage Bonds issued under PUHCA.²⁶³ The regulation also required the issuance of securities to be consistent with the provisions of Rule 50 under PUHCA, which requires the sale of securities through competitive bids.²⁶⁴ Those six conditions appeared to minimize the role of state regulation and to retain the role of federal regulation.

When it promulgated Rule 52, however, the SEC simultaneously proposed to eliminate those six conditions.²⁶⁵ Through 1990, the SEC had granted numerous exemptions from the Statement of Policy Regarding First Mortgage Bonds,²⁶⁶ which the SEC now suggested was "anachronistic in today's financial markets."²⁶⁷ With respect to Rule 50, the SEC

260. H.R. REP. NO. 1903, 74TH CONG., 1ST SESS. 66-67 (1935).

261. 55 Fed. Reg. at 11,362-63. "If adopted, [Rule 52] should eliminate unnecessary paperwork associated with a significant percentage of financing applications under [PUHCA]." 54 Fed. Reg. at 22,314. In comments on the proposed regulation, however, several organizations opposed the promulgation of Rule 52 because "state regulation of these matters may not be sufficient for adequate consideration of the issues." 55 Fed. Reg. at 11,364. Those organizations thus doubted the effectiveness of state regulation of inter-state holding companies relative to the issuance and sale of securities by subsidiaries of those companies. The SEC disagreed. In the statement of considerations that accompanied the promulgation of Rule 52, the SEC explained that there was no need for federal regulation of state-approved securities. "[T]he general purpose of [PUHCA] was to regulate the issuance of securities which could not be reached by state commissions." *Alabama Electric Cooperative v. SEC*, 353 F.2d 905, 907 (D.C. Cir. 1965), cert. denied, 383 U.S. 968 (1966); *City of Lafayette v. SEC*, 454 F.2d 941, 954-55 (D.C. Cir. 1971). "[T]he burden of [SEC] review under section 6(a) is not warranted where a state commission has exercised its authority to approve the issue or sale of securities to be used to finance the subsidiary's business . . ." 55 Fed. Reg. at 11,364. Thus the SEC observed that "no useful purpose is served by providing still another layer of review at the federal level . . ." 55 Fed. Reg. at 11,364.

262. 55 Fed. Reg. at 11,366.

263. Holding Co. Act Release No. 13105 (Feb. 16, 1956); see also Holding Co. Act Release No. 16369 (May 8, 1969)(revision). Rule 52 also required the issuance of preferred stock to conform with the SEC Statement of Policy Regarding Preferred Stock issued under PUHCA. Holding Co. Act Release No. 13106 (Feb. 16, 1956); see also Holding Co. Act Release No. 16758 (June 22, 1970) (revision).

264. 17 C.F.R. § 250.50.

265. 55 Fed. Reg. 11,390 (1990). "The [SEC] questions whether these conditions are necessary to fulfill the purposes of [PUHCA], and whether they may actually place unnecessary restraints on the ability of a public-utility holding company system to finance in an efficient and least-cost manner." *Id.* at 11,392.

266. See, e.g., *In re Georgia Power Company*, Holding Co. Act Release No. 25006 (Dec. 20, 1989); *In re Mississippi Power & Light Company*, Holding Co. Act Release No. 24883 (May 9, 1989); *In re Louisiana Power & Light Company*, Holding Co. Act Release No. 24774 (Dec. 25, 1988); *In re Columbia Gas System*, Holding Co. Act Release No. 24627 (April 22, 1989).

267. 55 Fed. Reg. at 11,392.

observed that “[s]tate public-utility commissions of today are far more sophisticated than they were in the 1930s and 1940s and . . . there can be no question that the state commissions can call into question any fees, expenses, terms, or conditions associated with the sale of a particular security.”²⁶⁸ On the whole, the SEC reasoned that “the regulatory burden on registered holding-company systems may be further lessened by eliminating the [six] conditions now contained in . . . rule 52.”²⁶⁹ Thus the SEC amended Rule 52 in July 1992.²⁷⁰ It had received no comments in opposition to the proposed elimination of those six conditions.²⁷¹

Although Section 6(b) directs the SEC to exempt from the requirements of Section 7 the issuance and sale of state-approved securities intended “solely” to finance routine business operations, the statute also directs the SEC to exempt the issuance and sale of securities intended “solely” to finance routine business operations “of [a] subsidiary company when such subsidiary company is not a holding company, a public-utility company, an investment company, or a fiscal or financing agency of a holding company, a public utility company, or an investment company.”²⁷² The exemption for state-approved securities is available not to all subsidiaries of registered holding companies but just to public utility subsidiaries. This second exemption, however, is available to to all subsidiaries.

When it proposed Rule 52 in May 1989,²⁷³ the SEC decided not to promulgate a regulation to implement the second exemption under Section 6(b).²⁷⁴ In July 1992, however, the SEC proposed an amendment to Rule 52 to implement this second exemption.²⁷⁵ NARUC and the City of New Orleans opposed the proposed amendment.²⁷⁶ Nonetheless, the SEC, in June 1995,²⁷⁷ adopted the amendment to exempt the issuance and sale of

268. *Id.* at 11,393. In addition, through 1990, the SEC had granted several exemptions from Rule 50. See, e.g., *In re National Fuel Gas Company*, Holding Co. Act Release No. 24438 (Aug. 11, 1987); *In re Northeast Utilities*, Holding Co. Act Release No. 18974 (May 8, 1975). “In recent years . . . the requirement of competitive bidding has imposed unnecessary and, at times, substantial financial hardship on jurisdictional utility systems.” 55 Fed. Reg. at 11,393.

269. 55 Fed. Reg. at 11,394.

270. 57 Fed. Reg. 31,120 (1992).

271. *Id.* at 31,121.

272. 15 U.S.C. § 79f(b).

273. 54 Fed. Reg. at 22,314.

274. This decision “stem[med] from concern . . . with the adverse consequences that potential growth of debt in the non-utility subsidiary companies could have for the holding-system and the public-utility subsidiaries.” *Id.* at 22,315.

275. 57 Fed. Reg. 31,156 (1992). “Because of the extensive reporting requirements imposed by [PUHCA] and other federal securities laws, and the far greater scrutiny of reporting companies generally since the passage of [PUHCA] fifty-seven years ago, the [SEC] believes that it may be appropriate to exempt unconditionally certain nonutility financings.” *Id.* at 31,158.

276. 60 Fed. Reg. 33,634, 33,635 (1992). New Orleans argued, would result in detrimental consequences for public utility subsidiaries of registered holding companies “particularly in the context of nonutility ventures that are not otherwise subject to effective state oversight.” *Id.* at 33,637.

277. *Id.* at 33,634. “The [SEC] believes that the registered holding-company systems should have a greater ability to engage in routine financings without the regulatory burden of prior [SEC] approval, and that this may be done without jeopardizing the interests [PUHCA] is desinged to protect.” *Id.* at 33,638.

securities by non-utility subsidiaries of registered holding companies if the securities are intended "solely" to finance the business of the subsidiaries and if the interest rates of debt securities issued and sold to companies within the same registered holding company system "parallel the effective cost of capital" of those companies.²⁷⁸

Finally, although Section 6(b) establishes two exemptions from the requirements of Section 7 relative to the issuance and sale of securities by subsidiaries of registered holding companies, Section 9 prohibits the acquisition of those securities by companies within the same registered holding company system except in accordance with Section 10.²⁷⁹ This prohibition is inapplicable, however, to the acquisition of securities "as the [SEC] may by rules and regulations or order prescribe as appropriate in the ordinary course of business of a registered holding company or subsidiary company thereof and as not detrimental to the public interest or the interest of investors or consumers."²⁸⁰

Under this authorization, the SEC promulgated Rule 52 with an exemption, from the requirements of Section 9 and Section 10, for the acquisition of securities, by companies within the same registered holding company system, issued and sold under the two exemptions of Section 6(b).²⁸¹

When Rule 52 was promulgated in March 1990, the exemption under Section 6(b) for state-approved securities that the regulation implemented was applicable not to all securities but just to common stock, preferred stock, mortgage bonds and notes.²⁸² When Rule 52 was amended in June 1995, the exemption was applicable to common stock, preferred stock, mortgage bonds, notes "or other form of indebtedness"²⁸³ Simultaneously, the SEC proposed an amendment to Rule 52 to authorize the exemption for all securities.²⁸⁴ In connection with this proposed amendment, the SEC also has proposed to rescind the Statement of Policy Regarding First Mortgage Bonds and the Statement of Policy Regarding Preferred Stock.²⁸⁵ The SEC has not promulgated this amendment to Rule 52 or rescinded the policy statements.

The implementation and constant expansion of the exemption under Section 6(b) for state-approved securities has prooccupied the SEC for the past decade, in which time it has promulgated just two other regulations. First, in December 1987,²⁸⁶ the SEC amended Rule 45 under PUHCA.²⁸⁷

278. 17 C.F.R. § 250.52(b).

279. 15 U.S.C. § 79i(a).

280. *Id.* § 79i(c)(3).

281. 17 C.F.R. § 250.52(d).

282. 55 Fed. Reg. at 11,366.

283. 60 Fed. Reg. at 33,639.

284. 60 Fed. Reg. 33,640 (1995). Under this amendment, the exemption would thus be applicable, for example, to guaranties of debt securities. "[G]uaranties . . . by public-utility companies are subject to public utility commission approval in many states." *Id.* at 33,641.

285. *Id.* at 33,642.

286. 52 Fed. Reg. 48,985 (1987).

287. 17 C.F.R. § 250.45.

Rule 45 implements some of the requirements of Section 12, which prohibits direct or indirect loans, without prior SEC approval, between companies within the same registered holding company system.²⁸⁸ The amendment, adopted in response to a petition submitted by Columbia Gas System, Inc., a registered holding company,²⁸⁹ exempted from this requirement of prior SEC approval agreements by registered holding companies to guarantee contingent liabilities of their subsidiaries.²⁹⁰

Second, in April 1994, the SEC adopted minor amendments to almost two dozen regulations under PUHCA "to modernize the rules . . . and, in particular, to reduce undue regulatory burdens on companies in a registered holding company system."²⁹¹ These minor amendments, which the SEC had proposed in November 1992,²⁹² included, however, the repeal of Rule 50,²⁹³ which had required the sale of securities through competitive bids.²⁹⁴ Finally, the SEC deleted from numerous regulations obsolete references to, for example, the Federal Power Commission.²⁹⁵

V. DEFERENCE TO STATES AND OHIO POWER

A. Background

PUHCA is not intended to preempt state regulation of inter-state holding companies. "The purpose of the Public Utility Holding Company Act, as shown by its legislative history, was to supplement state regulation — not to supplant it."²⁹⁶ In 1990, however, PUHCA in fact appeared to supplant state regulation. The SEC, therefore, since the U.S. Supreme Court issued a decision in *Arcadia, Ohio v. Ohio Power Co.*,²⁹⁷ has engaged in a campaign to persuade the states, as well as the U.S. Congress, that PUHCA is not intended to preempt state regulation.

In December 1971, the SEC authorized Ohio Power Company (Ohio Power), an electric public utility subsidiary of American Electric Power Company (AEP), a registered holding company, to form and capitalize Southern Ohio Coal Company (Ohio Coal).²⁹⁸ The authorization contem-

288. 15 U.S.C. § 791(b).

289. 52 Fed. Reg. 23,679 (1987) (notice of proposed regulation).

290. *Id.* at 48,986. "The Commission believes that the proposed amendment to Rule 45 will decrease the costs associated with the present requirement that the agreements . . . be authorized by the Commission . . ." *Id.* at 23,680.

291. 59 Fed. Reg. 21,922 (1994).

292. 57 Fed. Reg. 54,025 (1992). "The proposed amendments will decrease regulatory compliance costs for companies in a registered holding company system. In fiscal year 1991, for example, the amendments would have reduced . . . the regulatory burden . . . for an estimated savings of more than \$1.1 million." *Id.* at 54,029.

293. 59 Fed. Reg. at 21,928.

294. 17 C.F.R. § 250.50. "The Commission believes that the rule is no longer necessary in view of the extensive reporting requirements imposed by [PUHCA] and the other federal securities laws." 59 Fed. Reg. at 21,925.

295. 59 Fed. Reg. at 21,926.

296. *Alabama Electric Cooperative, Inc. v. SEC*, 353 F.2d 905, 907 (D.C. Cir.), *cert. denied*, 383 U.S. 968 (1965).

297. 498 U.S. 73 (1990).

298. *In re Ohio Power Co.*, HCAR No. 17383 (1971).

plated that the coal mined by Ohio Coal would be sold to Ohio Power and required that, pursuant to Section 13 of PUHCA,²⁹⁹ “[t]he charges for coal by [Ohio Coal] will be based on an amount equal to the actual cost of [Ohio Coal] in developing the reserve and mining such coal”³⁰⁰

In May 1982, Ohio Power applied, under Section 205 of the Federal Power Act,³⁰¹ to the FERC for an increase in rates for interstate wholesale electric power to be sold to fifteen Ohio municipalities and to Wheeling Electric Company (Wheeling), another electric public utility subsidiary of AEP.³⁰² The municipalities and several large industrial firms that purchased their power from Wheeling protested this rate increase application.³⁰³ The municipalities and the industrial firms settled with Ohio Power on all of the issues³⁰⁴ — except for the price to Ohio Power of “captive” coal purchased from Ohio Coal.

The FERC conducted an administrative hearing on the “captive” coal issue. The municipalities argued that the price of coal from Ohio Coal to Ohio Power was \$20 million over the market price for a comparable amount of coal.³⁰⁵ Ohio Power argued that the price it paid for coal from Ohio Coal was required under PUHCA and that a conflict between this price and a “just and reasonable” price must be resolved, in accordance with Section 318 of the Federal Power Act,³⁰⁶ through FERC deference to the SEC-mandated price.³⁰⁷

The FERC administrative law judge rejected this argument. He observed that Section 318 is applicable “to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing or reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter”³⁰⁸ He interpreted the statute to be inapplicable to a conflict between Section 13 of PUHCA and Section 205 of the Federal Power Act.³⁰⁹

The judge also rejected the argument that the FERC also was required to defer to the SEC-mandated price for the coal under its own regulations, which in relevant part provide that “[w]here the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the

299. 15 U.S.C. § 79m.

300. HCAR No. 17383, *supra* note 299, at 2.

301. “All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy . . . shall be just and reasonable” 16 U.S.C. § 824d(a).

302. *In re Ohio Power Co.*, 25 FERC ¶ 63,060, 65,180 (1983).

303. 20 FERC ¶ 61,081 (1982).

304. *In re Ohio Power Co.*, 23 FERC ¶ 61,236 (1983) (settlement with municipalities); *In re Ohio Power Co.*, 24 FERC ¶ 61,017 (1983) (settlement with industrial firms).

305. 25 F.E.R.C. at 65,180.

306. “If . . . any person is subject both to a requirement of [PUHCA] . . . and to a requirement of [the Federal Power Act] . . . the requirement of [PUHCA] shall apply to such person, and such person shall not be subject to the requirement of [the Federal Power Act] . . . with respect to the same subject matter” 16 U.S.C. § 825q.

307. 25 F.E.R.C. at 65,182.

308. 16 U.S.C. § 825q (emphasis added).

309. 25 F.E.R.C. at 65,183.

jurisdiction of a regulatory body, such cost shall be deemed to be reasonable"³¹⁰ Ohio Power argued that the FERC in the past has interpreted this fuel-cost regulation to mean that an SEC-mandated price under Section 13 of PUHCA is reasonable under Section 205 of the Federal Power Act.³¹¹ The judge concluded that the fuel-cost regulation simply creates a rebuttable presumption of reasonableness.³¹²

The judge conducted an independent review of the reasonableness of the price Ohio Power paid for coal from Ohio Coal and concluded that Ohio Power had demonstrated "by a preponderance of the evidence that . . . the prices paid for . . . coal were not unreasonable."³¹³ On review, the FERC disagreed with that conclusion.³¹⁴ It agreed, however, that neither Section 318 nor the fuel-cost regulation precluded an independent FERC review of the reasonableness of the price Ohio Power paid for coal from Ohio Coal.³¹⁵

On appeal, the D.C. Circuit vacated and remanded.³¹⁶ The court concluded that the FERC, under Section 318, was required to defer to the SEC-mandated price for the coal Ohio Power purchased from Ohio Coal. The court observed that this conclusion produced a result that was consistent with U.S. Supreme Court precedent.³¹⁷

The U.S. Supreme Court, however, reversed.³¹⁸ The Court concluded that Section 318 is inapplicable to a conflict, between Section 13 of PUHCA and Section 205 of the Federal Power Act, over the price to Ohio Power of "captive" coal.³¹⁹ It observed that the D.C. Circuit had interpreted "or any other subject matter" to mean that the statute is applicable to all subject matter in common between the SEC and the FERC.³²⁰ The Court interpreted the phrase to mean "other subject matter" *relative to* "the acquisition or disposition of any security, capital assets, [or] facilities."³²¹ Thus Section 318 is inapplicable to a conflict between an SEC-mandated price and a "just and reasonable" price for coal.

On remand, the D.C. Circuit again concluded that the FERC was required to defer to the SEC-mandated price for the coal Ohio Power purchased from Ohio Coal.³²² This conclusion, however, was based not on

310. 18 C.F.R. § 35.14(a)(7).

311. 25 F.E.R.C. at 65,183-84.

312. *Id.* at 65,184-85.

313. *Id.* at 65,203.

314. *In re Ohio Power Co.*, Opinion No. 272, 39 FERC ¶ 61,098 (1987).

315. 39 F.E.R.C. at 61,275.

316. *Ohio Power Co. v. FERC*, 880 F.2d 1400 (1989).

317. 880 F.2d at 1409. *Mississippi Power & Light Co.*, 487 U.S. 354 (1988)(conflict between FERC and Mississippi resolved through federal preemption of state). Judge Mikva agreed with the court but in a separate concurrence would have based the decision on the FERC fuel-cost regulation. 880 F.2d at 1410-14.

318. *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1990).

319. 111 S. Ct. at 422.

320. 111 S. Ct. at 419.

321. 111 S. Ct. at 419-22.

322. *Ohio Power Co. v. FERC*, 954 F.2d 779 (1992), *cert. denied*, 113 S. Ct. 483 (1992).

Section 318 but on the FERC fuel-cost regulation.³²³ The FERC had argued that the regulation simply creates a rebuttable presumption of reasonableness. The court disagreed. It concluded, for example, that the phrase “shall be deemed” has been interpreted to create a conclusive presumption.³²⁴

Because the D.C. Circuit concluded that the FERC was required to defer to the SEC-mandated price for the coal, the FERC was required to authorize Ohio Power, under Section 205 of the Federal Power Act, to recoup the price of “captive” coal through rates for interstate wholesale electric power. Ohio Power otherwise would have incurred “trapped” costs,³²⁵ which would have required it to “pretend that it is paying less for the [coal] . . . than is in fact the case.”³²⁶ In this regard, the court had observed, in its prior decision, that “our decision is buttressed by the consistency of its consequences with Supreme Court precedents that disfavor conflicting regulation resulting in trapped costs.”³²⁷

B. SEC Statements on Ohio Power

The D.C. Circuit ultimately authorized Ohio Power to avoid “trapped” costs, which result is consistent with U.S. Supreme Court precedent “that

323. 18 C.F.R. § 35.14(a)(7).

324. 954 F.2d at 783. *See, e.g.*, *Gaither v. Myers*, 404 F.2d 216, 218 (D.C. Cir. 1968); *H.P. Coffee Co. v. Reconstruction Finance Corp.*, 215 F.2d 818, 822 (Emer.Ct.App. 1954); *Forrester v. Jerman*, 90 F.2d 412, 413 (D.C. Cir. 1937). The court also observed that “[i]f FERC wishes to have [the fuel-cost regulation] create only a rebuttable presumption, then it may do so explicitly through the required [administrative] process.” 954 F.2d at 783.

325. “[W]e hold that FERC may not set a cost-trapping rate level where that effect is occasioned by a recovery calculation inconsistent with an SEC determination governing an inter-associate transfer” 954 F.2d at 786.

326. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 971 (1986) (conflict between FERC and North Carolina resolved through federal preemption of state). *See generally*, *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) (discussion of “trapped” costs); *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utilities Comm.*, 837 F.2d 600 (3rd Cir. 1988) (discussion of “trapped” costs).

327. *Ohio Power Co. v. FERC*, 880 F.2d at 1409. In October 1993, the FERC proposed to amend the fuel-cost regulation. 58 Fed. Reg. 51,259 (1993). In particular, it proposed to replace the phrase “shall be deemed” with the phrase “shall be presumed, subject to rebuttal.” *Id.* at 51,261. The FERC explained that the amendment would ensure the independence of its reviews of rates for interstate wholesale electric power. “While the Commission can give deference to decisions of another regulatory body and still fulfill its statutory obligation, it cannot in effect delegate its jurisdictional responsibilities to others.” *Id.* at 51,260. The FERC also proposed to amend the regulation to require the actual approval of “another regulatory body” — either the SEC or a state public utility commission — for the rebuttable presumption to be raised. “Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, and where the price of such fuel has been approved by that regulatory body, such cost shall be presumed, subject to rebuttal, to be reasonable” *Id.* at 51,261. In this regard, the FERC again stated that the amended fuel-cost regulation would promote the independence of its reviews of rates for interstate wholesale electric power. “[B]y amending [the regulation] to clearly specify that, where another regulatory body has jurisdiction over affiliate fuel costs and approves such costs, there will be a rebuttable presumption of reasonableness of affiliate fuel costs . . . the Commission is making clear that it has no intention of abdicating its regulatory responsibilities” *Id.* at 51,260. The FERC has not promulgated the revised regulation.

disfavor[s] conflicting regulation resulting in trapped costs."³²⁸ This precedent,³²⁹ however, involved not a conflict between SEC regulation under PUHCA and the FERC regulation under the Federal Power Act but between federal regulation and state regulation of electric public utility companies. Nonetheless, the D.C. Circuit observed that "Nantahala Power & Light and Mississippi Power & Light are not distinguishable from the present circumstances simply because they involved state-federal relations or because the FERC must be re-cast in the role of the respective states with the SEC taking the role formerly played by the FERC."³³⁰

The ultimate result of the *Ohio Power* decisions was consistent with U.S. Supreme Court precedent on federal preemption, under the Federal Power Act, of state regulation of electric public utility companies. Those decisions, therefore, have raised questions on their implications for federal preemption, under PUHCA, of state regulation of electric public utility companies. Since 1992, the SEC has attempted to address those questions with assurances that the *Ohio Power* decisions, like PUHCA in general, are not intended to preempt state regulation.

Both the U.S. Senate and the U.S. House of Representatives have conducted congressional hearings on the implications of the *Ohio Power* decisions.³³¹ The principal concern of those congressional hearings was the conflict between SEC regulation under PUHCA and the FERC regulation under the Federal Power Act. The FERC, for example, has testified before the Senate Committee on Energy and Natural Resources (Senate Committee) as well as the Subcommittee on Energy and Power of the House Committee on Energy and Commerce (House Subcommittee).³³² In addition, however, the congressional hearings addressed the possible conflict between federal regulation and state regulation of electric public utility companies. The states have testified before the Senate Committee as well as the House Subcommittee.³³³

328. *Ohio Power Co. v. FERC*, 880 F.2d at 1409.

329. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986)(conflict between FERC and North Carolina resolved through federal preemption of state). *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988)(conflict between FERC and Mississippi resolved through federal preemption of state).

330. 880 F.2d at 1409.

331. *Multistate Utility Company Consumer Protection Act of 1993: Hearing Before the Senate Comm. on Energy and Natural Resources*, 103rd Cong., 1st Sess. (1993)[hereinafter *Senate Ohio Power Hearing*]; *Registered Holding Company Transactions: Hearing Before the Subcomm. on Energy and Power of the House Comm. on Energy and Commerce*, 103rd Cong., 2nd Sess. (1994)[hereinafter *House Ohio Power Hearing*].

332. *Senate Ohio Power Hearing*, *supra* note 331, at 11-15 (prepared statement of Elizabeth Anne Moler, Chair); *House Ohio Power Hearing*, *supra* note 331, at 10-28 (prepared statement of Elizabeth Anne Moler, Chair).

333. *Senate Ohio Power Hearing*, *supra* note 331, at 26-29 (prepared statement of Sam I. Bratton, Jr., Chairman, Arkansas Public Service Commission); *House Ohio Power Hearing*, *supra* note 331, at 86-90 (prepared statement of Craig A. Glazer, Chairman, Public Utilities Commission of Ohio).

In March 1993, the Multi-State Utility Company Consumer Protection Act of 1993 was introduced.³³⁴ The bill proposed to amend Section 205 of the Federal Power Act to authorize the FERC to determine the extent to which electric public utility companies could recoup, in rates for interstate wholesale electric power, costs incurred under contracts between subsidiaries within the same registered holding company system.³³⁵ The bill also proposed to transfer to the FERC all functions of the SEC under PUHCA.³³⁶

The proposal to transfer PUHCA was the principal focus of a congressional hearing on S. 544 before the Senate Committee in May 1993.³³⁷ The Arkansas Public Service Commission (Arkansas) testified in support of the proposed transfer.³³⁸ The City of New Orleans (New Orleans), which, like a state, regulates the rates of electric public utility companies, also testified in support of S. 544.³³⁹ The SEC failed to appear before the Senate Committee.³⁴⁰

Arkansas acknowledged the potential for the *Ohio Power* decisions to preempt state regulation of electric public utility companies. Those decisions, the state explained, with respect to costs incurred under contracts between subsidiaries within the same registered holding company system, precluded FERC reviews of rates for interstate wholesale electric power.³⁴¹ With respect to SEC regulation under PUHCA in particular, Arkansas criticized the proposed acquisition, which the FERC and the SEC since have approved,³⁴² by Entergy Corporation, a registered holding company, of Gulf States Utilities, an exempt holding company.³⁴³

334. S. 544, 103rd Cong., 1st Sess. (1993), reprinted in 139 Cong. Rec. S2639 (daily ed. March 10, 1993). See also Multistate Utility Company Consumer Protection Act of 1993, S. 635, 103rd Cong., 1st Sess. (1993).

335. S. 544, *supra* note 334, § 2.

336. S. 544, *supra* note 334, § 3. S. 544 "would consolidate utility holding company regulation by transferring regulatory authority over PUHCA from the SEC to FERC, providing a more efficient regulatory system and greater protection for holding company consumers." 139 Cong. Rec. at S 2639 (statement of Sen. Bumpers).

337. "While it may have seemed reasonable to split utility regulation between the SEC and FERC in 1935, when both PUHCA and . . . the Federal Power Act were enacted, it makes no sense today." *Senate Ohio Power Hearing*, *supra* note 331, at 7 (statement of Sen. Bumpers).

338. *Senate Ohio Power Hearing*, *supra* note 331, at 26-29 (prepared statement of Sam I. Bratton, Jr., Chairman, Arkansas Public Service Commission).

339. *Senate Ohio Power Hearing*, *supra* note 331, at 33-38 (prepared statement of Joseph I. Giarrusso, Councilman at Large, City Council, City of New Orleans).

340. "I am really disappointed that the SEC, which has 22 employees in its public utility division, has chosen to snub this committee and has not even sent a witness to the hearing." *Senate Ohio Power Hearing*, *supra* note 331, at 7 (statement of Sen. Bumpers).

341. "Many observer's believe the Court's reasoning will preclude state commission review as well." *Senate Ohio Power Hearing*, *supra* note 331, at 27.

342. *In re Entergy Services, Inc.*, Opinion No. 385, 65 FERC ¶ 61,332 (Dec. 15, 1993); *In re Entergy Corp.*, HCAR No. 25952, 55 SEC Docket 2035 (Dec. 17, 1993).

343. "Another pitfall of the present statutory structure is illustrated by the Entergy proposal to acquire Gulf States Utilities, a troubled utility, for a price well above [its] book value." *Senate Ohio Power Hearing*, *supra* note 331, at 28. The state also rejected the suggestion that the SEC as well as the FERC should regulate electric public utility companies. "Over the past few years, many utilities argued for weakening PUHCA." *Senate Ohio Power Hearing*, *supra* note 332, at 29.

New Orleans described recent corporate diversification activities of Entergy Corporation — for example, into telecommunications³⁴⁴ — and observed that “the SEC has approved all of the . . . diversification efforts without a single hearing and without, on its own initiative, imposing any conditions to . . . protect Entergy’s ratepayers.”³⁴⁵ New Orleans also criticized the formation, which the SEC approved,³⁴⁶ of Entergy Power, Inc., an electric public utility subsidiary of Entergy Corporation, in 1990.³⁴⁷ Finally, New Orleans argued that the continued diversification of registered holding companies in the future raises the need for effective federal regulation.³⁴⁸

The SEC, in a statement ultimately submitted to the Senate Committee,³⁴⁹ declined to comment on the proposal to transfer PUHCA.³⁵⁰ The SEC, however, minimized the implications of the *Ohio Power* decisions.³⁵¹ In addition, it attempted to assure the Senate Committee that the *Ohio Power* decisions are not intended to preempt state regulation. “[The SEC] has met with [NARUC] to discuss these concerns. The PUHCA is intended, among other things, to promote effective local regulation. Recent developments in the industry and the law have led us to intensify our efforts to work in consultation with state and local regulators.”³⁵²

In July 1994, the Senate Committee amended S. 544 and, in August 1994,³⁵³ issued a report.³⁵⁴ The amended bill proposed to amend Section 318 of the Federal Power Act to authorize the FERC to determine the extent to which electric public utility companies could recoup, in rates for interstate wholesale electric power, costs incurred under contracts between subsidiaries within the same registered holding company system.³⁵⁵ The report on the amended bill explained that it “would overturn *Ohio Power*, thereby restoring FERC’s authority . . . to review costs associated with service, sales, and construction contracts between affiliated companies of a [non-exempt] holding company system for the purposes of establishing just and reasonable wholesale electric rates under the Federal Power Act.”³⁵⁶

344. See, e.g., *In re Entergy Corp., Holding Co.* Act Release No. 25353 (July 25, 1991)(acquisition on interest in communications corporation).

345. *Senate Ohio Power Hearing*, *supra* note 331, at 34.

346. *In re Entergy Corp., Holding Co.* Act Release No. 25136 (Aug. 27, 1990), *remanded*, *New Orleans v. SEC*, 969 F.2d 1163 (D.C. Cir. 1992).

347. *Senate Ohio Power Hearing*, *supra* note 331, at 36.

348. *Senate Ohio Power Hearing*, *supra* note 331, at 37-38.

349. *Senate Ohio Power Hearing*, *supra* note 331, at 139-41 (prepared statement of SEC).

350. “[W]e believe it would be more appropriate to defer the expression of our views on such a major change in responsibilities until confirmation of a new Chairman.” *Senate Ohio Power Hearing*, *supra* note 331, at 139.

351. “Beyond the immediate impact of the decision, however, the *Ohio Power* decision appears to have limited precedential significance. The matter arose in special circumstances which are unlikely to recur.” *Senate Ohio Power Hearing*, *supra* note 331, at 141.

352. *Senate Ohio Power Hearing*, *supra* note 331, at 140.

353. 134 Cong. Rec. S12,289 (daily ed. Aug. 22, 1994).

354. S. REP. NO. 351, 103RD CONG., 2ND SESS. (1994).

355. S. 544, 103rd Cong., 2nd Sess. (1994).

356. S. REP. NO. 351, *supra* note 354, at 5.

One year after the congressional hearing before the Senate Committee on the proposal in S. 544 to transfer PUHCA, the House Subcommittee conducted a congressional hearing on federal regulation of registered holding companies after the *Ohio Power* decisions. The House Subcommittee heard numerous views on the possible need for federal legislation to address the implications of those decisions.

NARUC insisted on federal legislation to ensure that the *Ohio Power* decisions would not preempt state regulation of electric public utility companies and to affirm the prerogative of the states to regulate retail electric power rates.³⁵⁷ The organization argued that, in consequence of the "trapped" costs rationale of those decisions, the states, with respect to electric public utility companies of registered holding companies, would be unable to regulate retail electric power rates through their public utility commissions.³⁵⁸ NARUC offered three specific proposals for federal legislation to address this problem: (i) an amendment to Section 318 of the Federal Power Act; (ii) an amendment to Section 13 of PUHCA; or (ii) the repeal of Section 13.³⁵⁹

The SEC disagreed with the need for federal legislation to address the implications of the *Ohio Power* decisions.³⁶⁰ It again minimized the implications of those decisions but acknowledged that "there are concerns that the *Ohio Power* decision can be read to challenge the ability of . . . state and local ratemakers to protect consumers through traditional ratemaking proceedings."³⁶¹ Finally, the SEC announced several initiatives to address the *Ohio Power* decisions.³⁶² In consequence of those decisions, the SEC had initiated an assessment of the need for comprehensive modernization of PUHCA.³⁶³ "The [SEC] proposes to conduct a comprehensive study of [PUHCA] to consider all issues related to modernization of the regulatory

357. *House Ohio Power Hearing, supra* note 331, at 86-90 (prepared statement of Craig A. Glazer, Chairman, Public Utilities Commission of Ohio). Those decisions, NARUC argued, "clearly threaten[] State regulation" of retail electric power rates. *House Ohio Power Hearing, supra* note 331, at 86. "The present regulatory gap caused by the *Ohio Power* decision has suddenly put the role of . . . the States into serious question." *House Ohio Power Hearing, supra* note 331, at 87. "For our system of Federalism to work, the . . . 50 State commissions should be allowed to do their job and not have a . . . super-agency, the SEC, dictating from Washington what consumers in America will pay." *House Ohio Power Hearing, supra* note 331, at 88.

358. "NARUC submits that extension of the *Ohio Power* ruling to the States will result in the preemption of State authority . . ." *House Ohio Power Hearing, supra* note 331, at 89.

359. *House Ohio Power Hearing, supra* note 331, at 89-90.

360. *House Ohio Power Hearing, supra* note 331, at 35-46 (prepared statement of Richard Y. Roberts, Commissioner, SEC).

361. *House Ohio Power Hearing, supra* note 331, at 35. "The [SEC] believes, however, that to the extent *Ohio Power* can be read to challenge the ability of state . . . regulators to protect consumers, the decision is cause for concern. The SEC emphasized, nonetheless, that "[a]lthough there is a perception that state ratemaking may be affected by the decision, *Ohio Power* does not address state regulation." See *supra* note 331, at 39.

362. *House Ohio Power Hearing, supra* note 331, at 42-46. For example, the SEC "has met with . . . representatives of [NARUC] to discuss their concerns and possible solutions." *House Ohio Power Hearing, supra* note 331, at 42.

363. *House Ohio Power Hearing, supra* note 331, at 43-46.

framework.³⁶⁴ This initiative resulted in the SEC proposal of June 1995 to repeal PUHCA.

The SEC has not confined its assurances — that the *Ohio Power* decisions are not intended to preempt state regulation — to congressional hearings. For example, in January 1996, the SEC authorized General Public Utilities Corporation (GPU), a registered holding company, to form and capitalize GPU Generation Corporation (GPU Generation), a mutual service company to provide operational services for the three electric public utility companies within the GPU holding company system — Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company (Utilities).³⁶⁵ Submitted under Section 9 of PUHCA,³⁶⁶ the application to form and capitalize GPU Generation was opposed by Allegheny Electric Power Cooperative, Inc. (Allegheny), a cooperative association that purchases wholesale electric power from Pennsylvania Electric Company. Allegheny requested an administrative hearing, which request the SEC denied.³⁶⁷

Allegheny opposed the formation of GPU Generation in the absence of adequate assurance that the contract between GPU Generation and the Utilities for operational services, under Section 13 of PUHCA, would be “performed economically and efficiently for the benefit of [the Utilities] at cost, fairly and equitably allocated among such companies.”³⁶⁸ The SEC concluded that the contract would be performed in accordance with Section 13.³⁶⁹ Allegheny raised several additional specific issues,³⁷⁰ the resolution of which could be achieved, the cooperative indicated, with an assurance that an SEC order for GPU Generation would not preempt federal and state regulation of the Utilities. The SEC responded that the “[a]pproval of this application . . . in no way precludes the New Jersey Board [of Regulatory Commissioners], the Pennsylvania [Public Utility] Commission, or any other regulatory authority from scrutinizing and disallowing the pass-through of costs in rates for services rendered to customers of the [Utilities].”³⁷¹

VI. SEC PROPOSAL TO REPEAL PUHCA

A. SEC Assessment

The SEC launched its assessment of the need for comprehensive modernization of PUHCA with a public “roundtable” conference in July 1994.³⁷² The conference included representatives of the electric and gas utility industries, holding companies, the FERC, state and local govern-

364. *House Ohio Power Hearing*, *supra* note 331, at 45.

365. *General Public Utilities Corp.*, Holding Co. Act Release No. 26463 (Jan. 26, 1996).

366. 15 U.S.C. § 79i(a).

367. Holding Co. Act Release No. 26463, *supra* note 365, at 25.

368. 15 U.S.C. § 79m(b).

369. Holding Co. Act Release No. 26463, *supra* note 365, at 14-17.

370. Holding Co. Act Release No. 26463, *supra* note 365, at 17-22.

371. Holding Co. Act Release No. 26463, *supra* note 365, at 23.

372. 59 Fed. Reg. 34,875 (1994)(public notice of “roundtable” conference).

ments, trade associations, public interest organizations, investment banks, universities, and the general public.³⁷³ In particular, one afternoon session of the conference addressed the relationship between federal and state regulation of holding companies and the need for PUHCA in view of state as well as FERC regulation of electric and gas public utility companies.³⁷⁴

With respect to federal regulation under both PUHCA and the Federal Power Act, NARUC opined that "it probably has not worked as it should and that, perhaps, there ought to be some thinking about whether those overlapping . . . responsibilities should at least be merged with a single federal agency."³⁷⁵ Alabama equivocated. On the one hand, the state opined that the abuses that PUHCA is intended to prevent could be prevented through state regulation.³⁷⁶ On the other hand, Alabama noted the need for PUHCA to regulate the diversification activities of holding companies and their non-utility subsidiaries.³⁷⁷ California appeared to agree on this particular need.³⁷⁸

Massachusetts stated that "repeal [of PUHCA] may be appropriate, albeit possibly in conjunction with a clarification or a better delineation of the responsibility of the other agencies, FERC or the [states]."³⁷⁹ New Orleans appeared to disagree. "Let's modernize rather than repeal PUHCA."³⁸⁰ Finally, Ohio emphasized that the purpose of PUHCA is to supplement, but not to supplant, state regulation.³⁸¹ The state acknowledged the improved effectiveness of state regulation of holding companies

373. See generally *In re Roundtable Discussion to Inaugurate Comprehensive Study of Regulation Under the Public Utility Holding Company Act of 1935*, Holding Co. Act Release No. 26077 (1994)(transcript of conference)[hereinafter Conference Transcript].

374. 59 Fed. Reg. at 34,875 (agenda for "roundtable" conference). See generally Conference Transcript, *supra* note 373, at 172-296 (statements and discussion on federal and state regulation).

375. Conference Transcript, *supra* note 373, at 174-75 (statement of Robert W. Gee, Commissioner, Texas Public Utility Commission).

376. "From my perspective, many of the kind of abusive transactions that [PUHCA] was originally designed to eliminate can be effectively dealt with by state commissions through prudence evaluations conducted in rate cases and in complaint proceedings." Conference Transcript, *supra* note 373, at 178-79 (statement of James Sullivan, President, Alabama Public Service Commission).

377. "The SEC should have the jurisdictional authority to monitor these diversified operations, since state commissions cannot reach unregulated businesses other than through their indirect impact on regulated operations." Conference Transcript, *supra* note 373, at 182.

378. "I do believe that there needs to be the insurance that diversification in unregulated investments will not impose costs on the core portion of the utilities business." Conference Transcript, *supra* note 373, at 184 (statement of James Boothe, Chief of Staff, California Public Utilities Commission).

379. Conference Transcript, *supra* note 373, at 190 (statement of Kenneth Gordon, Chairman, Massachusetts Department of Public Utilities). "[I]t may be that keeping [PUHCA] as originally constructed in place is a little bit like leaving Checkpoint Charlie standing after the Berlin Wall has come down." Conference Transcript, *supra* note 373, at 188.

380. Conference Transcript, *supra* note 373, at 193 (statement of Peggy Singleton Wilson, Vice President, City Council of New Orleans).

381. "Administration of [PUHCA] has never resulted in the kind of complementary regulation between the SEC, the FERC and the states which Congress clearly intended." Conference Transcript, *supra* note 373, at 199 (statement of Craig A. Glazer, Chairman, Ohio Public Utilities Commission).

but argued that "some federal oversight which complements and strengthens state oversight is needed more than ever to get the job done."³⁸²

In an unrelated congressional hearing in late July 1994 on electric public utility companies and telecommunications,³⁸³ the SEC reported to the U.S. Congress on the results of the conference.³⁸⁴ "Although . . . there was a wide divergence of opinion among the participants, there were some issues on which a consensus emerged. In particular, all participants agreed that the status quo is unacceptable. No one argued in favor of an unreformed [PUHCA] . . . [but] there was no consensus for repeal."³⁸⁵ The SEC reported that, in general, the holding companies favored, but the states opposed, the repeal of PUHCA.³⁸⁶

On the basis of the statements and comments that the conference generated, the SEC, in November 1994, published for public comment a "concept release" on the need for comprehensive modernization of PUHCA.³⁸⁷ The release discussed PUHCA from an historical perspective and relative to other statutes for federal regulation of electric and gas public utility companies³⁸⁸ — for example, the Public Utility Regulatory Policies Act,³⁸⁹ the Gas-Related Activities Act,³⁹⁰ and EPAct.³⁹¹ In addition, the release discussed PUHCA relative to FERC regulation³⁹² — for example, under the Federal Power Act,³⁹³ the Natural Gas Act,³⁹⁴ and the Natural Gas Policy Act.³⁹⁵ Finally, the release discussed, to a limited extent, PUHCA relative to state regulation of electric and gas public utility companies. "Congress intended that the . . . work [of the SEC] be coordinated with, and complement, the work of state and local regulators. In recent years, the [SEC] has worked in consultation with these regulators on a number of matters."³⁹⁶

382. Conference Transcript, *supra* note 373, at 200.

383. *Lifting PUHCA Restrictions: Joint Hearing Before the Subcomm. on Energy and Power and the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 103rd Cong., 2nd Sess. (1994).

384. *Id.* at 14-17 (prepared statement of Richard Y. Roberts, Commissioner, SEC).

385. *Id.* at 16. "The majority of the parties testifying at the SEC roundtable noted that while PUHCA was necessary in 1935 to correct abuses in the electric and gas industries, it now needs to be reexamined and changed — if not eliminated altogether." Burkhardt, *Does PUHCA Inhibit Diversification?*, PUB. UTIL. FORT., Sept. 1, 1994, at 33.

386. *See, supra* note 383, at 16.

387. 59 Fed. Reg. 55,573 (1994). "The Commission is undertaking a thorough evaluation of [PUHCA] to review the regulatory framework in light of developments in recent years and to consider how federal regulation of utility holding companies can best serve the interests of investors, consumers, and the general public in the years to come." *Id.* at 55,574.

388. *Id.* at 55,574-76.

389. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978).

390. Gas Related Activities Act of 1990, Pub. L. No. 101-572, 104 Stat. 2810 (1990).

391. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

392. 59 Fed. Reg. at 55,576-77.

393. 16 U.S.C. §§ 791-828c.

394. 15 U.S.C. §§ 717-717z.

395. *Id.* §§ 3301-3432.

396. 59 Fed. Reg. at 55,577.

The release invited public comment on the need for comprehensive modernization of PUHCA in general and, in particular, on (i) financial transactions between registered holding companies and their subsidiaries as well as service, sales, and construction contracts between subsidiaries within the same registered holding company system, (ii) acquisitions by registered holding companies of additional electric and gas public utility companies, (iii) diversification activities of registered holding companies, (iv) exemptions under Section 3 of PUHCA, (v) SEC audits of registered holding companies, and (v) miscellaneous issues.³⁹⁷

NARUC, ten states,³⁹⁸ and New Orleans commented on the release. The NARUC explained that it had initiated with the SEC a national survey of statutes and resources available to the states to authorize and finance their regulation of inter-state holding companies.³⁹⁹ The purpose of the survey was to determine "whether State commissions will be prepared to assume additional regulatory obligations should SEC regulation of utility holding companies be reduced or eliminated."⁴⁰⁰ Otherwise, the NARUC argued that the U.S. Congress should not amend or repeal PUHCA prior to the completion of the SEC assessment of the need for comprehensive modernization,⁴⁰¹ that an amendment to or the repeal of PUHCA must not preempt state regulation of electric and gas public utility companies,⁴⁰² and that a significant amendment to or the repeal of PUHCA would necessitate amendments to state statutes and increases in state resources to "fill the gaps" in the regulation of inter-state holding companies.⁴⁰³

New Orleans, in comments with which Arkansas and Nevada concurred, "oppose[d] the outright repeal of [PUHCA]."⁴⁰⁴ Otherwise New Orleans provided detailed and exhaustive comments on intra-system finan-

397. *Id.* at 55,578-83.

398. Alabama, California, Florida, Indiana, Iowa, Michigan, New York, Ohio, Texas and Virginia.

399. Comments of the National Association of Regulatory Utility Commissioners, SEC File No. S7-32-94, at 2-3 (Feb. 6, 1995).

400. *Id.* at 3.

401. *Id.* at 4-5.

402. *Id.* at 6-8. "It is a bedrock principle of [NARUC] that State regulation of carriers and utilities should not be preempted by Federal legislative or administrative action." *Id.* at 6.

403. *Id.* at 8-10. In addition, "the question of diversification will be the single most controversial issue raised in the PUHCA debate . . ." *Id.* at 11. In supplemental comments, NARUC also argued, in accordance with the Resolution on Legislation to Change the Public Utility Holding Company Act of 1935 that its Executive Committee adopted in March 1995, that an amendment to or the repeal of PUHCA also should authorize the states to examine the books and records of holding companies and their subsidiaries. Further Comments of the National Association of Regulatory Utility Commissioners, SEC File No. S7-32-94, at 5-7 (March 22, 1995). See also Comments of the Public Utility Commission of Texas, SEC File No. S7-32-94, at 6 (Feb. 1, 1995) ("Should federal oversight . . . be relaxed, state regulators may need greater access to the books and records . . ."); Comments of the Alabama Public Service Commission, SEC File No. S7-32-94, at 7 (Feb. 3, 1995) ("As regulations, legislation, technology and marketplaces result in changes in the utility industry, there must be a commitment among regulators to address those changes. [Alabama] believes that this can best be accomplished by insuring complete access to books and records of parent and subsidiary . . .").

404. Comments of the City of New Orleans, SEC File No. S7-32-94, at 1 (Feb. 6, 1995).

cial transactions and intra-system contracts,⁴⁰⁵ acquisitions, diversification activities,⁴⁰⁶ exemptions,⁴⁰⁷ and SEC audits.⁴⁰⁸ Virginia was concerned with the effectiveness of state regulation of inter-state holding companies in the absence of PUHCA.⁴⁰⁹

"[PUHCA] should not be changed substantially until there is a demonstration that either state regulation, competition, or a combination of the two will provide at least the same protections to utility customers as does PUHCA."⁴¹⁰

Michigan reiterated the position that the SEC should continue to regulate inter-state holding companies under PUHCA if the states lack the statutes and resources required to authorize and finance their regulation of those companies.⁴¹¹ Michigan proposed an "unless and except" clause for PUHCA that would authorize the states to regulate inter-state holding companies "unless and except" the states were ineffective.⁴¹²

In an alternative to the "except and unless" clause, Ohio proposed a "super" exemption from the requirements of PUHCA for inter-state holding companies if each state with rate jurisdiction over their public utility subsidiaries certifies that it is authorized under state statutes, and that it is funded, to regulate those companies.⁴¹³ The state also argued for "an initi-

405. "Our concerns regarding financings are with . . . those financings by or for the benefit of nonutility or unregulated businesses that have the potential to adversely affect access to or cost of capital to the regulated utilities." *Id.* at 2. "Intrasystem transactions is [*sic*] an area of explosive growth, the type of most concern to state and local regulators." *Id.* at 14.

406. "State and local regulators are very concerned with the trend by utility holding companies towards diversification. It has been studied on two occasions by NARUC and has been the subject of extended hearings in many jurisdictions." *Id.* at 33.

407. "State certification of an ability to effectively regulate an exempt holding company would be an appropriate input to the [SEC] in developing a basis for granting exemption." *Id.* at 44-45.

408. "State and local regulators need access to all holding company books and records that have the potential to affect retail rates . . ." *Id.* at 45-46. For example, with respect to regulation of intra-system contracts, New Orleans argued that "a continued federal role in this area may be appropriate. Such a federal role, however, should defer to state and local regulators . . ." *Id.* at 15. With respect to SEC audits, New Orleans observed that "the best solution is to federally mandate access to all utility holding company books and records by . . . state and local regulators." *Id.* at 46.

409. Comments of the Staff of the Virginia State Corporation Commission, SEC File No. S7-32-94 (March 28, 1995).

410. *Id.* at 1. With respect to regulation of intra-system contracts, Virginia argued for a determination of effective state regulation prior to the repeal of PUHCA. *Id.* at 11-14. With respect to acquisitions, the commonwealth observed that "[i]f effective review is not accomplished at the state level, a federal role is necessary." *Id.* at 15. With respect to exemptions, Virginia argued that the SEC should not grant exemptions from the requirements of PUHCA in the absence of effective state regulation. *Id.* at 20-22. *But see* Comments of the Public Utilities Commission of the State of California, SEC File No. S7-32-94, at 3 (Feb. 3, 1995) ("[I]t is difficult to recommend modifications to the exemption section of PUHCA until we have a clearer picture of the future structure of the electric utility industry.").

411. Comments of the Staff of the Michigan Public Service Commission, SEC File No. S7-32-94 (Feb. 8, 1995).

412. *Id.* at 3. "State regulators would take over the total responsibility for [intra-system financial] transactions. If they could not handle such responsibility, SEC requirements . . . would still exist. *Id.* at 12.

413. Comments of the Public Utilities Commission of Ohio, SEC File No. S7-32-94, at 11-13 (Feb. 6, 1995).

ative" that would authorize the states to examine the books and records of holding companies and their subsidiaries.⁴¹⁴

These comments offered the impression that the states desired increased participation in the regulation of inter-state holding companies but that, in the absence of adequate statutes and resources to authorize and finance this, the states desired a federal "backstop" in the nature of SEC regulation under PUHCA. Thus Indiana favored a significant amendment to, but not the repeal of, PUHCA and advised that "[p]roposals should not foist on state commissions regulatory burdens which they are currently unable to bear."⁴¹⁵ The state, which endorsed the proposal for a "super" exemption,⁴¹⁶ observed that "[t]he SEC has acknowledged that the states are under tremendous financial pressures, and are unlikely to ever have enough to accomplish everything they are called upon do."⁴¹⁷

New York, which argued for a federal statute that would authorize the states to examine the books and records of holding companies and their subsidiaries,⁴¹⁸ similarly explained that it "does not object to modification or repeal of [PUHCA] in areas where affected states . . . can certify they possess and exercise adequate authority to safeguard consumer interests. [H]owever, utility holding company structures present a real and substantial potential for abuse that tax the limits of state oversight authority."⁴¹⁹ Florida echoed the concern of Indiana and New York. "[W]e are concerned that in a time of fiscal restraints on States, a restructuring of regulation cannot be met with adequate resources to implement the reform without an adverse impact on the ratepayers in some States."⁴²⁰

B. SEC Report

On the basis of (i) these comments from the states, (ii) comments from electric and gas utility industries, holding companies, trade associations, public interest organizations, investment banks, and the general public, (iii) the results of the national survey it had conducted with NARUC on the statutes and resources available to the states to authorize and finance their regulation of inter-state holding companies, and (iv) the results of the July 1994 conference on the need for comprehensive modernization of

414. *Id.* at 13-17. Finally, Ohio proposed a three-part standard with which the states could authorize diversification activities. *Id.* at 8-11. For example, "[t]here must be the assurance that there are no losers from the diversification." *Id.* at 9.

415. Comments of the Indiana Utility Regulatory Commission, SEC File No. S7-32-94, at 3 (March 28, 1995). "[R]epeal of PUHCA would create regulatory gaps . . . [that] [t]he states are simply not jurisdictionally equipped to fill . . . because of the multi-state nature of these entities, and their own jurisdictional and regulatory limitations." *Id.* at 7.

416. *Id.* at 13-14.

417. *Id.* at 12.

418. Comments of the New York State Public Service Commission, SEC File No. S7-32-94, at 3-5 (Feb. 6, 1995).

419. *Id.* at 2.

420. Comments of the Florida Public Service Commission, SEC File No. S7-32-94, at 4 (Feb. 1, 1995).

PUHCA, the SEC prepared and issued, in June 1995, a report that proposes three options for the repeal of PUHCA.⁴²¹

First, the report proposes the repeal of PUHCA in conjunction with the enactment of a federal statute that would authorize the states to examine the books and records of holding companies and their subsidiaries.⁴²² Second, it proposes the unconditional repeal of PUHCA.⁴²³ Third, the report proposes an amendment to PUHCA that would authorize the SEC to issue broad exemptions from the requirements of PUHCA to holding companies.⁴²⁴

The report expresses a preference for the first option because "it would achieve the benefits of unconditional repeal, while preserving the ability of states to protect consumers . . ."⁴²⁵ Thus the SEC has recommended the elimination of federal regulation of inter-state holding companies in conjunction with increased state regulation of those companies. Indeed, this preference is reflected throughout the report, which, like the November 1994 SEC release that invited public comment on the need to modernize PUHCA, focuses on (i) financial transactions,⁴²⁶ (ii) service, sales, and construction contracts,⁴²⁷ (iii) acquisitions of electric and gas public utility companies,⁴²⁸ (iv) diversification activities,⁴²⁹ (v) exemptions,⁴³⁰ (vi) SEC audits,⁴³¹ and (vii) miscellaneous issues.⁴³²

With respect to financial transactions, the report discusses the promulgation in March 1990 of Rule 52, which implements the exemption under Section 6(b) for the issuance and sale of state-approved securities by subsidiaries of registered holding companies.⁴³³ Consistent with the rationale of Rule 52, the report also recommends several amendments to that regulation and to other SEC regulations that, in the absence of legislation to repeal PUHCA, would decrease federal regulation, and authorize increased state regulation, of securities issuances and of other financial transactions.⁴³⁴

421. PUHCA Report, *supra* note 4, at 131-44 (legislative recommendations).

422. PUHCA Report, *supra* note 4, at 131-41.

423. PUHCA Report, *supra* note 4, at 141-42.

424. PUHCA Report, *supra* note 4, at 142-44.

425. PUHCA Report, *supra* note 4, at 131.

426. PUHCA Report, *supra* note 4, at 41-58.

427. PUHCA Report, *supra* note 4, at 93-102.

428. PUHCA Report, *supra* note 4, at 59-80.

429. PUHCA Report, *supra* note 4, at 81-92.

430. PUHCA Report, *supra* note 4, at 109-124.

431. PUHCA Report, *supra* note 4, at 103-108.

432. PUHCA Report, *supra* note 4, at 125-30.

433. "Over the years, state and local regulators increasingly have begun to regulate the issuance of securities by utilities subject to their jurisdiction. Rule 52 was adopted to avoid duplicative regulation at the state and federal level and ease the regulatory burden on registered companies." PUHCA Report, *supra* note 4, at 47-48.

434. PUHCA Report, *supra* note 4, at 50-58 (recommendations for future regulation of financial transactions). "[C]ontinued SEC review of financing is unnecessary in most instances [because] many states review utility financing transactions." PUHCA Report, *supra* note 4, at 50. These recommendations, however, acknowledge the request for a federal "backstop" in the nature of continued SEC regulation under PUHCA. "A number of state and local regulators emphasize the need

With respect to intra-system service, sales, and construction contracts, the report reiterates prior SEC assurances that the *Ohio Power* decisions are not intended to preempt state regulation.⁴³⁵ To resolve the implications of those decisions, the report recommends that the SEC again reaffirm its intention not to preempt state regulation and that the SEC maintain a dialogue with the states to discuss their concerns in this regard.⁴³⁶

With respect to acquisitions and ownership of electric and gas public utility companies, the report acknowledges the application of "watchful deference" in the regulation of public utility acquisitions.⁴³⁷ The report recommends that the SEC continue to defer watchfully to the states and to the FERC in the regulation of public utility acquisitions.⁴³⁸ Indeed, in this regard, the report states that "the need for cooperation and consultation with the states is crucial in order to ensure that the SEC's decisions in this area do not impair the effectiveness of state regulation."⁴³⁹

With respect to diversification activities, the report observes that Section 11 of PUHCA, which prohibits the diversification of registered holding companies into businesses unrelated to the operations of public utility systems, has been provided a "more flexible interpretation to reflect the increasing effectiveness of state regulation"⁴⁴⁰ Consistent with this interpretation, the report recommends the promulgation of Rule 58 to authorize registered holding companies to engage and invest in specified diversification activities.⁴⁴¹

In June 1995, the SEC published Rule 58 for public comment Rule 58.⁴⁴² The regulation would authorize registered holding companies to invest in non-utility "energy-related" subsidiaries if their aggregate investments in such subsidiaries are under \$50 million and under 15% of their consolidated capitalizations.⁴⁴³ The definition of "energy-related" subsidi-

for continued SEC oversight of holding company financings. For example, [NARUC] believes that state statutes would require amendment to provide protection for consumer interests if the SEC no longer reviews holding company financings." PUHCA Report, *supra* note 4, at 52.

435. "The perception that [*Ohio Power*] may be read to impair the ability of . . . state and local regulators . . . is troubling because, historically, the SEC did not believe that the exercise of its authority . . . preempted . . . state ratemaking authority." PUHCA Report, *supra* note 4, at 99.

436. PUHCA Report, *supra* note 4, at 100-102 (recommendations for future regulation of intra-system contracts). "Nonetheless, whether an SEC action will preclude . . . state and local regulators in this regard remains for Congress or the courts to decide." PUHCA Report, *supra* note 4, at 102.

437. "A number of the SEC's major decisions involving mergers and acquisitions reveal . . . the SEC's increasing recognition that mergers and acquisitions were reviewed by the FERC and other federal and state regulators." PUHCA Report, *supra* note 4, at 67.

438. PUHCA Report, *supra* note 4, at 70-80 (recommendations for future regulation of ownership). "The . . . SEC [should] avoid duplicative review of acquisitions and, where possible, defer to the work of other regulators in reviewing acquisitions. These recommendations will permit registered holding companies to take advantage of developing markets and technologies, while avoiding duplicative and costly regulation." PUHCA Report, *supra* note 4, at 70.

439. PUHCA Report, *supra* note 4, at 73.

440. PUHCA Report, *supra* note 4, at 81.

441. PUHCA Report, *supra* note 4, at 87-92 (recommendations for future regulation of diversification activities).

442. 60 Fed. Reg. 33,642 (1995).

443. *Id.* at 33,649.

aries would include companies engaged in (i) energy conservation and management, (ii) the development of technologies related to energy conservation, (iii) the manufacture of electric and natural gas vehicles, (iv) the sale of electric and natural gas appliances, (v) the purchase and sale of energy commodities, (vi) the production of thermal energy products, (vii) the sale of technical services, (viii) the operation of thermal energy utilization facilities, (ix) the operation of fuel procurement, transportation and storage facilities, (x) the production of alternative energy forms, (xi) the development of technologies to utilize coal waste, and (xii) the ownership of telecommunications facilities and equipment.⁴⁴⁴

This definition would include companies in which the SEC, in the past, has authorized registered holding companies to invest.⁴⁴⁵ However, "the proposed rule . . . will eliminate unnecessary regulatory burdens and paperwork associated with filings by a registered holding company for [SEC] approval to invest in nonutility businesses that are closely related to a system's core utility business."⁴⁴⁶ In addition, Rule 58 would be available for investments in non-utility "energy-related" subsidiaries engaged in "such other activities . . . as the [SEC] may, from time to time . . . designate as "energy-related" for purposes of the rule."⁴⁴⁷

With respect to exemptions under Section 3 of PUHCA, the report explains that "[t]he SEC has traditionally interpreted the exemptions narrowly . . . [but] [i]n recent matters . . . the SEC has applied a more flexible approach in the absence of detriment to the effectiveness of state regulation"⁴⁴⁸ The report recommends that the SEC continue to interpret Section 3 in a flexible fashion⁴⁴⁹ — in large part because "the effectiveness of state regulation of utility holding companies has improved markedly."⁴⁵⁰

With respect to SEC audits, the report explains that, in the past decade, the SEC has invited numerous states to participate in audits of registered holding companies and that the SEC has employed its broad access to the books and records of registered holding companies to increase the

444. *Id.* at 33,649-50.

445. *See, e.g., Eastern Utilities Associates, Holding Co.* Act Release No. 26232 (Feb. 15, 1995)(energy conservation and management); *General Public Utilities Corp., Holding Co.* Act Release No. 26230 (Feb. 8, 1995)(energy conservation technologies); *Central Power and Light Co., Holding Co.* Act Release No. 26160 (Nov. 18, 1994)(electric and natural gas vehicles); *Consolidated Natural Gas Co., Holding Co.* Act Release No. 26234 (Feb. 23, 1995)(electric and natural gas appliances); *UNITIL Corp., Holding Co.* Act Release No. 25816 (May 24, 1993)(purchase and sale of energy commodities); *New England Electric System, Holding Co.* Act Release No. 26277 (April 26, 1995)(thermal energy products); *Middle South Utilities, Holding Co.* Act Release No. 22818 (Jan. 11, 1983)(technical services); *Energy Initiatives, Inc., Holding Co.* Act Release No. 25991 (Feb. 22, 1994)(thermal energy utilization facilities); *New England Electric System, Holding Co.* Act Release No. 26277 (April 26, 1995)(fuel procurement, transportation and storage facilities); *Southern Co., Holding Co.* Act Release No. 26211 (Dec. 30, 1994)(telecommunications facilities and equipment).

446. 60 Fed. Reg. at 33,643.

447. *Id.* at 33,643.

448. *Id.* at 110-11.

449. *Id.* at 118-24 (recommendations for future use of exemptions).

450. *Id.* at 119. It also suggests the formal withdraw of Rule 17, which the SEC proposed in February 1989 but has not promulgated. *Id.* at 120-24.

effectiveness of state regulation.⁴⁵¹ The report recommends that the SEC continue to share with the states its access to those books and records.⁴⁵²

The report also discusses the results of the national survey the SEC had conducted with NARUC on state statutes and resources, which indicated that some states are not authorized to examine the books and records of non-utility subsidiaries of registered holding companies.⁴⁵³ For this reason, the report expresses a preference for the repeal of PUHCA in conjunction with the enactment of a federal statute that would authorize the states to examine the books and records of holding companies and their public utility as well as non-utility subsidiaries.

In sum, the report appears to be a vote of confidence for state regulation of inter-state holding companies. Indeed, on the basis of this confidence, the SEC has explained and justified decreased federal regulation, in the past decade, of financial transactions, acquisitions of public utility companies, diversification activities, and exemptions. To be sure, the report recommends numerous amendments to SEC regulations that would continue to provide a federal "backstop" for the regulation of holding companies. For example, it proposes several amendments to SEC regulations applicable to securities issuances and to other financial transactions. These proposals, however, are based on the assumption that the U.S. Congress fails to implement the principal recommendation of the report — the repeal of PUHCA.

Nonetheless, with this vote of confidence for state regulation of inter-state holding companies, there appears to be no reason for the U.S. Congress not to implement this recommendation.

C. Congressional Review

The SEC presented the report and its three options for the proposed repeal of PUHCA to the Subcommittee on Energy and Power and the Subcommittee on Telecommunications and Finance of the House Committee on Commerce (House Committee) in August 1995 and, in an almost identical repeat performance, again in October 1995.⁴⁵⁴ The SEC emphasized its preference for the repeal of PUHCA in conjunction with the enactment of a federal statute relative to state examination of books and records.⁴⁵⁵ It observed that the SEC had "unanimously" recommended in 1982 the

451. *Id.* at 105.

452. *Id.* at 106.

453. *Id.* at 107.

454. *The Securities and Exchange Commission Report Entitled the Regulation of Public Utility Holding Companies: Joint Hearing Before the Subcomm. on Energy and Power and the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, 104th Cong., 1st Sess. (1995)*[hereinafter *House PUHCA Report Hearing*].

455. *Id.* at 8-12 (prepared statement of Chairman Levitt, August 4, 1995); see also *id.* at 94-97 (prepared statement of Barry P. Barbash, Director, Division of Investment Management, SEC, October 13, 1995).

repeal of PUHCA,⁴⁵⁶ in support of which recommendation “[t]he SEC noted that state regulation had expanded and strengthened since 1935.”⁴⁵⁷

The SEC highlighted for the House Committee its cooperation with NARUC to assess the statutes and resources available to the states to authorize and finance their regulation of inter-state holding companies. Because this assessment revealed that not all states are prepared to regulate inter-state holding companies, the SEC recommended a one-year transition period prior to the repeal of PUHCA “to enable the states to adopt legislation and add resources as necessary to shoulder the additional regulatory burden caused by the repeal of [PUHCA].”⁴⁵⁸

The report recommends numerous amendments to SEC regulations applicable to securities issuances and to other financial transactions,⁴⁵⁹ which amendments, the SEC testified, would eliminate two thirds of the applications filed with the SEC.⁴⁶⁰ In this respect, the SEC stated that it was committed to streamlined regulation, reduced burdens on business, and reinvented government.⁴⁶¹

Invited by the House Committee to comment on the report, together with the FERC,⁴⁶² NARUC similarly expressed a preference for the first option proposed by the SEC for the repeal of PUHCA.⁴⁶³ The NARUC observed that the first option was consistent with the Resolution on Legislation to Change the Public Utility Holding Company Act of 1935 that its Executive Committee adopted in March 1995.⁴⁶⁴ In particular, NARUC emphasized that an amendment to or the repeal of PUHCA: (i) must not preempt state regulation of electric and gas public utility companies;⁴⁶⁵ (ii)

456. See, e.g., *Public Utility Holding Company Act Amendments: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 2nd Sess. (1982).

457. *House PUHCA Report Hearing*, *supra* note 454, at 9; see also *id.* at 95. “Repeal legislation was not enacted, due in part to . . . the lack of consensus for change.” *Supra* note 454, at 9.

458. *Supra* note 454, at 10; see also *supra* note 454, at 96. With respect to the unconditional repeal of PUHCA, the SEC stated that “[s]ome interested parties argue that the states have the ability, if they choose to exercise it, to create regulatory structures sufficient to protect utility consumers in [inter-state] holding company structures.” *Supra* note 454, at 11; see also *supra* note 454, at 96. With respect to the third option — a PUHCA amendment to authorize the SEC to issue broad exemptions — the SEC opined that it would issue exemptions with the consent of affected states. “This approach could lead to negotiations between companies and state regulators as to the conditions on which consent would be granted.” *Supra* note 454, at 11; see also *supra* note 454, at 97.

459. See, e.g., 60 Fed. Reg. 33,642.

460. *House PUHCA Report Hearing*, *supra* note 454, at 11 and 97.

461. *House PUHCA Report Hearing*, *supra* note 454, at 12 and 97.

462. See *supra* note 454, at 14-18 (prepared statement of Elizabeth Anne Moler, Chair, FERC, August 4, 1995); see also *supra* note 454, at 88-93 (prepared statement of Chair Moler, October 13, 1995).

463. See *supra* note 454, at 41-43 (prepared statement of Robert W. Gee, Public Utility Commission of Texas, on behalf of NARUC, August 4, 1995); see also *supra* note 454, at 100-102 (prepared statement of Robert W. Gee, Public Utility Commission of Texas, on behalf of NARUC, October 13, 1995).

464. See *supra* note 454, at 42 and 100.

465. See *supra* note 454.

provide for a two-year transition period;⁴⁶⁶ (iii) authorize state regulation of intra-system service, sales, and construction contracts as well as diversification activities,⁴⁶⁷ and; (iv) authorize state examination of books and records.⁴⁶⁸

In the October 1995 congressional hearing, the NARUC supplemented those comments with an observation on the increased incidence of public utility acquisitions and combinations completed or announced throughout 1995.⁴⁶⁹ “[I]t is becoming readily apparent that concentration of industry ownership will place added stress on regulators at both Federal and State levels.”⁴⁷⁰ Several additional public utility acquisitions and combinations have been announced since the October 1995 congressional hearing.⁴⁷¹

VII. LEGISLATION AND THE REPEAL OF PUHCA

A. Senate and House Bills

The various positions, views, and sentiments on the proposed repeal of PUHCA that were presented to the house Committee in August 1995 and again in October 1995 were echoed before the Senate Committee on Banking, Housing, and Urban Affairs (Senate Committee), which in June 1996 conducted a congressional hearing on a bill that would repeal the statute⁴⁷² — S. 1317, the Public Utility Holding Company Act of 1995.⁴⁷³

Since Senator D’Amato introduced the bill in October 1995,⁴⁷⁴ S. 1317 had acquired broad bi-partisan support in the Senate.⁴⁷⁵ This support was

466. “For instance, in my State of Texas, as well as many other States, the state legislature meets just once every two years.” *Supra* note 454, at 42 and 101.

467. *Supra* note 454, at 42-43 and 101.

468. *Supra* note 454, at 43 and 101.

469. See, e.g., Holusha, *Takeover Bids Made for Two Big Utilities*, New York Times, Aug. 15, 1995, at D-1 (PECO Energy Co., parent of Philadelphia Electric Co., and PP&L Resources, Inc., parent of Pennsylvania Power and Light Co.; Union Electric Company and CIPSCO, Inc.); Salpukas, *2 Big Utilities Plan to Merge In Deal Valued at \$6 Billion*, New York Times, May 2, 1995, at D-2 (Northern States Power Co. and Wisconsin Energy Corp.).

470. *House PUHCA Report Hearing*, *supra* note 454, at 101.

471. See, e.g., Salpukas, *Utilicorp in \$3 Billion Deal With Kansas City Power*, New York Times, Jan. 23, 1996, at D-2 (Utilicorp United, Inc. and Kansas City Power and Light Co.); *3 Midwest Utilities Join Rising Trend Toward Consolidation* New York Times, Nov. 13, 1995, at D-2 (WPL Holdings, Inc., Interstate Power Co., and IES Industries). “The situation is dramatically different today. Now, more than six decades later . . . the States have developed effective public utility commissions to oversee the activities of public utilities and to ensure that energy consumers are protected.” The Public Utility Holding Company Act of 1935, June 6, 1966; Hearing on S. 1317, before the Senate Banking Committee, 1996 WL 308371 (F.D.C.H.) (Statement of U.S. Senator Alfonse M. D’Amato, Chairman, Senate Banking Committee) [hereinafter *D’Amato Statement*].

472. See, e.g., *D’Amato Statement*, *supra* note 471; Witness List, June 6, 1996: Hearing on S. 1317, before the Committee on Banking, Housing, and Urban Affairs, 1996 WL 311791 (F.D.C.H.).

473. S. 1317, 104th Con., 1st Sess. (1995).

474. 141 Cong. Rec. S15,118 (daily ed. Oct. 12, 1995) (introduction of S. 1317).

475. See, e.g., 142 Cong. Rec. S2658 (daily ed. March 21, 1996) (Sen. Grams (R-Minnesota) additional co-sponsor); *id.* at S1684 (daily ed. March 11, 1996) (Sen. Coats (R-Indiana) additional co-sponsor); *id.* at S1368 (daily ed. Feb. 27, 1996) (Sen. Warner (R-Virginia) additional co-sponsor); *id.* at S321 (daily ed. Jan. 23, 1996) (Sen. Inouye (D-Hawaii) additional co-sponsor); 141 Cong. Rec. S19,260

reflected in the first two witnesses before the Senate Committee — Frank H. Murkowski, Chairman of the Senate Committee on Energy and Natural Resource,⁴⁷⁶ and J. Bennett Johnston, Ranking Minority Member of the Senate Committee on Energy and Natural Resources⁴⁷⁷ — both of whom urged the enactment of S. 1317 and the repeal of PUHCA.⁴⁷⁸

The SEC, of course, also urged the enactment of S. 1317,⁴⁷⁹ which, it observed, “is largely consistent with the recommendations of the SEC with respect to the future of public utility holding company regulation.”⁴⁸⁰ The SEC supported the repeal of PUHCA in conjunction with the enactment of a federal statute relative to state examination of books and records because “[i]n recent years, the pace of change in the utility industry has accelerated significantly.”⁴⁸¹

With respect to the unconditional repeal of PUHCA, the SEC opined that “complete repeal is premature, in view of . . . the inconsistent pattern of state regulation”⁴⁸² The SEC had testified before the House Committee in 1995 that it was committed to streamlined federal regulation of inter-state holding companies.⁴⁸³ With respect to its third option for the proposed repeal of PUHCA — a PUHCA amendment to authorize the SEC to issue broad exemptions — the SEC stated that this option would fail to streamline federal regulation.⁴⁸⁴ Finally, it observed that the SEC had begun to promulgate various amendments to SEC regulations under PUHCA, which the report recommended, “[p]ending Congressional action.”⁴⁸⁵ Other witnesses before the Senate Committee hedged their

(daily ed. Dec. 22, 1995)(Sen. Akaka (D.-Hawaii additional co-sponsor); *id.* at S18,822 (daily ed. Dec. 18, 1995)(Sen. Heflin (D.-Alabama) additional co-sponsor); *id.* at S18,743 (daily ed. Dec. 15, 1995)(Sen. Cochran (R.-Mississippi) additional co-sponsor). “The bill before us is well balanced and bipartisan.” *D’Amato Statement, supra* note 471, at 3.

476. The Public Utility Holding Company Act of 1935, June 6, 1996: Hearings on S. 1317, before the Senate Committee on Banking, Housing, and Urban Affairs, 1996 WL 305915 (F.D.C.H.) (Statement of Senator Frank H. Murkowski, Chairman, Senate Committee on Energy and Natural Resource)[hereinafter *Murkowski Statement*].

477. Public Utility Holding Company Act of 1935, June 6, 1996: Hearings on S. 1317 before the Senate Committee on Banking, Housing, and Urban Affairs, 1996 WL 305931 (F.D.C.H.)(Statement of Senator J. Bennett Johnston, Ranking Minority Member, Senate Committee on Energy and Natural Resources)[hereinafter *Johnston Statement*].

478. “PUHCA is a sixty year old statute that was designed to cure the problems of a now long-gone, depression-era industry structure. Having done its job, it is now time to retire PUHCA.” *Murkowski Statement, supra* note 476, at 3. “PUHCA repeal is good for consumers, good for our economy, and good for our future. S. 1317 must go forward this year. The time for the Congress to act is long overdue.” *Johnston Statement, supra* note 477, at 5-6.

479. A Bill to Repeal the Public Utility Holding Company Act of 1935, June 6, 1996: Hearings on S. 1317, before the Senate Committee on Banking, Housing, and Urban Affairs, 1996 WL 305914 (Statement of Barry P. Barbash, Director, Division of Investment Management, U.S. Securities and Exchange Commission)[hereinafter *SEC Senate Statement*].

480. *Id.* at 1. “Senate Bill 1317 accomplished many of the goals of the conditional repeal contemplated by the SEC.” *Id.* at 4.

481. *Id.* at 3.

482. *Id.* at 5.

483. *House PUHCA Report Hearing, supra* note 454.

484. *SEC Senate Statement, supra* note 479, at 5.

485. *SEC Senate Statement, supra* note 479, at 6.

enthusiasm for the repeal of PUHCA — conditional or otherwise.⁴⁸⁶ For example, the FERC declined entirely to state a position on S. 1317 per se.⁴⁸⁷ In the alternative, the FERC deferred “to the expertise of the . . . [SEC] . . . as to whether . . . [PUHCA] should be repealed or amended.”⁴⁸⁸

In particular, the NARUC declined to endorse the enactment of S. 1317 per se.⁴⁸⁹ Instead, the NARUC, in a statement delivered almost verbatim on two prior occasions before the House Committee, reiterated elements of the Resolution on Legislation to Change the Public Utility Holding Company Act of 1935, which the association adopted in March 1995.⁴⁹⁰ The NARUC also reiterated a concern with the potential anti-competitive consequences of electric public utility acquisitions and combinations.⁴⁹¹ In this respect, the FERC, in February 1996, had initiated an assessment of its own policies and criteria, under Section 203 of the FPA,⁴⁹² for approval of acquisitions of electric public utility companies.⁴⁹³

To conform S. 1317 to the March 1995 resolution, NARUC offered the Senate Committee several suggested improvements to the bill to “ensure

486. *But see* Statement of E. Linn Draper, Jr. Chairman and Chief Executive Officer, American Electric Power Co., on Behalf of the Coalition to Repeal PUHCA Now, Before the Senate Committee on Banking, Housing, and Urban Affairs, on S. 1317, June 6, 1996, 1996 WESTLAW 305934 (F.D.C.H.). American Electric Power Company is a registered holding company. *See also* Statement of Philip C. Ackerman, Senior Vice President, National Fuel Gas Co., Before the Senate Committee on Banking, Housing, and Urban Affairs, on S. 1317, June 6, 1996, 1996 WESTLAW 308355 (F.D.C.H.). National Fuel Gas Company is a registered holding company. “PUHCA imposes unnecessary, redundant, burdensome and expensive regulation that is no longer needed. It should be repealed, and repealed now.” *Id.* at 1. *See also* Statement of Lloyd A. Levitin, Lecturer in Finance and Business Economics, University of Southern California, on Behalf of Pacific Enterprises, Before the Senate Committee on Banking, Housing, and Urban Affairs, June 6, 1996, 1996 WESTLAW 311730 (F.D.C.H.). Pacific Enterprises is an exempt holding company. “We applaud and support the SEC’s efforts to repeal [PUHCA], and urge you and this Committee to move ahead to pass S. 1317 so that the bill can be considered by the full Senate as quickly as possible.” *Id.* at 6. *See also* Statement of the American Gas Association Before the Senate on Committee on Banking, Housing, and Urban Affairs, on Public Utility Holding Company Act of 1995, June 6, 1996, 1996 WESTLAW 308353 (F.D.C.H.). “S. 1317 recognizes the anachronistic and burdensome regulatory impositions that are required to enforce the provisions of PUHCA.” *Id.* at 5.

487. *See generally*, Statement of Elizabeth A. Moler, Chair, Federal Energy Regulatory Commission, before the Senate Committee on Banking, Housing, and Urban Affairs, June 6, 1996, 1996 WL 305905 (F.D.C.H.).

488. *Id.* at *2.

489. *See generally* Statement of Robert W. Gee, Commissioner, Public Utility Commission of Texas, on Behalf of NARUC, before the Senate Committee on Banking, Housing, and Urban Affairs, on Reform of the Public Utility Holding Company Act of 1935, June 6, 1996, 1996 WL 308352 (F.D.C.H.) [hereinafter *NARUC Senate Statement*]. “[T]he NARUC believes S. 1317 moves in a very positive direction in rationalizing regulatory oversight . . .” *Id.* at *4.

490. The statement emphasized that an amendment to or the repeal of PUHCA should (i) not preempt state regulation, (ii) authorize state regulation of intra-system contracts and diversification activities, and (iii) authorize state examination of books and records. *Id.* at *5-8.

491. *Id.* at *9. *See also* National Association of Regulatory Utility Commissioners, Resolution Regarding Regulatory Policies for Review of Electric Utility Merger Proposals (Feb. 28, 1996) [on file with author].

492. 16 U.S.C. § 824b.

493. *See generally* Inquiry Concerning Commission’s Merger Policy Under the Federal Power Act, 61 Fed. Reg. 4596 (1996).

the States' ability to oversee multistate holding companies."⁴⁹⁴ For example, the organization again requested a two-year transition period.⁴⁹⁵ In addition, with respect to state examination of books and records, NARUC suggested an enforcement mechanism "to complement the intent of this section of the bill."⁴⁹⁶

Finally, some witnesses before the Senate Committee were opposed to the repeal of PUHCA in the near future and thus to the enactment of S. 1317. The National Association of State Utility Consumer Advocates doubted the present potential for effective state regulation of inter-state holding companies.⁴⁹⁷ In the absence of such regulation, the association argued, the Senate Committee should not "repeal or weaken the consumer protections in PUHCA as embodied in S. 1317"⁴⁹⁸ The Electricity Consumers Resource Council, an industrial trade association, opposed the "premature repeal" of PUHCA,⁴⁹⁹ which repeal, the trade association argued, would "allow regulated multi-state monopolies to become bigger, unregulated monopolies, resulting in anticompetitive consolidation of the electric industry."⁵⁰⁰ Otherwise, the trade association argued that the U.S. Congress should not repeal PUHCA in the absence of the a federal statute that would authorize the state to examine the books and records of holding companies and their subsidiaries.⁵⁰¹

Within hours after the Senate Committee concluded its congressional hearing on S. 1317, Representative W.J. (Billy) Tauzin (R.-Louisiana) introduced H.R. 3601,⁵⁰² the Public Utility Holding Company Act of 1996,⁵⁰³ which also would repeal PUHCA. A companion bill to the D'Amato bill, H.R. 3601 is almost identical to S. 1317. The House bill would repeal PUHCA one year after its enactment, thus eliminating to a large extent, federal regulation of holding companies.⁵⁰⁴ H.R. 3601 also would enact the

494. *NARUC Senate Statement, supra* note 489, at *12.

495. *NARUC Senate Statement, supra* note 489, at *13.

496. *NARUC Senate Statement, supra* note 489, at *12.

497. *See generally*, Statement of Larry A. Frimerman, Office of the Ohio Consumers' Counsel, on Behalf of the National Association of State Utility Consumer Advocates, before the Senate Committee on Banking, Housing, and Urban Affairs, on the Regulation of Public Utility Holding Companies, June 6, 1996, 1996 WL 305933 (F.D.C.H.). "[S]tate regulation is not, contrary to repeal proponents, sufficient to protect consumers in the absence of a federal statute regulating multistate public utility holding companies." *NARUC Senate Statement, supra* note 489, at *11. "[A]ll the necessary tools may not be within the state commissions's authority." *NARUC Senate Statement, supra* note 489, at *13.

498. *NARUC Senate Statement, supra* note 489, at *6-7.

499. *See generally* Statement of John A. Anderson, Executive Director of the Electricity Consumers Resource Council, 1996 WL 305932, (F.D.C.H.)(June 6, 1996)(discussing the Public Utility Holding Company Act of 1995 before the Senate Committee on Banking, Housing, and Urban Affairs).

500. *NARUC Senate Statement, supra* note 489, at *7.

501. *NARUC Senate Statement, supra* note 489, at *16.

502. H.R. 3601, 104th Cong. (1996).

503. 142 Cong. Rec. H6005 (daily ed. June 6, 1996)(introduction of H.R. 3601).

504. H.R. 3601, *supra* note 502, § 102. "[PUHCA] was intended to facilitate the work of State . . . regulators by placing certain constraints on the activities of holding company systems. Developments since 1935 . . . have called into question the continued relevance of the model of regulation established by the statute." H.R. 3601, *supra* note 502, at § 205(a).

Public Utility Holding Company Act of 1995,⁵⁰⁵ which would increase state regulation of holding companies. Under H.R. 3601, the states would be authorized to examine the books and records of holding companies and their non-utility subsidiaries.⁵⁰⁶ The FERC similarly would be authorized to examine the books and records of holding companies and their non-utility subsidiaries.⁵⁰⁷

Although H.R. 3601 has acquired some bipartisan support in the House,⁵⁰⁸ the bill has remained stalled in the House Committee since its introduction in June 1996.

B. Senate Report

In September 1996, the Senate Committee issued a report on S. 1317,⁵⁰⁹ which includes an amendment in the nature of a substitute.⁵¹⁰ The rhetoric of the report reflects a determination on the part of Senator D'Amato, Chairman of the Senate Committee, to proceed with the repeal of PUHCA as well as a vote of confidence in state regulation of inter-state holding companies.

The amended bill is quite similar to the original bill but includes several significant modifications and additional provisions. First, because it would still repeal PUHCA,⁵¹¹ the amended bill would still eliminate to a large extent federal regulation of holding companies. In this respect, the Senate Committee report discusses the ineffectiveness and burdensomeness of PUHCA.⁵¹² On the recommendation of the NARUC,⁵¹³ the amended bill also would provide, however, an eighteen-month transition period prior to repeal.⁵¹⁴

Second, the amended bill would increase to a large extent state regulation of holding companies. In particular, the states would be authorized to

505. See *supra* note 502, at § 210-13.

506. "Upon the written request of a State commission having jurisdiction to regulate a public utility company in a holding company system . . . a holding company or its associate company or affiliate thereof, wherever located, shall produce for inspection such books and records as have been identified in reasonable detail . . ." See *supra* note 502, at § 205(a).

507. See *supra* note 502, at § 204(a). "Limited Federal regulation is necessary to supplement the work of State commissions for the continued rate protection of electric and gas utility consumers. This Act is intended to address these concerns by providing for Federal and State access to book and records of all companies in a holding company system . . ." See *supra* note 502, at § 201.

508. See, e.g., 142 Cong. Rec. H8248 (daily ed. July 23, 1996) (Rep. Doolittle (R.-California) additional co-sponsor; Rep. Montgomery (D.-Mississippi) additional co-sponsor).

509. S. REP. No. 104-365 (1996).

510. *Id.* at 1.

511. *Id.* at 14 (analysis in Section 4).

512. *Id.* at 7-8. "[D]evelopments in other areas of the law have rendered PUHCA obsolete." *Id.* at 7. See also *id.* at 2 ("PUHCA no longer serves its original purpose of restructuring the energy industry and protecting investors and consumers from holding company uses.") But see *id.* at 3-4 (background). "States were unable and ill-equipped [prior to 1935] to regulate these multistate holding companies effectively. At the time, many states did not have a utility-related regulatory structure in place and the Supreme Court considered state regulation of multistate holding companies a violation of the Commerce Clause of the Constitution." *Id.* at 4 (note omitted).

513. See, e.g., NARUC Senate Statement, *supra* note 489, at 6.

514. S. REP. No. 104-365, *supra* note 509, at 16 (analysis of Section 15).

examine the books and records of holding companies and their non-utility subsidiaries.⁵¹⁵ The Senate Committee report emphasizes the importance of access to books and records.⁵¹⁶

Finally, the FERC would still be authorized to examine the books and records of holding companies and their non-utility subsidiaries.⁵¹⁷ In this respect, the Senate Committee report addresses a concern with the regulation of rates for interstate wholesale electric power.⁵¹⁸ To rebut the possible suggestion that the repeal of PUHCA, in conjunction with the enactment of a federal statute relative to the FERC examination of books and records, would result in the simple substitution of the FERC for the SEC, the Senate Committee report observes that the amended bill would "put in place a new, *less pervasive* regulatory structure that allows for greater diversification in the utility industry while ensuring that utility customers do not pay for diversification through increased energy rates."⁵¹⁹

The Senate Committee report depicts the amended bill in terms of the culmination of a twenty-year congressional debate on the repeal of PUHCA.⁵²⁰ In 1982, the SEC had urged the U.S. Congress to repeal PUHCA.⁵²¹ In 1981, Senator D'Amato had introduced three bills to amend PUHCA.⁵²² In 1977, however, the General Accounting Office, in a report to the U.S. Congress on the enforcement of PUHCA, had recommended — almost twenty years ago — that the SEC initiate a comprehensive assessment of the need for reform of PUHCA.⁵²³ Such an assessment, of course, was completed in 1995.

515. S. REP. NO. 104-365, *supra* note note 509, at 14-15 (analysis of Section 6).

516. S. REP. NO. 104-365, *supra* note 509, at 14-15 (analysis of Section 6). "The bill also contains an enforcement mechanism to ensure that the state commissions will be able to implement this newly expanded books and records review authority." *See supra* note 509, at 3.

517. S. REP. NO. 104-365, *supra* note 509, at 14 (analysis of Section 5).

518. S. REP. NO. 104-365, *supra* note 509, at 8-10. "The [Senate] Committee considered how to best ensure that the FERC . . . would be able to prevent the funding of non-utility investments through utility rates and other unfair affiliate transactions." S. REP. NO. 104-365, *supra* note 510, at 9.

519. S. REP. NO. 104-365, *supra* note 509, at 1-2 (emphasis added). *See also supra* note 510, at 13 (analysis of Section 2)("[T]he constraints placed on holding company systems by [PUHCA] are no longer relevant but . . . there is continuing need for limited Federal . . . regulations to protect the ratepayers of electric utilities and natural gas companies.").

520. S. REP. NO. 104-365 *supra* note 509, at 5-6. "Congress has debated the issue of PUHCA reform for nearly twenty-years."

521. *See generally* S. 1977, 97th Cong. (1982)(to repeal PUHCA); H.R. 5465, 97th Cong., (1982)(to repeal PUHCA); H.R. 6134, 97th Cong. (1982)(to repeal PUHCA); *Public Utility Holding Company Act Amendments: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 97th Cong., 2d Sess. (1982)*; *Utility Holding Company Act: Hearing Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce, 97th Cong. (1982)*. *See also Public Utility Holding Company Act Amendments of 1983: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 98th Cong. (1983)*; *Public Utility Holding Company Act Amendments: Hearing Before the Subcomm. on Energy Conservation and Power and the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce, 98th Cong. (1983)*; GENERAL ACCOUNTING OFFICE, ANALYSIS OF SEC RECOMMENDATIONS TO REPEAL THE UTILITY HOLDING COMPANY ACT (1983).

522. S. 1869, 97th Cong., (1981); S. 1870, 97th Cong. (1981); S. 1871, 97th Cong. (1981).

523. GENERAL ACCOUNTING OFFICE, THE FORCE OF THE PUBLIC UTILITY HOLDING COMPANY ACT HAS BEEN GREATLY REDUCED BY THE CHANGES IN THE SEC ENFORCEMENT POLICIES (1977).

VIII. CONCLUSION: THE "OLD" FEDERALISM

When he introduced S. 1317, Senator D'Amato observed that PUHCA served a purpose in 1935 but that "[s]tate [p]ublic [s]ervice commissions have become effective retail energy regulators, who can protect their rate-payers."⁵²⁴ Senator J. Bennett Johnston (D.-Louisiana), who has co-sponsored S. 1317, agreed. "Times have clearly changed. State regulators have the authority to protect retail ratepayers from monopolistic prices"⁵²⁵

S. 1317 would eliminate SEC regulation of inter-state holding companies under PUHCA,⁵²⁶ increase FERC regulation of those companies under the Federal Power Act,⁵²⁷ and, on balance, result in decreased federal regulation. The bill also would authorize the states to examine the books and records of inter-state holding companies and their non-utility subsidiaries and thus would authorize increased state regulation of those companies.

To the extent that it would decrease federal regulation and authorize increased state regulation, S. 1317 appears to be consistent with the New Federalism of the 104th Congress. Indeed, S. 1317 would not be the first energy legislation to reflect the New Federalism of the Republican-controlled U.S. Congress. For example, the National Highway System Designation Act of 1995 (NHSDA),⁵²⁸ enacted in November 1995, repealed the national maximum speed limit.⁵²⁹ With the repeal of this federal statute,⁵³⁰ which was enacted in 1974 in response to the notorious oil embargo of 1973, the states are now authorized to "fill in the gap" and enact their own speed limits.⁵³¹

524. 141 Cong. Rec. S15,128 (daily ed. Oct. 12, 1995).

525. 141 Cong. Rec. S15,129 (daily ed. Oct. 12, 1995).

526. S. 1317, *supra* note 1, § 102.

527. S. 1317, *supra* note 1, at § 204(a).

528. Pub. L. No. 104-59, 109 Stat. 568 (1995).

529. *Id.* § 205(d), 109 Stat. at 577.

530. 23 U.S.C. § 154 (national maximum speed limit).

531. "[On] Dec[ember] 8, states will be able to set their own speed limits, which in some western states will automatically go up to 70 mph or higher. Two decades ago President Richard M. Nixon signed legislation that lowered the national speed limit to 55 mph to save energy during an oil embargo." Phillips, *Federal Speed Limit, Set in 1974, Repealed; Clinton Signs Bill Letting States Decide*, Washington Post, Nov. 29, 1995, at A-1. See also Gray, *Senate Votes To Let States Set Car Speeds*, N.Y. Times, June 21, 1995, at 12. "The speed limit issue, having been an energy issue and then a safety issue, now is a federalism-10th Amendment-states' rights issue, with anti-paternalism in the bargain." Will, *Land of the Freewheeling*, Washington Post, June 25, 1995, at C-7. Indeed, the debates in the U.S. Congress on the NHSDA embodied the New Federalism of the 104th Congress. "The 55 mph speed limit was mandated by the federal government in 1973 . . . to conserve fuel during the Arab oil embargo. States, which had always set the speed limits on their highways, suddenly found they had lost their authority. They may finally get it back" 141 Cong. Rec. S8648 (daily ed. June 20, 1995). "In this instance it is totally reasonable and totally practical that the States should be setting the speed limits. If a State legislature is not capable of setting the speed limit within the State then what is it capable of doing?" *Id.* at S8651 (statement of Sen. D.M. "Lauch" Faircloth). The oil embargo of 1973 contributed to an energy crisis that precipitated the ultimate enactment of numerous federal energy legislative initiatives that included, for example, the Public Utility Regulatory Policies Act of 1978 (PURPA). Pub. L. No. 95-617, 92 Stat. 3119. This initiative is not immune from repeal in the 104th Congress. See, e.g., Electric Utility Ratepayer Act, S. 708, 104th Cong., 1st Sess. (1995)(to repeal

The repeal of PUHCA, however, was conceived well before the 104th Congress. The repeal of this legislation might have been conceived in 1935, when PUHCA was enacted to address the ineffectiveness of state regulation of inter-state holding companies and to restore effective state regulation,⁵³² which might be expected ultimately to eliminate the need for federal regulation. In this sense, the proposed repeal of PUHCA should not be associated with the New Federalism of the Republican-controlled 104th Congress but with an "old" federalism of the Democrat-controlled 74th Congress of 1935.

In the past decade, the U.S. Congress, the federal courts, and, in particular, the SEC, have contributed to the restoration of effective state regulation of inter-state holding companies. The U.S. Congress expanded the role of state regulation in the Energy Policy Act of 1992. The federal courts have authorized the SEC to engage in "watchful deference" to the states in the regulation of holding companies. The SEC has promulgated and amended regulations that have increased state regulation of inter-state holding companies.

The verdict on the effectiveness of state regulation was returned with the June 1995 SEC report that proposed the repeal of PUHCA and the enactment of a federal statute that would authorize the states to examine the books and records of inter-state holding companies and their subsidiaries. The effectiveness of state regulation has been restored. PUHCA has accomplished its mission. Now is the time for repeal.

Section 210 of PURPA); Ratepayer Protection Act, H.R. 2562, 104th Cong., 1st Sess. (1995)(to repeal Section 210 of PURPA).

532. "Congress hoped to . . . restore effective state regulation . . . which had been seriously impaired by the existence and practices of nation-wide holding company systems." *North American Co. v. SEC*, 327 U.S. 686, 704 (1946).