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It is, of course, a signal honor to be asked to speak to this 25th Anniversary Celebration of the *Energy Law Journal*. I received a letter from John Miller, a stalwart of this organization, apologizing for his non-attendance and informing me that he would be participating in an annual pilgrimage to Lourdes today, not—I hasten to say—on his own behalf, but as an escort for people hoping for cures. I think he made the right choice (I don't want to compete with Lourdes), but John told me in his letter that back in 1978 he had chaired a very successful symposium for FEBA [Federal Energy Bar Association], which produced a substantial nest egg. John said he feared for a time that the nest egg might be frittered away on, what he called, "marching and chowder" activities. Instead, the FEBA board decided to use the funds to institute the *Energy Law Journal*. I agree that the board showed very good judgment in that matter, but I would still welcome exposure to a few of those "marching and chowder" activities.

Beginning with that nest egg, the *Journal* has found a place in the very highest ranks of legal periodicals. Under the brilliant editorship of Bill Mogel, it has recorded, and in fact, led the movements in energy law in what has been perhaps its most dynamic period. You know, I love to get my semi-annual copy of the *Energy Law Journal*, because, although it contains highly sophisticated material about one of my favorite subjects, I can still get the general drift of what the articles are talking about. Unfortunately, when I get the journal of my own alma mater, *The Yale Law Journal*, I lay it wistfully to the side, hoping that some day I'll be able to understand what's in it.

You know, the wonderful thing about energy law and policy is that it's a little like the weather in Chicago: If you don't like it, just wait a while and you'll get something entirely different. Energy law and policy is nothing if not volatile, and this has certainly been true of the period when the *Energy Law Journal* has been documenting it. In one decade, coal and nuclear are the overwhelmingly

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popular fuels of choice; in the next decade, these two are nowhere, and suddenly natural gas has become the wonder fuel, but not for long, as its price skyrockets and we're back to coal. Once we were seriously studying proposals to put a number of nuclear plants in one center. Not long after, nuclear energy became virtually defunct. Coordination was the key to better things when Justice Breyer was writing about it in 1974, but only a short time later competition supplanted it. One minute we had integrated resource planning, a central planner's Utopia, but this gave way to the supremacy of the market and the awesome blessings of the Invisible Hand. This is the kind of volatility with which Bill Mogel and his stable of writers have dealt so nimbly and with such insight over these critical years.

Over the years, I think my view of energy law and policy has reflected the principle of contrary opinion, which is often proposed as an appropriate way to play the stock market. That is, never go with the conventional wisdom; always be looking for the dark underside of whatever is being touted at the moment. And since energy law tends to run in cycles, unpopular views today may turn into wonderful prophecies tomorrow.

This approach of rejecting the conventional wisdom can come rather naturally to an observer who has been ferociously bombarded by solicitations for seminars about energy, not only in college forums and hotel convention centers, but in ski lodges, tropic islands, cruise ships, and, in fact, in watering holes of every description. The sort of drum beating that came naturally with the deregulation movement was something wonderful to behold and experience. The word was that energy was entering a new era; things would never be the same; and you'd better jump on, because the train was leaving the station. This kind of approach just brings out the skeptic in me. I can't believe that things can ever be as rosy as such solicitations would suggest. And I can't believe that ideas could ever be as right as the proponents of voguish concepts argue. I think, we Americans like to have our ideas oversold so that we may be frequently wrong, but never in doubt.

In the evolution of electric power industry, the engineers, who put things together originally, gave way to the lawyers who supposedly knew how to stroke the regulators, until the economists came along and asserted that electricity is just another network—sort of like the airlines, but certainly like natural gas. At the moment, there are some signs that we may be going full circle to once again let engineers have their say. I have recently heard speakers with an engineering outlook assert that electricity is unique and you can't reason from highways or railroads to electric power systems. I wouldn't be surprised if this engineering approach might now have a run of popularity. But not to worry—whichever outlook is in vogue will always need the lawyers around to help impose its point of view on the unsuspecting masses.

Perhaps, the highest order of value invoked by the deregulation movement has been the importance of innovation. We have heard a lot about that as well as about the transcendent goal of consumer choice. I'm not going to derogate either innovation or consumer choice—they are, after all, the engines that have driven the American consumer economy, which, whatever may be said about it from an aesthetic point of view, has been a fabulous producer of wealth. But, when it

comes to thinking about the infrastructure, which is where the energy industries take their stand, reliability and predictability are the virtues that yield to none others. Infrastructure industries are really doing their job best when everybody is taking them for granted, when they are not making the headlines, and when they are not delivering surprises to the populace. I think what the public holds most dear are natural gas and electric power rates that are steady-as-she-goes, but with a definite bias toward reduction.

It is too bad for the standing of innovation that, for a number of years, its most visible exponent was the Enron Corporation, named the most innovative company in America for six straight years by business leaders from among *Fortune Magazine's* most admired companies. The only trouble was that Enron got enthusiastically involved in *financial* innovation and ended up with its fate tied intimately to the price of its stock, which disappeared down a rathole just as Insull's had 70 years earlier. Enron carried the title of the Flagship of Deregulation, and, when it met the fate of the Titanic, it took a lot of hopes and dreams to the bottom with it. I am certainly not here to preach against innovation; it's what our economy is all about. But, it's not going to be a blessing if it isn't linked to the old-fashion virtues of reliability, predictability and—of course—honesty.

Back in 1993, Dick Pierce and Bernard Black wrote an article about the choice between markets and central planning in regulating electric power. Well, you didn't have to digest the article and all its footnotes to guess who was going to come out ahead in that dichotomy. Surprise, surprise, it was markets. I don't know, however, that there has to be *that* sharp a dichotomy. I know about the numerous cautions that you can't mix markets and regulation, or as some wise guy put it, that no system can endure half-slave and half-free. I think, however, that there is always going to be room in the market mix for a certain amount of command and control—and I know what heresy it is to speak kindly of command and control. But, just as we do not leave safety to be determined by market forces in operating our airlines, I do not believe that the reliability of the electric power system can be entrusted exclusively or even primarily to financial incentives.

I must admit that I shall have a sort of soft spot for regulated utilities. Utilities with an obligation to serve and, subject to regulation, were sort of invented by Samuel Insull along with the holding company, which was a considerably less successful invention. Regulated utilities have the incentives that are provided by the profit motive, but they are subject to a variety of legal constraints, notably the obligation to serve, and to serve reliably. Most of the people who have something to do with their operation have learned over time to take the legal constraints seriously and to regard reliable service on almost the same level as the drive to make money. So, I hope that this mind set and culture is not completely lost in a struggle for economic efficiency.

I think it's very interesting to see how the two major industries that are covered by the *Energy Law Journal* have been impacted by the deregulation movement. Natural gas seems to have been an almost unqualified success, while electric power, which so many experts thought should be patterned after natural gas, proved to be fraught with problems. I have not heard much criticism of he

plan to operate the gas pipelines as common carriers, with the price of gas left to direct bargains between producers and consumers. No doubt, there are always going to be ways in which market power and abusive practices can make their way into the system, but on the whole that program seems to have been a success.

The most serious criticisms of the workings of natural gas markets have arisen in connection with the California fiasco, where the worst aspects of electric power and gas combined forces to create chaos in the Golden State. Jacqueline Weaver of the University of Houston Law School has produced a wonderful article based on extensive research about how bad practices in gas led to disaster in electricity. I suppose these reinforcing tendencies—and they certainly don't have to involve bad practices—will become widespread, if, as expected, electric generation goes heavily to gas.

As is well known, in California wholesale power prices went through the roof, and rolling blackouts were the vogue. One of the more interesting aspects of that phenomenon was that, when the lights and the traffic signals started going out, the citizenry did not blame the power companies or even Enron; instead, they blamed the government. Any government that can't keep the lights on has got to go. This confirms my suspicion that the average citizen regards the electric infrastructure as a function of sovereignty, and, when things really get tough, even the laws of economics are in temporary suspension. Various schools of economists have had different remedies for California's trouble. There was one school of thought that favored flowing through exorbitant wholesale costs to retail rates so that retail consumers could have adequate price signals and, presumably, turn off the air conditioning in August. I think I understand all the economic arguments on this, but, as a former regulator, I can predict that the average consumer is going to respond with rage, rather than rationality, if the price of electricity goes up by two or three times.

Having met with success in natural gas, the FERC [Federal Energy Regulatory Commission] continues the struggle to master electricity. Its Herculean efforts with standard market design have brought on the confrontation that has been inherent in restructuring policy from the start. Regional and national markets as the medium for allocating and pricing electricity are inescapably going to put the national authority in the catbird seat and necessarily diminish state control. Despite my own background in state regulation, I don't see how in the long run regulatory power can escape moving toward the center and away from the periphery. That is really the story of California, where the state regulators, had they really been in control, would certainly have pursued a different policy than the FERC.

What brought the California episode to a close were severe measures to keep all plants on line unless they had very persuasive reasons to be off the line, limits on wholesale prices, rate incentives and other measures to induce radical conservation of electricity (consumption of power was cut by eleven percent), cheaper gas—and a little cooler weather. After those developments, it all seemed to go away. Electricity is an infrastructure industry, which means that people take it for granted and expect it to be there twenty-four hours a day and at a reasonable price. Those are expectations that should be taken for granted in

thinking about reforms of the system.

Energy law, although it is gradually finding a place in the thinking of students of law, is still a rather exotic offering, landing somewhere between regulated industries, environmental, and natural resources law. I achieved my first publication in the *Energy Law Journal* in 1995 with a sort of shrill reaction to retail wheeling, which was just coming up on the radar screen and which, at the time, I thought had to be viewed with caution. Time, however, has mellowed my reaction, and at the same time retail wheeling has somehow receded from the popularity it enjoyed five or ten years ago. My article then was more gut reaction than rational analysis. Editor Mogel, fortunately, demanded that I tone down some of my more unrestrained rhetoric. Apparently my efforts, however, got the attention of those who were putting together a program for the FEBA meeting the following year. It was announced that there would be a debate between me and Joe Pace, a very capable economist, about the pros and cons of retail wheeling. I really wasn't looking forward to this event, since, as I read my article in the cold light of day, I thought I might have gone off the deep end. I was surprised and relieved, however, when I found that Joe had taken a fully rational view of the same subject and had raised many of the same questions much more intelligently than I had. So, our debate more closely resembled a duet, and those who paid to see a fight didn't get their money's worth.

It is interesting how energy law and policy have their ups and downs with law students. Back in 1978, when I was practicing law here in Washington, I undertook to teach a class in energy law at George Washington Law School at the suggestion of Harold Green. Harold, as some of you may know, was an authority on nuclear power, whom I had met a couple of years earlier at a conference on nuclear energy centers, otherwise known as nuclear power parks. That was a quaint idea about having a slew of nuclear plants sited in close proximity with one another and surrounding them virtually, if not literally, with an electric fence. It was not an idea that Amory Lovins would have fallen in love with, but conferences to address it were mandated by the legislation creating the Nuclear Regulatory Commission. At any rate, Harold and I became friends, and when the energy law course he got me into was announced, 140 students signed up for it. Apparently, my reputation as a teacher had gone before me. Imagine my disillusionment when I offered the same subject twenty-five years later at DePaul Law School in Chicago. There I ended up with ten students. But, twenty-five years later, there were standard casebooks with which to teach the course, which showed that energy law had come a long way. In 1978, I had to make up all the materials myself; and material from the *Energy Law Journal* is now playing a significant part in Energy Law course materials.

Perhaps, the most inescapable problem confronting energy policy makers today is the issue of global warming. The amazing industrial progress currently being made by China and, to a lesser extent, by India illustrates how the global warming picture is changing again as these developing countries race toward development. Global warming seems to be a phenomenon that almost everybody accepts informally, and refers to from time to time in everyday conversation, but where we as a nation have fought shy of international commitments. It may be the ultimate irony that the ongoing subjugation of

nature by humankind is, sort of, accidentally making us think critically about the weather—a phenomenon formerly left in the care and custody of God.

So, I'll leave you with the thought that the most pressing problem of energy law and policy today is what to do about the changes in climate that our massive outpouring of energy seems to produce. That is an issue that is not fading away and instead keeps nudging us to pay attention before it is too late.

Again, I say congratulations to the Energy Law Journal on its twenty-fifth anniversary, to Bill Mogel, to the editorial and business staffs, to the Foundation, to the University of Tulsa Law School and the student editors, and to all who have contributed to the cause. You have all done a wonderful job in producing a unique product.
