

THE WHOLESALE SERVICE OBLIGATION OF ELECTRIC UTILITIES

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Electric utilities are now operating in a changing and uncertain market and regulatory environment, unlike any experienced in the history of the industry. Customers have responded to the electric price increases of the last ten to fifteen years by reducing their consumption of electricity, or at least by reducing the rate of increase in their consumption. As a result, many utilities now have capacity resources that significantly exceed their peak requirements. In response, state regulatory commissions have developed a variety of ways to deal with what they consider to be excess capacity,¹ including the drastic measure (from the utility's viewpoint) of excluding entirely the costs of such capacity from rates. Utilities have reacted to these regulatory initiatives with what one analyst has called "a *de facto* industry-wide moratorium on the construction of new electricity supply sources."² Without new capacity resources in addition to those presently planned, some utility industry spokesmen and observers argue "that millions of Americans could face voltage reductions, rotating brownouts, and service interruptions in the 1990s."³

Electric utilities face additional supply uncertainties for several reasons. For the first time in this country, cogeneration has emerged as a major power and energy resource. The amount of power and energy that industrial cogeneration can supply, and the permanence of such supplies, have not been tested over time. Moreover, electric utilities may encounter a loss of load as more industrial concerns develop cogeneration capabilities, and particularly if such enterprises are allowed to engage in "self-service," i.e., to serve their other branches or affiliates with cogenerated power and energy, using the utility only as a carrier. At the same time, competition from other utilities for industrial loads appears to be increasing, raising the issue of whether utilities must transmit power for others to industrial customers within their service territories.⁴

Some commentators have responded to the present situation by calling for substantial deregulation of the generation market, coupled with increased access to utility transmission systems.⁵ Others have urged the adoption of marginal cost pricing principles in ratemaking, so that customers receive the proper pricing

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¹A recent National Regulatory Research Institute report analyzes 17 ratemaking treatments for overcapacity. National Regulatory Research Institute, *Commission Treatment of Overcapacity in the Electric Power Industry*, NRRI 84-10 (1984).

²Peter Navarro, of the Energy and Environmental Policy Center at Harvard University, *quoted in* ELECTRIC UTILITY WEEK, June 17, 1985, at 7.

³Paul, *Utilities Say This Summer's Brownouts Will Escalate to Severe Shortages in 1990s*, Wall St. J., June 17, 1985, at 23, col. 4.

⁴See, e.g., *Gulf States Utilities Co. v. City of Lafayette, La.*, No. 84-132 (M.D. La. 1984).

⁵See P. JOSKOW & R. SCHMALENSEE, *MARKETS FOR POWER — AN ANALYSIS OF ELECTRIC UTILITY DEREGULATION* (1983). See also, *Deregulating the Electric Utility Industry: Panacea or "Shades of AT&T"?*, ELECTRIC UTILITY WEEK, July 1, 1985, at 7.

signals in choosing what resources to consume.⁶ Indeed, the Federal Energy Regulatory Commission (FERC) has undertaken an inquiry into its regulation of wholesale sales and transmission of electric energy, in order to assess the effects of its policies on efficiency, and is exploring the possibility of looser regulation of coordination transactions, with a recognition of market forces,⁷ and of the use of marginal cost pricing in setting rates for requirements transactions.⁸ As part of its inquiry into the wisdom of marginal cost pricing, FERC has asked for comment on whether the basic allocation of risks between utility and ratepayer should be changed, with the utility bearing a greater share of the risks of plant construction and operation, as well as the market risks associated with sales for resale.⁹

Together, these developments have the potential to transform the electric industry and the role of utilities within it. The basic concepts associated with public utility status, particularly the duty to serve, may be affected and indeed may be altered dramatically. The purpose of this article is to explore the obligation, if any, of electric utilities to provide service at wholesale. We shall concentrate on the requirements of the Federal Power Act and, in particular its interpretation and implementation by the FERC and its predecessor, the Federal Power Commission. In addition, we shall consider the service obligation as it has been treated under common law and under the antitrust laws. In so doing, we hope to demonstrate that the obligation to serve cannot be separated from a corollary right to serve, which in fact existed at common law and now appears to be developing under the antitrust laws. While we offer no recommendation as to whether FERC, in its regulation of wholesale transactions, should follow the common law model by which a utility has a duty to serve and is insulated from competition, or should pursue an approach that encourages competition in the marketplace, we do argue that such a choice, which is now before the Commission and the industry, must recognize its implications on any obligation to provide wholesale electric service.

I. THE PUBLIC UTILITY STATUS AND THE DUTY TO SERVE

Public utility regulation has been summarized as "the expression of the right of the public, through the state, to obtain adequate service, at reasonable rates from a responsible public utility agency, in return for a grant of authority to such agency to operate in a given territory."¹⁰ This broad principle can be broken down into three component factors: (1) a *duty to serve* in a safe and adequate manner all those qualified to receive service in a particular area, (2) an *obligation to maintain reasonable rates* for service, and (3) the utility's *right to serve* and be protected in its service area from unwarranted competition of the same kind, as a corollary to the duty to serve.¹¹

Public utility status, at least in rudimentary form, is about as old as the law itself. Hammurabi's Code, the world's oldest code of laws, which was promulgated around

⁶*Id.* See also, *Stalon Aims For Rulemaking on Time-of-Use Rates for Electric Utilities*, INSIDE F.E.R.C., April 15, 1985, at 1.

⁷Regulation of Electricity Sales-for-Resale and Transmission Services (Phase I), 50 Fed. Reg. 23,445 (1985) (to be codified at 18 C.F.R. § 35).

⁸Regulation of Electricity Sales-for-Resale and Transmission Services (Phase II), 50 Fed. Reg. 27,604 (1985) (to be codified at 18 C.F.R. § 35, § 290).

⁹*Id.* at 27,612.

¹⁰F.X. WELCH, CASES & TEXT ON PUBLIC UTILITY REGULATION 82 (1961).

¹¹*Id.*

2300 B.C., specified the price at which a ship might be hired, and fixed the yearly rate for which a working ox could be rented.¹² The legal concept of public utility status developed under English common law during the Middle Ages,¹³ and was based on the principle that certain businesses were "affected with a public interest" and therefore ceased to be *juris privati* only, but instead were subject to service requirements and rate restrictions.¹⁴ In the United States, the Supreme Court first enunciated the principle that certain businesses are charged with a public interest in *Munn v. Illinois*,¹⁵ a case involving an Illinois statute that required the licensing of grain elevators as public warehouses and established maximum rates for them. The Court ruled that:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.¹⁶

Despite the many statutory and judicial pronouncements in English and American legal history as to the public utility status of numerous enterprises and the rights and obligations of public utility status, no clear-cut distinctions or identifying characteristics have emerged that conclusively and comprehensively divide public utilities from ordinary types of business enterprises.¹⁷ Two basic conditions are usually required for the imposition of public utility status: (1) the business can be grouped within that broad class of activities known as businesses affected with a public interest, and (2) there must be a specific legislative pronouncement that the business in question is declared to be a public utility, and therefore subject to certain regulation.¹⁸ Although various enterprises have been classified as public utilities over time, the fundamental obligations and rights that attend public utility status have not changed since they were established in early English common law. The responsibilities of a public utility typically include: (1) the obligation to serve all within the service area who request service, (2) the obligation to provide service at a reasonable rate, (3) the obligation to serve the whole public without undue discrimination or unfair preference, in either service or charges, and (4) the obligation to provide service on reasonable terms and conditions. As a corollary to these responsibilities, certain privileges are accorded to public utilities, including: (1) the right to charge a just and reasonable price, (2) the right of protection from competition from the same kind of utility business in the same service area, (3) the right to attach reasonable conditions to the initiation and provision of service, and (4) the right of "eminent domain," which enables a utility to condemn private property and take it for a "public use" by paying just compensation for it.¹⁹

¹²1 A.J. PRIEST, *PRINCIPLES OF PUBLIC UTILITY REGULATION* 5 (1969).

¹³See Mogel and Gregg, *Appropriateness of Imposing Common Carrier Status on Interstate Natural Gas Pipelines*, 4 ENERGY L.J. 155, 163-66 (1983).

¹⁴1 HARGRAVE LAW TRACTS 78 (1787).

¹⁵*Munn v. Illinois*, 94 U.S. 113 (1876).

¹⁶*Id.* at 126.

¹⁷WELCH, *supra* note 10, at 13.

¹⁸*Id.*

¹⁹*Id.* at 86-87. See also, C. PHILLIPS, *THE REGULATION OF PUBLIC UTILITIES*, 106-107 (1984).

It is apparent that the duty to serve is an integral aspect of public utility status. American courts imposed such a duty long before the establishment of comprehensive regulation of utilities pursuant to statutes. One of the earliest cases, *Bennett v. Dutton*,²⁰ involved the refusal of a coach operator to transport a passenger who had completed the first leg of his journey on a competitor's coach. The New Hampshire court, finding that the stage coach was a common carrier,²¹ held that its proprietors could not refuse to transport passengers as long as adequate accommodations existed, unless a sufficient reason existed to refuse service. The basic principle upheld was that common carriers were required to provide service to all persons or goods for which service was requested. The Supreme Court addressed this obligation of public utilities to provide service to their customers in the early 1900's:

Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render.²²

This language has consistently been cited and followed by other courts in addressing a utility's service obligation.

While the obligation to serve is fundamental, it is not boundless. A utility does not have to serve all customers in all situations. To begin with, its obligation to serve usually is defined, and thereby limited, by territorial or service area limitations. Beyond these territorial boundaries no obligation to serve exists. Moreover, a utility may not be required to serve when it does not have sufficient capacity. Lack of capacity, however, is not an absolute defense that can be imposed by a utility attempting to avoid a service obligation. In certain circumstances, a utility which is capacity-deficient will be required to expand its facilities as needed.

In fulfilling its service obligation, a utility must provide adequate service. While adequacy of service does not require the highest quality of service possible, it does require reasonably continuous service, free from unnecessary or avoidable interruptions. In addition, service must be safe, efficient and nondiscriminatory.²³

Where utility status exists, a particular service obligation may arise from several sources, separately or in combination. Obligations to serve in some instances have been imposed upon corporations by virtue of provisions contained in their charters.²⁴ Such provisions may delineate the utility's service territory.²⁵ Once the

²⁰*Bennett v. Dutton*, 10 N.H. 481 (1839).

²¹The court found that stage coaches, which transported both goods and passengers, were considered to be common carriers with respect to both. As such, they were required to provide at least a minimum level of service.

²²*New York & Queens Gas Co. v. McCall*, 245 U.S. 345, 351 (1917).

²³*Welch*, *supra* note 10, at 137-138.

²⁴*See, e.g., Allen v. Park Place Water, Light & Power Co.*, 266 S.W. 219 (1924) (water corporation whose charter indicated it intended to supply water to residents of town required to provide service to all persons in town on impartial basis).

²⁵A utility is not obligated to provide service, however, to a person or persons where such person or persons reside at a distance that makes provision of service unreasonable. At common law the precise limits of what was or was not too great a distance was determined on a case-by-case basis. These decisions were to be made by the court, which was competent to decide whether imposition of a particular obligation would impose unreasonable demands on a company.

utility commences operation pursuant to its charter, it is required to provide service to all members of the public eligible to receive such service.²⁶ Another method by which a service obligation is created is through the acceptance from a city or other governmental authority of a franchise which is either contractual or legislative, and which defines the utility's obligation to serve as to time, place and manner. The obligation to serve can also arise through profession of service, by which a utility holds itself out as ready to serve by means of maps, plans or tariffs filed with state regulatory authorities. These documents can become a part of the utility's certificate to operate, and thereafter can be enforced in a regulatory proceeding. A utility can also create a service obligation by its own action, through dedication to public service. This obligation is created where a utility has by open and unequivocal acts or admissions manifested an intent to devote its facilities to public service.²⁷ Such dedication to public service may obligate a utility to serve the public beyond its certificated service area. Finally, an obligation to serve can be created by contract. At one time such contracts could override a utility's service obligation imposed by a regulatory authority. With more comprehensive utility regulation, however, courts have held that a utility's service obligation takes precedence over a private contract which is in conflict therewith.²⁸

While utilities clearly had a duty to serve under common law, the common law duty is less significant now because most public utility enterprises are regulated either by a state or federal authority pursuant to statute. Typically, such statutes establish the extent of the service obligation.²⁹

Statutes imposing a duty to serve on utilities frequently incorporate the common law obligations of utilities to provide safe and adequate service to the public on reasonable terms, without undue discrimination. Thus, the service obligation may be expressed in broad terms, even where it is delineated by statute.³⁰ Indeed,

²⁶Some courts have held, however, that the authority granted to a utility in its charter is too broad and general for practical determination of a specific duty to serve. *See, e.g.,* Terminal Taxicab Co. v. Kutz, 241 U.S. 252 (1916).

²⁷*Ocheltree v. Princeton Water Co.*, 6 PUR 3d 220 (N.J. 1954).

²⁸*See, e.g.,* City of New York v. Consolidated Edison Co., 12 PUR 3d 500 (N.Y. 1956) (electric utility has no right to attempt by contract to supersede statutory provisions covering utility's duty to provide safe and adequate service); *Wattsburg Tel. Coop. Ass'n v. Pennsylvania P.U.C.*, 128 A.2d 160 (Pa. 1956) (any agreement which restricts or impairs utility's obligation to render service in chartered territory is tantamount to abandonment or surrender of franchise, and to be effective must be approved by state commission).

²⁹PHILLIPS, *supra* note 19, at 463.

³⁰For instance, the Colorado public utility law states:

(1) Whenever the commission, after a hearing upon its own motion or upon complaint, finds that the rules, regulations, practices, equipment, facilities, or service of any public utility or the methods of manufacture, distribution, transmission, storage, or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, equipment, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed and shall fix the same by its order, rule, or regulation.

(2) The commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and upon proper tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

COL. REV. STAT. § 40-4-101 (1973), *reprinted in* Re Rules Regulating Service of Electric Utilities, 35 PUR 4th 365, 374 (Colo. 1980).

the statute may impose a broad service obligation on utilities generally, without distinguishing among electric, gas, water, communications or transportation enterprises; such distinctions are left to the regulations and decisions of the regulatory agency. For example, the Uniform Public Utilities Act provides that:

Whenever the commission, after a hearing after reasonable notice had upon its own motion or upon complaint, finds that the service of any public utility is unreasonable, unsafe, inadequate, insufficient or unreasonably discriminatory, the commission shall determine the reasonable, safe, adequate, sufficient service to be observed, furnished, enforced or employed and shall fix the same by its order, rule or regulation.³¹

This approach has found its way into many state regulatory statutes. In keeping with the common law concepts associated with public utility status, state statutes governing utilities also typically provide for regulation of rates and allow some protection to the utility from competition within its service territory.

II. THE FEDERAL POWER ACT AND THE OBLIGATION TO PROVIDE WHOLESALE ELECTRIC SERVICE

Leaving for the moment the theory of public utility status and regulation as expressed in the common law and in statutes generally, we now turn to the regulation of sales of electric energy for resale in interstate commerce, under Part II of the Federal Power Act.³² First, we shall consider what obligation, if any, is imposed on a public utility, as defined in Section 201(e) of the Act,³³ to provide service in the first instance. Second, we shall explore whether service, once undertaken, must be continued, as well as the Commission's role in determining whether it can be abandoned. Third, we shall consider what limitations can be imposed on any service requirement, and what implications a service requirement has on rates.

A. The Obligation of a Public Utility to Initiate Service

Part II of the Federal Power Act begins with a Declaration of Policy, found in Section 201(a), in which Congress stated:

It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.³⁴

Advocates of the existence of a service obligation under the Federal Power Act have focused on the declaration, contained therein, that the transmission and sale of

³¹National Conference of Commissioners on Uniform State Laws, *UNIFORM PUBLIC UTILITIES ACT*, § 11 (1928).

³²Federal Power Act, ch. 687, 49 Stat. 848 (1935) (codified as amended at 16 U.S.C. §§ 824-828 (1982)). Part I of the Act, 16 U.S.C. §§ 792-823, was known initially as the Federal Water Power Act, and concerned the licensing and regulation of hydroelectric projects.

³³16 U.S.C. 824(e). From this point forward, the term "public utility" shall be used in the sense in which the Act defines it, as "any person who owns or operates facilities subject to the jurisdiction of the Commission under [Part II].

³⁴16 U.S.C. § 824(a).

electric energy for ultimate distribution to the public “is affected with a public interest. . . .” In such language, which as we have seen can be traced back to *Munn v. Illinois* and beyond, they have found an incorporation in the Act of the common law duty to serve. The legislative history of the Act, however, suggests that Congress did not intend to impose on jurisdictional utilities a service obligation similar to that existing at common law. The original Wheeler-Rayburn bill³⁵ would have imposed such an obligation, under its Section 202.³⁶

At hearings on the bill, Commissioner Seavey explained:

Section 202 (p. 104) imposes in general terms the duties of a public utility upon every operating company embraced with the jurisdiction defined in the preceding section. They are required to furnish, exchange, and transmit energy upon reasonable request, to maintain adequate service, and to charge reasonable and nondiscriminatory rates.³⁷

The service obligation contemplated by Section 202 engendered considerable controversy and was stricken in subsequent drafts.³⁸ The Act contains no provision establishing a general duty to supply service. By rejecting the language of the Wheeler-Rayburn bill, Congress appears to have disapproved a common law service requirement for utilities under the Act.

The argument that a general public utility service obligation is implied in the Act, in the declaration of policy in Section 201(a) or elsewhere, is also inconsistent

³⁵Companion bills S. 1725 and H.R. 5423, 74th Cong., 1st Sess. (1935).

³⁶Section 202 of the Wheeler-Rayburn bill stated:

Sec. 202. (a) It shall be the duty of every public utility to furnish energy to, exchange energy with, and transmit energy for any person upon reasonable request therefor; and to furnish and maintain such services and facilities as shall promote the safety, comfort, and convenience of all its customers, employees, and the public, and shall be in all respects adequate, efficient, and reasonable.

(b) All rates and charges made, demanded, or received by any public utility for any service furnished or to be furnished, and all rules and regulations affecting or pertaining to such rates and charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(c) No public utility shall, as to rates, charges, services, facilities, or in any other respect make or grant any preference or advantage to any person or subject any person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

³⁷Part I, *Hearings on H.R. 5423 Before the House Committee on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. at 383-385 (1935) (Statement of FPC Commissioner Seavey).

³⁸The service obligation provision disappeared in a confidential committee print of a revised S. 1725 designated “Comparative print showing proposed changes from introduced bill . . .”, dated May 4, 1935, less than a week after the close of the Senate Interstate Commerce Committee hearings. It did not reappear in other drafts of the bill. On May 13, 1935, the Senate Committee reported out its amendments in the form of a substitute bill, S. 2796. In eliminating the provision requiring the utilities “to transmit energy for any person upon reasonable request”, and refusing to give the Federal Power Commission the authority to compel the wheeling of electricity if such action was found to be “necessary or desirable in the public interest”, the Committee stated:

While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new Section 202(a) for the first Federal effort in this direction.

with some of the Act's specific provisions. If electric utilities subject to Commission jurisdiction had common law public utility obligations under the Act, there would have been no need for Congress to include Sections 202(b) or 207, which are discussed below, in the Act.

Thus, any duty of public utilities to initiate service must arise under specific statutory provisions, rather than from some common law obligation. The number and scope of such provisions under the Act are limited. Section 202(b) of the Act³⁹ empowers the Commission, upon application and after opportunity for hearing, to order a public utility to interconnect and to sell energy to a person engaged in the transmission and sale of electric energy.⁴⁰ In order for the Commission to order a utility to sell power it must find that its order will impose no "undue burden" on the public utility. Moreover, it cannot order a utility to sell energy if this sale would require an "enlargement of generating facilities" or would "impair [the utility's] ability to render adequate service to its customers." Section 207⁴¹ also empowers the Commission to order a utility to provide service. This power, however, is only invoked upon application by a State commission, requires a finding that the present service is "inadequate or insufficient," and cannot be exercised if the additional service would "compel the enlargement of generating facilities" or would "impair [the utility's] ability to render adequate service to its customers." Consequently, it has been rarely used.

Section 210,⁴² added to the Act by the Public Utility Regulatory Policies Act of 1978,⁴³ empowers the Commission to order interconnections and the sale or exchange of energy or other coordination under extremely limited conditions, set forth in Sections 210 and 212 of the Act. To date, the only order requiring service under Section 210 was the product of an uncontested settlement agreement.⁴⁴

The conclusion to be drawn from the limited powers granted by Sections 202(b), 207 and 210 is that under the Act parties are generally free to agree or not to agree to initial arrangements to buy or sell wholesale power. This conclusion is supported by the Supreme Court's decision in *Otter Tail Power Company v. United*

³⁹16 U.S.C. § 824a(b).

⁴⁰Section 202(b) provides:

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

16 U.S.C. § 824a(b).

⁴¹16 U.S.C. § 824f.

⁴²16 U.S.C. § 824i.

⁴³92 Stat. 3117, Pub. L. No. 95-617.

⁴⁴Central Power & Light Co., 17 F.E.R.C. ¶ 61,078 at 61,168 (1981).

States.⁴⁵ There, Otter Tail Power Company argued, *inter alia*, that its refusals to deal (including a refusal to interconnect with the Village of Elbow Lake) were immune from the antitrust laws because the Commission had the authority under Section 202(b) to compel interconnections. The Court rejected this argument, finding that “[t]he essential thrust of § 202, however, is to encourage voluntary interconnections of power.”⁴⁶ The Court based this finding upon its examination of the legislative history of Part II of the Federal Power Act.⁴⁷ Thus, the decision to purchase or sell wholesale power, like the decision to wheel, was left in the first instance to “voluntary commercial relationships” as recognized in *Otter Tail*. The legislative history of the Act strongly suggests that a public utility has no obligation under the Federal Power Act (except the limited obligation under Sections 202(a), 207, and 210) to initiate wholesale service that it has not voluntarily agreed to provide.

B. FERC Authority to Compel the Continuation of Wholesale Service

Although the initiation of service in most instances may be left to voluntary action by a public utility, the question remains as to the effect of such initiation of service on the duty to serve. FERC has taken the position that service, once commenced, can only be abandoned pursuant to the filing of a change in rate schedule, subject to Commission review. In other words, FERC approval is required before service can be abandoned. The Commission, as we shall see, has based its claim to such authority on its powers under Sections 205 and 206 of the Act. These sections provide for the review and determination by the Commission of rates charged by utilities for jurisdictional service.

Section 205(c) of the Federal Power Act requires a utility that provides transmission or sales subject to the Commission’s jurisdiction to file schedules with the Commission showing rates and charges for the service together with all contracts which affect or relate to the rates and charges.⁴⁸ Section 205(d) of the Act provides

⁴⁵410 U.S. 366 (1973).

⁴⁶*Id.* at 373.

⁴⁷The Court in examining Part II of the Federal Power Act stated that:

As originally conceived, Part II would have included a “common carrier” provision making it “the duty of every public utility to . . . transmit energy for any person upon reasonable request” In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be “necessary or desirable in the public interest.” H.R. 5423, 74th Cong., 1st Sess.; S. 1725, 74th Cong., 1st Sess. These provisions were eliminated to preserve “the voluntary action of the utilities.” S. Rep. No. 621, 74th Cong., 1st Sess., 19.

It is clear, then, that Congress rejected a pervasive regulation scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships.

Id. at 374.

⁴⁸Section 205(c), 16 U.S.C. § 824d(c), provides that:

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

that no change shall be made by a public utility in the rates, charges, classification or service provided or in any contract relating to that service except upon sixty days' notice to the Commission and the public.⁴⁹ Section 205(e) of the Act authorizes the Commission to conduct a hearing concerning the lawfulness of the proposed change and to issue a decision thereon.⁵⁰ Under Section 206(a), the Commission has authority to determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force.⁵¹ "Service" is not included in the enumeration of items subject to Commission determination under Section 206(a).

Apparently, the Commission is of the view that under this regulatory procedure, a request to terminate service must be considered a change in service that requires the Commission's approval to become effective. The Commission's regulations plainly reflect this interpretation. Specifically, the Commission's regulations under the Federal Power Act provide that a "cancellation or notice of termination" is a change in rate schedule subject to the Commission's Section 205

⁴⁹Section 205(d), 16 U.S.C. § 824d(d), provides that:

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

⁵⁰Section 205(e), 16 U.S.C. § 824d(e), provides:

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

⁵¹16 U.S.C. § 824e(a).

suspension power.⁵² Such is the case even if the contract underlying service expires, for the regulations provide that a notice of cancellation or termination must be filed whether the service “is proposed to be cancelled or is to terminate by its own terms. . . .”⁵³ Thus, under 18 C.F.R. § 2.4(c)(4), a notice of termination must be subjected to review by the Commission before service can be terminated, *even if* the underlying contract provides for termination of the service on a fixed date.

Moreover, the Commission adopted this interpretation of its authority in *Indiana & Michigan Electric Co.*⁵⁴ There, the Pennsylvania-New Jersey-Maryland Interconnection (PJM) filed a motion to terminate certain pending dockets relating to its conservation energy rate schedules. In support of its motion, PJM stated that these rate schedules expired by their own terms, and that no purchaser had requested service under them. The Commission denied PJM’s motion, ruling that termination was a change in rate schedule which could only be accomplished pursuant to filing and approval under Section 205:

The termination of a rate schedule is a change in the rate schedule. Termination of a rate schedule can therefore only be accomplished by following the requirements of Sections 205(d) and (e) of the Federal Power Act. Thus, PJM’s rate schedules can be terminated only by the filing of a notice of termination and by the Commission’s order permitting the termination or by superseding rate schedules becoming effective.⁵⁵

The Commission ruled that the expiration of the contract was irrelevant to the utility’s obligation to serve: “That the rate schedules provide that they will terminate on a date certain is irrelevant. The statutory requirements of Sections 205(d) and (e) apply regardless of the rate schedule’s, or underlying contract’s, terms.”⁵⁶ Thus, that the contract had expired of its own terms was not a sufficient reason for the Commission to terminate the service under Section 205; the Commission instead must determine whether termination would be just and reasonable.

It is difficult to reconcile certain elements of the legislative history and judicial interpretation of the Federal Power Act with the Commission’s interpretation of its authority under Section 205 as expressed in *Indiana & Michigan Electric Co.* In fact, the issue has not yet been subjected to the scrutiny of the appellate courts. Indeed, a final Commission order on the subject is lacking, but for FERC’s action in *Indiana & Michigan*, a minor proceeding.⁵⁷ A strong argument can be made that a wholesale service obligation expires with the contract by which the obligation was undertaken.

⁵²18 C.F.R. § 2.4(c)(4).

⁵³18 C.F.R. § 35.15.

⁵⁴12 F.E.R.C. ¶ 61,007 at 61,015 (1980).

⁵⁵*Id.* at 61,016 (footnotes omitted).

⁵⁶*Id.* at 60,016 n.8.

⁵⁷The issue of whether the FPC had authority to prevent termination of service after notice was present in two cases that went so far procedurally as to produce initial decisions: *Nevada Power Company*, 1 F.E.R.C. ¶ 63,004 (1977), and *City of Mishawaka, Indiana v. American Electric Power Co., Inc.*, Docket Nos. E-95-48, *et al.*, (Initial Decision issued May 10, 1977). In both cases, the Commission trial staff made the same arguments in support of Commission authority over terminations of service that were adopted by FERC in *Indiana & Michigan*, *supra*. While both initial decisions accepted the notion of Commission authority over terminations of service based on Pennsylvania Water & Power Co. v. FPC, 343 U.S. 414 (1952) (*see discussion, infra*), neither case went so far as a Commission opinion. The AEP proceeding ultimately was settled, while *Nevada Power* was mooted through an exchange of facilities; *Nevada Power Co. and California-Pacific Utilities Co.*, 1 F.E.R.C. ¶ 61,325 (1977).

To begin with, the Supreme Court has recognized that the Federal Power Act and the Natural Gas Act⁵⁸ permit "the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts. . . ."⁵⁹ Specifically, the Court ruled in *Mobile* that, although the Natural Gas Act presumes that natural gas companies have the capacity to make contracts and to change them, their power to make or change contracts is not defined by the Act. The Act simply provides for notice and review by the Commission; the power to make or change contracts remains a matter of private contract, unless the contract is so onerous as to conflict with the public interest rather than simply the private interests of the parties. Thus, the Court has recognized that the Federal Power Act and the Natural Gas Act were intended to preserve "the integrity of contracts," which are the means by which a service obligation is undertaken.⁶⁰ It should follow that the two acts, unless expressly providing otherwise, preserve the right to undertake by contract a service obligation limited to specific services and to a specific period.

As *Sierra* and *Mobile* make plain, Sections 205 and 206 of the Federal Power Act, providing for the review and fixing by the Commission of rates charged by utilities within the Act's purview, are companions to Sections 4 and 5 of the Natural Gas Act. In all respects material to the question of Commission authority over termination of service, the two acts' sections are identical. Yet, the Natural Gas Act provides expressly for Commission authority over abandonment of service in a separate Section 7(b),⁶¹ while there is no similar provision relating to abandonment of service in the Federal Power Act. The legislative history of the Federal Power Act discloses that Congress intentionally withheld from the Commission authority over abandonments of electric service, believing it to be unnecessary.

The original Wheeler-Rayburn bill provided for Commission authority over abandonment of service in Section 204(b), a provision similar to Section 7(b) of the Natural Gas Act.⁶² This authority was deleted from the bill when reported out of the House and Senate Committees.⁶³ The Senate Report stated:

⁵⁸15 U.S.C. §§ 717-717(z).

⁵⁹*United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

⁶⁰350 U.S. at 344.

⁶¹Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), states:

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

⁶²Section 204(b) of the Wheeler-Rayburn bill stated:

No public utility shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission or any service rendered by means of such facilities unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. This subsection shall not apply to the retirement of property by a public utility in the ordinary course of its business.

⁶³S. REP. NO. 621, 74th Cong., 1st Sess. (1935); H. REP. NO. 1318, 74th Cong., 1st Sess. (1935).

The requirement in section 204 of S. 1725 that a public utility secure a certificate of convenience and necessity before constructing, acquiring, or abandoning facilities has been eliminated entirely. While it may ultimately be desirable to adopt a provision of this kind, the committee is of the opinion that for the present there is no imminent danger of excessive extension that would prove disadvantageous to customers.⁶⁴

At the House and Senate Committee hearings, proposed section 204 was opposed as an unnecessary encroachment upon State authority.⁶⁵ In Senate debate, Senator Wheeler stated that the certificate authority and authority over abandonments were removed at his suggestion: "In the committee I insisted that this (provision) should be stricken out, because I felt that we should not go so far in this bill, because it was not necessary."⁶⁶

The *Sierra-Mobile* Doctrine, the contrasting authority of the Commission under the Natural Gas and Federal Power Acts, and the legislative history leading to the lack of specific abandonment authority under the Federal Power Act, lead to the conclusion that the power to terminate jurisdictional service pursuant to contract is the prerogative of the utility and not of the Commission.

Nevertheless, the Commission takes the position that a wholesale electric service obligation does not expire with the underlying contract. The Commission in *Indiana & Michigan* relied on the Court's opinions in *Sunray Mid-Continent Oil Co. v. FPC*⁶⁷ and *Pennsylvania Water & Power Co. v. FPC (Penn Water)*.⁶⁸ A review of these decisions, however, raises questions as to whether they stand for the precise holding for which they were cited by the Commission.

The Court in *Penn Water* held that "the [Federal Power] Act gives the Commission ample statutory power to order Penn Water and Consolidated Gas Electric Light & Power Company of Baltimore to continue their long-existing operational 'practice' of integrating their power output."⁶⁹ Accordingly, the Commission cited *Penn Water* as authority for the proposition that a wholesale electric service obligation does not expire with the underlying contract but, by reason of the Commission's power under the Act, continues until the Commission approves its termination. However, *Penn Water* does not stand for the proposition that the Commission has authority, apart from Sections 202(b) and 207, to continue a service obligation after the expiration of the underlying contract and timely filing of a notice of termination. A close review of the *Penn Water* case demonstrates that a properly filed notice of termination (*i.e.*, consistent with the underlying contract) terminates the service obligation at the end of the notice period unless the Commission exercises its Section 202(b) or Section 207 authority within this period to order continuation of the service.

The *Penn Water* case began in 1944, when the Maryland Public Service Commission, the City of Baltimore, the Baltimore County Commissioners and

⁶⁴S. REP. NO. 621, *supra*, at 20.

⁶⁵Hearings on H.R. 5423 Before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., at 437-440, 565-566, 1073 (1935); Hearings on S. 1725 Before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. at 346 (1935).

⁶⁶79 CONG. REC. 8431 (1935).

⁶⁷364 U.S. 137 (1960).

⁶⁸343 U.S. 414 (1952). These same cases, and no others, were cited in the initial decisions discussed at note 57, *supra*, in support of Commission authority over termination of service.

⁶⁹*Id.* at 422.

several private purchasers of power asked the Commission to investigate allegedly excessive rates charged to Consolidated Gas Electric Light & Power Company of Baltimore (Consolidated) by Pennsylvania Water and Power Company (Penn Water) for residual energy from an integrated pooling system to which the two companies belonged. On January 4, 1949, the Commission ordered Penn Water to file a new rate schedule reducing the rates charged to Consolidated.⁷⁰ Only the rates were changed by the Commission's order; the pooling system remained in effect. Penn Water requested rehearing on the ground, *inter alia*, that substantial changes in the contracts had occurred since the close of the record. Specifically, Penn Water contended that the underlying contracts were "null, void, and unenforceable" and that it had terminated the contracts, which termination was justified by Consolidated's material breaches thereof.⁷¹ These allegations were, at that time, before the United States District Court for the District of Maryland on Penn Water's complaint for declaratory judgment. The Commission rejected these arguments, ruling that its order reducing the rates was not dependent on the legality of the underlying contracts:

If there are questions as to legality of the foundation contracts which are in litigation, as respondents' application for rehearing indicates, the validity of our order is not dependent upon the decision of those questions. In our opinion and order we took care to leave the continuation of the operation of the integrated and interconnected system in full effect, merely changing the rates⁷²

Penn Water appealed these orders to the District of Columbia Circuit. During the pendency of this appeal, the Fourth Circuit, reversing the district court, ruled that the contracts were in violation of the Sherman Act and remanded the case to the district court with instructions to enter a declaratory judgment.⁷³ Accordingly, in its appeal of the Commission's orders to the District of Columbia Circuit, Penn Water argued that the Commission's orders should be set aside because the underlying contracts had been declared to be invalid by the Fourth Circuit. The District of Columbia Circuit rejected Penn Water's argument,⁷⁴ finding that the Fourth Circuit had "done no more than declare illegal under the antitrust laws certain restraints exercised by [Consolidated] upon Penn Water . . ." and, accordingly, "the Fourth Circuit's opinion neither purported to nor did relieve Penn Water from its obligation under the Federal Power Act to continue the then-existing services and rates."⁷⁵ Thus, the court rejected Penn Water's argument because, in its view, the underlying contracts, and the service obligation embodied therein, had not been extinguished by the Fourth Circuit's order.

The Supreme Court granted certiorari in the District of Columbia case to consider, *inter alia*, whether "the Commission's rate reduction action compel[s] the continuance of or is it improperly based upon contractual agreements between

⁷⁰Pennsylvania Water & Power Co., 8 F.P.C. 1 (1949).

⁷¹Pennsylvania Water & Power Co., 8 F.P.C. 170, 173 (1949).

⁷²*Id.* at 175.

⁷³Pennsylvania Water & Power Co. v. Consolidated Gas Electric Light & Power Co., 184 F.2d 552 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950).

⁷⁴Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230 (D.C. Cir. 1951), *cert. granted*, 342 U.S. 931 (1952).

⁷⁵*Id.* at 236.

Penn Water and Consolidated which Penn Water cannot carry out without violating the federal antitrust laws”⁷⁶ In contrast to the District of Columbia Circuit, the Court found that the Fourth Circuit had held the entire contract to be unenforceable.⁷⁷ Nonetheless, the Court decided that it need not address whether the Commission had the power “to rely on or to compel parties to carry out private contracts which would otherwise be illegal.”⁷⁸ Specifically, the Court acknowledged that, under the rate schedules prescribed by the Commission in the orders on review, “Penn Water must continue to buy, sell, and transmit power in the same coordinated manner in which it and Consolidated have been functioning for more than twenty years,” but the Commission’s order did not require Penn Water to engage in the particular activities required by the contracts which were found to be violative of the antitrust laws by the Fourth Circuit. Although this explanation suggests that the Commission’s order could be based on the continuation of the non-violative portions of the contract, the Court stated that the Commission’s order was based upon its statutory authority rather than the law of private contracts: “The duty of Penn Water to continue its coordinated operations with Consolidated springs from the Commission’s authority, not from the law of private contracts.”⁷⁹

The Court’s further discussion, however, retreated from this apparent statement of the Commission’s authority to order continuation of specific services even though the underlying contract for these services was unenforceable. In particular, the Court characterized the Commission’s order as requiring the continuation of a “practice” and noted, without discussion, the Commission’s authority under both Sections 206 and 202.⁸⁰ In addition, the Court stated that the procedures established in the Act, rather than the authority of the district courts to void contracts, were the proper method for Penn Water to discontinue or change its contract with Consolidated:

If Penn Water wishes to discontinue some or all of the services it has rendered for the past twenty years, the Act, as the Commission pointed out, opens up a way provided Penn Water can prove that its wishes are consistent with the public interest. . . . Section 205(d) provides that ‘no change shall be made by any public utility in any such . . . service . . . or contract relating thereto, except after thirty days’ notice to the Commission and to the public.’ Here instead of following the procedure for changing existing services and practices — a procedure which the Congress has authorized and which the Commission has supplemented by rules of its own — the Company has rather tried to utilize a violation of the Sherman Act [15 U.S.C.A. §1 *et seq.*] so as to nullify a rate-reduction order.⁸¹

These statements by the Court, interpreted in light of a close reading of the Commission’s orders, suggest that the Commission cannot compel a utility to provide service after the underlying contract has expired. First, the Court correctly stated that the Commission’s order had required the continuation of a long-existing operational practice [rather than a single sale] between Penn Water and Consolidated. Indeed, the Commission had emphasized this distinction.⁸² More

⁷⁶Pennsylvania Water & Power Co. v. FPC, 343 U.S. 414, 417-18 (1952).

⁷⁷*Id.* at 421.

⁷⁸*Id.*

⁷⁹*Id.* at 421-22.

⁸⁰*Id.* at 422-23.

⁸¹*Id.* at 423-24.

⁸²Pennsylvania Water and Power Co., 8 F.P.C. 170 at 176 (1949).

importantly, the Commission had emphasized that the discontinuance of this "practice" by Penn Water would effect both a *termination* of service and a *change* in rates and service. This distinction was important because different procedures were required to effect either termination or a change, and the Commission's authority over each is different.

According to the Commission, a "change in rates and service . . . cannot be accomplished except in compliance with . . . section 205 . . ." but a request which is "merely a termination of the purchase and sale . . . [is] a cancellation subject to [the notice requirement of] sec. 35.5 . . ."⁸³

In elaborating on this distinction, the FPC had stated:

Insofar as such changes affect *service*, compliance with the rule referred to [§ 35.5 of the Regulations] would enable [Consolidated], the Maryland Public Service Commission, or any other interested electric utility or State commission, before such changes are put into effect to make application under section 202(b) for an order "to sell energy * * * or exchange energy" from and after the time of the proposed change or termination of service, or a complaint under section 207 as to the adequacy of the service to be rendered.⁸⁴

Thus, while a proposed change in rates was subject to the Commission's Section 205 authority, a proposed cancellation of service was not subject to the Commission's Section 205 authority but was subject only to the notice requirement of what was then Section 35.5 of the regulations. This notice period was intended to provide sufficient time for affected parties to request the Commission to order the continuation of the service pursuant to its authority under Sections 202(b) or 207. The Commission had also indicated that it was prepared to exercise its Section 202(b) authority, if necessary, to order Penn Water to continue the pooling arrangements in the voided contract. This had not been necessary, in the Commission's opinion, because Penn Water had never complied with the Commission's filing requirements; Penn Water had never filed a notice of termination but had relied upon its allegation that the contract was void as violative of the antitrust laws.⁸⁵

In light of this interpretation by the Commission of its statutory authority, the Court's statement in *Penn Water* that Sections 206 and 202 of the Act provided the Commission with ample authority to order Penn Water and Consolidated to continue their long-existing operational practice of integrating their power output takes on a particular meaning. The Court's reference to the Commission's Section 206 authority would appear to refer to a particular aspect of Penn Water's attempt to change its long-existing practice, *i.e.*, to change rates. Similarly, the Court's reference to the Commission's Section 202 authority would refer to the other aspect of Penn Water's attempt to change its long-existing practice, *i.e.* to terminate service. The opinion should not be construed as holding that the Commission had authority under Section 206 to order the continuation of a properly terminated service contract. Such authority, if necessary, exists only under Section 202(b). Similarly, the Court's statement that the Act provides a way for Penn Water to terminate service provided it is consistent with the public interest also takes on a particular meaning. Specifically, the way provided by the Act is a properly filed notice of termination,

⁸³*Id.*

⁸⁴*Id.* at 177 (emphasis added).

⁸⁵*Id.* at 176-78.

which will take effect unless within the notice period the Commission is persuaded that the public interest requires an order under Section 202(b) continuing the service.

Sunray Mid-Continent Oil Co. v. FPC,⁸⁶ the other decision cited by the Commission in *Indiana & Michigan*, also fails to provide support for the Commission's assertion that a service obligation under the Federal Power Act continues after the expiration of the underlying contract. The issue before the Court in *Sunray* was "[w]hen a company, proposing to make, under contract, jurisdictional sales of natural gas in interstate commerce, applies for a certificate of public convenience and necessity as required by the [Natural Gas] Act, and requests that the certificate be limited in time to the duration of a contract for the sale of gas which it has entered, does the Federal Power Commission have the authority to tender it, instead, a certificate without time limitation?"⁸⁷ The Court resolved this question in the affirmative: the Commission is not constrained by the Act to tender the limited certificate which was requested; the Act authorizes the Commission to tender a certificate without time limitation even if a limited certificate was requested.

The relevance of this ruling to the present question — whether a wholesale electric service obligation continues by reason of the Federal Power Act after the contract, pursuant to which the service obligation was undertaken, expires or is terminated — is not clear because, as previously discussed, the two acts are significantly different on this point. Specifically, the Federal Power Act does not provide for certification or abandonment authority comparable to the authority provided in Section 7 of the Natural Gas Act.⁸⁸ Moreover, the Court in *Sunray* recognized that the party requesting a certificate of limited term was not compelled to accept the certificate without time limitation offered by the Commission but could "avail itself of its undoubted right to stand firm on its own application, and reject the proffered certificate."⁸⁹ Thus, under the Natural Gas Act, a service obligation may expire with or continue after the expiration of the underlying contract depending upon the terms of the certificate. Because there is no certification authority under the Federal Power Act, this option is not available; every service obligation assumed by contract must either expire with the contract or continue after its expiration.

In addition, the Court found that the Commission's order, offering a certificate without time limitation, "in no way violates the integrity of [Sun Oil's] contract

⁸⁶364 U.S. 137 (1960).

⁸⁷*Id.* at 138-39 (footnoted omitted).

⁸⁸The Court noted that express abandonment authority is a "common pattern in federal utility regulation," noting similar provisions in the Interstate Commerce Act, as added by the Transportation Act of 1920, and the Communications Act of 1934, as amended by the Act of March 6, 1943. *Id.* at 142 n.9. Thus, it is reasonable to conclude that the absence of such authority in the Federal Power Act is significant. In particular, the absence of this authority suggests that Congress intended the service obligation to expire with the contract and, thus, there was no need to include express abandonment authority in the Federal Power Act. The contrary inference — that Congress did not include express abandonment authority because it intended every service obligation undertaken by contracts of limited term to be unlimited — is inconsistent with the Act's recognition that service may be provided pursuant to either contract or tariff. Moreover, it is unreasonable to conclude that an electric utility must accept a service obligation of unlimited duration whenever any service is provided, but a natural gas company is free to refuse such an obligation because the Commission has *additional* powers — certification and abandonment authority — under the Natural Gas Act.

⁸⁹*Id.* at 141.

...⁹⁰ Specifically, the Court found that the integrity of the contract was not disturbed because the continuing service obligation was imposed by the certificate issued rather than by the contract:

When [the contract] expires, petitioner, to be sure, will be under an obligation to continue to deliver gas to United on the latter's request unless it can justify an abandonment before the Commission; but we do not see how this in any way disturbs the integrity of the contract during its term. The obligation that petitioner will be under after the contract term will not be one imposed by contract but by the [Natural Gas] Act.⁹¹

This ruling is not, of course, dispositive of an argument based on *Sierra-Mobile* that the integrity of contracts *under the Federal Power Act* precludes the continuation of a service obligation after the expiration of the contract whereby the obligation was undertaken. On the contrary, the Court's ruling supports this argument. The Court found that the source of the continuing service obligation was the certificate and not the contract; thus, because there is no certification authority under the Federal Power Act, it follows that a wholesale electric service contract alone does not establish a service obligation continuing beyond the contract's term.

In summary, while the Commission's position is that a service obligation under the Federal Power Act does not expire with the underlying contract but instead must be terminated after Commission review under Section 205, a very strong argument can be made to the courts that the Commission's position is inconsistent with the Act. The significance of a ruling by the courts that service obligations can be terminated pursuant to contractual provisions, unless service is otherwise required under Section 202(b), would be enormous. It would provide electric utilities much greater leverage in negotiating with wholesale customers, particularly those wanting to leave the system temporarily so as to take advantage of a more economical power source.

C. *Commission Regulation of Service Under The Federal Power Act*

While a strong argument can be made that electric utilities do not have an obligation to serve wholesale customers under the Federal Power Act and can in fact abandon service upon the expiration or termination of a contract or service agreement, the present state of the law as administered by FERC does not allow for such a possibility without Commission approval. Let us turn, then, to the question of what kind of service is required once service has been initiated. In other words, are there limits to service, short of termination, that a utility may impose on its customers? Moreover, what are the ratemaking implications of such restrictions, as well as of the service obligation itself? In this section, we shall explore these issues.

A fundamental question is whether a utility can distinguish between the types of service that it will provide. It is well established that there is a legitimate cost-based distinction between full and partial requirements service and that such a distinction justifies separate rates and rate schedules. Further, the Commission has recognized that there may be legitimate cost-based distinctions between different types of partial requirements service which would justify separate rate schedules: "Establishment of separate full and partial wholesale requirements rates is common

⁹⁰*Id.* at 155.

⁹¹*Id.*

practice. We have in fact recognized the differences in the costs of serving full and partial requirements customers, not to mention different types of partial requirements customers.”⁹² The immediate question, however, is not whether a utility *may* file separate rates for full and partial requirements service, but whether, by filing a rate limited to full requirements service, a company can limit its voluntarily assumed obligation to the provision of full requirements service.⁹³

In *Boston Edison Co.*,⁹⁴ Boston Edison Company filed a stratified partial requirements rate, *i.e.*, a separate rate for base, intermediate, and peaking power, as well as installed reserve, reactive power, and operating reserves. In Opinion No. 809, the Commission ruled that “the central concept of Edison’s new partial requirements rate (different services have different costs and thus require different rates) is acceptable in general”⁹⁵ The Commission did not, however, approve the stratified rate but adopted the administrative law judge’s ruling to conduct discussions with the parties to devise an appropriate rate. While Boston Edison had not rendered service under its partial requirements tariff, it had voluntarily filed the tariff, and therefore the Commission had no occasion to address whether its previous wholesale service included an obligation to provide partial requirements service as needed by its customers, or whether filing, even without actual service, was sufficient to establish an obligation to provide partial requirements service. On rehearing, Boston Edison was required to submit new partial requirements rates and detailed cost support.⁹⁶

In *Kentucky Utilities Co.*,⁹⁷ the Commission was faced with the question of whether Kentucky Utilities Company (KU), pursuant to its existing wholesale contracts, had undertaken an obligation to provide partial requirements service. KU had virtually identical fixed-rate contracts with its wholesale municipal customers (Cities) which took their full requirements from KU.⁹⁸ In the docket at issue, KU had filed proposed rates to supersede the wholesale contracts. The availability clause of the proposed rate provided that service under the rate was available only to distribution systems “purchasing all of their requirements of electricity from [KU].” KU did not propose any rate for partial requirements service. In response, Cities

⁹²Florida Power & Light Co., Opinion No. 57, 8 F.E.R.C. ¶ 61,121 at 61,467 (Aug. 3, 1979) (citing Boston Edison Co. No. 809-A, 1 F.E.R.C. ¶ 61,229 (Dec. 9, 1977)).

⁹³This question was not addressed in *Florida Power & Light Co.* Florida Power & Light Company (FPL), which had previously undertaken an obligation to provide full and partial requirements service pursuant to its SR-1 rate, proposed an SR-2 rate applicable only to existing full requirements customers and a PR rate applicable only to partial requirements customers which did not have sufficient self-generation to meet their load. The Commission ruled, *inter alia*, that FPL’s proposal of separate full and partial requirements rates was reasonable. However, the proposed restrictions on availability of partial requirements service were rejected. Because FPL had previously undertaken an obligation to provide both full and partial requirements service to its customers under its sales-for-resale tariff, the Commission found that FPL had failed to carry its burden of proof in requesting the change in its existing obligation to provide partial requirements service.

⁹⁴Opinion No. 809, 59 F.P.C. 319 (July 6, 1977) *modified in part*, Opinion No. 809-A, 1 F.E.R.C. ¶ 61,229 (Dec. 9, 1977).

⁹⁵59 F.P.C. at 344.

⁹⁶1 F.E.R.C. at 61,593.

⁹⁷23 F.E.R.C. ¶ 61,317 at 61,664 (1983).

⁹⁸These contracts contained three year notice of termination provisions which KU exercised in 1978.

contended that the proposed restriction on availability was an unreasonable change in service.⁹⁹

In resolving Cities' contention, the Commission stated that it was "necessary to compare the availability of service offered in the existing contracts with that offered in the proposed contracts."¹⁰⁰ The Commission found that "the availability of service that the existing contracts offered was not as limited as the service offered in the proposed contracts."¹⁰¹ In effect, the Commission found that KU had voluntarily undertaken, pursuant to its existing contracts, an obligation to provide both full and partial requirements service.¹⁰² Thus, KU's proposed availability clause, which effectively withdrew its obligation to provide partial requirements service, was "a change in service" which KU must justify under the standards of Section 205.¹⁰³ In contrast, if the Commission had found that KU, pursuant to its existing contracts, had undertaken an obligation to provide only full requirements service, then presumably the proposed availability clause would not have been a change in service. Thus, the Commission has tacitly recognized that a utility can undertake, by an appropriate contract, a service obligation limited to a particular kind of service.

The Commission, in discussing the extent of KU's obligation to provide partial requirements service, provided further support for this conclusion. For example, in attempting to justify the proposed change in service, KU had argued that it was "unreasonable to require it to design rates for all sorts of partial requirements service before a customer has made a definite request for that service."¹⁰⁴ The Commission rejected this argument, stating that KU was not obligated to provide all

⁹⁹23 F.E.R.C. at 61,665. Cities contended that the full requirements rate should be available to customers taking all or part of their requirements from KU until KU filed a partial requirements rate. *Id.*

¹⁰⁰*Id.* The Commission also stated that it "need not characterize the existing or proposed contracts as either full requirements contracts or partial requirements contracts." *Id.* This statement, however, is inconsistent with the Commission's analysis and its conclusion that "we find that the service offered in the existing contracts was not restricted to customers' purchasing their full requirements from Kentucky." *Id.* at 61,666 (footnote omitted). This statement is probably explained by the Commission's finding that the existing contracts could operate as either full or partial requirements contracts depending on the Cities' conduct. Thus, they could not fairly be characterized as either full or partial requirements service contracts, but they reflected an obligation to provide both services.

¹⁰¹*Id.* at 61,666. The Commission relied on two provisions of the existing contracts to reach this conclusion. First, the contracts obligated KU to provide each city with an approximate amount of power. Second, the contracts provided that each city "may" cause this approximate amount of power to be increased by providing KU with 90 days notice. The Commission interpreted this as permissive, rather than mandatory, language (*i.e.*, "may") to provide that a city "can require Kentucky to satisfy its full requirements, [but] it need not do so." In the event that a city did not request KU to increase the amount of its commitment to meet the city's load growth, then KU would provide partial, rather than full, requirements service under the contract. Therefore, in view of these provisions, the Commission concluded that the existing contracts obligated KU "to provide full requirements service to the customers if they so choose but do not require the customers to take their full requirements from Kentucky." *Id.*

¹⁰²*Id.* It should be noted that the Commission found that KU had undertaken an obligation to provide partial requirements service to Cities, in the sense that KU must obtain approval to withdraw this obligation, even though every city has always utilized its contract to purchase its full requirements from KU. Thus, the Commission found that filing a contract for particular service, even absent actual service under the contract, was sufficient to establish an obligation to provide this service.

¹⁰³*Id.* The Commission concluded that KU had failed to carry its burden of proof to support this change. *Id.*

¹⁰⁴*Id.* at 61,667.

sorts of partial requirements service, but only those partial requirements services that it had agreed to provide in its existing contracts: "Kentucky is under no obligation to provide all sorts of partial requirements service. Kentucky's obligation is more limited than that. Its obligation is to provide the service agreed to by the parties in their existing contracts. Hence it need not design and file different rates."¹⁰⁵ Thus, the Commission suggested that a utility could voluntarily undertake an obligation to provide partial requirements service which was limited to *specific* partial requirements services.

Second, the Commission ruled that, under the existing contracts, once a customer removed all or a portion of its load from KU (or failed to place a portion of its load on KU), then KU would no longer be obligated to serve the load unless it agreed to do so or unless it was ordered to do so by the Commission under Section 202(b).

Once a customer leaves Kentucky's system, in whole or in part, for another supplier, Kentucky is under no obligation to plan for the lost load. If the customer wants to return to Kentucky's system it can only do so pursuant to an agreement with the company or an order issued by us.¹⁰⁶

Moreover, the Commission noted that if the load was allowed to return to KU's system pursuant to such agreement or order, the rate for service of this load might well be different.¹⁰⁷ This conclusion appears to recognize that a utility's wholesale service obligations are limited to those undertaken by contract or ordered by the Commission pursuant to Section 202(b).

Kentucky Utilities Co. supports the propositions that wholesale service under the Federal Power Act can be limited to a particular type of service and that any obligation to serve a given load does not continue once the load has left the system (unless a contract or tariff provides otherwise). The case also provides discussion of other limitations on a service obligation, such as notice requirements and limitations on increases and decreases in load. While such restrictions do not interfere with any underlying duty to serve, they ameliorate the burden and the risk placed on a utility from an unlimited service obligation.

The importance of appropriate terms and conditions on a service obligation was recognized by the Commission in *Kentucky Utilities Co.* when it stated that:

[i]t is of vital importance to utilities to know who their customers will be and how much electricity they will need to provide. Notice of cancellation provisions aid utilities in their planning by giving them advance notice of decreases in the loads they will have to serve. Because of the importance of proper system planning to the efficient and reliable design and operation of electrical power systems, utilities should have adequate notice of decreases in their customers' requirements.¹⁰⁸

¹⁰⁵*Id.* (footnote omitted). Cities identified a number of partial requirements services, *i.e.*, peaking service, base load service, intermediate service, emergency power, maintenance power, and coordination power, but did not insist that the Commission order KU to file a rate for each of these services. Although suggesting that KU had not undertaken to provide all these services, the Commission did not determine which, if any, of these services were consistent with the parties' agreement in the existing contracts.

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 61,668.

The Commission found that while adequate notice varies with the circumstances, an acceptable measure of such notice was approximately "the period between the time the utility makes major commitments of capital to building generating units to serve its customers' future requirements and the time the generating unit is completed."¹⁰⁹ This measure of adequate notice was based on the assumption that once a utility commits capital to building a generating unit, its ability to adjust for decreases in its customer's requirement is limited.¹¹⁰ This determination was merely a starting point, however. The Commission ruled that KU's ability to adjust to the loss of load during the construction period must also be considered. In *Kentucky Utilities Co.*, the Commission found that a three year notice of termination was adequate for customers with peak demands of 25 MW or less and a five year notice of termination was justified for customers with peak demands greater than 25 MW.¹¹¹ On rehearing, the Commission also approved a "tempering" of the three-year notice period by limiting the total amount of load KU could lose in any three-year period to 25 MW.¹¹²

Finally, the Commission addressed the question of service *after* the effective date of cancellation. This situation would arise in two instances: when the notice was given in bad faith or when the availability of the alternative supply was delayed. In the first instance, the Commission ruled that KU was entitled to notice that identified the alternative supply and the date this supply was expected to be ready. In the second instance, the Commission ruled that KU would be fully protected if service after the effective date of cancellation was provided at incremental rates where such service burdened KU's other customers.¹¹³

The lesson to be learned for public utilities seeking to limit their service obligations is to include specific provisions in any contract by which wholesale service is to be provided. The contract should define the type of service to be provided, provide that if a customer leaves the system in order to take alternative service the utility's service obligation will cease, and perhaps most importantly include a notice of termination provision requiring a specific notice period before a customer can leave the system. This notice period should approximate the time from when the utility makes major commitments of capital to building generating units to serve its wholesale customers' future requirements to the time the generating unit is completed.¹¹⁴

¹⁰⁹*Id.* (footnote omitted). See also *Louisiana Power & Light Co.*, 17 F.E.R.C. ¶ 61,230 at 61,442 (Dec. 11, 1981).

¹¹⁰23 F.E.R.C. at 61,669. It should be emphasized that the beginning point of this measure is when the utility begins construction, not when the utility first commits capital to the project.

¹¹¹*Id.* at 61,672. It should be noted that the Commission ruled that the small size of Cities' loads was relevant to KU's ability to adjust its plans to reflect the loss of these loads. The Commission also noted that "the ideal notice provision would be a sliding scale with many different notice periods for the different sizes of loads in question" but stated that it "would not be inclined to devise such a complicated notice provision."

¹¹²25 F.E.R.C. ¶ 61,205 at 61,544 (Nov. 8, 1983).

¹¹³*Kentucky Utilities Co.*, 23 F.E.R.C. at 61,678-80.

¹¹⁴The notice requirements approved in *Kentucky Utilities* all concern the reduction of load on a utility's system. Theoretically, the same principles should apply to increases in load. Thus, a utility could require notice of load increases in excess of a certain amount. Such provisions have not been adjudicated by the Commission, however.

Yet, such steps may not be sufficient in light of FERC's reluctance to impose mutual rights and obligations on utilities and customers. The issue of a notice provision arose again recently in *Public Service Company of New Hampshire*.¹¹⁵ There, wholesale customers of Public Service Company of New Hampshire (PSNH) had a contract with PSNH for the purchase of power which provided that either party could terminate the contract by giving the other party at least two years written notice.¹¹⁶ The customers gave notice of termination¹¹⁷ which was subsequently opposed by PSNH. The Company, relying on the "unless otherwise ordered" language in the contract, argued that the termination was improper under the contract and unjust and unreasonable under the Act, given that it was constructing new capacity to serve the load. The Commission disagreed with PSNH, finding that the termination clause "provides a specific, unequivocal provision that the contracts can be terminated upon a written, two-year notice."¹¹⁸

It should be noted that this "specific, unequivocal provision," that FERC was so quick to uphold, is available to either party to the contract. Would the Commission allow termination as quickly where the utility, and not the customer, invoked the termination clause? Certainly nothing in prior cases suggests that it would. The Commission has not yet discovered any relationship between a duty to serve and a right to serve, despite the fact that the relationship is grounded in the basic theory of what constitutes a utility. Instead, contracts are honored where they impose obligations on utilities and rights on customers, and are ignored where the situation is reversed.

The continued imposition of a duty to serve on electric utilities in the face of increased customer mobility carries with it the potential for a dramatic increase in the rates paid for service by all wholesale customers. If wholesale customers were allowed to "shop around" and purchase power from other sources, the fixed cost of capacity, which was planned and installed to serve their loads as well as those of other customers, would necessarily be borne by the customers remaining. Higher rates would result, encouraging even more customers to look elsewhere for supplies, in a vicious circle — the so-called "death spiral." Either those customers which were unable to seek alternative supply sources, or utility shareholders, would be required to carry the costs of resources installed to meet expected load but subsequently went unused. Adding to the risks facing the utility is the possibility that alternative supplies could be temporary, with the result that customers could seek to return to the system that they left behind. While the Commission suggests in *Kentucky Utilities Co.* that incremental rates are the answer to this problem, it goes on to observe that such rates might not be necessary if capacity is available.¹¹⁹ Yet, unused capacity is precisely the problem caused by customers that leave the system.

¹¹⁵31 F.E.R.C. ¶ 61,267 at 61,545, *reh'g denied*, 32 F.E.R.C. ¶ 61,251 (1985).

¹¹⁶Specifically, the contract provided:

Unless otherwise ordered by any regulatory body having jurisdiction, the term of this agreement shall commence at the time of its acceptance for filing by the Federal Power Commission and shall continue thereafter until terminated by either party giving to the other not less than two (2) years written notice specifying a date for termination. *Id.*

¹¹⁷The customers, Exeter and Hampton Electric Company and Concord Electric Company (E&C) were full requirements customers of PSNH with load totaling approximately 11% of PSNH's total load. *Id.* at 61,546.

¹¹⁸*Id.* at 61,547.

¹¹⁹*Kentucky Utilities Co.*, 23 F.E.R.C. at 61,680.

At the same time that utilities are facing the risks of load loss from customers availing themselves of alternative supply sources, FERC is considering alternative rate policies that would increase the risks of utility shareholders.¹²⁰ Specifically, FERC has expressed concern that its "policies may not hold utilities fully accountable for the consequences of their decisions."¹²¹ By way of example, FERC cites the fact that under present policies utilities may request an increase in the demand rate to recover capacity costs over a smaller level of peak purchases if expected peak purchases decline.¹²² FERC also expresses concern that customers bear a portion of the risk associated with the prudently incurred construction costs of plants that are abandoned prior to operation, and that risk is shifted to customers through the use of the fuel adjustment clause.¹²³

If the Commission chooses to alter the allocation of risks as it has suggested, it is doubtful that any electric supplier could continue to incur the risk of building new generating facilities; even if the utility were willing, the necessary capital probably would not be forthcoming unless the utility were assured of a stable market for the output of new units or the prospect of a vastly increased return on its investment.¹²⁴ In short, the Commission's suggestions, standing alone, would violate the basic regulatory model consisting of a duty to provide service, free in large measure from business competition, at a regulated, non-discriminatory rate. Proposals advocating a shifting of risk to shareholders and increased competition among suppliers must address as well their effects on remaining customers, on the obligation to serve, and their consequences on rates.

In summary, we have seen that there is no obligation under the Federal Power Act for a utility to initiate service to wholesale customers unless ordered pursuant to Sections 202(b), 207, and 210. Once service is initiated, it is the Commission's view that service cannot be terminated without its approval; yet, the legal underpinning for this position is by no means beyond question. Finally, while FERC has acknowledged that utilities may need protection from customers' leaving the system without notice, it has not recognized that any service requirement between a utility and its customers should be mutual. Indeed, the Commission appears to be considering a move in the opposite direction, through an increase in the allocation of risks to the supplier. The adoption of any such change necessarily must call into question whether a service requirement apart from contractual provisions is appropriate or even lawful under the Federal Power Act.

III. SERVICE REQUIREMENTS UNDER THE ANTITRUST LAWS

In addition to any requirement to provide service under common law or under the Federal Power Act, utilities must also consider claims of an obligation to provide wholesale service under the antitrust laws. These claims have been based on both the traditional market share analysis, under which a monopolist may not refuse to deal,

¹²⁰Regulation of Electricity Sales-for-Resale and Transmission Services (Phase II), 50 Fed. Reg. 27,604 (1985) (to be codified at 18 C.F.R. § 290).

¹²¹*Id.*, slip op. at 42.

¹²²*Id.*

¹²³*Id.* slip op. at 44-45.

¹²⁴See Bauer and Edelman, *Mandatory Wheeling: Is Competition in the Nation's Best Interest?*, ELECTRIC PERSPECTIVES, Spring 1985 at 2.

and the essential facilities doctrine (or bottleneck theory), under which the owner of an essential facility that cannot be economically duplicated, such as a large generating plant, must provide access. Recent developments in antitrust law, principally concerning the telecommunications industry, suggest, however, that the relationship between a utility's obligation to serve and its right to serve may be recognized.

We shall now consider briefly the antitrust principles that have been invoked in support of an obligation to provide wholesale electric service. Section 2 of the Sherman Act, 15 U.S.C. § 1, provides that it is a violation of the Act to "monopolize or attempt to monopolize . . . any part of the trade or commerce among the several states." In certain circumstances a refusal to deal is not a violation of Section 2, because a company has a right to deal with whomever it chooses.¹²⁵ Ordinarily, an obligation to deal exists only if the Company refusing to deal possesses monopoly power and the refusal is an abuse of that power.¹²⁶

The offense of monopolization under Section 2 has two distinct elements: "(1) the possession of monopoly power in the relevant market and (2) the willfull acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident."¹²⁷ Monopoly power is the "power to control prices or exclude competition."¹²⁸ Courts frequently approach the problem of measuring market power by defining the relevant product and geographic market and computing the defendant's market share. Monopoly power is then ordinarily inferred from a predominant share of the market.

However, courts have criticized reliance on statistical market share in cases involving regulated industries. A predominant market share may merely be the result of regulation, and regulatory control may preclude the exercise of monopoly power. Therefore, in such cases market share should be at most a point of departure in determining whether monopoly power exists. Ultimately, a court should focus directly upon the ability of the regulated firm to control prices or exclude competition.¹²⁹ The essential facilities doctrine¹³⁰ has become the vehicle by which courts would determine whether the regulated company could control prices or exclude competitors.

¹²⁵Associated Press v. United States, 326 U.S. 1 (1945).

¹²⁶Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co., 615 F.2d 1372, 1387 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980).

¹²⁷United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

¹²⁸*Id.* at 571. United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956).

¹²⁹See MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1106-07 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983). There the Seventh Circuit expressly rejected the traditional market share analysis as a reliable method of establishing the possession of monopoly power by a regulated company stating:

Cases dealing with non-regulated industries have developed a number of analytic tools designed to aid courts in identifying each of these elements. In many instances, however, these tools are of only limited value in resolving monopolization charges against regulated monopolies. See Watson & Brunner, "Monopolization by Regulated 'Monopolies': The Search for Substantive Standards," 22 ANTITRUST BULL. 559, 563 (1977). In particular, the presence of a substantial degree of regulation, although not sufficient to confer antitrust immunity, may affect both the shape of "monopoly power" and the precise dimensions of the "willful acquisition or maintenance" of that power. *Id.* According to the Supreme Court,

The essential facilities doctrine provides that a company in possession or control of an "essential" facility must provide its competitors with reasonable access to the facility.¹³¹ A refusal to provide reasonable access to an essential facility is a violation of Section 2. Absolute equality of access to essential facilities is not mandated by the antitrust laws. In *United States v. Terminal Railroad Association*,¹³² the Supreme Court required that access to essential facilities be afforded to competitors "upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies."¹³³ Similarly, in *Hecht v. Pro-Football, Inc.*,¹³⁴ the District of Columbia Circuit stated that an essential facility need not be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."¹³⁵

monopoly power may be defined as "the power to control prices or exclude competition" in a relevant market. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). In many cases involving unregulated industries, however, courts have eschewed examination of the ostensible monopolist's actual degree of control over prices or competition, and have relied solely on statistical data concerning the accused firm's share of the market. Where that data reveals a market share of more than seventy to eighty percent, the courts have inferred the existence of monopoly power.

Such a heavy reliance on market share statistics is likely to be an inaccurate or misleading indicator of "monopoly power" in a regulated setting. In many regulated industries, each purveyor of service, regardless of absolute size, is in a monopoly position with regard to its customers. Indeed, while a regulated firm's dominant share of the market typically explains why it is subject to regulation, the firm's statistical dominance may also be the result of regulation. See *United States v. Marine Bancorporation*, 418 U.S. 602, 633 (1974). For these reasons, the size of a regulated company's market share should constitute, at most, a point of departure in assessing the existence of monopoly power. Ultimately, that analysis must focus directly on the ability of the regulated company to control prices or exclude competition — an assessment which, in turn, requires close scrutiny of the regulatory scheme in question.

708 F.2d at 1106-07. Similarly, in *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 354 (5th Cir. 1980), *cert. denied*, 449 U.S. 870 (1980), the court held that possession of a predominant share of the market by a regulated utility in a regulated market does not support the traditional inference of monopoly power. Specifically, the court stated that monopolization cases involving such regulated industries are special in nature and require close scrutiny. The reason for this is that regulation is considered an adequate replacement for the lack of competition that exists with a natural monopoly. In such a case, controlling a predominant share of the relevant market cannot infer the traditional monopoly power associated with an entity outside the regulated field. *Id.* at 354.

¹³⁰See *Byars v. Bluff City News Co., Inc.* 609 F.2d 843, 856 (6th Cir. 1980). This doctrine is also called the "bottleneck theory."

¹³¹There is some question whether the essential facilities doctrine should apply if the essential facility is owned by one company rather than by a group of companies or if it should apply with the same force. The Sixth Circuit has stated that "there may indeed be significant considerations of fairness and efficiency where a single innovative firm builds or obtains a unique facility." *Byars v. Bluff City News Co.*, 609 F.2d at 856 n.33. The Seventh Circuit, however, has ruled that the essential facilities doctrine does apply even if the purported essential facility is owned by a single firm. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d at 1147 n. 100.

¹³²224 U.S. 383 (1912).

¹³³*Id.* at 411.

¹³⁴570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

¹³⁵*Id.* at 992-93.

In several antitrust cases involving refusals to deal by regulated utilities, the courts have applied the essential facilities doctrine.¹³⁶ These cases indicate that the courts are foregoing a market share analysis and are relying, in its place, on the essential facilities doctrine to establish monopoly power in the context of refusals to deal by regulated companies operating as natural monopolies.

Certain defenses may be raised by a regulated utility under the essential facilities doctrine. For example, a refusal to deal can be justified by legitimate business purposes.¹³⁷ At least two courts have applied this principle in the context of a refusal to wheel to other utilities. In *Town of Massena v. Niagara Mohawk Power Corp.*,¹³⁸ the court found that the defendant-monopolist had not unconditionally refused to wheel. Moreover, its conditional refusal was based upon legitimate business considerations and was not part of an underlying scheme to stifle competition or a means of preserving its market power. Accordingly, defendant's refusal did not violate its duty to deal. Similarly, in *City of Groton v. Connecticut Light and Power Co.*,¹³⁹ the court ruled that a refusal to wheel, by a company which expressed a general willingness to wheel but recognized that its transmission capacity was limited, was justified because the request was without reference to time, quantity of power, or transmission capacity.¹⁴⁰ In effect, the court ruled that limited transmission capacity provided a sufficient business reason to refuse to accede to an open-ended request for wheeling.

In cases involving utilities in which a requirement to serve or to provide access has been at issue, under both the market share analysis and the essential facilities doctrine, the focus has been on whether the plaintiff has had reasonable alternatives to service or access provided by the defendant utility. If such alternatives are not available, then the courts generally have been willing to require the utility to provide service, either sales of power and energy or wheeling, whichever the case may require.¹⁴¹ In determining whether alternatives exist, the relationship between transmission service and sales of power may be critical; where transmission service is provided by a utility, then alternatives to wholesale service by the utility may become available.

An important question that the courts will have to resolve is whether access to an essential facility can be prevented because it would result in increased costs to a utility's other customers. In the classic bottleneck cases the required sharing of an essential facility neither reduced the access to the facility available to the owner's existing customers nor increased their costs. Yet, for instance, requiring a utility to provide transmission access by which alternative suppliers could reach particular

¹³⁶*Town of Massena v. Niagara Mohawk Power Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,526 (N.D.N.Y. 1980); *Borough of Landsdale v. Philadelphia Electric Co.*, 692 F.2d 307 (3d Cir. 1982); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983); and *City of Chanute v. Kansas Gas & Electric Co.*, 564 F. Supp. 1416 (D. Kan. 1983), *aff'd in part and rev'd in part*, 1985-1 Trade Cas. (CCH) ¶ 66,399 (10th Cir. 1985).

¹³⁷*Byars v. Bluff City News Co.*, 609 F.2d 843, 862 (6th Cir. 1980).

¹³⁸1980-2 Trade Cas. ¶ 63,526 (N.D.N.Y. 1980).

¹³⁹662 F.2d 921 (2d Cir. 1981).

¹⁴⁰*Id.* at 932-33.

¹⁴¹The Commission, while disclaiming any responsibility for enforcing the antitrust laws, has also concentrated on the availability of reasonable alternatives in assessing whether anticompetitive concerns require the provision of wholesale service. *Florida Power & Light Co.*, 8 F.E.R.C. ¶ 61,121 at 61,448-49, 61,467-78 (1979).

customers could well result in increased costs to the remaining customers. Similarly, if a utility is required to share its most economic generating resources with others or with particular customers, then the costs to the remaining customers will increase. Thus, an obligation to serve imposed by the antitrust laws may run afoul of the basic compact under which utilities traditionally have operated, with service provided, free from competition, at a regulated rate. Indeed, it may be impossible to reconcile a utility's obligations under the antitrust laws with its role as an enterprise "affected with a public interest,"¹⁴² required to meet the service demands of customers within its area of operation.

The courts are beginning to recognize the "public interest" aspect of utility operations and its effect on their obligations under the antitrust laws. Indeed, it is possible that the courts will impose an additional "public interest" standard for relief under the antitrust laws as a way of resolving problems such as those raised in the preceding paragraph. A step in this direction was present in *Almeda Mall, Inc. v. Houston Lighting & Power Co.*,¹⁴³ in which the Fifth Circuit held that to succeed with a private antitrust action alleging other than a per se violation, the plaintiff must show more than damage to himself; he must show "that the alleged unreasonable restraint tends to, or is reasonably calculated to, prejudice the *public interest*."¹⁴⁴

In several telephone cases, a claim of protecting the public interest pursuant to a regulatory scheme has been invoked successfully as a defense or justification of otherwise anticompetitive conduct. In *Phonetele Inc. v. American Tel. and Tel. Co.*,¹⁴⁵ the Ninth Circuit held that a regulated defendant may be permitted to show that its actions were justified by the constraints of the regulatory scheme under which it operated. In *Mid-Texas Communications Systems, Inc. v. American Tel. and Tel. Co.*,¹⁴⁶ the Fifth Circuit held that "[i]f Bell was correct in its assessment [that interconnection was contrary to the public interest], and if the purpose in refusing interconnection was to vindicate the public interest, then the refusal, despite its obvious anticompetitive effect, would have been proper and entitled to protection from antitrust scrutiny."¹⁴⁷ Continuing the trend, the District of Columbia Circuit has upheld a refusal by AT&T to provide interconnections based on a public interest justification similar to that recognized in *Mid-Texas*:

[T]his regulatory justification defense is only applicable if AT&T's asserted 'public interest' basis for its interconnection decision is reasonable and if AT&T actually made its decision at the time in good faith on that basis rather than solely on the basis of competitive considerations. The 'reasonableness' component of this test requires that AT&T have a reasonable basis in terms of concerns for the public interest that are concrete, articulable, and recognized as legitimate by the appropriate regulatory authorities.¹⁴⁸

¹⁴²As discussed previously, Section 201(a) of the Federal Power Act declares that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that federal regulation of transmission and wholesale sales is necessary in the public interest.

¹⁴³615 F.2d 343 (5th Cir.), *cert. denied*, 449 U.S. 870 (1980).

¹⁴⁴*Id.* at 351.

¹⁴⁵664 F.2d 716 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 785 (1983).

¹⁴⁶615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980).

¹⁴⁷*Id.* at 1390.

¹⁴⁸*Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 980, 1009, (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1359 (1985).

The court, recognizing that it could take into account problems of feasibility and practicality in determining what access was required under the essential facilities doctrine, affirmed the trial court's findings that AT&T's refusal to interconnect was motivated by a purpose to vindicate the public interest, was objectively reasonable, and therefore was legitimate conduct.¹⁴⁹

Two caveats are appropriate in considering the application of a public interest or regulatory justification to conduct by electric utilities. First, courts may be more receptive to such a claim in telecommunications cases because of the view, as expressed in one decision, that "FCC regulation of AT&T's rates may be more pervasive than Federal Power Commission . . . regulation of the wholesale rates of electric utilities."¹⁵⁰ Second, the public interest defense is a narrow exception to the application of the antitrust laws and in no way implies immunity to the antitrust laws, as AT&T itself can verify.¹⁵¹ Nevertheless, the regulatory or public interest justification that has developed with regard to the telecommunications industry may provide a vehicle by which the courts can balance the antitrust claims of particular utility customers with the public interest associated with service to the utility's other customers. Where particular customers or their alternative suppliers seek access to a utility's transmission facilities so as to allow the particular customers to leave the system, the utility could invoke the prospect of ruinous cost underrecovery or rate increases for its other customers as a public interest justification for refusing transmission access. Judicial acceptance of such a claim would amount to recognition that at least in some circumstances, an obligation to serve implies a right to serve, notwithstanding the antitrust laws. To view this situation in a different way, the duty to provide service at reasonable rates could obviate any anticompetitive intent or willful maintenance of monopoly power by the utility in denying transmission access. Under either view, the monopoly nature of enterprises affected with a public interest and public utility status, and hence obligated to serve the public, would be recognized.

CONCLUSION

In this article, we have first examined the basic concepts of public utility status and utility regulation, including the obligation to provide service to the public as reasonably demanded. This duty to serve, we have found, is intertwined with the other elements of utility status, including regulation of rates and the right to serve shielded from competitive interference. While a common law service obligation applicable to wholesale service was not incorporated under the Federal Power Act, FERC has taken the position that service, once commenced, may not be terminated without its approval, despite any contractual provisions to the contrary. Upon examination, however, this view of Commission authority may not be supported by the legislative history of the Federal Power Act or by judicial precedent. Perhaps more important, the requirement to serve apart from recognition of a right to serve may result in increased rates in the near term and insufficient capacity, or both, in the long run. While notice requirements and other limitations on service may

¹⁴⁹*Id.*

¹⁵⁰708 F.2d at 1104 n.30.

¹⁵¹*Id.* at 1133.

stabilize service somewhat, such restrictions have not yet been developed sufficiently. Both the Commission and the utilities subject to its authority should experiment with new requirements or, better yet, incentives aimed at regulating load.

At the present time, the Commission is considering dramatic changes in its regulatory policies, certain of which, if adopted, would result in a more competitive electricity market and would reallocate risks from utility customers to utility shareholders. While we take no position on the merits of particular proposals, the Commission's review of its existing policies should be encouraged. If significant change in present regulatory policy is adopted, however, it should not be accepted in a vacuum. The Commission must determine how its policies interact with the service requirements that it seeks to impose on public utilities under the Federal Power Act, and if necessary, revise one or the other. The antitrust courts are embarking on a similar inquiry, in considering a public interest justification defense, and the Commission should do likewise. In short, in a regulated industry, a duty to serve infers a right to serve.