

JURISDICTION OF THE FEDERAL ENERGY REGULATORY COMMISSION OVER UTILITY COMPANY REORGANIZATIONS AND SALES OF UTILITY STOCK AS DISPOSITIONS OF JURISDICTIONAL FACILITIES

*William D. DeGrandis**

The Federal Energy Regulatory Commission (FERC or Commission) has jurisdiction under section 203 of the Federal Power Act (FPA or Act)¹ over sales, leases, or disposition of facilities subject to its jurisdiction, or any part thereof valued in excess of fifty-thousand dollars.² The Commission also has jurisdiction over the merger or consolidation of a public utility's jurisdictional facilities, or any part thereof, with the jurisdictional facilities of another person and the purchase, acquisition or taking by a public utility of "any security of any other public utility."³

The FERC will approve the proposed disposition, consolidation, or acquisition if it determines after notice and opportunity for hearing, that the transaction is "consistent with the public interest."⁴ In reviewing the proposed transaction, the FERC may impose terms and conditions "it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission."⁵

In the past, the FERC has declined to assert jurisdiction over some utility company reorganizations in which an electric utility would establish a holding company and then become a wholly owned subsidiary of the holding company.⁶ In those instances, applicants were not required to seek FERC approval and demonstrate that the proposed reorganization was "consistent with the public interest." The FERC construed its jurisdiction over the disposition of jurisdictional facilities to apply only to transfers of title and/or operating rights to the facilities⁷, but "not to stock transactions transferring the ownership and control over the utility and all of its assets to another corporate

* B.A., Pennsylvania State University (1977); J.D., University of California at Los Angeles (1980). Mr. DeGrandis is an attorney with Paul, Hastings, Janofsky and Walker in Washington, D.C. The views expressed herein are those of the author. The author wishes to thank N. Beth Emery, Cada T. Kilgore III, Patrick Shea and Bruce Ryan for their helpful comments and James Fosnot for his assistance in the production of this article.

1. Federal Power Act, 16 U.S.C. §§ 791-825r (1982).

2. 16 U.S.C. § 824b(a) (1982); *see also* 18 C.F.R. § 33.1 (1988).

3. 16 U.S.C. § 824b(a).

4. *Id.*

5. *Id.* § 824b(b).

6. *See* Iowa S. Utils. Co., 35 F.E.R.C. ¶ 61,149 (1986); Texas-New Mexico Power Co., 28 F.E.R.C. ¶ 61,079 (1984); Sierra Pac. Power Co., 27 F.E.R.C. ¶ 61,081 (1984); Iowa Power & Light Co., 9 F.E.R.C. ¶ 61,099 (1979).

7. *See, e.g.,* Iowa Southern, 35 F.E.R.C. at 61,358.

entity.”⁸

In several recent cases, however, the FERC reversed its earlier policy and held that reorganizations involving the transfer of ownership or control over a utility's facilities through stock transactions constituted a “disposition of jurisdictional facilities” within the scope of section 203 of the FPA.⁹ In another recent case, the FERC again applied this new policy by asserting jurisdiction over a public utility's sale of all of its stock to a registered holding company as a “disposition of jurisdictional facilities” because it involved the transfer of ownership and control over the utility's facilities.¹⁰

Even if the FERC has jurisdiction over the transactions, the conflict of jurisdiction provisions of section 318 of the FPA may preclude it from actually asserting jurisdiction. Under section 318, if a person is subject both to the requirements of the Federal Power Act and to the requirements of the Public Utility Holding Company Act of 1935 (PUHCA)¹¹ with respect to, among other things, an “acquisition or disposition of any security, capital assets, facilities or any other subject matter,” the person would not be subject to the requirements of the Federal Power Act. In the two recent disposition-of-facilities cases in which applicants argued that the conflict of jurisdiction provision of section 318 preclude the FERC from asserting jurisdiction, the FERC refused to disclaim its jurisdiction.

After reviewing the specific transactions involved in each case, this article will examine the legal and policy underpinnings of the FERC's assertion of jurisdiction over utility reorganizations and sales of utility stock as dispositions of jurisdictional facilities in these recent cases. This article will then analyze why the FERC refused in these recent cases to disclaim jurisdiction under section 318 of the FPA. Next, this article will review the factors the FERC has examined in determining whether the dispositions of facilities are consistent with the public interest. This article will then examine other relevant factors which the FERC usually considers in other section 203 cases, such as those involving mergers and consolidations, which the FERC may also take into account in its public interest review in disposition of facilities cases. Finally, this article will discuss the implications of the FERC's assertion of jurisdiction in these cases and its “public interest” review for utilities, their customers, and other interested parties.

I. DETERMINATION OF WHETHER TRANSACTIONS CONSTITUTE DISPOSITIONS OF JURISDICTIONAL FACILITIES UNDER SECTION 203 OF THE FPA

Section 203 of the FPA states:

No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in

8. Savannah Elec. & Power Co., 42 F.E.R.C. ¶ 61,240, at 61,778 (1988).

9. Northern Ind. Pub. Serv. Co., 42 F.E.R.C. ¶ 61,245 (1988); Public Serv. Co. of Ind., 42 F.E.R.C. ¶ 61,243 (1988); Central Ill. Pub. Serv. Co., 42 F.E.R.C. ¶ 61,073 (1988); Central Vt. Pub. Serv. Corp., 39 F.E.R.C. ¶ 61,295 (1987).

10. Savannah Electric, 42 F.E.R.C. ¶ 61,240.

11. Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 to 79z-6 (1982).

excess of \$50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so.¹²

Once the FERC receives an application for approval of transactions involving dispositions of facilities, it is required to notify in writing the governor and the appropriate commission of each state in which the physical property affected, or any part thereof, is situated and "other persons as it may deem advisable."¹³ After providing the notice, the FERC may grant part or all of the application and require "such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to [its] jurisdiction. . . ."¹⁴ Moreover, the FERC may from time to time "for good cause shown" supplement its order which conditionally approves the application "as it may find necessary or appropriate."¹⁵

A. *Historic Commission Treatment of Utility Reorganizations*

Over the years, some utilities have determined it necessary or beneficial to reorganize their corporate structures. Such reorganizations could involve "streamlining" corporate structures by merging different subsidiaries into one, creating holding companies,¹⁶ or forming new subsidiaries to engage in business opportunities in which the utilities had not previously been involved.

Some electric utilities have created holding companies in order to diversify their operations, particularly those in states that prevent electric utilities from forming subsidiaries to diversify their operations or that subject diversified utilities to greater regulatory oversight.¹⁷ By forming holding companies, utilities may form subsidiaries to engage in the new businesses.¹⁸ One current

12. 16 U.S.C. § 824b(a).

13. *Id.* The Commission's regulations detail what the application and required exhibits must contain. See also 18 C.F.R. § 33.2-.3 (1988).

14. 16 U.S.C. § 824b(b).

15. *Id.*

16. Section 2(a)(7)(A) of the Public Utility Holding Company Act of 1935 defines a holding company as "any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public utility. . . ." 15 U.S.C. § 79b(a)(7)(A) (1982). The PUHCA requires that registered holding companies and their affiliates obtain approval from the Securities and Exchange Commission (SEC) for certain transactions. Even if a company fits the above definition, the SEC could determine after notice and hearing that the company does not exercise such a controlling influence over a public utility that it is necessary or appropriate in the public interest to regulate the company as a holding company under the PUHCA to protect investors or consumers 15 U.S.C. § 79b(a)(7)(B) (1982). On the other hand, the SEC could determine after notice and hearing that a company with less than a ten percent interest in a public utility should be regulated as a holding company because it exercises a controlling influence over the utility. *Id.*

17. D. HAWES, *UTILITY HOLDING COMPANIES* § 1.02, at 1-3 (1987). Generally, a holding company would not have to obtain prior PSC approval for diversification investments while a public utility, even if it were allowed to diversify, would be subject to regulatory oversight as to its investments. See *id.* § 8.04, at 8-11.

18. The SEC is required under the PUHCA to limit the operation of each holding company to a "single integrated public-utility system" with only "such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of [the] . . . system." 15 U.S.C. § 79k(b)(1) (1982).

reason for utilities to consider diversification concerns the current slowdown in generation plant construction activity. Utilities without new plants under construction may have an abundance of cash and management talent available and may examine other business opportunities available through diversification.¹⁹

In the past, the FERC declined to assert jurisdiction under section 203 over reorganizations involving formation of holding companies by utilities. For example, in *Iowa Power & Light Co.*,²⁰ the FERC considered whether to assert jurisdiction over a reorganization involving the creation of a holding company and the merger of the existing operating utility into that holding company.²¹ The FERC stated that it had jurisdiction over three different types of transactions under section 203: (1) disposal of any of a public utility's jurisdictional facilities, (2) merger or consolidation of any of a public utility's jurisdictional facilities with jurisdictional facilities owned by any other person, and (3) acquisition by a public utility of any security of any other public utility.²²

Under the proposed reorganization, Iowa Power would become the subsidiary of a new holding company, Iowa Resources. To accomplish that end, IPL, Inc., an Iowa Resources subsidiary created for purposes of the reorganization, would be merged into Iowa Power, which would be the surviving corporation. Iowa Power's and Iowa Resources' common stock would be exchanged share-for-share. Consequently, the current stockholders of Iowa Power would become the shareholders of Iowa Resources, and after the reorganization was completed, Iowa Power would be the wholly-owned subsidiary of Iowa Resources.

The FERC concluded that none of the three intercorporate transactions listed above was present in the Iowa Power proposal. First, the FERC concluded that Iowa Power's ownership and operating rights over utility facilities were not affected by the proposed reorganization, and, consequently, Iowa

See D. HAWES, *supra* note 17, § 3.03, at 3-6 to 3-7. Integrated electric systems consist of facilities that are "physically interconnected or capable of physical interconnection and which . . . [are] confined . . . to a single area or region, in one or more States, not so large as to impair . . . the advantages of localized management, efficient operation, and the effectiveness of regulation . . ." 15 U.S.C. § 79b(a)(29)(A) (1982).

The FERC has developed a two part test. The SEC will first determine whether an activity is functionally related, and, if that part of the test is satisfied, the SEC determines whether engaging in the new business by the registered holding company is in the public interest. See D. HAWES, *supra* note 17, § 3.05[1], at 3-30. In the past, the SEC has approved the following kinds of nonutility businesses as satisfying the functionally related criterion: pipeline construction (*Panhandle E. Pipeline Co. v. SEC*, 170 F.2d 453, 462-63 (8th Cir. 1948)); railcar repair facilities (*Ohio Power Co., SEC Holding Co. Act Release No. 21,173* (Aug. 3, 1979)); production and transmission facilities (*Cities Serv. Co.*, 15 S.E.C. 962, 969 (1944)); coal properties (*North Am. Co.*, 29 S.E.C. 521, 533 (1949)); and oil and gas exploration (*New England Elec. Sys., SEC Holding Co. Act Release No. 18,635* (Oct. 30, 1974)).

19. See D. HAWES, *supra* note 17, § 6.01, at 6-1.

20. *Iowa Power & Light Co.*, 9 F.E.R.C. ¶ 61,099 (1979).

21. *Iowa Power & Light Company* (Iowa Power) had filed an application which sought either (1) an order from the FERC under section 203 of the FPA that approved Iowa Power's proposed reorganization or (2) an order from the FERC that disclaimed jurisdiction over the proposed reorganization. *Iowa Power*, 9 F.E.R.C., at 61,198.

22. *Id.* at 61,199.

Power would not dispose of any jurisdictional facilities as a result of the reorganization. Second, because neither IPL, Inc. nor Iowa Resources owned or operated any utility facilities and hence were not "public utilities" under the Act, the reorganization would not entail any merger or consolidation of jurisdictional facilities between Iowa Power and another person. Lastly, Iowa Power, though a public utility, was not acquiring any securities.²³

Moreover, although Iowa Resources was purchasing Iowa Power securities, it was not a "public utility" under the Act because it did not own or operate any jurisdictional facilities.²⁴ The FERC therefore ruled that the reorganization was not a jurisdictional transaction and its approval was thus unnecessary.²⁵

B. *The FERC's New Policy on Utility Reorganizations*

The FERC explicitly reversed its previous policy of not asserting jurisdiction over such reorganizations in *Central Vermont Public Service Corp.*²⁶ In *Central Vermont*, the FERC considered a proposed reorganization whereby 100% of the common stock of Central Vermont Public Service Corporation (Central Vermont) would be transferred to a newly created holding company.²⁷ The proposed reorganization involved creation of two new businesses—Central Vermont Equity Corporation, a generation subsidiary, and CV Energy Services, Inc., an energy services subsidiary.²⁸ Central Vermont planned to transfer ownership of the two new subsidiaries to the newly created parent holding company. The parent would then create a corporation formed solely to accomplish a merger between the corporation and Central Vermont.

The parent would purchase ten shares of common stock of Central Vermont. After the merger, Central Vermont planned to cancel the parent's com-

23. *Id.*

24. A "public utility" is defined under section 201(e) of the FPA as "any person who owns or operates facilities subject to the jurisdiction of the Commission" under subchapter II of the FPA. 16 U.S.C. § 824(e) (1982). The provisions of this subchapter of the FPA "apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." *Id.* § 824(b)(1). A "sale of electric energy at wholesale" means a "sale of electric energy to any person for resale." *Id.* § 824d. See *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61, 67-73 (1943).

25. *Iowa Power*, 9 F.E.R.C. at 61,199. The FERC also noted that Iowa Power's proposed reorganization did not come within the purview of section 204 of the Act. Section 204 provides:

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser or surety or otherwise in respect of any security of another person, unless and until and then only to the extent that, upon application by the public utility, the Commission by order authorize such issue or assumption of liability.

16 U.S.C. § 824c(a) (1982). The FERC noted that all of the common stock of Iowa Power to be converted had been issued already under FERC authorization pursuant to section 204. The terms and conditions of the shares, as authorized and issued would not be changed by the merger. Because there would be no changes in the obligations of Iowa Power to its security holders or in the rights of its security holders, the FERC ruled that Iowa Power was not proposing to issue any security or assume any liability for any security of another person that would trigger the FERC's review under section 204.

26. *Central Vt. Pub. Serv. Corp.*, 39 F.E.R.C. ¶ 61,295 (1987).

27. Central Vermont is a public utility that owns and operates jurisdictional facilities in Vermont.

28. The FERC noted that the generation subsidiary would participate in generating projects such as a planned 230 megawatt natural gas-fired combined cycle unit, while the energy service subsidiary would promote energy conservation on a shared savings basis. *Id.* at 61,961 nn.7-8.

mon shares that Central Vermont held and then would convert each outstanding share of Central Vermont stock, other than the ten shares owned by the parent, into a share of common stock of the parent. The ten shares of common stock of Central Vermont would then represent the entire outstanding common stock of the utility.²⁹

Central Vermont contended that the FERC did not have jurisdiction over the corporate reorganization under section 203 of the Act and requested that the FERC disclaim jurisdiction based on its decision in *Iowa Power*. Central Vermont argued that there would be "no disposition by Central Vermont or Conn Valley of jurisdictional facilities, no merger or consolidation of jurisdictional facilities with those of another person, and no acquisition by Central Vermont or Conn Valley of the securities of another public utility."³⁰

The FERC disagreed and asserted jurisdiction over the transaction because the reorganization entailed a transfer of ownership and control over Central Vermont's jurisdictional facilities that would require FERC approval under section 203. The FERC noted that the current stockholders of the public utility would own stock in the holding company after the reorganization was completed but they would "no longer have a proprietary interest in, or direct control over, the jurisdictional facilities."³¹ Instead, the jurisdictional facilities of the public utility would be controlled through the parent's ownership of the utility's common stock as a result of the parent's ability to name Central Vermont's board of directors. The FERC concluded that the substance of the transaction involved a "disposition of facilities" through "the transfer of all direct control."³²

C. *Other Reorganizations and Transactions Over Which the FERC Has Asserted Jurisdiction Based Upon Its New Policy*

The FERC has similarly asserted jurisdiction under its rationale in *Central Vermont* over several other recent utility reorganizations and one sale of all of the stock of a public utility to a registered holding company. For instance, Public Service Company of Indiana (PSI) recently sought FERC approval of a proposed corporate reorganization that also involved creation of a holding company and a stock exchange.³³ PSI is an investor-owned utility engaged in the business of generating, transmitting, and distributing electrical

29. In addition, Central Vermont planned to transfer to the parent its wholly owned subsidiary, Connecticut Valley Electric Company. Connecticut Valley provided retail distribution service in New Hampshire and owned a small amount of jurisdictional facilities. *Id.* at 61,959.

30. *Id.* Central Vermont also argued that the FERC lacked jurisdiction over the issuance of securities involved in the reorganization under section 204(f) of the FPA. This section states that the FERC does not have jurisdiction over the issuance of securities by a public utility if such "security issues are regulated by a State commission." 16 U.S.C. § 824c(f) (1982). The FERC agreed it lacked jurisdiction because the authority of the Vermont Public Service Board over the stock issuance precluded its jurisdiction.

31. *Central Vermont*, 39 F.E.R.C. at 61,960.

32. *Id.* The FERC noted that its emphasis on the substance rather than the form of the transaction was consistent with its prior rulings involving jurisdictional determinations. See, e.g., *Ocean State Power*, 38 F.E.R.C. ¶ 61,140 (1987); *John J. Byrne*, 38 F.E.R.C. ¶ 61,067 (1987); *Citizens Energy Corp.*, 35 F.E.R.C. ¶ 61,198 (1986).

33. *Public Serv. Co. of Ind.*, 42 F.E.R.C. ¶ 61,243 (1988).

energy to various retail customers in Indiana. PSI proposed to create PSI Holdings, Inc. (HC) as a nominally capitalized subsidiary. All common stock of PSI outstanding before the reorganization would be transferred to HC. PSI would then become a subsidiary of HC with the former PSI shareholders owning the common stock of HC.³⁴

In a case involving a similar reorganization, Central Illinois Public Service Company (CIPS) proposed to create QNT Holding Company (QNT) as a wholly-owned subsidiary with authorized capital stock consisting of 100 million shares of common stock without par value, of which 100 shares would be issued and outstanding.³⁵ After approval by the shareholders of the holding company, each share of CIPS common stock would be exchanged for one share of the holding company common stock. The holding company would then own all the outstanding common stock of CIPS and there would be no changes in the capital structure of CIPS.³⁶

Similarly, Northern Indiana Public Service Company (Northern Indiana) sought to create a holding company that would acquire all the outstanding common shares of Northern Indiana and four of its subsidiaries.³⁷ Northern Indiana would organize the holding company and hold all of the outstanding shares. Under the reorganization, the holders of Northern Indiana common shares would become the owners of the holding company common shares, and the holding company would become the owner of all of Northern Indiana's common shares.³⁸

In each of these reorganization cases, the FERC applied its *Central Vermont* rationale and concluded that the reorganization constituted a "disposition of facilities" under section 203 because it involved transfer of control over the ownership and control of jurisdictional facilities.

The FERC also asserted jurisdiction over a recent sale of all of the stock of a public utility to a registered holding company, holding that such a sale was a "disposition of jurisdictional facilities" under section 203 of the Act. In *Savannah Electric & Power Company*,³⁹ the Southern Company (Southern) sought to acquire all of the outstanding stock of Savannah Electric and Power Company (Savannah). Southern and Savannah both contended that the proposed transaction did not constitute a disposition of facilities. Southern proposed to carry out the transaction by merging SV Ventures, Inc., a wholly-owned subsidiary of Southern that was formed solely for the purposes of the transaction with Savannah, with Savannah as the surviving corporation. Savannah would then become the fifth operating subsidiary of Southern. Savannah's corporate structure, facilities, franchises and liabilities would remain unchanged.⁴⁰ The FERC held that the transfer of ownership and con-

34. *Id.* at 61,734.

35. Central Ill. Pub. Serv. Co., 42 F.E.R.C. ¶ 61,073 (1988).

36. *Id.* at 61,327.

37. Northern Ind. Pub. Serv. Co., 42 F.E.R.C. ¶ 61,245 (1988).

38. *Id.* at 61,790-91.

39. Savannah Elec. & Power Co., 42 F.E.R.C. ¶ 61,240 (1988).

40. *Id.* at 61,778.

trol of the facilities by the sale of stock constituted a disposition of jurisdictional facilities, even though the facilities themselves were not sold.

D. Underlying Rationale for the FERC's New Policy of Asserting Jurisdiction

The FERC's main reason for asserting jurisdiction in these cases involved its concern over the transfer of ownership and control over the utilities' facilities. As noted in *Central Illinois*, the FERC is not concerned with the transfer of stock *per se*, but rather with the transfer of ownership or control over the utility's facilities.⁴¹

The FERC noted that it was not attempting to discourage utility restructuring. Rather, the FERC recognized that "changing circumstances in the electric power industry" have led to "ever-increasing reorganization involving jurisdictional public utilities"⁴² "wherein a jurisdictional public utility becomes the wholly owned subsidiary of a parent holding company. . . ."⁴³

Lack of regulatory oversight over such reorganization, the FERC believed, could result in abuses adverse to the public interest. For example, to the extent utility revenues are used to finance non-utility operations, the cost of providing electric utility service could increase. Specifically, if the parent company "makes unwise investment decisions, the reliability of service of jurisdictional facilities could be impaired."⁴⁴ By asserting jurisdiction, the FERC believed it would be in a better position to "secure the maintenance of adequate service and the coordination in the public interest of jurisdictional facilities."⁴⁵ Moreover, where the FERC found sufficient potential for abuse, it could disapprove the transaction or impose terms and conditions in accordance with its authority under section 203(b) of the Act. As a result of the restructuring in the utility industry, the FERC concluded that it was no longer in the public interest to apply section 203 solely to sales or transfers of title to jurisdictional facilities and that a reversal of its previous policy was necessary.⁴⁶

41. *Central Illinois*, 42 F.E.R.C. at 61,328.

42. *Id.*

43. *Central Vermont*, 39 F.E.R.C. at 61,960.

44. *Id.*

45. *Central Illinois*, 42 F.E.R.C. at 61,328.

46. *Savannah Electric*, 42 F.E.R.C. at 61,778. The FERC also concluded in *Central Illinois*, 42 F.E.R.C. at 61,328, that the legislative history of the Act supported assertion of jurisdiction in these cases. Specifically, in enacting the Public Utility Holding Company Act of 1935 (PUHCA), Congress was concerned with holding companies engaging in non-utility operation which could increase a utility's cost of service and impair its ability to render service. *Id.* The FERC noted that in enacting the FPA (title II of the PUHCA), Congress intended that the FERC should maintain oversight over any transfer of jurisdictional utility property. This included transfers of control over facilities through transfer of ownership of 100% of a utility's common stock. The FERC noted that the Senate Report on the bill that became the FPA stated, "This section [203] . . . complements title I of the bill [the PUHCA] by directing the [FERC] to prevent transfers or consolidations of property which would impair the ability of public utilities to render adequate service" *Id.* (emphasis deleted) (quoting S. REP. NO. 261, 74th Cong., 1st Sess. 18 (1935)).

E. The Conflict of Jurisdiction Provisions of Section 318 of the FPA

Even if the FERC asserts jurisdiction over a reorganization or sale of stock as a "disposition of facilities" under section 203 of the Act, a utility applicant may be able to demonstrate successfully that the conflict of jurisdiction provisions of section 318 of the Act preclude the FERC from asserting jurisdiction over a proposed reorganization or sale of stock. Specifically, under section 318, if a "person" is subject both to the requirements of the PUHCA with respect to, among other things, an issuance, sale or guarantee of a security, or the "acquisition or disposition of any security, capital assets, facilities, or any other subject matter," the person shall not be subject to the requirements of the FPA, "or of any rule, regulation or order thereunder, with respect to the same subject matter. . . ."⁴⁷ However, the FERC would be allowed to assert jurisdiction over the transaction if the Securities Exchange Commission SEC exempted such person from the requirements of the PUHCA.⁴⁸

Despite the contentions of the parties in the reorganization cases and the *Savannah Electric* case, the FERC did not determine conflicts in jurisdiction existed in any of these cases that would require it to disclaim jurisdiction. As the following discussion demonstrates, the FERC has refused to disclaim jurisdiction pursuant to section 318 because (1) no one person was subject to jurisdiction under both the Act and the PUHCA, (2) the same subject matter was not involved in the FERC and SEC proceedings, and (3) there was "no direct conflict" between the respective responsibilities of the FERC and the SEC.

1. No One Person Subject to Both the FERC and the SEC
Jurisdiction

The FERC has refused to disclaim jurisdiction under section 318 by finding that, *inter alia*, no one person was subject to both the FERC and the SEC jurisdiction. Specifically, in the *Central Illinois* case, the FERC noted that there were two different entities involved in the transaction, and each was regulated by a different agency. CIPS was subject to the FERC jurisdiction but not to the SEC jurisdiction under the PUHCA. The holding company had applied to the SEC for approval of its transaction, but it was not subject to the FERC jurisdiction. The FERC noted that if the holding company and CIPS were not different persons, the holding company might be considered a public utility subject to regulation under the Act.⁴⁹ The FERC stated it had no intention of regulating a holding company which is not itself a public utility.⁵⁰ However, if the holding company, rather than its subsidiary, operates as a public utility, the holding company would be subject to FERC jurisdiction. In that case, an entity operating as a holding company would be subject to regulation under both the Act and the PUHCA.

47. 16 U.S.C. § 825q (1982).

48. *Id.*

49. *Central Illinois*, 42 F.E.R.C. at 61,328.

50. See, *supra* note 24 for a discussion of the definition of "public utility" under the FPA.

The FERC reached a similar conclusion in *Savannah Electric*. The FERC found that the Southern Company and Savannah Electric were two separate corporate entities and each was regulated by a different agency. The FERC had jurisdiction over Savannah Electric, the operating utility, but did not have jurisdiction over the Southern Company. Similarly, the SEC had jurisdiction over Southern Company but not over Savannah Electric. The FERC concluded that section 318 did not apply since at the time of the transfer of control Savannah Electric was a separate person from Southern and was not subject to both the FPA and the PUHCA jurisdiction.⁵¹

2. Different Subject Matter Involved

The FERC also ruled that the conflict of jurisdiction provisions of section 318 did not apply because a different subject matter was involved in the Central Illinois reorganization. Specifically, it found that CIPS was involved in disposition of utility assets while the holding company was acquiring utility securities.⁵² The FERC also found this same distinction in the case involving the sale of Savannah Electric Company. Specifically, it determined that Savannah, the operating utility, was disposing of utility assets while Southern, the parent holding company, was acquiring utility securities.

The FERC's interpretation of the statute's reference to "subject matter" is significant. Based on the FERC's characterization of what "subject matter" was involved in the *Central Illinois* and *Savannah Electric* cases, the FERC would arguably always conclude that a different subject matter is involved in reorganization or sale of stock cases such as these. The FERC has determined that it is not asserting jurisdiction over the transfer of stock *per se*, but rather over the transfer of control or ownership of jurisdictional facilities through a stock transfer. The SEC on the other hand, the FERC noted, has jurisdiction over the acquisition of securities in such cases by the holding company. In any event, the SEC would not have jurisdiction over the sale of facilities by a public utility such as Savannah because Savannah is not a holding company or an affiliate of one. Similarly, in the reorganization cases, the FERC has stated that its review of the transfer of ownership or control of the utility facilities is a different subject matter than the purchase of utility securities by the newly formed holding company. Thus, the FERC's characterization of the "subject matter" over which it asserts jurisdiction would invariably lead to its concluding that different subject matters are involved in transactions such as the sale of all of the outstanding stock of a public utility or in the reorganization cases discussed above.

51. *Savannah Electric*, 42 F.E.R.C. at 61,781 n.22. As in *Central Illinois*, the FERC noted that it did not intend to regulate a holding company which was not itself a public utility. However, if the holding company operates as a public utility rather than its subsidiary, the holding company would be subject to the FERC jurisdiction under the FPA. The conflict of jurisdiction provisions of section 318 might have applied in the *Savannah Electric* case if a utility operating subsidiary of Southern, such as Georgia Power Company (Georgia Power), sought to purchase Savannah, assuming no provision in PUHCA prevented such a purchase. In that case, the utility would be subject to regulation both under the PUHCA as an affiliate of a registered holding company and under the Act as a "public utility." Therefore, in such a situation it would be strongly arguable that the "same person" was involved.

52. *Central Illinois*, 42 F.E.R.C. at 61,328.

3. No Conflict in Regulatory Responsibilities

As a third reason for holding that the conflict of jurisdiction provisions of section 318 did not apply, the FERC in the *Central Illinois* case stated that there is no conflict between the regulatory responsibilities of the FERC and the SEC. Specifically, the FERC stated there is no conflict between its responsibility to protect the interests of ratepayers and to insure reliable and adequate service and the principal thrust of the SEC's mandate under the PUHCA, to regulate industry structure rather than individual company operations.⁵³ Similarly, the FERC noted in *Savannah Electric* that there is no conflict between the FERC's interest in protecting ratepayers and insuring reliable and adequate service and the SEC concern over industry structure.⁵⁴

The FERC's third reason for concluding that section 318 was inapplicable in these cases is noteworthy because the FERC and the SEC will always have different regulatory responsibilities. Thus, if the Commission reviews a transaction in which both the same person and subject matter are involved, would it still refuse to disclaim jurisdiction under section 318 because its regulatory responsibilities are concededly different from the SEC's?

The scope of the FERC's third reason is still unclear, but it is likely that the FERC has used its "different regulatory responsibilities" reason for refusing to disclaim jurisdiction under section 318 to bolster its "different person" and "different subject matter" reasons, not to serve as an independent ground for refusing to disclaim jurisdiction. Nevertheless, if a reviewing court were faced with a case involving a transaction in which the same person and subject matter were involved, and the FERC refused to disclaim jurisdiction under section 318, it could very well determine that the Commission's "different regulatory responsibilities" reason is not supported by the statute.

II. DETERMINATION OF WHETHER THE DISPOSITION OF JURISDICTIONAL FACILITIES IS IN THE PUBLIC INTEREST

Once the FERC asserts jurisdiction, the next issue is what factors it will examine to determine whether the disposition of facilities is consistent with the public interest.

A. Reasons Underlying the Reorganization or Sale of Utility Stock

In proceedings in which the FERC reviews the proposed disposition of facilities, a utility is not required to demonstrate that a "positive benefit" to the public would result. Instead, a utility must show that the proposed dispo-

53. See *City of Lafayette v. SEC*, 481 F.2d 1101, 1105 (D.C. Cir. 1973); *Appalachian Power Co. v. FPC*, 328 F.2d 237 (4th Cir. 1964), cert. denied, 379 U.S. 829 (1964). The FERC also noted in *Central Illinois* that the holding company established by CIPS was an exempt holding company. Therefore, section 318 by its terms did not apply. The FERC could have found that section 318 did not require it to disclaim jurisdiction on this ground alone. It further stated that even if the holding company were registered with the SEC, section 318 would still not apply since the parent and CIPS would be separate persons at the time of the transfer of control.

54. *Savannah Electric*, 42 F.E.R.C. at 61,779.

sition is consistent with the public interest.⁵⁵ One court has stated that Congress intended the FERC to apply the public interest standard to prevent transactions, such as mergers or consolidations, that may harm consumers or investors or other legitimate national interests. Consequently, applicants are required under section 203 to disclose fully all material facts and bear the burden of demonstrating that the proposed transaction is consistent with the public interest.⁵⁶

In examining whether the proposed dispositions of facilities satisfy this public interest standard, the FERC will analyze the utilities' reasons for the reorganization or sale of stock and its possible effects. For instance, in *Public Service Co. of Indiana*, PSI contended that its reorganization would establish a more flexible capital structure, thereby enabling the holding company to respond to future business opportunities and to segregate utility and nonutility operations. PSI asserted, however, that it had no current plans to develop nonutility business by the holding company and no plans or arrangements concerning material acquisitions, investments, or expansions.⁵⁷

Northern Indiana in its application claimed its new holding company structure would facilitate diversification which would help "reduce investor risks associated with relying on a single business enterprise in a limited service area."⁵⁸ It claimed that the proposed restructuring would further the growth of the current subsidiaries, provide financial flexibility, and facilitate capital allocation and managerial accountability. Unlike PSI, Northern Indiana had an immediate reason to establish a holding company structure. It planned to incorporate a new wholly-owned subsidiary which would become a partner in a joint venture to construct and operate an intrastate gas pipeline in Texas.⁵⁹

In the transaction involving Savannah Electric's sale of all of its stock to the Southern Company, Savannah contended that it would experience significant cost savings by virtue of certain economies of scale that Southern possessed. Savannah contended that acquisition by Southern would reduce Savannah's capital requirements, thereby improving Savannah's long-term financial stability. Savannah contended that it would have greater diversity of generating sources by being part of the Southern system, and that efficiencies would result from having access to Southern Company's management serv-

55. *Pacific Power & Light Co. v. FPC*, 111 F.2d 1014 (9th Cir. 1940). See also *Utah Power & Light Co.*, 41 F.E.R.C. ¶ 61,238, at 61,752 (1987).

56. In *Pacific Power and Light*, 111 F.2d at 1014, the court reversed a Federal Power Commission order that denied the transfer of Inland Power and Light Company's property and assets to Pacific Power and Light. The FERC had denied the transfer because of a lack of public benefit or advantage derived from the transaction. In reversing the Commission, the court ruled that the applicant need only show that the transfer is compatible with the public interest and not that a public benefit would result.

The FERC regulations require a utility to include in its application all facts that "show that the proposed disposition, merger or consolidation of facilities or acquisition of securities will be consistent with the public interest." 18 C.F.R. § 33.2(p) (1988).

57. *Public Serv. Co. of Ind.*, 42 F.E.R.C. at 61,784-85.

58. *Northern Indiana*, 42 F.E.R.C. at 61,791.

59. *Id.* at 61,790. In addition, it desired to form a holding company so it could become involved in other energy-related, as well as non-utility businesses, although it did not expect its non-utility investments to exceed five percent of the holding company's total assets. *Id.* at 61,791.

ices, technical expertise, and information and planning services.⁶⁰

In reviewing a utility's reasons for determining the reorganization, the FERC has not evaluated whether these same goals of reorganization could be accomplished through some alternative corporate structure other than creation of a holding company. Rather, as shown below, the FERC examined to what extent consumers would be affected and whether there were safeguards in place to protect consumers from unreasonable increases in rates or impairment of reliable service.

B. Effect on Rates, Service and Subsequent Regulation

As the FERC noted in *Central Vermont*, reorganizations whereby "a jurisdictional public utility becomes the wholly owned subsidiary of a parent holding company may present potential for abuses adverse to the public interest."⁶¹ For example, utility revenues could be used to finance non-utility operations and the costs of providing utility service would increase as a result. Moreover, unwise investment decisions could impair the reliability of service from jurisdictional facilities.⁶²

As to the effect of the reorganization on rates, the FERC noted in *Central Vermont* that it would exercise its regulatory authority to consider any rate-related issue arising from the reorganization.⁶³ Similarly, in *Public Service Co. of Indiana*, the FERC stated it might not allow the costs associated with unsuccessful or successful diversification to be passed through to PSI's wholesale ratepayers and it could reject use of the common equity costs of the holding company in determining the "just and reasonable" common equity for PSI.⁶⁴ The FERC, in *Northern Indiana*, noted that the proposed organizational structure and corporate goals appear to "minimize the possibility of harm to ratepayers, and may even serve to reduce Northern Indiana's financing costs."⁶⁵ The FERC stated, however, that it would prevent Northern Indiana from recovering the costs associated with the effects of Northern Indiana's diversification efforts through wholesale rates.

In reviewing whether the sale of Savannah's securities to Southern was consistent with the public interest, the FERC first stated that because Savannah would become an operating subsidiary of Southern, a registered holding company, Savannah's future acquisitions, dispositions and sales of securities would be subject to SEC regulation under the PUHCA as an "affiliate" of a registered holding company. Although the FERC's own jurisdiction would be circumscribed pursuant to section 318 of the Act, it would maintain full regulatory authority to consider wholesale rate related issues arising from the

60. *Savannah Electric*, 42 F.E.R.C. at 61,779.

61. *Central Vermont*, 39 F.E.R.C. at 61,960.

62. *Id.*

63. *Id.*

64. *Public Serv. Co. of Ind.*, 42 F.E.R.C. at 61,785. See also *West Va. Pub. Serv. Comm'n*, 40 F.E.R.C. ¶ 61,117 (1987); *South Carolina Generating Co.*, 40 F.E.R.C. ¶ 61,116 (1987).

65. *Northern Indiana*, 42 F.E.R.C. at 61,792.

reorganization.⁶⁶

In addition, it noted that once Savannah became an operating subsidiary, it would be necessary for Savannah and the other operating companies to apply to the FERC for approval of an amendment to the Southern Company system's Inter-company Interchange Contract to add Savannah as a party. Moreover, any future interconnections that would be established would also be subject to the FERC's jurisdiction. Lastly, Savannah's retail cost of service and rates, capital structure, and financing would remain subject to regulation by the Georgia Public Service Commission.⁶⁷ Because there was no opposition to the application, because there were identified benefits that flowed from the proposed transaction, and because the potential problems that the FERC identified could be addressed at an appropriate later time, the FERC approved Savannah's disposition of jurisdictional facilities under section 203.

C. Cross-Subsidization

Related to its investigation of rate effects, the FERC also examines whether cross-subsidization between the operating electric utility and the non-FERC jurisdictional holding company could occur. In this regard, the FERC noted in *Public Service Co. of Indiana* that any improper cost allocation between PSI and the newly formed holding company could be corrected through subsequent FERC audits.⁶⁸ It also concluded that there would be minimal, if any, adverse impact upon PSI's customers because the utility and non-utility operations would be segregated. It further noted that the holding company's ability to receive capital contributions from PSI through payment of dividends from PSI to its only common stockholder, the holding company, would be limited by PSI's mortgage indenture and its articles of incorporation.⁶⁹

Similarly, in *Central Vermont*, the FERC acknowledged that the utility's application contained detailed "accounting and cost allocation procedures that will be used to prevent cross-subsidization between Central Vermont and the parent."⁷⁰ In fact, the FERC noted that the Vermont Public Service Board would be allowed to examine the books and records of both the parent and the operating subsidiaries. Although it did not do so in *Central Vermont*, the FERC in both its *Public Service Co. of Indiana* and *Northern Indiana* rulings approved the transactions subject to the condition that books, accounts, memoranda and records of the holding company and any subsidiary could be examined by FERC order.⁷¹

66. The conflict of jurisdiction provisions would apply because Savannah would be regulated as a "public utility" under the FPA and as an affiliate under the PUHCA.

67. *Savannah Electric*, 42 F.E.R.C. at 61,780; but see *Utah Power & Light Co.*, 43 F.E.R.C. ¶ 63,030, at 65,359 (1988) (where the administrative law judge denied the proposed merger between Utah Power & Light and Pacific Power & Light in part because the applicants' "proposed structure, ratemaking and allocation methodologies will impair, or at best make it extremely difficult for the F.E.R.C. and the affected State Commissions to regulate the merged company").

68. *Public Serv. Co. of Ind.*, 42 F.E.R.C. at 61,785.

69. *Id.*

70. *Central Vermont*, 39 F.E.R.C. at 61,960 (footnote omitted).

71. *Public Serv. Co. of Indiana*, 42 F.E.R.C. at 61,786; *Northern Indiana*, 42 F.E.R.C. at 61,793.

After taking these steps, the FERC held that each disposition of facilities was consistent with the public interest and that the utility's customers were protected by (1) detailed accounting and cost allocation procedures designed to prevent cross-subsidization between the utility and the holding company, between the utility and its affiliates, or both; (2) the FERC's authority over the utility's books, records, and wholesale rates; (3) the regulation of the public utility and, in some cases, the parent holding company by the state utility commission; and (4) the protection afforded by the FERC's reserved authority under section 203(b) to supplement its orders from time to time by imposing new terms or conditions as "necessary or appropriate."⁷²

III. ADDITIONAL RELEVANT FACTORS THE FERC MAY CONSIDER IN ITS "PUBLIC INTEREST" DETERMINATION

A. *Consideration of Anticompetitive Factors*

The FERC's assertion of jurisdiction raises questions about what other "public interest" criteria, if any, the FERC may apply in "disposition of facilities" cases involving sales of utility stock or utility reorganizations. One criterion that likely will be considered is the effect a proposed acquisition may have on existing or future competition in electric utility operations. The Supreme Court has made it clear that consideration of competitive factors is appropriate in a section 203 proceeding. In *Gulf States Utilities Co. v. FPC*,⁷³ the Supreme Court reviewed the FERC's approval of Gulf States Utilities Company's (Gulf States) request for authority under section 204 of the Act to issue thirty million dollars of first mortgage thirty-year bonds for cash after competitive bidding.⁷⁴

The Supreme Court noted that the FERC has broad powers of review under the Act, and held that the FERC is required under section 204 to "consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws."⁷⁵ The Supreme Court also stated in dictum that the FERC's broad power of regulatory review "carries with it the responsibility to "consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to [sections] 202 and 203 and under like directives contained in [sections] 205, 206, and 207."⁷⁶ Thus, the FERC has the responsibility to consider anticompetitive effects in section 203 cases.

72. *Central Vermont*, 39 F.E.R.C. at 61,960.

73. *Gulf States Utils. Co. v. FPC*, 411 U.S. 747 (1973).

74. The Court noted that the FERC would authorize the issuance if it "is for some lawful object within the corporate purposes of the applicant and compatible with public interest." *Id.* at 756 (quoting 16 U.S.C. § 824c (1982)). The cities of Lafayette and Plaquemine, Louisiana (Cities) intervened and opposed the application because they alleged the bonds would be used to refinance activities by Gulf States and two other investor-owned utilities that, the Cities alleged, violated the antitrust laws and the PUHCA. *Gulf States*, 411 U.S. at 751. The Cities opposed the reauthorization "unless and until Gulf States purges itself of these past violations, or unless the Commission conditions its authorization." *Id.* (quoting the Cities' petition to intervene in the proceedings before the FERC regarding Gulf's application to do business in Louisiana).

75. *Id.* at 759 (citations omitted).

76. *Id.* at 758-59 (emphasis added).

Now that the FERC will assert jurisdiction over reorganizations and sales of utility stock that transfer ownership or control over a utility's jurisdictional facilities, it may examine whether the proposed disposition of facilities would have anticompetitive effects. For instance, if a newly formed holding company forms a separate subsidiary to engage in a joint venture to build a gas pipeline and distribution system, a gas pipeline or gas distribution company competitor may request that the FERC examine potential anticompetitive effects associated with a holding company owning both electric and gas distribution companies in the same relevant geographic market.

The inquiry into possible anticompetitive effects is even more significant in cases involving sales of stock that transfer ownership or control over a utility's facilities, as in the Southern-Savannah Electric transaction. In such cases, the holding company's utility system is expanded by the addition of a new operating utility subsidiary and, hence, a new service area.

The FERC, in merger or consolidation cases, examines three related factors to discern possible anticompetitive effects under section 203 of the Act:

(1) Will the merger bring about a significant added concentration of economic power?

(2) Will it eliminate any meaningful competition which may presently exist between suppliers, such as competition in (a) attracting new industries to their respective service areas, (b) making wholesale sales, or (c) providing economical service?

(3) Will it have an adverse effect on competing energy sources?⁷⁷

Many of these factors are equally relevant to disposition-of-facilities cases because the same "public interest" standard of section 203 applies to both the disposition of facilities and the merger/consolidation cases. Moreover, both types of cases involve a transfer of control or ownership of jurisdictional utility facilities.⁷⁸ Because of the FERC's concern over the transfer of control or ownership of a utility's jurisdictional facilities, utilities and potential intervenors should recognize that the FERC may apply similar consideration of competitive factors to the utility reorganization and sale of stock cases discussed above. The following section examines the FERC's application of its three part test to determine anticompetitive effects in merger or consolidation cases and how these factors could be applied in disposition of facilities cases.

1. Concentration of Economic Power

In one of the most frequently cited FERC merger cases, *Commonwealth*

77. *Commonwealth Edison Co.*, 36 F.P.C. 927, 941 (1966), *aff'd sub nom.*, *Utility Users League v. FPC*, 394 F.2d 16 (7th Cir. 1968), *cert. denied*, 393 U.S. 953 (1968).

78. As the D.C. Circuit has noted, the merger or consolidation clause of section 203 of the Act encompasses *acquisitions* of facilities while the disposition of facilities clause encompasses sales, leases or other dispositions. *Duke Power Co. v. FPC*, 401 F.2d 930, 933 n.28 (D.C. Cir. 1968). Moreover, the court noted that the statutory provision dealing with mergers and consolidations refers to mergers or consolidation of facilities, not corporate entities, and that this clause in section 203 "expressly includes transactions involving less than all of a corporation's assets, as would not ordinarily be the case where a true merger or consolidation of corporations occurs." *Id.*

*Edison Co.*⁷⁹, the Commonwealth Edison Company (Commonwealth) proposed to merge with Central Illinois Electric and Gas Company (Central). Central would then cease to exist as a separate entity.⁸⁰ The FERC noted that there was a legitimate public interest in "the degree of concentration of economic power in American industries and, notwithstanding the safeguard of regulation, even in the electric utility industry."⁸¹ It found that the merger with Commonwealth's much smaller neighbor would not add appreciably to its "command of economic power" or its relative size with respect to other utilities.⁸² Specifically, the FERC noted that in 1965, Commonwealth ranked third among 211 Class A and B private utilities based on either operating revenues or gross utility plant. It noted that the ranking would not change by the merger, which would increase operating revenues of Commonwealth by 7%, net income by 6%, and net utility plant by approximately 5%. The FERC stated that this "relatively modest increase in Commonwealth's size" would permit total integration of facilities and would bring "tangible rate advantages to the customers of both companies."⁸³

In the recent *Utah Power & Light Co.*⁸⁴ case, an administrative law judge denied the proposed merger of Utah Power & Light Company (UP&L) and PacifiCorp Maine, one subsidiary of which was Pacific Power & Light Company (PP&L), in part because of the potential anticompetitive effects of the merger.⁸⁵ As to whether the merger would bring about added concentration of economic power, the judge determined that the merger would result in a level of "dominance and control" over transmission facilities to which suppliers of bulk power outside the region needed access in order to reach purchasers of bulk power in the California-Southern Nevada and Arizona-New Mexico power areas, resulting in enhancement of UP&L's and PP&L's economic power.⁸⁶ The merger of PP&L's and UP&L's generation and transmis-

79. *Commonwealth Edison*, 36 F.P.C. at 927.

80. *Id.*

81. *Id.* at 941.

82. *Id.*

83. *Id.* See also *Northern States Power Co.*, 37 F.E.R.C. ¶ 61,148 (1986). Here, Northern States Power Company (Northern States) applied jointly with Lake Superior District Power Company (Lake Superior) for an order authorizing a merger through the acquisition of securities of Lake Superior by Northern States Power-Wisconsin, which would be the surviving corporate entity. Northern States and Lake Superior were members of an integrated system by virtue of being subsidiaries of Northern States Power-Minnesota which owned all of the outstanding shares of common stock of both entities. Therefore, the FERC concluded that there would be no adverse effect on the availability of electric service for existing and new customers nor would there be any increase in concentration of economic power.

84. *Utah Power & Light Co.*, 43 F.E.R.C. ¶ 63,030 (1988).

85. *Id.* at 65,341-47. Under the Merger Agreement of the Applicants, PacifiCorp Maine and UP&L would be merged into PacifiCorp Oregon. PacifiCorp Oregon would be renamed PacifiCorp after the merger and would be the surviving corporation. *Id.*

86. *Id.* at 65,349, 65,369. The judge noted that section 7 of the Clayton Act prohibits mergers where the likely effects will be to "substantially . . . lessen competition, or to create a monopoly." 15 U.S.C. § 18 (1982). The judge recognized that the first step in assessing the competitive effect of any merger was to define the relevant market, in both product and geographic terms. The judge determined that transmission and bulk power sales were appropriate markets and the appropriate geographic market was the entire area covered by the Western States Coordinating Council (WSCC). *Utah Power*, 43 F.E.R.C. at 65,347. The judge also determined that potential purchasers for bulk power in the WSCC region were concentrated in

sion facilities, the judge determined, would result in a vertically integrated company, "with market power in one stage of production (i.e., transmission of electricity)" that would adversely affect competition in another stage of production (i.e., bulk power sales) with a resultant preclusion of direct competition and increased barriers to entry.⁸⁷ The merger companies would then have "strategic dominance" to restrict bulk power transactions in the relevant western states markets.

In disposition of facilities cases, the FERC may analyze to what extent the disposition will add to a utility's concentration of market power in the relevant geographic and product markets. In such transactions as the one between Savannah Electric and Southern Company, where a utility holding company purchases the stock of a nearby operating utility, intervenors might request that the FERC examine to what extent the acquisition will add to a concentration of the holding company's market power in the relevant market. This issue is relevant even if the operating utility exists as a separate operating utility with its own corporate structure within the holding company, as in the Savannah Electric-Southern case, because, as the FERC noted, the sale of Savannah's stock to Southern transferred control over Savannah's facilities to Southern. Consequently, Southern's market power over the electric power market in the areas Savannah served increased as a result of the sale, as did Southern's market power over the electric power market in the southeast United States.

2. Elimination of Any Meaningful Competition

The FERC will also examine whether a merger will eliminate any meaningful competition that may exist, such as competition to attract new industries to the respective new service areas, competition to make wholesale sales, or competition to provide economical service. In the *Commonwealth Edison* case, for example, the FERC noted that the competing rate structures of each utility were only slightly different. Moreover, although Central's residential rates were slightly lower than Commonwealth's, on an overall basis, if Central billed its customers under Commonwealth's rates, approximately the same revenue would be raised.⁸⁸

As for the ability to attract new industries, the FERC noted that Commonwealth's industrial rates were generally lower. Because Commonwealth's rates were regulated by the Illinois commission and these rates already had been maintained at levels significantly lower than those of Central's, the

the California-Southern Nevada and Arizona-New Mexico power area of the WSCC. *Id.* at 65,359. Non-firm energy purchasers are concentrated in both power areas while firm power purchasers are concentrated in the California-Southern Nevada power area. *Id.*

87. The judge concluded that the merger of UP&L and PP&L would "result in a company with the ability to exercise undue market power in both transmission and bulk power sales, to the detriment of other participants in the markets." *Id.* at 65,347. The judge also rejected the applicants' market power presentation because it did not address adequately the transmission market issues and the significant barriers to entry in both the bulk power and transmission markets. *Id.*

88. *Commonwealth Edison*, 36 F.P.C. at 941; see also *Northern States Power Co.*, 37 F.E.R.C. ¶ 61,148, at 61,353 (1986) (where the FERC noted that substantially similar gas and electric services would continue to be supplied in each applicant's service area).

FERC concluded that the "diminution of competition in this sphere does not appear to be real."⁸⁹

As to the effect on competition, the judge in *Utah Power* determined that the merger would lead to increased concentration in control over transportation arteries that tie the bulk power market in the region together, which would lead to a decrease in efficient operation and interregional competition.⁹⁰ One anticompetitive effect of the merger, the judge noted, was that of the utilities in the Northwest area, only PP&L would gain access through UP&L on a firm basis. Other utilities, the judge noted, would "generally be foreclosed due to the insuperable procedures set forth in Applicants' proposed wheeling policy."⁹¹ The judge further determined that the applicants' proposed wheeling policy would lead to denial of access to essential transmission facilities in the UP&L service territory. Such wheeling policies would not only affect the ability of wholesale suppliers to make sales in the UP&L service area, but it could also affect the level of retail competition.⁹²

In sale-of-stock cases, the FERC may examine whether competition between the acquired and acquiring utilities would be affected by the disposition of facilities. For instance, in *Savannah Electric*, although the issue was not raised, the FERC could have examined whether competition between Savannah and Georgia Power Company, an operating utility subsidiary of Southern located adjacent to Savannah's service territory, for new retail customers' loads would likely be greater if the two were separate, unaffiliated entities than if they were both part of the same system. Moreover, in such a case, the FERC could examine the effect of the sale of the operating utility on competition with other bulk power suppliers in the same state or appropriate relevant market.

3. Adverse Effect on Competing Energy Sources

In *Commonwealth Edison*, the FERC concluded that the merger would not have an adverse effect on any competition which may exist between electric power and other energy sources, such as oil, coal, and natural gas, in the company's service areas. After purchasing Central's gas properties, Commonwealth would continue Central's practice of using excess gas acquired under its existing firm contract as boiler fuel for its steam generators. The FERC determined it was not necessary to consider whether the continued operation of these gas properties or the use of natural gas for boiler fuel was in the public interest in the long run, because it was conditioning its approval of the merger on retaining jurisdiction over Commonwealth's continued operation of these

89. *Commonwealth Edison*, 36 F.P.C. at 941. The FERC noted, in fact, that the ability of the city of Rockford, a Central customer, to attract major industry would be enhanced by the merger. The Commission in *Commonwealth Edison* also focused on whether the merger would "choke off actual or potential areas of competition" between the two utilities as part of its "concentration of economic power" inquiry.

90. *Utah Power*, 43 F.E.R.C. at 65,359.

91. The judge concluded that UP&L had foreclosed other utilities from wholesale power purchases and sales by refusing to transmit power. *Id.* at 65,344, 65,359.

92. *Id.* at 65,345-46.

properties for final disposition at a later date.⁹³

In reorganization cases, the FERC may in the future review the utility's application to determine whether the newly formed holding company plans to establish subsidiaries to engage in other energy businesses. Where a newly formed holding company desires to engage in other energy businesses, potential competitors may wish to assess what effect a new subsidiary formed, for example, will have on the potential competitor's business.

B. Other Factors Considered in Merger or Consolidation Cases

The FERC examines other factors besides the effect on the competitive situation in determining whether a merger or consolidation is consistent with the public interest under section 203 of the Act. These other factors include:

- (1) the effect of the proposed action on the applicant's operating costs and rate levels;
- (2) the contemplated accounting treatment;
- (3) whether the consolidation will impair effective regulation either by the FERC or the appropriate state authority;
- (4) the reasonableness of the purchase price; and
- (5) whether the acquiring utility has coerced the to-be acquired utility into acceptance of the merger.⁹⁴

As noted in section II, the FERC, in the recent disposition of facilities cases, essentially examined the first three factors, but did not review the fourth and fifth listed above. The following subsections discuss these two factors and their potential relevance to disposition-of-facilities cases.

1. Reasonableness of the Purchase Price

The FERC will also examine the reasonableness of the purchase price in merger or consolidation cases. In *Commonwealth Edison*, the FERC noted that based on the respective stock prices on the date of the merger announcement, Commonwealth would pay approximately twenty-four million dollars more than the market value for Central Illinois. The FERC stated, however, that because Central was a "prosperous going concern", Central would not agree to a merger which "did not give its stockholders any immediate benefits."⁹⁵ The FERC concluded that the record indicated that the price was fair and reasonable to the companies and to the respective stockholders.⁹⁶

In cases involving the sale of utility stock, the FERC may also examine

93. *Commonwealth Edison*, 36 F.P.C. at 941-42.

94. *Northern States Power Co.*, 37 F.E.R.C. ¶ 61,148 (1986); *Commonwealth Edison Co.*, 36 F.P.C. 927 (1966); see also *Utah Power & Light Co.*, 41 F.E.R.C. ¶ 61,283, at 61,752-53 (1987).

95. *Commonwealth Edison*, 36 F.P.C. at 937. The FERC noted that the purchase price was agreed upon after hard bargaining by both parties and the offer was based on many factors including market value, earnings, book value, sales and growth prospects considering the economies of scale expected to be achieved by the merger.

96. In *Northern States*, the FERC concluded that Northern States Power-Wisconsin's proposal to pay Northern States Power-Minnesota (which owned all of the stock of Lake Superior) book value for Lake Superior's stock was reasonable. Lake Superior in turn would pay a "relatively small" premium to redeem its outstanding shares of preferred stock. *Northern States*, 37 F.E.R.C. at 61,352-53.

the purchase price for the acquired utility to review whether the purchase price was reasonable. Moreover, the acquired utility's customers could request that the FERC require that any premium paid above book value be passed through to reduce the utility's cost of service.

2. Evidence of Coercion

The FERC also examines, in merger or consolidation cases, whether there is any evidence of coercion by the acquiring utility. In *Commonwealth Edison*, the FERC noted that Commonwealth, as the dominant utility in Northern Illinois, had the ability to inhibit Central's efforts to secure meaningful interconnections that could enhance Central's independent status.⁹⁷ The FERC noted that it would have concluded that the merger was coerced by Commonwealth if it were shown that Commonwealth deprived Central of the opportunity to retain its independence for joint participation in the planning and construction of new generation and distribution facilities or the opportunity to purchase power at a reasonable rate. However, the FERC found no such evidence.

Coercion issues would not seem relevant to reorganization cases because all of the existing or newly formed entities are part of the same corporate structure.⁹⁸ However, in disposition-of-facilities cases involving the sale of stock, the issue could be relevant where a holding company with multiple electric operating entities attempts to acquire an unaffiliated electric utility operating in an adjoining service territory. In such a case, the FERC could examine whether the acquired utility was coerced into the sale of all of its stock to the holding company system.

Thus, utilities and intervenors should recognize that the FERC may examine potential anticompetitive effects of proposed dispositions of facilities and plan their case strategies accordingly.

IV. IMPLICATIONS OF THE FERC'S ASSERTION OF JURISDICTION AND ITS PUBLIC INTEREST REVIEW FOR UTILITIES, CUSTOMERS, AND OTHER INTERESTED PARTIES

As the previous discussion shows, when the FERC determines that a proposed reorganization or sale of utility stock involves a transfer of ownership or control over jurisdictional facilities, it will assert jurisdiction under section 203. Utility applicants, therefore, must be prepared to demonstrate that the proposed disposition of facilities is consistent with the public interest.

97. *Commonwealth Edison*, 36 F.P.C. at 940.

98. The FERC noted that relationships between Commonwealth and Central since the time Central was established as an independent company "whose principle electric division was almost completely surrounded by Commonwealth" did not demonstrate a pattern of close coordination, and there was no evidence to conclude that Commonwealth refused to cooperate with Central on reasonable terms over those years. In fact, the FERC noted that Central did not show any interest in establishing more than nominal emergency interconnection with its larger neighbor. The FERC also noted that the record demonstrated that Central was permitted to utilize the interconnections with Commonwealth in order to reduce Central's reserve requirements first to 20% and then to 12%, which is the same reserve margin that Commonwealth uses.

Specifically, utilities must be prepared to demonstrate that the public interest will be furthered by demonstrating the advantages of the transaction to their ratepayers and shareholders. They must also demonstrate a benefit to the financial structure of the utilities. A utility must be prepared to state precisely why it desires the disposition of facilities and what are its objectives. The utility must submit detailed accounting data and cost allocation plans designed to prevent cross-subsidization between the holding company and the utility or between the utility and other affiliates. Further, a utility should be able to quantify any cost savings that it claims will result from a reorganization and show how the savings will benefit its ratepayers. In addition, utility applicants should be prepared to discuss the effects of the proposed transaction on the other factors that the FERC has the discretion to consider as discussed in section III above.

Because the FERC has asserted jurisdiction in these cases, customers, competitors, and other interested persons now have an opportunity to intervene in the proceeding and comment upon the utility's application. In order to intervene, one must demonstrate that it has or represents an interest which may be directly affected by the outcome of the proceeding, including an interest as a consumer, competitor, customer, or security holder, or that one's participation is in the public interest.⁹⁹

The FERC has ruled in section 203 cases that it will review the effects of the transaction on retail rate levels in determining whether the transaction is consistent with the public interest.¹⁰⁰ Consequently, the FERC has granted retail customers of utilities, such as large industrial firms, the right to intervene when those customers can demonstrate that they have an interest in the proceeding and that their participation is in the public interest.¹⁰¹ For the same reasons, state agencies representing retail consumer groups have also been granted intervention.

The FERC's grant of intervention does not mean that the FERC is required to hold an evidentiary hearing. Evidentiary hearings are not required where there is no dispute about the facts, and an agency proceeding involves only questions of law.¹⁰² In those cases, the FERC may grant petitions to intervene and then rule on the basis of the legal arguments raised in the petitions or supporting briefs. One court has likened this procedure to disposition of cases by summary judgment procedures under which courts decide cases without evidentiary hearings because only legal issues are involved and there are "no bona fide disputed questions of fact."¹⁰³

We now will discuss the arguments made by intervenors in the recent "disposition of facilities" cases and the FERC's treatment of the arguments.¹⁰⁴

99. 18 C.F.R. § 385.214(b)(2)(ii-iii) (1988).

100. *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 n. 4 (D.C. Cir. 1969), *cert. denied*, 422 U.S. 1026 (1975).

101. *See* Public Serv. Co. of Ind., 42 F.E.R.C. ¶ 61,243, at 61,785 (1988).

102. *Id.*; *see also* *Commonwealth Edison*, 36 F.P.C. 927.

103. *Citizens for Allegan County*, 414 F.2d at 1128.

104. No persons intervened in the proceeding involving the sale of the Savannah Electric and Power Company stock to the Southern Company.

Although the FERC has only recently asserted jurisdiction over corporation reorganizations involving stock transfers, customers who have intervened in two of the four proceedings have been unable to convince the FERC that a hearing was necessary. For instance, in *Public Service Company of Indiana*, both the Office of the Indiana Utility Consumer Counselor (Consumer Counselor) and Nucor Corporation (Nucor), an industrial customer, intervened.¹⁰⁵ The Consumer Counselor argued that there were insufficient data to determine how the Public Service Company of Indiana (PSI) would deal with the costs associated with the reorganization. Also, the Consumer Counselor argued that there was no provision for recognizing the increased risks associated with non-regulated ventures that create an increased financing cost and there was no provision for recognizing the benefit of goodwill contributed by PSI to the new holding company and the non-regulated venture. The Consumer Counselor also argued that the application did not specify how the holding company would generate equity in the initial stages and that there was an overall lack of direction for future ventures by the holding company.¹⁰⁶

Nucor argued that the cost of electricity could increase as a result of the reorganization. It noted that an increase in cost of service or impairment of service reliability would result if PSI's non-utility ventures were underwritten by PSI's utility revenues. Moreover, if the non-utility investment proved unsuccessful, the reliability of utility service might be jeopardized.¹⁰⁷ The FERC concluded that a hearing was not necessary, since neither Nucor nor the Consumer Counselor identified "issues of fact or allegations of specific harm", although both expressed "general concerns about potential rate and service reliability impacts and the possibility of additional risks that may result from the formation of a holding company."¹⁰⁸

The FERC reached a similar conclusion in the *Northern Indiana* case. Consistent with its arguments in the PSI case, the Consumer Counselor argued that the utility's application lacked (1) sufficient data to determine how Northern Indiana would deal with the cost of reorganization as well as the transfer of experienced personnel, (2) adequate provision for Northern Indiana's recognition of the increased risk and financial costs associated with non-regulated ventures, and (3) adequate provision to recognize Northern Indiana's goodwill which would benefit the new holding company in non-regulated ventures. The Consumer Counselor also argued that the reorganization would remove the more lucrative gas business from regulation, and that the application did not adequately indicate how the holding company would generate equity in its initial stages.¹⁰⁹

The industrial intervenor, Bethlehem Steel Corporation (Bethlehem), a large retail gas and electric customer of Northern Indiana, did not protest the application or request a hearing. It did express concern over the lack of specificity in Northern Indiana's filing regarding a change in Northern Indiana's

105. *Public Serv. Co. of Ind.*, 42 F.E.R.C. ¶ 61,243 (1988).

106. *Id.* at 61,783-84.

107. *Id.* at 61,784.

108. *Id.* at 61,785.

109. *Northern Ind. Pub. Serv. Co.*, 42 F.E.R.C. ¶ 61,245, at 61,790 (1988).

operations, affiliate relations, and the establishment of new corporate entities.¹¹⁰

As to the Consumer Counselor's concern about the transfer of experienced personnel, the FERC stated that the intervenor had not demonstrated why the FERC should restrict the placement of employees in a new corporate structure and that the FERC concluded it was consistent with the public interest for Northern Indiana to retain control over the placement of employees and the duties of officers and directors.¹¹¹ The FERC was also not persuaded by the Consumer Counselor's allegation that the utility would not be adequately protected from "the risk inherent in any future non-regulated activities of the holding company."¹¹²

Regarding how the utility's customers would be protected, the FERC stated that in wholesale rate cases, it had discretion to consider the effects of Northern Indiana's diversification efforts upon its rates. In such a case, the FERC may decide not to allow the effects of imprudent diversification efforts to be passed through to Northern Indiana's wholesale ratepayers. Moreover, the FERC may decide not to adopt Northern Indiana's proposed debt/equity ratio or its proposed common equity costs in establishing a just and reasonable common equity return for Northern Indiana in subsequent ratemaking cases.¹¹³ The FERC further noted that any improper allocations of costs could be corrected pursuant to a FERC and/or state commission audit or in a wholesale or retail rate proceeding. Consequently, the FERC did not believe there were any issues of fact or specific harm identified by the Consumer's Counselor to justify a hearing.

Utilities, intervenors, and other interested persons should also recognize that the FERC could impose other terms and conditions after the disposition of facilities is consummated. As noted above, the FERC may from time to time supplement its order by imposing new terms and conditions or revising existing ones "for good cause shown" as the FERC "may find necessary or appropriate."¹¹⁴ Thus, utilities should be aware that if interested persons determine, after the transaction has been approved and consummated, that they are being damaged as a result of the reorganization or sale of utility stock, such persons may request that the FERC tighten up or enforce conditions or impose new ones.

V. CONCLUSION

The FERC has recently expanded its view of what constitutes a "disposition of facilities" subject to its jurisdiction under section 203 of the FPA. In the past, the FERC limited its jurisdiction to cases involving transfers of title to or sales of jurisdictional facilities. In a series of cases involving utility reorganizations and sale of utility stock, the FERC has expanded its previous

110. *Id.*

111. *Id.* at 61,792.

112. *Id.*

113. *Id.* See West Va. Pub. Serv. Comm'n, 40 F.E.R.C. ¶ 61,117, at 61,316-18 (1987); South Carolina Generating Co., 40 F.E.R.C. ¶ 61,116, at 61,310-12 (1987).

114. *Northern Indiana*, 42 F.E.R.C. at 61,792.

interpretation of "disposition of facilities" to include stock transactions which result in a transfer of ownership or control over a utility or its jurisdictional facilities.

Utilities must be prepared to demonstrate that the proposed disposition of facilities and its associated effects are consistent with the public interest. Utilities must also recognize that customers and other interested parties now have an opportunity to intervene in the proceedings and comment upon the utility's application, argue about whether the proposed disposition of facilities is "consistent with the public interest," and propose that the approval be denied or that certain conditions be imposed on the approval.

The public interest factors that the FERC has considered in the recent reorganization and sale of utility stock cases include the effect the transaction may have on rates, the reliability of service and future regulation by the FERC and the state commissions, the accounting treatment to be used and whether any cross-subsidization of nonutility activities with utility revenue will occur. The FERC also has the discretion to consider other relevant factors in its public interest determination that it has examined in other section 203 cases. One other factor includes whether any anticompetitive effects may result if the transaction is approved. Such anticompetitive factors the Commission could review include to what extent the transaction will affect the degree of concentration of economic power, whether meaningful competition would be eliminated, and what effect the disposition would have on competing energy sources. Finally, the FERC could also consider the reasonableness of the purchase price and any evidence of coercion by the acquiring utility or holding company.

AUTHOR'S AFTERWORD: Since the time this Article was sent to the printer, the Commission issued its opinion in *Utah Power & Light Co.*,¹¹⁵ that affirmed in part and reversed in part the Administrative Law Judge's initial decision.¹¹⁶ The Commission affirmed the initial decision with respect to the finding that the proposed merger of Utah Power & Light's (UP&L) transmission facilities with Pacific Power & Light's (PP&L) generation and transmission facilities would likely result in a substantial lessening of competition in the relevant product and geographic markets by enhancing both utilities' ability to exercise monopoly power. The Commission therefore concluded that the potential adverse effect on competition that would result from the merger is inconsistent with the underlying policies of the antitrust laws.¹¹⁷

The Commission, however, approved the merger subject to certain terms and conditions established to remedy the potential anti-competitive effects, thereby reversing the judge's denial of the proposed merger. The commission determined that it has authority under section 203(b) of the FPA to impose terms and conditions designed to remedy the merger's likely adverse effect on

115. *Utah Power & Light Co.*, No. EC88-2-000 (Oct. 26, 1988).

116. See *supra* notes 84-87, 90-92 and accompanying text.

117. *Utah Power* at 20, 70.

competition.¹¹⁸ The conditions included imposition of an absolute obligation of the merged company to provide firm wholesale transmission service at cost-based rates to any utility requesting such services. In addition, during a five-year transitional period, a portion of the transmission facilities of the merged company's transmission system would be set aside for use by third parties.¹¹⁹

118. *Id.* at 25.

119. *Id.* at 38.