

# TOWARD AN SEC-FERC MEMORANDUM OF UNDERSTANDING

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## I. INTRODUCTION

The Securities and Exchange Commission (SEC) is under fire. For the past year, the Congress has criticized its administration of the Public Utility Holding Company Act of 1935 (PUHCA).<sup>1</sup> The criticism might persuade the Congress to transfer the administration of PUHCA from the SEC to the Federal Energy Regulatory Commission (FERC).

In March 1993, Senator Dale Bumpers (D. Arkansas) introduced the Multi-State Utility Company Consumer Protection Act of 1993.<sup>2</sup> Section 3 of S. 544 would transfer to, and vest in, the FERC all functions of the SEC under PUHCA.<sup>3</sup> When he introduced S. 544, Senator Bumpers observed that it "would consolidate utility holding company regulation by transferring regulatory authority over PUHCA from the SEC to FERC, providing a more efficient regulatory system and greater protection for holding company consumers."<sup>4</sup>

The FERC, it appears, would be quite able to include PUHCA among its responsibilities, which include, in particular, the regulation of electric public utilities under the Federal Power Act (FPA).<sup>5</sup> In a congressional hearing on S. 544, conducted in May 1993 before the Senate Committee on Energy and Natural Resources,<sup>6</sup> the Chair of the FERC, Elizabeth Anne Moler, expressed no opposition to the possible transfer from the SEC to the FERC of PUHCA.<sup>7</sup> "Ultimately it comes down to a policy judgment for the Congress to make whether the functions should be transferred."<sup>8</sup>

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1. See generally 15 U.S.C. §§ 79-79z-6 (1988).

2. S. 544, 103rd Cong., 1st Sess. (1993), reprinted in 139 CONG. REC. S2640 (daily ed. Mar. 10, 1993).

3. S. 544, *supra* note 2, § 3. Section 3 was included in an amendment to S. 544, introduced by Senator Bumpers. 139 CONG. REC. at S2683.

4. 139 CONG. REC. at S2640 (daily ed. Mar. 10, 1993).

5. See generally 16 U.S.C. §§ 791-828c (1988). Under part I of the Federal Power Act (FPA), the FERC regulates the development of hydroelectric projects. *Id.* §§ 791-823b. Under part II, the FERC regulates electric public utilities engaged in interstate commerce. *Id.* §§ 824-824k.

6. *Multi-state Utility Company Consumer Protection Act of 1993: Hearing Before the Senate Comm. on Energy and Natural Resources*, 103rd Cong., 1st Sess. (1993)(hereinafter *Senate Hearing*).

7. *Id.* at 11-17 (prepared statement of Hon. Elizabeth Anne Moler, Chair, FERC).

8. *Id.* at 11.

The SEC has expressed no opposition to the possible removal of PUHCA from its responsibilities, which include—perhaps first and foremost—the Securities Act of 1933,<sup>9</sup> the Securities Exchange Act of 1934,<sup>10</sup> and the Investment Company Act of 1940.<sup>11</sup> The SEC even failed to send a representative to the May 1993 congressional hearing.<sup>12</sup> However, in a prepared statement submitted for the hearing record, it declined to state a position on section 3 of S. 544 until a new SEC Chairman was appointed.<sup>13</sup>

Perhaps the SEC ultimately would have no objection to the transfer of PUHCA to the FERC. In the past, it has supported the transfer of some responsibilities under PUHCA to the FERC.<sup>14</sup> Indeed, in the past it has supported the repeal of PUHCA.<sup>15</sup> The SEC is not commonly known for its regulation of public utilities.<sup>16</sup>

The congressional criticism of the SEC for its administration of PUHCA might be valid. In addition, perhaps the SEC has little interest in PUHCA relative to the Securities Act of 1933 or the Securities Exchange Act of 1934. Nonetheless, the transfer of PUHCA from the SEC to the FERC is not the ideal solution. For reasons discussed herein, the SEC should continue to administer PUHCA. However, it should administer PUHCA with increased cooperation with the FERC. The vehicle for increased cooperation should be the vehicle with which other federal administrative agencies resolve a conflict in jurisdiction with sister agencies—the Memorandum of Understanding.

Section II of this article will discuss the background relationship of PUHCA, under which the SEC regulates the securities transactions of public utilities, to the Federal Power Act, under which the FERC regulates the rates of public utilities. Section III of the article will discuss the case, which resulted in a November 1990 decision of the Supreme Court,<sup>17</sup> that recently has highlighted the conflict in jurisdiction between the SEC and the FERC relative to the regulation of public utilities. Section IV will discuss the two

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9. See generally 15 U.S.C. §§ 77a-77aa (1988).

10. *Id.* §§ 78a-78ll.

11. *Id.* §§ 80a-1 to 80a-64.

12. Senator Bumpers observed that "the SEC, which has 22 employees in its public utility division, has chosen to snub this committee and has not even sent a witness to the hearing." *Senate Hearing, supra* note 6, at 7.

13. "[W]e believe that it would be more appropriate to defer the expression of our views on such a major change in responsibilities until confirmation of a new Chairman." *Senate Hearing, supra* note 6, at 138 (statement of SEC).

14. See, e.g., *Department of Energy Organization Act: Hearing Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 797 (1977); *Combination Utility Companies: Hearings on S. 403 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 92nd Cong., 1st Sess. 502 (1971).

15. See, e.g., *The Public Utility Holding Company Act of 1935: Hearings on H.R. 5220, H.R. 5465, and H.R. 6134 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 97th Cong., 2nd Sess. 582 (1982); GENERAL ACCOUNTING OFFICE, ANALYSIS OF SEC RECOMMENDATIONS TO REPEAL THE UTILITY HOLDING COMPANY ACT (1983).

16. When he introduced S. 544, Senator Bumpers questioned "how many Senators asked themselves last year during the debate over the Energy Policy Act, what the SEC was doing regulating utility companies." 139 CONG. REC. at S2639 (daily ed. Mar. 10, 1993).

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

immediate responses to that conflict—a proposed amendment to a FERC regulation and S. 544—and the reasons that neither response is an ideal solution. In particular, it will discuss a recent electric utility acquisition that signals the potential for conflicts in jurisdiction between the SEC and the FERC in the future. Section V will propose an alternative to those immediate responses—the Memorandum of Understanding. It will discuss the limited experience of the FERC as well as the experience of other federal administrative agencies with this vehicle for the resolution of conflicts in jurisdiction. The Appendix to the article will propose a draft Memorandum of Understanding between the SEC and the FERC.

## II. BACKGROUND: PUHCA AND THE FEDERAL POWER ACT

### A. *Public Utility Act of 1935*

In 1935, Congress enacted the Public Utility Act.<sup>18</sup> Title I of the Public Utility Act enacted PUHCA.<sup>19</sup> Title II of the Public Utility Act amended the Federal Water Power Act of 1921,<sup>20</sup> which had established the Federal Power Commission (the Commission) to regulate the development of hydroelectric projects,<sup>21</sup> through the addition of two new parts.<sup>22</sup> The first new part, which became part II of the FPA,<sup>23</sup> authorized the Commission to regulate electric public utilities engaged in interstate commerce.<sup>24</sup> The second new part, which became part III of the FPA, provided numerous procedural and administrative statutes applicable to Commission regulation of hydroelectric projects and electric public utilities.<sup>25</sup> The Federal Water Power Act became part I of the amended legislation.

### B. *Public Utility Holding Company Act of 1935*

PUHCA contains an extensive and complex regime for SEC regulation of public utility holding companies.<sup>26</sup> The purpose of the regime is to prevent a recurrence of the financial abuses for which public utilities, and their holding companies, were notorious in the two decades prior to enactment of PUHCA.<sup>27</sup>

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

19. *Id.* § 33, 49 Stat. at 838.

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

21. *Id.* § 1, 41 Stat. at 1063.

22. Pub. L. No. 74-333, § 213, 49 Stat. at 847.

23. *Id.* The amended legislation was entitled the FPA. 16 U.S.C. § 791a (1988).

24. 16 U.S.C. §§ 791-823a (1988).

25. *Id.* §§ 825-825u.

26. The constitutionality of the regime was upheld in *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938).

27. 15 U.S.C. § 79a(c) (1988). “The purpose of [PUHCA] was to eliminate the evils then existing in public utility holding companies, and to protect the public from the abuses inherent in them as they were then constituted.” *American Natural Gas Co. v. United States*, 279 F.2d 220, 224 (Ct.Cl. 1960), *cert. denied*, 364 U.S. 900 (1961). “The object sought by [PUHCA] is the elimination of abuses in the public utility holding company field.” *North Am. Co. v. SEC*, 133 F.2d 148, 154 (2nd Cir. 1943), *aff’d*, 327 U.S. 686 (1946). The abuses that PUHCA is intended to prevent are enumerated therein. 15 U.S.C. § 79a(b) (1988). Those abuses also are detailed in the extensive legislative history of PUHCA.

The extensive and complex regime of PUHCA is applicable to public utility holding companies—and their public utility subsidiaries—that otherwise are ineligible for an exemption under section 3 thereof.<sup>28</sup> PUHCA subjects public utility holding companies that have not qualified for an exemption to numerous requirements. First, PUHCA requires the registration of those holding companies with the SEC.<sup>29</sup> In December 1992, there were fourteen registered holding companies.<sup>30</sup> Second, PUHCA requires the SEC to approve in advance the sale of securities,<sup>31</sup> as well as the acquisition of securities,<sup>32</sup> by registered holding companies.

Third, it requires the SEC to approve in advance specified financial transactions between registered holding companies and their subsidiaries.<sup>33</sup> It also requires the SEC to approve in advance service, sales, and construction contracts between subsidiaries within the same registered holding company system.<sup>34</sup> Fourth, PUHCA requires the operations of registered holding company systems to be limited to single and “integrated” public utility systems and to “such other businesses as are reasonably incidental, or economically necessary or appropriate, to the operations of such integrated” systems.<sup>35</sup> Thus, PUHCA restricts the diversification of registered holding companies into non-utility subsidiaries. Finally, PUHCA requires registered holding companies, which are subject to SEC investigation,<sup>36</sup> to maintain SEC-prescribed accounts and records, which are subject to SEC audit.<sup>37</sup>

Congress wrote five specific exemptions from the requirements of PUHCA into the legislation.<sup>38</sup> In addition, it authorized the SEC to exempt through regulation entire classes or categories of public utility holding companies “if and to the extent that [the SEC] deems the exemp-

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*See, e.g.,* U.S. FEDERAL TRADE COMMISSION, UTILITY CORPORATIONS, S. DOC. NO. 92, 74th Cong., 1st Sess. (1935); REPORT OF NATIONAL POWER POLICY COMMITTEE, H.R. DOC. NO. 137, 74th Cong., 1st Sess. (1935); H.R. REP. NO. 827, 74th Cong., 1st Sess. (1935).

28. 15 U.S.C. § 79c (1988).

29. *Id.* § 79e.

30. Allegheny Power System, Inc.; American Electric Power Co., Inc.; Central and South West Corp.; Columbia Gas System, Inc.; Consolidated Natural Gas Co.; Eastern Utilities Associates; Energy Corp.; General Public Utilities Corp.; National Fuel Gas Co.; New England Electric System; Northeast Utilities; Philadelphia Electric Power Co.; Southern Co.; and Unitil Corp. *See generally* SEC, HOLDING COMPANIES REGISTERED UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 (1992)(hereinafter REGISTERED HOLDING COMPANIES). In contrast, in November 1993, there were over 100 holding companies that had qualified for an exemption under section 3 of PUHCA. *See generally* SEC, HOLDING COMPANIES EXEMPT FROM THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 (1993).

31. 15 U.S.C. §§ 79f-79g (1988).

32. *Id.* §§ 79i-79j.

33. *Id.* § 79l.

34. *Id.* § 79m.

35. *Id.* § 79k(b)(1).

36. *Id.* § 79r.

37. *Id.* § 79o.

38. *Id.* § 79c(a). For example, PUHCA is inapplicable if “[a] holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto.” *Id.* § 79c(a)(2).

tion necessary or appropriate in the public interest or for the protection of investors or consumers. . . .”<sup>39</sup> Throughout PUHCA the SEC is directed to regulate public utilities “for the protection of investors or consumers.”<sup>40</sup>

Because PUHCA is applicable to public utility holding companies as well as their public utility subsidiaries, the SEC is directly involved in regulation of electric (and gas) public utilities. For example, under section 13 of PUHCA, the SEC regulates service, sales, and construction contracts between registered holding companies and their public utility (or non-utility) subsidiaries as well as between public utility (or non-utility) subsidiaries within the same registered holding company system.<sup>41</sup> Thus, the SEC would regulate sales contracts for coal between electric public utilities and coal companies within the same registered holding company system. In particular, section 13(b) requires the SEC to ensure that “such contracts are performed economically and efficiently for the benefit of . . . companies [within the same holding company systems] at cost, fairly and equitably allocated. . . .”<sup>42</sup>

Numerous SEC regulations implement section 13 of PUHCA.<sup>43</sup> In particular, Rule 90 promulgated under PUHCA prohibits, inter alia, all service, sales, and construction contracts between public utility (or non-utility) subsidiaries within the same registered holding company system, “at more than cost as determined pursuant to [Rule 91]. . . .”<sup>44</sup> Rule 91 provides that a contract shall, for purposes of section 13, be “at not more than cost if the price (taking into account all charges) does not exceed a fair and equitable allocation of expenses (including the price paid for goods) plus reasonable compensation for necessary capital procured through the issuance of capital stock. . . .”<sup>45</sup> There is one qualification to this requirement. Rule 92 provides that no service, sales, and construction contract between public utility (or non-utility) subsidiaries within the same registered holding company system shall be “at a price which exceeds the price at which the purchaser might reasonably be expected to obtain comparable goods elsewhere. . . .”<sup>46</sup>

### C. Federal Power Act

Part II of the FPA establishes an extensive regime for federal regulation of electric public utilities engaged in interstate commerce. In 1977, the

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39. *Id.* § 79c(d).

40. *See, e.g., id.* § 79e (registration of holding companies); *id.* § 79g (declarations by registered companies in respect to security transactions); *id.* § 79j (approval of acquisition of securities and utility assets and other interests); *id.* § 79k (simplification of holding companies).

41. 15 U.S.C. § 79m.

42. *Id.* § 79m(b).

43. *See generally* 17 C.F.R. §§ 250.80-95 (1935).

44. *Id.* § 250.90(a)(2).

45. *Id.* § 250.91(a). Thus the SEC, under section 13 of PUHCA and Rules 90 and 91 promulgated thereunder, authorizes sales contracts for coal between electric public utilities and coal companies within the same registered holding company system if the sales price “does not exceed a fair and equitable allocation of expenses . . . plus reasonable compensation for necessary capital. . . .” *Id.*

46. *Id.* § 250.92(a).

Department of Energy Organization Act, inter alia, abolished the Commission, established the FERC, and transferred the responsibilities of the former under part II of the FPA to the latter.<sup>47</sup> The enactment of part II was the result of a gradual increase in the involvement of electric utilities in interstate commerce as well as a U.S. Supreme Court decision, *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*,<sup>48</sup> which held that the states, through their state public utility commissions, had no jurisdiction to regulate the interstate wholesale transactions of electric public utilities.<sup>49</sup>

Thus the principal purpose of part II is to provide for federal regulation of the sale and transmission in interstate commerce of wholesale electric power.<sup>50</sup> Section 205 provides that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy . . . shall be just and reasonable. . . ."<sup>51</sup> The statute prohibits discrimination in electric power rates and charges as well as unreasonable differences in rates and charges between different classes of electric power service.<sup>52</sup> Finally, section 205 requires electric public utilities to maintain schedules of their rates and charges with the FERC, which is authorized to review the reasonableness of those rates and charges in administrative hearings.<sup>53</sup> The FERC receives several hundred modifications to electric power rate schedules each year,<sup>54</sup> in which time it also conducts numerous administrative hearings on such schedules.<sup>55</sup>

Section 206 authorizes the FERC, if it determines after an administrative hearing that an electric power rate schedule is unjust or unreasonable, to "determine the just and reasonable rate . . . to be thereafter observed and in force, and [to] fix the same by order."<sup>56</sup> Thus, the FERC is authorized to revise electric power rate schedules, which establish the charges of electric public utilities for wholesale electric power transmitted and sold in interstate commerce. In this regard, section 206 is the cornerstone of part II of the FPA.

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47. 42 U.S.C. § 7172(a) (1988).

48. 273 U.S. 83 (1927).

49. In *Attleboro*, the Court invalidated under the Commerce Clause an attempt on the part of the Rhode Island Public Utilities Commission to regulate the interstate wholesale rates of Narragansett Electric Lighting Co. The Court held that its regulation of interstate wholesale rates, in contrast to interstate retail rates, would pose a direct burden on interstate commerce. *Id.* at 89-90. See generally *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983) (extended discussion and explanation of *Attleboro*).

50. *Gulf States Util. Co. v. FPC*, 411 U.S. 747 (1973); *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61 (1943). In 1978, the PURPA amended title II to expand its purpose to the promotion of cogeneration and small power production. 16 U.S.C. § 824a-3 (1988).

51. *Id.* § 824d(a).

52. *Id.* § 824d(b).

53. *Id.* §§ 824d(c)-(e).

54. See generally 18 C.F.R. Part 35 (rate schedules).

55. See generally *id.* Part 385 (rules of practice for administrative hearings).

56. 16 U.S.C. § 824e(a) (1988).

The concern, reflected throughout part II, with just and reasonable rates and charges for the sale and transmission in interstate commerce of wholesale electric power is synonymous with the public interest. Section 201 states that the transmission and sale of electric power “is affected with a public interest” and that the extensive regime established under Part II for federal regulation of electric public utilities engaged in interstate commerce “is necessary in the public interest.”<sup>57</sup> The legal standard embodied in part II, therefore, is quite different from the legal standard embodied in PUHCA. Under PUHCA, the SEC is directed to regulate public utilities in the interest of “investors or consumers.” Under part II, the FERC is directed to regulate electric public utilities in the interest of the public alone and not of the public utilities as well. “That the purpose of the power given the [FERC] by (section) 206(a) is the protection of the public interest, *as distinguished from the private interests of the utilities*, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed ‘is necessary in the public interest.’”<sup>58</sup>

#### *D. Section 318 of the Federal Power Act*

Part III of the FPA provides numerous procedural and administrative statutes applicable to FERC regulation of hydroelectric projects and electric public utilities.<sup>59</sup> It also addresses the potential for conflicts between, on the one hand, SEC regulation, under PUHCA, of registered public utility holding companies and their public utility subsidiaries and, on the other hand, FERC regulation, under part II, of the sale and transmission in interstate commerce of wholesale electric power. Section 318 provides, in general, that a conflict of jurisdiction that arises between the SEC and the FERC in connection with several specific matters relative to electric public utilities is to be resolved through FERC deference to the SEC:

If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing or reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of [PUHCA] or of a rule, regulation, or order thereunder and to a requirement of [the Federal Power Act] or of a rule, regulation, or order thereunder, the requirement of [PUHCA] shall apply to such person, and such person shall not be subject to the requirement of [the Federal Power Act], or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the [SEC] has exempted such person from such requirement of [PUHCA], in which case the requirements of [the Federal Power Act] shall apply to such person.<sup>60</sup>

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57. *Id.* § 824(a).

58. *Federal Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956). In its review of a contract for the sale of electric power, the Court observed that “it is clear that a contract may not be said to be either ‘unjust’ or ‘unreasonable’ simply because it is unprofitable to the public utility.” *Id.* at 355.

59. 16 U.S.C. §§ 825-825u (1988).

60. *Id.* § 825q.

Thus, section 318 contemplates, in effect, that the SEC shall be the "lead" administrative agency with respect to several specific matters. In particular, it provides for SEC pre-emption of FERC requirements when a conflict in jurisdiction arises with SEC requirements.

It is apparent that, from the start of and throughout its consideration of and debate on the Public Utility Act, Congress anticipated the potential for conflicts of jurisdiction between the SEC and the Commission in their respective regulation of electric public utilities. A variation of the present section 318 was included in the original legislation introduced in the Senate in February 1935.<sup>61</sup> Similarly, the original legislation introduced in the House of Representatives in February 1935 also included a variation of the present section 318.<sup>62</sup> A subsequent bill, S. 2796, introduced in the Senate in May 1935, included a provision relative to conflicts in jurisdiction that was almost identical to the provision introduced in February 1935.<sup>63</sup> In a report on S. 2796, the Senate Committee on Interstate Commerce emphasized that "in case of conflict between the provisions of the Federal Power Act and [PUHCA], the requirements of the latter act shall apply. . . ."<sup>64</sup> The full Senate approved S. 2796 on June 11, 1935.<sup>65</sup>

The House Committee on Interstate and Foreign Commerce had conducted numerous hearings on its own original version of the Public Utility Act.<sup>66</sup> Nonetheless, S. 2796 was introduced in the House in June 1935. The House report on the legislation also emphasized that "in case of conflict between the provisions of the amended FPA and [PUHCA], the requirements of the latter act, and not those of the Power Act, shall apply. . . ."<sup>67</sup> The full House approved the legislation on July 2.<sup>68</sup> The Senate agreed to a minor modification to the legislation relative to conflicts of jurisdiction in conference committee in August 1935.<sup>69</sup> The Public Utility Act was enacted into law on August 26, 1935.<sup>70</sup>

The inclusion of section 318 in the legislation is a tribute to the foresight of Congress. Fifty years after its enactment, however, the statute failed to resolve, in the expeditious fashion in which it was expected to perform, an almost inevitable conflict between SEC and FERC regulation of electric public utilities. This particular conflict, which resulted in a November 1990 decision of the Supreme Court,<sup>71</sup> has highlighted the potential for conflicts between the SEC and the FERC, which potential has prompted the introduction of legislation to transfer the administration of

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61. S. 1725, 74th Cong., 1st Sess., § 213 (1935)(to be codified at section 317 Federal Power Act).

62. H.R. 5423, 74th Cong., 1st Sess., § 213 (1935)(to be codified at section 317 Federal Power Act).

63. S. 2796, 74th Cong., 1st Sess., § 212 (1935)(to be codified at section 316 Federal Power Act).

64. S. REP. NO. 621, 74th Cong., 1st Sess. 54 (1935).

65. 79 CONG. REC. 9040-65 (1935).

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

67. H.R. REP. NO. 1318, 74th Cong., 1st Sess. 35 (1935).

68. 79 CONG. REC. at 10,640.

69. H.R. REP. NO. 1903, 74th Cong., 1st Sess. 75 (1935).

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

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



PUHCA from the SEC to the FERC. This particular conflict is discussed in section III of this article.

In addition, several significant electric utility acquisitions are almost certain to occur in the next few years.<sup>72</sup> In a recent precedent, however, which resulted in a July 1992 decision of the U.S. Court of Appeals for the D.C. Circuit,<sup>73</sup> it appeared that the intent of section 318 was compromised and that the FERC, and not the SEC, was the “lead” administrative agency in an electric utility acquisition. The result reached in this precedent, in which there was no clear “lead” administrative agency, signals the potential for conflicts in jurisdiction in the future relative to electric utility acquisitions. This precedent is discussed in section IV of this article.

### III. THE OHIO POWER DECISIONS

Among the largest public utility holding companies registered with the SEC is American Electric Power Company (American Electric), which owns thirteen electric public utility subsidiaries throughout Indiana, Kentucky, New York, Ohio, West Virginia, and Virginia.<sup>74</sup> Those thirteen electric public utilities in turn own two dozen electric power plants, the bulk of them coal-fired, that generate in excess of 24,000 megawatts of electric power.<sup>75</sup> Among the thirteen electric public utilities of American Electric is Ohio Power Company (Ohio Power), which owns and operates several large coal-fired electric power plants. To facilitate the acquisition, and minimize the cost, of the coal required to fuel those plants, Ohio Power owns four coal companies in Ohio and West Virginia, Central Coal Company, Central Ohio Coal Company, Southern Ohio Coal Company, and Windsor Coal Company.<sup>76</sup>

Ohio Power incorporated Southern Ohio Coal Company (Ohio Coal) in December 1971. Pursuant to sections 9 and 10 of PUHCA,<sup>77</sup> the SEC authorized Ohio Power to form Ohio Coal.<sup>78</sup> The order contemplated that, pursuant to section 13 of PUHCA,<sup>79</sup> the coal that Ohio Coal developed and mined would be sold to Ohio Power for its coal-fired electric power plants. This order provided that “[t]he charges for coal by [Ohio Coal] will be based on an amount equal to the actual cost of [Ohio Coal] in developing the reserve and mining such coal, including all appropriate overheads and interest charges and including a reasonable rate of return on Ohio Power’s equity investment in [Ohio Coal].”<sup>80</sup>

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72. See, e.g., Charles M. Studness, *Electric Utility Mergers More Likely As Competition Spreads*, PUB. UTIL. FORT., Feb. 15, 1993, at 43.

73. *City of Holyoke Gas & Elec. Dep’t v. SEC*, 972 F.2d 358 (1992).

74. REGISTERED HOLDING COMPANIES, *supra* note 30, at 30.

75. REGISTERED HOLDING COMPANIES, *supra* note 30, at 31.

76. REGISTERED HOLDING COMPANIES, *supra* note 30, at 30.

77. 15 U.S.C. §§ 79i-79j (1988).

78. *In re Ohio Power Co., Holding Company Act Release (HCAR) No. 17,383* (Dec. 2, 1971).

79. 15 U.S.C. § 79m (1979).

80. HCAR No. 17,383, *supra* note 78, at 2.

This section 13 stipulation was reiterated in a subsequent SEC order that authorized Ohio Power, pursuant to, *inter alia*, sections 9 and 10 of PUHCA,<sup>81</sup> to sell to Ohio Coal its interests and investments in several coal mines located in southeastern Ohio.<sup>82</sup> This order also provided that "[t]he price at which [Ohio Coal] is sold to [American Electric] system companies will not exceed the cost thereof to the seller."<sup>83</sup> Ohio Coal continued to develop the coal mines it acquired from Ohio Power with equipment leased through a consortium of other Ohio Power coal companies, which leases the SEC approved,<sup>84</sup> with capital acquired from or with the assistance of Ohio Power or American Electric, which capital the SEC also approved,<sup>85</sup> and with other assistance from the American Electric holding company system, which assistance the SEC again approved.<sup>86</sup> The SEC orders that approved those leases, loans, cash contributions, and guarantees often reiterated that "the price at which coal is sold by [Ohio Coal] to [American Electric] system companies should not exceed [its] cost, including reasonable compensation for necessary capital. . . ."<sup>87</sup>

In 1983, an apparent conflict arose between these SEC orders and a FERC order, issued under part II, relative to the rates and charges of Ohio Power for the sale and transmission in interstate commerce of wholesale electric power.<sup>88</sup> The conflict arose in consequence of a decline in the price

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81. 15 U.S.C. §§ 79i-79j. (1988)

82. *In re Ohio Power Co.*, HCAR No. 20515, 14 SEC Docket 928 (Apr. 24, 1978).

83. *Id.* at 929.

84. *See, e.g., In re Ceder Coal Co.*, HCAR No. 20,687, 15 SEC Docket 881 (Aug. 30, 1978)(\$25 million lease and \$60 million lease); *In re Ceder Coal Co.*, HCAR No. 21,178, 18 SEC Docket 21 (Aug. 8, 1979)(additional \$20 million lease); *In re Ceder Coal Co.*, HCAR No. 21,356, 19 SEC Docket 32 (Dec. 21, 1979)(amendment of additional \$20 million lease). *See also In re Ceder Coal Co.*, HCAR No. 21,726, 20 SEC Docket 1568 (Sept. 24, 1980)(\$25 million lease); *In re Ceder Coal Co.*, HCAR No. 21,921, 22 SEC Docket 74 (Feb. 18, 1981)(amendment to \$25 million lease); *In re Ceder Coal Co.*, HCAR No. 22,114, 22 SEC Docket 1446 (June 30, 1981)(\$40 million lease).

85. *See, e.g., In re Southern Ohio Coal Co.*, HCAR No. 21,008, 17 SEC Docket 310 (Apr. 17, 1979)(\$13 million term loan agreement); *In re Southern Ohio Coal Co.*, HCAR No. 21,355, 19 SEC Docket 31 (Dec. 21, 1979)(amendment of \$13 million term loan agreement); *In re Southern Ohio Coal Co.*, HCAR No. 21,818, 21 SEC Docket 808 (Dec. 2, 1980)(extension of \$13 million term loan agreement); *In re Southern Ohio Coal Co.*, HCAR No. 22,326, 24 SEC Docket 474 (Dec. 18, 1981)(extension of \$13 million term loan agreement). *See also In re Southern Ohio Coal Co.*, HCAR No. 21537, 19 SEC Docket 1309 (April 25, 1980)(\$40.6 million in loans and cash contributions from Ohio Power to Ohio Coal for additional coal preparation facilities); *In re Southern Ohio Coal Co.*, HCAR No. 22,129, 23 SEC Docket 98 (July 13, 1981)(additional \$14 million in loans and cash contributions from Ohio Power to Ohio Coal for coal preparation facilities); *In re Southern Ohio Coal Co.*, HCAR No. 22,401, 24 SEC Docket 1150 (Feb. 24, 1982)(additional \$14 million in loans and cash contributions from Ohio Power to Ohio Coal for coal preparation facilities).

86. *See, e.g., In re American Elec. Power Corp.*, HCAR No. 20,740, 15 SEC Docket 1411 (Oct. 24, 1978)(American Electric procurement of letter of credit for Ohio Coal); *In re Ohio Power Co.*, HCAR No. 24,286, 37 SEC Docket 642 (Dec. 29, 1986)(Ohio Power guarantee of \$135 million in Ohio Coal unsecured notes); *In re Ohio Power Co.*, HCAR No. 25,405, 50 SEC Docket 230 (Nov. 7, 1991)(Ohio Power guarantee of \$40 million in Ohio Coal unsecured notes); *In re Ohio Power Co.*, HCAR No. 25,716, 53 SEC Docket 406 (Dec. 22, 1992).

87. *In re Southern Ohio Coal Co.*, HCAR No. 21,008, 17 SEC Docket at 312. *See also* HCAR No. 21,537, 19 SEC Docket at 1309 (reiteration of section 13 stipulation).

88. *In re Ohio Power Co.*, 25 F.E.R.C. ¶ 63,060 (1983).

of coal on the open market, which price was below the actual cost to Ohio Coal of coal production—thus the SEC orders appeared to authorize above-market costs paid to Ohio Coal.

In May 1982, Ohio Power, pursuant to section 205,<sup>89</sup> submitted to the FERC two schedules of rates and charges for wholesale electric power to be sold to fifteen Ohio municipalities and to Wheeling Electric Company (Wheeling), another electric public utility subsidiary of American Electric.<sup>90</sup> In response to the submission, the municipalities and several large industrial firms that purchased their power from Wheeling protested the electric power rate schedules.<sup>91</sup> The municipalities and the industrial firms ultimately withdrew most of their objections to the rate schedules, and concluded two separate FERC-approved settlements with Ohio Power,<sup>92</sup> on all issues except for the price to Ohio Power of “captive” coal purchased from its coal company subsidiary.

The FERC conducted an administrative hearing on the “captive” coal issue, in which the municipalities argued that the rates and charges that Ohio Power sought to impose were unreasonable because the price to Ohio Power of coal from Ohio Coal, which price was reflected in the rates and charges, was \$20 million over the market price for a comparable amount of coal.<sup>93</sup> For several reasons, Ohio Power disagreed that the rates and charges were unreasonable. In particular, it argued, in effect, that the rate schedules were reasonable in this regard because the price Ohio Power paid for coal from Ohio Coal was required under PUHCA and that a conflict between this price and a “just and reasonable” market price must be resolved, under section 318,<sup>94</sup> through FERC deference to the SEC-mandated price.<sup>95</sup>

The FERC administrative law judge (ALJ) rejected this argument because the application of the statute is limited to conflicts between the SEC and the FERC relative to “the same subject matter”—which, the ALJ decided, was not the case:

In conclusion, the SEC, at the most, is regulating the sale of coal between [Ohio Coal] and [Ohio Power] for purposes of keeping a reasonable arm’s-length relationship between the two associated companies, whereas the FERC is regulating the sale of electricity by [Ohio Power] to its customers. The subject matters are entirely different, and the “Conflict of Jurisdiction” provision of the Federal Power Act does not preclude the Commission from deciding what the “just and reasonable” rates are to be in this case, and in particular the proper amount to be allowed in the cost-of-service for the use of [Ohio Coal] coal by [Ohio Power].<sup>96</sup>

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89. 16 U.S.C. § 824d(a) (1988).

90. *In re Ohio Power Co.* 25 F.E.R.C. at 65,180.

91. *Ohio Power Co.*, 20 F.E.R.C. ¶ 61,081 (1982).

92. *In re Ohio Power Co.*, 23 F.E.R.C. ¶ 61,236 (1983)(settlement with municipalities); *In re Ohio Power Co.*, 24 F.E.R.C. ¶ 61,017 (1983)(settlement with industrial firms).

93. *In re Ohio Power Co.*, 25 F.E.R.C. at 65,180.

94. 16 U.S.C. § 825q (1988).

95. *In re Ohio Power Co.*, 25 F.E.R.C. at 65,182.

96. *Id.* at 65,183.

The ALJ similarly rejected the argument that the FERC also was required to defer to the SEC-mandated price for the coal under its own regulations, which in relevant part provide that "[w]here the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable. . . ."<sup>97</sup> Ohio Power argued that the FERC in the past has interpreted this fuel-cost regulation to mean that an SEC-mandated price under section 13 of PUHCA is reasonable under section 205.<sup>98</sup> The ALJ concluded that the fuel-cost regulation simply creates a rebuttable presumption of reasonableness.<sup>99</sup>

These conclusions relative to section 318 and the fuel-cost regulation necessitated an independent FERC review of the reasonableness of the price Ohio Power paid for coal from Ohio Coal. In this regard, the ALJ decided, on the basis of FERC precedent,<sup>100</sup> that the FERC "envision[s] the use of the market price test in instances where the market price is either above or below the coal supplier's cost of service."<sup>101</sup> After an exhaustive review of evidence on the market price of coal,<sup>102</sup> and a discussion of burden of proof in a FERC administrative hearing,<sup>103</sup> the ALJ concluded that Ohio Power had demonstrated "by a preponderance of the evidence that . . . the prices paid for . . . coal were not unreasonable."<sup>104</sup>

The FERC disagreed that Ohio Power had proven that the price it paid for coal from Ohio Coal approximated the market price of coal.<sup>105</sup> It agreed, however, that neither section 318 nor the fuel-cost regulation precluded an independent FERC review of the reasonableness of the price Ohio Power paid for coal from Ohio Coal.<sup>106</sup> With respect to section 318, the FERC observed that, under Rule 92 of the SEC regulations that implement PUHCA,<sup>107</sup> no contract between public utility (or non-utility) subsidiaries within the same holding company system is to be priced above the

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97. 18 C.F.R. § 35.14(a)(7)(1983).

98. *In re Ohio Power Co.*, 25 F.E.R.C. at 65,183-84.

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

100. *In re Public Serv. Co. of New Mexico*, 13 F.E.R.C. ¶ 63,041 (1980), *aff'd*, 17 F.E.R.C. ¶ 61,123 (1981), *aff'd*, *Public Serv. Co. of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987). *See also In re Public Serv. Co. of New Mexico*, 18 F.E.R.C. ¶ 61,276 (1982); *In re Public Serv. Co. of New Mexico*, 23 F.E.R.C. ¶ 61,218 (1983); *In re Public Serv. Co. of New Mexico*, 18 F.E.R.C. ¶ 63,005 (1982), *aff'd*, 20 F.E.R.C. ¶ 61,290 (1982).

101. *In re Ohio Power Co.*, 25 F.E.R.C. ¶ 63,060, at 65,187.

102. *Id.* at 65,187-201.

103. *Id.* at 65,201-203.

104. *Id.* at 65,203.

105. *In re Ohio Power Co.*, 39 F.E.R.C. ¶ 61,098 (1987). After the FERC reviewed the record compiled before the ALJ in the administrative hearing, the FERC concluded that the cost to Ohio Power of coal from Ohio Coal significantly exceeded the market price of coal and that the rates and charges in which this cost was reflected thus were unreasonable. It ordered Ohio Power to revise the rate schedules it had submitted for FERC review. *Id.* at 61,285-86.

106. "We affirm the judge's rulings and reasoning regarding the Commission's authority, pursuant to the Federal Power Act and our regulations, to determine the reasonableness of coal costs Ohio Power recovers from its wholesale customers." *Id.* at 61,275.

107. 17 C.F.R. § 250.92(a) (1993).

relevant market prior<sup>108</sup> With respect to the FERC fuel-cost regulation,<sup>109</sup> the FERC agreed that the fuel-cost regulation simply creates a rebuttable presumption of reasonableness.<sup>110</sup>

It also agreed with the ALJ that there was no conflict of jurisdiction between, on the one hand, SEC regulation of contracts between subsidiaries within the same holding company system under section 13 of PUHCA,<sup>111</sup> and, on the other hand, FERC regulation of rates and charges for wholesale electric power under section 205 of the FPA.<sup>112</sup> "More importantly . . . setting the intra-corporate price and setting rates are not the same subject matter which would bring section 318 into play."<sup>113</sup>

The U.S. Court of Appeals for the D.C. Circuit vacated and remanded this order.<sup>114</sup> Its decision is based on section 318. First, the D.C. Circuit disagreed that the regulation of contracts under PUHCA and the regulation of rates and charges under the FPA involve two separate and distinct subject matters to which section 318 thus is inapplicable. "The conclusion that the same subject matter is implicated is inescapable."<sup>115</sup> Second, the D.C. Circuit disagreed that there was no conflict between the SEC and the FERC in their respective regulation of Ohio Power because Rule 92 of the SEC regulations that implement PUHCA establishes a qualification to the cost-based price requirements of Rules 90 and 91. "We cannot accept this rationale . . . because it proceeds from a false premise that the bar of section 318 applies only when there is a *present* conflict between SEC and FERC prescriptions."<sup>116</sup> The D.C. Circuit thus held that there was a conflict in jurisdiction between the SEC and the FERC to which section 318 was applicable and that the FERC was required to defer to the SEC-mandated price for the coal Ohio Power purchased from Ohio Coal. It

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108. *In re Ohio Power Co.*, 39 F.E.R.C. at 61,275-78. See, e.g., *In re New England Elec. Sys.*, HCAR No. 22,309, 24 SEC Docket 298 (1981)(approval of market price).

109. 18 C.F.R. § 35.14(a)(7) (1983).

110. *In re Ohio Power Co.*, 39 F.E.R.C. at 61,278.

111. 15 U.S.C. § 79m (1988).

112. 16 U.S.C. § 824d (1988).

113. *In re Ohio Power Co.*, 39 F.E.R.C. at 61,276-77. See, e.g., *Mississippi Indus. v. FERC*, 808 F.2d 1525, 1551 (D.C. Cir. 1987)("The SEC itself perceives no conflict between its jurisdiction and that of FERC."). In this regard, its decision was based in part on an SEC statement filed with the FERC in 1978. COMMENT OF THE DIVISION OF CORPORATE REGULATION OF THE SECURITIES AND EXCHANGE COMMISSION ON THE FEDERAL ENERGY REGULATORY COMMISSION STAFF PRELIMINARY REPORT OF INVESTIGATION in FERC Docket No. E-9206 (July 31, 1978). The SEC acknowledged in that statement that "the SEC . . . has recognized that its regulation of fuel-related costs, pursuant to Section 13(b) (of PUHCA), is not in conflict with and does not preclude [the FERC] setting rates." *In re Ohio Power Co.*, 39 F.E.R.C. at 61,277.

114. *Ohio Power Co. v. FERC*, 880 F.2d 1400 (D.C. Cir. 1989).

115. *Ohio Power*, 880 F.2d at 1406. See, e.g., *Hearings on H.R. 5220, H.R. 5465, and H.R. 6134*, *supra* note 15, at 582-83 (SEC acknowledgement of conflict between section 13 of PUHCA and section 205 of FPA); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970-71 (1986)(conflict in jurisdiction between FERC and North Carolina public utilities commission resolved through federal preemption of North Carolina commission).

116. *Ohio Power*, 880 F.2d at 1408 (emphasis added).

observed that the resolution of the conflict through section 318 produced a result that was consistent with U.S. Supreme Court precedent.<sup>117</sup>

The U.S. Supreme Court, however, reversed the D.C. Circuit in an unanimous decision.<sup>118</sup> The Court concluded that a conflict in jurisdiction between section 13 of PUHCA and section 205 of the FPA, relative to the price to Ohio Power of "captive" coal purchased from its coal company subsidiary, was not a conflict to which section 318 is applicable.<sup>119</sup> The statute is applicable to "the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing or reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter. . . ."<sup>120</sup>

The Court observed that the D.C. Circuit appeared to interpret the phrase "or any other subject matter" to mean that section 318 was applicable to all matters in common between the SEC and the FERC.<sup>121</sup> The Court interpreted the phrase to mean other subject matters relative to "the acquisition or disposition of any security, capital assets, [or] facilities."<sup>122</sup> "Our reading is confirmed by long-time understanding and practice."<sup>123</sup> Thus, section 318 was inapplicable to the conflict in jurisdiction that arose in connection with the SEC-mandated price for the coal Ohio Power purchased from Ohio Coal. The Court expressed no view on the relevance of the FERC fuel-cost regulation to this issue.<sup>124</sup>

On remand, the D.C. Circuit again held that the FERC was required to defer to the SEC-mandated price for the coal Ohio Power purchased from Ohio Coal.<sup>125</sup> Its decision, however, was based not on section 318, but on the FERC fuel-cost regulation,<sup>126</sup> on which Judge Mikva based his concurrence in the previous D.C. Circuit opinion. The FERC argued that the regulation simply creates a rebuttable presumption of reasonableness. The D.C. Circuit disagreed. It concluded, for example, that the phrase "shall be deemed" has been interpreted to create a conclusive presump-

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117. *Id.* at 1409. Mississippi Power & Light Co., 487 U.S. 354 (1988)(conflict in jurisdiction between FERC and State of Mississippi resolved through federal preemption of State). Judge Mikva agreed with the panel but in a separate concurrence would have based the decision on the FERC fuel-cost regulation. *Id.* at 1410-14.

118. *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, (1990). Justice Souter took no part in the consideration or decision of the case.

119. *Id.* at 87.

120. 16 U.S.C. § 825q (1988) (emphasis added).

121. *Arcadia*, 498 U.S. at 79.

122. 16 U.S.C. § 825q (1988).

123. *Arcadia*, 498 U.S. at 79. See, e.g., Francis X. Welch, *Functions of the Federal Power Commission in Relation to the Securities and Exchange Commission*, 14 GEO. WASH. L.R. 81, 88 (1945).

124. *Arcadia* 498 U.S. at 77. Justice Stevens, with whom Justice Marshall joined, concurred in a separate opinion. *Id.* at 86. He observed that "Congress enacted PUHCA to supplement not supplant the [Federal Power Act]." *Id.* at 88. The D.C. Circuit had concluded that there was a conflict in jurisdiction between the SEC and the FERC and that, under section 318, the FERC thus was required to defer to the SEC. Justice Stevens observed that, in consequence of this conclusion, "the subject matter would come under the scrutiny of only the SEC despite the difference between the goals and expertise of the two agencies." *Id.* (emphasis added).

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

126. 18 C.F.R. § 35.14(a)(7) (1983).

tion.<sup>127</sup> It also observed that “[i]f FERC wishes to have [the fuel-cost regulation] create only a rebuttable presumption, then it may do so explicitly through the required [administrative] process.”<sup>128</sup>

#### IV. RESPONSES TO THE OHIO POWER DECISIONS

##### A. FERC Response and Electric Utility Acquisitions

The FERC heeded this advice. In October 1993, it proposed to revise the fuel-cost regulation.<sup>129</sup> In particular, the FERC proposed to replace the “shall be deemed” with the phrase “shall be presumed, subject to rebuttal.”<sup>130</sup> It emphasized that the amendment would underscore the independent nature of its review of electric power rate schedules under section 205. “While the Commission can give deference to decisions of another regulatory body and still fulfill its statutory obligation, it cannot in effect delegate its jurisdictional responsibilities to others.”<sup>131</sup>

The FERC also proposed to amend the regulation to require the actual approval of “another regulatory body”—either the SEC or a state public utility commission—for the rebuttable presumption to be raised. Thus, the regulation would provide that “[w]here the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, *and where the price of such fuel has been approved by that regulatory body*, such cost shall be presumed, *subject to rebuttal*, to be reasonable. . . .”<sup>132</sup> In connection with this second revision, the FERC again stated that the amended fuel-cost regulation would promote the independence of its reviews of electric power rate schedules:

In sum, by amending [the fuel-cost regulation] to clearly specify that, where another regulatory body has jurisdiction over affiliate fuel costs and approves such costs, there will be a rebuttable presumption of reasonableness of affiliate fuel costs, rather than a conclusive presumption, the Commission is making clear that it has no intention of abdicating its regulatory responsibilities under sections 205 and 206 of the [Federal Power Act].<sup>133</sup>

The proposed amendment to the fuel-cost regulation offers a resolution to the conflict in jurisdiction between section 13 of PUHCA and section 205 of the FPA. In this regard, it could resolve the problem identified in the *Ohio Power* administrative orders and judicial decisions. It will not,

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127. *Ohio Power*, 954 F.2d at 783. See, e.g., *Gaither v. Myers*, 404 F.2d 216, 218 (D.C. Cir. 1968); *H.P. Coffee Co. v. Reconstruction Fin. Corp.*, 215 F.2d 818, 822 (Emer.Ct.App. 1954); *Forrester v. Jerman*, 90 F.2d 412, 413 (D.C. Cir. 1937).

128. *Ohio Power*, 954 F.2d at 783. Finally, the D.C. Circuit held that, in a conflict between the SEC under section 13 of PUHCA and the FERC under section 205 of the FPA, the FERC is required to defer to the SEC. *Id.* at 784-86. “In contrast to the SEC’s specific statutory mandate to establish a cost-based price for sales of goods between [subsidiaries within the same holding company system], FERC can point to no equivalent authority besides its general charge to establish ‘just and reasonable’ wholesale electric rates.” *Id.* at 784.

129. 58 Fed. Reg. 51,259 (1993).

130. *Id.* at 51,261.

131. *Id.* at 51,260.

132. *Id.* at 51,261 (emphasis added).

133. *Id.* at 51,262.

however, address the potential for other conflicts in jurisdiction between the SEC and the FERC relative to the regulation of public utilities in general. Indeed, the *Ohio Power* orders and decisions, in this regard, might simply represent the tip of the iceberg.

Other conflicts in jurisdiction are certain to arise under other provisions of PUHCA and the FPA.<sup>134</sup> Indeed, a different conflict, altogether unrelated to the *Ohio Power* orders and decisions, already has begun to surface. This conflict is with respect to SEC and FERC regulation of electric public utility acquisitions, which, within the rubric of section 318,<sup>135</sup> involve the acquisition of securities, capital assets, or facilities. This conflict, which resulted in a July 1992 decision of the U.S. Court of Appeals for the D.C. Circuit,<sup>136</sup> was not resolved through section 318—in the fashion in which Congress had intended for conflicts in jurisdiction between the SEC and the FERC to be resolved.

The SEC is authorized to review and approve utility acquisitions under sections 9 and 10 of PUHCA.<sup>137</sup> In particular, it is unlawful under section 9(a)(1) for registered public utility holding companies and their public utility (or non-utility) subsidiaries to acquire the securities or assets of another electric public utility without SEC approval.<sup>138</sup> The conditions for SEC approval of utility acquisitions are set forth in section 10.<sup>139</sup> Those conditions include the requirement, under section 10(b)(1),<sup>140</sup> that a utility acquisition not result in a federal anti-trust violation as well as the requirement, under section 10(c)(2),<sup>141</sup> that a utility acquisition result in “economies and efficiencies” in the operation of the combined utilities. To ensure that a utility acquisition is in compliance with the conditions of section 10, the SEC is authorized to “prescribe such terms and conditions in respect of such acquisition . . . as the [SEC] may find necessary or appropriate. . . .”<sup>142</sup>

The FERC is authorized to review and approve utility acquisitions under section 203 of the FPA,<sup>143</sup> which prohibits the sale by an electric public utility of facilities, valued in excess of \$50,000, or securities without

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134. Section 318 contemplates four general areas of potential conflicts between the SEC and the FERC: (1) the issue or sale of securities and the assumption of obligations or liabilities with respect to securities; (2) the method in which accounts are required to be maintained; (3) the submission of reports; and (4) the acquisition or disposition of securities, capital assets, or facilities. 16 U.S.C. § 825q (1988).

135. See, e.g., Lawrence J. Spiwak, *Expanding the FERC's Jurisdiction to Review Utility Mergers*, 14 ENERGY L.J. 385 (1993). The author, an Attorney-Advisor in the Office of the General Counsel of the FERC, presents an argument for the transfer of PUHCA from the SEC to the FERC. *Id.* at 387.

136. *City of Holyoke Gas & Elec. Dep't v. SEC*, 972 F.2d 358 (D.C. Cir. 1992).

137. 15 U.S.C. §§ 79i-79j (1988).

138. *Id.* § 79i(a)(1).

139. *Id.* § 79j.

140. *Id.* § 79j(b)(1). See, e.g., *Environmental Action, Inc. v. SEC*, 895 F.2d 1255, 1260 (9th Cir. 1990)(interpretation of statute); *City of Lafayette v. SEC*, 481 F.2d 1101, 1103 (D.C. Cir. 1973)(interpretation of statute); *Municipal Elec. Ass'n of Mass. v. SEC*, 413 F.2d 1052, 1056-57 (D.C. Cir. 1969)(interpretation of statute).

141. 15 U.S.C. § 79j(c)(2) (1988).

142. *Id.* § 79j(e).

143. 16 U.S.C. § 824b (1988).



FERC approval.<sup>144</sup> The sole condition for FERC approval of a utility acquisition is the requirement that it “be consistent with the public interest. . . .”<sup>145</sup> The Commission interpreted this broad “public interest” standard to require that a utility acquisition, inter alia, not result in a federal anti-trust violation and result in “economies and efficiencies” in the operation of the combined utilities.<sup>146</sup> To ensure that a utility acquisition is in compliance with the requirements of section 203, the FERC is authorized to approve the acquisition “upon such terms and conditions as it finds necessary or appropriate. . . .”<sup>147</sup>

Thus, the requirements for SEC approval of utility acquisitions under sections 9 and 10 of PUHCA, therefore, are in several respects identical to the requirements for FERC approval of utility acquisitions under section 203 of the FPA.<sup>148</sup> In addition, both the SEC and the FERC are authorized to enforce those requirements through terms and conditions attached to approvals for utility acquisitions. If the SEC conditioned a utility acquisition on a requirement that was inconsistent with the requirement on which the FERC conditioned the utility acquisition, then section 318 would provide that “the requirement of [PUHCA] shall apply to such [acquisition], and such [acquisition] shall not be subject to the requirement of [the Federal Power Act]. . . .”<sup>149</sup>

On December 20, 1990, a FERC ALJ issued an initial decision in an administrative hearing on an application, filed under section 203 of the FPA,<sup>150</sup> for the acquisition by Northeast Utilities (Northeast), a registered public utility holding company of Public Service Company of New Hampshire (PSNH).<sup>151</sup> The initial decision addressed, among other things, the “economies and efficiencies” in which the operation of the combined utilities would result.<sup>152</sup> It also addressed the potential for the acquisition to

144. *Id.* § 824b(a). See generally 18 C.F.R. Part 33 (application for sale of facilities or purchase of securities).

145. 16 U.S.C. § 824b(a) (1988).

146. *In re Commonwealth Edison Co.*, 36 F.P.C. 927 (1966), *aff'd*, *Utility Users League v. FPC*, 394 F.2d 16 (7th Cir. (1968)), *cert. denied*, 393 U.S. 953 (1968). See also *Pac. Power & Light Co. v. FPC*, 111 F.2d 1014, 1016 (9th Cir. 1940) (“The phrase ‘consistent with the public interest’ does not connote a public benefit to be derived or suggest the idea of a promotion of the public interest. The thought conveyed is merely one of compatibility.”); *Kansas Power & Light Co. v. FPC*, 554 F.2d 1178 (D.C. Cir. 1977) (interpretation of statute relative to federal anti-trust policies).

147. 16 U.S.C. § 824b(b) (1988).

148. “This dual regulatory scheme . . . permits potential utility merger applicants to choose their regulatory forum in order to escape stringent regulatory scrutiny of their proposed merger’s effect on the existing competitive situation.” Spiwak, *supra* note 134, at 385. This argument is based in large part on an analysis of SEC and FERC approval for Midwest Energy Company, a holding company, and its electric public utility subsidiary, Iowa Public Service Company, to merge with Iowa Resources, Inc., also a holding company, and its electric public utility subsidiary, Iowa Power, Inc. *In re Midwest Resources*, HCAR No. 25159, 47 SEC Docket 617 (Sept. 26, 1990); *Missouri Basin Mun. Power Agency v. Midwest Energy Co.*, 53 F.E.R.C. ¶ 61,368 (1990); *In re Iowa Public Serv. Co.*, 60 F.E.R.C. ¶ 61,048 (1992).

149. 16 U.S.C. § 825q (1988).

150. *Id.* § 824b.

151. *In re Northeast Util. Serv. Co.*, 53 F.E.R.C. ¶ 63,020 (1990).

152. *Id.* at 65,210-14.

result in a federal anti-trust violation.<sup>153</sup> In this regard, the ALJ concluded that “[a]n unconditioned NU-PSNH merger would have anticompetitive consequences.”<sup>154</sup> For this reason, the ALJ, pursuant to section 203,<sup>155</sup> imposed several conditions on the acquisition relative to, inter alia, transmission in interstate commerce of wholesale electric power.<sup>156</sup>

In August 1991, the FERC affirmed in part, modified in part, and reversed in part the initial decision.<sup>157</sup> The FERC largely agreed with the FERC ALJ that the acquisition would, in general, result in “economies and efficiencies” in the operation of the combined utilities.<sup>158</sup> It also largely agreed with the FERC ALJ that “an unconditioned merger would likely have serious anticompetitive consequences for New England.”<sup>159</sup> Thus, it affirmed the imposition of conditions, on the basis of which, however, it approved the acquisition under section 203 of the FPA. The U.S. Court of Appeals for the First Circuit upheld the approval.<sup>160</sup>

On December 21, 1990, the SEC issued an order on an application, filed under sections 9 and 10 of PUHCA,<sup>161</sup> for the same acquisition.<sup>162</sup> The order, issued within 24 hours after the release of the FERC initial decision on the acquisition, denied numerous requests for an administrative hearing on the application.<sup>163</sup> With respect to the requirement, under section 10(b)(1),<sup>164</sup> that a utility acquisition not result in a federal anti-trust violation, the SEC concluded that the acquisition “does not tend towards the concentration of control of public utility companies of a kind, or to the extent, detrimental to the public interest or the interest of investors or consumers. . . .”<sup>165</sup>

With respect to the requirement, under section 10(c)(2),<sup>166</sup> that a utility acquisition result in “economies and efficiencies” in the operation of the combined utilities, the SEC stated that “[g]iven the structural similarities between [Northeast Utilities and PSNH] and other electric utility companies . . . and our experience with previous acquisitions, we conclude that it

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153. *Id.* at 65,214-19.

154. *Id.* at 65,219.

155. “The Commission may grant any application for an order . . . in whole or in part and upon 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. . . .” 16 U.S.C. § 824b(b) (1988). “[T]he Commission has broad authority under section 203(a) to condition approval of a merger that would not, but for such conditions, be consistent with the public interest.” *In re Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095, at 61,282 (1988).

156. *Northeast Util.*, 53 F.E.R.C. at 65,219-33.

157. *In re Northeast Util. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, *aff'd*, 58 F.E.R.C. ¶ 61,070 (1991), *petition for reh'g denied*, 59 F.E.R.C. ¶ 61,042 (1992).

158. *Id.* at 61,994-97.

159. *Id.* at 61,998.

160. *Northeast Util. Co. v. FERC*, 993 F.2d 937 (1st Cir. 1993).

161. 15 U.S.C. §§ 79i-79j (1988).

162. *In re Northeast Util.*, HCAR No. 25,221, 47 SEC Docket 1887 (Dec. 21, 1990).

163. *Id.* at 1956.

164. 15 U.S.C. § 79j(b)(1) (1988).

165. 47 SEC Docket at 1926.

166. 15 U.S.C. § 79j(c)(2) (1988).

is probable that the projected savings would result. . . .”<sup>167</sup> Apparently, in part on the basis of these conclusions, the SEC approved the acquisition under sections 9 and 10 of PUHCA. It imposed no terms or conditions relative to the requirements of section 10(b)(1) or section 10(c)(2).

The FERC as well as the SEC had approved the acquisition. The FERC, in its approval, had concluded that the acquisition could be anti-competitive and thus had conditioned the approval on several terms relative to interstate transmission of wholesale electric power. The SEC, in its approval, had concluded that the acquisition would not be anti-competitive and thus had imposed no terms or conditions in this regard. This difference in conclusions, relative to the potential for the acquisition to result in a federal anti-trust violation and the need for appropriate terms and conditions, was the basis for a petition for reconsideration of the SEC order. The SEC granted the petition in an order that reached, however, the same conclusion.<sup>168</sup> In the reconsideration order, the SEC accounted for and reconciled the difference between the FERC and SEC conclusions relative to the anti-competitive consequences of the acquisition and the need for appropriate terms and conditions:

Because the [Federal Power Act] is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by the petitioners lie principally with the FERC. When the [SEC], in determining whether there is an undue concentration of control, identifies such issues, we can look to the FERC’s expertise for an appropriate resolution of these issues. Accordingly, we condition our approval of the [a]cquisition upon the issuance by the FERC of a final order approving the merger under section 203 of the [Federal Power Act].<sup>169</sup>

Thus the SEC, apparently concluded that the acquisition would not be anti-competitive, and that no terms or conditions were required. In this regard, it relied on the terms and conditions provided in the FERC’s approval of that acquisition under section 203 of the FPA.

On appeal of the December 21, 1990 order, as well as the reconsideration order, the U.S. Court of Appeals for the D.C. Circuit decided that it was permissible for the SEC to defer to the FERC on the anti-trust implications of the acquisition and on the need for appropriate terms and conditions.<sup>170</sup>

Although the SEC may not rely upon the FERC’s concurrent jurisdiction over an acquisition as a reason to shirk its own statutory mandate to determine the anticompetitive effect of that transaction . . . it does not follow that the SEC must pretend that it is the only agency addressing the issue when it is not; that would only lead it to conduct a wasteful, duplicative proceeding.<sup>171</sup>

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167. 47 SEC Docket at 1939.

168. *In re Northeast Util.*, HCAR No. 25,273, 48 SEC Docket 776 (Mar. 15, 1991).

169. *Id.* at 783-84 (notes omitted).

170. *City of Holyoke Gas & Elec. Dep’t. v. SEC*, 972 F.2d 358 (D.C. Cir. 1992).

171. *Id.* at 363 (citation omitted). The D.C. Circuit also affirmed the December 21, 1990 order relative to its determination that the acquisition would result in “economies and efficiencies” in the operation of the combined utilities. *Id.* at 361-63. Finally, it upheld the SEC denial of the numerous requests for an administrative hearing on the acquisition. *Id.* at 365. *See, e.g., City of Lafayette v. SEC*,

The acquisition by Northeast of PSNH raised a difference of opinion between the SEC and the FERC relative to the anti-competitive consequences of the acquisition and the need for appropriate terms and conditions. The D.C. Circuit authorized the SEC to resolve this difference through deference to the FERC and to the terms on which the FERC conditioned the acquisition. "[W]hen the SEC and another regulatory agency both have jurisdiction over a particular transaction, the SEC may 'watchfully defer[ ]' to the proceedings held before, and the result reached by—that other agency."<sup>172</sup>

There was no conflict per se between the imposition of anti-trust conditions in the FERC approval of the Northeast-PSNH acquisition and the absence of anti-trust conditions in the SEC approval of the acquisition. It appears, however, that the intent of section 318 was compromised. Section 318 contemplates that the SEC shall be the "lead" administrative agency with respect to electric utility acquisitions—in particular, it requires the FERC to defer to the SEC when a conflict in jurisdiction arises. In the Northeast-PSNH acquisition, the FERC was the "lead" administrative agency. The FERC had imposed several anti-trust conditions on the acquisition but the SEC initially had imposed no such conditions. Ultimately the SEC apparently deferred to the terms on which the FERC conditioned the acquisition, which deference the D.C. Circuit authorized. The result of the Northeast-PSNH orders and decisions thus appears to stand section 318 on its head.

It was entirely appropriate, however, for the SEC to defer to the FERC in this instance. The FERC, after all, had reached a conclusion on the anti-competitive consequences of the acquisition after an administrative hearing, numerous requests for which the SEC had denied.<sup>173</sup> Indeed, the SEC has not held an administrative hearing on an electric utility acquisition since 1980.<sup>174</sup> Since 1980, it has denied all requests for administrative

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454 F.2d 941, 953 (D.C. Cir. 1971), *aff'd*, *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, (1973)(legal standards for review of requests for administrative hearings).

172. *Holyoke Gas*, 972 F.2d at 363-64 (citation omitted). See also *Wisconsin's Env'tl. Decade v. SEC*, 882 F.2d 523 (D.C. Cir. 1989). In *Decade*, the D.C. Circuit reviewed an SEC order that approved the acquisition by WPL Holdings, Inc. of Wisconsin Power & Light Company (WP&L). *In re WPL Holdings, Inc.*, HCAR No. 24,590, 40 SEC Docket 634 (1988). The acquisition was reviewed and approved in accordance with the requirements of sections 9 and 10 of PUHCA. 15 U.S.C. §§ 79i-79j (1988). The approval relied on the precedent the SEC established in a previous electric public utility acquisition. *In re Wisconsin Energy Corp.*, HCAR No. 24,267, 37 SEC Docket 387 (1986). In addition, the Wisconsin Public Utility Commission had approved the WP&L acquisition, subject to several conditions, under the Wisconsin Holding Company Act. 40 SEC Docket at 640-41. The approval under sections 9 and 10 of PUHCA acknowledged that the SEC could in some respects defer to the Wisconsin public utility commission to conclude that the acquisition complied with the requirements of those statutes. *Id.* at 648. The D.C. Circuit found no error in this deference. "Nor has petitioner given any substantial reason why the SEC's watchful deference to the . . . administrative judgment of a state regulating a . . . holding company is not permissible under [PUHCA]." *Wisconsin Env'tl.*, 882 F.2d at 525.

173. 47 SEC Docket at 1956.

174. *In re American Elec. Power Co.*, HCAR No. 21,433, 19 SEC Docket 581 (1980).

hearings on electric utility acquisitions.<sup>175</sup> Its apparent reluctance to grant requests for administrative hearings under sections 9 and 10 of PUHCA—as well as under section 13 and other provisions of the legislation—has subjected the SEC to much criticism.<sup>176</sup>

Nonetheless, the Northeast-PSNH orders and decisions establish a precedent that appears to undermine the intent of section 318. Under this precedent, the “lead” administrative agency on electric utility acquisitions is authorized to defer to another administrative agency on anti-trust conditions, which section 318 authorizes the “lead” administrative agency to preempt. Several significant electric utility acquisitions are almost certain to occur in the next few years.<sup>177</sup> Those acquisitions could result again in different conclusions between the two agencies on the anti-trust implications of the acquisitions and the need for anti-trust terms and conditions. Perhaps the SEC will condition a future utility acquisition on an anti-trust requirement that will be inconsistent with the anti-trust requirement on which the FERC will condition the utility acquisition. In this instance, section 318 would provide that “the requirement of [PUHCA] shall apply to such [acquisition], and such [acquisition] shall not be subject to the requirement of [the Federal Power Act]. . . .”<sup>178</sup> The Northeast-PSNH orders and decisions, however, would suggest that the SEC should defer to the FERC and to the anti-trust requirement on which the FERC conditioned the acquisition.

The present conflict in jurisdiction between the SEC and the FERC relative to the regulation of electric public utilities—the conflict that precipitated the introduction of S. 544—is based on SEC regulation of contracts between subsidiaries within the same holding company system under section 13 of PUHCA. The next conflict in jurisdiction, however, between the SEC and the FERC is almost certain to be relative to electric public utility acquisitions. In the absence of a clear “lead” administrative agency on electric utility acquisitions, a role that appeared to belong to the SEC prior to the Northeast-PSNH orders and decisions, an SEC-FERC conflict in jurisdiction with respect to an electric utility acquisition is almost certain to arise.

For this reason, the proposed amendment to the FERC fuel-cost regulation, although it could provide a resolution to the conflict between section 13 of PUHCA and section 205 of the FPA, appears to be a short-sighted quick-fix that will not, however, address the conflicts that already

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175. See, e.g., *In re Centerior Energy Corp.*, HCAR No. 24,073, 35 SEC Docket 769 (1986)(denial of requests for administrative hearing on electric utility acquisition).

176. “In fact, the SEC does not even bother to hold evidentiary hearings which would enable the [SEC] to make independent determinations.” *Senate Hearing*, *supra* note 6, at 7. “With one minor exception, the SEC has not ordered a fair hearing to review a holding company application in fifteen years.” 103 CONG. REC. H11,427, H11,446 (1992)(statement of Rep. Markey on Energy Policy Act of 1992).

177. “While not hitting the headlines as multimedia mergers do, merger mania has hit this once staid industry. The basic reason is deregulation. Almost unnoticed, Congress passed the Energy Policy Act in October of last year.” *Utility Merger Mania*, *FORBES*, Dec. 6, 1993, at 53.

178. 16 U.S.C. § 825q (1988).

appear on the horizon. A resolution to the problem identified in the *Ohio Power* administrative orders and judicial decisions should anticipate and address the conflicts of tomorrow and provide a permanent fix to the problem that the Congress attempted but failed to resolve under section 318.

*B. Congressional Response and Legal Standards*

The U.S. Congress responded to the *Ohio Power* decisions in a more sensational fashion. In March 1993, Senator Bumpers introduced his legislative proposal to transfer to, and vest in, the FERC all functions of the SEC under PUHCA.<sup>179</sup> Section 3 of S. 544, which would effect the transfer, was contained in an amendment to the legislative proposal, which amendment Senator Bumpers also introduced.<sup>180</sup> The original bill simply would have amended sections 205 and 206 of the FPA to authorize the FERC to review and revise rates and charges for interstate wholesale electric power—regardless of SEC-mandated prices under section 13 of PUHCA relative to contracts between subsidiaries within the same holding company system.<sup>181</sup> The wholesale transfer of PUHCA from the SEC to the FERC was an afterthought.

This afterthought, however, became the principal focus of the May 1993 Senate hearing on S. 544,<sup>182</sup> which rallied several outspoken critics of the SEC relative to its administration of PUHCA in general.<sup>183</sup> These critics, armed with numerous documented instances of alleged SEC malfeasance, appeared to contribute significantly to the political momentum for the transfer of PUHCA from the SEC to the FERC, place on the defensive the sole witness who testified, on behalf of several registered public utility holding companies, against the transfer,<sup>184</sup> and otherwise transform the Senate hearing into a referendum on SEC competence under PUHCA in general. The SEC was not available to defend its record in this regard.<sup>185</sup>

The Chair of the FERC, Elizabeth Anne Moler, tactfully expressed neither support nor opposition to the transfer under S. 544 of PUHCA from the SEC of the FERC.<sup>186</sup> The second witness, the chairman of the Arkansas public utility commission, was less circumspect.<sup>187</sup> His comments

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179. S. 544, *supra* note 2, § 3.

180. 139 CONG. REC. at S2683.

181. S. 544, *supra* note 2, § 2.

182. "While it may have seemed reasonable to split utility regulation between the SEC and FERC in 1935, when both PUHCA and Title II of the Federal Power Act were enacted, it makes no sense today." *Senate Hearing, supra* note 6, at 7 (statement of Sen. Bumpers).

183. See, e.g., *SEC Authority Over Holding Companies Challenged*, PUB. UTIL. FORT., June 15, 1993, at 40.

184. *Senate Hearing, supra* note 6, at 47-56 (prepared statement of Charles A. Patrizia).

185. "Now, Mr. Chairman, I am really disappointed that the SEC, which has 22 employees in its public utility division, has chosen to snub this committee and has not even sent a witness to the hearing." *Senate Hearing, supra* note 6, at 7 (statement of Sen. Bumpers). But see *Senate Hearing, supra* note 6, at 139-41 (prepared statement of SEC).

186. "Ultimately it comes down to a policy judgment for the Congress to make whether the functions should be transferred." *Senate Hearing, supra* note 6, at 11 (prepared statement of Ms. Moler).

187. *Senate Hearing, supra* note 6, at 26-29 (prepared statement of Sam I. Bratton, Jr.).

on the performance of the SEC under PUHCA in general focused on Entergy Corporation, a registered public utility holding company that owns eight electric public utility subsidiaries throughout Arkansas, Louisiana, and Mississippi.<sup>188</sup> The bulk of the electric power plants that those 8 subsidiaries own and operate are nuclear.<sup>189</sup> The chairman of the Arkansas commission observed, however, that “I am unaware of any nuclear operations expertise at the SEC, or of any effort to acquire any.”<sup>190</sup> He also criticized the proposed acquisition, which the FERC and the SEC have since approved,<sup>191</sup> by Entergy of Gulf States Utilities, a Louisiana public utility and a public utility holding company that is exempt from the requirements of PUHCA under section 3 thereof.<sup>192</sup> “Another pitfall of the present statutory structure is illustrated by the Entergy proposal to acquire Gulf States Utilities, a troubled utility, for a price well above [its] book value.”<sup>193</sup> In conclusion, the chairman of the Arkansas commission rebutted the argument that the SEC as well as the FERC should regulate electric public utilities because the legal standard embodied in part II of the FPA—regulation in the public interest—is quite different from the legal standard embodied in PUHCA—regulation in the interest of “investors or consumers.” He dismissed the argument because “[o]ver the past few years, many utilities argued for weakening PUHCA on the grounds that the investor protection function is adequately performed by the SEC under other securities statutes.”<sup>194</sup>

The criticism of the City of New Orleans was more pointed and direct.<sup>195</sup> First, it described the recent corporate diversification of Entergy into demand-side management and communications,<sup>196</sup> for example, and observed that “the SEC has approved all of the . . . diversification efforts without a single hearing and without, on its own initiative, imposing any conditions to fulfill PUHCA’s consumer protection mandate and protect Entergy’s ratepayers.”<sup>197</sup> Second, it argued that the SEC administers PUHCA in the interest of investors but not of consumers,<sup>198</sup> which it claimed the SEC disregarded, for example, when it approved in 1990 the

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188. REGISTERED HOLDING COMPANIES, *supra* note 30, at 65.

189. REGISTERED HOLDING COMPANIES, *supra* note 30, at 69.

190. *Senate Hearing*, *supra* note 6, at 28.

191. *In re Entergy Services, Inc.*, 65 F.E.R.C. ¶ 61,332 (1993); *In re Entergy Corp.*, HCAR No. 25,952, 55 SEC Docket — (Dec. 17, 1993).

192. 15 U.S.C. § 79c. (1988)

193. *Senate Hearing*, *supra* note 6, at 28.

194. *Senate Hearing*, *supra* note 6, at 29.

195. *Senate Hearing*, *supra* note 6, at 33-38 (prepared statement of Joseph I. Giarrusso, Councilman at Large, City Council, City of New Orleans).

196. *See, e.g., In re Entergy Corp.*, HCAR No. 25,718, 53 SEC Docket 620 (Dec. 28, 1992)(acquisition of interest in demand-side management corporation); *In re Entergy Corp.*, HCAR No. 25,353, 49 SEC Docket 667 (July 25, 1991)(acquisition on interest in communications corporation).

197. *Senate Hearing*, *supra* note 6, at 34.

198. “The SEC’s lack of enthusiasm for enforcing the consumer protection provisions in PUHCA may be attributed, largely, to institutional factors. *The SEC is a financial regulator, not a utility regulator.* In addition, a mere twenty-five member staff is dedicated to handle PUHCA-related matters. . . .” *Senate Hearing*, *supra* note 6, at 34-35.

formation of a new Entergy electric public utility subsidiary—Entergy Power, Inc.<sup>199</sup> The FERC, New Orleans thus argued, should administer the consumer-protection provisions of PUHCA. “New Orleans believes that the SEC, which as a financial regulator is a natural protector of investor interests, is not designed to fulfill this [consumer-protection] mandate as effectively as the FERC.”<sup>200</sup> Finally, it argued that the continued diversification of registered public utility holding companies raises the need for effective federal regulation,<sup>201</sup> which the FERC, but not the SEC could provide.

The Environmental Action Foundation and the Consumer Federation of America similarly appeared to indict the SEC on numerous counts of malfeasance in its administration in general of PUHCA.<sup>202</sup> In particular, the two public-interest organizations argued that the SEC had compromised PUHCA with respect to (1) the requirements, under sections 9 and 10 of PUHCA,<sup>203</sup> for the formation of new public utility (or non-utility) subsidiaries;<sup>204</sup> (2) service, sales, and construction contracts between public utility (or non-utility) subsidiaries within the same holding company system;<sup>205</sup> (3) the anti-trust requirements of section 9 and 10 of PUHCA for the formation of new subsidiaries;<sup>206</sup> (4) its failure to respond to consumer complaints;<sup>207</sup> and (5) exemptions from the requirements of PUHCA for ineligible public utility holding companies.<sup>208</sup> The two organizations concluded that “[t]he notion of transferring the PUHCA function to FERC is consistent with rational allocation of regulatory responsibility to those with the appropriate experience.”<sup>209</sup>

The sole witness who defended the SEC and who testified against the transfer of PUHCA from the SEC to the FERC appeared on behalf of an ad hoc group of several registered public utility holding companies (Ad

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199. *In re Entergy Corp.*, HCAR No. 25,136, 46 SEC Docket 1911 (Aug. 27, 1990), *remanded*, New Orleans v. SEC, 969 F.2d 1163 (D.C. Cir. 1992).

200. *Senate Hearing*, *supra* note 6, at 35.

201. *Senate Hearing*, *supra* note 6, at 37-38.

202. *Senate Hearing*, *supra* note 6, at 59-80 (prepared statement of Scott Hempling on Behalf of the Energy Project of Environmental Action Foundation and Consumer Federation of America).

203. 15 U.S.C. §§ 79i-79j (1988).

204. *Senate Hearing*, *supra* note 6, at 63-67. *See, e.g., In re Sierra Pacific Resources*, HCAR No. 24,566, 40 SEC Docket 161 (Jan. 28, 1988), *aff'd*, *Env'tl. Action v. SEC*, 895 F.2d 1255 (9th Cir. 1990)(alleged violation of “coordination” requirement of sections 9 and 10); *In re WPL Holdings, Inc.*, HCAR No. 24,590, 40 SEC Docket 634 (March 31, 1988), *remanded*, *Wisconsin's Env'tl. Decade v. SEC*, 882 F.2d 523 (D.C. Cir. 1989)(alleged violation of “economies and efficiencies” requirement of Sections 9 and 10); *In re of Southern Co.*, HCAR No. 24,476, 39 SEC Docket 765 (Oct. 20, 1987)(alleged violation of “pre-acquisition review” requirement of sections 9 and 10).

205. *Senate Hearing*, *supra* note 6, at 67-68.

206. The [SEC] has no expertise in this area.” *Id.* at 68. *See, e.g., In re Northeast Util.*, HCAR No. 25,221, 47 SEC Docket 1887 (Dec. 21, 1990), *aff'd*, HCAR No. 25,273, 48 SEC Docket 776 (March 15, 1991), *aff'd*, *City of Holyoke Gas & Elec. Dep't. v. SEC*, 972 F.2d 358 (D.C. Cir. 1992)(alleged violation of anti-trust requirement of sections 9 and 10).

207. *Senate Hearing*, *supra* note 6, at 68-69.

208. *Senate Hearing*, *supra* note 6, at 69-70.

209. *Senate Hearing*, *supra* note 6, at 80.



Hoc Group).<sup>210</sup> The Ad Hoc Group offered four arguments in support of its position that PUHCA should not be transferred from the SEC to the FERC.<sup>211</sup> First, it argued that the transfer of PUHCA to the FERC, which Congress has considered in the past,<sup>212</sup> would in principle and in practical terms be inappropriate.<sup>213</sup> Second, it argued that the transfer would be impractical.<sup>214</sup> Third, the Ad Hoc Group argued that the transfer would be unconstitutional under the Due Process and Just Compensation Clauses of the Fifth Amendment.<sup>215</sup> Finally, it argued that current division of jurisdiction between the SEC and the FERC has not harmed the public.<sup>216</sup> In conclusion, it observed that “if the SEC’s actions are in question, transferring authority to FERC is not the answer.”<sup>217</sup>

The criticism of SEC administration of PUHCA in general was brutal. In addition, Senator Bumpers observed that “[a]t a time when we are seeking to make Government more efficient, we simply can no longer afford to have two different agencies regulating utility holding companies.”<sup>218</sup>

The arguments in support of the wholesale transfer of PUHCA from the SEC to the FERC, however, suggested the principal argument against such a transfer, which relates to the different and distinct legal standards to which the SEC and the FERC are accustomed under PUHCA and part II of the FPA. The chairman of the Arkansas commission acknowledged that the legal standard in part II of the FPA—regulation in the public interest—is quite different from the legal standard in PUHCA—regulation in the interest of “investors or consumers.”<sup>219</sup> The City of New Orleans argued that the SEC administers PUHCA in the interest of investors, but not of

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210. *Senate Hearing, supra* note 6, at 47-56 (prepared statement of Charles A. Patrizia on Behalf of an Ad Hoc Group of Registered Electric Utility Holding Companies).

211. “We do not believe a change in the jurisdictional commission is required to increase the effectiveness of protection for consumers and investors mandated in PUHCA. Indeed, S. 544 would be an abandonment of consistent regulatory authority accepted by the Supreme Court and Congress for almost sixty years.” *Senate Hearing, supra* note 6, at 48.

212. “Congress has considered the transfer of PUHCA to FERC (or its predecessors) on several occasions. Each time there were neither compelling policy reasons nor a groundswell of support for the proposed transfer, and each of the previous attempts failed.” *Senate Hearing, supra* note 6, at 49.

213. “FERC and SEC have a different set of precedents, procedures, and regulatory philosophy. S. 544 would impose an entirely new regulatory scheme on this industry that has lived under SEC regulation for 58 years. Registered companies would still be subject to SEC jurisdiction for offerings and related securities issuances under the Securities Act of 1933 . . . and the Securities and Exchange Act of 1934. . . .” *Senate Hearing, supra* note 6, at 50.

214. “FERC procedures are fundamentally different than those at the SEC. The FERC process tends toward a more adversarial approach to regulation. Proponents of [S. 544] appear to seek routine adversarial proceedings with all the costs and time commitments they require.” *Senate Hearing, supra* note 6, at 53.

215. *Senate Hearing, supra* note 6, at 54-55. For example, with respect to the Due Process Clause, the Ad Hoc Group argued that “[t]here is simply no legitimate, governmental interest furthered by this legislation, and it follows that the means chosen are irrational and unreasonable.” *Senate Hearing, supra* note 6, at 55. *See also* *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989)(regulation of electric power rates subject to just compensation clause).

216. *Senate Hearing, supra* note 6, at 55-56.

217. *Senate Hearing, supra* note 6, at 56.

218. *Senate Hearing, supra* note 6, at 7.

219. *Senate Hearing, supra* note 6, at 29.

consumers.<sup>220</sup> Finally, the Environmental Action Foundation and the Consumer Federation of America argued that the SEC had failed to respond to consumer complaints.<sup>221</sup>

Thus, the arguments in support of the S. 544 implied that the wholesale transfer of PUHCA from the SEC to the FERC would trade one "evil" for another—regulation by the SEC on behalf of investors but not on behalf of consumers in exchange for regulation by the FERC on behalf of consumers but not on behalf of investors.

Indeed, although the Chair of the FERC expressed neither support nor opposition to the transfer of PUHCA, she appeared to acknowledge that the FERC could administer PUHCA from a consumer-protection perspective but that it might be difficult for the FERC to administer PUHCA from an investor-protection perspective:

We do rates. I mean, that is what we do. We have expertise in that area, and I see no policy or substantive reason why the rates of registered utility holding company subsidiaries should be any different than rates of other electric utilities. That is, with all modesty, what we are set up to do and know how to do. *The SEC, of course, has a very different function.*<sup>222</sup>

In a written response to additional questions submitted after the Senate hearing on S. 544, the Chair of the FERC similarly observed that "[t]he SEC primarily focuses on the impact of a transaction on corporate structure and investors, whereas the FERC primarily focuses on the impact of a transaction on utility ratepayers and utility operations."<sup>223</sup>

It seems duplicitous to argue that, although an investor-oriented administrative agency (the SEC) is unable to regulate for the protection of consumers as well as of investors, a consumer-oriented administrative agency (the FERC) would be able to regulate for the protection of investors as well as of consumers. Thus, the wholesale transfer of PUHCA is not the answer. The proper protection of investors, which PUHCA requires, necessitates that the SEC continue to administer it. The proper protection of consumers, however, which PUHCA also requires, necessitates some change in the manner in which it is administered.

## V. TOWARD AN SEC-FERC MEMORANDUM OF UNDERSTANDING

### A. Introduction

The SEC could stall the political momentum for the transfer of PUHCA from the SEC to the FERC if it administered PUHCA with an increased concern for consumer protection. The proponents of S. 544 have implied that such a concern is foreign to the SEC. It is not, of course, foreign to the FERC. Thus, the SEC should learn about consumer protection from the FERC. It could learn from the FERC through increased cooperation in their respective regulation of electric public utilities.

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220. *Senate Hearing, supra* note 6, at 34-35.

221. *Senate Hearing, supra* note 6, at 68-69.

222. *Senate Hearing, supra* note 6, at 18 (emphasis added).

223. *Senate Hearing, supra* note 6, at 114 (responses to questions from Sen. Bumpers).

This increased cooperation also could provide a context for the resolution of conflicts that arise between FERC administration of title II of the FPA and SEC administration of PUHCA. It could provide a broad context for the resolution of conflicts that arise between section 13 of PUHCA and section 205 of the FPA, sections 9 and 10 of PUHCA and section 203 of the FPA, and other provisions of PUHCA and the FPA.

The SEC and the FERC claim to have recognized, in the aftermath of the *Ohio Power* administrative orders and judicial decisions, the importance of increased cooperation in their respective regulation of electric public utilities. For example, in her prepared statement before the Senate Committee on Energy and Natural Resources on S. 544, the Chair of the FERC observed that “the staffs of the FERC and the SEC have attempted in recent years to coordinate more closely regarding matters of overlapping jurisdiction.”<sup>224</sup> In a written response to additional questions submitted after the Senate hearing on S. 544, the SEC observed that “[t]he staff of the [SEC] informally consults with the staff of the FERC on various issues.”<sup>225</sup> There is no reason to doubt that the SEC and the FERC are committed to increased informal cooperation. However, there are several problems with informal cooperation.

First, neither the public nor even perhaps the electric public utilities subject to SEC and FERC regulation are advised or aware of the substantive details of informal cooperation between the SEC and the FERC. There is no mechanism for the release to the public of those details. Second, there is no procedural protocol for informal cooperation between the SEC and the FERC. There are no rules for the two administrative agencies to observe. Third, neither the SEC nor the FERC is bound to cooperate with the other administrative agency. Finally, there is no impetus for either the SEC or the FERC to compromise or innovate to reach an accommodation.

These problems could be addressed through increased formal cooperation between the SEC and the FERC. In particular, a formal agreement between the two administrative agencies could define the procedural rules for increased cooperation, which procedural rules would include a requirement that the substantive details of this increased cooperation be released to the public. Both the SEC and the FERC could be bound to the agreement, which could promote compromises and accommodations as well as innovations in the regulation of electric public utilities.

The administrative vehicle for formal cooperation between two administrative agencies is the Memorandum of Understanding (MOU). The MOU, which is defined neither in administrative law treatises nor in the Administrative Procedure Act (APA), is a signed agreement between two administrative agencies that establishes a procedural protocol relative to, for example, exchanges of information and consultations on issues of common interest, which issues, to be sure, could precipitate conflicts in jurisdic-

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224. *Senate Hearing, supra*, note 6, at 15.

225. *Senate Hearing, supra* note 6, at 131.

tion between the two agencies. It is, first and foremost, a procedural mechanism for the conduct of administrative agency business. In this respect it is a procedural regulation, the promulgation of which the APA exempts from the notice and comment requirements applicable to the promulgation of substantive regulations.<sup>226</sup>

An MOU need not be confined, however, to exchanges of information and consultations between two administrative agencies. Because it is a procedural regulation, it is subject to few restrictions on form and content. "Absent constitutional restraints or extremely compelling circumstances[,] the 'administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' "<sup>227</sup>

Both the SEC and the FERC have quite limited experience with the MOU. Indeed, the SEC has never concluded an MOU with another federal administrative agency. The FERC is more familiar with the MOU, but has never concluded one relative to its responsibilities under part II of the FPA.

### *B. SEC and FERC Memoranda of Understanding*

The SEC is not altogether unfamiliar with the MOU. It has confined its use of this administrative vehicle for formal cooperation between two administrative agencies, however, to the regulation of international transactions in securities.<sup>228</sup>

In November 1988, the SEC issued a policy statement on the regulation of international transactions in securities.<sup>229</sup> The policy statement emphasized the need for cooperation among foreign administrative agencies responsible for securities regulation.<sup>230</sup> In July 1989, the SEC invited the public to comment on a proposal for SEC regulation of foreign brokers and dealers in securities, under which proposal the SEC would recognize the regulation of foreign brokers and dealers by foreign securities authorities and would thus exempt those foreign brokers and dealers, with limited business with significant U.S. institutional investors, from SEC registration

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226. 5 U.S.C. § 553(a)(2)(1988). *See, e.g.*, *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898 (8th Cir. 1979)(MOU not subject to APA notice and comment requirements).

227. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978)(citations omitted). *See also* *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

228. "MOUs have provided an effective and efficient means of obtaining information [on international securities transactions] and have enhanced the Commission's enforcement capabilities." S. Rep. No. 461, 100th Cong., 2nd Sess. 6 (1988). *See, e.g.*, *Insider Trading and Securities Fraud Enforcement Act of 1980*, Pub. L. No. 100-704, § 6, 102 Stat. 4677, 4681 (authorization for SEC assistance in investigations of international securities transactions)(codified at 15 U.S.C. § 78u(a)(2)(1988)).

229. Policy Statement on Regulation of International Securities Markets, International Series Release No. 1, 43 SEC Docket 128 (1988).

230. "The ability of securities regulators to address the issues raised by internationalization of the securities markets will depend greatly upon cooperation among regulators. There can be no doubt that all securities regulators should work together diligently. . . ." *Id.* at 139.

requirements.<sup>231</sup> The proposal required the cooperation of foreign securities authorities in the form of memoranda of understanding. "The [proposal] would require MOUs between the [SEC] and the [foreign securities authorities] that provide for cooperation and coordination in regulatory, as well as enforcement, matters."<sup>232</sup>

Since its issuance of the policy statement on the regulation of international transactions in securities, the SEC, relative to its responsibilities under the Securities Act of 1933,<sup>233</sup> or the Securities Exchange Act of 1934,<sup>234</sup> has concluded numerous memoranda of understanding with foreign administrative agencies responsible for securities regulation.<sup>235</sup> How-

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231. Recognition of Foreign Broker-Dealer Regulation, International Series Release No. 106, 43 SEC Docket 2110 (1989), *reprinted in* 54 Fed. Reg. 30,087 (1989). The purpose of the proposal was to "facilitat[e] international securities transactions without compromising the essential protection of the U.S. broker-dealer regulatory regime." *Id.* (Summary).

232. *Id.* at 30,090.

233. 15 U.S.C. §§ 77a-77aa (1988).

234. *Id.* §§ 78a-78kk.

235. Memorandum of Understanding Between the United States Securities and Exchange Commission and the Australian Securities Commission Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, International Series Release No. 599, 55 SEC Docket 840 (Oct. 20, 1993); Memorandum of Understanding Between the United States Securities and Exchange Commission and the Superintendencia de Valores y Seguros of Chile on Consultation, Technical Assistance, and Mutual Assistance for the Exchange of Information, International Series Release No. 548, 54 SEC Docket 542 (1993); Memorandum of Understanding between the United States Securities and Exchange Commission and the Commissione Nazionale per le Società e la Borsa of Italy, International Series Release No. 547, 54 SEC Docket 309 (1993); Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws Between the United States Securities and Exchange Commission and the Comisión Nacional del Mercado de Valores of Spain, International Series Release No. 429, 51 SEC Docket 2447 (1992); Memorandum of Understanding Between the United States Securities and Exchange Commission and the Comisión Nacional de Valores of Argentina on Consultation, Technical Assistance, and Mutual Assistance for the Exchange of Information, International Series Release No. 354, 50 SEC Docket 674 (1991); Memorandum of Understanding Between the United States Securities and Exchange Commission and the Norway Banking, Insurance, and Securities Commission Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, International Series Release No. 321, 49 SEC Docket 1462 (1991); Memorandum of Understanding on Mutual Assistance and the Exchange of Information Between the United States Securities and Exchange Commission and Commodity Futures Trading Commission and the United Kingdom Department of Trade and Industry and Securities and Investment Board, International Series Release No. 323, 49 SEC Docket 1468 (1991); Memorandum of Understanding Between the United States Securities and Exchange Commission and the Comisión Nacional de Valores of Mexico on Consultation, Technical Assistance, and Mutual Assistance for the Exchange of Information, International Series Release No. 305, 49 SEC Docket 876 (1991) (Spanish version); International Series Release No. 181, 47 SEC Docket 716 (1990) (English version); Memorandum of Understanding Between the United States Securities and Exchange Commission and the Institut Monétaire Luxembourgeois, International Series Release No. 137, 46 SEC Docket 1388 (1990); Memorandum of Understanding Between the United States Securities and Exchange Commission and the Comissão de Valores Mobiliários (Brazil), International Series Release No. 7, 43 SEC Docket 196 (1988); United States Securities and Exchange Commission Memorandum of Understanding With the Ontario Securities Commission, Commission des Valeurs Mobilières du Québec, and the British Columbia Securities Commission, International Series Release No. 6, 43 SEC Docket 175 (1988); Memorandum of Understanding on Exchange of Information Between the United States Securities and Exchange Commission and the United Kingdom Department of Trade and Industry in Matters Relating to Securities and Between the United States Commodity Futures Trading Commission and the United

ever, it has never concluded an MOU relative to its responsibilities under PUHCA.

The FERC also is not altogether unfamiliar with the MOU.<sup>236</sup> It has never concluded an MOU either with the SEC or under part II of the FPA. However, it has concluded several memoranda of understanding under part I of the FPA,<sup>237</sup> the Natural Gas Act of 1938,<sup>238</sup> and the Natural Gas Policy Act.<sup>239</sup>

Under part I of the FPA, the FERC regulates the development of hydroelectric projects.<sup>240</sup> Under the Reclamation (or National Irrigation) Act of 1902,<sup>241</sup> the Bureau of Reclamation of the U.S. Department of the Interior (Reclamation) is directed to construct dams for "the reclamation of arid lands. . . ."<sup>242</sup> Reclamation is authorized, however, to lease those dams to electric utilities for hydroelectric power development,<sup>243</sup> which would be subject to part I of the FPA, when the federal government itself has not reserved the right to such development.<sup>244</sup> There is in this regard the potential for conflicts of jurisdiction between the FERC and Reclamation.

To address the potential for conflicts in jurisdiction and otherwise facilitate leases of federal dams to electric utilities, the FERC and Reclamation concluded an MOU in November 1992.<sup>245</sup> The MOU acknowl-

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Kingdom Department of Trade and Industry in Matters Relating to Futures, International Series Release No. 4, 43 SEC Docket 163 (1986); Memorandum of Understanding Between the United States Securities and Exchange Commission and the Securities Bureau of the Japanese Ministry of Finance on the Sharing of Information, International Series Release No. 5, 43 SEC Docket 172 (1986); Memorandum of Understanding Between the United States of America and the Government of Switzerland, International Series Release No. 2, 43 SEC Docket 123 (1982).

236. See, e.g., Memorandum of Understanding Between the Federal Energy Regulatory Commission and the U.S. Department of the Interior to Establish a Partnership in Support of the Take Pride in America Program, 55 Fed. Reg. 53,335 (1990). The Take Pride in America Program "focuses national attention on the problems of abuse and misuse of natural and cultural resources and volunteer opportunities to address these problems, thereby promoting grassroots involvement to foster public awareness and stewardship activities." *Id.* Art. 1.

237. 16 U.S.C. § 791a-323b (1988).

238. 15 U.S.C. §§ 717-717z (1988).

239. *Id.* §§ 3301-3432.

240. See, e.g., *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, (1983); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, (1975); *First Iowa Hydroelectric Coop. Corp. v. FPC*, 328 U.S. 152, (1946).

241. See generally 43 U.S.C. §§ 371-573(1988).

242. *Id.* § 373a.

243. *Id.* § 522. "But the development and sale of such power is authorized only as an incidental phase of reclamation, not as a primary or independent end in itself. The statute and its amendments are *reclamation* acts, not commercial power development acts." *Burley Irrigation Dist. v. Ickes*, 116 F.2d 529, 530-31 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941).

244. See, e.g., Pub. L. No. 83-752, § 2, 68 Stat. 1045, 1045 (1954); Pub. L. No. 75-698, § 1, 52 Stat. 941, 941 (1938); Pub. L. No. 70-642, § 7, 45 Stat. 1057, 1062 (1928)(federal government reservations of right to hydroelectric power development).

245. Memorandum of Understanding Between the Federal Energy Regulatory Commission and the Bureau of Reclamation, Department of the Interior, for Establishment of Processes for the Early Resolution of Issues Related to the Timely Development of Non-Federal Hydroelectric Power at Bureau of Reclamation Facilities, 58 Fed. Reg. 3269 (1993).

edges that “Reclamation is agreeable to the development of hydro-electric power by non-federal entities under [Part I of the Federal Power Act] on Reclamation projects where hydroelectric power development has not been reserved exclusively for development under federal reclamation law. . . .”<sup>246</sup> The MOU establishes procedures for Reclamation review of applications filed under part I for FERC hydroelectric project licenses to determine if the federal government has reserved the right to hydroelectric power development.<sup>247</sup> It also establishes procedures for FERC review of applications filed with Reclamation for leases of federal dams to determine if the proposed hydroelectric projects would be subject to part I.<sup>248</sup>

The MOU commits both the FERC and Reclamation to guidelines, affixed to the MOU in an appendix,<sup>249</sup> to determine if the federal government has reserved the right to hydroelectric power development.<sup>250</sup> With respect to leases of Reclamation dams to electric utilities, the MOU provides that, for purposes of compliance with the National Environmental Policy Act (NEPA),<sup>251</sup> the FERC shall be the “lead” administrative agency.<sup>252</sup> Finally, it provides that “[n]othing [therein] shall be interpreted as modifying or limiting the legal rights and authorities of either agency. . . .”<sup>253</sup>

Under the Natural Gas Act of 1938,<sup>254</sup> the FERC regulates the sale and transportation in interstate commerce of wholesale natural gas, which includes liquified natural gas (LNG). For example, under section 7 of the Natural Gas Act,<sup>255</sup> the FERC issues licenses for LNG transportation and storage facilities, which licenses include to ensure their reliability as well as safe operation. The U.S. Department of Transportation (DOT), however, under the Natural Gas Pipeline Safety Act of 1968,<sup>256</sup> the Hazardous Materials Transportation Act,<sup>257</sup> and the Ports and Waterways Safety Act of 1972,<sup>258</sup> regulates the design, construction, inspection and maintenance of LNG transportation and storage facilities to ensure their safe operation. Thus the FERC as well as the DOT are responsible for the safe operation of LNG facilities.

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246. *Id.* (Preamble).

247. *Id.* at 3269-70 (Article I).

248. *Id.* at 3270 (Article 2).

249. *Id.* at 3271-72.

250. *Id.* at 3271 (Article 4).

251. 42 U.S.C. §§ 4331-70(1988).

252. FERC and the Bureau of Reclamation 58 Fed. Reg. at 3271 (Article 5).

253. *Id.* (Article 6). In addition, it states that “[n]othing [therein] shall be construed as limiting or modifying Reclamation’s rights to intervene in [FERC] proceedings. . . .” *Id.* (Article 7).

254. 15 U.S.C. §§ 717-717z (1988).

255. *Id.* § 717f.

256. 49 U.S.C. App. §§ 1671-88 (1988).

257. *Id.* §§ 1801-19 (1988).

258. 33 U.S.C. §§ 1221-36 (1988).

To avoid conflicts in jurisdiction in this regard, the FERC and the DOT concluded an MOU in April 1985.<sup>259</sup> The MOU acknowledges that the DOT exercises "exclusive authority to promulgate Federal safety standards" for LNG facilities but that the FERC is authorized to "impose more stringent safety standards when warranted by special circumstances. . . ."<sup>260</sup> It thus provides for DOT participation in FERC inspections of and conferences on LNG facilities.<sup>261</sup> It also establishes procedures for DOT evaluation of FERC-proposed license conditions and requirements for LNG facilities that exceed DOT requirements.<sup>262</sup>

Should the DOT agree with a FERC-proposed requirement that exceeds a DOT requirement, it is required under the MOU to impose and enforce the requirement in accordance with procedures under the Natural Gas Pipeline Safety Act and the Ports and Waterways Safety Act.<sup>263</sup> The MOU also requires the DOT to advise the FERC of DOT inspections of LNG facilities.<sup>264</sup> Finally, the MOU provides that the FERC and the DOT "will designate appropriate staff" to administer the MOU.<sup>265</sup>

A quite similar MOU was concluded in January 1993.<sup>266</sup> The recent MOU, however, is applicable to natural gas transportation and storage in general and was concluded also under the Natural Gas Policy Act.<sup>267</sup> It provides that the DOT shall advise the FERC of (1) DOT activities that impact the responsibilities of the FERC, (2) significant accidents relative to gas pipeline facilities, (3) significant DOT enforcement actions relative to such facilities, and (4) state and local government complaints relative to such facilities.<sup>268</sup> It conversely provides that the FERC shall advise the DOT of (1) potential problems with the safe operation of natural gas facilities, (2) future gas pipeline construction, (3) FERC environmental compliance inspections of natural gas facilities, (4) significant issues that arise in the preparation of environmental assessments or environmental impact statements under NEPA, and (5) state and local government complaints relative to gas pipeline facilities.<sup>269</sup> Finally, the MOU provides that the FERC and the DOT "will designate appropriate staff" to administer the MOU.<sup>270</sup>

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259. Memorandum of Understanding Between the Department of Transportation and the Federal Energy Regulatory Commission Regarding Liquefied Natural Gas Facilities, 50 Fed. Reg. 20,275 (1985).

260. *Id.* (statement of Purpose).

261. *Id.* ¶ 1.a.

262. *Id.* ¶¶ 1.b-2.c.

263. *Id.* ¶ 2.d.

264. *Id.* ¶ 2.e.

265. *Id.* ¶ 3. In addition, it provides that "[n]othing [therein] is intended to restrict the statutory authority of DOT or the FERC." *Id.* ¶ 5.

266. Memorandum of Understanding on Natural Gas Transportation Facilities, 58 Fed. Reg. 7884 (1993).

267. 15 U.S.C. §§ 3301-3432 (1988).

268. Natural Gas, Transportation Facilities 58 Fed. Reg. at 7884 (¶1).

269. *Id.* ¶ 2.

270. *Id.* (statement on administration). It also provides that "[n]othing [therein] is intended to restrict the statutory authority of the [DOT] or the [FERC]." *Id.* (statement on limitations).



*C. NRC-EPA Memoranda of Understanding*

Because the two agencies have quite limited experience with the MOU, both the SEC and the FERC could learn about this administrative vehicle for formal cooperation from other agencies that have employed the MOU to cooperate with, benefit from the expertise of, and resolve potential conflicts in jurisdiction with, sister administrative agencies. In particular, the U.S. Nuclear Regulatory Commission (NRC) has concluded memoranda of understanding with several administrative agencies.<sup>271</sup> The MOU is a common NRC administrative instrument because the Atomic Energy Act of 1954,<sup>272</sup> the principal legislation the NRC administers, often brushes up against statutes administered by, for example, the U.S. Environmental Protection Agency (EPA).

The NRC was established in 1974 under the Energy Reorganization Act.<sup>273</sup> In effect, it replaced, and acquired the responsibilities of, the Atomic Energy Commission (AEC),<sup>274</sup> which had administered the Atomic Energy Act. In general, the NRC is directed under the Atomic Energy Act to regulate the production and utilization of radioactive materials for the protection of the public health and safety.<sup>275</sup> The EPA was established in 1970 under an executive reorganization plan.<sup>276</sup> It acquired various responsibilities from, *inter alia*, the Department of the Interior, the Department of Health, Education, and Welfare, the Council on Environmental Quality, the Federal Radiation Council, and the Department of Agriculture.<sup>277</sup> It also acquired from the AEC the functions of its Division of Radiation Protection Standards "to the extent that such functions of the [AEC] consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material."<sup>278</sup>

Thus, the mandates of the NRC and the EPA are quite similar. Both agencies are to regulate radioactive materials. The NRC is to protect the public from radiological hazards. The EPA is to protect the environment from radiological hazards. The distinction, of course, between a public hazard and an environmental hazard is somewhat specious. In addition, the NRC is subject to NEPA, which requires the NRC, in effect, to endeavor to assure that its regulation of radioactive materials results in no significant detriment to the environment. In particular, under section 102 of NEPA,<sup>279</sup> the NRC is required to prepare an environmental impact statement on, for

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271. See, e.g., Memorandum of Understanding Between the U.S. Nuclear Regulatory Commission and the U.S. Department of Health and Human Services, Food and Drug Administration, 58 Fed. Reg. 47,300 (1993); 44 C.F.R. Part 353, Appendix A (Memorandum of Understanding Between Federal Emergency Management Agency and Nuclear Regulatory Commission).

272. 42 U.S.C. §§ 2011-2296 (1988).

273. *Id.* § 5814.

274. *Id.* §§ 5841-42.

275. *Id.* § 2012.

276. Reorg. Plan No. 3, 35 Fed. Reg. 15,623 (1970).

277. *Id.* at 15,623-25.

278. *Id.* at 15,624.

279. 42 U.S.C. § 4332 (1988).

example, the operation of a nuclear power plant before it licenses the plant. Thus, it was perhaps inevitable that the NRC and the EPA would regulate the same radiological hazards.

To avoid the potential for conflicts of jurisdiction in their respective regulation of radiological hazards, the AEC and the EPA concluded in September 1973 a Memorandum of Understanding With Respect to AEC-Licensed Facilities (Facilities MOU).<sup>280</sup> The Facilities MOU is still in effect.<sup>281</sup> It was concluded to "fix an appropriate interface of the respective functions of the two agencies, to further facilitate their useful cooperation, and to avoid unnecessary duplication with regard to AEC-licensed facilities. . . ."<sup>282</sup> The Facilities MOU provides, first, that the AEC will regulate its licensed facilities to assure that all radioactive discharges from those facilities are within EPA generally applicable environmental standards.<sup>283</sup> Second, it provides for AEC participation in studies for the development of environmental standards.<sup>284</sup> Third, the Facilities MOU provides for EPA participation in AEC inspections of AEC-licensed facilities to evaluate the compliance of those facilities with environmental standards.<sup>285</sup>

Fourth, it provides for AEC evaluation of EPA reports on radioactive discharges from AEC-licensed facilities.<sup>286</sup> Fifth, the Facilities MOU provides for EPA technical advice to the AEC on radioactive discharges from AEC-licensed facilities.<sup>287</sup> Finally, it provides that "nothing [therein], or any activities conducted [thereunder], shall be construed as precedent for, or as recognizing, any authority of EPA to duplicate or supervise inspection activities of the AEC."<sup>288</sup>

Even prior to the Facilities MOU, which addressed a broad potential for conflicts in jurisdiction between the NRC and the EPA, the two agencies had concluded a narrow MOU that addressed a specific potential for conflicts in jurisdiction under new legislation. In 1972, Congress enacted the Federal Water Pollution Control Act Amendments (FWPCA).<sup>289</sup> Section 402 of the FWPCA established the National Pollutant Discharge Elimination System (NPDES),<sup>290</sup> under which the EPA licenses the discharge of pollutants into rivers and lakes from, for example, industrial facilities. Under section 402, the EPA thus licenses the discharge of radioactive pollutants from nuclear power plants and other NRC-licensed facilities.

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280. 38 Fed. Reg. 24,936 (1973).

281. *See, e.g.*, 10 C.F.R. § 20.106 (1981)(reference to Facilities MOU).

282. AEC Licensed Facilities, 38 Fed. Reg. at 24,936.

283. *Id.* ¶ 1.

284. *Id.* ¶ 2.

285. *Id.* ¶ 3.

286. *Id.* ¶ 4.

287. *Id.* ¶ 5.

288. *Id.* ¶ 6.

289. 33 U.S.C. §§ 1251-1376 (1988). In 1977, Congress amended and re-titled the legislation the Clean Water Act. Pub. L. No. 95-217, 91 Stat. 1566 (1977).

290. 33 U.S.C. § 1342 (1988).

Under, inter alia, section 316,<sup>291</sup> the EPA also regulates thermal discharges from nuclear power plants.<sup>292</sup> Section 511 of the FWPCA provides that NEPA provides no basis for other federal administrative agencies to regulate discharges of pollutants into rivers and lakes.<sup>293</sup> Thus the NRC, when it licenses a nuclear power plant, for example, must allow the EPA to regulate radioactive discharges from the plant.

In January 1973, the AEC and the EPA concluded a Memorandum of Understanding Regarding Implementation of Certain Complementary Responsibilities (FWPCA MOU).<sup>294</sup> The FWPCA MOU was published with a revised statement of AEC responsibilities under NEPA relative to radioactive discharges.<sup>295</sup> The FWPCA MOU was concluded "[f]or the purpose of implementing NEPA and the FWPCA in a manner consistent with both acts and the public interest . . . ."<sup>296</sup> It provides, first, that the AEC, in accordance with section 511 of the FWPCA and the revised statement of responsibilities under NEPA, will regulate AEC-licensed facilities in deference to EPA requirements relative, inter alia, to radioactive discharges.<sup>297</sup> Second, the FWPCA MOU provides that the EPA will expedite the issuance of discharge licenses for AEC-licensed facilities.<sup>298</sup> Third, it provides that the EPA, will issue discharge licenses for AEC-licensed facilities on the basis of, inter alia, cost of pollution control measures, age of the AEC-licensed facilities, available pollution control techniques, and other considerations that might allow for increased levels of radioactive discharges.<sup>299</sup> Finally, the FWPCA MOU provides that "[n]othing [therein] is intended to restrict the statutory authority of either agency."<sup>300</sup>

The FWPCA MOU was revised in 1975, when the NRC and the EPA concluded the Second Memorandum of Understanding Regarding Implementation of Certain NRC and EPA Responsibilities (Second FWPCA MOU).<sup>301</sup> The Second FWPCA MOU is still in effect.<sup>302</sup> The Second FWPCA MOU, which is quite detailed, was published with a revised statement of NRC responsibilities under NEPA relative to radioactive discharges.<sup>303</sup> It also was published for public comment thirteen months prior to its adoption.<sup>304</sup> The Second FWPCA MOU explains that it was concluded "to clarify the respective roles of EPA and NRC in the decision-making processes concerning nuclear power plants and other facilities

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291. *Id.* § 1326.

292. *See, e.g.,* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1979), *cert. denied*, 439 U.S. 824 (1978)(EPA regulation of thermal discharges from nuclear power plant).

293. 33 U.S.C. § 1371 (1988).

294. 38 Fed. Reg. 2713 (1970).

295. 38 Fed. Reg. at 2679.

296. 38 Fed. Reg. at 2713.

297. *Id.* ¶ 1.

298. *Id.* ¶ 2.

299. *Id.* ¶ 3.

300. *Id.* ¶ 4.

301. 40 Fed. Reg. 60,115 (1975).

302. *See, e.g.,* 10 C.F.R. § 51.10 (reference to Second FWPCA MOU).

303. 40 Fed. Reg. at 60,120.

304. 39 Fed. Reg. 39,490 (1974).

requiring an NRC license. . . ."<sup>305</sup> In particular, it indicates that it is intended to reconcile NRC regulation under NEPA of radioactive discharges with EPA regulation under the FWPCA of radioactive discharges.<sup>306</sup>

The Second FWPCA MOU provides, first, that the NRC will regulate nuclear power plants and other specified NRC-licensed facilities in accordance with the revised statement of responsibilities under NEPA relative to radioactive discharges.<sup>307</sup> Second, it provides for the preparation of a single environmental impact statement in support of both an NRC license (for the operation of a nuclear power plant) and an EPA license (under the NPDES for radioactive discharges from the plant).<sup>308</sup> Third, the Second FWPCA MOU provides a detailed framework for NRC-EPA cooperation in the preparation of such environmental impact statements.<sup>309</sup> It states, for example, that "EPA and NRC will maintain close contact on water quality and related matters during the entire environmental review. . . ."<sup>310</sup>

Finally, the Second FWPCA MOU provides that "EPA and NRC will consider the feasibility of holding combined or concurrent hearings on EPA's section 402 permits and NRC's . . . permits, or other actions, on a case-by-case basis."<sup>311</sup> It appears that neither the NRC nor the EPA have ever conducted a combined administrative hearing for an NRC license and an EPA NPDES license. The NRC, however, has stated that the doctrine of res judicata is applicable in NRC administrative hearings to factual determinations reached in EPA administrative hearings.<sup>312</sup>

In a decision that adopted an EPA determination, under section 316 of the FWPCA,<sup>313</sup> on thermal discharges from a proposed nuclear power plant,<sup>314</sup> the NRC observed that "[p]erhaps the strongest reason for accepting as conclusive the EPA determinations of aquatic impact is to avoid protracted relitigation of these factual issues."<sup>315</sup> It also deferred to the EPA on thermal discharges, however, because "[t]he FWPCA reflects a

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305. 40 Fed. Reg. at 60,118.

306. *Id.* at 60,119.

307. *Id.* §§ 1-2.

308. *Id.* §§ 3-4.

309. *Id.* §§ 5-10.

310. *Id.* § 10.

311. *Id.* § 11.

312. *In re Public Serv. Co. of N.H. (Seabrook Station Units 1 and 2)*, CLI-78-1, 7 N.R.C. 1, *aff'd*, *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87 (1st Cir. 1978). *See, e.g., U.S. v. Utah Const. and Mining Co.*, 384 U.S. 394 (1966)(application of res judicata between two federal administrative agencies); *In re Houston Lighting & Power Co. (South Texas Project Units 1 and 2)*, CLI-77-13, 5 N.R.C. 1303 (1977)(application of res judicata between NRC and other federal administrative agency).

313. 33 U.S.C. § 1326 (1988).

314. "EPA is a sister Federal agency with expertise in the subject area, and it is being relied on for determination of a single entirely factual issue which Congress [under the FWPCA] has specifically entrusted to it." 7 N.R.C. at 52-53.

315. *Id.* at 53. "The alternative . . . would be for the [NRC] to allow relitigation of an issue already ventilated before the EPA, possibly leading to different determinations concerning aquatic impacts. . . ." *Id.* at 46. The decision observed that the EPA allows for formal administrative hearings on NPDES licenses. *Id.* at 54-55.

Congressional judgment that the primary repository of expertise on water pollution questions generally, and on the environmental impacts of heat specifically, should be the EPA.”<sup>316</sup> The U.S. Court of Appeals for the First Circuit agreed with the NRC. It stated in no uncertain terms that “the NRC may rely on EPA findings made in the course of determining whether to issue a discharge permit.”<sup>317</sup>

Thus the relationship between the NRC and the EPA, relative to their respective regulation of radiological hazards, is defined by an MOU on NRC-licensed facilities and by an MOU under the FWPCA. Together, the two documents provide for increased cooperation between the two administrative agencies and establish a framework for the resolution of potential conflicts in jurisdiction between two sister federal agencies.

## VI. CONCLUSION

Some members of the U.S. Congress have criticized the SEC for its administration of PUHCA, which it might, therefore, transfer to the FERC because the FERC, it is believed, could administer PUHCA with a genuine concern for consumer protection. Perhaps the SEC has no objection to the transfer of PUHCA to the FERC. If it wishes to retain its jurisdiction, however, then it must administer the legislation with increased concern for consumer protection, which it could learn from the FERC through increased cooperation.

The informal cooperation in which the *Ohio Power* administrative orders and judicial decisions have resulted is inadequate because it is, inter alia, not known to the public and not innovative. To assure that it acquires from the FERC a legitimate education in consumer protection, the SEC should conclude with the FERC and publish a formal agreement—a Memorandum of Understanding—with procedural rules for increased cooperation as well as a framework for the resolution of potential conflicts in jurisdiction between SEC administration of PUHCA and FERC administration of title II of the FPA.

It is possible to glean from the FERC memoranda of understanding under part I of the FPA, the Natural Gas Act, and the Natural Gas Policy Act, as well as from the more substantive NRC-EPA memoranda of understanding, the fundamental elements of a draft SEC-FERC MOU relative to the regulation of electric public utilities. A draft MOU could then be the subject of negotiation between authorized representatives of the SEC and the FERC.

First, some elements of the FERC and NRC memoranda of understanding are boiler-plate—the purpose of the MOU, the legal basis for and background to the MOU, the effectiveness of the MOU upon the signature of authorized representatives, the suspension, amendment, or termination of the MOU, and the effect of the MOU on authorities and responsibilities under federal law. An SEC-FERC MOU should, of course, include those

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316. *Id.* at 52.

317. *New England Coalition*, 582 F.2d at 99.

boiler-plate provisions. It should state the legal basis for and background to the MOU, which would provide an indication of the potential for conflicts in jurisdiction between the SEC and the FERC. In particular, it could reference sections 9 and 10 of PUHCA and section 203 of the FPA, relative to electric utility acquisitions, as well as section 13 of PUHCA and section 205 of the FPA, relative to service, sales, and construction contracts between public utility subsidiaries within the same holding company system.

Second, the FERC memoranda of understanding as well as the Facilities MOU and the Second FWPCA MOU establish procedural protocols, to which the administrative agencies are bound, with rules for sister agencies, to observe relative to their relationship. In particular, the FERC and NRC memoranda provide for routine exchanges of information and for consultations thereon. In some instances, the memoranda provide for written comments or other formal communications on information received from other administrative agencies, designate "lead" administrative agencies on particular issues, and allow for administrative agencies to conduct joint inspections and audits of regulated industries.

An SEC-FERC MOU should include these provisions. For example, the SEC should agree to provide the FERC with copies of applications, filed under sections 9 and 10 of PUHCA, for SEC approval of electric utility acquisitions and the FERC should agree to provide the SEC with applications, filed under section 203 of the FPA, for FERC approval of the same acquisitions. The MOU should establish an inter-agency committee to review and discuss those applications and to administer the MOU in general. Under an SEC-FERC MOU, the FERC should be the "lead" administrative agency on the anti-trust implications of electric utility acquisitions. The MOU also should allow the FERC to participate in SEC audits of registered holding companies.

Third, the FERC memoranda of understanding are somewhat pedestrian. The procedural protocols in the memoranda on natural gas transportation and storage, for example, might simply represent a codification of informal cooperation between the FERC and the DOT, which codification, to be sure, was a step in the right direction because, for the first time, it was available to natural gas companies and to the public. The NRC-EPA memoranda, however, are more innovative. The Second FWPCA MOU, for example, provides for combined administrative hearings for NRC licenses and for EPA NPDES licenses.

An SEC-FERC MOU should in some respects be innovative and depart from convention in the regulation of electric public utilities, which convention has subjected the SEC to much criticism. In particular, the MOU should provide for combined administrative hearings on proposed electric public utility acquisitions under sections 9 and 10 of PUHCA and section 203 of the FPA. A combined hearing would preclude the re-adjudication of issues that are common to section 10 of PUHCA and section 203 of the FPA—the federal anti-trust implications of the proposed acquisition and the "economies and efficiencies" in which it would result. It would

reverse an apparent SEC reluctance to grant requests for administrative hearings under PUHCA and would allow the SEC to learn first-hand from the FERC about consumer protection.

Finally, the Facilities MOU and the Second FWPCA MOU were published in the Federal Register and are referenced in the Code of Federal Regulations. The FERC memoranda of understanding were published in the Federal Register. In each instance, therefore, the MOU was available to the public. An SEC-FERC MOU should provide for its own publication in the Federal Register within a specified period after it is signed by authorized representatives of the SEC and the FERC.

An SEC-FERC MOU would impose new responsibilities on the SEC under PUHCA and otherwise limit its discretion in the administration of the legislation. In this regard it would be a burden on the SEC—as well as on the FERC. It would, however, provide a framework for the resolution of potential conflicts in jurisdiction between the SEC and the FERC relative to the regulation of electric public utilities. Such a framework should be in place, in particular, before the two agencies are inundated with applications for electric utility acquisitions. The alternative to an SEC-FERC MOU is to allow or expect the U.S. Supreme Court to continue to resolve conflicts between PUHCA and the Federal Power Act, which alternative neither the agencies nor the electric public utilities would relish.

In addition, the proponents of S. 544 and of the wholesale transfer of PUHCA from the SEC to the FERC have argued that the SEC has failed to administer PUHCA with concern for consumer protection. To retain its jurisdiction, the SEC must administer the legislation with increased concern for consumer protection, which it could learn through increased cooperation with the FERC under an MOU. In this respect, an SEC-FERC MOU could persuade the proponents of S. 544 that there is, after all, no need for FERC to administer PUHCA. An SEC-FERC MOU could thus be preferable to the loss of PUHCA altogether.

## APPENDIX: PROPOSED SEC-FERC MEMORANDUM OF UNDERSTANDING

*A. Purpose*

1. The purpose of this Memorandum of Understanding (MOU) between the U.S. Securities and Exchange Commission (SEC) and the Federal Energy Regulatory Commission (FERC) is to provide guidance and establish policies and procedures for their respective staffs and the electric public utility industry with respect to the execution of SEC responsibilities under the Public Utility Holding Company Act of 1935 (PUHCA) relative to the execution of FERC responsibilities under part II of the FPA.

*B. Background*

1. Part II of the FPA establishes an extensive regime for federal regulation of electric public utilities engaged in interstate commerce. 16 U.S.C. §§ 824-824k. The principal purpose of part II is to provide for federal regulation of the sale and transmission in interstate commerce of wholesale electric power. In particular, section 205 requires electric power rates and charges be just and reasonable. 16 U.S.C. § 824d. Section 206 authorizes the FERC to revise electric power rate schedules for wholesale electric power transmitted and sold in interstate commerce. 16 U.S.C. § 824e(a). In addition, the FERC is authorized to review and approve utility acquisitions under section 203 of the Federal Power Act, which prohibits the sale by an electric public utility of facilities, valued in excess of \$50,000, or securities without FERC approval. 16 U.S.C. § 824b.

2. PUHCA contains an extensive and complex regime for SEC regulation of public utility holding companies. 15 U.S.C. §§ 79-79z-6 (1988). The purpose of the regime is to prevent a recurrence of the financial abuses for which public utilities, and their holding companies, were notorious in the two decades prior to enactment of PUHCA. The requirements of PUHCA are applicable to public utility holding companies—and their public utility subsidiaries—that otherwise are ineligible for an exemption under the legislation. Because PUHCA is applicable to public utility holding companies as well as their public utility subsidiaries, the SEC is directly involved in regulation of electric public utilities. For example, under section 13 of PUHCA, the SEC regulates service, sales, and construction contracts between registered holding companies and their public utility subsidiaries as well as between public utility subsidiaries within the same registered holding company system. 15 U.S.C. § 79m. In addition, the SEC is authorized to review and approve utility acquisitions under sections 9 and 10 of PUHCA. 15 U.S.C. §§ 79i-79j.

*C. Responsibilities*

1. When the SEC has issued an order under section 13 of PUHCA that approves a service, sales, or construction contract between a public utility subsidiary and a non-utility subsidiary within the same registered holding company system, the SEC shall provide the order to the FERC.



2. When the SEC is to audit a registered holding company for which it has approved under section 13 of PUHCA service, sales, or construction contracts between public utility subsidiaries and non-utility subsidiaries within the same holding company system, the SEC shall allow the FERC to participate in the audit and, if the FERC declines to participate, provide the audit report to the FERC.
3. When the SEC has received an application under sections 9 and 10 of PUHCA for the acquisition of an electric public utility and the FERC has received an application under section 203 of the FPA for the same acquisition, the SEC and the FERC shall exchange copies of their respective applications. The SEC and the FERC shall consult on those applications.
4. When the SEC has received an application under sections 9 and 10 of PUHCA for the acquisition of an electric public utility and the FERC has received an application under section 203 of the Federal Power Act for the same acquisition, the SEC and the FERC shall consult on the appropriateness of a combined administrative hearing on the applications. The SEC agrees that, should a combined hearing be deemed by both agencies to be appropriate, a FERC administrative law judge shall preside over that combined hearing.
5. Should a combined hearing be deemed inappropriate, the SEC shall have the right to participate in a FERC administrative hearing on the acquisition and the FERC shall have the right to participate in an SEC administrative hearing on the acquisition.
6. The SEC agrees that, when the SEC has received an application under sections 9 and 10 of PUHCA for the acquisition of an electric public utility and the FERC has received an application under section 203 of the FPA for the same acquisition, the FERC shall be the lead agency on the anti-trust implications of the acquisition.

#### *D. Administration*

1. The principal SEC contact under this MOU shall be the Director of the Office of Public Utility Regulation, Division of Investment Management, SEC. The principal FERC contact under this MOU shall be General Counsel, FERC.
2. The SEC and the FERC shall designate appropriate staff representatives for an inter-agency committee, and will establish procedures from time to time, to administer this MOU.
3. This MOU shall become effective after it is signed by authorized representatives of the SEC and the FERC. It shall be applicable to all future applications received by the SEC under sections 9 and 10 of PUHCA for the acquisition of an electric public utility, all applications received by the SEC under section 13 of PUHCA for sales, service, and construction contracts, and all such applications now before the SEC that have not been resolved.
4. This MOU shall not be interpreted to restrict or compromise the authorities or responsibilities of the SEC under PUHCA or of the FERC under part II of the FPA.

5. The SEC and the FERC reserve the right to suspend, amend, or terminate their respective commitments contained in this MOU upon written notice to the other agency thirty days before the right is exercised.
6. This MOU shall be published in the Federal Register within 30 days after it becomes effective.