

THE REQUIREMENT TO PROVIDE WHOLESALE SERVICE UNDER THE FEDERAL POWER ACT: A REMEDY OF CONTINUING VITALITY TO PROMOTE EFFICIENCY AND PREVENT DISCRIMINATION

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I. INTRODUCTION

Recent articles in this journal have concluded that electric utilities regulated by the Federal Energy Regulatory Commission¹ under the Federal Power Act (the Act) have been subjected to an obligation to provide services at wholesale despite the lack of a specific statutory requirement.² These articles then questioned the continued validity of that obligation in light of ongoing changes in the structure and regulation of the electric utility industry.

This article responds that a comprehensive review of relevant portions of the statute and precedent reveals that the Act was intended to be, and has been, applied in a remedial fashion. The problems remedied were actions on the part of jurisdictional utilities which would have denied their utility customers the ability to obtain or provide adequate and reliable electric service on just and reasonable terms. The remedy was a requirement that the jurisdictional utility either initiate a new service or continue an existing service under prescribed terms and conditions. The sum total of the remedies in the individual cases is not a de facto obligation to serve. Rather, they constitute guidelines for preservation of the public interest.

A. Overview

In 1935, Congress enacted part II of the Act³ because it found, among other things, that unbridled and unregulated competition in the interstate sale and transmission of electric energy had served neither the country nor the consumer well. At the heart of the Act are provisions governing the conditions under which the Commission may: (1) order a jurisdictional electric

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1. As used in this article, the terms "FERC" and "Commission" are used interchangeably to refer to both the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission, in their roles as administrators of the Act.

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

3. Bouknight & Raskin, *Planning for Wholesale Customer Loads in a Competitive Environment: The Obligation to Provide Wholesale Service Under the Federal Power Act*, 8 ENERGY L.J. 237 (1987); Pace, *Wheeling and the Obligation to Serve*, 8 ENERGY L.J. 265 (1987); Norton & Spivak, *The Wholesale Service Obligation of Electric Utilities*, 6 ENERGY L.J. 179 (1985).

utility⁴ to interconnect with and initiate service to another electric utility, (2) order a jurisdictional electric utility to continue an existing service, and (3) order a jurisdictional electric utility to change the terms and conditions of an ongoing or proposed service to prevent the supplier from discriminating against the purchaser.

In adopting the Act, Congress recognized that the best arrangements for the provision of service were those voluntarily worked out by the utilities themselves. On the basis of experience, however, it also determined that since not all utilities had the same access to resources, regulation was in the public interest so that the adequacy and reliability of service to ultimate consumers of all utilities would not be jeopardized by oppressive practices pursued in the name of competition.

Today, certain commentators, semi-official study groups, academics, and others have voiced concerns that electric utilities in certain parts of the country will not have sufficient capacity in the mid-to-late 1990's⁵ to provide adequate and reliable electric service. Several of these commentators place the blame for this anticipated threat on misguided regulation at the wholesale and retail levels which has provided disincentives to the commitment of capital needed for new generation. Their proposed solution is to inject more competition into the provision of generation by turning the construction, maintenance,

4. Utilities regulated by the Act shall be referred to as "jurisdictional utilities" for purposes of this article. In general terms, the Act only encompasses investor-owned utilities, rural electric cooperatives, which provide wholesale electric service and which are not regulated by the United States Rural Electrification Administration, and other entities offering wholesale services which are not otherwise regulated by a governmental authority. More specifically, section 201(e) of the Act, 16 U.S.C. § 824(e) (1982), defines a jurisdictional utility as follows: "The term 'public utility' when used in this subchapter [part II of the Act] and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter. . . ." Municipally or governmentally owned utilities were exempted from the Commission's jurisdiction by section 201(f), 16 U.S.C. § 824(f) (1982), as follows:

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Rural electric cooperatives whose services are regulated by the Rural Electrification Administration (REA) are exempted from jurisdiction by virtue of Dairyland Power Coop., 37 F.P.C. 12 (1967). However, at least one generation and transmission cooperative which does not have a REA loan recently and voluntarily submitted to Commission jurisdiction under the Act. See *Golden Spread Elec. Coop., Inc.*, 39 F.E.R.C. ¶ 61,322.

5. Navarro, *Where Regulation Has Failed; Warding Off An Electricity Shortage*, N.Y. Times, July 7, 1985, § 3, at 3. This perception is also shared by the somewhat unofficial advisory group organized in the 1980's by the United States Department of Energy known as the "Keystone Electricity Working Group" (Keystone Group). One of the conclusions reached by the Keystone Group is that the "the industry will fail to make needed capital investment in cost-effective generation facilities to meet expanding loads in the 1990's and beyond." See undated working paper entitled "The Concluding Recommendations of the Keystone Electricity Working Group", circa 1986 (Keystone Report). According to the trade press, the recommendations of this group may form the basis for policy recommendations to the FERC and other bodies in the future. See, e.g., *Keystone Project Contemplates New Working Group on Transmission Access*, Electric Utility Week, Sept. 21, 1987; *FERC Regulator Drives Wedge In Plans To Move Ahead On Competitive Bidding*, Elec. Util. Week, July 27, 1987.

and operation of generation (even including existing generation) over to third parties who would not have any responsibility to provide electric service to the public.⁶ The utilities would nevertheless retain ultimate responsibility for obtaining sufficient generation to provide adequate electric service at retail.⁷

As electric utilities, particularly electric utilities which provide jurisdictional services under the Act, decide whether and how to respond to these challenges to their form and function, they have begun to question to whom they should be obligated to provide service. A recent spate of articles has examined the obligation under the Act of investor-owned electric utilities to provide service at wholesale.⁸ After describing the statutory basis and nature of the utilities' obligation to serve at retail, these articles pointedly demonstrate the lack of a corresponding obligation in the Act to provide service at wholesale. These articles then discuss relevant Commission precedent and reach the conclusion that such an obligation has nevertheless been created *de facto*. They then question the fairness, as well as the implications for the future, of that "obligation."⁹ In the somewhat self-absorbed process of this "definition" and "examination" of the so-called obligation to serve, however, these articles have ignored or otherwise mischaracterized the fundamental values and objectives applicable to the provision of service at wholesale contained in the Act.

The purpose of this article is to examine and reinject into the debate about deregulation those goals, objectives, and powers to safeguard service to the public incorporated by Congress into the Act. Given the continued fundamental importance to our technological society of the provision of reliable and adequate electric service,¹⁰ it must be asked whether the goals of the Act—prevention against oppression of the ultimate consumer through unjust and

6. The practicality of this theory is being tested to a small degree through the industry's experience with the implementation of section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (1982). That legislation provides for incentives for the development of cogeneration and small power production facilities. While a complete explanation of section 210 of PURPA is beyond the scope of this article, it is sufficient to note that the degree of development of independently owned cogeneration and small power production facilities varies greatly across the country.

7. See, e.g., Keystone Report, *supra* note 5. For a more detailed proposal along these lines, see Pierce, *A Proposal To Deregulate The Market For Bulk Power*, 72 VA. L. REV. 1183 (1986).

8. Bouknight & Raskin, *supra* note 3; Pace, *supra* note 3; Norton & Spivak, *supra* note 3.

9. See, e.g., Bouknight & Raskin, *supra* note 3, at 239 (emphasis added) (footnote omitted):

Analysis of the wholesale obligation to serve under existing interpretations of the [Act] FPA is important for several reasons. First, *to the extent that existing obligations are inconsistent with a system of free and fair competition for electric services, the Congress and the FERC must address the issue as part of any efforts to reshape the industry To the extent that FERC has been unable to put in place rules and policies that adequately resolve this tension, a new and hard look must be taken at the supplier-customer relationships that are intended to exist in the proposed new competitive environment.*

See also Norton & Spivak, *supra* note 3, at 179-80, 207-08.

10. Several courts have recognized this fundamental public interest in the context of challenges to the cutoff of retail electric services. For example, in recognizing that a retail customer's interest in the continued receipt of electric service was guaranteed due process protection from arbitrary state action under the United States Constitution, the Supreme Court stated: "Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978). In an earlier case involving

unreasonable terms of wholesale service or a refusal to provide service at all, encouragement of the conservation and efficient use of resources, prevention of discrimination, and the preservation and promotion of healthy competition at wholesale — should be discarded because of a belief that deregulation in the provision of generation will guarantee adequate and reliable electric service through the invisible beneficent hand of competition.

This article will show that the Commission and the courts have consistently ordered jurisdictional utilities to provide jurisdictional services on terms not voluntarily agreed to as a remedy against proposals (or lack of service) which were not consistent with the public interest goals of the Act. These decisions arose on the basis of case-by-case analysis, not rote application of an "obligation to serve." In other circumstances, the Commission and the courts have declined, based on analyses involving those same goals, to order the involuntary provision of services.

Remembering that the Act is based on the concept that the arrangements most consonant with its goals and structure are contracts entered into voluntarily, this article concludes that the most that can be drawn from the Act and applicable precedent is guidance to utilities of the minimum conditions of interconnection and service required by the Act. Within those guidelines as they have evolved, the Commission has actively encouraged utilities to develop carefully tailored arrangements which limit the obligation of jurisdictional utilities to provide service, but enable purchasing utilities to have sufficient access to generating resources. This flexible application of the principles of consumer protection and promotion of the efficient use of resources to insure an adequate supply is as relevant in an industry where generation is provided by non-utility third parties as in the traditional model of the industry prevalent when the Act was adopted. When viewed in this light, the issue presented for Congress and federal regulation is not whether jurisdictional utilities suffer under the albatross of a *de facto* obligation to serve which hinders their ability to engage in "free and fair competition,"¹¹ but how to apply the goals of the Act in a manner consistent with the changing industry environment.

B. Short Description of the Wholesale Supply Market

Before discussing those sections of the Act giving the Commission the authority to order the initiation or continuation of a particular service, it is necessary to understand the makeup of the wholesale market the Commission partially regulates. Three principal types of entities provide electric utility

similar questions of constitutional protection for a retail right to electric service, a federal district court explained the importance of electric service in a bit more detail:

The plaintiff relies upon electric service in his daily life . . . his ability to obtain heat in the winter, refrigeration and cooking of his food, and light by which he can see at night is dependent upon his receipt of electric service. Probably no other single utility service is so vital to this plaintiff's day-to-day existence.

Condosta v. Vermont Elec. Coop., Inc., 400 F. Supp. 358, 365 (D. Vt. 1975).

11. See *Bouknight & Raskin*, *supra* note 3, at 239.

services:¹² investor-owned utilities, municipal or other governmental entities with wholesale or distribution functions (publics), and rural electric cooperatives (cooperatives).¹³ Only investor-owned utilities, certain cooperatives and other entities are jurisdictional under the Act.¹⁴

Certain non-utilities (qualifying facilities or QFs) provide generation to the grid by making sales to utilities for resale under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹⁵ and implementing state and federal regulations. In addition, other entities, so-called independent power producers (IPPs), are coming into existence. IPPs are generation projects constructed to make sales to electric utilities for resale and do not qualify under section 210 of PURPA for exemption from regulation under the Act.¹⁶ Neither QFs nor IPPs have responsibility to provide electric service at retail to the public.¹⁷ In addition, any purchases they make of electric services from jurisdictional utilities would be at retail and thus not subject to protection under the Act.

The publics and cooperatives vary by size and function. Individual municipal systems with distribution responsibilities range in size from large cities, such as Los Angeles, to small villages with less than 100 customers. Several governmental utilities have wholesale supply obligations, including the federal power marketing administrations, municipal joint action agencies, and others.

The rural electric distribution cooperatives generally do not own any generation and have a density of less than ten customers per mile of transmission line.¹⁸ Many of them have joined together to form and become members of generation and transmission cooperatives (G&Ts) for the purpose of constructing or otherwise obtaining a base load electric power supply. The G&Ts sell power at wholesale to their member distribution cooperatives pursuant to full requirements contracts.

Not all publics or cooperatives purchase power from jurisdictional utilities. Some have sufficient generation to meet their retail or wholesale obligations. Several have sufficient generation to cover part of their requirements but need supplemental sources to be able to provide reliable service. Many others rely entirely on wholesale purchases to meet their service obligations

12. This description of the entities providing electric utility services does not include entities which construct electric generating facilities and sell all or part of the output to traditional electric utilities pursuant to contract or the authority of law provided under section 210 of the PURPA. PURPA, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified in scattered sections of 15, 16, 26, 30, 42, 43 U.S.C. (1982)). Section 210 is codified at 16 U.S.C. § 824a-3 (1982).

13. Energy Information Administration, Dep't of Energy, Annual Outlook for U.S. Electric Power 1985, 12-15 (Aug. 1985).

14. See *supra* note 4.

15. 16 U.S.C. § 823a-3 (1982).

16. See Notice of Proposed Rulemaking, *Regulations Governing Independent Power Producers*, 53 Fed. Reg. 9327 (1988) (to be codified at 18 C.F.R. pt 38 & 382) (proposed Mar. 22, 1988) [hereinafter NOPR].

17. A discussion of the types of utility responsibilities which should be imposed under applicable federal and state law is beyond the scope of this article. The nature of the regulation of IPPs is the subject of active Commission consideration through the NOPR cited in the immediately preceding footnote.

18. REA Bulletin Number 1-1 for 1986, Dep't of Agriculture, xxxiii (1987).

because they are either too small to construct base load generating units of a size sufficient to be economical or do not have direct access to generation for other reasons. Certain investor-owned utilities also rely on outside purchases from jurisdictional utilities to meet their retail obligations as well.

Many publics and cooperatives are interconnected with jurisdictional utilities. Their service areas may be completely surrounded by the geographic area which a jurisdictional utility is required by state law to serve at retail. Others are located adjacent to and are interconnected with jurisdictional utilities for the purposes of reliability and exchange of short-term coordination services.¹⁹ Their generation might be located inside their geographic service areas or many miles away. Some rely on jurisdictional utilities to wheel the output of their remotely located generation or other source of power supply to their service areas.

Despite their differing resource situations, purchasers of jurisdictional services may compete at retail with jurisdictional utilities for service territory and new loads. Legislation in many states gives governmental entities the right to organize utilities, condemn or otherwise purchase the property of jurisdictional utilities necessary to provide distribution services, and begin business. Conversely, jurisdictional utilities often make offers to buy out publics and cooperative utilities and assume the service obligation themselves.²⁰ New industries often shop the utility market before deciding where to locate new facilities.²¹ The competition between publics and jurisdictional utilities dates back to the development of the modern electric utility industry at the end of the 19th Century.²²

In regulating the services provided by jurisdictional utilities to their purchasers, the Commission must keep these competitive concerns in mind.²³ Equally important, however, is the fact that each purchaser has different resources and a different degree of access to additional resources. In many cases, the purchaser's ability to obtain access to generating resources not

19. "Coordination" services are generally described as opportunity transactions engaged in for economic reasons, not as a source of supply which a utility would rely upon to fulfill its retail service obligations. See, e.g., Notice of Inquiry, *Regulation of Electricity Sales-for-Resale and Transmission Service*, 50 Fed. Reg. 23,445 (1985) (to be codified at 18 C.F.R. pt. 35). Unless otherwise indicated, this article will use the terms "services" to mean the type of requirements services relied upon by a utility to meet its retail obligations.

20. See, e.g., *PS Colorado Rebuffed A Second Time In Offer To Buy Union Rural Co-Op*, Elec. Util. Week, July 20, 1987, regarding a takeover bid by Public Service Colorado to buy out Union Rural Electric Association; *PP&L Tri-State Break Off Talks On Settling Shoshone Takeover Litigation*, Electric Utility Week, Oct. 26, 1987, regarding Pacific Power & Light's purchase of Tri-State Generation and Transmission Association.

21. See *FPC v. Conway Corp.*, 426 U.S. 271 (1976) (discussion about the existence of such competition as a justification for requiring the Commission, under section 205(b) and (e) of the Act, to consider the effect of proposed changes in rates for jurisdictional services on the purchaser's ability to compete for such loads).

22. A complete description of the business relationships between jurisdictional utilities and the publics, particularly the competitive aspects, is beyond the scope of this article. For a well-documented, if somewhat biased, history of the parallel and competitive development of investor-owned and public power, see R. RUDOLPH & S. RIDLEY, *POWER STRUGGLE* 1-86 (1986).

23. *FPC v. Conway Corp.*, 426 U.S. 271; *Gulf States Utils. Co. v. FPC*, 411 U.S. 747 (1973).

located within its geographic service area may depend on the willingness of its jurisdictional utility supplier to provide transmission service. The awareness of Congress and the Commission of the existence of competition between jurisdictional utilities and their customers and jurisdictional utilities' control over the transmission needed to enable utility customers to obtain access to resources underlies the various provisions of the Act and the Commission decisions discussed below.

II. FEDERAL POWER ACT PROVISIONS AFFECTING SERVICE REQUIREMENTS BETWEEN JURISDICTIONAL SUPPLIER UTILITIES AND PURCHASING UTILITIES

A. *The Act Was Adopted with the Intention of Providing Goals to be Promoted and Minimum Standards to be Met Through the Provision of Wholesale Service*

1. The Act Vests Only Partial Jurisdiction Over the Electric Utility Industry in the Commission

The Act vests plenary jurisdiction in the Commission over the rates for sales of electric power for resale and the transmission of electric energy in interstate commerce, as well as the facilities used to transmit such electricity.²⁴ When it enacted the Act, Congress found that "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest."²⁵

While it might have been reasonable to assume that Congress would comprehensively regulate an industry it found to be affected with a public interest, Congress established in the Act a limited regulatory structure. That structure left in the hands of the utilities themselves and the states the initial determination of how electric utility services are best provided to the public at retail.²⁶ Congress explicitly refused to displace traditional state jurisdiction or otherwise assert control over essential decisions such as when jurisdictional utilities should be required to construct generation or to whom they should be

24. See *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). This jurisdiction is specifically set forth in section 201(b) of the Act, 16 U.S.C. § 824(b) (1982).

25. FPA, § 201(f), 16 U.S.C. § 824(a) (1982).

26. Sections 201(a) and (b) of the Act very pointedly circumscribe the extent of the authority the Commission may exercise in pursuance of its charge to regulate interstate transmission and sales at wholesale. Section 201(a), 16 U.S.C. § 796 (1982), provides in relevant part: "such Federal regulation [referring to regulation of interstate transmission and sales of electric energy at wholesale], however, to extend only to those matters which are not subject to regulation by the States." Section 202(b), 16 U.S.C. § 824i (1982), contains its limitation of jurisdiction throughout the entire section as follows:

(1) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

required to provide service even though such decisions might affect the wholesale functions regulated by the Commission under the Act. Indeed, as was later pointed out by one of the drafters of the statute, the reservation of such decisions to the states and the vesting of such limited authority in the Commission was a political necessity to obtain passage of the Act in Congress.²⁷

2. Congress Removed Provisions Imposing a Duty to Serve on Jurisdictional Utilities and Authorizing the Commission to Approve Abandonments of Service

The Act was passed in 1935 against the backdrop of the Supreme Court's 1927 decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*,²⁸ holding that states had no jurisdiction to regulate the rates for electric power transmitted or sold at wholesale across state borders in interstate commerce. The record created by the Federal Trade Commission (FTC) of abuses by interstate holding companies which had taken advantage of the so-called "Attleboro Gap" in regulation of interstate sales and transmission of electric energy to water stock and grossly inflated rates while not taking the steps or making the investments necessary to improve service also influenced the manner in which the Act was drafted.²⁹

The Federal Power Commission (FPC), which previously had jurisdiction under the Federal Water Power Act only over the licensing of hydroelectric projects on federal lands or navigable waters, was given the responsibility to draft the new legislation to provide the regulation necessary to prevent the abuses found by the FTC.³⁰ One of the drafters of what, after amendment, ultimately became the Act, described the problems which the Commission sought to remedy as follows:

The investigations that had been made under Congressional authority disclosed that the objective desired to be accomplished could not be attained merely by federal regulation of wholesale rates. These investigations had revealed that the electric operating companies were not keeping accurate accounts of the cost of construction of property devoted to public service, that adequate depreciation was not being set up, that mergers, consolidations and acquisitions were being haphazardly made in a highly competitive market, and *that there was little interconnection between competing electric systems and between privately and publicly owned sources of power. The control of these matters was vastly more important to consumers than the regulation of interstate wholesale rates, even conceding the great importance of the latter to consumers.*³¹

The Commission originally viewed the imposition of a duty to serve on jurisdictional utilities as a necessary element for achieving these objectives. As

27. DeVane, *Highlights of Legislative History of The Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 GEO. WASH. L. REV. 30, 34-36 (1945). Mr. DeVane was Solicitor of the Federal Power Commission during the drafting and passage of the Federal Power Act and Natural Gas Act.

28. *Public Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

29. For a summary description of the record created for Congress of the abuses necessitating passage of the Act in the context of the Public Utility Holding Company Act of 1935, see Davis, *The Influence of the Federal Trade Commission's Investigations on Federal Regulation of Interstate Electric and Gas Utilities*, 14 GEO. WASH. L. REV. 21 (1945).

30. See DeVane, *supra* note 27, at 34.

31. *Id.* at 35 (emphasis supplied).

originally drafted by the Commission and introduced in Congress by Representative Rayburn of Texas in the House of Representatives³² and Senator Wheeler of Montana in the Senate,³³ section 202(a) of the bill³⁴ would have imposed an affirmative duty or obligation to serve on jurisdictional public utilities³⁵ as follows:

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

After hearings before the Senate Committee on Interstate Commerce and the House Committee on Interstate and Foreign Commerce, a substitute bill³⁶ was introduced into the Senate and amendments to H.R. 5423 were reported to the House to reflect the results of the committee deliberations. Both bills deleted section 202(a) as originally proposed. In discussing the deletion, the report of the Senate Committee on Interstate Commerce stated:

Section 202(a) of S.1725 imposed upon each public utility the duty to furnish energy to, exchange energy with and transmit energy for any person upon reasonable request. This provision has been eliminated. . . . While imposition of such duties may ultimately be found to be desirable; the Committee does not think they should be included in this first exercise of Federal power over electric companies. *It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202(a). (formerly sec. 203(a)), for the first Federal effort in this direction.*³⁷

The report accompanying the amended version of H.R. 5423 did not explain its matching deletion of section 202(a).³⁸ The bill passed Congress substantially as reported by the two committees.

By eliminating the duty to serve included in the original version of section 202(a) as well as a corresponding provision which would have required jurisdictional utilities to obtain affirmative Commission approval before abandoning service,³⁹ Congress expressed a preference that relationships between utilities in the competitive bulk power market be initiated and developed on a

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

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

34. Representative Rayburn and Senator Wheeler were cosponsors of the same bill in their respective chambers. Hence, the bill has been referred to in the literature and will be referred to here as the "Wheeler-Rayburn" bill. See DeVane, *supra* note 27.

35. See *supra* note 4.

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

37. S. REP. NO. 621, 74th Cong., 1st Sess. 19 (1935) (emphasis supplied) [hereinafter S. REP.].

38. See H.R. REP. NO. 1318, 74th Cong., 1st Sess. (1935) [hereinafter H.R. REP. 1318].

39. Section 204(b) of the original Wheeler-Rayburn bill prohibited a jurisdictional utility from abandoning either service or any jurisdictional facilities without a certificate from the Commission finding the abandonment to be in the "present or future public convenience." This provision was removed by both the House and Senate committees discussed above. The Senate report stated in explaining the deletion of this provision: "While it may ultimately be found desirable to adopt a provision of this kind, the committee is of the opinion that for the present there is no danger of excessive extensions that would prove disadvantageous to consumers." S. REP., *supra* note 37, at 20. A version of this provision ultimately was enacted as section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b) (1982). See generally DeVane, *supra* note 27.

voluntary basis by contract.⁴⁰ As discussed below, however, Congress recognized the competitive nature of the bulk power market⁴¹ and included provisions to enable the Commission to achieve the goals incorporated in the Act. Such provisions and goals were later interpreted by the Commission as providing authority to require the initiation or continuation of service on terms not voluntarily agreed to by the jurisdictional utility but deemed necessary to meet the public interest.

3. Sections 202(a) and 202(b) Empowered the Commission to Promote Voluntary Interconnections and Pooling and to Require Interconnections and Sale of Services

In lieu of the duty to serve included in section 202(a) of the original Wheeler-Rayburn Bill, Congress required the Commission to encourage voluntary interconnections and coordination of facilities for the purpose of promoting an adequate supply of electric energy through the efficient utilization of resources. As ultimately adopted, section 202(a) states in relevant part:

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts

In embracing this provision as the alternative to a compulsory obligation to serve, the Senate committee expressed a firm preference for coordination in the industry:

By subsection (a), the Commission is directed to divide the country into regional districts, consisting of areas which can economically be served by interconnected and coordinated facilities. Within each such district and between such districts the Commission is directed to secure such interconnection and coordination by voluntary action as far as practicable The committee is confident that enlightened self-interest will lead the utilities to cooperate with the Commission and each other in bringing about the economies which can alone be secured through the planned coordination which has long been advocated by the most able and progressive thinkers on this subject.⁴²

The language of the corresponding report of the House Committee is limited to little more than a simple explanation of the provision.⁴³ Nevertheless, the Conference Report discussing the enacted form of the bill stated that section 202(a) "placed a positive duty upon the Commission to promote and

40. *Cf. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1955).

41. As recognized by the Supreme Court in its decision extending the reach of the federal antitrust laws to the electric utility industry, "the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

42. S. REP., *supra* note 37, at 49.

43. H.R. REP. 1318, *supra* note 38, at 27.

encourage voluntary interconnection.”⁴⁴

Congress did not leave its desire for increased interconnection without the teeth of enforcement. Section 202(b) of the Act provides in relevant part:

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: Provided, that the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.⁴⁵

The intent underlying this provision was most concisely set forth in the Senate Committee's report as follows: “*When interconnection cannot be secured by voluntary action*, subsection (b) gives the Commission limited authority to compel interstate utilities to connect their lines and sell or exchange energy. The power may only be invoked upon complaint by a State commission or a utility subject to the Act.”⁴⁶ While the Senate version of section 202(b) would have limited the interconnections only to jurisdictional utilities, the House version was more far-reaching:

This subsection [202(b)] differs from the Senate bill in two particulars: First, the Senate bill limits the power of the Commission to compel interconnections to interconnections between two interstate utilities. Your committee saw no reason for denying the same privilege to a company engaged in intrastate commerce where it desired the benefits of the interconnection; and secondly, the limitation placed upon the authority of the Commission to require such interconnection in cases arising under this subsection is not in the Senate bill.⁴⁷

Resolution of the difference between the House and Senate versions of section 202(b) concerning the designation of the entity eligible to petition for an interconnection is not explained in the House-Senate Conference report.⁴⁸ However, the fact that the Conference Committee used the House bill, H.R. 5423, as the basis for the final version of what became the Act demonstrates that the House's intent prevailed.⁴⁹ By defining a “person”⁵⁰ as an entity with the standing to request the Commission for an interconnection order under section 202(b), the House ensured that utilities which were not jurisdictional under the Act would be able to enjoy the benefits of interconnection and effi-

44. H.R. REP. NO. 1903, 74th Cong., 1st Sess. 74 (1935) [hereinafter H.R. REP. 1903].

45. 16 U.S.C. § 824a(b) (1982).

46. S. REP., *supra* note 37, at 49 (emphasis supplied).

47. H.R. REP. 1318, *supra* note 38, at 28.

48. See H.R. REP. 1903, *supra* note 44, at 65, 74.

49. 1 N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 11.08-.14 (4th ed. 1985 & Supp. 1987).

50. A “person” is defined in the Act as “an individual or a corporation.” 16 U.S.C. § 796(4) (1982).

ciencies of scale envisioned under subsections 202(a) and (b).⁵¹

4. Sections 205 and 206 of the Act Authorize the Commission to Prevent Discrimination in the Provision of Service and Section 207 Authorizes the Commission to Order a Jurisdictional Utility to Initiate a Service

Other sections of the Act as originally enacted bear directly on the manner in which jurisdictional utilities choose to provide or withhold services. First, several sections are designed to preserve competition. Section 205(b) of the Act prohibits a jurisdictional utility from discriminating between customers in the manner in which it chooses to provide services as follows:

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.⁵²

This obligation to protect purchasing utilities against discrimination by jurisdictional utilities in the provision of services is reinforced by section 206(a).⁵³ That section gives the Commission the authority to change any "rate, charge, classification, rule, regulation, practice or contract" which has been found to be "unjust, unreasonable, unduly discriminatory or preferential."⁵⁴ As will be demonstrated below, the Commission has used the authority to prevent discrimination under sections 205(b) and 206(a) to require a jurisdictional utility to continue to provide a service it unilaterally decided to terminate or to amend the terms it unilaterally decided to impose. The Commission's decision, in each case, was based on a review of the individual circumstances involved and a finding that the remedy imposed was required to preserve competition.

Second, section 205(d) of the Act requires any jurisdictional utility to provide notice to the Commission and the public before making any change in a rate, charge, classification or service.⁵⁵ One important effect of this provision is to give the Commission the opportunity to determine whether the change, including a cancellation of service, would violate the purposes the Act was intended to promote.⁵⁶

Finally, section 207 of the Act⁵⁷ provides the Commission with authority to require a jurisdictional utility to provide a new wholesale service if, after a proceeding commenced solely upon the complaint of a state commission, the Commission determines that the interstate service provided by a jurisdictional utility is inadequate or insufficient. The Commission's power in this regard,

51. Cf. *New England Power Co. v. FPC*, 349 F.2d 258 (1st Cir. 1965), *aff'd* *Shrewsbury Mun. Light Dep't v. New England Power Co.*, 32 F.P.C. 373 (1964) (discussed *infra* pp. 474-76.).

52. 16 U.S.C. § 824d(b) (1982).

53. 16 U.S.C. § 824e(a) (1982).

54. *Id.*

55. 16 U.S.C. § 824d(d) (1982).

56. See discussion concerning termination of service, *infra* pt. III, pp. 480-86.

57. 16 U.S.C. § 824f (1982).

however, is circumscribed by the statutory limitation that the Commission cannot compel the enlargement of generating facilities nor compel the utility to sell or exchange energy if such an order would impair its ability to render adequate service to its customers.⁵⁸ Such a limitation on the Commission's authority is consistent with the limitation included in sections 201 and 202, discussed above. The Commission's authority under this section has rarely been invoked and, even in the rare instances when it was, never resulted in a final Commission determination.⁵⁹

Taken together, the foregoing sections do not explicitly impose an obligation to serve at wholesale on jurisdictional utilities. However, the statutory language reflects a recognition that terms and conditions of service proposed by jurisdictional utilities may not be in accordance with the goals of the Act, and that the Commission must be able to take effective action to ensure that those purposes are not thwarted. As originally enacted in 1935, therefore, the Act provides a framework of goals and mechanisms which set forth the ground rules for service which jurisdictional utilities must observe in dealing with existing and prospective wholesale customers. As described in section III, *infra*, these ground rules underlie the Commission's subsequent decisions which required jurisdictional utilities to provide service in a form they did not voluntarily choose. This framework and body of precedent, therefore, do not establish a de facto obligation to serve as much as guidance for the establishment of relationships between competitors in the wholesale power market.

B. Several Amendments to the Act Reinforced Certain of its Original Goals

Congress recently reexamined and reinforced certain of the principles explained above. Various sections of title II of the PURPA, including amendments to the Act itself, strengthened the Commission's responsibility to promote the efficient use of resources, reliability of service, and the efficient interconnection of utilities. Several of these provisions simply require the collection or dissemination of information. Others, particularly new sections 210, 211, and 212 of the Act⁶⁰ may marginally augment, and certainly do not detract from, the Commission's ability to enforce the observation or attainment of these goals.

With respect to the Commission's responsibilities concerning the reliability of service, the PURPA added a new subsection (g) to section 201 which states in relevant part:

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to —

- (1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's *capability of serving its wholesale*

58: *Id.*

59. See, e.g., *Central Power & Light Co.*, 59 F.P.C. 1665 (1977); *Municipal Light Boards v. Boston Edison Co.*, 43 F.P.C. 951, 953 (1970).

60. 16 U.S.C. §§ 824i, 824j, and 842k, amended by Act of Nov. 9, 1978, Pub. L. No. 95-617, tit. 2, §§ 202, 203, 204, 92 Stat. 3135-38 (1982).

customers.⁶¹

The remainder of this provision requires jurisdictional utilities to submit reports of contingency plans to handle shortages and provides general directions for the handling of such shortages should they occur.⁶²

Sections 205 and 209 of the PURPA,⁶³ respectively, require the Commission to conduct studies designed to promote pooling and increased reliability. These studies were to include not just utilities which were previously jurisdictional under the Act but rather all "electric utilities"⁶⁴ in the United States as defined in the Act, as amended by the PURPA, including those utilities which otherwise would be wholesale customers of jurisdictional utilities.

Congress' findings set forth in the beginning of the PURPA evidence its desire to reinforce the federal role in assuring the adequacy and efficiency of electric service at both the wholesale and retail levels. The findings accompanying Congress' adoption of the PURPA state in relevant part:

The Congress finds that the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require . . .

(2) a program to improve the wholesale distribution of electric energy, the reliability of electric service, the procedures concerning consideration of wholesale rate applications before the Federal Energy Regulatory Commission . . . and to provide other measures with respect to the regulation of the wholesale sale of electric energy.⁶⁵

The House-Senate conference report accompanying the PURPA does not provide any additional explanation of the purposes underlying the above-quoted findings or sections 205 and 209 of the statute concerning pooling and reliability other than simply explaining the language of those sections.⁶⁶ The language of these provisions, however, is self-explanatory in evidencing Congress' intention to take further steps to empower the Commission to promote the goals of efficiency and reliability of service.

Sections 202, 203 and 204 of the PURPA, codified as sections 210, 211 and 212 of the Act, are also important to note, although their provisions are so complex and narrowly focused that they have not been successfully invoked to date.⁶⁷ These sections give the Commission additional authority to order

61. 16 U.S.C. § 824a(g)(1), *amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, tit. 2, § 206(a), 92 Stat. 3141 (1982) (emphasis supplied).

62. 16 U.S.C. § 824a(g)(2),(3)(1982).

63. PURPA, Pub. L. No. 95-617, §§ 205, 209, 92 Stat. 3140, 3143 (codified at 16 U.S.C. §§ 824a-1, 824a-2 (1982)).

64. The term "electric utility" was added as an amendment to section 3 of the Act by section 201 of the PURPA. The term is defined to include all electric utilities, whether jurisdictional under the Act or not, as follows: "'electric utility' means any person or State agency which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency." 16 U.S.C. § 796(22) (1982). It does not supplant the definition of "public utility" set forth in section 201(e) which designates jurisdictional utilities subject to the provisions of the Act discussed above. *See supra* note 4 and accompanying text.

65. PURPA, Pub. L. No. 95-617, § 2, 92 Stat. 3117, 3119 (1978) (codified at 16 U.S.C. § 2601 (1982)).

66. *See*, H.R. CONF. REP. NO. 1750, 95th Cong., 2d Sess. 63 (1978).

67. *See City of Manti v. Utah Power & Light Co.*, 34 F.E.R.C. ¶ 63,043 (1986) (denying Manti's application under §§ 210, 211 and 212 of the Act), *vacated*, 40 F.E.R.C. ¶ 61,004 (1987) (initial order

interconnections and purportedly new authority to order wheeling between "electric utilities" and others as defined in the statute.⁶⁸ While the limited applicability and usefulness of these sections must be recognized, it is also important to note that neither section 210 (concerning interconnections), nor section 211 (concerning wheeling) were to be treated as "limiting, impairing, or otherwise affecting any authority of the Commission under any other provision of law."⁶⁹ Accordingly, since sections 210 and 211 do not limit the efficacy of those provisions of the Act discussed in part II(4), *supra*, (i.e., sections 202, 205 or 206), they must be viewed as supporting the principles of the Act relied upon by the Commission to find that the initiation or continuation of a particular service is required.

III. COMMISSION DECISIONS REQUIRING THE PROVISION OR CONTINUATION OF SERVICE AT WHOLESALE BY A JURISDICTIONAL UTILITY

What others have referred to as the wholesale obligation to serve⁷⁰ is a collective characterization of Commission decisions under the Act in which a jurisdictional utility was (a) required to interconnect with another utility and initiate a wholesale service; (b) required to amend the conditions under which it would offer a particular service; or (c) denied permission to terminate a service. In the overwhelming majority of these cases, the Commission's scrutiny was precipitated by a jurisdictional utility's express refusal or failure to negotiate voluntarily a contractual arrangement. In each case, the Commission made its decision under the public interest standard incorporated in various provisions of the Act based on a balancing of the needs and relative resources of the supplying and purchasing utilities. It did not reach its decision through the rote application of a principle developed in a previous case. Only when a failure to follow the explicit commands of the Act or the Commission's regulations was involved did the Commission place less emphasis on the balancing of the purchaser's and supplier's interests. In many cases, the Commission couched its analysis and decision not only as a disposition of the facts before it but also as guidance for other utilities.

vacated due to subsequent agreement between the parties satisfying Manti's application); *Southeastern Power Admin. v. Kentucky Utils.*, 25 F.E.R.C. ¶ 61,204 (1983) (denying the Southeastern Power Administration's request to compel wheeling under §§ 211, 212 of the Act).

68. Section 210 of the Act provides for interconnection and coordination services "[u]pon application of any electric utility, Federal power marketing agency, geothermal power producer (including a producer which is not an electric utility), qualifying cogenerator, or qualifying small power producer . . ." 16 U.S.C. 824(j)(a)(l) (1982). Section 211 of the Act provides that: "Any electric utility, geothermal power producer (including a producer which is not an electric utility), or Federal power marketing agency may apply to the Commission for an order . . . requiring any other electric utility to provide transmission services to the applicant . . ." 16 U.S.C. 824(j)(a) (1982). The scope of these provisions, however, is somewhat uncertain. The Commission's implementing regulations, 18 C.F.R. § 292 (1982), modified the requirements of an application and merely required that electric utilities make such interconnections "as may be necessary." 18 C.F.R. § 292.303(c) (1988). Although this regulation was upheld by the Supreme Court in *American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983), the ability of a qualifying facility to actually obtain an interconnection or to obtain wheeling is not a uniform right.

69. Section 212 of the Act, 16 U.S.C. § 824k(e)(2) (1982).

70. See, e.g., *Norton & Spivak*, *supra* note 3; *Bouknight & Raskin*, *supra* note 3.

Accordingly, the principles arising from the cases discussed below should not be considered as forming the basis of a de facto obligation to serve doctrine, as suggested by the articles mentioned at the beginning of this article.⁷¹ Rather, they should be regarded as examples of acceptable or prohibited behavior that should serve as beacons for the negotiation and continuation of interconnected relationships between utilities.

The following section of this article will discuss the principles developed as they arose in the context of: (1) requests for interconnection and initiation of service, (2) efforts to unilaterally alter or terminate an existing service, and (3) inquiries into the extent that ratemaking could be influenced by changes in the supply/service relationship.

A. Applicants for an Order Requiring Interconnection and the Initiation of Service Under Section 202(b) Must Demonstrate That They Need the Benefits They Will Receive, That the Enhancement of Efficiency Will Be Promoted and That There Is Neither an Undue Burden on the Jurisdictional Utility Nor an Acceptable Alternative for Obtaining the Service

The Commission has had relatively limited opportunities to exercise its section 202(b) authority to require a jurisdictional utility to interconnect with and initiate service to another utility. Each of the three major cases in which it exercised this authority was commenced only upon the failure of efforts by the applicant to negotiate an acceptable arrangement with the jurisdictional utility.

1. Shrewsbury Municipal Light Department v. New England Power Co.

In *Shrewsbury Municipal Light Department v. New England Power Co.*,⁷² the Town of Shrewsbury, which operated a municipal utility, filed a complaint with the Commission in 1962 alleging that, since 1957, it had attempted to obtain a direct interconnection with and direct service from the New England Power Company (NEPCO) without success. Since 1908, Shrewsbury had been directly connected with and purchased its power supply from Massachusetts Electric Company (Mass Electric), a corporate affiliate of NEPCO. Under the challenged arrangement, Mass Electric received wholesale deliveries from NEPCO at the low voltage side of a 69 kV/13.8 kV substation within the Shrewsbury limits and made a resale and delivery to Shrewsbury at a switching station within the same compound. Shrewsbury then transmitted the power to its own substation on the other side of an alley for ultimate distribution.⁷³

In its complaint, Shrewsbury requested a direct connection with NEPCO at 69 kV to eliminate Mass Electric as the allegedly unnecessary middleman. In this case of first impression under section 202(b), the Commission estab-

71. See *supra* note 3.

72. *Shrewsbury Mun. Light Dep't v. New England Power Co.*, 32 F.P.C. 373 (1964), *aff'd*, *New England Power Co. v. FPC*, 349 F.2d 258 (1st Cir. 1965).

73. *Shrewsbury*, 32 F.P.C. at 374-75.

lished the requirement for a case-by-case scrutiny of applications under section 202(b) as follows:

Section 202(b) does not speak in terms of any one aspect of electric power service and certainly does not limit the Commission's interconnection powers to situations in which the quality of electric service, as contrasted with the rates therefor, are inadequate; instead, the Commission is empowered to order an interconnection whenever it determines that for any reason 'such action is necessary or appropriate in the public interest.'

The issue here, as we see it, is not one of our jurisdiction, which is clear, but rather of applying the public interest standard of Section 202(b) of the Federal Power Act to the facts of this case.⁷⁴

In subsequently deciding to award Shrewsbury the direct connection with NEPCO, although not at 69 kV, the Commission found that Mass Electric was a useless middleman. The Commission found that by eliminating Mass Electric, Shrewsbury's wholesale power rates would be substantially reduced, thus benefitting its consumers and enabling the town to encourage industrial expansion and greater use of electrical service.⁷⁵ The Commission also found that the offsetting injury to Mass Electric of ending its service to Shrewsbury was slight and that NEPCO might actually increase its revenues by virtue of the direct sale to Shrewsbury. Thus, the Commission found the public interest to be in favor of the direct interconnection.

In rejecting Shrewsbury's request that the service be provided at 69 kV rather than 13.8 kV, however, the Commission found that the public interest balance weighed in favor of NEPCO. The direct connection would have resulted in the idling of certain of NEPCO's and Mass Electric's substation facilities. The Commission also found that the cost of constructing the new transformation equipment would be higher than continuing the existing interconnection. Most cogently, however, the Commission's decision rested on the principal of reliability which is ingrained firmly in the Act:

We believe it is desirable for the achievement of the most efficient system of power supply at wholesale that the wholesaler maintain control over equipment such as the transformers here in question which are integrally related to rendering reliable and adequate service. We do not mean to suggest that wholesale service must invariably be at the low tension side of the transformer in question or that in many cases it may not be mutually advantageous for the distributor to own the transformation equipment associated with the interconnection with its wholesale supplier. We merely hold in the circumstances of this case . . . that a Commission order requiring the duplication of the wholesaler's existing facilities has not been shown to be in the public interest.⁷⁶

On appeal, the United States Court of Appeals for the First Circuit upheld the Commission's authority to order a direct interconnection under section 202(b) even though an indirect connection already existed. It then went on to hold that the Commission's authority to order both an interconnection and the sale of energy under section 202(b) is plenary "as it finds necessary or appropriate in the public interest" subject to the limitations included

74. *Id.* at 376.

75. *Id.* at 377.

76. *Id.* at 380.

in the statute.⁷⁷ It also held that Shrewsbury was a "person" within the meaning of section 3(4)⁷⁸ entitled to file an application under section 202(b) of the Act. While the result of this decision was of major importance, at least as much of its precedential significance lies in the Commission's explanation and balancing of the factors it considered relevant to the evaluation of interconnection applications under section 202(b). The fact of this approach, as well as its application in subsequent cases, should provide guidance for the voluntary negotiation of future arrangements between utilities.

2. *Gainesville Utilities v. Florida Power Corp.*

Shortly after it issued its decision in *Shrewsbury*, the Commission was faced with a section 202(b) interconnection application premised on the applicant's desire for increased reliability rather than simply a power supply. In *Gainesville Utilities v. Florida Power Corp.*,⁷⁹ the Commission approved the application by the Gainesville Utilities Department (Gainesville) for a direct interconnection with, and provision of interconnection services by, Florida Power Corporation (Florida Power). Gainesville had unsuccessfully attempted to obtain an interconnection for several years with either Florida Power or Florida Power & Light Company through negotiation before resorting to the section 202(b) application to the Commission.⁸⁰

The Commission ordered the interconnection based on its finding that the interconnection would improve the reliability and efficiency of service for both entities, although Gainesville would clearly benefit more than Florida Power. The Commission found that in the absence of the interconnection, Gainesville, which up to then operated in isolation, would need to construct generating facilities in order to maintain the reserve margin needed to insure reliable service. The Commission found that the sharing of generating reserves which would be effected by the interconnection, as well as certain enhancements to the reliability of Florida Power's service in the area of the interconnection, justified the ordering of the interconnection.

The Commission ordered Gainesville to pay the entire cost of the interconnection and to maintain the generating reserve margin required by the power pool⁸¹ to which Florida Power belonged. However, the Commission denied Florida Power's request to collect an annual standby charge of \$150,000 to reflect Florida Power's contention that Gainesville gained much more from the interconnection than Florida Power and should be required to pay for that disproportionate benefit.⁸²

77. *New England Power Co. v. FPC*, 349 F.2d 258, 263 (1st Cir. 1965).

78. 16 U.S.C. § 796(3) (1982).

79. *Gainesville Utils. Dep't v. Florida Power Corp.*, 40 F.P.C. 1227 (1968), *aff'd*, 402 U.S. 515 (1971).

80. *Id.*; see also *Gainesville Utils. Dep't*, 402 U.S. at 521 (1971). As part of its efforts, Gainesville brought and ultimately prevailed in an antitrust action showing that Florida Power and Light and Florida Power had conspired against its wholesale customers. *Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978).

81. The Florida Operating Committee, consisting primarily of the other investor owned utilities in Florida.

82. *Gainesville Utils. Dep't*, 402 U.S. at 515.

On appeal, Florida Power contested only the Commission's denial of the standby charge, not the issuance of the interconnection order. The appellate court reversed the Commission on that issue.⁸³ The Supreme Court reversed the appellate court and strongly reaffirmed the Commission's analysis in all respects.⁸⁴ In particular, the Court approved the Commission's conclusion that the proper focus of investigation under section 202(b) is not on the respective gains to be realized by each of the parties but upon a sharing of the respective burdens imposed by interconnection.⁸⁵ The Court went on to state that the benefits to each party might properly be reflected in a negotiated agreement which apportions the overall burdens and responsibilities.⁸⁶ Finally, the Court held on the basis of the record established by the Commission that even if a weighing of the respective benefits to each party was appropriate in determining the appropriate compensation for the interconnection, sufficient evidence existed of benefits to be enjoyed by Florida Power that the Commission's denial of the standby charge was well supported.⁸⁷

3. *Village of Elbow Lake v. Otter Tail Power Co.*

The third major case in which the Commission ordered an interconnection and the initiation of service under Section 202(b) occurred in *Village of Elbow Lake v. Otter Tail Power Co.*⁸⁸ The lengthy history of this and related proceedings is recounted in the Supreme Court's decision in *Otter Tail Power Co. v. United States*.⁸⁹ This case arose from the efforts of Otter Tail, the jurisdictional utility, to thwart the efforts of the Village of Elbow Lake to establish its own electric distribution system and assume the responsibility of providing retail electric service to its citizens.

In the early 1960's, Elbow Lake decided not to renew Otter Tail's retail franchise. After much skirmishing, during which Otter Tail ripped out its distribution facilities rather than sell them to the community,⁹⁰ the village

83. *Florida Power Corp. v. FPC*, 425 F.2d 1196 (5th Cir. 1970), *rev'd sub nom.* *Gainesville Utils. Dep't v. Florida Power Corp.*, 402 U.S. 515 (1971).

84. *Gainesville Utils. Dep't*, 402 U.S. at 515.

85. *Id.* at 523.

86. *Id.*

87. In its discussion rejecting the value of benefits approach to determining compensation for an interconnection, the Court set forth a cautionary rationale which should now be kept in mind by regulatory commissions in evaluating value of service pricing as a consideration in setting rates for service:

What Florida Power chooses to emphasize is that the availability of a certain amount of power flowing from it to Gainesville is relatively more valuable to Gainesville's small system than the availability of the same amount of power flowing from Gainesville to Florida Power. It is certainly true that the same service or commodity may be more valuable to some customers than to others, in terms of the price they are willing to pay for it . . . [B]ut focus on the willingness or ability of the purchaser to pay for a service is the concern of the monopolist, not of a governmental agency charged both with assuring the industry a fair return and with assuring the public reliable and efficient service, at a reasonable price.

Id. at 528.

88. *Village of Elbow Lake v. Otter Tail Power Co.*, 40 F.P.C. 1262 (1968), *aff'd*, *Otter Tail Power Co. v. FPC*, 429 F.2d 232 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). *See also* *Village of Elbow Lake v. Otter Tail Power Co.*, 46 F.P.C. 675 (1971).

89. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

90. The history of the fight between Otter Tail and Elbow Lake, which is recounted in part in the

constructed its own distribution system and installed two small diesel generators to operate in isolation. It also attempted to make arrangements with the United States Bureau of Reclamation to obtain a power supply and with Otter Tail to obtain an interconnection and wheeling service. In light of Otter Tail's refusal to negotiate and the growth in loads which threatened to exceed the reliable capacity of Elbow Lake's generators, Elbow Lake applied to the Commission for a permanent interconnection order under section 202(b) and an emergency interconnection order under section 202(c).⁹¹

The Commission first permitted Elbow Lake to make a temporary interconnection with Otter Tail under section 202(b), rather than using the emergency powers under section 202(c), while it studied the merits of ordering a permanent interconnection.⁹² It later granted the permanent interconnection.⁹³ In doing so, however, the Commission evaluated Elbow Lake's need for the interconnection against Otter Tail's complaint that approval of the interconnection would encourage other retail customers to do the same, thus threatening the long term financial health of the company. After finding that any economic burden imposed on Otter Tail by the interconnection could be relieved by the establishment of appropriate charges, the Commission ultimately determined that the increasingly desperate condition of Elbow Lake's system, with its attendant consequences to the reliability and adequacy of service to its consumers, and the lack of a physical burden on Otter Tail's system sufficiently tipped the public interest considerations in favor of the interconnection.⁹⁴ It also specifically determined that the phrase "undue burden" as used in section 202(b) "refers to a physical burden upon the facilities and not to an economic burden upon the company."⁹⁵

In finding that the public interest standard of the Act balanced in favor of ordering the interconnection because of the need of Elbow Lake's consumers for reliable service, however, the Commission expressed its distaste for the events forcing it to make this determination. It also undertook to give explicit guidance to utilities in future circumstances:

As a general proposition, we note that whenever two electric systems with generating capacity undertake to interconnect and operate in parallel it is necessary for them to consider the nature of their respective electrical resources and individual system utility responsibilities, both as a means of evaluating the particular services to be rendered between the connecting systems and in order to ensure that appropriate compensation is afforded, either through service exchanges or financial payments. Marked disparities between two (or more) systems in the reliance placed upon the network should be reflected in the terms and conditions of the interconnection arrangement through appropriate provisions. Each participant should bear its proportionate share of that responsibility. In our judgment, a prerequisite to viable and effective interconnected operations among all electric systems is an equitable sharing of the responsibilities of interconnected operation.

decisions cited *supra* note 88, also led to the historic Supreme Court decision applying the federal antitrust laws to the electric utility industry. See *id.* at 366.

91. 16 U.S.C. § 824a(c) (1982); *Village of Elbow Lake*, 46 F.P.C. at 675.

92. *Village of Elbow Lake*, 40 F.P.C. at 1262-63.

93. *Village of Elbow Lake*, 46 F.P.C. at 675.

94. *Id.*

95. *Village of Elbow Lake*, 40 F.P.C. at 1270.

Each participant should bear its proportionate share of that responsibility. In doing so, each interconnecting system will meet its utility responsibilities and there will be no economic penalties for being the last one on the interconnected network.⁹⁶

As demonstrated below, this statement is indicative not only of the analysis the Commission applies to individual situations but also of its intention, through such determinations, to provide guidelines to the participants in the bulk power market for structuring their arrangements consistent with the public interest as expressed in the Act.⁹⁷

4. *Indiana & Michigan Electric Co.*

The Commission subsequently used the factors discussed in the *Village of Elbow Lake v. Otter Tail Power Co.*⁹⁸ to deny a request by a municipality under section 202(b) for an expansion of services. Richmond Power & Light (Richmond), the utility department of the City of Richmond, Indiana, had applied to the Commission for an order under section 202(b) requiring Indiana & Michigan Electric Company (I&M) to provide complete interchange services, in addition to partial requirements, emergency, and scheduled maintenance service, through their existing interconnection.⁹⁹ Richmond had just completed and brought on line a 60 MW generating plant.

In FPC Opinion No. 817, the Commission granted Richmond's companion request to require I&M to provide the same emergency and scheduled maintenance services it provided to other utilities that had their own generation in I&M's control area.¹⁰⁰ The Commission based that decision on the anti-discrimination provisions of section 206 of the Act.¹⁰¹ In denying Richmond's request for additional services which would have enhanced its ability to carry out interconnected operations, however, the Commission specifically found that Richmond had not proven any public need under the above-quoted *Elbow Lake* test for the requested services. The Commission specifically found that the provision of such services would not provide any benefits to I&M or to the geographic areas served by either utility in addition to the emergency and scheduled maintenance services already required by the order.¹⁰²

5. Summary

The precedent created by the Commission in cases brought under section

96. *Village of Elbow Lake*, 46 F.P.C. at 678-79 (citing *Gainesville Utils. v. Florida Power Corp.*, 40 F.P.C. 1227, 1233 (1968)).

97. For a subsequent case without strong precedential value in which an interconnection was ordered and acquiesced in by the participants, see *Central Virginia Elec. Coop. v. Appalachian Power Co.*, 24 F.E.R.C. ¶ 63,118, *aff'd*, 25 F.E.R.C. 61,218 (1983). The Commission issued a Notice of Finality of Decision without an opinion in this proceeding because neither party took exceptions to the initial decision. 25 F.E.R.C. ¶ 61,218 (1983).

98. See *supra* note 94 and accompanying text.

99. *Indiana & Michigan Elec. Co.*, 59 F.P.C. 1383 (1977).

100. *Id.*

101. 16 U.S.C. § 824e (1982).

102. 59 F.P.C. at 1395-96.

202(b) consists of more than the decision whether or not to order an interconnection. Through its reasoning and its extensive discussion in cases such as *Village of Elbow Lake v. Otter Tail Power Co.*¹⁰³ about how utilities should plan to meet their obligation and interact, the Commission virtually announced to the competing participants in the electric utility industry that if the provision of reliable electric service to the public by the customer requires the jurisdictional supplier to interconnect and provide service, that concern would override the jurisdictional utility's desire not to sustain a competitor. If the provision of reliable service is not at stake, however, the Commission might not feel obligated to order an interconnection or the initiation of a new service.

This is not the same as an overt obligation to serve. What the Act and the Commission do require is that the otherwise competing business entities analyze their relative abilities to provide service in light of the goals of the Act. Where the actions of a jurisdictional utility threaten the purchaser's ability to provide service, the remedial provisions of the Act will be called upon to correct the situation.

B. Section 205 Enables the Commission to Order a Continuation of or Prevent a Change or Termination of Service in Order to Promote Efficiency or Reliability or to Prevent Discrimination

Another line of Commission decisions requiring service not voluntarily offered by jurisdictional utilities arose from situations in which jurisdictional utilities unilaterally attempted to cancel or otherwise change the terms of an existing service. Certain of these decisions may be characterized as instances where the jurisdictional utility simply ran afoul of the procedural requirements of the Act and the Commission's regulations.¹⁰⁴ However, all of these decisions rest upon the same balancing of each utility's access to resources and other needs evidenced in the initiation of service cases discussed in the preceding section. As such, they should be considered more as an inducement to negotiation between utilities based on their relative resources rather than an arbitrary obligation imposed on jurisdictional utilities.

1. Terminations of Service Will Be Reviewed by the Commission Under Section 205 as a Change in Rate in Accordance With the Goals of the Act

Section 205(c) of the Act¹⁰⁵ requires jurisdictional utilities to keep on file with the Commission all of their rates and charges for any jurisdictional service.¹⁰⁶ Section 205(d)¹⁰⁷ prohibits jurisdictional utilities from making any

103. *Village of Elbow Lake*, 46 F.P.C. at 678-679.

104. See, e.g., *Pennsylvania Water & Power Co.*, 8 F.P.C. 170 (1949), *aff'd*, 193 F.2d 230 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

105. 16 U.S.C. § 824d(c) (1982).

106. Section 205(c) provides:

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and

changes in the rates or terms and conditions of wholesale service they provide without first giving advance notice to the Commission.¹⁰⁸ With respect to terminations of service, the Commission, soon after the Act's enactment, adopted a regulation requiring jurisdictional utilities to file a notice of termination of service in accordance with the requirements of section 205(d).¹⁰⁹

a. *Pennsylvania Water and Power Co. v. FPC*

The Commission's first opportunity to apply its regulation preventing a unilateral termination of service occurred during rehearing of a rate case involving Pennsylvania Water and Power Company (Penn Water).¹¹⁰ According to the Commission's initial opinion, Penn Water, a utility with retail service obligations in Pennsylvania, closely coordinated its planning and operations with three other companies, pursuant to a set of interrelated contracts.¹¹¹ These companies were the Susquehanna Transmission Company of Maryland, a subsidiary, the Consolidated Gas, Electric, Light and Power Company of Baltimore, Maryland (Consolidated) and the Safe Harbor Water and Power Corporation (Safe Harbor), an affiliate of both Penn Water and Consolidated. As described by the Commission, Penn Water, Safe Harbor

charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

Id.

107. 16 U.S.C. § 824d(d) (1982).

108. Section 205(d) provides:

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

Id.

109. Section 35.15 of the Commission's regulations provides:

When a rate schedule or part thereof required to be on file with the Commission is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, each party required to file the schedule shall notify the Commission of the proposed cancellation or termination on the form indicated in § 131.53 of this chapter at least sixty days but not more than one hundred-twenty days prior to the date such cancellation or termination is proposed to take effect. A copy of such notice to the Commission shall be duly posted. With such notice each filing party shall submit a statement giving the reasons for the proposed cancellation or termination, and a list of the affected purchasers to whom the notice has been mailed. For good cause shown, the Commission may by order provide that the notice of cancellation or termination shall be effective as of a date prior to the date of filing or prior to the date the filing would become effective in accordance with these rules.

18 C.F.R. § 35.15 (1979).

110. *Pennsylvania Water & Power Co.*, 8 F.P.C. 170 (1949), *aff'd*, 193 F.2d 230 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

111. 8 F.P.C. at 170.

and Consolidated planned and coordinated their steam maintenance schedules and other operations. The companies agreed, pursuant to their contracts, to use the peaking capabilities of Penn Water's hydro facilities to carry the load swings caused by Consolidated's industrial customers' loads in Baltimore. Penn Water and Consolidated made sales to each other to reflect these power transfers.¹¹²

One of the Commission's principal holdings in its first decision in the proceedings concerned Penn Water's challenge to the Commission's jurisdiction over the rates for its sales to Consolidated. The Commission found that it had jurisdiction and reduced the rates.¹¹³

After the close of the record, Penn Water terminated its three-party agreement with Consolidated and Safe Harbor. Moreover, it stated that it would cease to take and pay for energy delivered from Maryland and it would change its method of operations to effect a separation from the Maryland-based companies.¹¹⁴ Penn Water had not filed a notice of termination with the Commission.

In examining the termination of the contract on rehearing, the Commission recounted how Penn Water had extolled the benefits of the integrated operations to its stockholders. The Commission particularly noted that this arrangement was precisely the sort of interconnected operation which was in the public interest and which the Commission had a duty to encourage under section 202(a) of the Act.¹¹⁵ Penn Water's termination of that arrangement, therefore, would sacrifice "all of the carefully built-up benefits of pool design, investment, construction and operation" and would "destroy the pool economies."¹¹⁶

The Commission then went on to hold that the termination of the agreement was a change in rates and services which could be effectuated only pursuant to a filing with the Commission under section 205(d) of the Act and the Commission's regulation requiring a notice of termination.¹¹⁷ The Commission emphasized the importance of observing this procedural requirement when a termination of service was involved because it gives all interested parties, particularly state regulatory commissions and customers, the chance to intervene and challenge the termination.¹¹⁸ The Commission thus held that its authority to order a continuation of service pending observance of the filing requirements and proper review rested on its independent authority under the Act apart from the terms of the contract.¹¹⁹

112. *Id.*

113. *Id.* at 170-71.

114. *Id.* at 173.

115. *Id.* at 175.

116. *Id.* at 176.

117. *Id.* at 176. That regulation, substantially similar to 18 C.F.R. § 35.15, quoted *supra* note 109, at that time was designated as section 35.5.

118. 8 F.P.C. at 177-78.

119. *Id.*

On appeal, both the District of Columbia Circuit and the Supreme Court upheld the Commission's determination to require Penn Water to file a notice of termination of the agreement before permitting the service to end.¹²⁰ Penn Water argued that the fact that part of the contract had been declared illegal under the federal antitrust laws in an unrelated proceeding was determinative for purposes of ending its relationship with Consolidated. In rejecting that reasoning, the Supreme Court held, citing section 206 of the Act, that "[t]he Act gives the Commission ample statutory power to order Penn Water to continue their [i.e., the three companies'] long-existing operational 'practice' of integrating their power output."¹²¹ The Court further held that the Commission had properly exercised its power under section 206 by requiring the integrated operations to continue until a proper filing had been made under section 205(d) because the integrated operations were precisely the type of practice the Commission was obligated to encourage under sections 202(a) and 202(b) of the Act.¹²²

The Commission's reliance on the objectives of the Act, as well as its jurisdiction under section 205(d) of the Act, establish *Pennsylvania Water* as the foundation precedential authority for requiring jurisdictional utilities to continue to provide service under approved terms and conditions until the Commission has had the opportunity to examine and approve the requested changes, including terminations of service.¹²³ When analyzing other termination and change of service cases, the Commission has continued to apply the approach sanctioned by the Supreme Court in *Pennsylvania Water*, although not always with the same result.

b. *Tapoco, Inc.*

In *Tapoco, Inc.*,¹²⁴ a relatively recent decision, the Commission was again faced with a proposed termination of a long-standing three-party agreement. Tapoco and Nantahala Power and Light Company (Nantahala) were wholly owned subsidiaries of the Aluminum Company of America (Alcoa). Tapoco's only customer is Alcoa's facilities. Nantahala provided utility services in North Carolina. Both utilities were interconnected and purchased part of their power supply from the Tennessee Valley Authority (TVA) at relatively inexpensive rates. Tapoco and Nantahala apportioned such inexpensive power between themselves pursuant to agreements on file with the Commission.¹²⁵

120. *Pennsylvania Water & Power Co. v. FPC*, 193 F.2d 230 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

121. *Pennsylvania Water*, 343 U.S. at 422.

122. *Id.* at 423-24.

123. See, e.g., *Union Electric Co.*; 26 F.E.R.C. ¶ 61,147 (1984); *Central Illinois Pub. Serv. Co.*, 17 F.E.R.C. ¶ 61,090 (1981); see also Bouknight & Raskin, *supra* note 3, at 255 nn.96-97.

124. *Tapoco, Inc.*, 39 F.E.R.C. ¶ 61,363 (1983).

125. *Id.* at 62,164.

In the proceedings at issue, Nantahala and Tapoco proposed to terminate their agreements with each other and with TVA and filed notices of termination. Tapoco filed a new interconnection agreement with TVA under which it assumed all of the benefits of the relatively inexpensive TVA "entitlement" power it previously had shared with Nantahala. Although Nantahala retained the responsibility to serve retail and wholesale customers, it was left without a comprehensive interconnection agreement with TVA. Since Nantahala did not have sufficient generation of its own to satisfy its load, it would have been required to purchase relatively high cost generation from TVA to make up the difference. The termination of the contracts was protested by Nantahala's customers and state regulators.¹²⁶

Citing its authority under sections 205 and 206 of the Act, the Commission decided to amend the proposed cancellation of service by requiring Tapoco to "make sure that, in any given year, Nantahala is no worse off under the new agreements than it would have been under the old agreements" until Nantahala had obtained an adequate long term supply at a reasonable price.¹²⁷ Tapoco was to do this either by compensating Nantahala in cash for any increase in Nantahala's power costs due to the new agreement, or by providing power to Nantahala at a price that ensured that Nantahala was no worse off.¹²⁸

The Commission's decision was based on a finding that Nantahala's predicament was caused by the decisions of Alcoa, its corporate parent. Nantahala had not been permitted to plan and obtain a reliable long-term source of power as if it had been a truly independent utility, even though its non-Alcoa public load was growing. Accordingly, the Commission found that the equitable claims of Nantahala's customers for protection were dispositive under the public interest balancing test.

The Commission based its authority to fashion this remedy upon sections 205 and 206, rather than section 202(b), as requested by certain intervenors. In so doing, it cast its holding as falling within the mainstream of its precedents going back to *Pennsylvania Water*.¹²⁹ One must note, however, that the factual situation under which this case arose is both somewhat of an anomaly because of the corporate relationship between the parties, and one in which the Commission admittedly applied greater scrutiny and skepticism to the motives of the terminating utilities because of that relationship.¹³⁰

126. *Id.*

127. *Id.* at 62,163-64.

128. *Id.*

129. *Id.* at 62,172-73.

130. *Id.* at 62,169.

c. Cases in Which Contested Terminations of Service Were Not Prohibited

In *Nevada Power Co.*,¹³¹ Nevada Power filed a notice of cancellation of wholesale service for another investor-owned utility, California-Pacific Utilities Company (Cal-Pac) because of problems Nevada Power was experiencing obtaining sufficient capacity to serve both its retail load and Cal-Pac. Nevada Power's claim that it had the right to terminate the service pursuant to the cancellation provision of its contract was rejected by the presiding Administrative Law Judge (ALJ) under the authority of *Pennsylvania Water*. Despite the opposition of the Commission staff and Cal-Pac, however, the initial decision concluded that the termination of service was in the public interest. The presiding ALJ found that Cal-Pac could have access to an alternative source of power, albeit at a higher cost, and that Nevada Power had offered to wheel. Nevada Power also had proven its difficult financial condition and its apparent inability to attract capital at a reasonable cost. The presiding ALJ thus concluded that under the public interest balancing test, the burden on Nevada Power's customers of continuing the wholesale service weighed more heavily than Cal-Pac's need for lower priced power than its alternative.¹³² The case became moot before the Commission had an opportunity to issue an opinion.¹³³

In *Public Service Co. of New Hampshire*,¹³⁴ the only reported case concerning a jurisdictional supplier's complaint seeking protection under sections 205 and 206 of the Act from a termination by the *customer*, the Commission declined to weigh the respective burdens and needs of the parties under the public interest balancing test first discussed in *Pennsylvania Water* and applied in subsequent cases. The Commission denied Public Service Company of New Hampshire's (PSNH) request that termination of a contract between PSNH and two of its customers, Exeter and Hampton Electric Company and Concord Electric Company (jointly, E&C), be declared improper under the terms of the contract and unjust and unreasonable under the Act. PSNH also had requested the Commission to delay termination of the contract until 1993 or until PSNH could sell the capacity it purportedly had dedicated to E&C, whichever is earlier.

The Commission essentially upheld the validity of the notices of termination given by E&C under the contract. It found that the protections of sections 205 and 206 were intended to protect customers of jurisdictional utilities from unjust and unreasonable terminations by requiring the utilities to file changes in service under section 205.¹³⁵ It refused to extend similar protection

131. *Nevada Power Co.*, 1 F.E.R.C. ¶ 63,004 (1976).

132. *Id.*

133. *Nevada Power Co.*, 1 F.E.R.C. ¶ 61,325 (1977).

134. *Public Serv. Co. of New Hampshire*, 31 F.E.R.C. ¶ 61,267, *reh'g denied*, 32 F.E.R.C. ¶ 61,251 (1985).

135. 32 F.E.R.C. ¶ 61,251, at 61,598.

to jurisdictional supplying utilities against their customers.

The Commission did not, however, completely close the door on applying a more searching analysis in an analogous situation in the future. In rejecting PSNH's request, the Commission noted that:

[W]hen a customer first requests service or continues to request service once a contract or service agreement has expired, the Commission can determine the terms and conditions under which such service will be provided, including the length or term of such service. *A customer is bound by such a determination (which it has had a chance to challenge).* Likewise, the Commission can prospectively revise contracts or rate schedules found to be unjust or unreasonable, even if they have originally been approved, under certain conditions.¹³⁶

The Commission then went on to state that "PSNH could have protected itself by making a timely filing to prospectively amend the contract terms *before* it made substantial investments on behalf of E&C."¹³⁷

While these statements are dicta and possibly somewhat gratuitous,¹³⁸ they are consistent with the theory that the Commission will exercise its authority in pursuance of the statutory goals of the Act when negotiations do not result in a contract which enables the provision of reliable service to both the supplier's and the purchaser's customers. In this instance, the Commission did not have a solid jurisdictional basis for helping PSNH even if it had desired to do so.

2. Unilateral Changes in Terms and Conditions of Service Also Are Reviewed in Accordance with the Public Interest Goals of the Act

In addition to jurisdiction over initiation and termination of service, the Commission's jurisdiction over changes in terms and conditions of service under section 205(d) of the Act gives it an opportunity to determine whether the Act's public interest purposes of promoting reliable and adequate service and the efficient use of resources are being met. In circumstances where the Commission has found that proposed changes in the availability of service could threaten the long-term viability of the purchasing utility or otherwise thwart legitimate competition, it has ordered the continuation of previous forms of service, although modified to meet the demonstrated needs of the jurisdictional supplier. In this review, the Commission's responsibility under sections 205(b) and 206(a) to consider and prevent the anticompetitive effects of a jurisdictional rate, term, or condition of service comes into play.¹³⁹

136. *Id.* (emphasis supplied) (footnote omitted).

137. *Id.* (emphasis in original).

138. Particularly in light of subsequent events. On January 29, 1988, PSNH became the first utility in modern times to file for protection from creditors under Chapter 11 of the federal Bankruptcy Code, 11 U.S.C. §§ 1101-1174 (1982). This filing was brought on in large part because of financial problems caused by its substantial investment in the as-yet unopened Seabrook Nuclear Power Plant. *See Daniels, Bankruptcy Filed by Leading Utility in Seabrook Plant*, N.Y. Times, Jan. 29, 1988, at A1, col. 6.

139. Section 205(b), 16 U.S.C. § 824d(b) (1982) provides:

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in

a. *Florida Power & Light Co.*

The primacy of promoting the Act's goals, as opposed to accommodating the purported "planning needs" of a jurisdictional supplier, is most vividly illustrated by the Commission's analysis in *Florida Power & Light Co.*¹⁴⁰ In that case, Florida Power & Light Company (FP&L) filed to replace its single generally available tariff for wholesale service with two schedules, one for full requirements and one for partial requirements service. While the existing schedule was available to all wholesale customers, existing or future, the availability of each of the new schedules was restricted to named existing customers. In addition, FP&L filed notices of cancellation of service to two existing wholesale customers which FP&L asserted were self-sufficient in generation. FP&L offered to provide those two entities with interchange (coordination)¹⁴¹ services at incremental cost rates.¹⁴²

FP&L's justification for the change was that the customers' use of service under the previous service was unpredictable and precluded any rational system planning. It alleged that its self-sufficient customers would unpredictably swing on and off the system. It also alleged that it faced a problem in securing a reliable fuel supply for new and existing generation because of regulatory and world market conditions.¹⁴³

The most conservative interpretation of the Commission's decision would point to the fact that the Commission found no record support for the operational and fuel supply constraints proffered by FP&L as support for the change.¹⁴⁴ In fact, in certain respects, the Commission found that the record demonstrated the opposite.¹⁴⁵ FP&L alleged that the two purportedly self-

rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Section 206(a), 16 U.S.C. § 824e(a) (1982) provides:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

In addition to the above-quoted sections, the Supreme Court has made it abundantly clear that part of the Commission's duty in determining the public interest is to consider the competitive effects of its action. *FPC v. Conway Corp.*, 426 U.S. 271 (1976); *Gulf States Utils. Co. v. FPC*, 411 U.S. 747 (1973). In *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973), the Supreme Court stated: "the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest."

140. *Florida Power & Light Co.*, 8 F.E.R.C. ¶ 61,121, *reh'g denied*, 9 F.E.R.C. ¶ 61,015 (1979).

141. Coordination services are generally described as transactions that allow buyers to realize cost savings or reliability gains that are not attainable from sole reliance on their own resources. See *supra* note 19.

142. 8 F.E.R.C. ¶ 61,121.

143. *Id.*

144. *Id.* at 61,465.

145. *Id.*

sufficient customers would swing on and off its system and use its resources only for peaking or other inefficient purposes. The Commission found instead that these customers would actually use wholesale service for base load purposes and use their own generation for peaking and regulation of load purposes. In addition, the Commission found that the interchange services offered to those customers were not an adequate substitute for the cancelled service and could be used only to augment other primary sources of bulk supply to sustain load requirements.¹⁴⁶

The Commission stressed that it could imagine that some limitation of service might be acceptable to "ameliorate some legitimate operational problems faced by FP&L. . . . However, FP&L has not provided any middle ground."¹⁴⁷ The Commission did, however, permit FP&L to separate its rates for full requirements and partial requirements customers after ordering removal of the availability restrictions.

This conservative interpretation of the case, however, does not illuminate the factors which actually undergirded the Commission's decision. The Commission's decision really turned on the balancing of FP&L's claims with the interests of the ultimate customers, as viewed against a history of FP&L's obstruction of its wholesale customers' access to alternate resources. The Commission concluded that FP&L's proposed availability restrictions had anticompetitive purposes. As the Commission succinctly stated at the beginning of the opinion:

To set the stage for our discussion, we wish to state at the outset our view that where a utility possessing market power in a relevant market seeks to amend a general tariff to impose conditions which foreclose supply options or increase the costs of competitors, or which otherwise contribute to the acquisition or maintenance of monopoly power, its application for amendment must be rejected and found unjust and unreasonable under Sections 205 and 206 of the Federal Power Act—unless the utility can show that compelling public interests justify the service conditions. Moreover, even where overriding public policy objectives are shown to justify some restriction on wholesale service, such a utility must be called upon to demonstrate that its proposal is the least anticompetitive method of obtaining legitimate planning or other objectives.¹⁴⁸

The Commission then went on to analyze the characteristics of the retail and wholesale markets in which FP&L operated. The Commission found that FP&L dominated those markets. Moreover, it also noted a number of actions FP&L had taken to frustrate competition from its customers, including denial of access to joint participation in new nuclear, base load generating plants, opposition to legislation favorable to the formation and operation of municipal utilities, refusals to facilitate the formation of a general integrated power pool in Florida which would have included those FP&L wholesale customers with their own generation, and the establishment of unreasonable restrictions on

146. *Id.* at 61,454.

147. *Id.* at 61,468.

148. *Id.* at 61,448.

the provision of coordination services.¹⁴⁹ In addition, the Commission recited a long history of unsuccessful efforts by certain of the customers to negotiate with FP&L for the provision of coordination services.¹⁵⁰ Based on this background, the Commission found it necessary to declare the proposed restrictions contrary to the mandates of sections 205(b) and 206 and to order FP&L to restore the availability of service as it previously existed with the modifications approved in the order.¹⁵¹

b. *Kentucky Utilities Co.*

The Commission's jurisdiction over changes in terms and conditions under section 205 was exercised and is again illustrated in the analysis in *Kentucky Utilities Co.*¹⁵² In that proceeding, the Commission was presented with changes by Kentucky Utilities Company (KU) in its tariff under which service was provided to several municipalities.¹⁵³ Specifically, KU proposed to limit the availability of its tariff to full requirements customers only, to extend the notice period for cancellation of service, to increase significantly the obligations of the customers for service taken after the cancellation date, to limit allowed increases in load growth to "normal" growth which KU would be obligated to serve and require long term planning and notice for expected growth, and to continue the prohibition of assignment of contract rights. The Commission held that the proposal by KU constituted a substantial change in its service and must be considered under section 205 to determine if the changes were justified.¹⁵⁴

In performing the required analysis under the Act, the Commission made an element-by-element review of each change and examined the utility's justification for the change on a case-specific basis. As detailed below, the primary focus was placed upon the need for the change or condition to match adequately the service with the availability of generating capacity.

The major issue in the case involved the proposed limitation on the availability of service only to full requirements customers.¹⁵⁵ Under the proposed

149. *Id.* at 61,453.

150. *Id.* at 61,460.

151. As the Commission was careful to point out, the mere existence of market power would not make a change in service availability unacceptable. The Commission stated:

To the extent that legitimate purposes are sought to be attained by FP&L, there appear to be a number of alternative means of less anticompetitive effect for their accomplishment. The Commission wishes to emphasize that we are not today holding that a utility with market power is, *per se*, precluded from amending a general tariff to impose conditions which limit service availability. The Federal Power Act accords a utility the right to propose such limitations and an opportunity to demonstrate that its proposed change in service is just and reasonable. . . . FP&L did not carry the burden here.

Id. at 61,448-449.

152. *Kentucky Utils. Co.*, 23 F.E.R.C. ¶ 61,317, *aff'd in part*, 25 F.E.R.C. ¶ 61,205 (1983), *remanded in part*, *Kentucky Utils. Co. v. FERC*, 766 F.2d 239 (6th Cir. 1985).

153. 23 F.E.R.C. ¶ 61,317, at 61,664-65.

154. *See id.* at 61,665.

155. *Id.*

change, a customer could not opt for another wholesale supply, including self-generation, for a part of its requirements and still look to KU to serve the remaining requirements. Although each of the municipal customers was currently taking its full requirements from KU, the cities argued that the proposed change unreasonably limited their contract rights and was anticompetitive by precluding them from bringing in alternative power sources (including their own potential generation) in the future and purchasing only partial requirements service from KU.¹⁵⁶

In considering the issue, the Commission first looked at the specific contracts between the cities and KU and determined that the service offered in the existing contract was not restricted to only those customers purchasing their full requirements from KU. The existing contracts allowed the cities to purchase increased requirements from KU or from some other source. Hence, the Commission concluded that the proposed change required justification.¹⁵⁷

KU attempted, but failed, to justify the limitation by claiming that its rate for the service was designed for full requirements service only and that it would be unreasonable to require it to design rates for "all sorts of partial requirements."¹⁵⁸ The Commission summarily rejected these arguments finding the first unsupported by factual evidence on the record. The Commission also found that, contrary to KU's claims, its obligation would be limited to the service agreed to by the parties in their contract.¹⁵⁹

KU's other justification for the reduced availability was that it is unreasonable to require it to plan and provide for full requirements service while allowing the cities to switch their loads back and forth. The Commission rejected this justification, saying that the remedy for this concern is found in adequate notice provisions.¹⁶⁰ The Commission further explained the boundary of the "obligation" owed to a load-switching customer, stating:

Kentucky's concern about allowing a customer to switch back to it from another supplier is, however, imaginary. Kentucky assumes that it would have to serve that customer and that it will therefore have to continue to plan generating capacity for the customer's requirements. This is incorrect. Once a customer leaves Kentucky's system, in whole or in part, for another supplier, Kentucky is under no obligation to plan for the lost load. If the customer wants to return to Kentucky's system it can only do so pursuant to an agreement with the company or an order issued by us. In either case, the adequacy of generating capacity to provide for the new load would be an important consideration in deciding whether Kentucky should serve. Even if Kentucky had adequate generating capacity, the rate for service to the new load might well be different.¹⁶¹

This relationship between the availability of generating capacity and the demands imposed on KU by the municipalities also governed the decisions on

156. *See id.*

157. *Id.*

158. *Id.* at 61,667.

159. *Id.*

160. *Id.*

161. *Id.* (footnote omitted).

KU's other proposed changes to its tariff. For example, in terms of the notice period for cancellations, the Commission considered KU's planning process and found that a five-year notice provision for termination adequately protected the utility.¹⁶² The Commission similarly rejected KU's claim that its planning needs required an automatic five-year term contract extension if any customer took service for more than 120 days after the cancellation of the contract.¹⁶³ Instead, the Commission balanced the need to protect the utility from bad faith cancellation against the chilling effect on new power sources caused by the automatic renewal. After assessing the balance, the Commission required that any notice of cancellation must specify the new supply source and include an affidavit regarding the new supply in order to eliminate bad faith cancellation. The Commission also promised to provide rate relief for an extension of an otherwise terminated service if such extension imposed any additional costs on KU.¹⁶⁴

c. Order 474 — Construction Work in Progress

The Commission's order on construction work in progress (CWIP)¹⁶⁵ presents another approach to the obligation to serve a returning customer. In that proceeding, in the context of considering whether wholesale customers should be permitted to waive their right to future service from their current suppliers in order to avoid paying CWIP, the Commission solicited comments concerning the utility's obligation to serve.¹⁶⁶ In its order, the Commission indicated that it has never determined whether there is a statutory obligation to serve full requirements customers.¹⁶⁷ The Commission noted, however, that where a utility has contractually agreed to provide service, termination will be allowed only if it is shown to be in the public interest.¹⁶⁸

The Commission went on to state that it would not allow service to be cut off to a wholesale customer that has no alternative source of power "simply because that customer has not adequately arranged for its own needs when it is technically feasible to provide service of some sort."¹⁶⁹ Yet, the continued service is not without a risk or a price. As the Commission stated:

Under such circumstances, the practical issue associated with wholesale custom-

162. *Id.* at 61,677. The Commission originally found that a three year notice period was sufficient for loads less than 25 MW but this was later rejected by the 6th Circuit. *Kentucky Utils. Co. v. FERC*, 766 F.2d 239, 250 (6th Cir. 1985).

163. 23 F.E.R.C. ¶ 61,317, at 61,679.

164. *See id.* at 61,677-680.

165. Order No. 474, *Electric Rates: Construction Work in Progress, Anticompetitive Implication*, III F.E.R.C. Stats. & Regs. ¶ 30,751, 52 Fed. Reg. 23,948 (1987) (to be codified at 18 C.F.R. pt. 35).

166. III F.E.R.C. Stats. & Regs. ¶ 30,751, at 30,718. The request for comments arose from the remand of the Commission's prior CWIP rule by the D.C. Circuit in *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985).

167. III F.E.R.C. Stats. & Regs. ¶ 30,751, at 30,718.

168. *Id.*

169. *Id.* at 30,719. The final rule classified wholesale customers as those customers who made good faith representations that they would reduce future loads by arranging for alternative sources and avoid CWIP payments but then later failed to reduce their load. *Id.*

ers who avoided CWIP by arranging for alternative sources of power will typically not be whether the utility will continue to provide them with power, but rather the price at which such service is continued. Clearly, wholesale customers who have avoided CWIP based on their representations to the utility that they are arranging for alternative sources of power and who have voluntarily foregone the benefits of their current supplier's efforts to secure an adequate and reliable source of power on their behalf have assumed the risks of 'best efforts' service. These wholesale customers who stay on the system longer than anticipated cannot simply expect to continue to receive service under the same requirements tariff as the other customers who have been paying CWIP. These customers will have made a voluntary decision to leave the security of the utility's service and must live with the consequences of that choice. If it is technically feasible, they may seek to regain their prior service status by paying the unpaid CWIP with interest, plus reimbursement of any system costs due to inefficiencies caused by the utility not having been able to plan to provide them service, or they can continue to forego the local utility's planning responsibilities and simply reimburse the utility for the additional costs, if any, of the utility's best efforts to provide lesser quality service on their behalf.¹⁷⁰

Thus, the availability of capacity, the existence of contractual obligations or lack thereof, and the cost of providing service again were designated as the important factors.¹⁷¹

d. *Commonwealth Edison Co.*

The issue of the obligation to provide power supply services to a customer which leaves the system and then seeks to return was tentatively addressed again in *Commonwealth Edison Co.*¹⁷² That case involved proposed changes in a tariff providing transmission service to two Illinois cities. The municipal customers objected to a provision in the proposed tariffs which stated that if transmission service were terminated, the utility had no obligation thereafter to provide future power supply requirements service. The customers contended that although their contracts did not specifically entitle them to future requirements service, the proposed language could be interpreted to place them in an inferior position relative to other new customers.¹⁷³

The Commission acknowledged that "the language in question involves important policy questions regarding a utility's duty to serve customers who voluntarily give up one form of service for another and then wish to return to the original form of service."¹⁷⁴ Nonetheless, the Commission granted the

170. *Id.* (citations and footnotes omitted).

171. In *Pacific Gas and Elec. Co.*, 42 F.E.R.C. ¶ 61,406 (1988), the Commission expressly reaffirmed the view stated in Order No. 474 that the FPA contains no express obligation to serve wholesale customers and that any obligation by a utility to provide service beyond those defined in the contract stem from the customer's inability to obtain access to alternative suppliers. *Id.* at 62,199 n.14, mimeo at 11. That affirmation came in the context of a Commission order approving a complex interconnection agreement between Pacific Gas & Electric Company (PG&E) and Turlock Irrigation District which, inter alia, expressly limited PG&E's obligation to provide service to Turlock beyond the amounts set forth in the agreement. *Id.* at 62,196. This order is presently pending rehearing.

172. *Commonwealth Edison Co.*, 38 F.E.R.C. ¶ 61,141 (1988).

173. *Id.* at 61,384 n.3.

174. *Id.* at 61,384.

customers' request and struck the tariff language. The Commission's rationale was that the availability issue should not be considered in the context of a transmission service case and could be addressed at a later time.¹⁷⁵ The Commission noted that the utility was not prejudiced by the decision because of the requirement of one year's advance notice from a customer prior to termination of transmission service.¹⁷⁶ The Commission thus preserved its options for future proceedings.

e. Summary

The discussion in these cases and orders both exemplifies the Commission's approach to examining the service obligation of jurisdictional utilities and demonstrates the flexibility available to both jurisdictional utilities and their customers in formulating supply arrangements. Once service has commenced, the jurisdictional utility cannot impose changes or terminate service in a manner which might impair the wholesale customer's ability to provide retail service to the public. However, the jurisdictional utility has a limited underlying or backup planning obligation to a customer which assumes full or partial responsibility for its power supply from other sources of generation and actually takes delivery from those sources. If a jurisdictional utility and its customer negotiate an arrangement which will provide the customer access to other resources on nondiscriminatory and just and reasonable terms, the jurisdictional utility's "obligation" should be abated commensurately. This abatement would be consistent both with the objectives of the Act and the Commission's decisions.

3. Arrangements Governing the Joint Planning of Resources and Coordination of Operations Must Be Nondiscriminatory

a. *Mid-Continent Area Power Pool Case*

The interplay between section 202(a) of the Act, which encourages voluntary interconnection and coordination of generation and transmission facilities, and sections 205 and 206, which empower the Commission to remedy discriminatory or anticompetitive behavior, is illustrated in the Commission and judicial decisions involving the validity of the Mid-Continent Area Power Pool (MAPP).¹⁷⁷ In the Commission's decision, as affirmed by the District of Columbia Circuit, the MAPP Agreement was upheld, with the exception of certain membership criteria.

The reasoning behind the approval of the MAPP is based upon the language of section 202(a) of the Act. As noted by the District of Columbia Circuit in discussing this section: "Congress has decided, as a matter of gen-

175. *Id.*

176. *Id.* at 61,385 n.6.

177. See *Mid-Continent Area Power Pool Agreement*, 58 F.P.C. 2622 (1977), *aff'd sub nom.* *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979).

eral policy, that power pooling arrangements, rather than unrestrained competition between electric facilities, are in the public interest."¹⁷⁸ Further commenting on the section 202(a) policy, the District of Columbia Circuit listed the following factors concerning a pool arrangement to be considered: "[W]hether the arrangement imposes negative restrictions on competition, whether such restrictions are reasonably related to valid purposes of the power pool, and whether the arrangement is, on the whole, in the public interest."¹⁷⁹

The discrimination aspect of the decisions arose over requests by small utilities which purchased certain of their services (but which also owned some generation) either to strike the entire Agreement or to add provisions to the Agreement providing them full access to the arrangements. The Commission acknowledged that the interests of interconnection must be consistent with the discrimination provisions of the Act. This balance extends to the regulation of a voluntary arrangement such as a pooling agreement, as indicated in the Commission's decision:

While there is no obligation for utilities in the first instance to have a pooling agreement, if one does exist it must be nondiscriminatory. Within the dynamics of the electric utility industry, the oftentimes subtle and yet significant long-term impact of power pooling demands our close scrutiny of provisions which deny access to the benefits of the pool. Thus the presence of such bilateral arrangements and the absence of denials of membership do not vindicate discrimination inherent in the membership provisions.¹⁸⁰

The one area of the pooling agreement which was held to be anticompetitive, and thus violative of sections 205 and 206 of the Act, involved the membership provisions.¹⁸¹ The Agreement created a distinction between participants, who were entitled to representation on all pool committees and participation in the full range of pool services, and associate participants, who were entitled to representation on only certain pool committees and participation only in pool planning functions. In order to be a participant, a party was required to meet certain requirements, including interconnection with two or more electric systems; ownership or control of transmission facilities operated at 115 kV or higher forming an integral part of the regional transmission network; contribution of significant reliability of the interconnected systems operation; and operation of a twenty-four hour dispatch center with a terminal on the communication network connecting the participant.¹⁸² The overall result of these criteria was that a smaller utility was precluded from the full benefits

178. *Central Iowa Power Coop.*, 606 F.2d at 1162.

179. *Id.* at 1163.

180. 58 F.P.C. at 2636.

181. Four violations of the antitrust laws and policies were cited: (1) the restrictive membership provisions created a "bottleneck"; (2) the membership provisions, along with voting provisions and MAPP participants' transmission monopoly, were an unlawful barrier to entry into the bulk power supply market; (3) MAPP's uniform prices, terms of service, and allocation of purchases and sales was a per se violation of section 1 of the Sherman Act; and (4) the MAPP agreement culminated 20 years of past anticompetitive behavior. *Id.* at 2627 n.3. Of these, only the argument that the membership provisions were unduly restrictive was persuasive to the Commission. See *id.* at 2628.

182. *Central Iowa Power Coop.*, 606 F.2d at 1170.

of the Agreement.¹⁸³ In modifying the Agreement to exclude the size criteria, the Commission held that the criteria were "not reasonably related to the MAPP objectives. . . . [of] the effectuation of reserve sharing so as to best develop through coordination reliable and economic generating capacity."¹⁸⁴

b. *Middle South Energy, Inc.* — Grand Gulf Issues

The concept of compulsory purchases by a utility in an integrated system, in contrast to compulsory sales, was raised in the cost allocation proceeding involving the Grand Gulf nuclear project and the Middle South Utility system.¹⁸⁵ Relying on the Supreme Court decision in *Pennsylvania Water*¹⁸⁶ and the approval of the MAPP agreement,¹⁸⁷ the District of Columbia Circuit affirmed the decision of the Commission to allocate costs to the expensive plant among members of an integrated system for which the additional capacity was built.¹⁸⁸ The Commission had been careful to structure its decision as the allocation of costs among members of the Middle South system, rather than a compulsory purchase of power by the system's members.¹⁸⁹

This decision reaffirms the authority of the Commission "to approve and/or modify the terms of the pooling and coordination agreements of closely integrated power systems when it deems those arrangements unlawful as filed."¹⁹⁰ As in MAPP, the Commission's authority under section 206 to step in and modify an unlawful voluntary power pool was held to be consistent with the objectives of furthering fully integrated systems as encouraged by section 202(a) of the Act.

IV. CONCLUSION

The decisions of the Commission and the courts provide relatively clear guidance as to when a jurisdictional utility will be required to interconnect with and provide wholesale services to another utility. When the purchaser can prove that its ability to provide adequate and reliable service is being jeopardized or the change in terms and conditions of service present that possibility for the future, the Commission will exercise its remedial powers under sections 202(b), 205 and 206 to require service *if* such an order will not impose an undue burden on the jurisdictional utility or threaten its ability to provide service to its customers. In making this examination, the Commission takes a

183. 58 F.P.C. at 2632.

184. *Id.* at 2635.

185. *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 (1985), *aff'd sub nom.* *Mississippi Indus. v. FERC*, 808 F.2d 1525 (D.C. Cir.), *cert. denied sub nom.* *Arkansas Pub. Serv. Comm'n v. FERC*, 108 S. Ct. 500 (1987).

186. *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952).

187. *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979).

188. *Mississippi Indus.*, 808 F.2d at 1525.

189. See 31 F.E.R.C. ¶ 61,305, at 61,643.

190. *Mississippi Indus.*, 808 F.2d at 1545. This authority was also asserted in the companion case, *Middle S. Serv., Inc.*, Docket No. ER82-483-000, in which the non-Grand Gulf cost responsibility was reallocated. See *Middle S. Serv., Inc.*, 30 F.E.R.C. ¶ 63,030, at 65,165 (1985).

hard look at the amount of service the purchaser really needs and the other resources available to it. In many cases, it is the jurisdictional utility's control of the purchaser's access to those resources which will influence the Commission's decision to exercise those remedial powers.

The second related form of guidance arising out of these decisions is that interconnected operation, if it leads to the more efficient delivery of services to all utilities, should neither be terminated without good cause nor discriminatorily barred to small utilities. Simply because utilities are interconnected, however, does not mean that the smaller utility is entitled to all forms of interconnected services other than basic power supply.

These general principles do not constitute an "obligation to serve" imposed on all jurisdictional utilities as implied by the articles referred to above.¹⁹¹ What they do constitute are minimum guidelines to govern the contractual arrangements for interconnected operations between jurisdictional and other utilities. The cases clearly evidence that the Act and the Commission will not countenance arrangements (or lack thereof) under which jurisdictional utilities attempt to deny prospective purchasing utilities the access to resources required for the purchasers to provide adequate and reliable service. Neither the cases nor the Act specify what services or arrangements will be required in every situation. They also do not require jurisdictional utilities to provide services that might require them to jeopardize their ability to provide services to their other customers. These principles, therefore, should be viewed as an incentive for jurisdictional utilities to enter into arms-length interconnection arrangements which give each party the opportunity to provide adequate and reliable service at a reasonable cost.

Given the congressional determination in the Act and in title II of the PURPA that limited competition in the provision of electric utility services is to be encouraged, the principles discussed above would appear to have as much relevance now as at any time during the last fifty years. Even if the provision of generation services becomes deregulated through administrative rulemaking¹⁹² or further legislation, that will not a priori guarantee that every utility will have access to the resources required to provide adequate, reliable and efficient service. Where a jurisdictional utility is able to provide such access, the principles incorporated in the Act and developed through precedent should continue to apply. Therefore, as the Commission, state commissions, and possibly Congress worry about how to deregulate some or all of the functions of the electric utility industry, they should not be concerned about whether an "obligation to serve" should "continue" to apply at wholesale. Rather, their attention should be focused on ensuring that whatever changes they encourage in the industry do not compromise the principles incorporated in the Act which have served well to ensure the continuity of both competition and reliable service.

191. Norton & Spivak, *supra* note 3; Bouknight & Raskin, *supra* note 3.

192. See NOPR, *supra* note 16.