

# ELECTRIC UTILITIES AND TELECOMMUNICATIONS

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## INTRODUCTION: THE INFORMATION SUPERHIGHWAY

On January 11, 1994, Vice-President Gore, in a speech before the Television Academy in Los Angeles, California, introduced a proposal for the creation of a National Information Infrastructure (NII).<sup>1</sup> Two weeks later, President Clinton, in his state of the union address before a joint session of Congress, reiterated the proposal for the construction of an "information super-highway."<sup>2</sup> "And the Vice President is right, we must also work with the private sector to connect every classroom, every clinic, every library,

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1. See generally Al Gore, *The National Information Infrastructure*, in 60 VITAL SPEECHES 229 (1994).

2. See generally William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union, 30 WEEKLY COMP. PRES. DOC. 148 (1994).

every hospital in America into a national information superhighway by the year 2000."<sup>3</sup>

The proposal Vice-President Gore premiered contained five fundamental objectives, which included, first and foremost, the encouragement of private investment in the NII and the promotion and protection of competition within the NII.<sup>4</sup> In particular, he advocated with respect to competition the participation of electric utilities in the NII. "To take one example of what competition means, cable companies, long distance companies, and electric utilities must be free to offer two-way communications and local telephone service."<sup>5</sup>

To be sure, the Clinton Administration had introduced the concept of the NII with its release in September 1993 of the "National Information Infrastructure: Agenda for Action" (NII Agenda).<sup>6</sup> To assist it with the development of the NII, the Clinton Administration established within the Department of Commerce the Advisory Council on the National Information Infrastructure (NII Advisory Council).<sup>7</sup> It also established the Information Infrastructure Task Force, which "consists of high-level representatives of the Federal agencies that play a major role in the development and application of information technologies."<sup>8</sup> The NII Agenda describes the NII in terms of "a seamless web of communications networks, computers, databases, and consumer electronics that will put vast amounts of information at users' fingertips."<sup>9</sup> The NII Agenda describes the role of the federal government to promote the development of the NII, which is to be built, however, through private investment. Indeed, the annual investment on the part of U.S. companies in telecommunications and information technologies in recent years has exceeded \$50 billion.<sup>10</sup>

To encourage and promote an increase in private investment in, as well as in competition within, the NII, the NII Agenda proposes several legislative initiatives.<sup>11</sup> For example, in August 1993 President Clinton signed into law the Omnibus Budget Reconciliation Act of 1993 (Budget Act).<sup>12</sup> Title VI of the Budget Act enacted the so-called Emerging Telecommunications Technology Act (Technology Act),<sup>13</sup> which the NII

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3. *Id.* at 150. "[T]he 'information superhighway' is a label that is used by different people to apply to different developments. As a result, the information superhighway has become an umbrella concept." Blake & Tiedrich, *The National Information Infrastructure Initiative and the Emergence of the Electronic Superhighway*, 46 *FED. COMM. L.J.* 397, 397 (1994).

4. Gore, *supra* note 1, at 230.

5. Gore, *supra* note 1, at 231.

6. 58 *Fed. Reg.* 49,025 (1993).

7. Exec. Order No. 12,864, 58 *Fed. Reg.* 48,773 (1993). *See also* Exec. Order No. 12,890, 59 *Fed. Reg.* 499 (1994) (amendment to increase Advisory Council from twenty-five to thirty members). *See, e.g.*, 59 *Fed. Reg.* 3758 (1994) (notice of Advisory Council meeting); *id.* at 10,256 (notice of Advisory Council meeting).

8. 58 *Fed. Reg.* 49,025, 49,035 (1993).

9. *Id.* at 49,025.

10. *Id.* at 49,026-27.

11. *Id.* at 49,028.

12. Pub. L. No. 103-66, 107 Stat. 312 (1993).

13. Pub. L. No. 103-66, §§ 6001-03, 107 Stat. 379-401 (1993).

Agenda states will "create high-tech jobs and accelerate the development of new wireless industries . . . ." <sup>14</sup> The Technology Act amended the National Telecommunications and Information Administration Organization Act (NTIA), <sup>15</sup> which had established, within the Department of Commerce, the administration responsible for the allocation of radio frequencies to federal agencies. <sup>16</sup> The Technology Act provides for the eventual transfer of those radio frequencies to the Federal Communications Commission (FCC or Commission) for allocation to commercial radio stations, telecommunications companies, wireless industries, and state and local governments. <sup>17</sup>

In particular, the NII Agenda states that the Clinton Administration will cooperate with Congress for the enactment of comprehensive communications reform legislation that will "explicitly promote private sector infrastructure investment—both by companies already in the market and those seeking entry." <sup>18</sup>

In November 1993, Representative Edward J. Markey (D. Massachusetts), Chairman of the Telecommunications and Finance Subcommittee of the House Committee on Energy and Commerce, introduced House Bill 3636, the National Communications Competition and Information Infrastructure Act of 1994, <sup>19</sup> a bill "to promote a national communications infrastructure to encourage deployment of advanced communications services . . . ." <sup>20</sup> Congressman Markey explained that House Bill 3636 was intended to (i) promote the development of advanced telecommunications technologies as well as an increase in competition for local telephone companies; (ii) promote an increase in competition for cable television companies through repeal of a prohibition on the participation of local telephone companies in video services; and, (iii) promote and enhance the universal provision of affordable telephone services. <sup>21</sup> The reform legislation would, he emphasized, promote "an electronic superhighway to enrich the lives of all Americans in the Information Age." <sup>22</sup>

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14. 58 Fed. Reg. 49,036 (1993).

15. See generally 47 U.S.C. §§ 901-04 (1988).

16. *Id.* § 902(b)(2)(A).

17. Pub. L. No. 103-66, § 6001, 107 Stat. 379-87 (1993). The transfer was based in part on "evidence that the Federal Government does not always employ the most efficient use of its assigned frequencies, nor utilize the most spectrum-efficient technologies in every case." H.R. REP. NO. 111, 103d Cong., 1st Sess. 249 (1993). In addition, "[t]he lack of unassigned, usable spectrum available for commercial and non-Federal Government users has forced the [FCC] to postpone or forego spectrum assignments for many worthwhile uses and technologies, and is imposing unacceptable levels of congestion in many areas." *Id.* at 250. See, e.g., 59 Fed. Reg. 9100 (1994) (promulgation of regulations for allocation of radio frequencies); 59 Fed. Reg. 6005 (1994) (notice of release of NTIA Preliminary Spectrum Reallocation Report).

18. 58 Fed. Reg. 49,025, 49,028 (1993).

19. H.R. 3626, 103d Cong., 1st Sess. (1993).

20. 139 CONG. REC. H10,983, 10,984 (daily ed. Nov. 22, 1993) (introduction of H.R. 3636).

21. *Id.* at E3114 (daily ed. Nov. 24, 1993).

22. *Id.* at E3115 (daily ed. Nov. 24, 1993). "It is important to note that [H.R. 3636] delivers more than just the latest Arnold Schwarzenegger movie or the latest U2 video. It promises the construction of seamless digital network, whereby any book in the Library of Congress can be called up on a computer . . . ." 140 CONG. REC. E112 (daily ed. Feb. 3, 1994) (statement of Representative Markey).

Similarly, in February 1994 Senator Ernest F. Hollings (D. South Carolina), Chairman of the Senate Committee on Commerce, Science and Transportation, introduced Senate Bill 1822, the Communications Act of 1994,<sup>23</sup> a bill "to foster the further development of the Nation's telecommunications infrastructure and protection of the public interest . . . ."<sup>24</sup>

The House Committee on Energy and Commerce, after congressional hearings on the proposed legislation,<sup>25</sup> amended and reported House Bill 3636.<sup>26</sup> The House approved the proposed legislation in late June.<sup>27</sup> The Senate Committee on Commerce, Science and Transportation, after congressional hearings on the proposed legislation,<sup>28</sup> amended and reported Senate Bill 1822.<sup>29</sup> However, it was never forwarded to the Senate for debate and a vote before it recessed in October 1994.<sup>30</sup>

Comprehensive communications reform legislation, however, is not dead and gone. Indeed, it is certain to be re-introduced in Congress in 1995. Senator Robert J. Dole (R. Kansas), the senior Republican in the Senate, predicted in late September 1994 that "a strong bipartisan proposal can be crafted and enacted into law early next year."<sup>31</sup>

Both House Bill 3636 and Senate Bill 1822 were designed to promote the development of the NII and the "information superhighway" through increased investment in, and competition within, telecommunications industries on the part of "companies already in the market and those seeking entry."<sup>32</sup> Electric utilities, which are engaged in the generation, transmission, and distribution of electric power, are among the "companies . . . seeking entry."<sup>33</sup> Indeed, electric utilities have begun to invest and engage in telecommunications activities<sup>34</sup>—in part because "[t]he annual revenues

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23. S. 1822, 103d Cong., 2d Sess. (1994).

24. 140 CONG. REC. S769 (daily ed. Feb. 3, 1994) (introduction of S. 1822).

25. See, e.g., *National Communications Infrastructure (Parts 2-3): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. (1994).

26. H.R. REP. NO. 560, 103d Cong., 2d Sess. (1994).

27. 140 CONG. REC. H5247-48 (daily ed. June 28, 1994).

28. See generally *S. 1822—Communications Act of 1994: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. (1994).

29. S. REP. NO. 367, 103d Cong., 2d Sess. (1994).

30. See, e.g., 140 CONG. REC. S13,823 (daily ed. Sept. 30, 1994) (statement of Senator Pressler).

31. *Id.* at S13,265 (daily ed. Sept. 23, 1994).

32. 58 Fed. Reg. 49,025, 49,028 (1993).

33. See generally ELECTRIC POWER RESEARCH INSTITUTE, BUSINESS OPPORTUNITIES AND RISKS FOR ELECTRIC UTILITIES IN THE NATIONAL INFORMATION INFRASTRUCTURE (Oct. 1994) [hereinafter OPPORTUNITIES AND RISKS].

34. "Electric utilities, facing the prospect of lower prices and competition within their service territories . . . are looking for ways to grow earnings and retain customers through diversification and differentiation." Peter B. Ziesmer & Kurt A. Hoffman, *The Information Superhighway: A New Market for Utilities?*, PUB. UTIL. FORT., June 15, 1994, at 18. "The information superhighway being pushed here in Washington likely will be constructed largely through the efforts of telecommunications and cable companies. But natural gas, water, and especially, electric utilities could play a major role in creating, using, and competing for customers on the national network." David C. Wagman, *Time to Make Tracks*, PUB. UTIL. FORT., Mar. 1, 1994, at 5. But see Michael J. Ashworth, *Electric Utilities and the Info-Way*, PUB. UTIL. FORT., Mar. 15, 1994, at 24, 27 ("Information superhighways have yet to rise

of the telecommunications industry are about \$200 million, very close to the total annual revenues of the electric power industry."<sup>35</sup>

Some electric utilities intend to lease portions of fiber optic cables constructed for internal communications.<sup>36</sup> Electric utilities also intend to invest in telecommunications technologies for demand-side management (DSM).<sup>37</sup> Finally, electric utilities hope to offer cable television, telephone service, and other traditional telecommunications services.<sup>38</sup> The rationale for traditional telecommunications services is simple—electric utilities have a wire connected to each home in America.<sup>39</sup>

The participation of electric utilities in the NII, however, raises several legal issues.<sup>40</sup> In particular, telecommunications companies are regulated by the FCC under the Communications Act of 1934.<sup>41</sup> Electric utilities are regulated by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act,<sup>42</sup> and by the Securities and Exchange Commission

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above political puffery and high-tech hype, but when they do, telecommunications companies—and not electric utilities—will be the providers of choice.”). See generally Rhodes, *To What Extent Should an Electric Utility Become Involved in Creating and Competing on the “Information Superhighway”?*, PUB. UTIL. FORT., June 1, 1994, at 28-32 (twelve responses from electric utility executives).

35. OPPORTUNITIES AND RISKS, *supra* note 33, at 2-1.

36. “The Federal Communications Commission (FCC) reports that electric utilities have 105,000 miles of fiber capacity under lease to telecommunications companies.” John E. Hayes, *Opportunities for Growth*, PUB. UTIL. FORT., June 15, 1994, at 13, 14.

37. “Investing in telecommunications to achieve demand-side management might become so cost-effective that power utilities can now be ‘white knights’ helping local telephone companies accelerate building fiber-to-home the networks.” Steven R. Rivkin, *White Knights for Fiber Nets: How Electrics Can Help Telcos Bring Fiber to the Home*, PUB. UTIL. FORT., Aug. 16, 1990, at 20. See, e.g., Andrew Colman et al., *Powerview: A DSM-Focused Technology*, PUB. UTIL. FORT., Nov. 1, 1993, at 40. But see Ashworth, *supra* note 34, at 26 (“Perhaps the greatest risk of all, though, is in rationalizing the info-way through the legerdemain of DSM.”); Ziesmer & Hoffman, *supra* note 34, at 19 (“[T]he jury is still out on consumer demand and acceptance of ‘hard’ DSM services.”).

38. “Telecommunications as a new business is a ‘natural.’ The FCC’s welcoming attitude toward newcomers in telecommunications is no secret. The more astute energy companies have realized the drift of events, the opportunity they now have, and its potential for the future of their business.” Sheila S. Hollis & John W. Berresford, *The Next Generation: Energy Companies in Telecom*, PUB. UTIL. FORT., May 1, 1994, at 16, 17. See, e.g., Rivkin & Carson, *The Coming Transformation of Electric Service: Entry Into Cable Television*, PUB. UTIL. FORT., Feb. 4, 1982, at 21.

39. “[Electric utilities] already run their own wires to almost every house and apartment in America. For them to add information-carrying capability to their lines could be cheaper, easier and more socially constructive than for either the cable or phone companies, especially if done in cooperation with the other.” Steven R. Rivkin, *While the Cable and Phone Companies Fight . . . Look Who’s Wiring the Home Now*, N.Y. TIMES MAG., Sept. 26, 1993, at 46. But see Pradeep C. Gupta & John Bringenberg, *Building “The Last Mile,”* PUB. UTIL. FORT., Mar. 15, 1994, at 28, 29 (“The cable industry today passes over 90 percent of all homes in the United States with a fiber-coaxial network—a formidable asset in the race to provide the “last mile” of the information superhighway.”).

40. “For any company to succeed in deploying part of the information superhighway, there remain many thorny regulatory and social policy issues to be addressed, particularly in the telecommunications arena itself.” Ashworth, *supra* note 34, at 26. “The ultimate potential for electric utilities in this emerging market is unknown and many issues remain to be resolved.” Ziesmer & Hoffman, *supra* note 34, at 19. See, e.g., OPPORTUNITIES AND RISKS, *supra* note 33, at 8-1 to 8-24 (regulation of utility entry into telecommunications).

41. 47 U.S.C. §§ 151-613 (1988 & Supp. IV 1992).

42. 16 U.S.C. §§ 791-828c (1988 & Supp. V 1993).

(SEC) under the Public Utility Holding Company Act of 1935 (PUHCA).<sup>43</sup> Electric utilities involved in the NII could be subject to regulation by the FCC, as well as by the FERC and the SEC.

Part I of this article will provide some background on the involvement of electric utilities in telecommunications. It will discuss the Power Radio Services, under which the FCC regulates radio communications of electric utilities, the pole attachment statute of the Communications Act, which authorizes the FCC to regulate attachments of cable television cables to electric utility poles, and a recent Department of Energy (DOE) report on the need for a demonstration on the use of telecommunications for DSM. Part I will also discuss several recent developments relative to the Power Radio Services and the pole attachment statute.

Part II will discuss electric utilities and telecommunications under PUHCA. It will outline the extensive and complex requirements of PUHCA that are applicable to public utility holding companies, as well as the specific requirements of PUHCA for the formation by public utility holding companies of subsidiaries to engage in telecommunications activities. It will also discuss the seven instances in the past decade in which the SEC has approved the formation by public utility holding companies of such subsidiaries.

Part III of this article will discuss a principal obstacle to expanded electric utility involvement in telecommunications activities—a series of administrative and judicial decisions that illustrate the potential for dual regulation by the SEC and the FERC to result in confusion and inefficiencies. It will also discuss proposals in Congress to minimize this potential.

Part IV will discuss House Bill 3636 and Senate Bill 1822 and their proposals to amend PUHCA to facilitate the formation or acquisition by public utility holding companies of non-utility subsidiaries to engage in telecommunications activities. It will also discuss their proposals to address the potential consequences of dual regulation by the SEC and the FERC of electric utilities involved in telecommunications.

This article concludes that Senate Bill 1822 might have discouraged investments on the part of electric utilities in telecommunications technologies for DSM. In this regard, it proposes a legislative amendment intended to prevent such an unfortunate consequence of comprehensive communications reform legislation.

## I. BACKGROUND AND RECENT DEVELOPMENTS

### A. *Power Radio Services*

The FCC, under the Communications Act of 1934,<sup>44</sup> regulates interstate and foreign commerce in communication over wire and radio for the purpose “of promoting safety of life and property through the use of wire

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43. 15 U.S.C. §§ 79-79z-6 (1988 & Supp. V 1993).

44. 47 U.S.C. §§ 151-613 (1988 & Supp. IV 1992).

and radio communication . . . .”<sup>45</sup> Title III governs radio regulation.<sup>46</sup> It provides the FCC with exclusive jurisdiction to allocate and license radio frequencies to commercial radio stations, other commercial industries and businesses that use and depend on wireless communications—for example, commercial aviation—and state and local governments.<sup>47</sup> “The fundamental purpose of Congress [in the Communications Act] in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.”<sup>48</sup>

In addition to commercial radio stations, the FCC has allocated and licensed frequencies under its “private radio” regulations to five broad categories of industries, businesses, and non-federal governments: (i) the Public Safety Radio Services,<sup>49</sup> which is available to local governments and police and fire departments;<sup>50</sup> (ii) the Special Radio Emergency Service,<sup>51</sup> which is available to medical services, rescue organizations, and disaster relief organizations;<sup>52</sup> (iii) the Land Transportation Radio Services,<sup>53</sup> which is available to commercial bus lines and railroads;<sup>54</sup> (iv) the Industrial Radio Services,<sup>55</sup> and, (v) the Radiolocation Service,<sup>56</sup> which “accommodates the use of radio methods for determination of direction, distance, speed, or position for purposes other than navigation.”<sup>57</sup>

Within the Industrial Radio Services, the FCC has allocated and licensed frequencies under its “private radio” regulations to nine broad categories of industries and businesses: (i) the Petroleum Radio Service,<sup>58</sup> which is available to businesses engaged in the production, collection, or transportation of petroleum products or natural gas;<sup>59</sup> (ii) the Forest Products Radio Service,<sup>60</sup> which is available to firms engaged in “woods opera-

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45. *Id.* § 151. *See, e.g.,* FCC v. Midwest Video Corp., 440 U.S. 689 (1979); Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94 (1973). “Congress’ purpose in passing the Communications Act was to regulate the communications industry . . . .” *ON/TV of Chicago v. Julien*, 763 F.2d 839 (7th Cir. 1985). The FCC regulates “so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . .” 47 U.S.C. § 151 (1988 & Supp. IV 1992).

46. 47 U.S.C. §§ 301-399b (1988 & Supp. IV 1992). *See generally* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (federal radio regulation upheld).

47. 47 U.S.C. § 303 (1988). “The ‘public interest’ with which the Commission is charged is that involved in granting licenses.” *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 132 (1945). Title III similarly prohibits the transmission of radio communications “except under and in accordance with” an FCC license. 47 U.S.C. § 301 (1988).

48. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

49. 47 C.F.R. §§ 90.15-.25 (1993).

50. *Id.* § 90.15.

51. *Id.* §§ 90.33-.55.

52. *Id.* § 90.33.

53. 47 C.F.R. §§ 90.59-.95 (1993).

54. *Id.* § 90.85.

55. *Id.* §§ 90.59-.81.

56. *Id.* §§ 90.101-.103.

57. 47 C.F.R. § 90.101 (1993).

58. *Id.* § 90.65.

59. *Id.* § 90.65(a).

60. *Id.* § 90.67.

tions" or the manufacture of wood products;<sup>61</sup> (iii) the Film and Video Production Radio Service,<sup>62</sup> which is available to entities engaged in the production of motion pictures or television programs;<sup>63</sup> (iv) the Relay Press Radio Service,<sup>64</sup> which is available to companies engaged in publication of newspapers;<sup>65</sup> (v) the Special Industrial Radio Service,<sup>66</sup> which is available to farms and ranches;<sup>67</sup> (vi) the Business Radio Service,<sup>68</sup> which is available for commercial, educational, philanthropic, ecclesiastical, or medical activities;<sup>69</sup> (vii) the Manufacturers Radio Service,<sup>70</sup> which is available to industrial plants and factories;<sup>71</sup> (viii) the Telephone Maintenance Radio Service,<sup>72</sup> which is available to telephone companies;<sup>73</sup> and, (ix) the Power Radio Service,<sup>74</sup> which is available to electric utilities,<sup>75</sup> natural gas utilities,<sup>76</sup> steam utilities,<sup>77</sup> or companies that provide support services to electric utilities, natural gas utilities, or steam utilities.<sup>78</sup>

The FCC has allocated and licensed to electric utilities under its "private radio" regulations frequencies largely in the VHF Low Band (30-75 MHz), the VHF High Band (130-175 MHz), the UHF Low Band (410-470 MHz), and the UHF High Band (800-1000 MHz).<sup>79</sup> In addition to frequencies on the radio spectrum, the FCC also has allocated and licensed to electric utilities, under its "private microwave" regulations,<sup>80</sup> frequencies on the microwave spectrum. Microwave frequencies, between 928 and 929 MHz and above 952 MHz—in effect, above 1 GHz—<sup>81</sup> are available to industries, businesses, and non-federal governments that otherwise are eli-

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61. 47 C.F.R. § 90.67(a) (1993).

62. *Id.* § 90.69.

63. *Id.* § 90.69(a).

64. *Id.* § 90.71.

65. 47 C.F.R. § 90.71(a) (1993).

66. *Id.* § 90.73.

67. *Id.* § 90.73(a).

68. *Id.* § 90.75.

69. 47 C.F.R. § 90.75(a) (1993).

70. *Id.* § 90.79.

71. *Id.* § 90.79(a).

72. *Id.* § 90.81.

73. 47 C.F.R. § 90.81(a) (1993).

74. *Id.* § 90.63.

75. *Id.* § 90.63(a)(1).

76. *Id.* § 90.63(a)(2).

77. 47 C.F.R. § 90.63(a)(3) (1993).

78. *Id.* § 90.63(a)(4). *See, e.g., In re Amendment of Part 91 to Expand Eligibility in the Power Radio Service*, 35 F.C.C.2d 557 (1972) (promulgation of amendment relative to businesses engaged in support services).

79. 47 C.F.R. § 90.63(c) (1993). The regulation imposes twenty-six limitations on the use of those frequencies. *Id.* § 90.63(d). For example, 153.425 MHz is shared with the Forest Products Radio Service and the Petroleum Radio Service in Arkansas, Louisiana, Oklahoma, and Texas. *Id.* § 90.63(d)(4). 158.160 MHz is not available in Arkansas, Louisiana, Oklahoma, Oregon, Texas, and Washington. *Id.* § 90.63(d)(9). The regulation also authorizes the substitution of those specific radio frequencies for radio frequencies below 25 MHz. *Id.* § 90.63(e).

80. 47 C.F.R. § 94 (1993).

81. *Id.* § 94.1.



gible for frequencies under its "private radio" regulations.<sup>82</sup> The specific frequencies that the FCC has allocated and licensed to electric utilities are enumerated in the FCC regulation on microwave frequencies.<sup>83</sup>

The FCC often reallocates frequencies on the radio and microwave spectra.<sup>84</sup> In particular, the FCC recently amended its "private microwave" regulations to establish procedures for the gradual reallocation of microwave frequencies, between 1850 and 2200 MHz—in effect, in the 2 GHz range—from electric utilities to telecommunications companies that propose to provide personal communications services (PCS).<sup>85</sup> The amendment accompanied the promulgation of regulations intended to promote the development of PCS.<sup>86</sup> Congress required the FCC to expedite the promulgation of these regulations in the Technology Act.<sup>87</sup>

PCS includes "[v]ery broadly defined and flexible radio services that encompass a wide array of mobile and ancillary fixed communications services [for] individuals and business, and [are] integrated with a variety of competing networks."<sup>88</sup> In November 1991, the FCC began to fashion a legal regime for the development of PCS with the release of a policy statement that explained that the FCC "intends to broadly define [PCS] and

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82. *Id.* § 94.5.

83. *Id.* § 94.65.

84. *See, e.g.*, 59 Fed. Reg. 9100 (1994) (to be codified at 47 C.F.R. pts. 1, 21, 22, 90, 94, 95) (promulgation of regulations for allocation of radio frequencies). Electric utilities often have gained additional radio and microwave frequencies under those reallocations. For example, in 1984, the FCC amended its "private radio" regulations, in response to a request from the Utilities Telecommunications Council (UTC), a trade association of electric, natural gas, and water utilities, to allocate and license to electric utilities several frequencies on the HF Band (2-25 MHz). 47 C.F.R. §§ 2, 90 (1993); 49 Fed. Reg. 3259 (1984). The FCC stated that "[t]his allocation of spectrum recognizes the public interest in allowing fixed and mobile use of these frequencies for exploration for energy and mineral resources, restoration of electric power distribution systems, and provision of backup communications circuits." 48 Fed. Reg. 32,991 (1983) (codified at 47 C.F.R. §§ 2, 90 (1993)). In 1981, the FCC amended its "private microwave" regulations, also in response to a UTC request, to allocate and license to electric utilities several additional frequencies on the microwave spectrum. 47 C.F.R. §§ 2, 94 (1993). The FCC concluded that "the public interest will be served by allocating frequencies in the 928-929 MHz bands for use by public utilities for use in energy distribution automation radio systems." 46 Fed. Reg. 9950, 9952 (1981). The FCC has accommodated the needs of electric utilities for radio and microwave frequencies in other respects as well. For example, in 1981 it amended its "private radio" regulations, again in response to a UTC request, to authorize the use of digital voice modulation in radio communications. 47 C.F.R. § 90 (1993). The FCC explained that "the Federal Government and the utilities industry are concerned about attempts to intercept communications of the utilities in general and nuclear power facilities in particular, and requested the Commission to allow Power Radio Service licensees to secure their communications through the use of digital voice scrambled systems." 46 Fed. Reg. 27,707 (1981) (note omitted). In 1983, the FCC denied a request from Forest Industries Telecommunications, a trade association of forest products businesses, to amend its "private radio" regulations to authorize those businesses to share several radio frequencies allocated to electric utilities. 48 Fed. Reg. 32,614 (1983).

85. 47 C.F.R. § 94.59 (1993).

86. *See generally* 47 C.F.R. pt. 24 (1993) (personal communications services). Part 24 was transferred from part 99 in April 1994. 59 Fed. Reg. 18,493, 18,499 (1992).

87. Pub. L. No. 103-66, § 6002(d)(2)(A), 107 Stat. 397 (codified at 47 U.S.C. § 309 note (Supp. V 1993)).

88. 47 C.F.R. § 24.5 (1993). *See generally* Comment, *Personal Communications Services: The Wireless Future of Telecommunications*, 44 FED. COMM. L.J. 335 (1992).

make available an adequate amount of spectrum to foster the development of innovative and competitive markets for these services.”<sup>89</sup> In September 1992, the FCC proposed to allocate specified microwave frequencies to PCS for mobile and portable wireless telephones, facsimile machines, and electronic mail services.<sup>90</sup> The FCC also began to license microwave frequencies, under its “pioneer preference” regulations,<sup>91</sup> to businesses with innovative but demonstrated PCS technologies.<sup>92</sup>

The PCS regulations were promulgated in several stages. The FCC allocated specific microwave frequencies to, and promulgated regulations for,<sup>93</sup> narrowband PCS in August 1993,<sup>94</sup> and for broadband PCS, as well as unlicensed PCS, which are subject to separate FCC regulations,<sup>95</sup> in November 1993.<sup>96</sup> The broadband PCS regulations were again amended in

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89. 56 Fed. Reg. 56,937, 56,937 (1992).

90. 57 Fed. Reg. 40,630, 40,630 (1992).

91. 47 C.F.R. §§ 1.402-403 (1993). “The Commission pioneer’s preference rules provide preferential treatment in its licensing process to parties that demonstrate their responsibility for developing new communications services and technologies.” 59 Fed. Reg. 9419, 9420 (1994). *See generally* Comment, *Pioneer Preferences: Analysis Through Five Models*, 45 FED. COMM. L.J. 149, 149 (1992). The FCC amended its “pioneer preference” regulations in conjunction with its promulgation of PCS regulation. *See generally* First Report and Order, 59 Fed. Reg. 8413, 74 Rad. Reg.2d (P & F) 642 (1994); Memorandum Opinion and Order on Remand, 59 Fed. Reg. 42,521, 75 Rad. Reg.2d (P & F) 1088 (1994).

92. *See, e.g.*, Memorandum Opinion and Order, 57 Fed. Reg. 57,457, 71 Rad. Reg.2d (P & F) 683 (1992) (twenty-one requests for preferences denied on reconsideration); Tentative Decision, 57 Fed. Reg. 57,458, 71 Rad. Reg.2d (P & F) 683 (1992) (three requests for preferences granted and fifty-three requests for preferences denied); Third Report and Order, 59 Fed. Reg. 9419, 74 Rad. Reg.2d (P & F) 659 (1994) (three requests for preferences granted and forty-seven requests for preferences denied). *See also* Adams Telecom, Inc. v. FCC, 997 F.2d 955 (D.C. Cir. 1993) (appeal of Memorandum Opinion and Order) (motion to dismiss appeal denied). “The Commission granted these [three] requests in order to reward these grantees for developing new or innovative technologies and services. The Commission also intends this action to encourage entities to pioneer new technologies or services and present them before the Commission.” 57 Fed. Reg. 57,458 (1992).

93. 47 C.F.R. pt. 99 (1993) (personal communications services).

94. First Report and Order, 58 Fed. Reg. 42,681, 73 Rad. Reg.2d (P & F) 435 (1993), *aff’d and amended*, Memorandum Opinion and Order, 59 Fed. Reg. 14,115, 74 Rad. Reg.2d (P & F) 822 (1994), *aff’d and amended*, Second Memorandum Opinion and Order, 59 Fed. Reg. 46,195, 75 Rad. Reg.2d (P & F) 1240 (1994). “The Commission finds that authorizing these services would permit provision to consumers of new mobile and portable communications services, which are expected to increase the productivity of businesses, enhance the public’s communications, and assist American industry to maintain its leadership position in the global telecommunications marketplace.” 58 Fed. Reg. 42,681 (1993). “These rules are intended to foster introduction of this new service to the public, *contribute to development of the national information infrastructure*, and provide for ubiquitous wireless access to new voice and data services.” 59 Fed. Reg. 14,115 (1994) (emphasis added). “The changes adopted herein are intended to improve the fairness of the licensing process for narrowband PCS and provide for more effective use of the narrowband PCS spectrum.” 59 Fed. Reg. 46,195 (1994).

95. *See generally* 47 C.F.R. pt. 15 (1993) (radio frequency devices). Unlicensed PCS operates between 1890 and 1930 MHz. 58 Fed. Reg. 59,174 (1993).

96. Second Report and Order, 58 Fed. Reg. 59,174, 73 Rad. Reg.2d (P & F) 1417 (1993), *aff’d and amended*, Memorandum Opinion and Order, 59 Fed. Reg. 32,830, 75 Rad. Reg.2d (P & F) 491 (1994). “The PCS rules being adopted will provide [broadband] licensees and developers of unlicensed equipment the flexibility to introduce a wide variety of new and innovative telecommunications services and equipment.” 58 Fed. Reg. 59,175-76 (1993). “This action will result in lower costs for the broadband PCS industry and lower prices for consumers.” 59 Fed. Reg. 32,830 (1994).

August 1994.<sup>97</sup> The FCC observed that “[p]ersonal communications needs are changing rapidly as our society becomes more mobile and people demand rapid communications no matter where they are or what time it is.”<sup>98</sup>

To accommodate the allocation of specific microwave frequencies in the 2 GHz range for PCS, the FCC amended its “private microwave” regulations to establish procedures for the gradual reallocation of those frequencies from electric utilities.<sup>99</sup> In February 1992, the FCC proposed to amend its Table of Frequency Allocations,<sup>100</sup> which is a codification of allocated radio and microwave frequencies, “to provide spectrum for new emerging technologies [that] are being proposed.”<sup>101</sup> It also proposed procedures and a transition period for PCS companies to negotiate with electric utilities for specific microwave frequencies in the 2 GHz range. If those negotiations failed, then the FCC would impose a reallocation of those frequencies upon expiration of the transition period.<sup>102</sup> In September 1992, the FCC, in exchange for those frequencies, proposed to allocate specific microwave frequencies above 3 GHz to the displaced companies.<sup>103</sup>

In October 1992, the FCC allocated specific microwave frequencies in the 2 GHz range to PCS companies and promulgated regulations for the transition period.<sup>104</sup> Ultimately the FCC selected a two-year transition period.<sup>105</sup> In September 1993, it allocated specific microwave frequencies above 3 GHz to the displaced companies.<sup>106</sup> In support of the reallocation,

97. Further Order on Reconsideration, 59 Fed. Reg. 39,704, 75 Rad. Reg.2d (P & F) 1015 (1994). “This action is taken so that these rules can be more effectively enforced consistent with their intent, which is to ensure that broadband PCS licensees lack any incentive to impede the development of full competition with the cellular licensees or with other broadband PCS licensees in the same geographic area.” 59 Fed. Reg. 39,704 (1994).

98. 59 Fed. Reg. 32,830 (1994).

99. “Looking around for frequencies that were not being used efficiently, the Commission’s gaze fell upon the 2 GHz Band. In a series of decisions that is still unfolding, the FCC decided, in effect, to take the 2 GHz Band away from the energy companies and allocate it to [PCS].” Hollis & Berresford, *supra* note 38, at 16. See, e.g., Steven R. Rivkin, *FCC to Electrics: Move, Use, or Lose!*, PUB. UTIL. FORT., May 1, 1992.

100. 47 C.F.R. § 2.106 (1993).

101. 57 Fed. Reg. 5993, 5993 (1992). “The notice proposes to allocate the 1950-1990, 2110-2150, and 2160-2200 MHz bands for emerging technologies. It proposes that the fixed operations currently using these bands be reaccommodated on higher frequency common carrier and private operational fixed microwave bands or on alternative media.” *Id.* at 5994.

102. *Id.* See also 57 Fed. Reg. 48,776 (1992) (proposed revised transition period). “The intended effect of this action is to provide for a smooth transition between existing and new uses of the 2 GHz band where necessary to accommodate new services and technologies.” 57 Fed. Reg. 48,776 (1992).

103. 57 Fed. Reg. 42,916 (1992).

104. First Report and Order, 57 Fed. Reg. 49,020, 71 Rad. Reg.2d (P & F) 349 (1992). “The transition period would be of fixed duration, during which the only method for relocation would be pursuant to voluntary relocation arrangements negotiated by emerging technology service providers and incumbent fixed microwave licensees.” 57 Fed. Reg. 49,020 (1992).

105. Third Report and Order, 58 Fed. Reg. 46,547, 73 Rad. Reg.2d (P & F) 766 (1993), *aff’d*, Memorandum Opinion and Order, 59 Fed. Reg. 19,642, 74 Rad. Reg.2d (P & F) 1042 (1994).

106. Second Report and Order, 58 Fed. Reg. 49,220, 73 Rad. Reg.2d (P & F) 766, *aff’d*, 59 Fed. Reg. 19,642 (1994). “6 GHz will be the primary relocation band for 2 GHz licensees, and therefore efficiently accommodating these licensees in this band is of utmost importance.” 58 Fed. Reg. 49,221

the FCC observed that "[r]eaccommodation of these licensees is necessary to ensure that they can continue to provide equivalent service with comparable reliability."<sup>107</sup>

The Power Radio Service has fostered the construction and development, on the part of electric utilities, of an extensive wireless telecommunications infrastructure.<sup>108</sup> Electric utilities, it is estimated, have invested over \$4.3 billion in over 43,000 private radios, over \$1.3 billion in 7000 point-to-point microwave stations, and over \$330 million in 1700 point-to-multipoint microwave stations.<sup>109</sup> In addition, "[u]tility installation of fiber optics is expected to increase as a result of increased communications requirements and the recent reallocation of their primary 2 [GHz] microwave band to the development of [PCS]."<sup>110</sup>

The infrastructure serves numerous purposes.<sup>111</sup> For example, it is used for electric power transmission and distribution control, transmission and distribution facilities maintenance, general information exchange, and emergencies.<sup>112</sup> With respect to transmission and distribution control in particular, it is stated that "[e]lectric utilities have the most critical private-industry need for 'real-time' communications in the nation . . . ."

### B. Pole Attachments

FCC regulation of wire and radio communications has included, under title VI of the Communications Act,<sup>113</sup> cable television since 1984, when Congress, to encourage the growth and development of cable television systems,<sup>114</sup> enacted the Cable Communications Policy Act.<sup>115</sup> The FCC

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(1993). "The energy companies and other incumbent users of the 2 GHz Band put up a terrific fight through several rounds of proceedings at the FCC. They argued that the 2 GHz Band was being well used and that it would be unfair . . . for them to move to higher frequency bands." Hollis & Berresford, *supra* note 38, at 17.

107. 58 Fed. Reg. 49,220, 49,222 (1993).

108. *But see* OPPORTUNITIES AND RISKS, *supra* note 33, at 2-9 to 2-10 ("The overall information and telecommunications requirements of utilities in the near future cannot be met by the telecommunications systems most utilities now have in place. Utilities will have to build new networks or lease facilities from commercial telecommunications service providers.").

109. Herbert A. Cavanaugh, *Information Superhighways Are Under Construction At Many Electric Utilities*, ELECTRICAL WORLD, Feb. 1994, at 5.

110. Sean A. Stokes, *Reforming Telecommunications: How Utilities Fare on Capitol Hill*, PUB. UTIL. FORT., June 15, 1994, at 28, 29.

111. *See, e.g.*, BUFORD GOFF & ASSOCIATES, HOW UTILITIES USE RADIO (1993); OPPORTUNITIES AND RISKS, *supra* note 33, at 6-1 to 6-82 (utility applications of telecommunications).

112. GOFF & ASSOCIATES, *supra* note 111, at 4.

113. *See, e.g.*, 47 U.S.C. §§ 521-59 (1988) (cable communications).

114. *Id.* § 521.

115. Pub. L. No. 98-549, 98 Stat. 2780 (1988). *See also* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). The Cable Communications Policy Act, in effect, updated the Communications Act with provisions for FCC regulation of cable communications. "The Communications Act of 1934, which provides the overall framework for the regulation of the communications industry, was enacted well before the advent of cable television." H.R. REP. NO. 934, 98th Cong., 2d Sess. 19 (1982). "[FCC] efforts to update its rules, as well as congressional efforts to address problems arising from the development of this new medium, barely

regulates cable television "to protect [and] promote the objectives for which [the FCC] had been assigned jurisdiction over broadcasting."<sup>116</sup>

Since 1978, however, section 224 of the Communications Act had authorized the FCC,<sup>117</sup> in the absence of state regulation,<sup>118</sup> to regulate the rates, terms, and conditions for attachments of cable television cables to poles or conduits owned or maintained by electric utilities.<sup>119</sup> The statute provides a formula for the FCC to determine the fairness and reasonableness of the rates charged to cable television companies by electric utilities for pole attachments.<sup>120</sup>

The pole attachment statute forged an acrimonious relationship between the cable television companies and the electric utilities. Indeed, the electric utilities have opposed the enactment,<sup>121</sup> implementation, and extension of the statute.

For years the FCC had investigated contractual agreements between cable television companies and electric utilities (and telephone companies) on pole attachments for cable television cables.<sup>122</sup> In 1977, however, the FCC concluded that it was not authorized under the Communications Act to regulate pole attachments, which, it concluded, were outside the ambit of wire and radio communications.<sup>123</sup> The decision arose from a petition, filed by the National Cable Television Association (NCTA) and opposed by the Utilities Telecommunications Council (UTC), for reconsideration of a previous FCC determination that it was without jurisdiction to regulate leases of poles from electric utilities and other non-telephone utilities.<sup>124</sup>

The petition for reconsideration argued that "the financial viability of the cable industry is threatened by past and future increases in pole and conduit rental charges . . ."<sup>125</sup> It also argued that the FCC was authorized to regulate pole attachments because the Supreme Court had held in 1968

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have kept pace with technological innovation and consumer interest." S. REP. NO. 67, 98th Cong., 2d Sess. 5 (1982).

116. *United States v. Midwest Video Corp.*, 406 U.S. 649, 667 (1972).

117. 47 U.S.C. § 224 (1988).

118. *Id.* § 224(c).

119. *Id.* § 224(b).

120. "[A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments . . . ." *Id.* § 224(d)(1). See generally 47 C.F.R. §§ 1.1401-15 (1993) (pole attachment complaint procedures). "The rules and regulations contained in [those regulations] provide complaint and enforcement procedures to ensure that rates, terms, and conditions for cable television pole attachments are just and reasonable." *Id.* § 1.1401.

121. The pole attachment statute was enacted in the Communications Act Amendments of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978).

122. See, e.g., *In re Pole Attachment Proceeding*, 42 F.C.C.2d 460, 28 Rad. Reg.2d (P & F) 187 (1973). "The Commission today instructed the staff to draft appropriate documents asserting jurisdiction over pole attachments and conduit agreements and arrangements for cable television usage; such jurisdiction to be exercised in those instances where adequate provisions in this respect have not been made by State or other local jurisdictions." 42 F.C.C.2d at 460.

123. See generally *In re California Water and Tel. Co.*, F.C.C. 77-219, 64 F.C.C.2d 753, 40 Rad. Reg.2d (P & F) 419 (1977). "Our finding that pole attachment arrangements do not constitute wire or radio communications precludes our regulation . . . ." 64 F.C.C.2d at 760.

124. F.C.C. 76-636, 37 Rad. Reg.2d (P & F) 1166 (1976).

125. 64 F.C.C.2d at 754.

that the FCC was authorized to regulate cable television in connection with its mandate to regulate broadcast television.<sup>126</sup> The UTC, in contrast, dismissed the financial ruin that the NCTA postulated. It argued for state regulation of pole attachments.<sup>127</sup>

The FCC concluded, in effect, that the broad interpretation of its mandate provided by the Supreme Court was limited.<sup>128</sup> It also concluded that the request for federal regulation of pole attachments sought a role for the FCC that Congress never countenanced.<sup>129</sup>

Even prior to the FCC decision on pole attachments, the cable television companies shifted their objective from administrative to legislative relief and lobbied Congress for pole attachment legislation in 1976 and 1977.<sup>130</sup> The legislation was enacted in the Communications Act Amendments of 1978.<sup>131</sup> Congress decided to authorize the FCC, in the absence of state regulation,<sup>132</sup> to resolve pole attachment disputes between electric utilities (and telephone companies) and cable television companies. Those disputes often had been resolved in state courts.<sup>133</sup>

Congress was persuaded that the dependence of cable television companies on electric utilities for utility poles subjected the companies to near-extortion for pole attachment rates.<sup>134</sup> It was not persuaded that the states

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126. "It is enough to emphasize that the authority which we recognize today [for cable television regulation] is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, (1968).

127. "UTC points out that among approximately 3,000 electric utility companies nationwide, NCTA cited only seven cable system operators involved in disputes with these companies." 64 F.C.C.2d at 755-56.

128. 64 F.C.C.2d at 758-60. "The allowance of 'wide latitude' in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority." *National Ass'n of Regulatory Util. Comm'r's v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976).

129. 64 F.C.C.2d at 758-60. *See, e.g., Illinois Citizens Comm. for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1976).

130. *See, e.g., H.R. 15268*, 94th Cong., 2d Sess. (1976); *H.R. 15372*, 94th Cong., 2d Sess. (1976); *H.R. 7442*, 95th Cong., 1st Sess. (1977); *S. 1547*, 95th Cong., 1st Sess. (1977); *Cable TV Regulation Oversight: Hearing Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. (1976).

131. Pub. L. No. 95-234, 92 Stat. 33 (1978).

132. The Cable Communications Policy Act amended § 224 to define the absence of state regulation in terms of the failure to issue state rules and regulations to resolve, in an expeditious manner, pole attachment disputes between electric utilities (and telephone companies) and cable television companies. 47 U.S.C. § 224(c)(3) (1988).

133. *See, e.g., California Community Television Ass'n v. General Tel. Co. of Cal.*, 73 Cal. P.U.C. 507 (1973); *California Community Tel. Ass'n v. General Tel. Co. of Cal.*, 87 Pub. Util. Rep.3d (PUR) 340 (Cal. P.U.C. 1970).

134. *See, e.g., H.R. REP. NO. 721*, 95th Cong., 1st Sess. 3 (1977). "Thirty electric utility companies have also announced rate increases. The overall 55 percent increase adjusted the rates from an average of \$3.90 per pole to an average of \$6.05 per pole." *Id.* at 5. *See also S. REP. NO. 580*, 95th Cong., 1st Sess. 13 (1977). Electric utilities had argued that their monopolies on utility poles were not an unfair advantage in negotiations with cable television companies for contractual agreements on pole attachments. *See, e.g., Communication Act Amendments of 1977: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 173-88 (1977) (statement of Joseph A. Dowd, Edison Electric Institute). "The institute strongly

alone should regulate the rates and terms for pole attachments.<sup>135</sup> Finally, Congress was satisfied that the formula it fashioned for the FCC, in section 224(d),<sup>136</sup> for pole attachment rates would be fair and equitable for the

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disagrees with arguments that legislation such as this is necessary to prevent utilities from exacting unreasonably high charges. We believe that our member companies have set rates at reasonable levels, and that in most instances good, businesslike cooperation exists between electric utilities and [cable television] companies." *Id.* at 173. See also *Pole Attachment: Hearing Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 26 (1976) (statement of D. Morgan Dubrow, National Rural Electric Cooperative Association) [hereinafter *Pole Attachment*]. "The rural cooperatives own and operate about 44 percent of the electric distribution lines in the United States and have always demonstrated a willingness to make these facilities available for other public purposes on reasonable terms and conditions." *Id.* at 27. Electric utilities also had argued that the proposed pole attachment legislation would result in electric-utility subsidies for cable television services. "[T]he basic issue . . . is whether the already overburdened consumers of electricity should be put in the position of providing a limited subsidy—yes, a free ride—to the prospering cable television industry." *Communication Act Amendments of 1977: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 176 (1977) (statement of Joseph A. Dowd, Edison Electric Institute) [hereinafter *Communication Act Amendments of 1977*].

135. Electric utilities had argued that the states, and not the FCC, should regulate rates and terms for pole attachments. See, e.g., *Pole Attachment*, *supra* note 134, at 28-31 (statement of Northcutt Ely, American Public Power Association); *Communication Act Amendments of 1977*, *supra* note 134, 232-33 (statement of James C. Campbell, Utilities Telecommunications Council). In this regard, the National Association of Regulatory Utility Commissioners (NARUC), an association of state public utility commissions, had agreed. See, e.g., *Pole Attachment*, *supra* note 134, at 40-47 (statement of Tenney I. Deane, Jr., NARUC). "The NARUC believes not only that there is no need for federal regulation of pole attachment agreements, but also that it should be left to the States to determine what regulation, if any, is necessary." *Pole Attachment*, *supra* note 134, at 44. But see *Communication Act Amendments of 1977*, *supra* note 134, at 146-49 (statement of Alexander J. Kalinski, NARUC). "[T]he NARUC and the [NCTA] earlier this year attempted to draft an agreement on legislation for the regulation of cable television pole attachments. Our joint efforts were successful and . . . both NARUC and NCTA formally approved draft language." *Communication Act Amendments of 1977*, *supra* note 134, at 146. Nonetheless, Congress decided that the FCC should be authorized to regulate leases of poles from electric utilities. "However, S. 1547, as reported, does expand the Commission's authority over entities not otherwise subject to FCC jurisdiction (such as electric power companies) . . ." S. REP. NO. 580, 95th Cong., 1st Sess. (1977).

136. "[A pole attachment] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole . . ." 47 U.S.C. § 224(d)(1) (1988).

short term.<sup>137</sup> The Supreme Court concluded that the pole attachment statute was constitutional in 1987.<sup>138</sup>

Since the promulgation in 1978 of regulations to implement section 224,<sup>139</sup> the FCC, through its Common Carrier Bureau, has adjudicated numerous disputes between electric utilities and cable television companies. Several of those disputes over pole attachment rates and terms reached the Commission.<sup>140</sup> On review of some Commission orders on pole attachment rates and terms, the federal courts have directed the FCC

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137. "This . . . formula reflects a belief that the annual pole attachment fee should be set somewhere between avoidable and fully allocated costs in order to avoid inhibiting the growth of cable television . . ." S. REP. NO. 580, 95th Cong., 1st Sess. 19 (1977). Section 224(e) provided for the elimination of the formula in five years. 47 U.S.C. § 224(e) (1988). "A 5-year termination formula is imposed to afford the [FCC] greater leeway to select a more appropriate methodology should experience and changed conditions so dictate." S. REP. NO. 580, 95th Cong., 1st Sess. 21 (1977). However, § 224(e) was repealed in 1982. Communications Amendments Act of 1982, Pub. L. No. 97-259, § 106, 96 Stat. 1087, 1091 (1982). The Congress ultimately concluded that the formula was effective and thus should be preserved in the statute. H.R. REP. NO. 765, 97th Cong., 2d Sess. 30-31 (1982). "In the event that the requirement of the formula established by Section 224(d) were permitted to expire, it would increase the likelihood that parties would petition to alter the formula by rulemaking, with resulting increased burden on the FCC and uncertainty in the industry until such issues were resolved." *Id.* at 31.

138. *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). "Because we hold that the Pole Attachment Act does not authorize a taking of property within the meaning of the Fifth Amendment, the holding of the [U.S.] Court of Appeals [for the Eleventh Circuit], that the Act is void because it unconstitutionally constrains the judicial determination of just compensation for takings, necessarily falls." *Id.* at 254.

139. See generally 47 C.F.R. §§ 1.1401-15 (1993) (pole attachment complaint procedures); 77 F.C.C.2d 187 (1980) (memorandum opinion and order for promulgation of amended regulations); *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (amended regulations upheld). "The [FCC] may proceed 'to hear and resolve complaints regarding the arrangements between cable television systems and the owners or controllers of utility poles' . . . using the methods for calculating and apportioning costs that it has prescribed." *Id.* at 1257 (citation omitted).

140. *Heritage Cablevision Assocs. v. Texas Utils. Elec. Co.*, No. PA-89-002, 1992 FCC LEXIS 3575 (1992); *Heritage Cablevision Assocs. v. Texas Utils. Elec. Co.*, 69 Rad. Reg.2d (P & F) 1749 (1991); *Continental Cablevision of N.H., Inc. v. Concord Elec. Co.*, No. PA-82-0074, 1985 FCC LEXIS 2538 (1985); *Port Gibson Cable TV v. Mississippi Power & Light Co.*, 58 Rad. Reg.2d (P & F) 1293 (1985); *Texas Cablevision Co. v. Southwestern Elec. Power Co.*, No. PA-84-0007, 1985 FCC LEXIS 2743 (1985); *Scripps-Howard Cable Servs. Co. v. Florida Power Corp.*, No. PA-85-0003, 1985 FCC LEXIS 3172 (1985); *Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, No. PA-84-0016, 1985 FCC LEXIS 3295 (1985); *Group W Cable, Inc. v. Wisconsin Elec. Power Co.*, No. PA-82-0062, 1985 FCC LEXIS 3476 (1985); *Warner Amex Cable Communications, Inc. v. Southwestern Elec. Power Co.*, No. PA-82-0017, 1985 FCC LEXIS 4130 (1985); *Teleprompter Corp. v. Texas Power & Light Co.*, 57 Rad. Reg.2d (P & F) 438 (1984); *American Television & Communications Corp. v. Florida Power Corp.*, No. PA-83-0035, 1984 FCC LEXIS 1590 (1984); *Teleprompter Corp., Inc. v. Florida Power Corp.*, No. PA-81-0008, 1984 FCC LEXIS 1874 (1984); *Teleprompter Corp., Inc. v. Florida Power Corp.*, No. PA-81-0008, 1984 FCC LEXIS 1908 (1984); *Booth American Co. v. Duke Power Co.*, No. PA-82-0068, 1984 FCC LEXIS 1953 (1984); *Liberty TV Cable, Inc. v. Georgia Power Co.*, No. PA-82-0008, 1984 FCC LEXIS 1954 (1984); *Group W Cable, Inc. v. Interstate Power Co.*, No. PA-82-0070, 1984 FCC LEXIS 1955 (1984); *Cablevision of Augusta, Inc. v. Georgia Power Co.*, No. PA-83-0013, 1984 FCC LEXIS 2019 (1984); *Georgia Power Co. v. Columbus Cablevision, Inc.*, No. PA-80-0022, 1984 FCC LEXIS 2045 (1984); *Teleprompter Corp. v. Tampa Elec. Co.*, No. PA-81-0041, 1984 FCC LEXIS 2371 (1984); *Television Cable Serv., Inc. v. Monongahela Power Co.*, 88 F.C.C.2d 56, 50 Rad. Reg.2d (P & F) 583 (1981); *Cable Info. Servs., Inc. v. Appalachian Power Co.*, 81 F.C.C.2d 383, 48 Rad. Reg.2d (P & F) 305 (1980).



to allow electric utilities to charge rates that reflect the cost of pole anchors,<sup>141</sup> private land rights for poles,<sup>142</sup> and taxes on poles.<sup>143</sup>

The debates in Congress on Senate Bill 1822, the Communications Act of 1994,<sup>144</sup> and House Bill 3636, the National Communications Competition and Information Infrastructure Act of 1994<sup>145</sup>—both of which represented the first proposed comprehensive reform of the Communications Act since its enactment in 1934<sup>146</sup>—presented electric utilities with a serendipitous chance to reform the pole attachment statute and to increase the rates charged for pole attachments. Neither Senate Bill 1822, introduced in February 1994, or House Bill 3636, introduced in November 1993, contained an amendment to section 224 of the Communications Act. However, when Senate Bill 1822 was reported from the Senate Committee on Commerce, Science and Transportation in September 1994,<sup>147</sup> it included a provision to revise the formula for the fairness and reasonableness of the rates charged for pole attachments. When House Bill 3636 was reported from the House Committee on Energy and Commerce in June 1994,<sup>148</sup> it included a similar provision.

In particular, section 107 of House Bill 3636, as reported, would have amended section 224 to require the FCC to promulgate regulations within one year “for ensuring that utilities charge just and reasonable and nondiscriminatory rates for pole attachments provided to all providers of telecommunications services, including such attachments used by cable television systems . . . .”<sup>149</sup> Section 107 also would have provided that the new FCC regulations would be inapplicable, and the old formula would continue to be applicable, to “a pole attachment used by a cable television system which solely provides cable service . . . .”<sup>150</sup> “When Congress enacted Section 224 in 1978, cable television systems were the only entities seeking the

141. *Alabama Power Co. v. FCC*, 773 F.2d 362, 367-69 (D.C. Cir. 1985).

142. *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1272-75 (5th Cir. 1986).

143. *Alabama Power Co.*, 773 F.2d at 370-71; *Texas Power & Light Co.*, 784 F.2d at 1271-72. “[*Alabama Power Co.*] was remanded to the Commission with instructions to allow tax normalization, unless and until a reasoned position for its use of the flow-through method could be successfully reconciled and explained.” 784 F.2d at 1271.

144. S. 1822, 103d Cong., 2d Sess. (1994).

145. H.R. 3636, 103d Cong., 1st Sess. (1993).

146. See, e.g., 140 CONG. REC. S5686-87 (daily ed. May 12, 1994) (statement of Senator Breaux) (“As a matter of fact, the last major communications act in Congress was adopted back in 1934—60 years ago.”); 140 CONG. REC. S9168 (daily ed. July 18, 1994) (statement of Senator Durenberger) (“[Federal communications reform legislation] is an issue much in need of congressional attention because—despite technological advancement and the judicial dismantling of AT&T—national communications policy has gone virtually unchanged for 60 years.”); 140 CONG. REC. S13,823-24 (daily ed. Sept. 30, 1994) (statement of Senator Pressler) (“We need to revise our Nation’s communications laws. The current statute is 60 years old, and does not address the realities of today.”).

147. S. 1822, 103d Cong., 2d Sess. (1994); see generally S. REP. NO. 367, 103d Cong., 2d Sess. (1994).

148. H.R. 3636, 103d Cong., 2d Sess. (1994); see generally H.R. REP. NO. 560, 103d Cong., 2d Sess. (1994).

149. H.R. 3636, 103d Cong., 2d Sess. § 107 (1994) (to be codified in § 224(d)(1)).

150. *Id.* (to be codified in § 224(d)(2)). “A cable operator that offered telecommunications service, as well as cable service, would be required to pay a pole attachment rate as established under the standard added by [section 107].” S. REP. NO. 580, 95 Cong., 1st Sess. (1977).

right to attach to utility poles. [Section 107] recognizes that as competition develops in telecommunications markets, entities other than cable television systems may attach to utility poles . . . ."<sup>151</sup>

Section 305 of Senate Bill 1822, as reported, was almost identical to section 107.<sup>152</sup> The Senate Committee on Commerce, Science and Transportation stated that section 305 "is intended to remedy the anomaly of current law, under which cable systems providing telecommunications services are able to obtain a regulated pole attachment rate . . . while other providers of telecommunications services are unable to obtain a regulated pole attachment rate . . . ."<sup>153</sup> The report also emphasized that "once a cable company begins to provide telecommunications services over those wires . . . its pole attachment rate will increase to the rate paid by other competitors."<sup>154</sup>

### C. Demand-Side Management

In October 1992, Congress enacted the Telephone Disclosure and Dispute Resolution Act (TDDRA) to provide for federal regulation of pay-per-call telephone services,<sup>155</sup> which commonly are offered through 900 telephone numbers.<sup>156</sup> In particular, the legislation added to the Communications Act Section 228,<sup>157</sup> which requires the FCC to promulgate regulations for "a system for oversight and regulation of pay-per-call services in order to provide for the protection of consumers . . . ."<sup>158</sup> The FCC proposed regulations to implement section 228 in March 1993.<sup>159</sup> The regulations,<sup>160</sup> which, for example, prohibit the disconnection of local telephone

151. S. REP. NO. 580, 95th Cong., 1st Sess. 72 (1977).

152. S. 1822, 103d Cong., 2d Sess. (1977) (containing § 305 which will be codified in § 224(d)(1)-(3)).

153. S. REP. NO. 367, 103d Cong., 2d Sess. 65 (1994).

154. *Id.* at 24.

155. Pub. L. No. 102-556, 106 Stat. 4181 (1992).

156. "Although 900 services can provide a valuable service in the information economy, it is clear that some unscrupulous companies will utilize 900 services as a way to make easy money. For this reason, some guidelines and safeguards must be established that will permit the industry to flourish . . . ." H.R. REP. NO. 430, 102d Cong., 2d Sess. 6 (1992). "The 900 pay-per-call business, which began in the early 1980s, has developed into a \$759 million industry and is projected to grow into a \$1.6 billion industry by 1992." S. REP. NO. 190, 102d Cong., 2d Sess. 2 (1992). See also S. 471, the 900 Services Consumer Protection Act of 1991, and S. 1166, the Telephone Consumer Assistance Act: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 102d Cong., 1st Sess. (1991); Telephone '900' Services: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. (1991). *In re Policies and Rules Concerning Interstate 900 Telecommunications Servs.*, 6 F.C.C.R. 1857, 1991 FCC LEXIS 1449 (1991) (proposed regulations); *In re Policies and Rules Concerning Interstate 900 Telecommunications Servs.*, 6 F.C.C.R. 6166, 69 Rad. Reg.2d (P & F) 1360, 1991 FCC LEXIS 5525 (1991) (final regulations).

157. 47 U.S.C. § 228 (Supp. V 1993).

158. *Id.* § 228(b).

159. *In re Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, 8 F.C.C.R. 2331, 1993 FCC LEXIS 1562 (1993).

160. 47 C.F.R. §§ 64.1501-1515 (1993).

services for delinquent charges for pay-per-call telephone services,<sup>161</sup> were adopted in August 1993.<sup>162</sup>

The TDDRA also directed the Federal Trade Commission (FTC) to promulgate regulations to prohibit unfair and deceptive practices in advertisements for pay-per-call telephone services and to establish procedures for the correction of erroneous charges for those services.<sup>163</sup> The FTC proposed regulations to implement its new mandate in March 1993.<sup>164</sup> The regulations,<sup>165</sup> which were adopted in August 1993,<sup>166</sup> require charges for pay-per-call telephone services to be "clearly and conspicuously" disclosed in advertisements.<sup>167</sup>

With respect to electric utilities and telecommunications, section 401 of the TDDRA, which was added to the legislation in the course of Senate debate thereon,<sup>168</sup> directed the Department of Energy (DOE) to prepare a proposal for a demonstration of the potential of innovative telecommunications equipment and services to assist electric utilities in the generation, transmission, and distribution of electric power:

(a) **DEMONSTRATION PROPOSAL.** — Within 180 days after the date of enactment of this Act, the Assistant Secretary of Energy for Conservation and Renewable Energy, in consultation with the Assistant Secretary of Commerce for Communications and Information, shall submit to Congress a proposal for demonstrating the ability of new and innovative communications equipment and services to further the national goals of conserving energy and protecting public health and safety.

(b) **FACTORS TO BE ADDRESSED.** — The demonstration proposal required by subsection (a) shall address —

(1) the feasibility of using communications technologies to read meters from remote locations;

(2) the feasibility of *managing* the consumption of electrical power and natural gas by residences and businesses, thereby reducing the *demand* for new and additional sources of energy, and controlling the cost of providing improved utility services; and

(3) the public safety implications of monitoring utility services outages during earthquakes, hurricanes, typhoons, tornadoes, volcanoes, and other natural disasters.<sup>169</sup>

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161. *Id.* § 64.1507.

162. *In re Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, 8 F.C.C.R. 6885, 1993 FCC LEXIS 4147 (1993).

163. *See generally* 15 U.S.C. §§ 5701-24 (1988). The TDDRA authorizes the states to enforce FCC regulations with respect to unfair and deceptive advertisements. *Id.* § 5712(a). With respect to FCC procedures relative to erroneous bills and charges, the TDDRA provides that it "does not annul, alter, or affect, or exempt any person . . . from complying with, the laws of any State with respect to telephone billing practices . . ." *Id.* § 5722(a).

164. 58 Fed. Reg. 13,370 (1993).

165. 16 C.F.R. pt. 308 (1993).

166. 58 Fed. Reg. 42,364 (1993).

167. 16 C.F.R. § 308.3(b)(1) (1993).

168. 138 CONG. REC. S17,455 (daily ed. Oct. 7, 1992).

169. Pub. L. No. 102-556, §§ 401(a)-(b), 106 Stat. 4194 (1992) (emphasis added).

The statute also directed the DOE to consider if the Department of Commerce should be requested to allocate radio frequencies for use in the DOE demonstration.<sup>170</sup>

The DOE was instructed to propose a demonstration of the use of telecommunications for DSM.<sup>171</sup> Indeed, in several federal statutes, from the Energy Policy and Conservation Act of 1975<sup>172</sup> through the Energy Policy Act of 1992,<sup>173</sup> the federal government has encouraged electric utilities to engage in DSM.<sup>174</sup>

In September 1993, the DOE, after it invited public comments on the issue,<sup>175</sup> reported to Congress that there was no need for a DOE demonstration of the use of telecommunications to assist electric utilities with DSM.<sup>176</sup> On the basis of information provided in part by the NCTA, the UTC,<sup>177</sup> the National Association of Regulatory Utility Commissioners (NARUC), an association of state public utility commissions, and several electric utilities and cable television companies,<sup>178</sup> the DOE concluded that "[u]tilities are already making significant investments in communications systems; these investments are rapidly increasing."<sup>179</sup>

In its report to Congress, the DOE described the present uses by electric and natural gas utilities of telecommunications systems, as well as the anticipated future uses of those systems, through a combination of wireless media—radios and satellites (as well as wire media), telephone wires, cable television cables, fiber-optic cables, and electric power lines.<sup>180</sup> For example, through the Automatic Meter Reading Association, the DOE learned

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170. *Id.* § 401(c). "Congress recognizes that other countries, such as Great Britain, have allocated radio frequency spectrum dedicated to the use of utility communications services and equipment. Accordingly, our nation can ill afford to fall behind in the development, testing, and utilization of this technology." 138 CONG. REC. H11,935 (1992) (statement of Representative Slattery on § 401).

171. Pub. L. No. 102-556, § 401(b)(2), 106 Stat. 4194 (1992). "It is my hope that the [DOE] will recognize the need for advanced innovative energy conserving devices . . ." 138 CONG. REC. S17,455 (1992) (statement of Senator Gorton on § 401).

172. *See generally* 42 U.S.C. §§ 6201-6422 (1988).

173. *See generally* Pub. L. No. 102-486, 106 Stat. 2776 (1992).

174. *See generally* James W. Moeller, *Electric Demand-Side Management Under Federal Law*, 13 VA. ENVTL. L.J. 57 (1993).

175. 58 Fed. Reg. 4987 (1993). The DOE invitation for public comment observed that "[t]here are a number of companies which are presently marketing or developing communication systems for load control, outage detection, and remote meter reading." *Id.* at 4988.

176. *See generally* U.S. DEPARTMENT OF ENERGY, PROPOSAL FOR DEMONSTRATING THE POTENTIAL OF INNOVATIVE COMMUNICATIONS EQUIPMENT AND SERVICES FOR UTILITY APPLICATIONS (Sept. 1993).

177. The UTC represents about 2,000 electric, natural gas, and water utilities on telecommunications issues. *Id.* at 11.

178. *Id.* app. C (respondents to invitation for public comments).

179. *Id.* at 35. "Nearly 100 utilities are conducting or plan to conduct demonstrations and installations." *Id.* at 29.

180. *Id.* at 11-27.

that almost 100 electric, natural gas, and water utilities have installed telecommunications systems to read meters.<sup>181</sup>

## II. PUBLIC UTILITY HOLDING COMPANY ACT (PUHCA)

### A. *PUHCA in General*

PUHCA contains an extensive and complex regime for SEC regulation of public utility holding companies.<sup>182</sup> The purpose of the regime is to prevent a recurrence of the financial abuses for which public utilities, and their holding companies, were notorious prior to PUHCA.<sup>183</sup>

PUHCA applies to public utility holding companies—and their public utility subsidiaries—that are ineligible for an exemption under section 3.<sup>184</sup> PUHCA subjects these “non-exempt” public utility holding companies to numerous requirements. First, PUHCA requires registration with the SEC.<sup>185</sup> Second, PUHCA requires the SEC to approve in advance sales of securities,<sup>186</sup> as well as acquisitions of securities, by non-exempt holding companies.<sup>187</sup>

Third, PUHCA requires the SEC to approve in advance specified financial transactions, between non-exempt holding companies and their

181. *Id.* app. D (utilities engaged in trials and installations of telecommunications systems to read meters). “Utilities have already installed over one million automated meters and plan to install nearly two million more.” *Id.* at 29.

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

183. 15 U.S.C. § 79a(c) (1988). “The purpose of [PUHCA] was to eliminate the evils then existing in public utility holding companies, and to protect the public from the abuses inherent in them as they were then constituted.” *American Natural Gas Co. v. United States*, 279 F.2d 220, 224 (Cl. Ct. 1960), *cert. denied*, 383 U.S. 968 (1961). “The object sought by [PUHCA] is the elimination of abuses in the public utility holding company field.” *North Am. Co. v. SEC*, 133 F.2d 148, 154 (2d Cir. 1943), *aff’d*, 327 U.S. 686 (1944). The abuses that PUHCA is intended to prevent are enumerated therein. 15 U.S.C. § 79a(b) (1988). Those abuses also are detailed in the extensive legislative history of PUHCA. *See, e.g.*, U.S. FEDERAL TRADE COMMISSION, *UTILITY CORPORATIONS*, S. DOC. NO. 92, 74th Cong., 1st Sess. (1935); REPORT OF NATIONAL POWER POLICY COMMITTEE, H.R. DOC. NO. 137, 74th Cong., 1st Sess. (1935); H.R. REP. NO. 827, 74th Cong., 1st Sess. (1935). *See generally* U.S. ENERGY INFORMATION AGENCY, *THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: 1935-1992*, at 9-13 (Jan. 1993) (discussion of financial abuses of public utility holding companies prior to PUHCA) [hereinafter *HOLDING COMPANY ACT*]. “The highly concentrated nature of the public utility business, along with the collapse of many of the utility empires during the Great Depression[,] led to investigations and ultimately demands for stern regulation of public utility holding companies.” *Id.* at 9.

184. 15 U.S.C. § 79c (1988).

185. *Id.* § 79e. In December 1992, there were fourteen non-exempt holding companies: Allegheny Power System, Inc.; American Electric Power Co., Inc.; Central and South West Corp.; Columbia Gas System, Inc.; Consolidated Natural Gas Co.; Eastern Utilities Associates; Entergy Corp.; General Public Utilities Corp.; National Fuel Gas Co.; New England Electric System; Northeast Utilities; Philadelphia Electric Power Co.; Southern Co.; and, Unitil Corp. *See generally* SEC, *HOLDING COMPANIES REGISTERED UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935* (1992) [hereinafter *REGISTERED HOLDING COMPANIES*]. In contrast, in November 1993, there were over 100 holding companies that had qualified for an exemption under § 3 of PUHCA. *See generally* SEC, *HOLDING COMPANIES EXEMPT FROM THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935* (1993).

186. 15 U.S.C. §§ 79f-79g (1988).

187. *Id.* §§ 79i-79j.

subsidiaries,<sup>188</sup> as well as service, sales, and construction contracts between subsidiaries within the same non-exempt holding company system.<sup>189</sup> Fourth, PUHCA requires the operations of non-exempt holding company systems to be limited to single and "integrated" public utility systems and to "such other businesses as are reasonably incidental, or economically necessary or appropriate, to the operations of such integrated" systems.<sup>190</sup> Thus, PUHCA restricts the diversification of non-exempt holding companies into non-utility subsidiaries. Finally, PUHCA requires non-exempt holding companies, which are subject to SEC investigation,<sup>191</sup> to maintain SEC-prescribed accounts and records, which are subject to SEC audit.<sup>192</sup>

Congress wrote five specific exemptions from the requirements of PUHCA into the legislation.<sup>193</sup> In addition, it authorized the SEC to exempt through regulation entire classes or categories of public utility holding companies "if and to the extent that [the SEC] deems the exemption necessary or appropriate in the public interest or for the protection of investors or consumers . . . ."<sup>194</sup> Throughout PUHCA, the SEC is directed to regulate public utilities "for the protection of investors or consumers."<sup>195</sup>

The formation by non-exempt public utility holding companies of non-utility subsidiaries is subject to section 9(a) of PUHCA, which prohibits the acquisition of securities and interests in other businesses except in accordance with section 10.<sup>196</sup> Section 10(a) requires a proposed acquisition of securities to be described in an application for approval filed with the SEC.<sup>197</sup> Section 10(d) directs the SEC to review and consider the application for approval and to issue an order that either grants or denies it.<sup>198</sup> The criteria for SEC review and consideration of applications for approval are detailed in section 10(b)<sup>199</sup> and in section 10(c).<sup>200</sup> In particular, section 10(c)(1) provides that a proposed acquisition of securities by a non-exempt public utility holding company shall not be approved by the SEC if it would be "detrimental to the carrying out of the provisions of [section 11 of PUHCA]."<sup>201</sup>

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188. 15 U.S.C. § 79l (1988).

189. *Id.* § 79m.

190. *Id.* § 79k(b)(1).

191. *Id.* § 79r.

192. *Id.* § 79o.

193. 15 U.S.C. § 79c(a) (1988). For example, PUHCA is inapplicable if "[a] holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto." *Id.* § 79c(a)(2).

194. *Id.* § 79c(d).

195. See, e.g., 15 U.S.C. § 79e (1988) (registration of holding companies); *id.* § 79g (declarations by registered companies in respect to security transactions); *id.* § 79j (approval of acquisition of securities and utility assets and other interests); *id.* § 79k (simplification of holding companies).

196. 15 U.S.C. § 79i(a) (1988).

197. *Id.* § 79j(a).

198. *Id.* § 79j(d).

199. *Id.* § 79j(b).

200. *Id.* § 79j(c).

201. *Id.* § 79j(c)(1).

Section 11 is “the very heart of [PUHCA], the section most essential to the accomplishment of [its] purposes . . . .”<sup>202</sup> The statute directs the SEC to limit the activities and operations of non-exempt public utility holding companies “to a single integrated public-utility system, *and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public utility system.*”<sup>203</sup> With respect to electric utilities, section 2 of PUHCA defines an integrated public utility system in terms of electric power generation, transmission, and distribution facilities and equipment that (i) are interconnected or capable of interconnection; (ii) operate in a single interconnected and coordinated system; and, (iii) are confined to a single area or region, the size of which will not impair “the advantages of localized management, efficient operation, and the effectiveness of regulation.”<sup>204</sup>

Section 11 elaborates on the qualification to its general limit on the activities and operations of non-exempt public utility holding companies:

The [SEC] may permit as reasonably incidental, or economically necessary or appropriate to the operation of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public utility company as such) which the [SEC] shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.<sup>205</sup>

Thus, there is no *per se* prohibition under section 11 on non-utility subsidiaries.<sup>206</sup> The formation, however, by non-exempt public utility holding companies of non-utility subsidiaries—to engage in telecommunications or otherwise—is subject to section 9 and section 10,<sup>207</sup> as well as to section 11 which requires the SEC to determine that the non-utility subsidiaries are (i) “reasonably incidental, or economically necessary or appropriate to the operation of [an integrated public utility system]”; and, (ii) “necessary or appropriate in the public interest or for the protection of investors or con-

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202. S. REP. NO. 621, 74th Cong., 1st Sess. 11 (1935). See, e.g., SEC v. New Eng. Elec. Sys., 384 U.S. 176, 180 (1966) (interpretation of § 11). Section 11 also is the provision of PUHCA that precipitated numerous constitutional challenges against the statute. “The first response [to PUHCA] of the holding companies was resistance to the Act. As a result, 58 cases were brought challenging the law’s constitutionality. These cases led to some of the most colorful and intricate legal maneuvering of the New Deal years.” HOLDING COMPANY ACT, *supra* note 183, at 20. See, e.g., American Power & Light Co. v. SEC, 329 U.S. 90 (1946) (section 11 constitutional under Commerce Clause and Due Process Clause; section 11 not an ex post facto law); North Am. Co. v. SEC, 327 U.S. 686 (1946) (section 11 constitutional under Commerce Clause); Northern States Power Co. v. SEC, 164 F.2d 810 (3d Cir. 1947) (section 11 constitutional under Due Process Clause); United Gas Improvement Co. v. SEC, 138 F.2d 1010 (3d Cir. 1943) (section 11 not an unconstitutional delegation to SEC of legislative powers); Commonwealth & S. Corp. v. SEC, 134 F.2d 747 (3d Cir. 1943) (section 11 constitutional under Commerce Clause).

203. 15 U.S.C. § 79k(b)(1) (1988) (emphasis added).

204. *Id.* § 79b(a)(29)(A).

205. *Id.* § 79k(b)(1). See, e.g., United Gas Improvement Co. v. SEC, 138 F.2d 1010 (3d Cir. 1943) (interpretation of provision).

206. See, e.g., United Gas Corp. v. Pennzoil Co., 354 F.2d 1002 (2d Cir. 1965).

207. See, e.g., Wisconsin’s Env’tl. Decade, Inc. v. SEC, 882 F.2d 523 (D.C. Cir. 1989).

sumers and not detrimental to the proper functioning of [an integrated public utility system]."<sup>208</sup>

In practical terms, the SEC has interpreted section 11 to require a "functional relationship" between non-exempt public utility holding companies and their non-utility subsidiaries.<sup>209</sup> The SEC has required, for example, a public utility holding company with a gas utility subsidiary to sell an oil production and distribution subsidiary because the oil subsidiary had no "functional relationship" to the gas utility subsidiary.<sup>210</sup> In addition, the SEC has declared that a non-utility subsidiary should be "subordinate" to the utility subsidiary of a public utility holding company.<sup>211</sup> Finally, the SEC has declared that a non-utility subsidiary should contribute to the activities and operations of the utility subsidiary of a public utility holding company and should not be "devoted to independent ends."<sup>212</sup>

In the past decade, the SEC has approved the formation or acquisition of numerous non-utility subsidiaries with conditions intended to ensure a "functional relationship" between those subsidiaries and the utility activities and operations of their public utility holding companies. The conditions confined the activities and operations of those subsidiaries to the geographical regions served by the electric utilities affiliated with their public utility holding companies.<sup>213</sup>

In December 1986, the SEC approved the acquisition by Eastern Utilities Associates (EUA), a non-exempt holding company, of Citizens Heat and Power Corporation (Citizens), a DSM firm.<sup>214</sup> The SEC provided that Citizens could engage in DSM outside of New England "provided that the revenues of CHPC attributable to customers located outside New England remain less than the revenues attributable to customers located within the area."<sup>215</sup> To ensure a "functional relationship" between Citizens and the utility activities of EUA, the SEC thus established a "fifty-percent" standard for Citizens—fifty percent of its revenues were required to be from

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208. See, e.g., *North Am. Co. v. SEC*, 327 U.S. 686 (1943).

209. *In re Michigan Consol. Gas Co.*, 44 S.E.C. 361, 364 (1970), *aff'd*, *Michigan Consol. Gas Co. v. SEC*, 444 F.2d 913 (D.C. Cir. 1971) (adoption of "functional relationship" test); *North Am. Co. v. SEC*, 318 U.S. 750 (1943) (approval of "functional relationship test").

210. *Arkansas Natural Gas Co. v. SEC*, 154 F.2d 597 (5th Cir.), *cert. denied*, 329 U.S. 738 (1946).

211. "The retainable non-utility interests should occupy a clearly subordinate position to the integrated system constituting the primary business of the registered holding company." *In re United Light & Ry.*, 35 S.E.C. 516, 519 (1954).

212. *In re Engineers Pub. Serv. Co.*, 12 S.E.C. 41, 50 (1942).

213. For example, in September 1985, the SEC approved the formation of a joint venture between Central and South West Corporation, a non-exempt holding company, and Time Energy Management System Southwest, which joint venture was to engage in DSM sales and services "within the territory of the Electric Reliability Council of Texas and the Southwest Power Pool." *In re Central & S. W. Corp.*, HCAR No. 23818, 33 SEC Docket 1332 (Sept. 5, 1985).

214. *In re Eastern Util. Assoc.*, HCAR No. 24273, 37 SEC Docket 481 (Dec. 9, 1986). See also *In re Eastern Util. Assoc.*, HCAR No. 24221, 36 SEC Docket 1043 (Oct. 23, 1986) (notice of EUA application for approval).

215. 37 SEC Docket at 482.



DSM sales and services from within the geographical region (New England) served by the electric utilities of EUA.<sup>216</sup>

Similarly, in July 1990, the SEC approved the acquisition by Northeast Utilities (NU), a non-exempt holding company, of HEC Energy Corporation (HEC), a DSM firm.<sup>217</sup> The SEC provided that HEC could engage in DSM outside of New England and New York "with the restriction that the percentage of its overall assets and budget devoted to sales efforts outside of [New England and New York] will not exceed 50% of its overall assets and budget devoted to such sales efforts."<sup>218</sup> The SEC, in this instance, thus established a "fifty-percent" standard relative to budget and assets.

In December 1992, the SEC authorized Entergy Corporation (Entergy), a non-exempt holding company, to form a non-utility subsidiary that would acquire an interest in Systems and Service International (SASI), a DSM firm, and that would engage in DSM in Arkansas, Louisiana, and Mississippi<sup>219</sup>—the states served by the four retail electric utilities within Entergy.<sup>220</sup> The SEC imposed the "fifty-percent" standard on the non-utility subsidiary to ensure a "functional relationship" with the utility activities of Entergy.<sup>221</sup> The order explains that "[t]he condition that 50% of the non-utility revenues derive from activities within [Arkansas, Louisiana, and Mississippi] is one means of ensuring that [the non-utility subsidiary] will primarily serve the [Entergy] integrated public utility system."<sup>222</sup>

Finally, in March 1994, the SEC appeared to affirm the wisdom of the "fifty-percent" standard in a denial of an application for approval to exceed the standard.<sup>223</sup> In July 1985, the SEC had approved the formation by Central and South West (CSW), a non-exempt holding company, of CSW Credit to process the accounts receivable of the four electric utilities within CSW.<sup>224</sup> In July 1986, the SEC authorized CSW Credit to process the accounts receivable of non-affiliated companies.<sup>225</sup> The SEC, however, imposed a "fifty-percent" standard on accounts receivable processed by

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216. In September 1992, the SEC amended the "fifty-percent" standard to include New York within the geographical region. *In re Eastern Util. Assoc.*, HCAR No. 25636, 52 SEC Docket 1480 (Sept. 17, 1992). In December 1992, it authorized the acquisition by Citizens, which had become EUA Cogenex Corporation, of New England Sun Control, another DSM firm. *In re EUA Cogenex Corp.*, HCAR No. 25697, 52 SEC Docket 2977 (Dec. 9, 1992). The SEC approval provided that "[t]he revenues from the business acquired from [New England Sun Control] will be included in the calculation of Cogenex's revenues for purposes of the 50% Restriction." 52 SEC Docket at 4611.

217. *In re Northeast Util.*, HCAR No. 25114-A, 46 SEC Docket 1555 (July 27, 1990). See also *In re Northeast Util.*, HCAR No. 25102-A, 46 SEC Docket 945 (July 11, 1990) (notice of NU application for approval).

218. 46 SEC Docket at 1556.

219. *In re Entergy Corp.*, HCAR No. 25718, 53 SEC Docket 350 (Dec. 28, 1992). See also *In re Entergy Corp.*, HCAR No. 25545, 51 SEC Docket 855 (May 22, 1992) (notice of Entergy application for approval); *In re Entergy Corp.*, HCAR No. 25682, 52 SEC Docket 2748 (Nov. 23, 1992) (supplemental notice of Entergy application for approval).

220. REGISTERED HOLDING COMPANIES, *supra* note 185, at 67-71.

221. 53 SEC Docket at 631.

222. *Id.* at 632 (footnote omitted).

223. *In re CSW Credit, Inc.*, HCAR No. 25995, 56 SEC Docket 521 (Mar. 2, 1994).

224. *In re Central & S. W. Corp.*, HCAR No. 23717, 33 SEC Docket 1161 (Aug. 9, 1985).

225. *In re CSW Credit*, HCAR No. 24157, 36 SEC Docket 245 (July 31, 1986).

CSW Credit—fifty percent of the accounts receivable processed by CSW Credit were required to be from affiliated electric utilities within CSW.<sup>226</sup>

In April 1987, CSW filed an application for approval for CSW Credit to process without limitation the accounts receivable of non-affiliated companies.<sup>227</sup> After administrative adjudication, the SEC denied the application.<sup>228</sup> The SEC stated that “the failure . . . to establish that a majority of a [non-utility] business is conducted with affiliated utilities should establish a presumption that [its] primary purpose is not to further the [utility] operations of the holding company.”<sup>229</sup>

The SEC based its conclusion on established SEC precedent.<sup>230</sup> On a previous occasion, the SEC had interpreted this precedent to establish that “where the portion of the other [non-utility] business which is functionally related to the utility operations exceeds the portion which is not, the other business may be acquired or retained.”<sup>231</sup> The SEC affirmed this interpretation and thus required that fifty percent of the accounts receivable processed by CSW Credit be from affiliated electric utilities within CSW.

With respect to SEC approval of service, sales, and construction contracts between subsidiaries within the same non-exempt holding company system, under section 13 of PUHCA, the SEC regulates contracts between non-exempt holding companies and their public utility or non-utility subsidiaries as well as between public utility or non-utility subsidiaries within the same non-exempt holding company system.<sup>232</sup> Thus, the SEC would regulate contracts for telecommunications services between electric utilities and telecommunications companies within the same non-exempt holding company system. In particular, section 13(b) requires the SEC to ensure that “such contracts are performed economically and efficiently for the benefit of . . . companies [within the same holding company systems] at cost, fairly and equitably allocated . . . .”<sup>233</sup>

Numerous SEC regulations implement this requirement.<sup>234</sup> In particular, rule 90 promulgated under PUHCA prohibits all service, sales, and construction contracts between public utility or non-utility subsidiaries within the same non-exempt holding company system, “at more than cost as determined pursuant to [rule 91] . . . .”<sup>235</sup> Rule 91 provides that a contract shall, for purposes of section 13, be “at not more than cost if the price (taking into account all charges) does not exceed a fair and equitable allocation of expenses (including the price paid for goods) plus reasonable

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226. “[CSW] Credit is to limit its acquisition of receivables of nonassociate utilities to an amount less than the receivables acquired from CSW system companies.” 36 SEC Docket at 333.

227. 56 SEC Docket at 522.

228. 56 SEC Docket at 529.

229. 56 SEC Docket at 528.

230. See, e.g., *In re United Light & R.R.*, 35 S.E.C. 516 (1954); *In re North Am. Co.*, 28 S.E.C. 742 (1948); *In re Cities Serv. Co.*, 15 S.E.C. 962 (1944); *In re Engineers Pub. Serv. Co.*, 12 S.E.C. 41 (1942).

231. *In re Jersey Cent. Power & Light Co.*, HCAR No. 24348, 37 SEC Docket 1243 (Mar. 18, 1987).

232. 15 U.S.C. § 79m (1988).

233. *Id.* § 79m(b).

234. See generally 17 C.F.R. §§ 250.80-95 (1994).

235. *Id.* § 250.90(a)(2).

compensation for necessary capital procured through the issuance of capital stock . . . .”<sup>236</sup> There is one qualification to this requirement. Rule 92 provides that no service, sales, and construction contract between public utility or non-utility subsidiaries within the same non-exempt holding company system shall be “at a price which exceeds the price at which the purchaser might reasonably be expected to obtain comparable goods elsewhere . . . .”<sup>237</sup>

### B. Telecommunications Subsidiaries Under PUHCA

In the past decade, the SEC has granted seven applications for approval of the formation or acquisition by non-exempt holding companies of telecommunications subsidiaries. In each instance, the SEC concluded that the telecommunications subsidiary bore a “functional relationship” to the utility activities and operations of the non-exempt holding company.

First, in October 1984 the SEC approved the acquisition by the Southern Company, a non-exempt holding company, of an interest in Integrated Communications Systems, Inc. (ICS).<sup>238</sup> The SEC explained that ICS was engaged in research and development of “a system, including computer software and hardware, for two-way communications over local telephone lines to provide a wide range of energy-related services in the residential and small commercial markets.”<sup>239</sup> The SEC added that “other non-associated vendors could offer certain other services through the [s]ystem, including (a) home security [and] (b) entertainment . . . .”<sup>240</sup>

Second, in January 1987 the SEC similarly approved the acquisition by American Electric Power Company (AEP), also a non-exempt holding company,<sup>241</sup> of an interest in ICS.<sup>242</sup> The SEC approval explained that the use of the ICS system for DSM, for example, as well as for non-utility applications “will create economies of scale and will further the successful commercialization of [the system].”<sup>243</sup> With its acquisition of the interest, AEP owned almost fifteen percent of ICS.<sup>244</sup>

Third, in December 1988 the SEC authorized four electric utility subsidiaries of AEP, which intended to install a fiber optics cable between

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236. *Id.* § 250.91(a).

237. *Id.* § 250.92(b).

238. *In re Southern Co.*, HCAR No. 23440, 31 SEC Docket 556 (Oct. 1, 1984).

239. *Id.* at 701. *See also In re Southern Co.*, HCAR No. 23361, 30 SEC Docket 1122 (July 6, 1984) (notice of Southern application for SEC approval).

240. 31 SEC Docket at 701. In October 1987, the SEC approved the acquisition by the Southern Company of an additional interest in ICS. *In re Southern Co.*, HCAR No. 24477, 39 SEC Docket 577 (Oct. 20, 1987). *See also In re Southern Co.*, HCAR No. 24443, 38 SEC Docket 1440 (Aug. 20, 1987) (notice of Southern application for SEC approval). With its acquisition of the additional interest, the Southern Company owned almost 33% of ICS. 39 SEC Docket at 769.

241. AEP owns thirteen electric public utility subsidiaries throughout Indiana, Kentucky, New York, Ohio, West Virginia, and Virginia. REGISTERED HOLDING COMPANIES, *supra* note 185, at 30.

242. *In re American Elec. Power Co.*, HCAR No. 24295, 37 SEC Docket 508 (Jan. 8, 1987). *See also In re Connecticut Light & Power Co.*, HCAR No. 24135, 35 SEC Docket 1258 (June 26, 1986) (notice of AEP application for SEC approval).

243. 37 SEC Docket at 735.

244. *Id.* at 736.

Columbus, Ohio and Roanoke, Virginia for purposes of internal communications, to lease to non-associated companies up to one-half of the fibers.<sup>245</sup> The SEC explained that "significant ratepayer benefits will be obtained if they are permitted to lease [one-half of the] fibers until their internal needs require the use of same."<sup>246</sup> In particular, the SEC indicated that the revenue from the leases would be applied to the cost of the fiber optics cable.<sup>247</sup> Although the leases required no non-utility subsidiary, section 9(a) of PUHCA was applicable because the four AEP electric utility subsidiaries would acquire an interest in a telecommunications business.<sup>248</sup>

Fourth, in July 1991 the SEC approved the acquisition by Entergy Corporation, a non-exempt holding company, of an interest in First Pacific Networks, Inc., which was engaged in research and development of a communications system with DSM applications.<sup>249</sup> The SEC explained that the system would combine data, voice, and video communications on a single wire that would, "in a cost-effective fashion, dramatically increase the exchange of information between a utility and its customers."<sup>250</sup> With its acquisition of an interest, Entergy owned almost ten percent of First Pacific.<sup>251</sup> The SEC, however, required Entergy to sell that interest by January 1, 2002.<sup>252</sup>

Fifth, in June 1994 the SEC approved the formation by CSW of CSW Communications, a non-utility subsidiary intended to lease to non-associated companies about one-half of the fibers of a fiber optics cable that CSW intends to install for purposes of internal communications.<sup>253</sup> The SEC explained that the new fiber optics cable "will provide the communications infrastructure required for residential demand-side management, other means of load management, and other applications in the electric power business."<sup>254</sup> It also explained that the leases of fibers to non-associated companies would allow CSW Communications to lease back the fibers "to the extent needed in the business of the CSW system."<sup>255</sup> Finally, the

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245. *In re* Appalachian Power Co., HCAR No. 24772, 42 SEC Docket 611 (Dec. 9, 1988).

246. 42 SEC Docket at 719. *See also In re* Appalachian Power Co., HCAR No. 24740, 42 SEC Docket 212 (Nov. 3, 1988) (notice of application for SEC authorization).

247. 42 SEC Docket at 720.

248. 42 SEC Docket at 718.

249. *In re* Entergy Corp., HCAR No. 25353, 49 SEC Docket 664 (July 25, 1991).

250. 49 SEC Docket at 668. *See also In re* Entergy Corp., HCAR No. 25324, 48 SEC Docket 1732 (May 31, 1991) (notice of Entergy application for approval).

251. 49 SEC Docket at 672.

252. *Id.* at 673. In July 1992, the SEC approved the acquisition by Entergy of additional common stock in First Pacific. *In re* Entergy Corp., HCAR No. 25580, 51 SEC Docket 2114 (July 13, 1992). *See also In re* Entergy Corp., HCAR No. 25556, 51 SEC Docket 1124 (June 12, 1992) (notice of Entergy application for approval). With its acquisition of the additional common stock, Entergy continued to own almost 10% of First Pacific. 51 SEC Docket at 2116.

253. *In re* Central & S. W. Corp., HCAR No. 26061, 56 SEC Docket 2725 (June 3, 1994).

254. *Id.* at 2726. *See also In re* Central & S. W. Corp., HCAR No. 25884, 55 SEC Docket 119 (Sept. 17, 1993) (notice of CSW application for approval).

255. 56 SEC Docket at 2730.

SEC required that the revenue from the leases be applied to the cost of the fiber optics cable.<sup>256</sup>

Sixth, in August 1994 the SEC authorized Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company—three electric utilities of General Public Utilities (GPU), a non-exempt holding company—to lease to non-associated companies up to one-half of the fibers of a fiber optics cable that the three electric utilities constructed between Morristown, New Jersey and Johnston, Pennsylvania for purposes of internal communications.<sup>257</sup> The SEC explained that the leases of fibers to non-associated companies “will not interfere with the primary and priority use” of the fiber optics cable by the three GPU subsidiaries.<sup>258</sup> The SEC observed that the leases of fibers to non-associated companies were consistent with SEC precedent.<sup>259</sup> Finally, the SEC required that the revenue from the leases “will be used to offset or reduce the cost of services charged by the [three subsidiaries] to their ratepayers . . . .”<sup>260</sup>

Seventh, and finally, in January 1995 the SEC approved the formation by the Southern Company of Southern Communications, a non-utility subsidiary that is to install a wireless digital communications system and operate specialized mobile radio (SMR) services for the holding company system as well as for non-associated companies.<sup>261</sup> The SEC also denied a request for administrative adjudication on the application for approval to form Southern Communications.<sup>262</sup>

In 1993, the Southern Company submitted an application for approval to invest \$179 million in Southern Communications as well as to install and operate a communications system throughout Alabama, Georgia, northwestern Florida, and southeastern Mississippi<sup>263</sup>—the states served by the five retail electric utilities within the holding company system.<sup>264</sup> Southern anticipated that up to eighty percent of the communications system could provide SMR services for non-associated companies.<sup>265</sup> However, “[o]f the \$179 million invested in Southern Communications, less than \$20 million

256. *Id.* at 2729.

257. *In re* Jersey Cent. Power & Light Co., HCAR No. 26095, 57 SEC Docket 781 (Aug. 2, 1994).

258. 57 SEC Docket at 782. *See also In re* Jersey Cent. Power & Light Co., HCAR No. 25359, 49 SEC Docket 855 (Aug. 9, 1991) (notice of GPU application for approval).

259. *In re* Central & S. W. Corp., HCAR No. 26061, 56 SEC Docket 2725 (June 3, 1994); *In re* Appalachian Power Co., HCAR No. 24772, 42 SEC Docket 611 (Dec. 9, 1988).

260. 57 SEC Docket at 783.

261. *In re* Southern Co., HCAR No. 26211, 58 SEC Docket 1517 (1994).

262. 58 SEC Docket at 1532-38 (1994) (request for hearing).

263. 58 SEC Docket at 1517-29 (1994) (background). *See also In re* Southern Co., HCAR No. 25996, 56 SEC Docket 587 (Mar. 4, 1994) (notice of Southern's application for approval).

264. REGISTERED HOLDING COMPANIES, *supra* note 185, at 104-06.

265. “Southern Communications would offer SMR services to nonassociate customers consisting primarily of industrial, commercial and other retail and wholesale customers of the Southern operating companies, including interconnected utilities, and federal, state and local public safety, law enforcement and emergency management governmental agencies; and other agencies of the states . . . .” 58 SEC Docket at 1522-23 (1994).

would be used to facilitate the proposed transactions with nonassociates."<sup>266</sup>

The SEC concluded that the operation of a communications system that would provide SMR services largely for non-associated companies nonetheless was consistent with the "functional relationship" requirement of section 11 of PUHCA.<sup>267</sup>

The [SEC] believes that an assessment of functional relationship that takes into consideration the relative investments for associate and nonassociate companies is consistent with the rationale underlying its decision in *CSW Credit*. Southern proposes to invest \$159 million to meet the needs of its system companies. It represents that an additional investment of less than \$20 million will facilitate nonassociate transactions. Even though the majority of the revenues may ultimately come from nonassociate customers, the system will at all times remain available for the unencumbered use of the Southern utilities.<sup>268</sup>

The SEC observed that the communications system would support electric power transmission and distribution as well as DSM.<sup>269</sup> The SEC required that the revenue from the SMR services for non-associated companies be applied to the cost of the communications system to "reduce the costs borne by the Southern operating companies."<sup>270</sup>

Dial Page, Inc. (Dial Page), a telecommunications firm that intends to offer SMR services in Alabama and Georgia and thus to compete with Southern Communications, had requested an administrative adjudication on the application for approval to form Southern Communications.<sup>271</sup> Dial Page had argued, for example, that "Southern has selected the [communications system] merely as a pretext to justify the provision of commercial SMR services."<sup>272</sup> The SEC concluded, however, that the selection of the communications system, although it would provide SMR services largely for non-associated companies, "is properly entrusted to the applicant's business judgement."<sup>273</sup> The SEC, therefore, denied the request.<sup>274</sup>

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266. 58 SEC Docket at 1523.

267. 58 SEC Docket at 1529-32 (analysis).

268. 58 SEC Docket at 1531.

269. "[T]he wireless system can serve as infrastructure to support distribution automation, demand-side management, remote meter-reading, load control and coordination, automatic vehicle location, and field access to local and wide area computer networks . . ." 56 SEC Docket at 1810 (1994). See, e.g., *In re Southern Dev. & Inv. Group, Inc.*, HCAR No. 26047, 56 SEC Docket 1810 (May 6, 1994) (notice of Southern application for approval to invest \$257 million in non-utility subsidiary to engage in DSM).

270. 58 SEC Docket at 1523.

271. 58 SEC Docket at 1517.

272. 58 SEC Docket at 1523.

273. 58 SEC Docket at 1532 (note omitted).

274. "The [SEC] is satisfied that the record in this matter provides an adequate basis for the findings required by [PUHCA]. In addition, the [SEC] believes that a hearing would not adduce any supplemental information that would be necessary for this purpose." 58 SEC Docket at 1535. See, e.g., *City of Holyoke Gas & Elec. Dep't v. SEC*, 972 F.2d 358, 363 (D.C. Cir. 1992) (denial of request for adjudication); *City of Lafayette v. SEC*, 454 F.2d 941, 953 (D.C. Cir. 1971), *aff'd sub nom.* *Gulf States Util. Co. v. FPC*, 411 U.S. 747 (1973) (denial of request for adjudication).

### III. THE *Ohio Power* Obstacle

#### A. *Background*

AEP owns thirteen electric utility subsidiaries throughout Indiana, Kentucky, New York, Ohio, West Virginia, and Virginia,<sup>275</sup> which subsidiaries, in turn, own two dozen electric power plants—the bulk of them coal-fired—that generate in excess of 24,000 megawatts of electric power.<sup>276</sup> Ohio Power Company (Ohio Power), an electric utility subsidiary of AEP, owns and operates several large coal-fired electric power plants. To facilitate the acquisition, and minimize the cost, of the coal required to fuel those plants, Ohio Power owns four coal companies in Ohio and West Virginia—Central Coal Company, Central Ohio Coal Company, Southern Ohio Coal Company, and Windsor Coal Company.<sup>277</sup>

The SEC authorized Ohio Power to form Southern Ohio Coal Company (Ohio Coal) in December 1971.<sup>278</sup> The order contemplated that, pursuant to section 13 of PUHCA,<sup>279</sup> the coal would be sold to Ohio Power. This order provided that “[t]he charges for coal by [Ohio Coal] will be based on an amount equal to the actual cost of [Ohio Coal] in developing the reserve and mining such coal . . . .”<sup>280</sup>

This stipulation was reiterated in a subsequent SEC order that authorized Ohio Power to sell to Ohio Coal its interests and investments in several coal mines located in southeastern Ohio.<sup>281</sup> This order also provided that “[t]he price at which [Ohio Coal] is sold to [American Electric] system companies will not exceed the cost thereof to the seller.”<sup>282</sup>

In 1983, a conflict arose between these SEC orders and a FERC order, issued under part II of the Federal Power Act,<sup>283</sup> relative to the rates and charges Ohio Power levies for the sale and transmission in interstate com-

275. REGISTERED HOLDING COMPANIES, *supra* note 185, at 30.

276. REGISTERED HOLDING COMPANIES, *supra* note 185, at 31.

277. REGISTERED HOLDING COMPANIES, *supra* note 185, at 30.

278. *In re Ohio Power Co.*, HCAR No. 17383 (Dec. 2, 1971).

279. 15 U.S.C. § 79m (1988).

280. *Ohio Power Co.*, HCAR No. 17383 at 2.

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

282. 14 SEC Docket at 929.

283. 16 U.S.C. §§ 824-824k (1988). The principal purpose of part II of the Federal Power Act is to provide for federal regulation of the sale and transmission in interstate commerce of wholesale electric power. *Gulf States Util. Co. v. FPC*, 411 U.S. 747 (1973); *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61 (1943). In 1978, the Public Utility Regulatory Policies Act amended title II to expand its purpose to the promotion of cogeneration and small power production. 16 U.S.C. § 824a-3 (1988). Section 205 provides that “[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy . . . shall be just and reasonable . . . .” 16 U.S.C. § 824d(a) (1988). The statute prohibits discrimination in electric power rates and charges as well as unreasonable differences in rates and charges between different classes of electric power service. *Id.* § 824d(b). Finally, section 205 requires electric public utilities to maintain schedules of their rates and charges with the FERC, which is authorized to review the reasonableness of those rates and charges in administrative hearings. *Id.* §§ 804d(c)-(e). The FERC receives several hundred modifications to electric power rate schedules each year. See generally 18 C.F.R. pt. 35 (1994) (rate schedules). It also conducts administrative hearings on such schedules. See generally *id.* pt. 385 (rules of practice for administrative hearings).

merce of wholesale electric power. The conflict arose because a decline in the price of coal on the open market resulted in market prices that were below the actual cost to Ohio Coal of coal production. Thus, the SEC orders appeared to authorize above-market prices paid to Ohio Coal.<sup>284</sup>

In May 1982, Ohio Power applied to the FERC for an increase in rates for wholesale electric power to be sold to fifteen Ohio municipalities and to Wheeling Electric Company (Wheeling), another electric utility subsidiary of AEP.<sup>285</sup> In response, the municipalities and several large industrial firms that purchased their power from Wheeling protested.<sup>286</sup> The municipalities and the industrial firms ultimately settled with Ohio Power on all of the issues<sup>287</sup>—except for the price to Ohio Power of “captive” coal purchased from its coal company subsidiary.

The FERC conducted an administrative hearing on the “captive” coal issue. The municipals argued that the price of coal from Ohio Coal to Ohio Power was \$20 million over the market price for a comparable amount of coal.<sup>288</sup> Ohio Power argued that the price it paid for coal from Ohio Coal was required under PUHCA and that a conflict between this price and a “just and reasonable” market price must be resolved through FERC deference to the SEC-mandated price.<sup>289</sup>

In particular, section 318 of the Federal Power Act provides that a conflict of jurisdiction between the SEC and the FERC is to be resolved through FERC deference to the SEC:

If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing or reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of [PUHCA] or of a rule, regulation, or order thereunder and to a requirement of [the Federal Power Act] or of a rule, regulation, or order thereunder, the requirement of [PUHCA] shall apply to such person, and such person shall not be subject to the requirement of [the Federal Power Act], or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the [SEC] has exempted such person from such requirement of [PUHCA], in which case the requirements of [the Federal Power Act] shall apply to such person.<sup>290</sup>

Ohio Power thus argued for SEC pre-emption of FERC requirements when a conflict in jurisdiction arises.

The FERC administrative law judge (ALJ) rejected this argument. He held that the application of the statute is limited to conflicts between the SEC and the FERC relative to “the same subject matter”—which, the ALJ decided, was not the case.<sup>291</sup>

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

285. *Id.* at 65,180.

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

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

288. 25 F.E.R.C. ¶ 63,060, at 65,180.

289. 25 F.E.R.C. ¶ 63,060, at 65,182.

290. 16 U.S.C. § 825q (1988).

291. 25 F.E.R.C. ¶ 63,060, at 65,183.



The ALJ similarly rejected the argument that the FERC also was required to defer to the SEC-mandated price for the coal under its own regulations, which in relevant part provide that “[w]here the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable . . . .”<sup>292</sup> Ohio Power argued that the FERC in the past has interpreted this fuel-cost regulation to mean that an SEC-mandated price under section 13 of PUHCA is reasonable under section 205.<sup>293</sup> The ALJ concluded that the fuel-cost regulation simply creates a rebuttable presumption of reasonableness.<sup>294</sup>

The FERC ALJ conducted an independent review of the reasonableness of the price Ohio Power paid for coal from Ohio Coal. He decided, on the basis of FERC precedent,<sup>295</sup> that the FERC “envision[s] the use of the market price test in instances where the market price is either above or below the coal supplier’s cost of service.”<sup>296</sup> After an exhaustive review of evidence on the market price of coal,<sup>297</sup> and a discussion of burden of proof in a FERC administrative hearing,<sup>298</sup> the ALJ concluded that Ohio Power had demonstrated “by a preponderance of the evidence that . . . the prices paid for . . . coal were not unreasonable.”<sup>299</sup>

The FERC disagreed that Ohio Power had proven that the price it paid for coal from Ohio Coal approximated the market price of coal.<sup>300</sup> It agreed, however, that neither section 318 nor the fuel-cost regulation precluded an independent FERC review of the reasonableness of the price Ohio Power paid for coal from Ohio Coal.<sup>301</sup> With respect to section 318, the FERC observed that, under rule 92 of the SEC regulations that implement PUHCA,<sup>302</sup> no contract between public utility (or non-utility) subsidiaries within the same holding company system is to be priced above the relevant market price.<sup>303</sup> With respect to the FERC fuel-cost regulation,<sup>304</sup> the FERC agreed that the fuel-cost regulation simply creates a rebuttable presumption of reasonableness.<sup>305</sup>

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292. 18 C.F.R. § 35.14(a)(7) (1994).

293. 25 F.E.R.C. ¶ 63,060, at 65,183-84.

294. 25 F.E.R.C. ¶ 63,060, at 65,184-85.

295. *In re Public Serv. Co.*, 13 F.E.R.C. ¶ 63,041 (1980), *modified*, Opinion No. 133, 17 F.E.R.C. ¶ 61,123 (1981), *aff’d*, *Public Serv. Co. v. FERC*, 832 F.2d 1201 (10th Cir. 1987). *See also In re Public Serv. Co.*, 18 F.E.R.C. ¶ 61,276 (1982) (affirmation of Opinion No. 133); Opinion No. 164, *In re Public Serv. Co.*, 23 F.E.R.C. ¶ 61,218 (1983) (affirmation of Opinion No. 133); *In re Public Serv. Co.*, 18 F.E.R.C. ¶ 63,005 (1982), *aff’d*, Opinion No. 146, 20 F.E.R.C. ¶ 61,290 (1982).

296. 25 F.E.R.C. ¶ 63,060, at 65,187.

297. 25 F.E.R.C. ¶ 63,060, at 65,187-201.

298. 25 F.E.R.C. ¶ 63,060, at 65,201-03.

299. 25 F.E.R.C. ¶ 63,060, at 65,203.

300. Opinion No. 272, *In re Ohio Power Co.*, 39 F.E.R.C. ¶ 61,098 (1987).

301. *Id.* at 61,275.

302. 17 C.F.R. § 250.92(b) (1994).

303. 39 F.E.R.C. ¶ 61,098, at 61,275-78. *See, e.g., In re New Eng. Elec. Sys.*, HCAR No. 22309, 24 SEC Docket 298 (Dec. 9, 1981) (approval of market price).

304. 18 C.F.R. § 35.14(a)(7) (1994).

305. 39 F.E.R.C. ¶ 61,098, at 61,278.

It also agreed with the ALJ that there was no conflict of jurisdiction between, on the one hand, SEC regulation of contracts between subsidiaries within the same holding company system under section 13 of PUHCA,<sup>306</sup> and, on the other hand, FERC regulation of rates and charges for wholesale electric power under section 205 of the Federal Power Act.<sup>307</sup> "More importantly . . . setting the intra-corporate price and setting rates are not the same subject matter which would bring section 318 into play."<sup>308</sup>

The U.S. Court of Appeals for the D.C. Circuit vacated and remanded this order.<sup>309</sup> The court disagreed that the regulation of contracts under PUHCA and the regulation of rates and charges under the Federal Power Act involve two separate and distinct subject matters to which section 318 thus is inapplicable.<sup>310</sup> The court also concluded that there was a conflict between the SEC and the FERC in their respective regulation of Ohio Power because rule 92 establishes a qualification to the cost-based price requirements of rules 90 and 91.<sup>311</sup> The D.C. Circuit thus held that there was a conflict in jurisdiction between the SEC and the FERC to which section 318 was applicable, and that the FERC was required to defer to the SEC-mandated price for the coal Ohio Power purchased from Ohio Coal. The court observed that the resolution of the conflict through section 318 produced a result that was consistent with U.S. Supreme Court precedent.<sup>312</sup> Judge Mikva agreed with the court but in a separate concurrence would have based the decision on FERC fuel-cost regulation.<sup>313</sup>

The U.S. Supreme Court, however, reversed.<sup>314</sup> The Court concluded that section 318 was inapplicable to a conflict in jurisdiction, between section 13 of PUHCA and section 205 of the Federal Power Act, over the price to Ohio Power of "captive" coal.<sup>315</sup> The statute is applicable to "the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing or reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter . . . ."<sup>316</sup>

The Court observed that the D.C. Circuit appeared to interpret the phrase "or any other subject matter" to mean that section 318 was applica-

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306. 15 U.S.C. § 79m (1988).

307. 16 U.S.C. § 824d (1988).

308. 39 F.E.R.C. ¶ 61,098, at 61,276-77. *See, e.g.,* Mississippi Indus. v. FERC, 808 F.2d 1525, 1551 (D.C. Cir. 1987) ("The SEC itself perceives no conflict between its jurisdiction and that of FERC.").

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

310. 880 F.2d at 1406. *See, e.g.,* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 970-71 (1986) (conflict in jurisdiction between the FERC and North Carolina Public Utilities Commission resolved through federal preemption of North Carolina commission).

311. 880 F.2d at 1408 (emphasis added).

312. 880 F.2d at 1409. Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354 (1988) (conflict in jurisdiction between the FERC and the State of Mississippi resolved through federal preemption of the State).

313. 880 F.2d at 1410-14.

314. Arcadia v. Ohio Power Co., 111 S. Ct. 415 (1990).

315. 111 S. Ct. at 422.

316. 16 U.S.C. § 825q (1988) (emphasis added).

ble to all matters in common between the SEC and the FERC.<sup>317</sup> The Court interpreted the phrase to mean other subject matters relative to "the acquisition or disposition of any security, capital assets, [or] facilities."<sup>318</sup> Thus, section 318 was inapplicable to the conflict in jurisdiction that arose in connection with the SEC-mandated price for the coal Ohio Power purchased from Ohio Coal.

On remand, the D.C. Circuit again held that the FERC was required to defer to the SEC-mandated price for the coal Ohio Power purchased from Ohio Coal.<sup>319</sup> Its decision, however, was based not on section 318, but on FERC fuel-cost regulation.<sup>320</sup> The FERC argued that the regulation simply creates a rebuttable presumption of reasonableness. The court disagreed. It concluded, for example, that the phrase "shall be deemed" has been interpreted to create a conclusive presumption.<sup>321</sup> It also observed that "[i]f FERC wishes to have [the fuel-cost regulation] create only a rebuttable presumption, then it may do so explicitly through the required [administrative] process."<sup>322</sup>

Because the D.C. Circuit held that the FERC was required to defer to the SEC-mandated price for the coal, the FERC was required to authorize Ohio Power, under section 205 of the Federal Power Act, to recover the price of "captive" coal through rates for interstate wholesale electric power. Ohio Power otherwise would have incurred "trapped" costs,<sup>323</sup> which would have required it to "pretend that it is paying less for the [coal] . . . than is in fact the case."<sup>324</sup> In this regard, the court had observed, in its prior decision, that "our decision is buttressed by the consistency of its consequences with Supreme Court precedents that disfavor conflicting regulation resulting in trapped costs."<sup>325</sup>

In October 1993, the FERC proposed to revise the fuel-cost regulation.<sup>326</sup> In particular, it proposed to replace the phrase "shall be deemed" with the phrase "shall be presumed, subject to rebuttal."<sup>327</sup> The FERC emphasized that the amendment would underscore the independent nature of its review of rates for interstate wholesale electric power. "While the

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317. 111 S. Ct. at 419.

318. 111 S. Ct. at 419-22.

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

320. 18 C.F.R. § 35.14(a)(7) (1994).

321. 954 F.2d at 783. *See, e.g.*, *Gaither v. Myers*, 404 F.2d 216, 218 (D.C. Cir. 1968); *H.P. Coffee Co. v. Reconstruction Fin. Corp.*, 215 F.2d 818, 822 (Emer. Ct. App. 1954); *Forrester v. Jerman*, 90 F.2d 412, 413 (D.C. Cir. 1937).

322. 954 F.2d at 783.

323. "[W]e hold that FERC may not set a cost-trapping rate level where that effect is occasioned by a recovery calculation inconsistent with an SEC determination governing an inter-associate transfer . . ." 954 F.2d at 786.

324. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 971 (1986). *See generally* *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) (discussion of "trapped" costs); *Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3d Cir. 1988) (discussion of "trapped" costs).

325. *Ohio Power Co. v. FERC*, 880 F.2d 1400, 1409 (D.C. Cir. 1989).

326. 58 Fed. Reg. 51,259 (1993).

327. *Id.* at 51,261.

Commission can give deference to decisions of another regulatory body and still fulfill its statutory obligation, it cannot in effect delegate its jurisdictional responsibilities to others."<sup>328</sup>

The FERC also proposed to amend the regulation to require the actual approval of "another regulatory body"—either the SEC or a state public utility commission—for the rebuttable presumption to be raised. Thus, the regulation would provide that "[w]here the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, and where the price of such fuel has been approved by that regulatory body, such cost shall be presumed, subject to rebuttal, to be reasonable . . . ." <sup>329</sup> In this regard, the FERC again stated that the amended fuel-cost regulation would promote the independence of its reviews of rates for interstate wholesale electric power.<sup>330</sup> The FERC, however, has not promulgated the revised regulation.

In December 1994, the SEC proposed to revise the cost-based price requirements of rules 90 and 91.<sup>331</sup> In particular, it proposed to amend rule 90 to provide that "in the special or unusual circumstances in which the purchaser might reasonably be expected to obtain comparable goods, services or construction elsewhere at a lower price . . . such transaction shall be permitted only if performed at that lower price."<sup>332</sup> The SEC emphasized that the amendment would promote the independence of FERC regulation of wholesale electric power rates and of state regulation of retail electric power rates. "The [SEC] has historically viewed its role as supplementing, not supplanting, the work of federal and state ratemaking authorities. To the extent Ohio Power may be viewed as impairing the ability of those regulators to protect consumers, the [SEC] is committed to restoring the balance of regulation."<sup>333</sup>

The SEC cautioned, however, that the amendment would not resolve all of the implications of the *Ohio Power* decisions.

The rule is intended to impose market discipline, to ensure that transactions are carried out economically and efficiently for the benefit of associate companies. Thus, consumers would receive the benefit of market prices, when such prices for comparable goods, services, and construction are lower than cost as defined by rule 91. The rule does not, however, purport to resolve the jurisdictional concerns raised by the decisions.<sup>334</sup>

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328. *Id.* at 51,260.

329. *Id.* at 51,261.

330. "[B]y amending [the regulation] to clearly specify that, where another regulatory body has jurisdiction over affiliate fuel costs and approves such costs, there will be a rebuttable presumption of reasonableness of affiliate fuel costs . . . the Commission is making clear that it has no intention of abdicating its regulatory responsibilities . . . ." *Id.* at 51,260.

331. 59 Fed. Reg. 67,248 (1994).

332. *Id.* at 67,252 (to be codified at 17 C.F.R. pt. 250).

333. *Id.* at 67,249. See, e.g., *In re Indiana & Mich. Elec. Co.*, HCAR No. 19986, 11 SEC Docket 2249 (Apr. 14, 1977). "[N]othing in this order shall be construed as in any manner affecting the jurisdiction of any other regulatory authority with respect to rates, accounting or similar matters in connection with the proposed transactions." 11 SEC Docket at 2252.

334. 59 Fed. Reg. 67,248, 67,251 (note omitted).

The deadline for public comments on the proposed amendment was March 29, 1995.<sup>335</sup>

### B. Senate Response to Ohio Power

In March 1993, Senator Dale Bumpers (D. Arkansas) introduced the Multi-State Utility Company Consumer Protection Act of 1993.<sup>336</sup> The bill proposed to amend sections 205 and 206 of the Federal Power Act to authorize the FERC to determine the extent to which electric utilities could recover, in rates for interstate wholesale electric power, costs incurred under contracts between subsidiaries within the same holding company system.<sup>337</sup>

In addition, the bill proposed to transfer to the FERC all functions of the SEC under PUHCA.<sup>338</sup> The provision of the bill to transfer PUHCA was an afterthought.<sup>339</sup> When he introduced the amendment, Senator Bumpers observed that it "would consolidate utility holding company regulation by transferring regulatory authority over PUHCA from the SEC to the FERC, providing a more efficient regulatory system and greater protection for holding company consumers."<sup>340</sup>

The amendment, however, became the principal focus of a congressional hearing on Senate Bill 544 conducted in May 1993 before the Senate Committee on Energy and Natural Resources.<sup>341</sup> The Senate hearing brought together several critics of the SEC.<sup>342</sup> These critics, armed with numerous documented instances of alleged SEC malfeasance, appeared to contribute significantly to the political momentum for the transfer of the PUHCA from the SEC to the FERC. These critics also appeared to place on the defensive the sole witness who testified, on behalf of several non-exempt holding companies, against the transfer.<sup>343</sup> In effect, the Senate hearing was transformed into a referendum on SEC competence to administer the PUHCA. The SEC was not available to defend its record.<sup>344</sup>

335. *Id.* at 67,249.

336. S. 544, 103d Cong., 1st Sess. (1993). *See also* S. 635, 103d Cong., 1st Sess. (1993).

337. S. 544, 103d Cong., 1st Sess. § 2 (1993).

338. S. 544, 103d Cong., 1st Sess. § 3 (1993).

339. 139 CONG. REC. S2683 (daily ed. Mar. 10, 1993).

340. *Id.* at S2640.

341. "While it may have seemed reasonable to split utility regulation between the SEC and FERC in 1935, when both PUHCA and Title II of the Federal Power Act were enacted, it makes no sense today." *Multistate Utility Company Consumer Protection Act of 1993: Hearing Before the Senate Comm. on Energy and Natural Resources*, 103d Cong., 1st Sess. 7 (1993) (statement of Senator Bumpers) (emphasis added) [hereinafter *Senate Ohio Power Hearing*].

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

343. *Senate Ohio Power Hearing*, *supra* note 341, at 47-56 (prepared statement of Charles A. Patrizia).

344. "Now, Mr. Chairman, I am really disappointed that the SEC, which has 22 employees in its public utility division, has chosen to snub this committee and has not even sent a witness to the hearing." *Senate Ohio Power Hearing*, *supra* note 341, at 7 (statement of Senator Bumpers). *But see Senate Ohio Power Hearing*, *supra* note 341, at 139-41 (prepared statement of SEC).

The Chair of the FERC, Elizabeth Anne Moler, was neutral on the transfer of the PUHCA from the SEC to the FERC.<sup>345</sup> The Chairman of the Arkansas Public Service Commission, Sam I. Bratton, was less circumspect.<sup>346</sup> His comments on the performance of the SEC under the PUHCA focused on Entergy. Entergy owns eight electric utility subsidiaries throughout Arkansas, Louisiana, and Mississippi,<sup>347</sup> which own and operate numerous nuclear power plants.<sup>348</sup> Chairman Bratton observed, however, that "I am unaware of any nuclear operations expertise at the SEC or of any effort to acquire any."<sup>349</sup> He also criticized the proposed acquisition, which the FERC and the SEC since have approved,<sup>350</sup> by Entergy of Gulf States Utilities, an exempt holding company. He stated that "[a]nother pitfall of the present statutory structure is illustrated by the Entergy proposal to acquire Gulf States Utilities, a troubled utility, for a price well above [its] book value."<sup>351</sup> In conclusion, Chairman Bratton rebutted the argument that the SEC as well as the FERC should regulate electric utilities because the legal standard embodied in part II of the Federal Power Act—regulation in the public interest—is quite different from the legal standard embodied in the PUHCA—regulation in the interest of "investors or consumers." He dismissed the argument because "[o]ver the past few years, many utilities argued for weakening PUHCA on the grounds that the investor protection function is adequately performed by the SEC under other securities statutes."<sup>352</sup>

The criticism of the City of New Orleans was more pointed and direct.<sup>353</sup> First, City Councilman Giarrusso described the recent corporate diversification of Entergy into DSM and telecommunications,<sup>354</sup> for example, and observed that "the SEC has approved all of the . . . diversification efforts without a single hearing and without, on its own initiative, imposing any conditions to fulfill PUHCA's consumer protection mandate and protect Entergy's ratepayers."<sup>355</sup> Second, he argued that the SEC administers PUHCA in the interest of investors but not of consumers.<sup>356</sup> Giarrusso

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345. "Ultimately it comes down to a policy judgement for the Congress to make whether the functions should be transferred." *Senate Ohio Power Hearing*, *supra* note 341, at 11 (prepared statement of Elizabeth Anne Moler, Chair, Federal Energy Regulatory Commission).

346. *Senate Ohio Power Hearing*, *supra* note 341, at 26-29 (prepared statement of Sam I. Bratton, Jr.).

347. REGISTERED HOLDING COMPANIES, *supra* note 185, at 65.

348. REGISTERED HOLDING COMPANIES, *supra* note 185, at 69.

349. *Senate Ohio Power Hearing*, *supra* note 341, at 28.

350. Opinion No. 385, *In re Entergy Serv., Inc.*, 65 F.E.R.C. ¶ 61,332 (1993); *In re Entergy Corp.*, HCAR No. 25952, 55 SEC Docket 2035 (Dec. 17, 1993).

351. *Senate Ohio Power Hearing*, *supra* note 341, at 28.

352. *Senate Ohio Power Hearing*, *supra* note 341, at 29.

353. *Senate Ohio Power Hearing*, *supra* note 341, at 33-38 (prepared statement of Joseph I. Giarrusso, City Councilman-at-Large, City of New Orleans).

354. See, e.g., *In re Entergy Corp.*, HCAR No. 25718, 53 SEC Docket 620 (Dec. 28, 1992) (acquisition of interest in demand-side management corporation); *In re Entergy Corp.*, HCAR No. 25353, 49 SEC Docket 667 (July 25, 1991) (acquisition of interest in communications corporation).

355. *Senate Ohio Power Hearing*, *supra* note 341, at 34.

356. "The SEC's lack of enthusiasm for enforcing the consumer protection provisions in PUHCA may be attributed, largely, to institutional factors. *The SEC is a financial regulator, not a utility*

mentioned, for example, the approval in 1990 of a new Entergy electric utility subsidiary—Entergy Power, Inc.<sup>357</sup>

The FERC, City Councilman Giarrusso argued, should administer the consumer-protection provisions of PUHCA. He also stated that “New Orleans believes that the SEC, which as a financial regulator is a natural protector of investor interests, is not designed to fulfill this [consumer-protection] mandate as effectively as the FERC.”<sup>358</sup> Finally, the Councilman argued that the continued diversification of non-exempt holding companies raises the need for effective federal regulation,<sup>359</sup> which the FERC but not the SEC could provide.

The Environmental Action Foundation and the Consumer Federation of America similarly appeared to indict the SEC on numerous counts of malfeasance in its administration of PUHCA.<sup>360</sup> In particular, the two public-interest organizations argued that the SEC had compromised PUHCA with respect to (i) the requirements, under sections 9 and 10,<sup>361</sup> for the formation of new public utility (or non-utility) subsidiaries;<sup>362</sup> (ii) service, sales, and construction contracts between public utility (or non-utility) subsidiaries within the same holding company system;<sup>363</sup> (iii) the anti-trust requirements of sections 9 and 10 for the formation of new subsidiaries;<sup>364</sup> (iv) its failure to respond to consumer complaints;<sup>365</sup> and, (v) exemptions from the requirements of the PUHCA for ineligible public utility holding companies.<sup>366</sup> The two organizations concluded that “[t]he notion of transferring the PUHCA function to FERC is consistent with rational allocation of regulatory responsibility to those with the appropriate experience.”<sup>367</sup>

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regulator. In addition, a mere twenty-five member staff is dedicated to handle PUHCA-related matters . . . .” *Senate Ohio Power Hearing*, *supra* note 341, at 34-35 (emphasis added).

357. *In re Entergy Corp.*, HCAR No. 25136, 46 SEC Docket 1911 (Aug. 27, 1990), *remanded*, *City of New Orleans v. SEC*, 969 F.2d 1163 (D.C. Cir. 1992).

358. *Senate Ohio Power Hearing*, *supra* note 341, at 35.

359. *Senate Ohio Power Hearing*, *supra* note 341, at 37-38.

360. *Senate Ohio Power Hearing*, *supra* note 341, at 59-80 (prepared statement of Scott Hempling on behalf of the Energy Project, Environmental Action Foundation, and Consumer Federation of America).

361. 15 U.S.C. §§ 79i-79j (1988).

362. *Senate Ohio Power Hearing*, *supra* note 341, at 63-67. See, e.g., *In re Sierra Pac. Resources*, HCAR No. 24566, 40 SEC Docket 161 (Jan. 28, 1988), *aff'd*, *Environmental Action, Inc. v. SEC*, 895 F.2d 1255 (9th Cir. 1990) (alleged violation of “coordination” requirement of sections 9 and 10); *In re WPL Holdings, Inc.*, HCAR No. 24590, 40 SEC Docket 634 (Mar. 31, 1988), *remanded*, *Wisconsin’s Envtl. Decade v. SEC*, 882 F.2d 523 (D.C. Cir. 1989) (violation of “economies and efficiencies” requirement of sections 9 and 10); *In re Southern Co.*, HCAR No. 24476, 39 SEC Docket 765 (Oct. 20, 1987) (alleged violation of “pre-acquisition review” requirement of sections 9 and 10).

363. *Senate Ohio Power Hearing*, *supra* note 341, at 67-68.

364. “The [SEC] has no expertise in this area.” *Senate Ohio Power Hearing*, *supra* note 341, at 68. See, e.g., *In re Northeast Util.*, HCAR No. 25221, 47 SEC Docket 1887 (Dec. 21, 1990), *aff'd*, HCAR No. 25273, 48 SEC Docket 776 (Mar. 15, 1991), *aff'd*, *City of Holyoke Gas & Elec. Dep’t v. SEC*, 972 F.2d 358 (D.C. Cir. 1992) (alleged violation of anti-trust requirement of sections 9 and 10).

365. *Senate Ohio Power Hearing*, *supra* note 341, at 68-69.

366. *Senate Ohio Power Hearing*, *supra* note 341, at 69-70.

367. *Senate Ohio Power Hearing*, *supra* note 341, at 80.

The sole witness who defended the SEC and who testified against the transfer of PUHCA appeared on behalf of an ad hoc group of several non-exempt holding companies (Ad Hoc Group).<sup>368</sup> The Ad Hoc Group offered four arguments in support of its position.<sup>369</sup> First, it argued that the transfer of PUHCA to the FERC, which Congress has considered in the past,<sup>370</sup> would in principle and in practical terms be inappropriate.<sup>371</sup> Second, it argued that the transfer would be impractical.<sup>372</sup> Third, the Ad Hoc Group argued that the transfer would be unconstitutional under the Due Process and Just Compensation Clauses of the Fifth Amendment.<sup>373</sup> Finally, it argued that current division of jurisdiction between the SEC and the FERC has not harmed the public.<sup>374</sup> In conclusion, the Ad Hoc Group observed that "if the SEC's actions are in question, transferring authority to FERC is not the answer."<sup>375</sup>

The criticism of SEC administration of PUHCA in general was brutal. In addition, Senator Bumpers observed that "[a]t a time when we are seeking to make Government more efficient, we simply can no longer afford to have two different agencies regulating utility holding companies."<sup>376</sup>

In July 1994, the Senate Committee on Energy and Natural Resources significantly amended Senate Bill 544 and, in August 1994,<sup>377</sup> issued a report.<sup>378</sup> The reported bill proposed to amend section 318 of the Federal

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368. *Senate Ohio Power Hearing*, *supra* note 341, at 47-56 (prepared statement of Charles A. Patrizia on behalf of an Ad Hoc Group of Registered Electric Utility Holding Companies).

369. "We do not believe a change in the jurisdictional commission is required to increase the effectiveness of protection for consumers and investors mandated in PUHCA. Indeed, [Senate Bill] 544 would be an abandonment of consistent regulatory authority accepted by the Supreme Court and Congress for almost sixty years." *Senate Ohio Power Hearing*, *supra* note 341, at 48.

370. "Congress has considered the transfer of PUHCA to FERC (or its predecessors) on several occasions. Each time there were neither compelling policy reasons nor a groundswell of support for the proposed transfer, and each of the previous attempts failed." *Senate Ohio Power Hearing*, *supra* note 341, at 49.

371. Patrizia continued by stating:

[The] FERC and SEC have a different set of precedents, procedures, and regulatory philosophy. [Senate Bill] 544 would impose an entirely new regulatory scheme on this industry that has lived under SEC regulation for 58 years. Registered companies would still be subject to SEC jurisdiction for offerings and related securities issuances under the Securities Act of 1933 . . . and the Securities and Exchange Act of 1934 . . . .

*Senate Ohio Power Hearing*, *supra* note 341, at 50.

372. "FERC procedures are fundamentally different than those at the SEC. The FERC process tends toward a more adversarial approach to regulation. Proponents of [Senate Bill 544] appear to seek routine adversarial proceedings with all the costs and time commitments they require." *Senate Ohio Power Hearing*, *supra* note 341, at 53.

373. *Senate Ohio Power Hearing*, *supra* note 341, at 54-55. For example, with respect to the Due Process Clause, the Ad Hoc Group argued that "[t]here is simply no legitimate, governmental interest furthered by this legislation, and it follows that the means chosen are irrational and unreasonable." *Senate Ohio Power Hearing*, *supra* note 341, at 55. See also *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (regulation of electric power rates subject to Just Compensation Clause).

374. *Senate Ohio Power Hearing*, *supra* note 341, at 55-56.

375. *Senate Ohio Power Hearing*, *supra* note 341, at 56.

376. *Senate Ohio Power Hearing*, *supra* note 341, at 7.

377. 140 CONG. REC. S12,289 (daily ed. Aug. 22, 1994).

378. S. REP. NO. 351, 103d Cong., 2d Sess. (1994).



Power Act—not sections 205 and 206—to determine the extent to which electric utilities could recover, in rates for interstate wholesale electric power, costs incurred under contracts between subsidiaries within the same holding company system.<sup>379</sup>

In particular, Senate Bill 544, as reported, would have provided a rebuttable presumption, in FERC administrative hearings under sections 205 and 206 of the Federal Power Act, that SEC-mandated prices under contracts between subsidiaries within the same holding company system were reasonable.<sup>380</sup> In addition, it would have required the FERC, also in such administrative hearings, to afford “substantial deference” to such SEC-mandated prices.<sup>381</sup> Nonetheless, it authorized the FERC to disagree with the SEC and, regardless of SEC-mandated prices, to revise interstate wholesale electric power rates, which would, in twelve months, be “binding on the [SEC] as of that date.”<sup>382</sup>

The report on Senate Bill 544 explained that it “would overturn *Ohio Power*, thereby restoring FERC’s authority . . . to review costs associated with service, sales, and construction contracts between affiliated companies of a [non-exempt] holding company system for the purposes of establishing just and reasonable wholesale electric rates under the Federal Power Act.”<sup>383</sup> Upon approval by the Senate Committee on Energy and Natural Resources in July 1994, Senate Bill 544 was forwarded to the Senate Committee on Commerce, Science and Transportation for incorporation into Senate Bill 1822.<sup>384</sup>

### C. House Response to *Ohio Power*

One year after the Senate hearing on Senate Bill 544, the Subcommittee on Energy and Power of the House Committee on Energy and Commerce (Subcommittee) conducted a congressional hearing on federal regulation of non-exempt holding companies after the *Ohio Power* decisions.<sup>385</sup> No bill, similar to Senate Bill 544, had been introduced in the House, and there was no proposal to transfer to the FERC all functions of the SEC under PUHCA. The Subcommittee heard numerous views, however, on the possible need for federal legislation to address the implications of the *Ohio Power* decisions.

Chair Moler of the FERC recommended the enactment of an amendment to part II of the Federal Power Act to authorize the FERC “to regulate the rates of public utility members of [non-exempt] holding companies

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379. S. 544, 103d Cong., 2d Sess. (1994) (to be codified in § 318(b)(1)).

380. *Id.* (to be codified in § 318(c)).

381. *Id.* (to be codified in § 318(d)(1)).

382. *Id.* (to be codified in § 318(d)(2)).

383. S. REP. NO. 351, 103d Cong., 2d Sess. 5 (1994). “Under [*Ohio Power*], the SEC would be solely responsible for protecting ratepayers from excessively high or imprudently incurred costs charged in affiliate services, sales, or construction contracts.” *Id.* at 4.

384. *Id.* at 5.

385. *Registered Holding Company Transactions: Hearing Before the Subcomm. on Energy and Power of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. (1994) [hereinafter *House Ohio Power Hearing*].

in the same way it regulates the rates of all other public utilities.”<sup>386</sup> She argued that, in consequence of the *Ohio Power* decisions, the FERC, with respect to electric utilities of non-exempt holding companies, would be unable to regulate rates and charges for wholesale electric power in accordance with section 205 of the Federal Power Act.<sup>387</sup> “This situation presents . . . the potential for higher rates for consumers served by [non-exempt] holding company utilities.”<sup>388</sup> Chair Moler argued for multiple regulation of non-exempt holding companies—SEC regulation of contracts between subsidiaries within the same holding company system under section 13 of PUHCA,<sup>389</sup> on the one hand, and FERC regulation of rates and charges for wholesale electric power under section 205 of the Federal Power Act,<sup>390</sup> on the other hand. She stated that “[d]ual regulation has long been a fact of life for [non-exempt] holding companies that have public utility subsidiaries.”<sup>391</sup> Finally, she suggested that the FERC and the SEC “should attempt to develop consistent policies in order to provide [non-exempt] holding companies greater regulatory certainty.”<sup>392</sup>

Commissioner Richard Y. Roberts of the SEC disagreed with the need for federal legislation to address the implications of the *Ohio Power* decisions. He first observed that the *Ohio Power* decisions “arose in special circumstances that are unlikely to recur.”<sup>393</sup> He also testified that the implications of the *Ohio Power* decisions were “unclear” and that the “unfortunate” decisions could have been avoided through “better communication” between the SEC and the FERC.<sup>394</sup>

Finally, Commissioner Roberts described for the Subcommittee the four initiatives the SEC had initiated to address the concerns that the *Ohio Power* decisions raised: (i) a dialogue with the FERC to discuss those concerns; (ii) a joint SEC-FERC proposal for an amendment to section 318 of the Federal Power Act; (iii) a proposed SEC regulation to revise the cost-based price requirements of rules 90 and 91; and, in particular, (iv) an assessment of the need for comprehensive modernization of PUHCA.<sup>395</sup>

Dr. E. Linn Draper, Chairman and CEO of AEP, attributed the concerns associated with the *Ohio Power* decisions to the prior FERC precedent, discussed in those decisions,<sup>396</sup> that replaced the cost-based standard under section 205 of the Federal Power Act with the market-price stan-

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386. *Id.* at 11 (prepared statement of Chair Moller). In particular, she recommended an amendment to § 318 of the Federal Power Act. *Id.* at 25.

387. *Id.* at 14-20.

388. *Id.* at 19.

389. 15 U.S.C. § 79m (1988).

390. 16 U.S.C. § 824d (1988).

391. *House Ohio Power Hearing*, *supra* note 385, at 24.

392. *House Ohio Power Hearing*, *supra* note 385, at 27.

393. *House Ohio Power Hearing*, *supra* note 385, at 36 (prepared statement of Commissioner Roberts).

394. *House Ohio Power Hearing*, *supra* note 385, at 41.

395. *House Ohio Power Hearing*, *supra* note 385, at 42-46.

396. *Public Serv. Co.*, 13 F.E.R.C. ¶ 63,041 (1980), *aff'd*, 17 F.E.R.C. ¶ 61,123 (1981), *aff'd*, *Public Serv. Co. v. FERC*, 832 F.2d 1201 (10th Cir. 1987).

dard.<sup>397</sup> Prior to this precedent, Dr. Draper argued, “both the SEC and the [Federal Power Commission], and later the FERC, during all those years were operating on the same wave length.”<sup>398</sup> The introduction of the market-price standard under section 205, he argued, “is the true source of the problem.”<sup>399</sup>

Craig A. Glazer, Chairman of the Public Utilities Commission of Ohio, testified on behalf of NARUC.<sup>400</sup> He argued that, in consequence of the “trapped” costs rationale of the *Ohio Power* decisions, the states, with respect to electric utilities of non-exempt holding companies, would be unable to regulate rates and charges for retail electric power through their public utility commissions.<sup>401</sup> He recommended the enactment of federal legislation to affirm the prerogative of state public utility commissions to regulate retail electric power rates.<sup>402</sup> Commissioner Glazer offered three specific proposals: (i) an amendment to section 318 of the Federal Power Act; (ii) an amendment to section 13 of PUHCA; or, (iii) the repeal of section 13.<sup>403</sup>

The Coalition for Full Oversight and Regulation of Public Utility Holding Companies and Affiliates (Coalition), an ad hoc organization, discussed the alleged inadequacies of federal regulation of non-exempt holding companies.<sup>404</sup> The SEC, it argued, “lacks basic resources and authorities necessary to regulate these complex [section 13] transactions and protect consumers . . . .”<sup>405</sup> The Coalition recommended the enactment of federal legislation to authorize both the FERC and the states to regulate wholesale and retail electric power rates regardless of SEC regulation of contracts between subsidiaries within the same holding company system.<sup>406</sup>

Finally, the Ad Hoc Group argued that, in view of adequate SEC regulation of non-exempt holding companies, there was no need for federal legislation to address the implications of the *Ohio Power* decisions.<sup>407</sup> It argued that SEC regulation of contracts between subsidiaries within the

397. *House Ohio Power Hearing*, *supra* note 385, at 70-79 (prepared statement of Mr. Draper).

398. *House Ohio Power Hearing*, *supra* note 385, at 73.

399. *House Ohio Power Hearing*, *supra* note 385, at 74.

400. *House Ohio Power Hearing*, *supra* note 385, at 86-90 (prepared statement of Chairman Glazer).

401. *House Ohio Power Hearing*, *supra* note 385, at 86-89.

402. “For our system of Federalism to work, the FERC and the 50 State commissions should be allowed to do their job and not have a third super-agency, the SEC, dictating from Washington what consumers in America will pay.” *House Ohio Power Hearing*, *supra* note 385, at 88.

403. *House Ohio Power Hearing*, *supra* note 385, at 89-90.

404. *House Ohio Power Hearing*, *supra* note 385, at 128-37 (prepared statement of Coalition).

405. *House Ohio Power Hearing*, *supra* note 385, at 130.

406. *House Ohio Power Hearing*, *supra* note 385, at 135-37. “Failure to act could result in an explosion of affiliate suppliers for a myriad of goods and services.” *House Ohio Power Hearing*, *supra* note 385, at 137.

407. *House Ohio Power Hearing*, *supra* note 385, at 102-23 (prepared statement of Ad Hoc Group). “We continue to believe that PUHCA provides ample statutory authority to fully protect the interests of consumers and there have been no abuses or public harm under the current regulatory scheme.” *House Ohio Power Hearing*, *supra* note 385, at 103-04.

same holding company system under a cost-based standard, with simultaneous FERC regulation of rates and charges for wholesale electric power under a market-price standard, would place non-exempt holding companies in a "twilight zone."<sup>408</sup> Finally, the Ad Hoc Group argued that there was no need to transfer PUHCA from the SEC to the FERC.<sup>409</sup>

#### IV. PROPOSED TELECOMMUNICATIONS LEGISLATION

##### A. *Legislation in General*

In November 1993, Representative Edward J. Markey (D. Massachusetts), Chairman of the Telecommunications and Finance Subcommittee of the House Committee on Energy and Commerce, introduced House Bill 3636, the National Communications Competition and Information Infrastructure Act of 1993.<sup>410</sup> In February 1994, Senator Ernest F. Hollings (D. South Carolina), Chairman of the Senate Committee on Commerce, Science and Transportation, introduced Senate Bill 1822, the Communications Act of 1994.<sup>411</sup> Both bills would amend, to a significant extent, title II of the Communications Act.

Title II establishes extensive FCC regulation of common carriers engaged in interstate or foreign communication via wire (and radio), but not in broadcast radio.<sup>412</sup> Thus, title II is applicable to telephone and telegraph companies, but not to radio and television stations.<sup>413</sup> Indeed, Congress decided not to subject radio and television stations, which are subject to the requirements of title III, to title II.<sup>414</sup> This decision was based on the belief that the telephone companies, in contrast to radio and television companies, were natural monopolies, which required rigorous regulation.<sup>415</sup>

Section 201 requires all charges, practices, classifications, and regulations for telephone services to be just and reasonable.<sup>416</sup> Section 202 simi-

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408. *House Ohio Power Hearing*, *supra* note 385, at 111-15.

409. *House Ohio Power Hearing*, *supra* note 385, at 119-22. "The placement of PUHCA in the SEC was a deliberate action by the Congress, and Congress has several times reaffirmed that role, during 59 years of growth and stability in the electric utility industry." *House Ohio Power Hearing*, *supra* note 385, at 120.

410. H.R. 3636, 103d Cong., 1st Sess. (1993).

411. S. 1822, 103d Cong., 2d Sess. (1994).

412. 47 U.S.C. § 153(h) (1988). *See, e.g., OPPORTUNITIES AND RISKS*, *supra* note 33, at 9-1 to 9-58 (regulation of telecommunications service providers).

413. *United States v. Radio Corp. of America*, 358 U.S. 334 (1959); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

414. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). *But see* *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976) ("The common carrier provisions [of title II] and the radio licensing provisions [of title III] of [the Communications Act] are not mutually exclusive, and a common carrier may be regulated under both.").

415. *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (D.C. Cir. 1970).

416. 47 U.S.C. § 201(b) (1988). "The supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is 'charges, practices, classifications, and regulations for and in

larly prohibits unjust or unreasonable discrimination for charges, practices, classifications, and regulations relative to telephone services.<sup>417</sup>

Section 203 requires schedules of charges, as well as amendments to those schedules, for telephone services to be filed with the FCC and to be available for public inspection.<sup>418</sup> Under section 204, a schedule of charges or an amendment thereto is subject to administrative adjudication before the FCC.<sup>419</sup> Finally, section 205 authorizes the FCC, after administrative adjudication, to determine and to prescribe charges if a schedule or an amendment is deemed unjust or unreasonable.<sup>420</sup> No charges shall be determined and prescribed, however, in the absence of administrative adjudication.<sup>421</sup> Just and reasonable charges prescribed by the FCC shall permit common carriers to recoup their costs for telephone services and to earn a reasonable rate of return on invested capital.<sup>422</sup> Other provisions of title II regulate consolidations of telephone companies,<sup>423</sup> obscene telephone calls in interstate or foreign communication,<sup>424</sup> and telephone services for impaired individuals.<sup>425</sup>

Neither House Bill 3636 nor Senate Bill 1822 would have changed the fundamental regime under title II of the Communications Act. Section 102 of Senate Bill 1822 would have added to the Communications Act Section 201A, which would have required common carriers to contribute to the enhancement of universal and affordable telephone services.<sup>426</sup> Section 103 of Senate Bill 1822 would have amended section 202 to require all common carriers to provide preferential charges for telephone services to schools and universities, medical centers, state and local governments, public broadcast stations, libraries, and other public entities.<sup>427</sup> Otherwise Senate Bill 1822 would have added to title II several new sections on (i) incentives for investments in telecommunications infrastructures;<sup>428</sup> (ii) the participation of telephone companies in the production of telecommunications equipment;<sup>429</sup> (iii) the participation of telephone companies in elec-

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connection with such communication service.' " *Ambassador, Inc. v. United States*, 325 U.S. 317, 323 (1945).

417. 47 U.S.C. § 202(a) (1988). *See, e.g.*, *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) (interpretation of § 202); *American Trucking Ass'n, Inc. v. FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

418. 47 U.S.C. § 203(a) (1988).

419. *Id.* § 204(a)(1).

420. *Id.* § 205(a).

421. *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865 (2d Cir. 1973).

422. *Ohio Bell Tel. Co. v. FCC*, 949 F.2d 864 (6th Cir. 1991).

423. 47 U.S.C. § 221 (1988).

424. *Id.* § 225.

425. *Id.* § 227.

426. S. 1822, 103d Cong., 2d Sess. § 102(a) (1994).

427. *Id.* § 103(a).

428. *Id.* § 104.

429. *Id.* § 403. Subtitle A of title IV of Senate Bill 1822 is entitled the Telecommunications Equipment Research and Manufacturing Competition Act of 1994. *Id.* § 401. It was based on previous legislative proposals to authorize the participation of telephone companies in the production of telecommunications equipment. *See, e.g.*, Telecommunications Equipment Research and Manufacturing Competition Act of 1991, S. 173, 102d Cong., 1st Sess. (1991); *Telecommunications*

tronic surveillance and protection services, electronic publication services, and information services;<sup>430</sup> (iv) competitive safeguards for telephone customers;<sup>431</sup> and, (v) protection of telephone customer information.<sup>432</sup>

Senate Bill 1822 would have amended title II, however, to authorize electric utilities to offer telephone services.<sup>433</sup> Section 302 would have added to the Communications Act Section 230, which would have provided that "[n]otwithstanding any other provision of law and subject to the regulatory safeguards imposed by an appropriate regulatory agency, *an electric, gas, water or steam utility may provide telecommunications services.*"<sup>434</sup> However, section 230 also would have provided that "[t]o the extent that they provide telecommunications services, telecommunications carriers shall be deemed common carriers under [title II of the Communications Act]."<sup>435</sup> Senate Bill 1822 would have amended the Communications Act to define telecommunications carriers to include electric utilities engaged in telecommunications services.<sup>436</sup>

Finally, Senate Bill 1822 would have amended title VI of the Communications Act, which governs the regulation of cable television, to authorize telephone companies to provide cable television services. Section 613 provides that "[i]t shall be unlawful for any common carrier, subject in whole or in part to, [title II of the Communications Act], to provide video programming directly to subscribers in its telephone service area . . . ."<sup>437</sup> Section 501 of Senate Bill 1822 would have amended section 613 to authorize telephone companies to provide cable television services, and vice versa, but would have required separate though affiliated companies.<sup>438</sup>

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*Equipment Research and Manufacturing Competition Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 102d Cong., 1st Sess. (1991); S. REP. NO. 41, 102d Cong., 1st Sess. (1991) (report on Senate Bill 173); Telecommunications Equipment Research and Manufacturing Competition Act of 1989, S. 1981, 101st Cong., 1st Sess. (1989); *Telecommunications Equipment Research and Manufacturing Competition Act: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 2d Sess. (1990); S. REP. NO. 355, 101st Cong., 2d Sess. (1990) (report on Senate Bill 1981). The Telecommunications Equipment Research and Manufacturing Competition Act of 1994 would have eliminated restrictions, on the participation of telephone companies in the production of telecommunications equipment, imposed through the modified final judgment in *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.C. Cir. 1991).

430. S. 1822, 103d Cong., 2d Sess. §§ 232-34 (1994).

431. *Id.* § 502.

432. *Id.* § 601.

433. Section 2 of Senate Bill 1822 finds that "electric utilities, satellite carriers, and others are prepared to enter the local telephone market over the next few years . . . ." *Id.* § 2(17). "Electric and gas utilities hope that whatever bill is passed will allow them to provide telecommunications services and take part in the communication revolution." Lori A. Burkhardt, *Lawmakers Vie to Let Utilities Onto the Info Highway*, PUB. UTIL. FORT., Mar. 15, 1994, at 41.

434. S. 1822, 103d Cong., 2d Sess. § 302 (1994) (emphasis added) (to be codified in § 230(b)).

435. *Id.* § 302 (to be codified in § 230(d)).

436. *Id.* § 301.

437. 47 U.S.C. § 533(b)(1) (1988). Section 613 was added to the Communications Act by § 2 of the Cable Communications Policy Act, Pub. L. No. 98-549, § 2, 98 Stat. 2780, 2785 (1984).

438. S. 1822, 103d Cong., 2d Sess. § 501 (1994).

House Bill 3636 included no provision to authorize electric utilities to offer telephone services.<sup>439</sup> Otherwise, however, House Bill 3636 was similar to Senate Bill 1822. It also would have amended title II of the Communications Act. For example, to promote universal and affordable telephone services, section 102 of House Bill 3636 would have required common carriers to provide to other common carriers equal access to and functional and reliable interconnection with their telecommunications facilities.<sup>440</sup> House Bill 3636 also would have authorized telephone companies to provide cable television services. First, it would have amended section 613 to authorize telephone companies to provide cable television services through separate companies or, under certain circumstances, through their own facilities.<sup>441</sup>

Second, House Bill 3636 also would have added to title VI of the Communication Act several new sections.<sup>442</sup> For example, it would have detailed the circumstances under which telephone companies could provide cable television services through their own facilities,<sup>443</sup> would have required telephone companies that provide cable television services through separate companies to provide to other cable television companies access to their cable television facilities,<sup>444</sup> and would have prohibited cross-subsidization between telephone companies and their affiliated cable television companies.<sup>445</sup>

### B. Senate Consideration

The Senate Committee on Commerce, Science and Transportation conducted numerous congressional hearings on Senate Bill 1822 in the Spring and Summer of 1994.<sup>446</sup> In particular, on May 11, 1994, it heard the perspectives and concerns of several witnesses regarding the participation of electric utilities in telecommunications services.<sup>447</sup>

The President of Southern Company Services, Inc., a non-utility subsidiary of the Southern Company, expressed the view that there would be an important role for electric utilities in the development of the "information superhighway," but that PUHCA would be an obstacle to the partici-

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439. "Many utilities have been laying fiber-optic lines for years and would need only a small portion of the fiber capacity from the information superhighway. The rest they could easily lease to telecommunications and cable companies. Hopefully, Congress will pave the way." Lori A. Burkhardt, *Utilities on the Info Highway: Part Two*, PUB. UTIL. FORT., May 15, 1994, at 39.

440. H.R. 3636, 103d Cong., 1st Sess. § 102(a) (1993).

441. *Id.* § 201(a)(1).

442. *Id.* § 201(b).

443. *Id.* § 201(b) (to be codified in § 652).

444. *Id.* § 201(b) (to be codified in § 654).

445. *Id.* § 201(b) (to be codified in § 655).

446. See generally *S. 1822—Communications Act of 1994: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 341 (1994) [hereinafter *Senate Telecommunications Hearing*].

447. *Id.* at 341-96.

pation therein of non-exempt holding companies.<sup>448</sup> In particular, he opined that the requirements of PUHCA would complicate business transactions in telecommunications and that the "functional relationship" requirement of section 11 of PUHCA would prohibit some transactions altogether.<sup>449</sup> He thus argued that PUHCA should be amended to provide an exemption from its requirements for the telecommunications activities of non-exempt holding companies.<sup>450</sup> He argued that the federal government should not second-guess and restrict the investment decisions of non-exempt holding companies.<sup>451</sup> "In this day and age, it seems a remarkable proposition that government should be presumed to make better investment choices than corporations disciplined by the hard realities of markets."<sup>452</sup>

The President of SCANA Corporation, an exempt public utility holding company, testified on behalf of the Edison Electric Institute (EEI), a trade association of for-profit electric utilities, and the UTC.<sup>453</sup> In 1984, SCANA formed MPX Corporation, a non-utility subsidiary, to lease to non-associated companies the excess fibers in a fiber optics cable that SCANA installed for internal communications.<sup>454</sup> EEI and the UTC testified "to promote the option for voluntary participation by electric utilities and their affiliates in the provision of telecommunications services without inadvertently harming private communications control necessary for the provision of electric services."<sup>455</sup> The two associations thus argued that there should be no obstacles to the participation in the development of the "information superhighway" of non-exempt holding companies.<sup>456</sup>

In contrast, the National Association of Utility Consumer Advocates (NASUCA), a trade association of state consumer advocates,<sup>457</sup> cautioned against the removal of restrictions on the participation of electric utilities in the NII.<sup>458</sup> NASUCA argued that "[r]egulatory safeguards must be in

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448. See generally *id.* at 371-77 (prepared statement of Paul Denicola). "[E]lectric utilities are prepared to build local broad band links in the near term because they have the end-uses ready now or in the immediate future that will support the investment." *Id.* at 372.

449. *Id.* at 372-73. "This 50 percent requirement serves as a major stumbling block to [non-exempt] holding company participation in NII because markets do not segment themselves according to regulatory dictates." *Id.* at 373.

450. *Id.* at 374-77. PUHCA, of course, is not an obstacle to the participation in the development of the "information superhighway" of exempt holding companies. "There are more than 100 electric utility holding companies in the United States. All of them with the exception of the ten registered holding companies can currently invest in telecommunications (or any other non-utility business) without restriction under PUHCA . . . ." *Id.* at 374.

451. *Id.* at 375-76.

452. *Id.* at 376.

453. See generally *id.* at 363-69 (prepared statement of Lawrence M. Gressette).

454. *Id.* at 363.

455. *Id.* at 365.

456. *Id.* at 367-69.

457. See generally *id.* at 348-50 (prepared statement of Martha S. Hogerty).

458. *Id.* at 349-50. "[T]he specter of the convergence of electric and telecommunications ventures does raise unique problems." *Id.* at 350.



place to protect captive electric company consumers from bearing any risk associated with electric entry into telecommunications."<sup>459</sup>

Finally, the American Public Power Association (APPA), a trade association of not-for-profit electric utilities, both applauded section 302 of Senate Bill 1822, which would have authorized electric utilities to engage in telecommunications activities, and criticized it because it would subject such electric utilities to the requirements of title II of the Communications Act.<sup>460</sup> "For utilities that will develop and operate communications systems for their own use or to provide conduit but not content service to others, legislation should not saddle them with common carrier obligations."<sup>461</sup> The APPA argued, for example, that leases to non-associated companies of excess fibers in fiber optics cables installed for internal communications should not subject electric utilities to common carrier obligations under title II.<sup>462</sup> The trade association also cautioned against the removal of restrictions on the participation of non-exempt holding companies in the NII.<sup>463</sup>

The Senate Committee on Commerce, Science and Transportation amended Senate Bill 1822 and, in September 1994,<sup>464</sup> issued a report thereon.<sup>465</sup> The reported bill incorporated or otherwise reflected several provisions of other proposed telecommunications reform legislation.<sup>466</sup> Indeed, recommendations forwarded to the Senate Committee on Commerce, Science and Transportation from the Senate Committee on Energy and Natural Resources and the Senate Committee on Banking, Housing and Urban Affairs in July 1994,<sup>467</sup> resulted in an expansion of section 302 and the incorporation of other proposed legislation relative to electric utilities and telecommunications.<sup>468</sup>

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459. *Id.* at 350.

460. *See generally id.* at 353-60 (prepared statement of William J. Ray).

461. *Id.* at 354. *See also* Stokes, *supra* note 110, at 29-30 ("From the utility perspective, it is critical that private internal-use communications systems—integral to safe, effective and reliable utility service—not be saddled with common carrier service obligations.").

462. *Senate Telecommunications Hearing, supra* note 446, at 359.

463. "Congress must therefore weigh the benefits of enhancing competition in telecommunications that might occur if [non-exempt] holding companies diversify into this area with the risks posed to consumers from such activities." *Senate Telecommunications Hearing, supra* note 446, at 358.

464. 140 CONG. REC. S12,940 (daily ed. Sept. 14, 1994).

465. S. REP. NO. 367, 103d Cong., 2d Sess. (1994).

466. *See, e.g.,* National Public Telecommunications Infrastructure Act of 1994, S. 2195, 103d Cong., 2d Sess. (1994); Telecommunications Infrastructure Act of 1993, S. 1086, 103d Cong., 1st Sess. (1993).

467. S. REP. NO. 367, 103d Cong., 2d Sess. 19 (1994). "A year-old blockade that has thwarted Senate efforts to settle a squabble between the Securities and Exchange Commission (SEC) and the Federal Energy Regulatory Commission (FERC) may be lifted soon by an unlikely cause: telecommunications reform." *Congress Moves to Resolve FERC-SEC Dispute*, PUB. UTIL. FORT., July 1, 1994, at 37.

468. The report on Senate Bill 1822 explained that "[non-exempt] holding companies may be precluded from competing in the developing information superhighway, thus potentially limiting consumer choice and resulting in higher prices, unless current PUHCA restrictions are loosened with respect to investment in telecommunications infrastructure and applications." S. REP. NO. 367, 103d Cong., 2d Sess. 4 (1994) (emphasis added).

Section 302(a) of Senate Bill 1822, as reported, would have added to title II of the Communications Act Section 230, which "establishes the principles for permitting competition for local telephone service."<sup>469</sup> Section 302(b)(1), however, would have added to PUHCA Section 34, which would have authorized the participation of electric utilities in telecommunications services.<sup>470</sup> In addition, section 302(b)(2) of Senate Bill 1822, as reported, incorporated the provisions of Senate Bill 544, which the Senate Committee on Energy and Natural Resources had approved in July 1994.<sup>471</sup>

Section 34 would have established an exemption from the requirements of PUHCA<sup>472</sup>—but not from the requirements of the Communications Act<sup>473</sup>—for "communications entities" of non-exempt holding companies that engaged in telecommunications services—"including energy and demand-side management . . . ."<sup>474</sup> However, it would have required the SEC to approve in advance the sale of securities by non-exempt holding companies to finance the formation or acquisition of communications entities.<sup>475</sup> Section 34 also would have required communications entities to maintain separate accounts and records, conduct separate promotions for their telecommunications services, and perform independent audits of transactions with affiliated public utilities upon request by state public utility commissions with jurisdiction over the affiliated public utilities.<sup>476</sup> Finally, section 34 would have prohibited assumptions of liabilities or pledges or encumbrances of assets on the part of public utilities for the benefit of affiliated communications entities.<sup>477</sup>

Some non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities would have been ineligible for the

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469. *Id.* at 55.

470. *Id.* at 62. "Allowing [non-exempt] holding companies to become vigorous competitors in the telecommunications industry is in the public interest. Consumers are likely to benefit when more well-capitalized and experienced providers of telecommunications services actively compete. Competition to offer the same services may result in lower prices for consumers. Moreover, numerous competitors may offer consumers a wider choice of services." *Id.* at 10.

471. *Id.* at 63.

472. S. 1822, 103d Cong., 2d Sess. § 302(b)(1)(B) (1994) (to be codified in § 34(a)-(b)).

473. *Id.* § 302(b)(1)(B) (to be codified in § 34(h)).

474. *Id.* § 302(b)(1)(B) (to be codified in § 34(i)(1)(A)). Section 34 would have required the SEC to promulgate regulations to establish "expeditious procedures" for certifications of communications entities eligible for exemptions under § 34. *Id.* § 302(b)(1)(B) (to be codified in § 34(i)(1)(B)).

475. *Id.* § 302(b)(1)(B) (to be codified in § 34(c)(1)).

476. *Id.* § 302(b)(1)(B) (to be codified in § 34(c)(2)-(d)). "To ensure that PUHCA amendments which allow [non-exempt] holding companies to invest in telecommunications and related businesses are in the public interest, section 302(b)(1) of the reported bill contains stringent consumer protection provisions." S. REP. NO. 367, 103d Cong., 2d Sess. 11 (1994).

477. S. 1822, 103d Cong., 2d Sess. § 302(b)(1)(B) (1994) (to be codified in § 34(e)-(f)). Section 34 also would have required the FCC to promulgate regulations to "prohibit a communications entity that is an associate company of a [non-exempt] holding company from providing telecommunications services . . . to any associate company thereof unless the terms under which the communications entity offers such services . . . are comparable to those offered to the public . . . ." *Id.* § 302(b)(1)(B) (to be codified in § 34(g)).

exemption under section 34.<sup>478</sup> Section 301 of Senate Bill 1822, as reported, would have added to the Communications Act a definition of telecommunications services,<sup>479</sup> which section 34 of PUHCA would have adopted,<sup>480</sup> intended to exclude telecommunications companies formed by non-exempt holding companies to lease to non-associated companies excess fibers in fiber optics cables installed for internal communications.<sup>481</sup>

The term "telecommunications service" is not intended to include the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services. For instance, the offering by an electric utility of bulk fiber optic capacity . . . does not fall within the definition of telecommunications service.<sup>482</sup>

Some non-utility subsidiaries of non-exempt holding companies, therefore, which were formed to lease excess fibers, would not have been communications entities under section 34 of PUHCA and thus would have continued to be subject to the requirements of PUHCA.<sup>483</sup>

Of particular significance was the incorporation into Senate Bill 1822, as reported, of a solution to the *Ohio Power* problem. In particular, section 302(b)(2) would have added to section 318 of the Federal Power Act the provisions of Senate Bill 544.<sup>484</sup> The report on Senate Bill 1822 stated that the Senate Committee on Commerce, Science and Transportation "recognizes that FERC and State utility commissions . . . have the authority to consider and disallow the costs . . . associated with non-utility enterprises engaged in by an associate company of the public utility if they determine that such costs will be unreasonably recovered in the rates of a public utility."<sup>485</sup>

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478. In support of the exemption, the report on the amended Senate Bill 1822 observed that electric utilities have acquired "extensive experience" in telecommunications, would provide "economically significant" telecommunications services, and would be "effective competitors" in telecommunications. S. REP. NO. 367, 103d Cong., 2d Sess. 10-11 (1994). See also *id.* at 22 ("Energy companies could be significant competitors to the local telephone companies because (1) they have control over rights-of-way to customers' homes, (2) they have an existing relationship with their customers, and (3) they also have experience with telecommunications.").

479. S. 1822, 103d Cong., 2d Sess. § 301 (1994) (to be codified in § 3(jj)).

480. *Id.* § 302(b)(1)(B) (to be codified in § 34(i)(2)).

481. "What is needed . . . is flexible legislation that lets utilities and other infrastructure providers continue to privately offer 'bulk' telecommunications facilities or capacity on a 'wholesale' basis to existing and emerging telecommunications service providers. Specifically, legislation should ensure that the regulatory focus properly remains on . . . common carriers." Stokes, *supra* note 110, at 30.

482. S. REP. NO. 367, 103d Cong., 2d Sess. 54-55 (1994). Similarly, § 301 of amended Senate Bill 1822 would have added to the Communications Act a definition of "telecommunications carrier" that the Senate Committee on Commerce, Science and Transportation intended to exclude telecommunications companies formed by non-exempt holding companies to conclude leases with non-associated companies of excess fibers in fiber optics cables installed for internal communications. S. 1822, 103d Cong., 2d Sess. § 301 (1994) (to be codified in § 3(jj)). "For instance, an electric utility that is engaged solely in the wholesale provision of bulk transmission capacity to carriers is not a telecommunications carrier." S. REP. NO. 367, 103d Cong., 2d Sess. 55 (1994).

483. See, e.g., *In re Central and S. W. Corp.*, 56 S.E.C. Docket 2725 (June 3, 1994).

484. S. 1822, 103d Cong., 2d Sess. § 302(b)(2)(B) (1994) (to be codified in § 318(a)-(f)).

485. S. REP. NO. 367, 103d Cong., 2d Sess. 11 (1994).

Although the Senate Committee on Commerce, Science and Transportation reported Senate Bill 1822, with a solution to the *Ohio Power* problem, in September 1994,<sup>486</sup> the Senate was unable to vote on Senate Bill 1822 before it recessed in October 1994.<sup>487</sup> Indeed, Chairman Hollings announced on September 27 that "[Senate Bill] 1822 would not be considered by the Senate prior to sine die adjournment."<sup>488</sup>

### C. House Consideration

The Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce also conducted numerous congressional hearings on House Bill 3636 in the Spring and Summer of 1994.<sup>489</sup> On July 29, 1994, together with the Subcommittee on Energy and Power, it heard the perspectives and concerns of several witnesses on the participation of electric utilities in telecommunications services.<sup>490</sup>

Chair Moler testified that the FERC opposed federal legislation to authorize non-exempt holding companies to acquire telecommunications subsidiaries unless the legislation guaranteed that the FERC would be able to regulate rates and charges for wholesale electric power under title II of the Federal Power Act.<sup>491</sup> In effect, she reiterated her recommendation, presented to the Subcommittee in May 1994 in its congressional hearing on federal regulation of non-exempt holding companies,<sup>492</sup> for federal legislation to resolve the implications of the *Ohio Power* decisions. Indeed, in June 1994, Representative Frederick C. Boucher (D. Virginia) introduced a bill to amend section 318 of the Federal Power Act to authorize the FERC to determine the extent to which electric utilities could recover, in rates for interstate wholesale electric power, costs incurred under contracts between subsidiaries within the same holding company system.<sup>493</sup> Thus, Chair Moler urged the enactment of Senate Bill 544 and House Bill 4645 prior to

486. "Originally, [Senate Bill] 1822 was expected to go to the Senate floor by the end of September, but that date likely will be pushed back because of health care reform delays." Lori A. Burkhardt, *Communications Act Revamp Finally Down to the Wire*, PUB. UTIL. FORT., Oct. 1, 1994, at 63.

487. "Electric and gas utilities that had been hoping to compete with local telephone companies in providing telecommunications services have also lost out." Lori A. Burkhardt, *Telecommunications Bill Is Dead: We All Lose*, PUB. UTIL. FORT., Nov. 1, 1994, at 33.

488. 140 CONG. REC. S13,823 (daily ed. Sept. 30, 1994) (statement of Senator Pressler).

489. See generally *National Communications Infrastructure (Parts 2-3): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. (1994). See also *National Communications Infrastructure: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1993).

490. *Lifting PUHCA Restrictions: Joint Hearing Before the Subcomm. on Energy and Power and the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. (1994) [hereinafter *House Telecommunications Hearing*].

491. *Id.* at 11-13 (prepared statement of Elizabeth Anne Moler, Chair, Federal Energy Regulatory Commission).

492. *House Ohio Power Hearing*, *supra* note 385, at 10-19.

493. H.R. 4645, 103d Cong., 2d Sess. (1994). When he introduced the bill, Congressman Boucher stated that it would "restore a measure of protection for utility ratepayers served by the operating subsidiaries of [non-exempt] public utility holding companies . . ." 140 CONG. REC. E1323 (daily ed. June 24, 1994).

or in conjunction with the enactment of federal legislation on electric utilities and telecommunications.<sup>494</sup> She preferred House Bill 4645 to Senate Bill 544, however, because Senate Bill 544, as reported,<sup>495</sup> would require the FERC to “give substantial deference” to SEC-mandated prices under section 13 of PUHCA.<sup>496</sup> Chair Moler stated that she would “oppose any provision that further diminished our authority to review cost allocations under the well established legal standards and public procedures we follow under the [Federal Power Act].”<sup>497</sup>

Commissioner Roberts of the SEC declined to support an amendment to PUHCA to authorize non-exempt holding companies to acquire telecommunications subsidiaries.<sup>498</sup> He reiterated the announcement, presented to the Subcommittee in its May 1994 congressional hearing on federal regulation of non-exempt holding companies,<sup>499</sup> that the SEC had initiated an assessment of the need for comprehensive modernization of PUHCA and stated that the SEC would have no position on federal legislation relative to electric utilities and telecommunications until the assessment was completed.<sup>500</sup>

Indeed, the SEC, in July 1994, had conducted a “roundtable” discussion of PUHCA, to which the public was invited,<sup>501</sup> to initiate the assessment.<sup>502</sup> “The majority of the parties testifying at the SEC roundtable noted that while PUHCA was necessary in 1935 to correct abuses in the electric and gas industries, it now needs to be reexamined and changed—if not eliminated altogether.”<sup>503</sup> The “roundtable” discussion addressed, for example, acquisitions by non-exempt holding companies of non-utility subsidiaries.<sup>504</sup>

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494. *House Telecommunications Hearing*, *supra* note 490, at 12.

495. S. REP. NO. 351, 103d Cong., 2d Sess. (1994).

496. *House Telecommunications Hearing*, *supra* note 490, at 12.

497. *House Telecommunications Hearing*, *supra* note 490, at 12-13.

498. *House Telecommunications Hearing*, *supra* note 490, at 14-17 (prepared statement of Richard Y. Roberts, Commissioner, Securities and Exchange Commission).

499. *House Ohio Power Hearing*, *supra* note 385, at 35-46.

500. *House Telecommunications Hearing*, *supra* note 490, at 16.

501. *See, e.g.*, 59 Fed. Reg. 34,875 (1994) (notice of roundtable discussion to inaugurate comprehensive study of regulation under the Public Utility Holding Company Act of 1935).

502. *See generally In re Roundtable Discussion to Inaugurate Comprehensive Study of Regulation Under the Public Utility Holding Company Act of 1935*, HCAR No. 26077 (1994) (transcript of roundtable) (on file with author). “Others say that increased federal oversight is needed as companies more and more often diversify away from their core utility business. The time has come to step back and consider all aspects of this issue. We begin the task this morning with this roundtable discussion.” *Id.* at 6 (statement of SEC Chairman Levitt).

503. Lori A. Burkhardt, *Does PUHCA Inhibit Diversification?*, PUB. UTIL. FORT., Sept. 1, 1994, at 33.

504. *See, e.g.*, EDISON ELECTRIC INSTITUTE, NONUTILITY BUSINESS ACTIVITIES OF INVESTOR-OWNED ELECTRIC UTILITIES (1994). “The number of new diversified ventures is still growing rapidly, as diversified assets in the aggregate increase. The financial performance of utilities’ diversification efforts is not as discouraging as some would have you believe.” *Id.* at 22. *See also* Charles M. Studness, *Earnings From Utility Diversification Ventures*, PUB. UTIL. FORT., Sept. 1, 1992, at 28; *Diversification: Utilities Cautious But Still Interested*, ELECTRICAL WORLD, Dec. 1991, at 13.

Commissioner Roberts described the "roundtable" discussion and observed that there is a need for effective state and federal regulation of diversification by non-exempt holding companies into non-utility subsidiaries.<sup>505</sup> He stated, however, that the SEC lacked the resources to regulate effectively and that the recent experience of non-exempt holding companies with non-utility subsidiaries had not been positive.<sup>506</sup>

A third federal agency—the FCC—also testified on the participation of electric utilities in telecommunications services.<sup>507</sup> It observed that the FCC, in accordance with title II of the Communications Act, would be authorized to regulate non-utility subsidiaries of non-exempt holding companies that offered telecommunications services—but not information services—in interstate commerce.<sup>508</sup> Indeed, under title II, those non-utility subsidiaries would be required to file with the FCC schedules of charges for communications services.<sup>509</sup> The FCC would be authorized to review and, after administrative adjudication, to revise these schedules if the FCC deemed their charges unjust or unreasonable.<sup>510</sup> The FCC explained that a principal purpose of federal regulation of those non-utility subsidiaries should be to prevent cross-subsidization between public utility subsidiaries of non-exempt holding companies and their affiliated telecommunications subsidiaries.<sup>511</sup> The FCC acknowledged that Senate Bill 544 and House Bill 4645 reflected this purpose.<sup>512</sup> It observed, however, that it would be difficult for the FCC alone to prevent cross-subsidization because the FCC could regulate the telecommunications subsidiaries but not the public utility subsidiaries or the non-exempt holding companies. "Enforcement of the cross-subsidization prohibition [of Senate Bill 544 and House Bill 4645] presents a greater degree of challenge than in a case in which a single agency has jurisdiction over all the entities."<sup>513</sup>

Ronald E. Russell of the Michigan Public Service Commission, on behalf of NARUC, stated that the association, in accordance with a resolution it adopted in March 1994, was not opposed to federal legislation to authorize non-exempt holding companies to acquire telecommunications subsidiaries, if the legislation posed no threat to state regulation of electric utilities and retail electric power rates and sought to prevent cross-subsidi-

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505. *House Telecommunications Hearing*, *supra* note 490, at 16-17.

506. *House Telecommunications Hearing*, *supra* note 490, at 15-16.

507. *House Telecommunications Hearing*, *supra* note 490, at 18-20 (prepared statement of Michael L. Katz, Chief Economist, Federal Communications Commission).

508. "The FCC would have jurisdiction over interstate telecommunications services offered by the communications entities affiliated with registered holding companies." *House Telecommunications Hearing*, *supra* note 490, at 19.

509. 47 U.S.C. § 203(a) (1988).

510. *Id.* § 205(a).

511. "Adequate safeguards must be established to ensure that the costs of competitive telecommunications services are not recovered improperly from charges assessed to utility ratepayers." *House Telecommunications Hearing*, *supra* note 490, at 19.

512. *House Telecommunications Hearing*, *supra* note 490, at 19-20.

513. *House Telecommunications Hearing*, *supra* note 490, at 20.

zation and unfair competition.<sup>514</sup> Nonetheless, it expressed a reservation with a “piece-meal” amendment to PUHCA on electric utilities and telecommunications.<sup>515</sup> NARUC also echoed the recommendation of Chair Moler for the enactment of a legislative solution to the *Ohio Power* problem prior to or in conjunction with the enactment of federal legislation on electric utilities and telecommunications.<sup>516</sup> The association preferred the proposed Senate legislation to the proposed House legislation, which lacked a provision on state regulation of retail electric power rates.<sup>517</sup>

In addition to federal and state commissions, the House Committee on Energy and Commerce heard from several electric utilities, telecommunications companies, and public interest organizations. The Environmental Action Foundation and the Consumer Federation of America opposed an amendment to PUHCA to authorize non-exempt holding companies to acquire telecommunications subsidiaries.<sup>518</sup> “Allowing [non-exempt] holding companies to diversify into telecommunications opens a can of worms that could spell disaster for electricity ratepayers.”<sup>519</sup> The two public interest organizations also argued, however, that such an amendment should, for example, authorize state public utility commissions to review and, in certain circumstances, prohibit acquisitions by non-exempt holding companies of telecommunications subsidiaries.<sup>520</sup>

CSW testified (i) that the participation of electric utilities in the development of telecommunications technologies for DSM will accelerate the development of the NII; (ii) that the diversification of electric utilities into new businesses is essential for their continued financial success; (iii) that PUHCA is a serious impediment to such diversification; (iv) that no current public policies support the restrictions on diversification of non-exempt holding companies into non-utility subsidiaries; and, (v) that the financial failures non-exempt holding companies experienced with non-utility subsidiaries in the past provides no basis to reject an amendment to PUHCA to authorize non-exempt holding companies to acquire telecommunications subsidiaries.<sup>521</sup>

Southern Company presented numerous arguments for an amendment to PUHCA to repeal the “fifty-percent” standard and to authorize non-

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514. *House Telecommunications Hearing*, *supra* note 490, at 23-26 (prepared statement of Ronald E. Russell, Commissioner, Michigan Public Service Commission).

515. “[W]e are deeply concerned that in its piece-meal adoption of PUHCA amendments on a line-of-business by line-of business basis, Congress will lose sight of the cumulative effect that the resulting diversifications will have on [non-exempt holding companies].” *House Telecommunications Hearing*, *supra* note 490, at 25.

516. *House Telecommunications Hearing*, *supra* note 490, at 25-26.

517. *House Telecommunications Hearing*, *supra* note 490, at 26.

518. *House Telecommunications Hearing*, *supra* note 490, at 44-48 (prepared statement of Mark N. Cooper, Director of Research, Consumer Federation of America).

519. *House Telecommunications Hearing*, *supra* note 490, at 44.

520. *House Telecommunications Hearing*, *supra* note 490, at 44-46.

521. *House Telecommunications Hearing*, *supra* note 490, at 54-58 (prepared statement of Thomas V. Shockley, III, Executive Vice President, Central and South West Corporation).

exempt holding companies to acquire telecommunications subsidiaries.<sup>522</sup> "The 50% requirement serves as a major stumbling block to [non-exempt] holding company participation in the NII because markets do not segment themselves according to regulatory dictates."<sup>523</sup> Southern Company argued that the use of telecommunications technologies for DSM would generate revenues to fund in part the cost of the NII.<sup>524</sup> It also argued that no current public policies supported restrictions on diversification of non-exempt holding companies into non-utility subsidiaries.<sup>525</sup>

Bellsouth Telecommunications, Inc. (Bellsouth) was not opposed to the participation of electric utilities in telecommunications services but recommended an amendment to PUHCA to prevent cross-subsidization between public utility subsidiaries of non-exempt holding companies and their affiliated telecommunications subsidiaries and to subject telecommunications subsidiaries of non-exempt holding companies to FCC regulation.<sup>526</sup> In addition, Bellsouth argued that the common carrier obligations applicable to telecommunications companies under title II of the Communications Act should also be applicable to telecommunications subsidiaries of non-exempt holding companies.<sup>527</sup>

Finally, the Personal Communications Industry Association (PCIA), a trade association of companies engaged in wireless communications services, cautioned that an amendment to PUHCA to authorize non-exempt holding companies to acquire telecommunications subsidiaries, without appropriate safeguards and effective federal and state regulation, could result in unfair competition in telecommunications services through, for example, cross-subsidization between public utility subsidiaries of non-exempt holding companies and their affiliated telecommunications subsidiaries.<sup>528</sup> PCIA described a complaint filed with the Georgia Public Service Commission against Southern Communications,<sup>529</sup> a non-utility subsidiary

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522. *House Telecommunications Hearing*, *supra* note 490, at 60-65 (prepared statement of Paul J. DeNicola, President, Southern Company Services, Inc.).

523. *House Telecommunications Hearing*, *supra* note 490, at 62.

524. "[E]lectric utilities are prepared to build local broad band links in the near term because they have the end-uses ready now or in the immediate future that will support the investment." *House Telecommunications Hearing*, *supra* note 490, at 61.

525. *House Telecommunications Hearing*, *supra* note 490, at 64-65. "In this day and age, it seems a remarkable proposition that government should be presumed to make better investment choices than corporations disciplined by the hard realities of markets." *House Telecommunications Hearing*, *supra* note 490, at 64.

526. *House Telecommunications Hearing*, *supra* note 490, at 50-52. For example, Bellsouth argued that "[o]ther agencies, such as the FERC or the SEC, should not be required to extend their jurisdiction and expertise into these areas." *House Telecommunications Hearing*, *supra* note 490, at 51.

527. "Power companies, if permitted to provide communications services, additionally should have the same equal access and interconnection obligations applied to them as these obligations are applied to their competitors." *House Telecommunications Hearing*, *supra* note 490, at 52.

528. *House Telecommunications Hearing*, *supra* note 490, at 67-72 (prepared statement of William DeKay, President, PCF Development Corp.). "PCIA is concerned that cross-subsidization not infiltrate and poison the competitive telecommunications landscape." *House Telecommunications Hearing*, *supra* note 490, at 69.

529. *In re Transfer of Licenses from Georgia Power Co. to Southern Co.*, Docket No. 5236-U (Ga. P.U.C.).



the Southern Company proposes to form to manage and coordinate the telecommunications activities of the holding company system.<sup>530</sup> The complaint, PCIA claimed, provided "a current illustration of many of the dangers and challenges presented by the amendments under consideration."<sup>531</sup>

The House Committee on Energy and Commerce amended House Bill 3636 and, in June 1994,<sup>532</sup> issued a report thereon.<sup>533</sup> The reported bill was quite similar to the original bill. In particular, there was no provision in House Bill 3636, as reported, on the participation of electric utilities in telephone services. However, the House report acknowledged the potential for electric utilities to compete with local telephone companies in its discussion of the provisions in House Bill 3636, as reported, to require common carriers to provide to other common carriers equal access to their telecommunications facilities:

Electric utility companies may have the technological capacity to provide local telephone service. They already have a wire going into every home, a sophisticated distribution network, and are experienced in providing an essential service reliably to the public. One basis for the interest from electric utilities is their direct concern with energy conservation. Many utilities believe telecommunications holds the key to significant advances in energy load management and energy conservation. However, entry by electric utilities into the telecommunications markets necessitates a review of collateral issues involving energy and securities laws.<sup>534</sup>

The House debated House Bill 3636, as reported, in late June 1994.<sup>535</sup> On June 28, it approved the legislation on a vote of 423 to 4.<sup>536</sup> Upon approval, it was incorporated into House Bill 3626.<sup>537</sup>

#### CONCLUSION: DSM ON THE INFORMATION SUPERHIGHWAY

Electric utilities have begun to engage in telecommunications activities. Some electric utilities have leased or plan to lease to non-associated companies portions of fiber optics cables the electric utilities constructed for their own internal communications.<sup>538</sup> Electric utilities also have

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530. See, e.g., *In re Southern Co.*, HCAR No. 25996, 56 SEC Docket 587 (1993) (notice of Southern application for approval).

531. *House Telecommunications Hearing*, *supra* note 490, at 70.

532. 134 CONG. REC. H4995 (daily ed. June 24, 1994).

533. H.R. REP. NO. 560, 103d Cong., 2d Sess. (1994).

534. *Id.* at 41.

535. See, e.g., 134 CONG. REC. E1332 (daily ed. June 27, 1994) (statement of Representative Nussle in support of House Bill 3636); *id.* at E1368 (daily ed. June 29, 1994) (June 28 statement of Representative Quinn in support of House Bill 3636); *id.* at E1398 (daily ed. June 30, 1994) (June 28 statement of Representative Hughes in support of House Bill 3636); *id.* at E1435 (daily ed. July 12, 1994) (June 28 statement of Representative Kyl in support of House Bill 3636); *id.* at E1439 (June 28 statement of Representative Slattery in support of House Bill 3636); *id.* at E1450 (daily ed. July 13, 1994) (June 28 statement of Representative Paxon in support of House Bill 3636).

536. 134 CONG. REC. H5247-48 (daily ed. June 27, 1994).

537. *Id.* at H5248. See also *id.* at E1390 (daily ed. June 30, 1994) (statement of Representative Swett) ("I strongly urge the [Senate] to move swiftly in passing similar legislation so that a conferenced bill can be approved and sent to the President for signature before the end of this session.").

538. See, e.g., *In re Jersey Cent. Power & Light Co.*, HCAR No. 26095, 57 SEC Docket 781 (Aug. 2, 1994); *In re Central & S. W. Corp.*, HCAR No. 26061, 56 SEC Docket 2725 (June 3, 1994).

invested and plan to invest in telecommunications technologies for DSM.<sup>539</sup> Finally, electric utilities hope to engage in telecommunications activities, unrelated to the generation, transmission, and distribution of electric power,<sup>540</sup> and to offer cable television, telephone service, and other traditional telecommunications services<sup>541</sup>—as well as PCS and other non-traditional telecommunications services.<sup>542</sup>

The participation of electric utilities in the “information superhighway” raises several legal issues.<sup>543</sup> Congress, in its consideration of Senate Bill 1822, the Communications Act of 1994,<sup>544</sup> and House Bill 3636, the National Communications Competition and Information Infrastructure Act of 1994,<sup>545</sup> addressed some of these issues. Comprehensive communications reform legislation is certain to be re-introduced in Congress in 1995. This reform legislation should, of course, address these issues.

First, the reform legislation should include an amendment to PUHCA to facilitate the formation or acquisition by non-exempt holding companies of non-utility subsidiaries to engage in telecommunications activities. Senate Bill 1822 would have added to PUHCA Section 34, which would have established an exemption from the requirements of PUHCA for “communications entities” of non-exempt holding companies that engaged in telecommunications services. There was, however, no provision in House Bill 3636 on the participation of electric utilities in telecommunication services.

Second, the reform legislation should include a solution to the *Ohio Power* problem. Senate Bill 1822 would have added to section 318 of the Federal Power Act the provisions of Senate Bill 544 and would have authorized the FERC to determine the extent to which electric utilities could recover, in rates for interstate wholesale electric power, costs incurred under contracts between subsidiaries within the same holding company system. There was, however, no provision in House Bill 3636 on the *Ohio Power* problem.

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539. See generally U.S. DEPARTMENT OF ENERGY, PROPOSAL FOR DEMONSTRATING THE POTENTIAL OF INNOVATIVE COMMUNICATIONS EQUIPMENT AND SERVICES FOR UTILITY APPLICATIONS (Sept. 1993). “When DSM is coupled with remotely-provided information services to help . . . buy and manage . . . power, the more comprehensive term Energy Information Services (EIS) is used.” OPPORTUNITIES AND RISKS, *supra* note 33, at 2-6.

540. But see OPPORTUNITIES AND RISKS, *supra* note 33, at 2-7 (“The principal reason for a utility to become involved in telecommunications is to support supply side information systems that can help the utility to become more efficient or more competitive in its generation, transmission, and distribution functions and to provide EIS to its customers.”).

541. See, e.g., OPPORTUNITIES AND RISKS, *supra* note 33, at 7-1 to 7-33 (telecommunications markets—services and providers).

542. “Some form of involvement in PCS will appeal to energy companies that want to lead . . .” Sheila S. Hollis & John W. Berresford, *The Next Generation: Energy Companies in Telecom*, PUB. UTIL. FORT., May 1, 1994, at 16, 18. See, e.g., OPPORTUNITIES AND RISKS, *supra* note 33, at 10-1 to 10-44 (personal communications systems).

543. See, e.g., OPPORTUNITIES AND RISKS, *supra* note 33, at 8-1 to 8-24 (regulation of utility entry into telecommunications).

544. S. 1822, 103d Cong., 2d Sess. (1994).

545. H.R. 3636, 103d Cong., 1st Sess. (1993).

Senate Bill 1822, in these two respects, establishes an ideal pattern for comprehensive communications reform legislation introduced in 1995. In one respect, however, the reported bill should be reconsidered. Senate Bill 1822, as reported, included an amendment to PUHCA to facilitate the formation by non-exempt holding companies of non-utility subsidiaries to engage in telecommunications activities. The amendment, however, might have impeded the formation by non-exempt holding companies of non-utility subsidiaries to engage in DSM.

Senate Bill 1822, as reported, would have added to PUHCA Section 34, which would have established an exemption from the requirements of PUHCA—but not from the requirements of the Communications Act—for “communications entities” of non-exempt holding companies that engaged in telecommunications services—“including energy and demand-side management . . . .” Thus, non-utility subsidiaries of non-exempt holding companies that provided telecommunications services for DSM, under Senate Bill 1822, as reported, would be communications entities under section 34 of PUHCA, and thus would not be subject to the requirements of PUHCA but would be subject to the requirements of title II of the Communications Act. Conversely, the exclusion of DSM from the purview of section 34 would subject non-utility subsidiaries of non-exempt holding companies that provided telecommunications services for DSM to the requirements of PUHCA but not to the requirements of title II of the Communications Act.

Title II of the Communications Act would (i) require all charges, practices, classifications, and regulations relative to telecommunications services for DSM to be just and reasonable;<sup>546</sup> (ii) prohibit unjust or unreasonable discrimination for charges, practices, classifications, and regulations relative to telecommunications services for DSM;<sup>547</sup> (iii) require schedules of charges, as well as amendments to those schedules, for telecommunications services for DSM to be filed with the FCC and to be available for public inspection;<sup>548</sup> (iv) subject schedules of charges or amendments thereto to administrative adjudication before the FCC;<sup>549</sup> and, (v) authorize the FCC, after administrative adjudication, to determine and prescribe charges if a schedule of charges or an amendment thereto is deemed unjust or unreasonable.<sup>550</sup>

Conversely, PUHCA would require the SEC to approve in advance the sale of securities,<sup>551</sup> as well as the acquisition of securities,<sup>552</sup> by non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities for DSM. It would require the SEC to approve in advance specified financial transactions between non-exempt holding

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546. 47 U.S.C. § 201(b) (1988).

547. *Id.* § 202(a).

548. *Id.* § 203(a).

549. *Id.* § 204(a)(1).

550. *Id.* § 205(a).

551. 15 U.S.C. §§ 79f-79g (1988).

552. *Id.* §§ 79i-79j.

companies and their subsidiaries that engage in telecommunications activities for DSM.<sup>553</sup> It also would require the SEC to approve in advance service, sales, and construction contracts between subsidiaries that engage in telecommunications activities for DSM and subsidiaries within the same non-exempt holding company system.<sup>554</sup> Finally, PUHCA would require non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities for DSM to maintain SEC-prescribed accounts and records, which are subject to SEC audit.<sup>555</sup>

For several reasons, the reform legislation that is certain to be re-introduced should exclude from the purview of section 34 non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities for DSM. Under this proposal, non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities for DSM would not be subject to regulation by the FCC under title II of the Communications Act but—ineligible for the exemption from the requirements of PUHCA for communications entities—would continue to be subject to regulation by the SEC under PUHCA.

First, the SEC has regulated for over a decade non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities for DSM.<sup>556</sup> The FCC never has regulated such subsidiaries. Second, and similarly, it is reasonable to subject to FCC regulation non-utility subsidiaries of non-exempt holding companies that offer telephone service and other traditional telecommunications services because there are now no such subsidiaries subject to SEC regulation. Conversely, it is unreasonable to subject to FCC regulation non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities for DSM because there are now such subsidiaries subject to SEC regulation.

Third, in several legislative initiatives, from the Energy Policy and Conservation Act of 1975<sup>557</sup> through the Energy Policy Act of 1992,<sup>558</sup> the federal government has encouraged electric utilities to engage and invest in DSM.<sup>559</sup> In October 1992, the TDDRA directed the DOE to propose a demonstration of the use of telecommunications for DSM.<sup>560</sup> To be consistent with federal policies relative to DSM, federal regulation of non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities for DSM should facilitate and not impede the formation of such subsidiaries and thus should be *de minimis* or otherwise impose the legal regime, from the available alternatives, with the least rigorous requirements. In this respect, PUHCA, it could be argued, is preferable to title II of the Communications Act.

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553. *Id.* § 79l.

554. *Id.* § 79m.

555. *Id.* § 79o.

556. *See, e.g., In re Southern Co.*, 31 SEC Docket 700 (1984).

557. *See generally* 42 U.S.C. §§ 6201-6422 (1988).

558. *See generally* Pub. L. No. 102-486, 106 Stat. 2776 (1992).

559. *See generally* James W. Moeller, *Electric Demand-Side Management Under Federal Law*, 13 V.A. ENVTL. L.J. 57 (1993).

560. Pub. L. No. 102-556, § 401(b)(2), 106 Stat. 4181, 4194 (1992).

Fourth, the rigorous common carrier obligations under title II of the Communications Act are applicable to telephone and telegraph companies that provide telecommunications services to the general public. However, non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities for DSM would provide telecommunications services to electric utilities alone and would not provide telecommunications services to the general public. Thus, the FCC should not regulate under title II of the Communications Act non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities for DSM.

Fifth, and similarly, there is no need for FCC regulation of rates for DSM-related telecommunications services offered through non-utility subsidiaries of non-exempt holding companies. Under title II of the Communications Act, the FCC would be authorized, after administrative adjudication, to determine and prescribe charges for DSM-related telecommunications services if a schedule of charges was deemed unjust or unreasonable. In contrast, under PUHCA, the SEC would not be authorized to determine and prescribe charges for DSM-related telecommunications services. Thus, it could be argued, the FCC should regulate non-utility subsidiaries of non-exempt holding companies that engage in telecommunications activities for DSM. There is no need, however, for federal regulation of charges for DSM-related telecommunications services, which would be reflected in rates and charges for retail electric power—the regulation of which is the prerogative of state public utility commissions.

Sixth, and finally, there is no indication in the congressional hearings on Senate Bill 1822,<sup>561</sup> or in the report the Senate Committee on Commerce, Science and Transportation issued on Senate Bill 1822 in September 1994,<sup>562</sup> that the inclusion of DSM within the purview of section 34 was in furtherance of significant or important federal policies. Indeed, the amendment to PUHCA to facilitate the formation by non-exempt holding companies of non-utility subsidiaries to engage in telecommunications activities could have been unintentional.

To be sure, the inclusion of DSM within the purview of a legislative amendment to PUHCA to facilitate the formation or acquisition by non-exempt holding companies of non-utility subsidiaries to engage in telecommunications activities would provide one unique advantage. Eligible for the exemption from the requirements of PUHCA for communications entities, non-utility subsidiaries that engage in telecommunications activities would not be subject to the “fifty-percent” standard the SEC has established to ensure a “functional relationship” between utility activities of non-exempt holding companies and the activities and operations of non-

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561. See generally *S. 1822—Communications Act of 1994: Hearings Before the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. (1994).

562. See generally *S. REP. NO. 367*, 103d Cong., 2d Sess. (1994).

utility subsidiaries formed or acquired to engage in telecommunications activities.<sup>563</sup>

This advantage, however, could be short-lived. The SEC has initiated an assessment of the need for comprehensive modernization of PUHCA. In July 1994, the SEC conducted a "roundtable" discussion of PUHCA to initiate the assessment.<sup>564</sup> In November 1994, the SEC published a "concept release" to solicit public comments on the need for comprehensive modernization of PUHCA.<sup>565</sup> When the assessment is completed, the SEC could conclude that the "fifty-percent" standard should be eliminated.

In particular, the "concept release" discusses PUHCA from a historical perspective and relative to other statutes for federal regulation of electric utilities<sup>566</sup>—for example, the Public Utility Regulatory Policies Act,<sup>567</sup> the Gas-Related Activities Act,<sup>568</sup> and the Energy Policy Act.<sup>569</sup> The "concept release" also discusses electric utilities from a historical perspective. "The electric . . . utility industry is in transition. The rapid growth that characterized the industry in the early part of this century has diminished. In addition, companies must adapt to an increasingly competitive environment."<sup>570</sup>

In conclusion, the "concept release" invites public comments on the need for comprehensive modernization of PUHCA in general and, in particular, on (i) financial transactions between non-exempt holding companies and their subsidiaries, as well as service, sales, and construction contracts between subsidiaries within the same non-exempt holding company system; (ii) acquisitions by non-exempt holding companies of electric utilities; (iii) exemptions under section 3 of PUHCA; (iv) SEC audits of non-exempt holding companies; and, (v) acquisitions by non-exempt holding companies of non-utility subsidiaries.<sup>571</sup>

With respect to non-utility subsidiaries,<sup>572</sup> the "concept release" invites public comments on the "functional relationship" requirement of

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563. See, e.g., *In re Jersey Cent. Power & Light Co.*, HCAR NO. 26095, 57 SEC Docket 781 (Aug. 2, 1994); *In re Central & S. W. Corp.*, HCAR No. 26061, 56 SEC Docket 2725 (June 3, 1994); *In re Appalachian Power Co.*, HCAR 24772, 42 SEC Docket 718 (1988).

564. See generally *In re Roundtable Discussion to Inaugurate Comprehensive Study of Regulation Under the Public Utility Holding Company Act of 1935*, HCAR No. 26077 (1994) (transcript of roundtable) (on file with author); Lori A. Burkhardt, *Does PUHCA Inhibit Diversification?*, PUB. UTIL. FORT., Sept. 1, 1994, at 33.

565. HCAR No. 26,153, 59 Fed. Reg. 55,573 (1994). "The Commission is undertaking a thorough evaluation of [PUHCA] to review the regulatory framework in light of developments in recent years and to consider how federal regulation of utility holding companies can best serve the interests of investors, consumers, and the general public in the years to come." 59 Fed. Reg. 55,573, 55,574 (1994).

566. 59 Fed. Reg. 55,573, 55,576 (1994).

567. Pub. L. No. 95-617, 92 Stat. 3117 (1978).

568. Pub. L. No. 101-572, 104 Stat. 2810 (1990).

569. Pub. L. No. 102-486, 106 Stat. 2776 (1992).

570. 59 Fed. Reg. 55,573, 55,577 (1994).

571. *Id.* at 55,578-83.

572. See, e.g., EDISON ELECTRIC INSTITUTE, *NONUTILITY BUSINESS ACTIVITIES OF INVESTOR-OWNED ELECTRIC UTILITIES* (1994); Charles M. Studness, *Earnings From Utility Diversification Ventures*, PUB. UTIL. FORT., Sept. 1, 1992, at 28.

section 11 of PUHCA and on the “fifty-percent” standard.<sup>573</sup> It questions, for example, if the “fifty-percent” standard should be eliminated.<sup>574</sup>

Finally, the cost of this advantage—non-utility subsidiaries that engage in telecommunications activities would not be subject to the “fifty-percent” standard—appears to be expensive. The inclusion of DSM within the purview of a legislative amendment to PUHCA to facilitate the formation or acquisition by non-exempt holding companies of non-utility subsidiaries to engage in telecommunications activities would authorize DSM-related telecommunications services without limitation under the “fifty-percent” standard, but would subject DSM-related telecommunications services to regulation under title II of the Communications Act—in effect, the “fifty-percent” standard in exchange for FCC common carrier regulation, which, it could be argued, is not an attractive trade for non-exempt holding companies.

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573. 59 Fed. Reg. 55,573, 55,581 (1994). The “concept release” explains that the “functional relationship requirement was intended to focus the attention of the registered holding company on its operating utilities in order to protect consumers and investors from risks associated with unrelated businesses.” *Id.*

574. “Should there be limits on diversification by [non-exempt] holding companies?” *Id.*

APPENDIX: PROPOSED AMENDMENT TO PROPOSED  
SECTION 34 OF PUHCA

SEC. 34. PARTICIPATION IN PROVISION OF TELECOMMUNICA-  
TIONS SERVICES.

(a) EXEMPTION OF COMMUNICATIONS ENTITIES FROM  
APPLICABILITY OF ACT. — A communications entity shall be  
exempt from all provisions of this Act, whether or not it is a subsidiary  
company, an affiliate, or an associate company of a holding company.

\* \* \*

(i) DEFINITIONS. — For purposes of this section:

(1) COMMUNICATIONS ENTITY. —

(A) IN GENERAL. — The term “communications  
entity” means any person determined by the [SEC],  
whether through ownership of facilities, in the provision  
of services, or otherwise, directly (or indirectly through  
ownership of securities or any other interest) and exclu-  
sively in the business, wheresoever located, of providing  
telecommunications services, information services, or  
other products or services set forth in or subject to the  
Communications Act of 1934, or products or services  
related or incidental thereto, ~~including energy and  
demand-side management services (but not the manu-  
facturing of devices or products except to the extent such  
devices or products relate to the provision of electric or  
gas services, and energy and demand-side management  
services).~~

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