WHEELING FOR COGENERATION and SMALL POWER PRODUCTION FACILITIES

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INTRODUCTION

There is a growing interest in decentralized power sources involving cogeneration and small power production. New problems have arisen regarding the ability to wheel such power between electric utilities or between various industrial facilities within a common geographical area. Since marginal fuel costs within the region play an important role in the economic attractiveness of decentralized power sources, some project sponsors believe that, if the electric utilities could be induced to adopt more liberal wheeling policies, cogeneration and small power production could be increased in those regions where marginal utility costs are lower. There are some industrial users who believe that operating efficiencies, cost savings, and security of electric power supplies could be achieved through wheeling of excess power to industrial facilities owned by the same corporation within a common geographic area. All of this discussion, however, must take into consideration various statutory and regulatory constraints.

This article will explore the historical and present positions of the Federal Power Commission, now the Federal Energy Regulatory Commission (FERC or Commission), as it has interpreted its authority under Part II of the Federal Power Act (Act)[1] to order the wheeling of electric power. From the earliest expression of the Commission's position in 1969,[2] the Act has been interpreted as providing the Commission no authority to order wheeling. This position has been maintained throughout the 1970's during which the Commission held that interconnection and transmission of power within a common geographical area to *third parties* must remain on a voluntary basis, relying on 16 U.S.C. §824a(a), and that the appropriteness of such interconnections is to be measured by the dictates of the public interest, relying on 16 U.S.C. §824a(b).

We will also outline and discuss related antitrust issues which often arise within the context of wheeling and the possibilities of recognizing potential antitrust violations as a factor in promoting wheeling arrangements. An indepth discussion will follow on the impact of the Public Utility Regulatory Policies Act (PURPA), which was passed by Congress in 1978, Public Law No. 95-617, 16 U.S.C. §§2601, *et seq.*, amending Part II of the Act. Under PURPA, the Commission can direct an electric utility to provide trans-

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[1]Part II of the Act is entitled: "Regulation of Electric Utility Companies Engaged in Interstate Commerce," 16 U.S.C. §§824, *et seq.*

[2]*See* City of Paris v. Kentucky Utilities Co., 41 F.P.C. 45 (1969).

mission services. This power, however, can only be exercised after a series of complex findings by the Commission through evidentiary hearings. *See* Section 212(a) of PURPA. PURPA, in addition, amended other sections of the Federal Power Act to provide various rate incentives and exemptions for cogeneration and small power production facilities, 16 U.S.C. §842a-3. This article will also explore possibilities for state approaches to wheeling where common carrier concerns may impact, and where wheeling for cogeneration and small power production facilities can enhance the operating efficiencies of state and local facilities. Finally, the article will offer some suggestions on how to promote and encourage increased wheeling arrangements.

A. *FPC and FERC Authority Over Wheeling Prior to PURPA*

Wheeling has been defined by the Supreme Court as:

> . . .transfer by direct transmission or displacement [of] electric power from one utility to another over the facilities of an intermediate utility.

Otter Tail Power Co. v. United States, 410 U.S. 359, 363, *reh. denied,* 411 U.S. 910 (1973); *remanded,* 360 F.Supp. 451, *aff'd,* 417 U.S. 901 (1974). More explicitly, Judge Skelly Wright observed:

> . . .under this section [§202a(b)] [a privately owned public utility can] be ordered to transmit the power of *another* for the benefit of third parties — that is, to 'wheel' for another utility. . .

City of Paris v. FPC, 399 F.2d 983, 984 (D.C. Cir. 1968) (Emphasis in original). In the *City of Paris* case, the Court required the Commission tod ecide first, whether Kentucky Utilities Company could be ordered to wheel for another utility, and second, whether it would be in the public interest to do so. *Id.* at 985. Yet, in a cryptic footnote, the Court gave the Commission the opportunity to avoid reaching the broader question of "wheeling" authority if in its findings the public interest in this instant case did not require so. *Id.* n.3 at 385. On remand, the Commission concluded that wheeling:

> . . .means the *obligation* of one public utility to make its transmission facilities available to 'facilitate' a power supply contract between two other unconnected electric companies. (Emphasis supplied.)

41 F.P.C. at 47 (Emphasis supplied.). The Commission concluded it was forced to reject wheeling because Congress had purposely eliminated a provision placing a *common carrier* duty upon a public utility. *Id.* at 46.[3]

The Supreme Court in the *Otter Tail* case elaborated further on this point:

> As originally conceived, Part II would have included a 'common carrier' provision making it the duty of every public utility to . . . transmit energy for any person upon reasonable request

[3]The Commission, however, recognized that as part of its conditioning power in issuing licenses under Part I of the Act, it can insert "wheeling" conditions. 41 F.P.C. at 48. But in reviewing legislative history and court precedent, the Commission decided that Part II, which was enacted fifteen years after Part I, did not grant this same authority. *See* in particular, Idaho Power Co. v. FPC, 189 F.2d 665 (D.C. Cir. 1951), *rev'd,* FPC v. Idaho Power Co., 344 U.S. 17 (1952). The issue in the *Idaho Power* cases was the authority of the Commission to include in a Part I license a condition requiring licensee to convert transmission lines to 230 kv at the Secretary of Interior's request to allow power generated by the United States to be transmitted over licensee's lines. Although the Court of Appeals held that Part I did not include this authority, the Supreme Court reversed.

> . . . . In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be 'necessary or desirable in the public interest.' H.R. 5423, 74th Cong., 1st Sess.; S. 1725, 74th Cong., 1st Sess. These provisions were eliminated to preserve 'the voluntary action of the utilities.' S. Rep. No. 621, 74th Cong., 1st Sess., 19.

410 U.S. at 366.

In the *City of Paris,* the city of Paris, Kentucky, had filed a complaint against Kentucky Utilities Company, a public utility, asking the Commission to interconnect its electric transmission facilities with those of Paris and the East Kentucky Rural Electric Corporation (REC). The Commission had determined originally in Opinion No. 525, 38 F.P.C. 269, 271-72 (1967), that REC was a government instrumentality, exempted under Section 201(f), 16 U.S.C. 824(f) of the Act. REC and the public utility had contractual arrangements embodied in FPC Rate Schedule No. 73. Nevertheless, the Commission concluded that these contractual arrangements with REC did not obligate a public utility to operate its system for the benefit of a municipality.

While the Congress provided for the exemption of government instrumentalities in Section 201(f) of the Act, the whole issue of wheeling, meanwhile, is an interpretive one. Prior to the enactment of PURPA, there was no mention in the Act of "wheeling." Not even the complainant in the *City of Paris* case used the word, a fact observed by the Commission:

> Its [Paris] complaint to the Commission avoids a semantic trap by not asking the Commission to compel Kentucky Utilities to *wheel* for Paris.

41 F.P.C. at 50 (Emphasis supplied.).

As we have already noted, the Supreme Court in the *Otter Tail* decision specifically held that the Commission has no authority under Prt II of the Act to order wheeling. The interesting aspect of the *Otter Tail* case is the antitrust ramifications which permeate many proceedings in which "wheeling" is at issue. The *Otter Tail* case began as a civil antitrust suit brought by the Department of Justice under Section 2 of the Sherman Act, 15 U.S.C. §2. According to the government, Otter Tail was attempting to prevent communities from replacing their service with a municipal distribution system after their retail distribution franchise had expired. Relying on its wheeling contracts with the Bureau of Reclamation and Cooperatives and denying any obligation to wheel power to municipalities served at retail by Otter Tail at the time the contracts were signed, Otter Tail argued that, if the Company were required to wheel electric power to more and more municipalities, it soon would be out of business. Further, Otter Tail contended it was exempt from antitrust regulations by reason of the Act.[4]

The Supreme Court summarily dealt with both arguments. It held that "the promotion of self interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." 410 U.S. at 369. Further, "activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Id.* at 365.

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[4]Since 1947, Otter Tail had been acquiring municipal systems in Minnesota, North and South Dakota. Among the antitrust charges were the allegations that Otter Tail was preventing these cities from voting to establish their own municipal systems when Otter Tail's franchise in these towns expired. In furtherance of its attempt to monopolize, the Supreme Court noted that Otter Tail refused to sell energy to the new systems at wholesale and refused to wheel power from other available suppliers.

While the focus of the Commission and Supreme Court was Section 202 of the Act in the *City of Paris* and *Otter Tail* cases, the issue of the Commission's authority to compel wheeling also arose in a rate proceeding. In *Southern California Edison Co.*, 50 F.P.C. 1479 (1973), the Anza Electric Cooperative, Inc. argued that if Southern California Edison Company voluntarily provided wheeling service to some of its customers, then the Commission had the authority to order the company to wheel to all of its customers. The Commission disagreed:

> If this Commission does not have authority to order wheeling under Section 202 of the Federal Power Act, we fail to see how we can order wheeling, as a remedy for violation of antitrust laws, under Section 205 of the Federal Power Act. *The Company's voluntary agreement to provide such service to some customers does not indirectly vest the Commission with powers which the Supreme Court has indicated it does not have directly.*

50 F.P.C. at 1481 (Emphasis supplied.).

An assertion of undue discrimination, therefore, will not necessarily require that transmission service be offered to all customers if it is offered to some customers served by the electric utility. Indeed, the Commission in *New England Power Pool Participants,* Docket Nos. RM 74-22 and E-8589, Order issued on September 26, 1975, was even more emphatic when it stated in that case:

> Accordingly, since we may not compel a public utility to wheel energy generated by another utility and transmit it to a third party who is a customer of the generating party, we may not, by indirection, require wheeling by directing the public utility to offer to such third party a rate schedule and service agreement containing provisions for wheeling service. (Footnote omitted). . . *[W]e do not conclude that transmission service withheld from one party while being offered to other electric systems is in itself a difference which as a matter of law would constitute undue discrimination.* Since the Act does not require such voluntary transmission service in the first instance, what may or may not be unduly discriminatory treatment must reflect that reality. (Emphasis supplied.)[5]

While claims of discrimination in providing transmission service will be examined in the context of the voluntary nature of the service, this does not necessarily mean, however, that the Commission is precluded from finding some wheeling arrangements unduly discriminatory. The Commission has considered its authority over wheeling during its review of particular power pooling agreements. Although the Commission in *New England Power Pool Agreement,* Docket No. E-7690, Opinion No. 755, issued September 10, 1976, has recognized that power pools are *based on voluntary interconnections* under Section 202(a) of the Act and that the Commission has no authority to order pooling or wheeling, the Commission nevertheless can order changes in the provisions governing a pool agreement, including those concerning wheeling, which are found to be unduly discriminatory.

Subsequently, in *Town of Norwood v. FERC,* 587 F.2d 1306 (D.C. Cir. 1978), the Court of Appeals remanded a Commission order to permit it to determine whether the Boston Edison Company (Boston Edison) violated Section 205 of the Act. Norwood alleged a violation of the Act because Boston Edison had fixed-price contracts with other utilities for "wheeling" and transmitting

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[5] *See also* Northern California Power Agency v. FPC, 514 F.2d 184 (D.C. Cir. 1974), *cert. denied,* 423 U.S. 863 (1975).

power at a lower rate than that which was proposed to Norwood. Specifically, Norwood wished to purchase power from the New England Power Company (NEPCO) at a cheaper price and utilize Boston Edison's transmission line to wheel the NEPCO power. Relying on two previous decisions,[6] the Commission rejected Norwood's argument stating that under the Act rates only have to be "just and reasonable," and if other jurisdictional customer rates are not challenged, there is no undue discrimination under Section 205(b).

Although the courts have made it clear that the Commission can review and modify transmission agreements,[7] any attempts to require involuntary wheeling prior to the passage of PURPA have been rejected. The recent decision by the United States Court of Appeals for the Fifth Circuit in *Florida Power & Light Co. v. FERC,* 5th Cir. No. 80-5259, decided November 6, 1981, is illustrative. In that case, Florida Power & Light Company had a policy to negotiate separate interchange and wheeling arrangements with various municipalities. Because of the similarity of the various individual agreements, the Commission required the Company to file a single tariff which also would have incorporated a policy statement on availability contained in testimony of a Company official. On appeal, the Court agreed with the Company that the Commission decision was tantamount to requiring Florida Power & Light Company to become a common carrier and, as such, it would be obligated to serve all qualifying customers in the future.

The *Florida Power & Light* case has two other significant aspects. First, the appellate court was clear that, although the Commission's order was issued *after* the passage of PURPA, the Commission did not attempt to justify its order by relying on that statute which "expanded the Commission's power to include the authority to compel wheeling in certain circumstances." Slip op. 12813 n. 15. Second, the Court acknowledged that it was questionable whether the Commission could order wheeling to remedy anti-competitive conduct. Whereas the D.C. Circuit suggested wheeling as a remedy in dictum[8] and the Second Circuit disagreed about compliance with the requirements of PURPA,[9] the court in the *Florida Power & Light* case found it unnecessary to address this issue because the Commission had not relied upon this rationale as the basis of its order.[10] But later in its opinion, the court of appeals somewhat inconsistently asserted (Slip Op. 12812):

> Instead, as we read the orders, the Commission was attempting to foster competition in the Florida area. While we deem this a laudable goal, we conclude that, in the absence of findings of specific anticompetitive activities or antitrust violations, the Commission is without authority under the FPA to compel wheeling. We pretermit decision on whether the

[6]*See* United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). In *Sierra* a fixed rate *may* be increased if undue discrimination is present only, however, if doing so is consistent with the policies behind the so-called *Mobile-Sierra* doctrine. The interrelation of Section 205(b) and the *Mobile-Sierra doctrine* rests on a three-prong test enunciated in the *Sierra* case which can require upward revision of the lower contractural rate.

[7]*E.g.*, New York State Electric & Gas Corp. v. FERC, 638 F.2d 388 (2d. Cir. 1980); Richmond Power and Light of Richmond, Indiana v. FERC, 574 F.2d 610 (D.C. Cir. 1978).

[8]Richmond Power & Light of Richmond, Indiana v. FERC, 574 F.2d 610, 623 (D.C. Cir. 1978).

[9]New York State Electric & Gas Corp. v. FERC, 638 F.2d 388, 400 (2nd Cir. 1980).

[10]In passing, the court noted that Florida Power & Light Company's conduct in the past had not been "exemplary" citing its decision in Gainesville Utilities Department v. Florida Power & Light Co., 573 F.2d 292 (5th Cir.), *cert. denied,* 439 U.S. 966 (1978) and Commission Opinion No. 57, 32 P.U.R. 4th 313 (1979), appeal dismissed *sub nom.* Florida Power & Light Co. v. FERC, No. 79-2414 (D.C. Cir. April 25, 1980).

Commission has authority to compel wheeling as a remedy for specific finding of anticompetitive activities or antitrust violatioins.

At this point, it is sufficient to note that the language of the Court may potentially form the basis for a wheeling order under PURPA since the antitrust laws constitute one element of the "public interest."[11] In any event, as one can readily observe from Commission and court decisions prior to PURPA, wheeling had to be *voluntary* and wheeling for some customers at the expense of others was not necessarily discriminatory. Only antitrust behavior moved the courts to grant some relief. Because of the statutory restrictions of the Act and the limited remedies under the antitrust laws, it is not surprising that Congress went back to the drawing boards and developed new legislation to remove the impasse.

B. *The PURPA Amendments Governing Wheeling*

In 1978, Congress amended Part II of the Act to provide certain interconnection and wheeling authority when it enacted PURPA. PURPA must be viewed in tandem with the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301 *et seq.*, and the National Energy Conservation Policy Act of 1978, as amended, 42 U.S.C. §§8301 *et seq.* The summary of H.R. 8444, reported favorably by the Ad Hoc Energy Committee (H. Rep. No. 95-542, 95th Cong. 2d Sess. 21, *reprinted in* [1978] U.S. Code Cong. and Ad. News 690, Chapter 3 of Part V of Title I entitled "Improving Efficiency of, and Preserving Competition in, Generating and Transmission of Electricity") outlines the general provisions which expand the authority of the Commission to order interconnections between electric utilities and to order wheeling of electric power to utilities. In the introduction, the Ad Hoc Energy Committee — which represents the first time Congress in its history established a special committee designed to reconcile all the recommendations of the standing energy committees — looked to "fashion a comprehensive legislative package" to deal with "[t]he fundamental problem for U.S. energy policy [which] is the insecurity of its oil supply." *Id.* at 7673.

The Conference Committee in House Conference Report No. 95-1750, 95th Cong., 2d Sess. 63, makes clear the conferees intended to preserve the jurisdiction of the Federal and state courts in antitrust law matters whether or not parties have sought remedies under the present legislation:

> Specifically with regard to certain authorities to order interconnections and wheeling under Title II [changed from Title I], it is not intended that the courts defer actions arising under the antitrust laws pending a resolution of such matters by the [Commission] . . . Courts have jurisdiction to proceed with antitrust cases without deferring to the Commission for the exercise of primary jurisdiction.

Id. at 7802.

The conferees emphasized that the term "efficient use of facilities and resources" included efficient use of both existing facilities and resources as well as resources reasonably contemplated in the future. Sections 202 and 203 of Title II of PURPA, *Id.* at 7824-25. In addition under Section 203 which

[11] *E.g.,* Gulf States Utilities Co. v. FPC, 518 F.2d 450 (D.C. Cir. 1975).

adds Sections 211 and 212 to the Act, entitled "Wheeling"[12] no order can be used under subsection (a) nor can any facility apply for transmission service under Section 211 unless the Commission determines it is (1) in the public interest; (2) would conserve a significant amount of energy, or significantly promote the efficient use of facilities and resources, or improve the reliability of one or more of the utility systems to which the order applies; and, (3) meet the requirements of Section 212." *Id.* at 7825. The conferees did not intend that the wheeling authority granted by Section 203 should affect the authority of the Commission under other provisions of law to order wheeling for continuation of service, *i.e.*, orders under this section never were intended to be used to require utilities to enter into buying and selling power arrangements. Rather, it was the intent of the conferees to require a third party to provide transmission services between a *willing* buyer and seller. *Id.* at 7826.

The new Section 212 of the Act requires a facility to meet certain requirements before it can apply for transmission service under new Section 211. The requirements include a determination by the Commission that such an order is not likely to result in a reasonably ascertainable uncompensated economic loss for any electric utility, qualifying cogenerator, or qualifying small power producer affected by the order. There can be no undue burden on an electric utility, qualifying cogenerator, or qualifying smallpower producer affected by the order, nor can it unreasonably impair the reliability of any electric utility affected by the order. Finally, it cannot unreasonably impair the ability of any electric utility affected by the order to render adequate service to its customers.

PURPA also created other procedural requirements that must be satisfied before a wheeling order can be granted. For instance, Section 211(b)(1) authorizes the Commission to issue a wheeling order if the Commission determines that: (1) the other utility has been requested to provide wheeling services to the applicant; (2) the other utility has provided applicant with actual or constructive notice that it is unwilling or unable to provide transmission service; and (3) the other utility has provided applicant with actual or constructive notice that it is unwilling or unable to provide its electric service requirements.

Further, Section 211(c)(1) requires the Commission to determine whether an order compelling wheeling would reasonably preserve existing competitive relationships. Finally, Section 211(c)(2) (A) and (B) requires an evaluation of whether the order would necessitate the replacement of electric energy currently provided pursuant to contract or rate schedule.

The procedures to be followed under these provisions are complex and will necessarily result in lengthy proceedings. The FERC itself has expressed some dissatisfaction with its wheeling authority and has indicated support for expansion of its authority to order wheeling for cogeneration facilities and small power production facilities. In testimony before the House Energy and Commerce Subcommittee on Energy Conservation and Power on the Utility Role in Cogeneration, June 3, 1981, John B. O'Sullivan, then FERC Chief

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[12]Although the heading for this statutory provision uses the term "wheeling," the text of this provision refers to "transmission service" rather than wheeling.

Advisory Counsel, specifically indicated that current procedures are too lengthy and expensive, and are limited with respect to who can actually seek wheeling services under the Act, as amended by PURPA. To date Congress has not acted on these recommendations.

There are presently no rules or regulations under Sections 211 and 212 to set guidelines or facilitate the complexities of the procedures. Since its enactment, only one case has been heard pursuant to the new Sections 211 and 212 of the Act, 16 U.S.C. §§824j, 824k, created by the PURPA amendments, *Southeastern Power Administration (SEPA) v. Kentucky Utilities Co.*, Docket No. EL80-7, Initial Decision issued on September 10, 1981. In the long run, it might be useful to promulgate regulations rather than use a case-by-case approach establishing certain guidelines.

The regulations issued by the FERC pursuant to Section 210 of PURPA and the FERC explanation thereof indicate that the transmission or wheeling of electric energy produced by a qualifying facility will occur in only very limited circumstances. Essentially, wheeling will occur only where both the qualifying facility and the electric utility to which such facility makes its energy available agree that such energy shall be wheeled to another electric utility. In the absence of the agreement of either of those parties, there will be no wheeling of such energy under these regulations.

The FERC rules and regulations directly pertinent to purchasing of energy and capacity made available by a qualifying facility and wheeling are set forth in Sections 292.303(a) and 292.303(d). Those regulations provide as follows:

> (a) *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase, in accordance with §292.304, any energy and capacity which is made available from a qualifying facility:
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> (1) Directly to the electric utility; or
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> (2) Indirectly to the electric utility in accordance with paragraph (d) of this section.
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> * * * * *
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> (d) *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to §292.304(e)(4) and shall not include any changes for transmission.

The foregoing sections were interpreted and analyzed by the FERC to set forth with respect to the electric utility obligations involved virtually an absolute duty upon an electric utility to purchase the energy and capacity made available to that utility by a qualifying facility. In that regard the analysis and explanation states as follows:

> §292.303 Electric utility obligations under this subpart. Section 210(a) of PURPA provides that the Commission prescribe rules requiring electric utilities to offer to purchase electric energy from qualifying facilities. The Commission interprets this provision to impose on electric utilities an obligation to purchase all electric energy and capacity made available from qualifying facilities with which the electric utility is directly or indirectly interconnected, except during periods described in §292.304(f) or during system emergencies.

> A qualifying facility may seek to have a utility purchase more energy or capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a qualifying facility, the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load. *These rules impose no requirement on the purchasing utility to deliver unusable energy or capacity to another utility for subsequent sale.* (Emphasis supplied.)

Thus, it can be seen from the emphasized language above that the FERC interprets its rules and regulations so as to not require transmission by a utility to another utility of even that energy and capacity made available to it by a qualifying facility which cannot be used by such utility.

Nevertheless, many open questions remain at this time. One such question raised by the PURPA amendments is whether a qualifying cogeneration facility can specifically apply for wheeling services or must such an application be initiated by an electric utility or a federal power marketing agency. One approach could be to construe a qualifying cogeneration facility as a "person" or a "corporation" — since further amendments to the Act also amended the definition of electric utility under Section 3(22) of the Act to include *any person* or State agency which sells electric energy, including the Tennessee Valley Authority, but excluding any federal power marketing agency, 16 U.S.C. §796(22). Section 3(4) of the Act defines a person as "an individual or corporation," 16 U.S.C. §796(4). Section 3(3) of the Act defines a corporation as "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not. . ." but excludes municipalities, 16 U.S.C. §796(3). An electric utility could be a person or a corporation which sells electric energy for purposes of Section 211 of the Act including a qualifying cogeneration facility. Thus, if the qualifying facility were a person or a corporation under the Act, it should be able to seek wheeling services under Section 211 of the Act. However, the Commission has not adopted such a construction to date, and has instead reuired that such application be filed by the electric utility and not the qualifying facility. *See Southeastern Power Administration (SEPA) v. Kentucky Utilities Co., supra.*

The exemption provisions of Section 210(3) of PURPA for cogeneration and small power production, 16 U.S.C. §824a-3(e), could also be useful as a vehicle for establishing that qualifying facilities are considered electric utilities for the limited purposef seeking wheeling services under the Act. Such an approach would require further rulemaking to amend the Commission's final regulations implementing Section 210, but could be consistent with the statutory directive that such facilities may be "exempted in whole or part from the Act. . . ." Such a construction, however, can present some inconsistencies with the other specific references to "qualifying cogenerator" in Section 211 of the Act which imply a separate and distinct entity apart from the electric utility references in the section. Moreover, such a construction could create an inconsistency with the definition of a qualifying cogeneration facility under Section 3(18) of the Act, 16 U.S.C. §796(18), which means a facility which is "owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities)." Finally, Section 210(e)(3), which is the only provision of this section which deals with the wheeling or transmission of energy or capacity in any context does prohibit the Commission from exempting qualifying facilities from the provisions of Section 211 and 212 of the Act (*i.e.*, Sections 203 and 204 of PURPA).

Another question raised by PURPA deals with the term "applicant." Section 211 of the Act refers to the term "applicant" to the proceeding and raises the question whether an "applicant" can be considered a party that is not an electric utility or federal power marketing agency. Both the statute and the legislative history of PURPA are silent on the definition of the term "applicant" and do not provide any constructive guidance. When both the statute and the legislative history do not define a specific term, the responsibility to fashion a reasonable definition usually falls on the regulatory agency with responsibility to administer the statute. The Commission's Rules of Practice and Procedure define applicant as (18 C.F.R. §1.1(f)(8)):

> Applicants. In proceedings involving applications for permission or authorization which the Commission may give under statutory or other authority delegated to it, the parties on whose behalf the applications are made are styled applicants.

This position was advocated by Commission Staff in their pretrial brief filed in *Southeastern Power Administration (SEPA) v. Kentucky Utilities Co.*, *supra,* Brief at 20. In the Initial Decision in this case, the Presiding Administrative Law Judge concluded that " 'applicant' is the entity to whom power will flow, or the 'buyer' of power." Initial Decision at 17. In that instant case each of the municipalities, including the two which were not parties to the case, was an applicant, along with SEPA.

Another question is what is the impact of FERC Order No. 84 (issued May 7, 1980) which amends Part 35 of the Regulations under the Federal Power Act by limiting percentage adders in electric rates for transmission service.[13] These final regulations require that limits be placed on the amount of revenues that a utility may recover based on the determination that any adder which is applied in rates for transmission services that becomes a part of the purchased power price is unjust and unreasonable, unless cost-justified. For example, in "a multi-party interchange transaction, the rates and charges for electric power paid by the ultimate purchaser reflect less and less the actual costs of producing and transmitting the electric power." Order No. 84 at 14. Is wheeling for cogeneration and small power production facilities covered by this final order? Under the statute and rules, it is unclear.

As noted earlier, the recent Fifth Circuit decision implies that a wheeling order might be issued to remedy anticompetitive activities. But even that court noted if a utility's monopoly power is not "significantly" diminished, a "wheeling" order may be a questionable remedy. Needless to say, the propriety of such a remedy must await a specific case. At this juncture, it seems appropriate to note that utilities as well as cogenerators and small power producers must be sensitive to antitrust issues, especially in the context of "wheeling" services. Although cooperation between utilities and cogenertors and small power producers is preferable, the potential litigation involving these parties

[13] An "adder" is included in an electric rate to capture unquantifiable costs.

before the FERC and federal courts seems inevitable if utilities attempt to frustrate cogeneration or small power production projects.

Finally, power supplies generated by cogenerators and small power producers will no doubt impact upon the operation of existing power pools. In addition to the technical and engineering problems associated with this integration, there are many rate and pool accounting issues that will have to be addressed with thoughtful solutions. Although FERC would have no authority to expand a voluntary pool arrangement, discriminatory restrictions have been raised and in some cases rectified by the Commission.[14] Because power pools differ in size and complexity, any "wheeling" within a particar pool or beyond may ultimately be resolved and accommodated by negotiation, thereby minimizing regulatory concerns and intrusion into pool arrangements.[15]

The questions identified in the article are not exhaustive but will require answers if PURPA is to meet the objectives envisioned by Congress. PURPA's provisions cannot be read in a vacuum, but must be examined in an integrated manner with Sections 203 and 204 of PURPA, as well as Section 210, in light of the definitions contained in Section 3 of the Act. The Act should be read as a "symmetrical whole" in light of the overriding purposes of PURPA to encourage cogeneration and small power production.[16] The Commission in a rulemaking should explore the limits of its authority granted under PURPA while avoiding delay and uncertainty in seeking legislative amendments to the Act to promote enhanced "wheeling" for cogeneration and small power production facilities. Hopefully, this approach will allow interested parties to address issues in a thoughtful way. In the meantime, a utility is caught in a "catch-22" situation. It can't withhold wheeling unreasonably because it risks violating the antitrust statutes; on the other hand, neither the statutory provisions of PURPA nor the Commission's regulations are clear on the status of "wheeling" and interconnection orders under PURPA.

C. *Federal vs. State Authority over Wheeling*

Under the Act, the transportation of power over a utility transmission grid which is used in interstate commerce is subject to FERC jurisdiction. As discussed in *Otter Tail Power Co. v. U.S., supra,* the decision to wheel was left to the voluntary coordination of electric utilities. Although the Commission prior to PURPA had limited jurisdiction to order interconnection in certain circumstances, it did not have similar jurisdiction to order wheeling.[17] As previously discussed, the addition of Sections 211 and 212 to the Act permit public utilities and public agencies to request the FERC to order wheeling services by another utility. Under its final regulations implementing Section 210, the Commission has decided that wheeling is discretionary with the purchasing utility so long as the qualifying facility agrees, 18 C.F.R. §292.303(d). As FERC stated:

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[14]See, *e.g.*, Mid-Continent Area Power Pool Agreement, Opinion No. 806,____ F.P.C.____ (June 15, 1977), aff'd *sub nom.* Central Iowa Power Cooperative, Inc. v. FERC, 606 F.2d 1156 (D.C. Cir. 1979); City of Frankfort v. Kentucky Utilities Co., FERC Opinion No. 15-A,____ F.E.R.C.____ (July 2, 1980).

[15]For a comprehensive discussion of power pools, see the report of the Office of Electric Power Regulations of the FERC, entitled, "Power Pooling in the United States," dated December 1981.

[16]Panhandle Eastern Pipe Line Co. v. FPC, 204 F.2d 675, 679 (3d Cir. 1953).

[17]*See* Sunflower Electric Cooperative v. Kansas Power & Light Co., 603 F.2d 791 (10th Cir. 1979).

> . . .this transmission can only occur with the consent of the utility to which energy or capacity from the qualifying facility is made available. *Thus, no utility is forced to wheel.*

45 Fed. Reg. 12,220 (Feb. 25, 1980) (Emphasis supplied.) Otherwise, wheeling is a mater of voluntary negotiation between the affected utilities and qualifying facilities.

State authority to order wheeling is somewhat circumscribed. Prior to the recent PURPA amendments to the Act, federal courts have held that states were preempted under Section 201 of the Act from regulating the transmission of electric power and the sale of wholesale electric power in interstate commerce, *FPC v. Southern California Edison Co.,* 376 U.S. 205, *reh. denied,* 377 U.S. 913 (1964). Further, Section 201 of the Act precludes concurrent state jurisdiction over the matters covered by that section, *Arkansas Powr and Light Co. v. FPC,* 368 F.2d 376 (8th Cir. 1966). Federal jurisdiction attaches, however, only if the transmission of electric power is *in* interstate commerce. Interstate commerce, however, does not necessarily require a direct connection to out-of-state utilities. Federal jurisdiction under Section 201 of the Act attaches even if the utility has no direct connection with another utility outside the state, *FPC v. Florida Power & Light Co.,* 404 U.S. 453 (1972). In the aforementioned case, federal jurisdiction attached where the electric utility was interconnected with another utility that had interstate connections with other utilities.

These precedents raise some additional issues that must be resolved if PURPA is to be an effective piece of legislation. For example, an owner of a cogenerating facility "x" wishes to have a utility transmit power to facility "y" which it also owns within the utility's service area. Although we are dealing with two local facilities relatively close together within a circumscribed service area within the State, who has jurisdiction—the Federal government, the state, or perhaps, both?

The Supreme Court in the *Florida Power & Light* case made it clear that the Act imposes a " 'legalistic or government' test. . . [and f]ederal jurisdiction may not reach 'facilities used in the local distribution' of energy."[18] In the foregoing example, the nature of the facilities will determine which regulatory agency has authority. Arguably, if only distribution facilities are involved connecting facilities "x" and "y," the state commission may have authority under its enabling legislation to direct the utility to "wheel" power for the owner of the cogeneration facilities. If distribution and transmission facilities are required for the delivery of electric energy between facilities "x" and "y," then both the state commission as well as the Commission would have jurisdiction and the potential for conflicting decisions is heightened.

Then there is a second situation: the owner of a cogenerating facility "x" within a utility's service area wishes to transmit power to facility "y" (either owned by it or a third party) within a second utility's service area either in the same state or another state. This arrangement likewise poses interesting questions of jurisdiction. To the extent electric energy is delivered to a second state, the transmission service provided appears to be completely within the FERC's jurisdiction. Power flows across the state lines and the rates for trans-

[18]404 U.S. at 468. *See also* Connecticut Light and Power Co. v. FPC, 324 U.S. 515 (1945).

mission service must satisfy the requirements of the Act. Any transmission of electric energy within the same state, but between two utility service areas, poses a more difficult jurisdictional analysis.

In a recent case involving Consolidated Edison Company of New York, Inc. (Con Ed) the FERC reviewed its jurisdiction over Con Ed's transmission service for the Power Authority of the State of New York (PASNY) and concluded that it had jurisdiction over the entire service provided by Con Ed including those facilities used in local distribution.[19] The FERC reviewed the Supreme Court decision in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), which held that the states were constitutionally forbidden from fixing rates for sales at wholesale in interstate commerce and noted the limitations on jurisdictionunder Section (201(b) of the Act for "facilities used in local distribution," citing *Duke Power Co. v. FPC,* 401 F.2d 930 (D.C. Cir. 1968), and *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964). The Commission reasoned that, although the service agreement for delivery of power directly to PASNY customers contained elements which might be regarded as distribution, the agreement reflected a single transaction which constitutes the transmission of electric energy in interstate commerce. As the Commission stated:

> The 'local distribution facilities' exemption, upon which Con Ed relies, establishes a legal standard for distinguishing between companies which are 'public utilities' as defined by the Federal Power Act and those which are not. (citing *Connecticut Light & Power Co. v. FPC,* 324 U.S. 515 (1945)).
>
> It neither applies to nor deprives the Commission of jurisdiction over sales for resale or transmission in interstate commerce. (citing *Indiana & Michigan Electric Co. v. FPC,* 365 F.2d 180 (7th Cir.), *cert. denied,* 385 U.S. 972 (1966)).
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> . . .We intend to exercise our jurisdiction over this service, in this and future filings by Con Ed, by accepting the rate determination of the NYPSC in the absence of a showing that the NYPSC has abused its discretion or violated a public policy, such as the policy against undue discrimination. In other words, we shall not insist that the rates be developed, in all respects, according to the ratemaking practices of this Commission, but will accept the NYPSC's rate practices and determinations in the absence of a showing of abuse as described above.

Slip op. at 5.

The Commission's decision in the *Con Ed* case should be viewed with cautious optimism by utilities, cogenerators and small power producers. In many respects, the exercise of state commission jurisdiction is more desirable since that commission has a more intimate knowledge of a utility's operations and the needs of the consumers served by the utility. Admittedly, the whole issue of wheeling may be an area in which state commissions to date have had little practical experience. Nevertheless, some states — Oregon, California, New Jersey, Texas and North Carolina — have initiated investigations and/or rulemaking proceedings to investigate the extent of the state's authority to address the issue of wheeling. Although some utilities may opt for federal regulation of wheeling service provided to cogenerators and small power producers, it appears desirable that utilities adopt a two-fold strategy. First, a

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[19]Consolidated Edison Company of New York, Inc., Docket No. ER81-183-000, Order issued on May 26, 1981.

utility should urge that the state commission encourage voluntary arrangements for wheeling services to be provided to qualifying facilities. Second, the utilities should actively participate in the rulemaking or investigation proceedings and suggest minimum rates and standards pursuant to which they would wheel power for cogeneration and small power producers. The advantage to a utility should be obvious — compensatory rates and the avoidance of extended litigation before agencies and courts. As we have noted above, a private utility must be sensitive to the antitrust laws and, while the "state action" doctrine enunciated in *Parker v. Brown,* 317 U.S. 341 (1943), has been eroded, the potential of this defense appears greater if the rates and conditions for wheeling are mandated by a state commission.

D. *Wheeling: The Negotiation Process*

As we have discussed, the issue of wheeling services to be provided by a private utility raises thorny jurisdictional issues as well as concerns under the antitrust laws. While electric utilities should not be common carriers,[20] where some element of mutual cooperation exists between interested parties, the negotiation of wheeling arrangements provides the best short-term prospects for owners of qualifying facilities. If an owner of a qualifying facility agrees, an electric utility, which would otherwise be obligated to purchase energy or capacity from such qualifying facility, may transmit the energy to any other electric utility, 18 C.F.R. §292.303(d). The negotiation process offers flexibility to the parties and assures that a thoughtful assessment of the proposed arrangement occurs.[21]

In Texas, a Task Force in a document entitled *Report of the 1980 Task Force on Cogeneration in Texas,* October, 1980 made some useful suggestions. Although wheeling charges would be separately negotiated, the Task Force urged the development of model guidelines for wheeling charges as more experience was gained. Some of the general factors for consideration in the development of a wheeling rate include: interconnection costs, the amount of power being wheeled, duration of the wheeling, the load cycle, the location where the power enters and exists the system, the distance the power is wheeled, peak/off-peak time of the day when wheeling service is required, the rate of return on the utility's investment, administrative and billing costs and line losses from transmission. *Id.* Generally, the Texas Task Force believed that certain conditions, however, should be imposed. System reliability should not be impaired for emergency transmission. A non-jurisdictional utility should not be placed under FERC jurisdiction through a wheeling arrangement. While prior commitments of a utility could not be impaired, the utility would be allowed to recover its costs, including a reasonable return on investment. Finally, according to the Task Force, the wheeling charges

[20]From the perspective of cogenerators and small power producers, this is the least attractive alternative since Congress would be required to address economic, engineering and political issues before passing new legislation. Further, the process of seeking legislative amendments to require wheeling on behalf of qualifying facilities faces an uncertain outcome and would surely create a lengthy, protracted debate in the Congress.

[21]The Second Circuit, however, noted in City of Groton v. Connecticut Light & Power Co., ____ F.2d ____ (Oct. 13, 1981): "In short, a general agreement to wheel without reference to time, quantity of power, or transmission capacity is essentially meaningless."

assessed to the qualifying facilities would be subject to review by the appropriate state commission. Although the issues identified by the Task Force are not exhaustive, the report does provide parties to the negotiation process a handy "check-list" of issues on which the parties must focus.

CONCLUSION

In our judgment, Congress will probably not be willing to address the issue of wheeling for cogenerators and small power producers in the near future. Likewise, the Commission is not inclined to institute a rulemaking proceeding to explore the limits of its jurisdiction over transmission services rendered by private utilities to cogenertors or small power producers. Therefore, the negotiation of wheeling rates by project sponsors takes on added importance and, in the long-term, may result in more flexible and creative arrangements than solutions imposed by regulatory agencies or the Congress. The legitimate concerns of private utilities and owners of cogeneration and/or small power production facilities may be best handled through voluntary arrangements. Indeed, the potential availability of power generated by cogenerators and/or small power producers should be welcomed by the electric utility industry in light of its present financial health. Admittedly, purchases of power from cogenerators or small power producers will only postpone the construction of new generating capacity by electric utilities. In the meantime, so long as existing customers are protected and no enlargement of facilities is required, the concept of wheeling for cogenerators or small power producers should be welcomed. In short, creativity and flexibility on the part of utilities will avoid the potential imposition of still more regulation and costly antitrust litigation in the future.