

# ACID RAIN COMPLIANCE: COORDINATION OF STATE AND FEDERAL REGULATION

by  
*Robert R. Nordhaus\**

## I. WHAT IS THE PROBLEM?

The Clean Air Act (CAA) Amendments of 1990 impose new controls on emissions by electric utilities of the two major precursors of acid rain: sulfur dioxide (SO<sub>2</sub>) and oxides of nitrogen (NO<sub>x</sub>). Utilities, and the utility holding company systems and power pools of which they are members, will be subject to extensive and costly compliance obligations under the new statute. Most of these utilities, utility systems, and power pools are regulated by more than one utility regulatory authority. Some utilities are regulated by several states, some by a single state and by the Federal Energy Regulatory Commission (FERC), and some by multiple states, by the FERC, and by the Securities and Exchange Commission (SEC). Utility regulators will need to coordinate their policies for ratemaking and for reviewing acid rain compliance strategies if least cost solutions are to be implemented without imposing on ratepayers and utility shareholders the costs and risks of inconsistent regulatory determinations. This article outlines the scope of the coordination problem and addresses possible approaches that utility regulators may take to deal with this problem.

## II. THE 1990 AMENDMENTS

The CAA Amendments of 1990<sup>1</sup> represent the most significant overhaul of air pollution regulation in this country since 1970, when the present system of federal controls was established.<sup>2</sup> Key provisions of the 1990 Amendments include a new acid rain control program (described below), a graduated system of new controls in areas that have not attained the Clean Air Act's health-

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\* Mr. Nordhaus is a member of the law firm of Van Ness, Feldman and Curtis, P.C. A preliminary version of this paper was prepared for the April 14-15, 1992, National Regulatory Research Institute Workshop on Developing Public Utility Commission Rules and Procedures for Electric Utility Compliance with the Clean Air Act Amendments of 1990, held in Charlotte, North Carolina. The author wishes to acknowledge the assistance and comments of his colleagues Joe Nelson, John Buchovecky, and Howard Shapiro, and the helpful input from participants in the workshop. Thomas K. Gump provided research and editorial assistance.

1. Pub. L. No. 101-549, 104 Stat. 2399 (Nov. 15, 1990)(codified as amended at 42 U.S.C. §§ 7401-7626 (Supp. II 1990)).

2. The Clean Air Act (CAA) Amendments of 1970 provided for national ambient air quality standards that had to be met in every area of the country within statutory deadlines (which expired in 1975) (Clean Air Act (CAA) §§ 109-10, 42 U.S.C. §§ 7409-10 (1988)); and directed the EPA to establish new source performance standards (CAA § 111, 42 U.S.C. § 7411) and limitations on emissions of hazardous pollutants (CAA § 112, 42 U.S.C. § 7412). The amendments also established statutory standards for mobile sources (CAA § 202, 42 U.S.C. § 7521).

based ambient air quality standards,<sup>3</sup> and potential new controls on utility emissions of hazardous air pollutants<sup>4</sup> and greenhouse gases.<sup>5</sup>

*A. Acid Rain (SO<sub>2</sub>)*

Title IV of the CAA Amendments imposes an additional layer of control on utility emissions of SO<sub>2</sub> and NO<sub>x</sub>, the major precursors of acid rain.<sup>6</sup> The SO<sub>2</sub> controls are designed to achieve a 10 million ton reduction of utility emissions of SO<sub>2</sub> in two phases, one beginning in 1995, the other beginning in the year 2000.<sup>7</sup> A permanent cap of 8.9 million tons per year is imposed on utility SO<sub>2</sub> emissions in the second phase.<sup>8</sup> Each existing utility generating unit that is fueled by coal, oil, or gas is allocated a fixed number of nationally-tradable emission allowances (an allowance is the right to emit one ton of SO<sub>2</sub> in a

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3. As noted, *see supra*, note 2, the CAA Amendments of 1970 were intended to bring every area in the U.S. into compliance with health-based national ambient air quality standards for ozone, carbon monoxide and certain other pollutants. Twenty years later, approximately 100 urban areas had not attained the federal standards for ozone and approximately 50 urban areas had not attained the standard for carbon monoxide. H.R. REP. NO. 490, 101st Cong., 2d Sess., pt. 1 at 197-8, 204-5 (1990). As a result, the 1990 Amendments imposed a graduated system of additional controls on areas that had not attained these standards (non-attainment areas). Among the key new requirements for non-attainment areas are more stringent "offset" requirements that apply to any utility proposing to construct a new major stationary source in a non-attainment area. Under these requirements, the utility must purchase offsetting reductions from other sources in the area at least equal to the new emissions the utility is responsible for by reason of construction of the new source. In addition, the EPA is likely to apply the same control requirements to NO<sub>x</sub> as it does to the other ozone precursor, volatile organic compounds (VOC). As a result, increasingly stringent controls imposed on VOC emissions could, in many areas, also be applied to NO<sub>x</sub> emissions. Non-attainment compliance obligations will raise many of the same utility regulatory issues as the acid rain program.

4. Title III of the 1990 Amendments (104 Stat. 2531-84) is a new attempt to control hazardous emissions from stationary sources. Utilities have received a reprieve of at least three years from additional regulation under this title, while the EPA studies the need to apply these new requirements to utility emissions. CAA § 112, 42 U.S.C.A. § 7412(n) (West Supp. 1991). After the EPA completes its study (which is likely to take about 5 years), it is possible that extensive new controls, particularly on coal-fired plants, will be necessary in order to comply with the requirements of this title.

5. Although the 1990 Amendments do not impose any limitations on CO<sub>2</sub> emissions, the requirements for monitoring CO<sub>2</sub> (CAA § 412, 42 U.S.C.A. § 7651k (West Supp. 1992)) and the studies EPA is required to conduct under CAA § 103, 42 U.S.C.A. § 7403 (West Supp. 1992)) may set the stage for future Federal regulation of CO<sub>2</sub> emissions and other greenhouse gases. *See also* H.R. 776, 102d Cong., 2d Sess. §§ 1601-6 (1992).

6. Although rain is naturally acidic, many regions of the U.S. receive rainfalls which are significantly more acidic than the natural background. This excess acidity results when emissions of SO<sub>2</sub> and NO<sub>x</sub> from man's activities react in the atmosphere to form sulfates and nitrates, which can travel for hundreds, and even thousands of miles before reaching ground level as rain, snow or fog or with particulate matter. The ultimate environmental effects of acid rain are thought to include the acidification of lakes, the killing of fish, the corrosion of buildings, the damage to vegetation, and the impacts on human health. The CAA prior to the 1990 Amendments regulated SO<sub>2</sub> and NO<sub>x</sub> as local air quality problems through the use of State Implementation Plans (SIPs) and New Source Performance Standards (NSPS). This localized approach was not well designed to deal with the possibility for long range transfer of these pollutants, thereby limiting the effectiveness of the Act in dealing with the acid rain problem. The 1990 Amendments address these problems through a national "cap" on SO<sub>2</sub> emissions and other devices. H.R. REP. NO. 490, 101st Cong., 2d Sess., pt. 1, at 356-367 (1990).

7. Phase I requirements are found at CAA § 404, 42 U.S.C.A. § 7651c (West Supp. 1992); Phase II requirements are located at CAA § 405, 42 U.S.C.A. § 7651d (West Supp. 1992).

8. CAA § 403(a), 42 U.S.C.A. § 7651b(a)(1) (West Supp. 1992).

calendar year).<sup>9</sup> Utilities are permitted to trade allowances among themselves and with non-utilities,<sup>10</sup> and they may emit any amount of SO<sub>2</sub> (subject to other limitations under the CAA and state or local air quality laws) so long as they have a number of allowances equal to their emissions in a particular year.<sup>11</sup> New units are not allocated any allowances<sup>12</sup> and must purchase allowances from owners and operators of existing units or on the allowance market in order to operate. The objective of the allowance system is to achieve the 10 million ton SO<sub>2</sub> reduction, and to ensure compliance with the permanent 8.9 million ton SO<sub>2</sub> cap at least cost to utilities and the nation as a whole.<sup>13</sup>

### B. Acid Rain (NO<sub>x</sub>)

The NO<sub>x</sub> controls under the acid rain program are different from the SO<sub>2</sub> controls in several respects. First, the NO<sub>x</sub> controls apply only to coal-fired units.<sup>14</sup> Second, they are not tons-per-year limitations, rather they are emission standards expressed in terms of pounds of NO<sub>x</sub> per MMBtu of fuel input.<sup>15</sup> Third, while the statute permits averaging of NO<sub>x</sub> emissions among units under common ownership or control, it does not permit national trading similar to that provided for under the SO<sub>2</sub> control program.<sup>16</sup>

### C. Costs of Compliance

Estimates of the cost of control for SO<sub>2</sub> and NO<sub>x</sub> under Title IV range from \$4 to \$8 billion per year in Phase II.<sup>17</sup> These estimates for the most part assume that the utility industry will be permitted by utility regulators to adopt least cost compliance strategies, including full utilization of the allowance trading system.<sup>18</sup> If implementation of least cost compliance strategies is impeded by inconsistent regulatory restrictions imposed by utility regula-

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9. *Id.*

10. The 1990 Amendments provide that the owner or operator of a unit not subject to SO<sub>2</sub> controls under the acid rain program may choose to opt in and receive allowances based on its emissions in a base period. In addition, non-utilities may buy and sell allowances in the national allowance market. See 56 Fed. Reg. 63,127 (1991) (to be codified at 40 C.F.R. pt. 74).

11. Under CAA § 404(b), 42 U.S.C.A. § 7651e (West Supp. 1992), special rules apply to Phase II units that are substituted for Phase I units during Phase I.

12. The 1990 Amendments define a new unit as "a unit that commences commercial operation on or after the date of enactment of the Clean Air Act Amendments of 1990;" existing units are defined as "a unit (including units subject to Section 111) that commenced commercial operation before the date of enactment of the Clean Air Act Amendments of 1990." CAA § 402, 42 U.S.C.A. § 7651(a) (West Supp. 1992).

13. 56 Fed. Reg. 63,004-63,005 (1991).

14. CAA § 407(a), 42 U.S.C.A. § 7651f(a) (West Supp. 1992).

15. *Id.* at § 407(b), 42 U.S.C.A. § 7651f(b).

16. *Id.* at § 407(e), 42 U.S.C.A. § 7651f(e).

17. For varying Congressional estimates, see 136 Cong. Rec. S16963, S16966 (daily ed. Oct. 27, 1990) (statement of Sen. Baucus); *id.* at S16989 (statement of Sen. Nickles); *id.* at S17430 (statement of Sen. McClure); *id.* at H12898 (statement of Rep. Bruce); *id.* at H12916, H12917, H12919 (statement of Rep. Dannemeyer); *id.* at H12942 (statement of Rep. Martin).

18. If one assumes that the allowance trading system is fully operational and that allowance values represent the marginal cost of control of SO<sub>2</sub> emissions on a national basis, then annual cost of control would be less than ALLOWANCE VALUE (\$/TON) X TONS REDUCTION IN SO<sub>2</sub>. For example, if we assumed (consistent with current projections) that allowance values in year 2000 were \$400/ton and that a

tors, the total compliance cost for the acid rain program may increase substantially.<sup>19</sup>

This article focuses on the interaction between the new federal acid rain requirements and state and federal utility regulation, and how utility regulators can coordinate their responses to these environmental requirements.

### III. IMPLICATIONS FOR UTILITY REGULATION

#### A. Federal and State Utility Regulatory Framework

##### 1. Federal

Electric utility regulation in the United States reflects the intricacies of our Federal system. The FERC regulates interstate wholesale sales and interstate transmission of electricity under the Federal Power Act (FPA).<sup>20</sup> FERC regulation under the FPA extends not only to rates for interstate wholesale sales and transmission, but also to contracts and practices that affect those rates.<sup>21</sup> The FERC also has authority over some aspects of corporate regulation of utilities, such as securities issuances, mergers and disposition of utility assets.<sup>22</sup> The FERC's rules under the Public Utility Regulatory Policies Act of 1978<sup>23</sup> (PURPA) also provide a general framework under which utilities purchase electricity from cogeneration and renewable energy facilities. The FERC does not regulate generation or siting,<sup>24</sup> except for hydroelectric licensing.

The Public Utility Holding Company Act of 1935<sup>25</sup> (PUHCA), administered by the SEC, regulates public-utility holding companies. If a company is part of a public-utility holding company system under PUHCA, it must structure its financing and business activities so as to qualify for one of the various exemptions under section III of PUHCA,<sup>26</sup> or it must register with the SEC and submit to extensive corporate regulation and scrutiny of its business and

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10,000,000 ton reduction were required in that year, then \$4 billion would be the upper limit on compliance cost for SO<sub>2</sub>.

19. If there were regulatory impediments to full utilization of the allowance system, then marginal cost of control could exceed allowance costs (because some utilities would be unable to comply by purchasing allowances even though on a cost per ton basis allowance purchases would be cheaper than controlling their units). National compliance costs in that case could exceed ALLOWANCE VALUE X TONS REDUCED.

20. § 201(b), 16 U.S.C. § 824(b) (1992).

21. *Id.* at §§ 205, 206, 16 U.S.C. §§ 824d, 824e.

22. *See infra* text accompanying note 39.

23. PURPA § 210 (1978) (codified at 16 U.S.C. § 824a-3 (1988)).

24. FPA § 201(b)(1), 16 U.S.C. § 824(b)(1) (1992). *Cf.* *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 212 (1983) (In commenting on the pre-emptive effects of the Atomic Energy Act, Justice White declared that "the Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.")

25. 15 U.S.C. § 79-79z-6 (1988 & Supp. II 1990).

26. *Id.* at § 79c. PUHCA provides an exemption from registration for a holding company which is: (i) predominantly an intrastate utility holding company, (ii) predominantly a public utility company, (iii) only incidentally a holding company, (iv) temporarily a holding company, or (v) a holding company over foreign utilities.

financial affairs, including securities issuances, dividends and capital contributions, sales and acquisitions of utility properties,<sup>27</sup> and interaffiliate transactions and contracts (other than for sale of power).<sup>28</sup> PUHCA also requires "any registered holding company or subsidiary thereof [to obtain prior SEC approval before acquiring] any securities or utility assets or any other interest in any business."<sup>29</sup> Exempt holding companies must also seek prior SEC approval of certain acquisitions.<sup>30</sup>

## 2. State

States regulate retail sales of electricity and related aspects of distribution of electricity to consumers, as well as siting and operation of generating facilities.<sup>31</sup> States' ability to regulate utility activities otherwise within their jurisdiction is subject to federal constitutional constraints under the preemption doctrine of the Supremacy Clause,<sup>32</sup> under the Commerce Clause<sup>33</sup> and under the Compact Clause.<sup>34</sup> The preemption doctrine can limit states' actions in areas where Congress has enacted statutes which regulate the same subject matter.<sup>35</sup> The FERC is regarded as having exclusive jurisdiction over ratemaking for interstate wholesale sales and interstate transmission of electric power under the Federal Power Act. However, the FERC's authority over most other aspects of utility regulation is either shared or concurrent with that of the states (e.g., securities issuances,<sup>36</sup> mergers, and acquisitions and sales of jurisdictional assets<sup>37</sup>). In addition, PUHCA's role for state commissions

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27. Registered holding companies are subject to the "integration requirement" of § 11 of PUHCA, which limits each holding company system 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. . . ." 15 U.S.C. § 79k(b)(1).

28. 15 U.S.C. § 79(e)(b) (1992).

29. PUHCA § 9(a)(1), 15 U.S.C. § 79i(a)(1) (1991). PUHCA § 10(b), 15 U.S.C. § 79(j)(b), identifies various factors that the SEC must examine in determining whether to grant the approval required by section 9(a), including whether: (i) the acquisition will tend toward a detrimental concentration of control of public utility companies, (ii) the compensation paid in connection with the acquisition is reasonable, and (iii) the acquisition will unduly complicate the capital structure of the holding-company system of the applicant. In addition, the SEC may not approve the acquisition unless it is satisfied that applicable state laws have been complied with. PUHCA § 10(f), 15 U.S.C. § 79j(f).

30. Subject to limited exceptions, any person who owns 5% or more of any public-utility company, must obtain the approval of the SEC (taking into consideration the relevant standards under PUHCA § 10, 15 U.S.C. § 79j) pursuant to PUHCA § 9(a)(2), 15 U.S.C. § 79i(a)(2), before acquiring 5% or more of the securities of another public utility company.

31. 15 U.S.C. § 79b(c).

32. U.S. CONST. art. VI, cl. 2.

33. U.S. CONST. art. I, § 8, cl. 3.

34. U.S. CONST. art. I, § 10, cl. 3.

35. *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 368, (1986). The CAA's preemption provisions also bear mention here. The general rule for stationary source regulation under section 116 of the CAA is that states are free to impose more stringent regulation than Federal requirements and the acid rain control program specifically preserves the authority of state regulators over utilities otherwise within their jurisdiction. 42 U.S.C. § 7416. One area of uncertainty in the statute is with respect to state restrictions on trading of allowances by utilities.

36. FPA § 203, 16 U.S.C. §§ 824b, 824c.

37. FPA § 204, 16 U.S.C. § 824e (1988). Section 204 provides that if a state regulates the security issues of a public utility, then the federal government will not assert jurisdiction in that context. Thus, the

allows them considerable latitude in matters also regulated by the SEC.<sup>38</sup>

The Commerce Clause ensures that states do not disrupt or burden interstate commerce in circumstances where Congress' power remains unexercised. Thus, states may not impose requirements that unduly burden interstate commerce or discriminate against the free flow of commerce.<sup>39</sup>

Finally, the Compact Clause prohibits a state from entering into "an Agreement or Compact with another State without the consent of Congress."<sup>40</sup> This limitation restricts the extent to which states may enter into interstate agreements that either purport to authorize action within those areas in which states may not act by reason of preemption or the Commerce Clause,<sup>41</sup> or which otherwise enhance the power of the states at the expense of

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state and federal regulatory bodies share authority as one of the two bodies will have exclusive authority at all times. The issue of federal and state authority over the issuance of securities by a public utility was recently addressed. The Supreme Court struck down a Michigan statute which gave the Michigan Public Service Commission authority to grant approval for the issuance of a long-term security by a public utility transporting natural gas. Finding that the state statute amounted to a direct regulation of the rates and facilities used in the interstate commerce of natural gas, the Supreme Court found that the field that the state of Michigan had regulated was preempted by the Natural Gas Act, even though that Act did not have any provision for Federal regulation of issuance of securities. *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. 1145 (1988). *Schneidewind* is inapplicable to electric utility securities regulation because FPA § 204 specifically withholds Federal regulation of public utility securities whenever a state regulates them.

38. PUHCA was not intended to supplant state regulation, but rather to supplement it by filling the void created by the constitutional disability of the states, as perceived at the time, to regulate and prevent abuses by interstate holding company systems. *Alabama Elec. Coop. v. SEC*, 353 F.2d 905, 907 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 968 (1966). In some instances PUHCA permits the SEC to defer to the states' authority. For example, PUHCA permits the SEC to exempt a holding company or subsidiary thereof from approval of certain security issuances if state commission approval has been obtained and the purpose of the security issuance is sufficiently limited. PUHCA § 6(b), 15 U.S.C. § 79f(b). Other transactions are subject to the concurrent authority of both the SEC and the states. For example, interaffiliate transactions may be subject to both SEC authority and state review (in some instances as part of a state's general ratemaking authority). See PUHCA § 13, 15 U.S.C. § 79m; N.Y. Pub. Serv. Law. § 110(2). Finally, some states have even enacted legislation which regulates growth and formation of utility holding companies themselves. (For a summary of holding company legislation enacted by the states see Douglas W. Hawes, *UTILITY HOLDING COMPANIES*, § 4 (Clark Boardman 1987)).

39. The dormant Commerce Clause doctrine prohibits states from enacting statutes or regulations which unduly burden interstate commerce. See *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)) (holding that upon a finding that a statute discriminates against interstate commerce "either on its face or through practical effect," the state must demonstrate that the statute serves a legitimate state purpose and no means other than those currently employed could achieve that purpose).

40. U.S. CONST. art. I, § 10, cl. 3. In its recent *Wyoming v. Oklahoma* decision, the Supreme Court reaffirmed that "[w]hen a state statute clearly discriminates against interstate commerce, it will be struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." 112 S. Ct. 789, 800 (1992) (Citing *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988); *Maine v. Taylor*, 477 U.S. 131 (1986)). *Wyoming* affirmed that the "undue burden" test applies in the energy context.

41. *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 478 (1978) (stating that "[a]nytime a state adopts a fiscal or administrative policy that affects the program of a sister state, pressure to modify those programs (of the sister state) may result. Unless that pressure transgresses the bounds of the Commerce Clause . . . it is not clear how our federal structure is implicated."); See also *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 432-33 (1855) (holding that a compact between states cannot restrict the power of Congress to regulate commerce among the states).

the federal government's authority.<sup>42</sup> However, the Supreme Court has recognized several types of state agreements which will not be considered subject to the Compact Clause.<sup>43</sup> Interstate agreements allowing for the reciprocal application of regulations or statutes to entities having a presence in both states,<sup>44</sup> enactment of uniform state laws,<sup>45</sup> and multistate cooperation in overseeing the taxation of interstate corporations<sup>46</sup> have all been recognized as agreements outside of the consent requirements of the Compact Clause. Finally, agreements between a state and the United States are beyond the purview of the Compact Clause.<sup>47</sup>

*B. Potential Jurisdictional Conflicts Under Existing State/Federal Utility Regulatory Scheme*

From the preceding description, it should be clear that there is ample opportunity, even in the absence of an acid rain program, for jurisdictional conflicts, either among states or between state and federal authority. Representative situations are described below.

1. Single Utility

A single or "stand-alone" utility<sup>48</sup> can be subject to both FERC and state regulation, with the FERC regulating its interstate wholesale sales and its transmission for others and the state regulating retail sales and facilities siting. Similarly, a single utility may operate in several states (PacifiCorp operates an integrated utility system in seven states<sup>49</sup>). Each state can adopt conflicting regulatory policies with respect to the operation of the utility in its state. In

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42. *Virginia v. Tennessee*, 148 U.S. 503, 520 (1893). See *United States Steel Corp.*, 434 U.S. at 470-71 (where the Supreme Court noted that agreements subject to the Compact Clause are those that directly encroach upon a federal interest); *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 175-76 (1985) (the Court held that an agreement between New York and Massachusetts to enact similar statutes regarding the purchase of in-state banks by out-of-state bank holding companies was not subject to the Compact Clause since it did not contain the distinguishing characteristics of an interstate compact and in fact did not encroach upon federal supremacy in the area of banking regulations. The indicia of an interstate compact include: whether a joint organization or body has been established to regulate a specific activity, whether enactment of the statutes are conditioned on action by other states, and whether each state is free to modify or repeal its law or regulation unilaterally). This last indicium, that of giving a state the ability to modify or repeal its law or regulation unilaterally is of particular significance to interstate agreements involving utility regulation to the extent action by a state utility commission can be modified or reversed upon a proper showing of a change in circumstances or an adequately justified change in policy.

43. For a discussion of informal state cooperation which would not implicate the Compact Clause see Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842, 858(n.84-112)-862 (1989).

44. *Northeast Bancorp, Inc.*, 472 U.S. at 166.

45. *New York v. O'Neill*, 359 U.S. 1, 11-12 (1959).

46. *United States Steel Corp.*, 434 U.S. at 481-82.

47. *Blango v. Thornburgh*, 942 F.2d 1487, 1490 (10th Cir. 1991) ("[W]hile the compact clause prohibits agreements between the states, it does not prohibit agreements between the federal government and the states."). See also *United States ex. rel. Gereau v. Henderson*, 526 F.2d 889, 894 (5th Cir. 1976).

48. A "stand-alone" utility is a utility that is not part of a holding company system or which is the only operating utility in a holding company system.

49. PacifiCorp operates in California, Idaho, Montana, Oregon, Washington, Wyoming and Utah.

addition, there is potential for conflict between each state and the FERC with respect to the utility's interstate wholesale sales and interstate transmission.

## 2. Holding Companies

Public-utility holding companies operating in more than one state are subject to retail rate regulation by each state in which their subsidiaries have utility operations. They are also subject to FERC regulation of their power sales and transmission transactions among themselves. There is an overlay of SEC regulation under PUHCA which applies to securities issuances, corporate structure, and contract relations (other than FERC-jurisdictional sales and transmission) among the companies within a registered holding company system.<sup>50</sup>

## 3. Power Pools

Pooling agreements for power pools which include investor-owned utilities that are connected to the interstate grid are subject to FERC regulation, whether or not the boundaries of the pool extend across state lines.<sup>51</sup> This regulation extends not only to regulation of rates for sale of firm power among the members, but also to coordination transactions and to passthrough of fuel and other costs ancillary to the production of power sold among pool members.<sup>52</sup> Costs incurred in power purchases from the pool become components of the utility's retail rates. Continuing questions arise as to the authority of state regulators to scrutinize particular components of costs that are passed

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50. PUHCA gives the SEC jurisdiction over certain transactions among registered public utility holding companies and their subsidiaries and affiliates. At the same time, part II of the FPA grants the FERC jurisdiction over the transmission and sale of electric power at wholesale in interstate commerce. Conflicts between SEC and FERC jurisdiction are handled under FPA § 318, 16 U.S.C. 825q, which resolves these conflicts by stating that PUHCA shall apply unless the SEC has exempted the affected party from the PUHCA requirement, in which case the FPA will apply. *See Arcadia Ohio v. Ohio Power Co.*, 111 S.Ct. 415, 417 (1990) (holding that § 318 does not establish a broad preemption in favor of the SEC. Instead, Justice Scalia wrote that § 318 operates only in the four areas specifically enumerated in the opinion. *Id.* at 419-20. The Supreme Court left for the lower court on remand the argument that the FERC's decision in that case had violated its own governing rules when it determined at a rate proceeding that a power company's cost of coal was unreasonably high. *Id.* at 422.). On remand, the D.C. Circuit found that the PUHCA provision directing the SEC to price goods at cost constrained the FERC from altering that price under its authority to set just and reasonable rates. *Ohio Power Co. v. F.E.R.C.*, 954 F.2d 779, 784 (D.C. Cir. 1992).

51. The Supreme Court has taken an expansive view of what constitutes interstate commerce for purposes of delimiting the borders of the FPC's jurisdiction. *See F.P.C. v. Florida Power & Light*, 404 U.S. 453, 456-59 (1972) (the Supreme Court held that Florida Power and Light's indirect connection with out-of-state companies through its participation in an in-state power pool that interconnects and exchanges power with a Georgia utility was sufficient to confer regulatory jurisdiction on the FPC). *See also F.P.C. v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-216 (1964), *reh'g denied*, 377 U.S. 913 (1964) (the Supreme Court held that the FPA grants the Commission jurisdiction of all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act itself).

52. The D.C. Circuit affirmed the FERC's assertion of jurisdiction over deficiency charges ordered by a voluntary pooling agreement, the New England Power Pool (NEPOOL). *Municipalities of Groton v. F.E.R.C.*, 587 F.2d 1296, 1301-2 (D.C. Cir. 1978). Similarly, the Supreme Court has held that the FERC's exclusive jurisdiction applies not only to rates, but also to power allocations that affect wholesale rates. *See supra* note 54.



through to utilities by reason of pooling agreements.<sup>53</sup>

### C. Utility Regulatory Issues Under the 1990 Amendments

Almost every aspect of compliance with acid rain requirements of the 1990 Amendments raises important and potentially "big-dollar" utility regulatory issues. Moreover, any issue that can be raised before a single utility regulatory agency has the potential to be raised before other agencies. There is the possibility that each different agency will reach a different result on the particular issue. As discussed below, a utility whose regulators adopt inconsistent policies toward acid rain compliance will likely not be able to comply with the Clean Air Act at least cost to its customers or to the country as a whole. In addition, its shareholders may not be able to recover the full cost of compliance in each jurisdiction.

#### 1. Planning Conflicts

Traditional utility planning entails matching projected demand with available resources (e.g., generating units and purchased power). More recently, utilities have used least cost planning or integrated resource planning<sup>54</sup> in an attempt to identify the mix of existing, new and repowered generation units,<sup>55</sup> purchased power<sup>56</sup> and "demand-side management"<sup>57</sup> that will permit the utility to meet its likely demand (with adequate reserve margins) at least cost to its customers or to society.<sup>58</sup>

Utility planning after enactment of acid rain control is different and a much more complex exercise than it was before the 1990 Clean Air Act Amendments. If utility acid rain compliance plans are to attain compliance at

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53. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). Mississippi attempted to deny Mississippi Power & Light the right to pass through to retail customers the cost associated with purchasing power pursuant to capacity allocations mandated by the FERC. Holding that the state commission could not alter components of a FERC-mandated capacity allocation, the Supreme Court (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986)) stated that, "[w]hen FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. . . . Such a trapping of costs is prohibited."

54. See generally Electric Power Research Institute, *Status of Least-Cost Planning in the United States*, EPRI EM-6133, Final report, (Palo Alto, CA: 1988); David Moskowitz, *Profits & Progress Through Least-Cost Planning*, National Association of Regulatory Commissioners, Washington, D.C., November, 1989.

55. The utility analyzes options for increasing or decreasing the rate of utilization of existing units, retiring those units, "repowering" or reconstructing them to increase their capacity or efficiency, and building new units.

56. A utility may purchase power from other utilities or from non-utility generators.

57. Demand-side management is a panoply of rate design, load management, and energy efficiency measures designed to reduce energy use or peak electric demand, or both. Rate design measures include daily or seasonal peak load pricing, interruptible rates, and elimination of certain promotional rates. Load management includes devices designed to reduce demand during peak periods. Efficiency measures include industrial, commercial, and residential energy conservation, and upgrading efficiency of customer appliances and equipment.

58. In the late 1980s, some 26 states required environmental and other "external" costs borne by society as a whole, rather than by the utility and its customers, to be taken into account in a utility's planning.

least cost to the utility and its customers, the utility must undertake extensive analysis of the acid rain compliance options available to it. Such options may involve a range of control technologies,<sup>59</sup> fuel switching,<sup>60</sup> allowance sales and purchases,<sup>61</sup> demand-side management,<sup>62</sup> and other measures.<sup>63</sup> The evaluation of each option relies on assumptions as to allowance prices, fuel prices, equipment prices, future demand, unit availability and many other factors.

In addition, state decisions on acid rain compliance may factor in policies beyond simply minimizing cost, such as the use of locally-produced fuels, employment impacts, compliance with other Clean Air Act requirements, and local air quality objectives.

Similarly, differences in timing of regulatory review of compliance plans can produce uncertainty or shareholder risks that make rational planning very difficult. If state A provides for full prior review and approval of compliance plans, and state B has an after-the-fact approval mechanism, there is a risk that changes in utility management's plan to satisfy one regulator will arouse the ire of the other many years down the road.

Other specific issues that can come up are differing policies towards allowance purchases and sales, differing assumptions as to allowance prices, differing policies with respect to use of local fuels, or differing externality calculations for use of coal by utility systems. For example, some states may choose to implement a proposed rate surcharge to allow utilities to recover the costs of acquiring scrubbers whereas other public utilities commissions might choose to treat these costs as part of a rate base. Another example of a potential state jurisdictional conflict could arise in the context of fuel switching. Some states may prefer not to switch to low sulphur coal in order to preserve

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59. See *Atlantic Electric Eyes Scrubbers as Phase One Compliance Strategy*, UTIL. ENVTL. REP., Apr. 19, 1991 at 14-15. Atlantic Electric investigated 70 possible compliance strategies before deciding to install scrubbers at its B.L. England coal-powered Units 1-2. Atlantic Electric also plans to employ scrubbers, or some combination of scrubbers, at the Conemaugh Station facility. The company hopes that the scrubbers will generate excess emissions allowances for its own use or to be sold on the market.

60. See *TECO to Fuel-Switch for Phase One, Will Make Scrubber Decision by July*, UTIL. ENVTL. REP., Mar. 20, 1992 at 12-13. Tampa Electric Company has chosen to switch to low-sulphur coal to assist in its compliance efforts; *NIPSCO Plans Precipitator Upgrades as Part of Michigan City Overhaul*, UTIL. ENVTL. REP., Feb. 21, 1992 at 8. Northern Indiana Public Service Company has chosen to upgrade the electrostatic precipitator at one of its units so as to burn low-sulphur coal more efficiently. The upgrade, likely to be the largest in the power plant's history, will involve internal design changes. Twelve to fourteen companies are presently under contract to do various portions of the project. When completed, the new precipitator will allow the company's Unit-12 to burn a fuel mixture that contains an increased concentration of low sulphur coal.

61. See *PEPCO Clean Air Plan Combines Allowance Trading, Fuel-Switching and Conservation*, UTIL. ENVTL. REP., May 15, 1992 at 7-8. Potomac Electric Power Company has indicated that it plans to purchase an additional 25,000 allowances annually to bring the Chalk Point and Morgantown plants into compliance under Phase-One.

62. See *id.* Potomac Electric Power Company also plans to meet 49% of its new demand through conservation by the year 2000 when it plans to have 1,180 MW of demand-side management programs in place.

63. See *Kentucky Governor Signs Bill Allowing Surcharge to Recover Scrubber Costs*, UTIL. ENVTL. REP., Apr. 3, 1992 at 4-5. Kentucky authorized utilities to collect a monthly "environmental surcharge". This surcharge will be used to pay for scrubber installations that will allow Kentucky utilities to continue to burn high-sulphur coal, thereby protecting local jobs.

local jobs in the coal industry. In contrast, other states may choose to switch fuels as they would not feel these same costs of increased unemployment.

Inescapably, the assumptions, projections or policies which are acceptable to one regulatory agency may not be acceptable to the other regulatory agencies which have jurisdiction over a particular utility or utility system's rates and operations. This can have two results. First, utilities are subject to the risk that compliance with one regulator's assumptions or policy preferences will result in disallowance by another regulator, unless they can induce their regulators to adopt common policies.

Second, utilities may be induced to adopt inefficient compliance plans to minimize the risk of disallowance. Utilities or utility systems that operate in more than one state may find that least cost compliance for the utility as a whole will entail adopting expensive compliance strategies in one state (such as installing scrubbers) and adopting an inexpensive compliance strategy in other states (such as fuel switching or retiring a unit). Conflicts will arise as to how to allocate the costs and benefits of such a strategy among states. If the states are unable to agree, the utility may decide to minimize compliance cost, in each state, rather than for the systems as a whole, resulting in higher compliance costs on a system basis.<sup>64</sup>

## 2. Operational Conflicts

Regulators' ratemaking and other practices with respect to utility operations also pose considerable potential for conflicting, and ultimately inefficient, regulation. The simplest example is differing policies on allowance valuation. A multi-state utility, which is regulated in two states that have different methods of valuing for ratemaking purposes allowances consumed in generation, would place a utility in an almost impossible bind in determining how to dispatch its units at least cost using its central dispatch system. Similarly, prudence questions could arise for central dispatch systems operated for multi-utility power pools or registered holding companies. The value of charges or credits allowed pool members by the pooling agreement for allowances consumed in generation may be different than the value assumed by one or more states for purposes of prudence review of the utility's contribution of allowances to the pool. If this occurs, there appears no way to operate the pool without imposing losses or conferring gains on ratepayers within particular jurisdictions, or on shareholders.

## IV. METHODS FOR DEALING WITH POTENTIAL JURISDICTIONAL CONFLICTS

The potential jurisdictional conflicts described above can be addressed by Congress, either through statutory changes in the FPA,<sup>65</sup> or through consent

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64. Another possibility which has been noted is that utilities may be driven to sites in states that offer the most attractive climate from the standpoint of the shareholders. Thus, interstate utilities may bunch their facilities in only certain states. As a result, the citizens of those states will shoulder the burden of the pollution which stems from the construction of the new facilities.

65. Such a change might give the FERC additional supervisory authority over conflicting state decisions respecting acid rain compliance.

of Congress to interstate compacts.<sup>66</sup> Alternatively, state regulators and the FERC can use tools available to them under existing law to reduce the potential for conflict. The tools available under existing law are examined below.

#### *A. General Approach*

As a preliminary matter, it should be noted that the application of federal law, including the Compact Clause, the Commerce Clause, and preemption doctrine, is highly fact-dependent. The factual circumstances attending different utilities' operations and corporate and contractual arrangements will have different legal consequences. In addition, different regulatory issues may require different responses from utilities and regulators in order to eliminate possibilities of jurisdictional conflict. Finally, the FERC, states, and utilities have a great deal of latitude under federal law to structure corporate, contractual and regulatory arrangements. It may therefore be possible to reach a workable accommodation of state and federal interests in these circumstances of potential conflict. In this light, utilities and regulators may wish to look at the process described below for assuring policy coordination (or at least minimizing potential conflict) in connection with CAA compliance.

The incidence of regulation on each utility, holding company, and power pool needs to be separately reviewed for potential conflicts and for coordination needs. This might be achieved by setting up an ad hoc committee of utility officials and federal and state regulators on a utility-by-utility basis to identify issues, and to recommend common policies and a mechanism for resolving potential conflicts. Once a general course of action is outlined, then there are a number of potential mechanisms, described below, that may be used to iron out policy differences and resolve conflicts.

#### *B. Coordination Mechanisms*

##### 1. Informal Consultation

Early, informal contacts among regulators can do much to avoid unnecessary conflicts among jurisdictions regulating the same entity. For example, an informal meeting between the representatives of the various regulatory agencies and the utility could help ensure that utility resources are used most efficiently in the case of conflicting regulatory policies regarding allowance purchases and sales. Still, regulators must take care in engaging in such informal consultations during pending proceedings so as to ensure that they do not violate the APA's prohibitions on ex parte contact or open meeting laws, if applicable.<sup>67</sup>

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66. Congress could consent to multi-state regulatory arrangements under which regional regulation would displace both state retail rate regulation and FERC wholesale rate regulation.

67. See *infra* note 76.

## 2. Rulemaking

### a. Joint Policy Statements

The APA<sup>68</sup> recognizes the role of policy statements, published statements of agency policy which are not binding in each particular case, but which can be prescribed in advance as an indication of general policies an agency intends to follow.<sup>69</sup> Where state law makes similar provision, state regulators, alone or together with the FERC, should consider whether they are able to arrive at and prescribe joint statements of policy on key issues of acid rain compliance. These could include policies on allowance sales and purchases, allowance valuation, timing and scope of prudence review, and perhaps common assumptions on planning issues such as fuel prices and discount rates. Joint policy statements, because they need not be followed in future proceedings, are not likely to be regarded as contravening the Compact Clause. Moreover, agreements between a state and the federal government are not subject to the strictures of the Compact Clause.<sup>70</sup>

### b. Uniform Substantive Rules

The State legislative practice of adopting uniform laws is not regarded as presenting Compact Clause objections.<sup>71</sup> There is no reason to believe that uniform administrative rules should be any more objectionable under the Compact clause than uniform laws. There may be substantial agreement among regulators on particular ratemaking, accounting or similar issues. State and federal<sup>72</sup> regulators should examine the possibility of each exercising their independent authority to promulgate uniform rules on key substantive issues such as accounting practices and ratemaking treatment of allowances.<sup>73</sup>

## 3. Coordination of Adjudicatory Proceedings

Adjudicatory proceedings pose more difficulties for joint action than

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68. 5 U.S.C. §§ 551-559 (1988).

69. What constitutes a statement of policy under the APA has been a topic of academic and judicial discussion for decades and apparently no definitive explication has resulted. *See* Kenneth C. Davis, *ADMINISTRATIVE LAW TREATISE*, § 7:5 (1979 & 1989 Supp.); *Pacific Gas & Elec. Co. v. F.P.C.*, 506 F.2d 33, 37 (D.C. Cir. 1974) ("A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications."). Current case law hinges on the question of whether the agency statement establishes a "binding norm." *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983), *cert denied*, 466 U.S. 927 (1984).

70. *See supra* note 49.

71. *See Fraser v. Fraser*, 415 A.2d 1304 (R.I. 1980) (holding that state legislative enactment of the Uniform Reciprocal Enforcement of Support Act (URESA) was not a violation of the Compact Clause under the Supreme Court's current interpretation of the clause). *See also Ivey v. Ayers*, 301 S.W. 2d 790, 794-95 (Mo. 1957).

72. In the federal arena, agencies with overlapping or complementary authority over a particular issue have issued joint rules which are promulgated by each agency involved.

73. *See infra* note 76.

rulemakings because of concerns with *ex parte* constraints,<sup>74</sup> requirements for a record basis for decisions, and open meeting requirements.<sup>75</sup> However, there are several possibilities for coordinating adjudicatory proceedings.

a. Coordination of staff litigation positions

The first option is to have each regulatory commission's litigation staff cooperate to submit a common litigation position to each commission involved. If feasible, a joint proceeding should be used (see below). The joint staff litigation position then would be separately considered by each commission, and each commission would issue a decision with or without consultation with the other commissions.<sup>76</sup>

b. Joint proceedings

A preferred approach, to the extent permissible under applicable administrative procedure requirements, would be a joint hearing, and, if possible, a common decision subscribed to by each commission participating in the proceeding. Section 209(b) of the FPA specifically permits the FERC, under its rules, to hold joint hearings with any state commission.<sup>77</sup> The FERC rules interpret this provision as authorizing a "concurrent" hearing in which state and federal regulators participate on issues over which each commission has jurisdiction. Each commission makes a separate decision on the record developed in the concurrent hearing. An opportunity for a pre-decisional conference among the participating commissioners is provided.<sup>78</sup>

Section 209(b) of the FPA provides general authorization at the federal level to hold such hearings; however, consideration needs to be given to the possible application of statutory *ex parte* rules and open meeting requirements, which were subsequently enacted.<sup>79</sup> Similar issues would have to be

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74. 5 U.S.C. § 557(d) (1988).

75. *Id.* § 552(b).

76. This approach would not trigger the *ex parte* prohibitions of the APA. Section 557(d) prohibits off-the-record communications between the decisional body and interested persons outside the agency. However, if such communications are on the record then they will not invalidate the final adjudicatory decision. *See United Airlines, Inc. v. Civil Aeronautics Board*, 309 F.2d 238 (D.C. Cir. 1962). In addition, to the extent the FERC is setting rates, the Department of Energy Organization Act (DOE Act) permits the FERC to use trial-type proceedings under 5 U.S.C. §§ 556-557 (DOE Act § 403(c) (1977)). The APA's *ex parte* rule applies only to proceedings conducted under sections 556 and 557.

The statutory separation-of-functions under 5 U.S.C. § 554(d) is likely to be inapplicable to utility regulatory proceedings relating to acid rain compliance because of that section's exemptions for ratemaking and initial licensing. State administrative law may differ.

77. 16 U.S.C. § 824h(b). "[T]he Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act."

78. 18 C.F.R. § 385.1305(a). The FERC also reads the FPA's joint hearing provision as permitting participation by state commissions in an advisory capacity. § 385.1305(b).

79. *See supra* notes 73, 74. Also, FPA § 209(b) allows the Commission to confer with State Commissions regarding rate structures, costs, accounts, charges, practices, and regulations of public utilities under that State's jurisdiction.

examined at the State level.<sup>80</sup>

c. Joint Boards under FPA

(i) Statute and regulations

Another option is the joint board procedure provided in section 209(a) of the Federal Power Act (FPA).<sup>81</sup> Under this procedure, the Commission may refer a matter to a board composed of a member or members from each state involved. The Board has the same powers, duties, and liabilities as a single FERC commissioner in conducting a hearing. The action of a board has "such force and effect and its proceedings shall be conducted in such manner" as the FERC prescribes by regulation.<sup>82</sup> The FERC's regulations provide that "the force and effect" of a joint board's order will be spelled out in the FERC order referring a matter to a joint board.<sup>83</sup>

The FERC's regulations (which were originally adopted by the Federal Power Commission in the 1930s) take a very restrictive view of the functions of a joint board. The rules state: "It is believed that the [joint board procedures] were designed for use in unusual cases, and as a means of relief to the Commission when it might find itself unable to hear and determine the cases before it, in the usual course, without undue delay."<sup>84</sup> The Commission's position on the role of joint boards appears flatly inconsistent with Congressional intent. Hearings on the 1935 legislation made it clear that the joint board provision was "intended as a cooperative provision"<sup>85</sup> that "try[s] to get back so far as possible to the source of the questions that might arise."<sup>86</sup> The 1935 Senate Committee report explained: "This subsection [now FPA § 209(a)] is designed to permit decentralized administration under the general supervision of the Commission by individuals who are acquainted with the situation and the problems of the locality affected by the particular proceeding."<sup>87</sup>

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80. Note that § 4-213 of the Uniform Law Commissioners' Model State Administrative Procedure Act specifically permits a member of a multimember panel of presiding officers to communicate with other members of the panel. Model State Admin. Procedure Act, § 4-213(b), 15 U.L.A. (1981).

81. 16 U.S.C. § 824h(a) (1988). "The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe."

82. *Id.*

83. 18 C.F.R. § 385.1304(b) (1991).

84. *Id.* See *Kansas Gas and Electric Co.*, 31 F.E.R.C. ¶61,379 at 61,379-80 (1985); *Massachusetts v. New England Power Co.*, 27 F.E.R.C. ¶61,029 at 61,051 (1984); *Kansas State Corp. Comm'n*, 25 F.E.R.C. ¶61,400 (1983).

85. Hearings on H.R. 5243 (to Amend the Federal Water Power Act) Before the House Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 519 (1935) (comments of Solicitor Devane).

86. *Id.* at 405 (comments of Commissioner Seavey).

87. H.R. Conf. Rep. No. 621, 74th Cong., 1st Sess. 52 (1935).

There appears to be no legitimate reason not to use the joint board procedure to meet the coordination needs discussed in this article. It should be noted that a state's participation in a joint board proceeding (which by its terms relates only to matters arising under the FPA) does not necessarily bind the state acting through its own state commission to adopt parallel policies under state law. However, the agreement of a state representative to a particular policy at the federal level is likely to facilitate a similar result at the state level.

(ii) How joint boards could operate

The Commission could vest in a joint board authority to decide particular acid rain compliance issues as they relate to one or more utilities, and provide that the decision, if unanimous, would not be reviewed by the Commission, except on very narrow grounds. Non-unanimous decisions would be subject to plenary review by the full Commission. If the board failed to decide a dispute within a specified time, the Commission would revoke its reference of the matter to the joint board, and decide the matter itself. Such a joint board procedure could operate as follows:

(1) The FERC, through a policy statement or other pronouncement, states that it will use joint boards to deal with acid rain compliance issues, on request of state regulators.

(2) State utility regulators with jurisdiction over a multistate utility or operating utilities that are members of a holding company or power pool petition the FERC to establish a joint board to review identified acid rain compliance issues. These issues could include the "wholesale" prudence issues relating to a compliance plan for a utility or holding company or the validity under the FPA of changes in a system agreement or pooling agreement. The states involved could also agree to conduct concurrent hearings on state prudence and retail rate issues arising out of the same compliance plan, system or, pooling agreements.

(3) The FERC issues an order establishing the joint board. The order would:

(A) Require notice and opportunity to participate by any interested person, but would otherwise permit the board to establish its own procedural rules. *Ex parte* and Sunshine Act issues can be dealt with through open meetings.

(B) Require a board decision within nine months (unless an extension is granted for good cause). The joint board would be discharged of its jurisdiction over the proceeding if it failed to issue a decision within the prescribed period.

(C) Provide that a unanimous decision of the board would be subject to "certiorari" type review by the Commission on very narrow grounds. That is, the decision would be reviewed only if two FERC commissioners affirmatively voted to review it, and the scope of review would be limited to grounds of excess of statutory authority, deprivation of constitutional rights, or fundamental violation of due process.<sup>88</sup>

(D) Provide that a non-unanimous decision would be subject to plenary FERC review, just as a FERC ALJ decision is under existing practice.

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88. Consideration should be given to conditioning certiorari review on each state agreeing not to adopt any decision at the state level that is inconsistent with the joint board decision.



The above approach would, in the author's view, provide incentives for timely and unanimous resolution of interstate conflicts in utility regulatory policy respecting acid rain compliance. Unanimous decisions by the states are encouraged because such decisions would be subject to the narrowest review permissible under the FPA. Timely decisions are encouraged because delay automatically relegates the matter back to the FERC.

#### 4. FERC Rate Filings

Some issues are so closely tied to FERC's exclusive jurisdiction over rates for interstate wholesale sales and interstate transmission that obtaining state input may require a different approach. Utilities and their state regulators could agree to file pooling or other agreements with the FERC that have specific provisions for prior approval by the affected state commissions. Under this approach, a mechanism for joint approval of key ratemaking components by the state regulators would be incorporated into the FERC-filed rate. However, the mechanism would leave to the FERC the decision on these issues if the state regulators could not agree.<sup>89</sup> For example, a holding company could amend its system agreement to provide that any capital expenditure or operating expense approved by the States that have retail regulatory jurisdiction over the systems operating companies would be deemed prudent for purposes of wholesale sales and exchanges among the companies. Such a mechanism would not require Congressional authorization if it were properly constructed,<sup>90</sup> but would require a willingness by the state regulators to subject themselves to such a mechanism.

### V. CONCLUSION

Because of the wide range of factual situations presented to regulators at this intersection of environmental and utility regulation, and the differing types of regulatory issues that must be resolved, federal and multi-state coordination will have to be approached on an ad hoc basis, looking at a variety of tools under existing law for resolving potential conflicts. While not all conflicts can be resolved by coordination and agreement, it is possible to assure that unnecessary or unintended differences in state and federal regulatory policies would not impede least cost compliance with the CAA Amendments of 1990.

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89. This mechanism would be akin to a "formula rate." The FERC in some circumstances allows utilities to file a rate formula rather than a fixed rate. Once the formula is approved, then rates can change under the formula without the necessity of further rate filings. Typically, a formula rate could take into account various operating factors necessary for the production, sale and transmission of power for a particular company.

90. One issue to be resolved, because of delegation concerns, is whether joint approval would be given conclusive or merely presumptive weight.