

FERC'S JURISDICTION UNDER SECTION 205 OF THE FEDERAL POWER ACT

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I. INTRODUCTION

Constitutional law scholars often comment that the U.S. Supreme Court adjudicated its initial case under the First Amendment over one hundred years after the states ratified the Bill of Rights.¹ Similarly, future historians may note that the Federal Energy Regulatory Commission (FERC or the Commission),² the agency that administers the Federal Power Act of 1935 (FPA), instituted a proceeding to decide two questions equally fundamental to the electric utility world fifty-seven years after Congress passed the law—what agreements fall within FERC's rate jurisdiction? and what "classifications, practices and regulations" must be filed?³

Ironically, the Commission worked for the first time to define comprehensively its regulatory authority while it found itself in the midst of a movement in the opposite direction. In an effort to make the industry more competitive, the FERC sought ways to apply "light handed" regulation to the sale of electricity at wholesale in interstate commerce, one of the two areas of its jurisdiction over public utilities. A related paradox arose from the fact that the case that triggered the whole proceeding to determine FERC's rate jurisdiction involved a rate the parties negotiated in the marketplace, outside the confines of traditional regulation.

The FPA emerged during the New Deal as a companion to the Public Utility Holding Company Act (PUCHA).⁴ The substantive roots of FERC's rate jurisdiction, however, go back to the beginning of administrative regulation in the Populist Era. In particular, section 205, as well as other sections of the FPA that deal with rates and financial matters, finds its intellectual antecedents in the Interstate Commerce Act of 1887 and federal regulation of railroads. Case law has established that Congress used that experience as the model for economic regulation in the utility industries.⁵

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1. E.g., GERALD GUNTHER & NOEL T. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* at 1050 (8th ed. 1970).

2. 42 U.S.C. § 7172 (1988) (successor to the Federal Power Commission).

3. *Prior Notice and Filing Requirements under Part II of the Federal Power Act; Technical Conference & Request for Comments*, 57 Fed. Reg. 59,338 (1992).

4. 15 U.S.C. §§ 79 to 79z-6 (1988).

5. See *Northwest Pub. Serv. Co. v. Montana Dakota Util. Co.*, 181 F.2d 19, 22 (8th Cir. 1950), *aff'd*, 341 U.S. 246 (1951); *Public Serv. Co. of Ind.*, 56 F.P.C. 3003 (1976).

Over the years, the courts have had occasion to discuss in detail the rate making concepts "just and reasonable" and "undue discrimination."⁶ While the cases may not make for a well defined body of law, by and large regulators, companies and counsel know what these substantive concepts mean.⁷ The other aspect of FERC's regulation, the filing requirements of section 205 of the FPA, did not receive such close scrutiny until the *Prior Notice* proceeding.

Rather, for certain categories of cases, the industry and the Commission staff over the years must have operated under a tacit understanding. Instead of arguing over which classes of agreements came within section 205, the industry filed those contracts covering transactions it thought (or the staff indicated) the agency would scrutinize. Companies held back those in which the Commission would show no interest, even if the agreements were jurisdictional. The advent of competition and the need for the FERC to review market-based rates led to the *Central Maine* case⁸ and its aftermath, and irrevocably shattered any unwritten framework that had existed.

What occupied FERC in the two years the agency examined the extent of its jurisdiction, and what I shall discuss here, breaks down into two parts. First, the story of the *Central Maine* cases lends itself to a political scientist's study of the laws of good intentions and unintended consequences. Second, and more important in the long run, out of the chaos of *Central Maine* grew the *Prior Notice* proceeding. Here, the FERC tried to give the industry guidance on very basic issues: FERC jurisdiction and, apart from that, the Commission's discretion to require companies to file information to help the FERC carry out its responsibilities.

On *Central Maine* itself, this article argues that, while it appears to many that the FERC's effort amounted to nothing more than a bureaucratic misstep or a capricious effort to violate a long standing "gentlemen's agreement," in fact, neither characterization correctly describes what occurred. True, the Commission changed course several times, but it had good reason to take the first step. The agency needed to take more control of the developing market in order to enforce its mandate under section 205.

With the latest amnesty having closed at the end of 1993, the FERC must still pick up the pieces from that venture. The Commission issued a notice early this year that indicated overall, 887 filings, and in the last ten days of the amnesty, 438 submissions, came in under section 205. While it could not state exactly how many, most of the filings surfaced as a result of *Central Maine*.⁹ Few, however, presented novel issues. Section II of the article discusses *Central Maine* and its aftermath.

6. See *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984), cert. denied sub nom., *Williams Pipeline Co. v. Farmers Union Cent. Exch., Inc.*, 469 U.S. 1034 (1984).

7. Indeed, the *Farmers Union* court took great pains to point out how the FERC went wrong in allowing oil pipelines to earn returns higher than cost-based.

8. *Central Maine Power Co.*, 56 F.E.R.C. ¶ 61,200 (1991).

9. 58 Fed. Reg. 2364 (1994).

As for the *Prior Notice* proceeding, in my opinion, that effort will prove to have been fruitful. Affected companies can now discern the FERC's thinking on its jurisdiction. The advent of competition has increased the need for the Commission to become better informed about the different agreements utilities enter into, so that the agency can guide the industry. Especially if utilities negotiate market-based agreements, the FERC must review the rates to ensure the legality of the charges.

While the industry may find the new era difficult to live in, and the Commission may have left itself much room for maneuver, its orders do have an underlying theme, as this article will develop. The *Prior Notice* proceeding is explored and critiqued in sections III-VI. The conclusion, Section VII, touches on some of the implications of the FERC's activities.

To understand the issues involved, one must have at least passing familiarity with the language of section 205. Section 205(a) of the FPA grants the Commission authority to regulate:

[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electricity subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or changes. . . .¹⁰

In addition to granting the FERC rate jurisdiction, the FPA, in section 205(c), authorizes the Commission to require utilities to file "classifications, practices and regulations affecting [or] relating to" rates.¹¹ This provision, requiring utilities to file "classifications," as well as "practices and regulations" that affect (not only jurisdictional service but) "rates," may include matters that the FERC does not directly regulate. For example, section 205(c) allows the Commission to obtain information about activities outside the FERC's jurisdiction that it needs in order to exercise its responsibilities.

If, for example, a utility includes a charge for advertising in a wholesale rate, an issue may arise about the charges that utility levies. The Commission may find the advertising excessive as part of adjudication of the rate case. In order to enable the FERC to decide, the FPA gives the Commission authority to require the utility to file the information on its advertising, even though the Commission does not regulate advertising.

Yet a third category of filing requirements covers matters bearing a remote relationship to rates, such as labor agreements. Utilities need not file these items with the FERC in the first instance; they must produce the relevant documents in litigation or on an audit, as support for rates the companies request.¹²

Even with its long experience administering the FPA, only in the past two years did the FERC seek in a systematic way to clarify its rate jurisdiction and filing requirements. The Commission began to define the concepts "for or in connection with" service and "affecting or pertaining to"

10. 16 U.S.C. § 824d(a) (1988) (emphasis added).

11. 16 U.S.C. § 824d(c) (1988).

12. See, e.g., *Prior Notice*, 64 F.E.R.C. ¶ 61,139, t 61,988 n.3.

jurisdictional rates and charges.¹³ The FERC received filings and convened a technical conference.

After a second round of comments, the Commission issued a Final Order,¹⁴ with an appendix entitled, "*Response to Requests in the Technical Conference For Additional Guidance on Agreements the Commission Considers Subject to Filing Under Section 205 of the Federal Power Act*" (Jurisdiction Appendix), specifically addressing questions concerning the FERC's jurisdiction. The Commission issued as well an Order Granting in Part and Denying In Part Motions for Clarification and Rehearing (Order on Clarification).¹⁵ Nevertheless, the FERC has not yet made a definitive pronouncement on the meaning of section 205.

The second part of this article surveys that undertaking and offers my view of a framework within which to determine the FERC's rate jurisdiction in particular cases.¹⁶ I suggest the following formula. The charges customers pay for services which public utilities must offer in order to sell electricity at wholesale or provide transmission in interstate commerce fall within the ambit of the Commission's rate regulation. If the bill for a wholesale sale or transmission in interstate commerce normally includes a fee for the transaction at issue, not only does the FERC regulate the services that encompass the activity in question, it also regulates the rates. In short, section 205 jurisdiction attaches. The Commission may exempt utilities from regulation only in the most restricted circumstances.

For example, agreements for discrete payments to construct transmission lines come within the FERC's purview, because in regulated rates, utilities charge transmission customers for the cost of building lines. In contrast, contracts for renting utility poles to phone companies fall outside the Commission's rate jurisdiction, as the FERC does not regulate telephone service.

This article will also cover "classifications, practices and regulations" that affect or relate to "rates," since they are included in the FPA's filing requirements.¹⁷ Here, the cases hold that the Commission enjoys considerable discretion to determine the information it needs. Therefore, the FERC may, if it wishes, excuse utilities from filing "classifications, practices and regulations" of a minor or remote character. In fact, the Commission applies that standard in deciding whether to require a utility to file a particular classification, practice or regulation under section 205(c).

13. The *Prior Notice* order also discussed section 205(c) of the Federal Power Act and the Commission's authority to require utilities to file schedules affecting or pertaining to rates. 64 F.E.R.C. ¶ 61,139, at 61,986.

14. 64 F.E.R.C. ¶ 61,139 (1993).

15. 65 F.E.R.C. ¶ 61,081 (1993).

16. The Commission's jurisdiction under section 205(c) to require filing of classifications and practices related to rates encompasses more than the FERC's rate jurisdiction under section 205(a), since the latter must relate to jurisdictional service.

17. Not only the final order, but also the Jurisdictional Appendix discussed section 205(c). 64 F.E.R.C. ¶ 61,139, at 61,988.

II. THE *CENTRAL MAINE* ODYSSEY

A. *How It All Began*

On the same day it decided the momentous merger between Northeast Utilities, Inc. and Public Service Company of New Hampshire,¹⁸ the Commission considered what appeared at the time to be a straightforward case. Central Maine Power Company (Central Maine), filed with the Commission only after service had ceased a host of contracts to sell electricity for resale in interstate commerce. That the company ignored its obligation under the FPA¹⁹ seemed to be an increasingly recurring, but still isolated, event.²⁰ In fact, the case attracted attention mainly because the parties to the agreements had negotiated market-based rates.²¹

At that early stage, as competition evolved in the sale of electricity, the FERC constantly refined the standards for allowing parties to depart from cost-based rates.²² That made advance Commission approval especially important and the temptation to avoid seeking it particularly inviting.²³ As a result, the Commissioners and those involved in the adjudication found no reason to question the idea that Central Maine had transgressed the FPA's filing requirements and that the FERC must act against that company and other utilities similarly ignoring the commands of section 205. The debate concentrated on the exact remedy to apply in order to cure the problem.²⁴

The Commission imposed on Central Maine a refund of all its revenue under the previously unfiled contracts in excess of the amount of its fixed costs of performing the contracts. In addition, the FERC granted the industry a grace period—what the order referred to as “an amnesty”—within which to file agreements they had neglected to submit before service began. After that time, utilities that ignored the 60-day advance filing requirement of the FPA could recover only the variable operation and maintenance costs of performing the contract. They would have to refund the difference between the rate they actually collected and that lower figure.

The deliberations in *Central Maine* concentrated entirely on the question whether the Commission should, in the future, allow forgetful utilities such as Central Maine to recover certain out-of-pocket costs (operation

18. *Northeast Util. Serv. Co.*, 56 F.E.R.C. ¶ 61,269 (1991), *order on reh'g*, 58 F.E.R.C. ¶ 61,070 (1992), *remanded*, 993 F.2d 937 (1st Cir. 1993), *order on remand*, 66 F.E.R.C. ¶ 61,332 (1994).

19. Section 205(d) requires utilities to file rates for the FERC's approval 60 days before they propose putting them into effect. 16 U.S.C. § 824d(d) (1988).

20. 56 F.E.R.C. ¶ 61,200, at 61,817.

21. 56 F.E.R.C. ¶ 61,200, at 61,816.

22. *Compare Pacific Gas & Elec. Co.*, 42 F.E.R.C. ¶ 61,406 (1988), *order on reh'g*, 43 F.E.R.C. ¶ 61,403 (1988) with *Nevada Sun Peak, Ltd.*, 54 F.E.R.C. ¶ 61,264 (1991).

23. This does not suggest that Central Maine deliberately failed to file its contract.

24. The *Central Maine* case began in 1991.

and maintenance) or a lower amount in their rates.²⁵ The FERC decided that although failing to file market-based rates constituted particularly egregious conduct (because utilities could collect rates the FERC would have rejected had the Commission reviewed them), the variable operation and maintenance cost cap sufficed, at least as a first step in trying to deter that type of behavior.

If the FERC had confined the *Central Maine* order to market-based rates (as some at the Commission urged) it would have caused a ripple in the industry, but not the great deal of agony that some have described. The decision to include cost-based rates in the formulation came as an afterthought. Section 205(d) of FPA requires advance filing of rates, no matter how the parties derive them. So, when the Commission created the remedy and amnesty for *Central Maine*, the FERC applied them to cost-based, as well as market-based rates. At the same time, the FERC believed that the number of cost-based rates needing the *Central Maine* treatment would turn out to be small, no more than a dozen.

The original *Central Maine* order supports this interpretation. The discussion criticizing the utility's actions²⁶ cited two cases, *Portland General Exchange, Inc.*²⁷ and *Central Vermont Public Service Corporation*.²⁸ Both involved companies that began selling at market-based rates without advance FERC approval. In fact, the Commission²⁹ adopted as its refund remedy the type of rate it allowed in *Central Vermont*: 100 percent contribution to fixed costs could be retained, and the rest of the revenues must be refunded.

Furthermore, in announcing its intention to impose a stiffer refund requirement in the future, the FERC emphasized that failing to file for advance approval of market-based rates constituted especially disturbing conduct. *Central Maine* declared.

Delay in tendering rate filings can place the Commission in a difficult position, regardless of whether the rates are cost- or market-based. However, this problem is most acute when market-based rates are requested. Timing is critical in such cases. The Commission cannot cure a defective market or market process prospectively. Therefore, all rates submitted on a nontraditional basis must be filed with the Commission at least 60 days before the expected date of commencement of service.³⁰

25. My notes of the Commission meeting indicate that Commissioner Trabandt asked whether the law allowed the FERC to reduce the rate below variable operation and maintenance costs for utilities disobeying section 205.

26. 56 F.E.R.C. ¶ 61,200, at 61,817.

27. 51 F.E.R.C. ¶ 61,108 (1990), *order granting clarification*, 51 F.E.R.C. ¶ 61,279 (1990), *order accepting compliance filing*, 53 F.E.R.C. ¶ 61,216 (1990).

28. 54 F.E.R.C. ¶ 61,153 (1991).

29. 56 F.E.R.C. ¶ 61,200, at 61,818.

30. *Id.*

After disclosing the new refund policy for market-based rates, the order stated, [i]n addition, the Commission is announcing a similar policy with respect to traditional cost-based rates.”³¹

Moreover, at the technical conference,³² two Commissioners explained that more exacting enforcement of the FPA's notice requirements became important with the coming of more competition to the industry. Commissioner Trabandt commented:

My interest in making sure that we know [in advance] what you're doing [in charging for jurisdictional electric and transmission service] . . . is to make sure that, particularly with the evolving competitive situation, that it meets the just and reasonable standard. . . .

The plain vanilla kind of a situation for me was not the driving force [behind *Central Maine*], it was the types of more market oriented arrangements, non-cost based types of circumstances that were of particular interest to me.³³

Immediately following that statement, Commissioner Moler added:

As this has evolved, it is obvious that short-term bulk power transactions, and embedded cost rates, or a traditional split the savings kind of approach are not terribly tricky for us to deal with. . . .

It is the market-based rates. You understand why we are interested in going there, and you are interested in going there, without any showing of competition, availability of information to others . . . where we got into the business after the fact, or I don't think we're meeting our obligations. . . .

The answer to your question, then, is that it's both the rate as well as the timing. . . .³⁴

Insisting that utilities file market-based rates, even if one favors maintaining the entrenched custom that prevailed for decades on cost-based rates, makes sense, for two reasons. Utilities needed to submit to the Commission market-based rates, which the FERC evaluated under ever-shifting standards, in order for the FERC to establish the boundaries of acceptable pricing for wholesale electric utilities engaging in jurisdictional transactions. Second, if utilities calculate a market price, they may collect exorbitant rates, if they failed to seek Commission approval. Therefore, failing to file market-based rates may amount in many instances to much more than a technical violation.

While the problem at hand did not require new rigor with regard to cost-based rate filings, the *Central Maine* decision embraced everything and once it became public, the industry began complying with the order.

31. *Id.* Ultimately, the Commission substituted the loss of the time value of the money the utility collected until 60 days after it filed with the Commission. *Prior Notice*, 64 F.E.R.C. ¶ 61,139, at 61,979-80. *See infra* text, at 96-97.

32. The commission called a technical conference as part of the *Prior Notice* proceeding. *See infra* text, at 97-103.

33. *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, FERC Technical Conference, Transcript at 41 (Jan. 28, 1993) (statement of Commissioner Trabandt) [hereinafter *Prior Notice Technical Conference*].

34. *Id.* at 42 (statement of Commissioner Moler).

B. The Amnesty Window Opened and the Cases Poured In

With the benefit of hindsight, differing schools of thought have emerged about how the FERC should have handled the situation regarding cost-based agreements utilities failed to file. Some, including many in the industry, believe that it might have been better to draw the line in the following fashion: apply draconian remedies to utilities engaging in selling electricity under market-based rates for which they failed to obtain approval and maintain the status quo with regard to agreements that called for cost-based prices.

Proponents of that view maintain that as things turned out, *Central Maine* proceedings engulfed the industry and, ultimately, swamped the Commission. For example, the filings that resulted from the final amnesty led the FERC to consider novel ways of disposing of the hundreds of cases that came before the Commission.

I submit that while the FERC could have treated cost-based agreements differently from market-based rates, in fact, it could not have ignored the former altogether. Perhaps, when the Commission issued *Central Maine*, under the false impression that few, if any, effective cost-based rates remained for utilities to file, the Commission, as some suggested at the time, might have decided not to expend time and money on pursuing a few careless companies. Once the dimensions of the phenomenon became apparent, however, the law bound the FERC to take action. The Supreme Court case, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,³⁵ shows why.

Maislin involved the failure of a trucking company to file its rates. The Motor Carrier Act contains a similar requirement to section 205: regulated companies must charge rates that the commission finds reasonable.³⁶ The Interstate Commerce Commission allowed truckers to collect rates they negotiated with customers but did not file. The Supreme Court held that the statute did not permit the carriers to conduct their business in that fashion because Congress had not authorized the administrative agency to "alter the well-established statutory filed rate requirements."³⁷ The FERC would breach its statutory duty if it ignored the widespread violations of the FPA's filing requirements.

More to the point, the industry holds in its hands the possibility of ameliorating, if not resolving, the legitimate complaints it has expressed regarding the FPA's filing requirements in the post-*Prior Notice* world. First of all, even without whatever tacit understanding the industry once had with the staff, utilities need not drown in paperwork, nor engage the Commission in regulating trivia.

The Jurisdictional Appendix affords utilities the opportunity to make an effective argument that on de minimis grounds, i.e., that regulation provides no public benefit and amounts to a useless exercise, the FERC should exempt from filing certain types of agreements that technically fall within

35. 497 U.S. 116 (1990).

36. 42 U.S.C. § 10,701(e) (1988).

37. 497 U.S. at 135.

the jurisdiction of the Commission but, as a practical matter, the agency need not review. So far, the industry has failed in its efforts.³⁸

In addition, many electric companies criticized *Central Maine* for removing flexibility to negotiate agreements when quick action mattered. Yet, as the discussion at the technical conference showed, extending the filing requirements to cost-based rates need not hobble anyone on that score. The FERC and utilities, since *Central Maine*, more carefully are considering ways of doing business, such as filing "umbrella tariffs," that allow the industry to take advantage of fleeting business opportunities, while meeting the requirements of section 205 of the FPA.³⁹

It does not follow, however, that the FERC should have constructed a Procrustean bed for the electric industry. As I discuss in section V, some decisions on filing particular classes of contracts present closer calls than others. One may well argue that, rather than use the *Central Maine* stick for cost-based rates, the Commission should have chosen to stay its hand in ordering refunds for past failures to submit agreements for review, especially if no party filed a complaint against the rates. The FERC could have made the filing requirement for cost-based rates prospective.⁴⁰

The standards the Commission used in evaluating cost-based rates, unlike those for the market-based rates *Central Maine* directly involved, had become stable and well known. Therefore, if all parties (retail utilities, customers and state commissions) acquiesced, the rates almost certainly fell within the just and reasonable range. Anyone involved in or reading about the proceedings must concede, however, that the rough seas the Commission travelled before the FERC issued the Final Order and the Order on Clarification in *Prior Notice* made the industry uneasy. Companies faced large refunds, especially interest payments, for transactions that had begun many years ago. I now turn to that.

The "amnesty" the FERC established in *Central Maine* lasted from August 2 (the date the Commission issued the decision) until October 7, 1991 (60 days after the order appeared in the Federal Register). During that time, and even afterward, companies filed in three types of instances. One involved agreements the parties conceded they should have filed 60 days in advance of service, but for various reasons had failed to do so. In these instances, e.g., *Central Hudson Gas & Electric Corp.*,⁴¹ and *Green Mountain Power Corp.*,⁴² the Commission took the opportunity to define "good cause" for purposes of waiving the advance filing requirement of the FPA.

38. See, e.g., *Pennsylvania Power & Light Co.*, 65 F.E.R.C. ¶ 61,039 (1993).

39. See *infra* note 61.

40. Interestingly, in the end, the Commission reversed itself and exempted *Central Maine* from the *Central Maine* remedy. The utility, which had paid its refund under a settlement, persuaded the Commission to overturn a previous decision to enforce that agreement. *Central Maine Power Co., order granting reh'g*, 64 F.E.R.C. ¶ 61,376 (1993).

41. 60 F.E.R.C. ¶ 61,106 (1992), *reh'g denied*, 61 F.E.R.C. ¶ 61,089 (1992).

42. 59 F.E.R.C. ¶ 61,219 (1992), *reh'g denied*, 60 F.E.R.C. ¶ 61,158 (1992), *order on compliance*, 61 F.E.R.C. ¶ 61,203 (1992).

The cases set forth a three-tiered system: if the filing involved no rate increase, the Commission would grant a waiver; or, if the utility submitted a rate increase but filed in advance of service, the company must show good cause to obtain a waiver; or if the company requested a rate increase but came to the FERC after service began, nothing less than extraordinary circumstances could justify a waiver. Denial resulted in the *Central Maine* remedy applying to the transactions that occurred before the filing. That system remains intact, and, as the FERC pointed out in the Final Order, the Commission received few comments on its general policy.⁴³

A turnabout ensued, however, when the waiver for past transactions involved individual service contracts utilities had failed to file. The companies committing these lapses had on file with the Commission valid general tariffs containing the broad outlines of the transaction, relegating the details to these individual agreements. In some instances, the "details" amounted to nothing more than the name of the customer, although the omission could also have been more significant. For example, the tariff could have left the conditions of service to later negotiations.

Initially, the FERC applied the "extraordinary circumstances" test to these late-filed service agreements under umbrella tariffs as well. This pronouncement caused a great stir in the industry. Utilities correctly argued that this would discourage companies from selling short-term power because in some instances, sellers cannot, in fact, provide advance notice. The FERC, in the end, agreed and said it would waive notice for service agreements under umbrella tariffs that the seller filed within 30 days after service began.⁴⁴

Another sore point arose on refunds for transactions that utilities engaged in under service agreements that the sellers filed after energy flowed. At first, the FERC applied the *Central Maine* remedy to those utilities that missed the deadline of the first amnesty.⁴⁵ Then, the Commission established another amnesty for utilities in these circumstances.⁴⁶

Although the question of the proper place for tariffs and individual service agreements carries broad implications in the debate over the future of the electric utility industry, we need not dwell on it at length. For purposes of this article, it suffices to mention that here, as with the cases I discuss next, the Commission collapsed the various amnesty periods into one that expired December 31, 1993, and changed its refund policy.

The third category of filings involved agreements for service that utilities assumed, or for other reasons believed, did not require Commission approval or notice to the FERC. In one such situation, the contracts concerned contributions in aid of construction (CIAC, in the industry's parlance). A customer requests service, for instance, transmission, which the

43. 64 F.E.R.C. ¶ 61,139, at 61,984.

44. 64 F.E.R.C. ¶ 61,139, at 61,983-84.

45. *Mississippi Power Co.*, 58 F.E.R.C. ¶ 61,286 (1992), *reh'g granted*, 61 F.E.R.C. ¶ 61,014 (1992); *New England Power Co.*, 59 F.E.R.C. ¶ 61,253 (1992), *reh'g granted*, 61 F.E.R.C. ¶ 61,015 (1992); *Central Power & Light*, 60 F.E.R.C. ¶ 61,211 (1992), *reh'g granted*, 61 F.E.R.C. ¶ 61,065 (1992).

46. See, e.g., *New England Power Co.*, 61 F.E.R.C. ¶ 61,015 (1992).

seller's system cannot at the time accommodate. Rather than lose the business, the utility offers to build new facilities (or upgrade the existing grid). The customer, in turn, agrees to pay for the new line separately, in one lump sum or in installments.

Many in the industry had thought that the FPA excluded CIAC agreements from the FERC's jurisdiction because these contracts stand apart from the agreement to provide the transmission service. A few months after *Central Maine*, the Commission squarely ruled for the first time, in *American Municipal Power-Ohio, Inc. v. Ohio Edison Co. (AMP-Ohio)*,⁴⁷ that utilities must file CIAC agreements with the agency. With the *Central Maine* sanctions in effect, utilities filed for retroactive approval of existing contracts.

At first, in *Florida Power Corporation*,⁴⁸ the FERC ordered refunds for customers of those utilities that filed after the amnesty closed, and affirmed that holding on rehearing.⁴⁹ When the utility petitioned for judicial review, the Commission, on its own motion, acknowledged that the matter of the FERC's jurisdiction over CIAC had become clear only after *Central Maine*.⁵⁰ Therefore, the agency instituted a new 30-day amnesty for CIAC agreements.

Similarly, in *Barton Village v. Citizens Utilities Co.*,⁵¹ a case the Commission decided before *Prior Notice* but after the technical conference, the FERC excused a utility from refunds for failing to file a jurisdictional agreement under which it exchanged power with Canada. The Commission found that the utility had reasonably relied on discussions with the agency's staff.

To replace the patchwork of grace periods for filing different agreements, the Final Order created a final "general" amnesty.⁵² In addition, the FERC made the refund remedy for failing to file less drastic than *Central Maine*'s. The Final Order provided that:

Accordingly, we will lessen the severity of our refund policy. If a utility files an otherwise just and reasonable cost-based rate after new service has commenced, or if waiver is denied and the proposed rate goes into effect after service has commenced, we will require the utility to refund to its customers the time value of the revenues collected, calculated pursuant to . . . our regulations . . . for the entire period that the rate was collected without Commission authorization. . . .

We will implement a similar remedy for . . . market-based rates. . . . In addition, the utility will be required to refund all revenues [constituting] the difference . . . between the market-based rate and a cost-based rate.⁵³

To complete the picture, if a utility filed, after service began, a rate that the Commission later found exorbitant, the "time value" remedy

47. 57 F.E.R.C. ¶ 61,358 (1991), *reh'g denied*, 58 F.E.R.C. ¶ 61,182 (1992).

48. 58 F.E.R.C. ¶ 61,161 (1992).

49. *Florida Power Corp.*, 60 F.E.R.C. ¶ 61,003 (1992).

50. *Florida Power Corp.*, 61 F.E.R.C. ¶ 61,063, *order granting stay*, 61 F.E.R.C. ¶ 61,244 (1992).

51. 63 F.E.R.C. ¶ 61,329 (1993).

52. 64 F.E.R.C. ¶ 61,139, at 61,977-78.

53. 64 F.E.R.C. ¶ 61,139, at 61,979-80 (footnotes omitted).

applied in addition to the refund that brought the rate down to the proper level.

Filings such as these increased as utilities attempted to meet the amnesty deadlines the various FERC orders established for the specific categories of agreements utilities brought to the Commission in the aftermath of *Central Maine*. In addition, during the late summer and early fall of 1991, companies searched through their files for other types of agreements that the Commission would now insist fell within the filing requirements of section 205.⁵⁴

III. THE TECHNICAL CONFERENCE: QUESTIONS FROM THE INDUSTRY

To help the industry try to take control of the cascading *Central Maine*-type proceedings, the FERC called a technical conference. In the wake of the questions that grew out of *Central Maine*, the Commission took on the job of interpreting the FPA's filing requirements for all concerned. At the same time it scheduled oral and written presentations, the FERC published a list of issues for participants to address. The Commission acknowledged that the time had come for a more formal procedure to establish the extent of the FERC's electric rate jurisdiction.

The order establishing the Prior Notice docket noted that the Edison Electric Institute (EEI), a trade association that represents investor-owned electric utilities, had filed a request for a stay of the expiration of the amnesty for CIAC agreements.⁵⁵ In that filing, EEI stated that *Central Maine* created a potential for requiring utilities to file thousands of contracts that parties signed many decades ago, both for service that had ended and for service that might still be continuing. EEI also pointed out that confusion existed as to the extent of the FERC's jurisdiction over electric rates and which ancillary contracts the Commission would decide utilities must file under the FPA.⁵⁶ Consolidated Edison Company and Portland General Electric Company also requested the FERC's guidance.⁵⁷

In establishing the procedure, the Commission expressed its surprise at "the number of filings . . . raising difficult jurisdictional and implementation issues."⁵⁸ The order articulated the hope that:⁵⁹

[T]his [conference] will allow us to achieve the intended purpose of the *Central Maine* policy, which was to add clarity and certainty to the filing obligations of public utilities. . . . Careful consideration of any concerns related to our enforcement of the prior notice and filing requirement is especially important now, as the Commission . . . continues to consider applications for approval of negotiated, market-based rates.

54. 57 Fed. Reg. 59,338, at 59,339.

55. 57 Fed. Reg. 59,338, at 59,339-40.

56. *Id.*

57. 57 Fed. Reg. 59,338, at 59,340.

58. *Id.*

59. The questions related to: the obligation to search files; the necessity to file expired agreements; the proper procedure in doubtful cases; the amnesty the Commission had by then declared, namely, the extent of the subject matter it covered and its duration; and the meaning of good cause for waivers of advance notice. *Id.*

To help the parties prepare for the conference, the notice listed six specific questions to which the Commission wanted responses. None concerned the extent of the FERC's FPA jurisdiction.⁶⁰

At the conference, the main theme that emerged concerned the rigidity that strictly enforcing the FPA's advance filing requirement introduced. As a result, the bulk of the discussion covered how the industry could use the "umbrella tariff" as a vehicle for accommodating the fluidity of the market to the requirements of the FPA.⁶¹ A secondary motif the industry sounded dealt with the uncertainty that existed over the scope of the FERC's jurisdiction.

The industry expressed its wish to comply with, but its difficulty in ascertaining, the requirements of section 205 of the FPA. The EEI representative said that the spate of decisions after *Central Maine* betokened a departure from the "rule of reason standard which serve[d] to limit the filing of agreements which could in any way relate to" wholesale sales or transmission.⁶² EEI requested guidance to answer the "many new questions" the *Central Maine* decisions had engendered.⁶³

Several utility representatives also defined the problem as the industry's uncertainty over the Commission's views on section 205. One representative spoke of the "need [for] some better definition of a jurisdictional agreement," and suggested regulations as the answer.⁶⁴ Another representative said that "the first step of identifying jurisdictional agreements that have to be filed is for us a difficult one and one that at time[s] is very confusing. . . ."⁶⁵ He asked for a "rule to follow or guidelines or a manual. . . ."⁶⁶ A third representative decried as "troubling" the fact that utilities must answer many "new and novel" questions on jurisdiction, for which previous decisions have no relevance.⁶⁷

Some participants also raised specific questions. Several utility representatives requested that the Commission define CIAC agreements so as to encompass all facility charges, not just lump sum charges for construction. A participant argued that these agreements "take many forms."⁶⁸ Another industry official whose utility constructs facilities the customers own and maintain, thought his company, in that situation, acted as a "contract vendor," and should not file the contract.⁶⁹ A third participant, representing a company that sent out crews to repair a neighboring system's power lines in

60. See, e.g., *Prior Notice Technical Conference*, Transcript at 26-39, 44-47, 58-58, 67-69, 75-80, 105-08, 116-23, 137-39.

61. *Id.* at 8.

62. *Id.*

63. *Id.* at 139 (presentation on behalf of Montana Power Co.).

64. *Id.* at 143 (presentation on behalf of Washington Water Power Co.).

65. *Id.*

66. *Id.* at 149 (presentation on behalf of PacifiCorp).

67. *Id.* at 54 (presentation on behalf of New England Power Co.).

68. *Id.* at 134 (presentation on behalf of Southwestern Public Service Co.).

69. *Id.* at 160 (statement of Washington Water Power Co.).

a snow storm, wondered whether that qualified as a CIAC agreement subject to the FERC's jurisdiction.⁷⁰

Still other questions about jurisdiction arose at the conference. A participant argued that the Commission should not exercise jurisdiction over "borderline agreements" under which a retail customer obtains service from a third-party utility, and not from his local power company. In that instance, he urged that the Commission should defer to the states which already regulate those transactions.⁷¹

Two utilities from the Pacific Northwest brought up the question of filing agreements peculiar to their region. One utility listed the following: return of energy in exchange for purchasing capacity alone; generating or transmission facilities a regulated utility jointly owns with an unregulated company; repairs and replacements of transmission facilities apart from wheeling; and storm damage repair.⁷² The representative of the other company mentioned hydroelectric facilities of one system and thermal plants of another operating during different parts of the day. He viewed the transaction as a "shaping service" unique to the western United States.⁷³

The Commission allowed parties to file supplemental comments within five weeks.⁷⁴ In all, the comments utilities filed in conjunction with the conference articulated the following forty-nine areas of doubt about the reach of the FERC's jurisdiction under section 205:⁷⁵

- *De minimis* contracts
- CIAC agreements
- Construction contracts under which the utility that builds the facility turns it over to the customer
- Construction contracts under which both the seller and customer will build facilities
- Construction contracts which have expired but the constructed facility still serves the grid
- Borderline agreements
- Qualifying facility (QF) interconnection agreements
- Agreements to construct transmission facilities unregulated utilities will own
- Maintenance agreements for transmission lines, e.g., tree trimming

70. *Id.* at 93 (statement of Jersey Central Power Co.).

71. *Id.* at 145-46 (statement of Washington Water Power Co.).

72. *Id.* at 156 (statement of PacifiCorp).

73. *Id.* at 39.

74. These designations come from the comments the FERC received from the following: American Public Power Ass'n; Baltimore Gas & Electric Co.; Barton Villages; Boston Edison Co.; Central Vermont Public Service Corp.; Central Maine Power Co.; Citizens Utility Co.; Consolidated Edison Co.; Edison Electric Institute; Energy Services, Inc.; Entergy Services, Inc.; Green Mountain Power Co.; Gulf States Utilities Co.; Iowa Illinois Gas & Electric Co.; Jersey Central Power & Light Co.; Kansas City Power & Light Co.; Montana Power Co.; New England Power Co.; New York State Electric & Gas Co.; Niagara Mohawk Power Co.; Northeast Utilities; Northern States Power Co.; PacifiCorp; Pennsylvania Power & Light Co.; Portland General Electric Co.; Puget Sound Power & Light Co.; Sacramento Municipal Utility District; Southwestern Public Service Co.; Washington Water Power Co.; United Illuminating Co.; UNITIL Co.; and UtiliCorp United, Inc. 64 F.E.R.C. ¶ 61,139, at 61,985.

75. *Id.*

- Agreements to dispatch or control the output of generating plants without fee
- Dispatch arrangements for a fee
- Agreements to operate generating plants for the owners
- Operating and maintenance agreements for unregulated utilities
- Operating and maintenance agreements that include assuring reliability
- Joint ownership agreements for generating plants under which the owners share everything (including costs) in proportion to their ownership interests
- Joint ownership agreements under which the owners divide responsibility on other bases
- Joint ownership agreements for generating facilities which incidentally include substations
- Joint ownership agreements for transmission facilities under which the owners share according to their respective ownership interests
- Joint ownership agreements for transmission facilities under which the anticipated benefits form the basis for sharing
- Power sales of electricity the buyer uses in its power plant
- Agreements to store or install transformers for another utility
- Agreements leasing rights of way to other utilities
- Pole attachment agreements for transmission lines
- Pole attachment agreements for distribution lines
- Pole attachments or transmission tower agreements
- Agreements allowing utilities to use each other's poles
- Pole attachments for television cables or phone wires
- Agreements allowing other utilities to use microwave communications equipment for dispatch
- Mutual assistance agreements between utilities for work in emergencies
- Agreements under which one utility operates demand side management (conservation) programs for other utilities
- Service agreements under umbrella tariffs
- Confirmation of actual transactions and prices under service agreements
- Transaction documents under filed tariffs
- Limited maintenance agreements between utilities and QFs
- Pre-contract documents that result in a jurisdictional agreement
- Agreements that utilities filed improperly
- Preliminary engineering studies
- Leases of land for communication towers
- Assignment of the right to purchase power without transmission
- Interconnections that FERC approved as part of a merger
- A new interconnection involved in the sale of a substation where the Commission approved the sale
- Reciprocal rights among joint owners to use transmission facilities connecting a jointly owned generating plant to the grid of the Bonneville Power Administration (BPA)
- Exchange agreements by one utility terminating the obligation of another to provide electricity
- Return of energy under a "naked" capacity purchase
- Agreements changing delivery points
- Agreements subject to state regulation
- Sale or purchase of emission allowances under the Clean Air Act
- Collection of costs of maintaining another utility's facilities if no other transactions occur
- Contracts under which a service company subsidiary of a holding company performs its duties for a regulated utility

As discussed in section V, the Commission, in the Jurisdictional Appendix, condensed these areas into seven categories, as follows:⁷⁶

- A. CIAC agreements
- B. QF interconnection agreements
- C. Exchanges
- D. Pole Attachment contracts
- E. Joint ownership agreements and operation and maintenance (O&M) agreements
- F. Borderline agreements
- G. *De minimis* contracts

In addition, in the *Order On Clarification*,⁷⁷ discussed in section VI, the Commission ruled on the question as to what extent the FERC has jurisdiction over contracts for studies on the feasibility of specific transmission service. Specifically, the question is whether utilities must file these agreements if the studies show that the grid cannot accommodate the transaction, or for some other reason, no service ensues.

IV. THE JURISDICTIONAL APPENDIX: THE ANSWERS EMERGE

A. *The Received Learning From The Courts*

1. What Does the FERC Regulate?

In providing a synopsis of the law on jurisdiction under section 205, the Jurisdictional Appendix played down its significance because the FERC did not want to lay down a hard-and-fast rule. In fact, the Commission emphasized, at the outset that: "[O]ur analysis is intended to be illustrative, not comprehensive; it provides a general understanding of the bounds of our authority under the FPA to require the filing of rates and practices for Commission review."⁷⁸

At the conclusion of the general sketch of section 205, the Final Order again noted:

[T]his analysis is general in nature and intended to be illustrative of the Commission's thinking on these subjects. As such, nothing presented . . . is new. Rather, the analysis provides a convenient compilation of Commission discussion on these subjects found in various sources. . . . [T]he general nature of this analysis [makes] this proceeding . . . not the best vehicle for argument [on] the Commission's current analysis. . . .⁷⁹

A close reading of the authorities, however, including those on which the Jurisdictional Appendix itself relied, supports the proposition that the FERC's jurisdiction under section 205(a) extends to agreements that govern even one ingredient of the rate public utilities charge their wholesale customers for wholesale electric sales or electric transmission service in interstate commerce.

76. 65 F.E.R.C. ¶ 61,081 (199—).

77. 64 F.E.R.C. ¶ 61,139, at 61,986 (1993).

78. 64 F.E.R.C. ¶ 61,139, at 61,989.

79. See *supra* text, at 85-86.

As we saw at the outset⁸⁰ section 205(a) of the FPA requires the FERC to ensure that the rates public utilities charge “for or in connection with transmission or sale of electricity subject to the jurisdiction of the Commission . . . shall be just and reasonable.”⁸¹ One must read section 201 in order to determine what service is referred to by section 205(a). Section 201 defines the extent of the Commission’s activities in the electric area.

Section 201(b)(1) declares “the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce” as the FERC’s regulatory responsibility.⁸² Indeed, this section also states explicitly that the FPA “shall not apply to any other sale of electric energy.” Section 201(e) and (f)⁸³ reveal that FERC may apply its regulation under section 205 to those that come within the class of public utilities. That category, in turn, encompasses any “person,” but with the following exceptions: the United States, a state, a municipality or other subdivision of a state, a government corporation, or a government employee acting in an official capacity, who “owns or operates” facilities that sell or transmit electricity in interstate commerce. In addition, a co-operative utility financed under the Rural Electrification Administration’s programs also enjoys an exemption from the FERC’s rate regulation.

Thus, according to statute, the Commission may exercise authority over a transaction only if the service involves a public utility: (1) selling at wholesale, or transmitting, electricity in interstate commerce; or (2) installing, operating, or otherwise using facilities involved in such sales or transmission.

Therefore, if an investor-owned electric company provides wholesale service to a retail utility that a state regulates, federal jurisdiction would extend to the seller’s rates and conditions, and the state (subject to federal pre-emption of recoupment of wholesale rates) would regulate the purchasers. Similarly, even if a public utility sells to municipalities—entities which the Commission and many states leave unregulated—the Commission’s section 205 jurisdiction attaches to the sale. The FERC regulates the transaction, not the municipal purchaser.⁸⁴

The subject of the *Prior Notice* proceeding, and of this article, concerns how close a connection must the FERC make between an agreement and the activities Congress ordered the Commission to regulate in order to exercise jurisdiction. We now proceed to that inquiry.

As the Jurisdictional Appendix acknowledged,⁸⁵ the legislative history of section 205(a) omitted any mention of this issue. The House Committee on Interstate and Foreign Commerce, which added the phrase “for or in connection with” to the FPA, explained the provision as follows: “subsection [205](a) imposes upon public utilities the duty of charging just and

80. 16 U.S.C. § 824d(a) (1988).

81. 16 U.S.C. § 824(b)(1) (1988).

82. 16 U.S.C. §§ 824(e)-(f) (1988).

83. See generally, 64 F.E.R.C. ¶ 61,139, at 61,986.

84. 64 F.E.R.C. ¶ 61,139, at 61,987.

85. *Id.* (citing H. REP. NO. 1318, 74th Cong., 1st Sess. 51 (1935)).

reasonable rates. . . .”⁸⁶ The Committee provided a similarly terse answer to the associated question: which agreements must public utilities file? The report stated that “[s]chedules and contracts relating to all rates and charges subject to the jurisdiction of the Commission,” must be filed.⁸⁷

The Jurisdictional Appendix next reviewed the case law, from the courts as well as the Commission. Finding no judicial precedent in the electric area, FERC cited and briefly reviewed⁸⁸ a case under the Natural Gas Act (NGA).⁸⁹ The decision, *Natural Gas Co. v. FERC*⁹⁰ (*Natural Gas Co.*), interpreted the requirement “identical to that in section 205 of the FPA” that utilities charge just and reasonable rates “for or in connection with” jurisdictional gas service.⁹¹ Because the U.S. Supreme Court has long recognized the two statutes as interchangeable,⁹² *Natural Gas Co.* also serves as a guide for construing section 205.

The case involved a Commission determination to exercise jurisdiction over the rate an interstate gas pipeline charged shippers for gathering as part of its transportation service. Gathering, or assembling gas flowing out of wells in the field, occurs before the commodity enters the pipeline. Moreover, in the NGA,⁹³ Congress placed gathering facilities beyond federal economic regulation. The pipeline argued that the “gathering exemption” meant that in no circumstances could the FERC regulate gathering rates. The court sided with the FERC, in an opinion by Judge John R. Brown (of the Fifth Circuit, sitting by designation).

The Eighth Circuit described the FERC’s regulatory scheme as requiring that the pipeline “separately identify cost components attributable to transportation, storage and gathering costs.”⁹⁴ The panel next mentioned as “significant”⁹⁵ the fact that the gas moving over the gathering lines forms a “‘continuous [flow] from the well head to the ultimate consumer.’”⁹⁶ In that manner the court established that transportation, both as a matter of economics and physics, subsumed gathering. The Commission, then, could consider the pipeline as performing gathering as “for or in connection with” jurisdictional transportation.

The opinion next culled the U.S. Supreme Court’s cases that construed “for or in connection with” under the NGA’s sales provisions. First, the court cited *Colorado Interstate Natural Gas Co. v. FPC*.⁹⁷ There, the issue concerned whether, in setting sales rates, the Commission could legally

86. *Id.* (citing H. REP. NO. 1318 at 29).

87. 64 F.E.R.C. ¶ 61,139, at 61,987.

88. 15 U.S.C. § 717 (1988).

89. 929 F.2d 1261 (8th Cir. 1989), *cert. denied*, 112 S. Ct. 169 (1991).

90. 15 U.S.C. § 717c (1988).

91. *See, e.g.,* *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

92. 15 U.S.C. § 717(b) (1988).

93. 929 F.2d at 1264 (citing 18 C.F.R. § 284.7(d)).

94. *Id.* at 1265.

95. *Id.* (footnote omitted).

96. 324 U.S. 581 (1945).

97. 929 F.2d at 1269.

have applied “. . . return to *all costs*,”⁹⁸ including gathering. The pipeline had argued that the “gathering exemption” forced the Commission to use the “fair field price” of gas as it entered the pipeline as the base from which to add the return. The Court affirmed the Commission.

The *Natural Gas Co.* panel explained the ruling in terms of the intertwined nature of the gathering and transportation rates at issue: “Of course, the Commission approved sales rate was affected by the gathering rate the companies charged because the *gathering [rate]* was “*bundled*” in the sales [rate]. Therefore, *it would not [have been] possible to set a sales rate without including a gathering charge.*”⁹⁹

The court held that although the case before it involved transportation and the Supreme Court had ruled only on sales, the law considers the two situations “nearly identical”¹⁰⁰ and deserving of the same result. The Eighth Circuit added that excluding the gathering rate from the FERC purview “would, in effect, permit the pipeline to establish rates for the interstate transportation,”¹⁰¹ since adjusting the gathering charges for outside shippers enables the pipeline to manipulate transportation rates in its favor.

The court then cited¹⁰² *Interstate Natural Gas Co. v. FPC*,¹⁰³ for the proposition that “unreasonable charges exacted at this [gathering] stage of the interstate movement become perpetuated in large part in fixed items of cost which must be covered by rates charged subsequent purchasers of the gas”¹⁰⁴ In effect, the Eighth Circuit reiterated this rationale for regulating gathering: the charge for the service forms a part of a jurisdictional rate and the transaction falls within the category of jurisdictional service.

After surveying the Supreme Court cases, the court distinguished *Mobil Oil Corp. v. FPC (Mobil)*.¹⁰⁵ *Mobil Oil* held that the Commission lacks jurisdiction to regulate liquid hydrocarbons (that precipitate from natural gas at gas wells). In its ruling, the D.C. Circuit held:

Congress did not give the FPC *carte blanche* to take whatever action it might consider appropriate in furtherance of [its rate jurisdiction]. The Commission cannot gain jurisdiction over an activity simply by characterizing it as part of a “total transaction” of which another part happens to be subject to the FPC’s control.¹⁰⁶

The *Northern Natural* court put that finding in its proper context. It recited another portion of the *Mobil* opinion to the effect that no connection existed between liquid hydrocarbons and regulating the rates of natural gas. “We are not confronted with a case where the Commission has

98. *Id.* at 1270 (emphasis added).

99. *Id.* at 1273.

100. *Id.* at 1270 (emphasis added).

101. *Id.*

102. 331 U.S. 682 (1947).

103. *Id.* at 693 (brackets added in court of appeals decision).

104. 483 F.2d 1238 (D.C. Cir. 1973).

105. 929 F.2d 1272 (quoting 483 F.2d at 1248).

106. *Id.* at 1272-73 (quoting 483 F.2d at 1247, 1249).

demonstrated that rate jurisdiction over liquids is necessary to preserve its rate jurisdiction over natural gas."¹⁰⁷

In contrast, the Eighth Circuit held that regulating the gathering rate of a pipeline engaged in transportation of a shipper's gas "is necessary to preserve the Commission's [rate] jurisdiction."¹⁰⁸ Having established that link, the FERC could directly regulate the gathering rate. The court also held that since gathering charges constituted an ingredient in transportation rates, "stating the gathering rate separately from its related jurisdictional transportation rate does not magically 'unbundle'" that activity from the regulated service.¹⁰⁹

To recapitulate, the Eighth Circuit held the "for or in connection with" language gave the FERC "the ability to regulate other aspects of the . . . industry as necessary to make effective its primary control over interstate transportation and sales."¹¹⁰ In the electric area, as we will see later, the Commission may exercise its authority when the FERC can connect the charge and the activity in question to a jurisdictional rate and service.

As the concrete examples participants posed in the technical conference show, deciding whether a sufficient connection exists between an activity and a federally regulated electric rate, for the Commission's regulation to attach, or whether a stronger connection exists between the activity and matters beyond the FERC's jurisdiction, may become difficult in practice. Indeed, the fact that the industry has kept on filing agreements and requesting guidance reflects the difficulty in drawing lines. Nevertheless the FERC must come to grips with this assignment. For its part, the industry should ask questions rather than make its own decisions.

2. What Else Must Utilities File?

Once section 205(a) requires a utility to submit its rates to the FERC, section 205(c) imposes other, more extensive filing requirements: those for "classifications, practices and regulations" that relate to jurisdictional rates and service. This latter provision covers a wide range of matters beyond what the FERC itself regulates under section 205, for example, the price of coal a utility buys for its generators. The courts have given the FERC considerable discretion to determine the extent of the information public utilities must file under section 205(c).

This acquiescence results from the fact that exercise of section 205(c) authority entails the filing of information, rather than the assertion of jurisdiction. The FERC may require a utility to file matters that the Commission may regulate and in those instances, the Commission may modify the contract the utility submits. Section 205(c) also allows the FERC to require utilities to file matters outside the Commission's regulatory reach, in order to aid regulation. In those cases, the FERC may not change the

107. *Id.* at 1273.

108. *Id.*

109. *Id.*

110. 772 F.2d 1368 (D.C. Cir. 1985).

document the utility files. Since interpreting section 205(c) involves defining pertinent information, something which requires a detailed knowledge of how the industry works, the courts have held that the Commission has considerably more expertise than judges. Interpreting congressional grants of jurisdiction, on the other hand, comes more naturally to courts.

Beginning with the *City of Cleveland, Ohio v. FERC*,¹¹¹ the courts (i.e., the District of Columbia Circuit) have given the Commission considerable deference. In the D.C. Circuit, the Commission defended a decision that required the utility to file rate schedules containing specific procedures for such matters as scheduling and dispatch of electricity to the city. Even with these details, greater than those the utility offered to other customers, the municipality wanted more specificity. For example, it argued for including all the factors the company would use to decide whether it had power available, all the unforeseen circumstances that could arise and which decisions the dispatcher would have to refer to a corporate officer.¹¹²

The court affirmed the Commission. It held that the sweeping language of section 205(c) made it especially necessary for the FERC to be able to apply its expertise. Specifically, the D.C. Circuit found:

[T]here is an infinitude of practices affecting rates and service. The statutory directive must reasonably be read to require the recitation of only those practices that affect rates and service *significantly*, that are realistically *susceptible* of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous. It is obviously left to the Commission, within broad bounds of discretion, to give concrete application to this amorphous directive. For the same pragmatic reasons we do not read the Commission's regulations . . . as prescribing numeration of the innumerable. . . .¹¹³

In the next case in which the court reached the issue, *Public Service Commission of New York v. FERC*,¹¹⁴ the D.C. Circuit interpreted the identical provision in the NGA to give the Commission a great deal of discretion on the content of rate schedules. Contrary to the FERC's position, one of the petitioners argued that the pipeline must file rules on curtailment of service. The court rejected that argument. It held that the statute did not require utilities to file matters of "practical insignificance"¹¹⁵ to their daily operations. In the case at bar, curtailment presented either a remote, or a nonexistent possibility.

B. The Commission's Pronouncements

1. Jurisdiction

In at least one case it decided before the *Prior Notice* proceeding, the FERC held that matters integral to the rate wholesale customers pay fall within its section 205 jurisdiction. In a case which the Jurisdictional

111. *Id.* at 1377.

112. *Id.* at 1376 (citation omitted).

113. 813 F.2d 448 (D.C. Cir. 1987).

114. *Id.* at 454.

115. 64 F.E.R.C. ¶ 61,139, at 61,988.

Appendix cites,¹¹⁶ *Central & South West Services, Inc.*,¹¹⁷ the Commission required the utility to file in its rate schedule data indicating the extent of the company's planning reserves. Unlike operating reserves, the actual cushion a utility maintains to enable it to function in case of unexpectedly high demand, planning reserves serve no operational purpose. They constitute the operating reserve levels which utilities strive to achieve. Private groups, namely, reliability councils, govern these matters. The FERC had no difficulty with maintaining that arrangement and had no interest in regulating planning reserves.

Nevertheless, the Commission ruled that the utility had to file the information, since the company included planning reserves as a "central" part of its rates.¹¹⁸ The concurring opinion on rehearing explicitly stated the point:

In this case, the planning reserve figure serves another function. . . . [The utility] must maintain a balanced among member companies regarding who pays for the physical plant all use. . . .

[I]n order to ascertain whether (and how much) one company owes the others, interested parties must know [the level] of planning reserves. . . .¹¹⁹

Central & South West Services, Inc. applied section 205(c) and required the utility to file data about those reserves. The case did not hold that the FPA allows the Commission to determine how high the company should set its planning reserves or supervise their computation. The underlying rationale also applies to other information beyond the FERC's authority to regulate.

Filing under section 205(c) may also trigger the FERC's regulation under section 205(a), if the filing concerns jurisdictional service. As the Fifth Circuit held in *Florida Power & Light Company v. FERC*,¹²⁰ once a utility files a rate under section 205(c), the full panoply of the FERC's jurisdiction attaches to the transactions involved, including section 205(a). For that reason, the court reversed a FERC decision under section 205 that compelled the company to file a commitment to provide transmission as a tariff.

Three other cases bear on the scope of the Commission's section 205(a) jurisdiction. *AMP-Ohio* articulated for the first time the FERC's jurisdiction over CIAC agreements. Ohio Edison, which provided transmission service to AMP-Ohio, contracted to build a new line for that customer. AMP-Ohio agreed to pay for it in advance, rather than over the period that it used the utility's transmission service. The Commission held that the CIAC agreement covered facilities that Ohio Edison used "in connection with" jurisdictional transmission service and section 205(a) required the utility to submit the contract. The order found:

116. 48 F.E.R.C. ¶ 61,197 (1989), *reh'g denied*, 49 F.E.R.C. ¶ 61,118 (1989).

117. 48 F.E.R.C. ¶ 61,197, at 61,732.

118. 49 F.E.R.C. ¶ 61,118, at 61,504.

119. 660 F.2d 668, 676 (5th Cir. 1981).

120. 64 F.E.R.C. ¶ 61,139, at 61,988-89 (quoting 57 F.E.R.C. ¶ 61,358, at 62,161).

A utility's rates for jurisdictional service . . . are developed to recover the costs of providing that service. Moreover, it is well settled that the costs of the facilities that provide the service are among the costs that may be included [in rates]. The [CIAC agreement] affects transmission service and the rate for such service because it involves facilities necessary in order to provide jurisdictional service. . . . In this instance, instead of attempting to recover such costs over time as is typically the case (i.e., through depreciation), Ohio Edison has opted to recover the costs of the interconnection in the form of lump sum payments.¹²¹

In denying rehearing, the Commission explained that jurisdiction attaches even if the seller and the customer deal with each other only on the ancillary activity. The order recited that: "Ohio Edison argues that because the [CIAC] is a separate and distinct contract . . . [it is] nonjurisdictional. . . . [W]e find that the [agreement] cannot be neatly disconnected from the provision of jurisdictional service. . . ." ¹²²

To summarize, because the utility needed the line to provide transmission and the seller factored the cost of those facilities into its wholesale rates, section 205 brought the CIAC payments under the FERC's jurisdiction. Moreover, if the customer needs only to arrange construction of the transmission line, as for wholesale service from its own generating plants, the CIAC agreement between the utilities fall under section 205(a).¹²³ Now, the payment relates to transmission service in interstate commerce.

The Commission elaborated on both aspects of this issue in *New York State Electric & Gas Corp.*¹²⁴ The contract at issue called for two public utilities to charge a lump sum payment in order to alter their grids to accommodate transmission that an unregulated state agency provided its customers. The Commission found the arrangements subject to its jurisdiction. The FERC rejected the claim that the facts in *AMP-Ohio*—and the finding that the CIAC related to jurisdictional transmission service Ohio Edison provided the municipality—set the limits of section 205(a). The order held:

The fact that Ohio Edison's charges . . . happened to be part of a broader package of services . . . provided to AMP-Ohio in no way supports the . . . argument here that the charges would not have been jurisdictional absent those other services. . . . [The charges fell within section 205(a) because] Ohio Edison assessed the charge . . . for use of its transmission facilities. As such [the] charge was for jurisdictional service. Similarly, here, the [utilities] assess [the state agency] a charge for use of their transmission facilities, and accordingly, [these] charges . . . are for a jurisdictional service or use. . . .¹²⁵

In *PSI Energy, Inc.*,¹²⁶ the Commission held that a regulated utility and a co-operative outside the FERC's jurisdiction must submit for filing

121. 58 F.E.R.C. ¶ 61,182, at 61,565 (1992).

122. See *Florida Power Corp.*, order denying reh'g, 60 F.E.R.C. ¶ 61,003, at 61,017 (CIAC agreements fall under section 205(a) as "stand alone" contracts), *supplemental order*, 61 F.E.R.C. ¶ 61,063, at 61,266 (1992) (using the same description).

123. 63 F.E.R.C. ¶ 61,318 (1993).

124. 64 F.E.R.C. ¶ 61,139, at 61,989 (quoting 63, F.E.R.C. ¶ 61,312, at 63,154).

125. 63 F.E.R.C. ¶ 61,107 (1993).

126. 55 F.E.R.C. ¶ 61,417, order on reh'g and directing filing, 56 F.E.R.C. ¶ 61,325 (1991).

an agreement under which each reimburses the other for using a grid they own jointly.

These cases hold that the FERC may regulate rates under section 205(a), if the charges for an activity that the utility must perform as part of jurisdictional service go into calculating a jurisdictional rate. The utility must also file as "classifications, practices and regulations" information, such as the planning reserves in *Central & South West Services, Inc.*, FERC needs in order to set or monitor jurisdictional rates.

2. Classifications, Practices and Regulations

Of the cases the Commission decided under section 205(c), we need to examine only two. One, *Transmission Agency of Northern California v. Pacific Gas & Electric Co. (PG&E)*,¹²⁷ elucidates the type of information the Commission requires. The other, *Town of Easton, MD v. Delmarva Power & Light Co. (Easton)*,¹²⁸ provides a sample of what the Commission has excluded from the requirements of that section of the FPA.

PG&E involved a set of principles that formed the basis for the utility to provide transmission to a group of co-operative and government-owned utilities. The agreement incorporating those principles specifically required a more detailed future contract before the company would begin service. Nevertheless, the FERC held that it had the authority under section 205(c) to require the PG&E to file the principles. Citing to an earlier *Pacific Gas & Electric Co.* case,¹²⁹ in which the Commission required the company to file transmission commitments the utility made as part of a nuclear licensing proceeding, the FERC held¹³⁰ that the principles actually governed, and therefore, "related to," the proposed service.

In *Easton*, the Commission entertained a complaint against the Pennsylvania-New Jersey-Maryland Power Pool. The City of Easton argued that the pool used unreasonable criteria in its operations and wanted the pool to be compelled to file certain documents with the Commission. The pool resisted, but the FERC ordered it to file portions of the agreement. With regard to the part that the Commission excused, the order found:

Initially we note that these agreements are a mixture of minute detailed operating procedures and general procedures and requirements for obtaining transmission capacity The former portions of the agreements deal with detailed operating procedures that are best left to the ongoing judgment of those familiar with the day-to-day operating characteristics and needs of [the pool]. . . . We, therefore, do not believe that these portions of the agreements need be filed.¹³¹

127. 24 F.E.R.C. ¶ 61,251 (1983).

128. 11 F.E.R.C. ¶ 61,246 (1980), *reh'g denied*, 12 F.E.R.C. ¶ 61,097 (1980), *aff'd*, 679 F.2d 262 (D.C. Cir. 1983).

129. 55 F.E.R.C. ¶ 61,417, at 62,251.

130. 24 F.E.R.C. ¶ 61,251, at 61,531.

131. *See, e.g., Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980).

The Commission can best judge what constitutes the “minutiae,” which utilities need not submit. As with the FERC’s regulations on what information utilities must file in support of rates,¹³² the courts give the FERC considerable leeway to make that decision.

V. THE SEVEN CATEGORIES: THE ANSWERS APPLIED IN PRACTICE

A. CIAC Agreements

The Commission had assumed jurisdiction over CIAC agreements before the Technical Conference occurred.¹³³ So the participants in the technical conference asked more detailed questions about *Central Maine* and CIAC. The discussion in the Jurisdictional Appendix on this issue¹³⁴ first dealt with how to define “expired” agreements. The Commission, in its Initial Order After the Prior Notice Technical Conference,¹³⁵ had exempted utilities from filing such contracts.

The FERC’s Jurisdictional Appendix also clarified the scope of the class of CIAC agreements that fell within section 205(a).¹³⁶ EEI asserted that contracts calling for periodic as well as lump sum payments belonged in the CIAC category, while a utility contended that agreements for construction of generating plants fell outside the FERC’s jurisdiction altogether.

The Commission granted EEI’s request but “stopp[ed] short”¹³⁷ in the case of the utility’s request. As to EEI, the FERC held:

[T]he question of our jurisdiction over a particular contract depends on whether the contract contains a rate or charge for or in connection with the transmission or sale of electric energy in interstate commerce, or whether the contract affects or relates to such rates or service. It does not depend on the timing of payments under the contract. . . .

The Commission further clarifies that characterization of a particular arrangement as [providing for periodic] or [lump sum payments] is irrelevant because both types of agreements provide for construction “for or in connection with” jurisdictional service.¹³⁸

This comports with the proposition that charges for ancillary services that wholesale customers pay utilities as an item on their bills, as well as the service itself, come within the FERC’s authority under section 205(a). The FERC’s answer to the utility’s request concerning construction of generating plants further supports this demarcation.

As the Jurisdictional Appendix stated:

[C]IAC agreements which must be filed for Commission [rate] review must relate to transmission in interstate commerce or sales for resale of electric energy in interstate commerce. . . .

132. See *supra* text accompanying note 46.

133. 64 F.E.R.C. ¶ 61,139, at 61,989-90.

134. Initial Post-Technical Conference Order on the Filing of Expired Agreements, 62 F.E.R.C. ¶ 61,128 (1993).

135. 64 F.E.R.C. ¶ 61,139, at 61,990-91.

136. 64 F.E.R.C. ¶ 61,139, at 61,991.

137. 64 F.E.R.C. ¶ 61,139, at 61,990.

138. 64 F.E.R.C. ¶ 61,139, at 61,991.

As we noted earlier, even in . . . our most recent order on the subject, we held that in order to come within our purview, the agreement must contain a charge connected to jurisdictional service.¹³⁹

The Commission continued¹⁴⁰ that, while the FPA denied the agency jurisdiction over generating facilities, the FERC's sales jurisdiction placed within the Commission's dominion CIAC agreements covering plants for wholesale customers, since the utility that owned the line normally recovered the cost of construction through a depreciation charge. Construction contracts for plants generating electricity for retail sales had no connection with jurisdictional service and fell outside the scope of section 205(a). In fact, the Commission¹⁴¹ made the analogy to construction work in progress, a payment the wholesale customer made before a generating plant began jurisdictional service, that came within the FERC's jurisdiction when the matter involved wholesale service and fell under states' authority prevailed when it involved sales at retail.

The Jurisdictional Appendix gave straightforward responses to the questions the participants asked. The uncertainty with CIAC lay in the underlying holding of *AMP-Ohio*. Except for its current and limited power to require a utility to expand the grid, subject to state approval, when the Commission issues a wheeling order, the FERC has no authority over construction of transmission lines. In the complaint case *AMP-Ohio* filed, which predated the expansion of the FERC's wheeling authority, the Commission had no role in regulating construction.

State laws, if any, applied (except in the case of lines over federal rights-of-way, for which the Department of the Interior must grant permits). Because CIAC constitutes a term of a construction contract, many thought CIAC agreements related to construction and the FERC had no jurisdiction over those contracts. While the FERC correctly held that the payment formed one component of rates for transmission service, utilities that took the contrary view should enjoy the benefit of the doubt for purposes of refunds on pre-existing contracts.

The saga of CIAC agreements shows why, in hindsight, the FERC might have taken a more measured stand regarding utilities' failure to file cost-based rate agreements. That the FERC first announced its jurisdiction over CIAC agreements after the decision in *Central Maine*, and, as a result, companies needed more time to file, the Commission acknowledged early on by creating a special amnesty. In addition, in situations such as *AMP-Ohio*, which present a close question, leniency serves the public interest.

B. QF Agreements

The Commission's jurisdiction over these contracts remained even murkier than its authority to regulate CIAC until the FERC issued *Western Massachusetts Electric Co. (Western Massachusetts)*,¹⁴² which interpreted

139. *Id.*

140. *Id.*

141. 59 F.E.R.C. ¶ 61,091 (1992), *reh'g denied*, 61 F.E.R.C. ¶ 61,182 (1992).

142. 16 U.S.C. §§ 2601-45 (1988).

ambiguous Commission regulations. Here, again, this occurred before the Technical Conference, so the Jurisdictional Appendix made some clarifications, as opposed to reviewing the central question. Nevertheless, had the Commission known about these QF agreements when it issued *Central Maine* perhaps it would have limited the refund remedy to future QF agreements.

After Congress passed the Public Utility Regulatory Policies Act of 1978 (PURPA),¹⁴³ which created a niche for QFs, the Commission issued a myriad of regulations. One of the rules¹⁴⁴ gave the states the authority to regulate interconnections between QFs and the utilities that purchased power from them. Before the Prior Notice Technical Conference, the FERC had held that the regulation covered only direct links between sellers and buying utilities. Therefore, if a QF, as in *Western Massachusetts*, transmitted power over a line to an intervening utility, the FERC, not the state, exercised authority over the interconnection.

In its comments for the technical conference, one utility requested the Commission to clarify that it would exercise jurisdiction over interconnection agreements between QFs and third parties only if the contracts “also involve transmission” service.¹⁴⁵ The utility also urged the FERC to disclaim jurisdiction over the initial (presumably the construction) agreement if, in fact, the relationship expanded to include transmission. The Commission declined. It reasoned as follows: “Our jurisdiction over interconnection agreements derives from our section 205 authority over matters relating to the wholesale sale or transmission of electric energy in interstate commerce.”¹⁴⁶

Quoting from *PSI Energy, Inc.*,¹⁴⁷ the Commission elaborated: “[W]hile we have no authority with respect to construction obligations[,] the Commission’s jurisdiction over the facilities [interconnection] agreements is limited to the provisions of the agreement that facilitate the exchange of energy between the parties, i.e., the sale of electric energy at wholesale in interstate commerce.”¹⁴⁸ The Commission concluded that the same held true for construction agreements that resulted in transmission, the other prong of its jurisdiction.

Here, again, the FERC made the jurisdictional demarcation in an incontrovertible manner. The holding on QF agreements places on one side of the line an action (construction of a tie) that, on its own, lies outside the reach of the FPA. The FERC held that the same activity, if an ingredient in jurisdictional service (in this instance, transmission), falls within the Commission’s domain. In addition, the Commission emphasized that even

143. 18 C.F.R. § 292.306 (1993).

144. 64 F.E.R.C. ¶ 61,139, at 61,991.

145. *Id.*

146. 56 F.E.R.C. ¶ 61,237, at 61,908 (1991).

147. 64 F.E.R.C. ¶ 61,139, at 61,991-92.

148. 64 F.E.R.C. ¶ 61,139, at 61,992.

if the transmission service occurs later, since the utility builds the interconnection with that in mind, the FERC's jurisdiction attaches.¹⁴⁹

The complication on the jurisdictional status of QF agreements occurred earlier, in the *Western Massachusetts* case. While this case lies outside the discussion in the Jurisdictional Appendix it still merits comment. The language of the QF regulations themselves do mention that states regulate interconnections. The rules say nothing about jurisdiction over interconnections for third parties. No one may have thought of the question, as the scheme contemplated the utility neighboring the QF would purchase its power. *Western Massachusetts*, therefore, announced a new interpretation.

That consideration made QF agreements different from the market-based wholesale rates of *Central Maine*. The industry could logically assume that the state regulated QF interconnections of all types, as with the price of the electricity that QF generated. For that reason, these cases would have merited more tempered treatment.

C. Exchanges

The Jurisdictional Appendix¹⁵⁰ addressed a broader topic than the comments requested. The narrower issue concerned agreements under which utilities in the Pacific Northwest, parties to a Canadian Entitlement Exchange Agreement with BPA, assigned back their entitlements. In return, BPA promised to provide capacity or energy from other sources. Because the extent of the Commission's supervision of BPA activity resulted from unusual statutory arrangements,¹⁵¹ the Jurisdictional Appendix first approached the question as if two public utilities in other parts of the United States had engaged in this transaction.

In that instance, said the FERC, the utilities must file both the initial Canadian Entitlement Exchange Agreement (assuming that the exchange includes a U.S. element) and the amendment. The Commission has always considered an "exchange as a type of sale." The FERC's regulations¹⁵² require utilities to file rate schedules governing "electric service," including those that call for payment in kind (rather than money). The regulations state that a public utility may render wholesale service "without regard to the form of payment or compensation."¹⁵³ The fact that an exchange involves Canadian power does not remove the transaction from the FPA.

In two cases, *Green Mountain Power Corp.*,¹⁵⁴ and *Barton Village, Inc. v. Citizens Utilities Co.*,¹⁵⁵ the Commission reiterated the necessity for utilities to file exchanges. *Barton Village*, in particular, dealt with exchanges

149. *Id.*

150. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839e (1998).

151. 18 C.F.R. § 35.2 (1993).

152. *Id.*

153. 59 F.E.R.C. ¶ 61,291 (1992), *reh'g denied*, 60 F.E.R.C. ¶ 61,158 (1992), *order on compliance filing*, 61 F.E.R.C. ¶ 61,203 (1992).

154. 63 F.E.R.C. ¶ 61,329 (1993), *reh'g pending*.

155. 64 F.E.R.C. ¶ 61,139, at 61,992.

that involved Canadian power. Because United States utilities engaged in the transactions and the utilities exchanged the Canadian power for electricity on this side of the border, the activity came within the FPA and section 205 applied.

The Commission, therefore, stated that unless both sides of the exchange involved Canadian power, the utilities must file the agreement and any changes under section 205(a). In addition, the Jurisdictional Appendix found¹⁵⁶ that filing the amendment "allows us to . . . keep our files current," implicating section 205(c) as well.

Finally, the FERC turned to the situation with BPA, the question the northwestern utility raised. The Jurisdictional Appendix cited a case from the U.S. Court of Appeals for the Ninth Circuit.¹⁵⁷ It held that while the FERC has authority to review BPA's rates, the Commission may not exercise jurisdiction over BPA's transmission line, the Pacific Intertie. Therefore, the Commission held in the Jurisdictional Appendix, that "utilities need not file agreements relating to capacity on any of the [BPA] interties, but must submit those relating to electric energy."¹⁵⁸

The rulings on exchanges, which fell on both sides of the jurisdictional line, show that to invoke section 205, one must tie the activity to the Commission's jurisdiction. Having established that exchanges of electricity flowing in the United States constitute wholesale sales for payment in kind, the Jurisdictional Appendix included even those involving Canadian electricity as the barter. The United States' portion of the transaction implicated interstate commerce. Similarly, when the issue turned to BPA, the FERC carefully differentiated between entitlement to electricity, that the Pacific Northwest utilities must file, and to the intertie, which they do not.

The extent of the FERC's jurisdiction over BPA dictated the result. Since the Commission exercises supervisory jurisdiction over electric rates, filing that type of entitlement furthers the regulatory scheme. Because the FERC has nothing to do with BPA's transmission lines, utilities need not file agreements regarding their use of the intertie.

The requirement for public utilities to file exchange agreements ineluctably follows from the regulations themselves.¹⁵⁹ They state explicitly that sales and transmission jurisdiction extend to transactions irrespective of the form of compensation. If a utility receives payment in kind, it must file, just as it must if the arrangement involved money. The fact that the recipient may be Canadian or outside the FERC's purview (or, as with BPA, subject to limited Commission review) makes no difference.

Section 205(a) of the FPA confers jurisdiction over transactions public utilities engage in, irrespective of the regulatory status of the purchaser. A wholesale sale or transmission of electricity, if a public utility uses inter-

156. *California Energy Resources Conservation & Dev. Comm'n v. Bonneville Power Admin.*, 831 F.2d 1467 (9th Cir. 1987), *cert. denied*, 488 U.S. 818 (1988).

157. 64 F.E.R.C. ¶ 61,139, at 61,992.

158. 18 C.F.R. § 35.2 (1993).

159. 64 F.E.R.C. ¶ 61,139, at 61,992-93 (citing *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1267 (5th Cir. 1986)).

state commerce, falls within Commission rate jurisdiction. An exchange, no less than a sale of similar character, also comes within the FERC's purview.

D. Pole Attachment Contracts

As the name indicates, pole attachments involve utilities renting their poles to allow the lessee to attach wires. Placing new wires on existing poles costs less than constructing new facilities and avoids community opposition to new structures.¹⁶⁰ Before *Central Maine*, electric utilities assumed the FERC had no jurisdiction over these contracts. Those companies took a reasonable position, since before *AMP-Ohio*, ambiguity prevailed over contracts more directly related to jurisdictional service between the parties: CIAC.

The Commission, in the Jurisdictional Appendix, observed that, besides jurisdictional companies, cable television operators and telephone companies rent space on electric utility poles.¹⁶¹ Therefore, the connection between a pole attachment agreement and wholesale electric sales or electric transmission service varied, depending on the specific facts of the case. The Commission noted that Congress gave the Federal Communications Commission authority to regulate pole attachments for cable television.¹⁶² The FERC, therefore, did not require utilities to file pole attachments for cable television wires.

The Commission also excused utilities from filing pole attachments for other activities over which the FERC had no authority. As an example, the Jurisdictional Appendix¹⁶³ held that public utilities that sign leases that call for the lessor to provide poles for purposes such as telephone wires or wires for retail electric service do not have to file those agreements with the FERC. The Commission has no jurisdiction over telephone or retail electric service. The Jurisdictional Appendix did not elaborate further.

In my view, however, certain pole attachment contracts may come within section 205. For example, a pole attachment agreement that calls for attaching transmission wires or wires to permit wholesale electric service between the parties to the agreement becomes subject to the FERC's jurisdiction, if the lease requires the lessee to pay a separate charge (as with CIAC) for what the lessor would otherwise include in jurisdictional rates.

If the lessee uses the pole for wires to provide jurisdictional service and the lessee's customer pays for the attachment in its electric rates, the Commission may require the lessee to file the pole attachment for cost support. Whether in that case, the lessor would be providing jurisdictional service (i.e., with the pole that permitted the transaction) and would need to file the pole attachment agreement as a jurisdictional contract, remains unclear.

160. 64 F.E.R.C. ¶ 61,139, at 61,993.

161. *Id.* (citing *Texas Power & Light Co. v. FCC*, 784 F.2d at 1267-68).

162. *Id.*

163. 64 F.E.R.C. ¶ 61,193, at 61,993.

In my interpretation, in order to fall within the FERC's jurisdiction, the utility must offer the service (in this instance, the pole attachment) as a feature of jurisdictional activity. This criterion eliminates attachments for television and telephone wires. Second, the rate for the jurisdictional transaction (wholesale sale of electricity or transmission) must include a charge for the service (the pole attachment), either on the electric bill or by a separate invoice. Again, whether a utility that provides a pole for another utility to attach a wire for jurisdictional service also comes within the FERC's purview awaits an answer.

E. Joint Ownership and O&M Agreements

The Jurisdictional Appendix disposed of the questions on this issue, joint ownership agreements for generating plants, with little discussion.¹⁶⁴ The Commission pointed out that the FERC's regulatory writ extends to transmission facilities, but not to those for generation. As the Jurisdictional Appendix stated, "section 201 of the FPA prohibits [the FERC] from regulating the construction of generating facilities, except as provided in Parts II and III of the FPA."¹⁶⁵

In addition, the Commission had held, in interpreting section 203 of the FPA and the requirement for utilities to seek approval of disposition of jurisdictional facilities,¹⁶⁶ that the requirement did not apply to facilities generating power for sales in interstate commerce. The state, not the FERC, regulated that aspect of company operations.

The Jurisdictional Appendix concluded that, because construction and disposition of generating facilities remained matters of state concern, utilities need not file joint ownership agreements, as such, with the FERC. The Commission noted, however, that if an issue arose concerning allocation of the cost of generating plants in wholesale rates, the utility may have to file the agreement as part of its case. This response reflects traditional FERC precedent: agreements to allocate transmission lines come to the Commission, those for generating plants do not.

O&M agreements presented a more complicated question. The Jurisdictional Appendix promulgated this two-part test: what type of service does the O&M agreement relate to? and does a "public utility" provide the service?¹⁶⁷ The Commission elaborated:

The first question requires us to determine the nature of the service the operator engages in—does the O&M agreement require the operator to perform services connected with sales at wholesale or transmission in interstate commerce, or does the contract involve, for example, distribution lines for service to retail customers?¹⁶⁸

The FERC explained that if the O&M agreement covers facilities for wholesale sales or interstate transmission, "[t]he payment for O&M service

164. *Id.*

165. *E.g., Entergy Serv., Inc.*, 51 F.E.R.C. ¶ 61,376 (1990).

166. 64 F.E.R.C. ¶ 61,193, at 61,993-94.

167. 64 F.E.R.C. ¶ 61,193, at 61,993.

168. *Id.* (emphasis added).

constitutes, at a minimum, a payment affecting a section 205 rate (*for the customers ultimately pay for O&M service in their rates.*)”¹⁶⁹

The answer to the second question bears mention as well. The issue whether the FERC exercises jurisdiction over the contract turns not on the nature of the service for which the owner uses the facility, but on the status of the owner or operator. The Jurisdictional Appendix declared that who “owns” or “operates” the facility, and therefore, whether the FERC will require a filing, depends on whether the provider of the O&M service comes within the definition of a “public utility” and whether the “public utility” exercises control over the operations of the facility.

If a public utility remains in control, the O&M agreement ties in with a facility producing a jurisdictional service. If not, the O&M contract bears no relation to service under Commission supervision. To make that determination, the Commission held, required an analysis of the facts in each case.¹⁷⁰

This recitation correctly applies the two determinants of the FERC’s jurisdiction. First, does service over which the FERC has jurisdiction encompass the activity in question? Second, will wholesale customers ultimately pay for the cost of the transaction in question? Therefore, the Appendix holds that the status of joint ownership agreements depends on the type of facilities the contracts cover. Those contracts for transmission facilities fall within the FERC’s jurisdiction, because the FERC regulates facilities that provide that service. Utilities must file these agreements with the FERC. Under the same criteria, contracts for joint ownership of generation facilities receive different regulatory treatment.

Because section 201 exempts those facilities from the FERC’s jurisdiction, agreements fall outside the ambit of section 205(a). The joint ownership contracts could also fall within section 205(c) as “practices . . . related to” jurisdictional rates, if for example, a question arises about ownership shares in generating plants, the costs of which affect jurisdictional rates.¹⁷¹ On the other hand, if joint ownership becomes relevant to specific wholesale rate proceedings, utilities must file or produce the agreements in their cases.¹⁷²

The holdings on operation and maintenance agreements also follow traditional legal analysis. Whether utilities must file depends on the relationship between the O&M activity and jurisdictional service. Therefore, utilities need not file all agreements, for the FERC does not regulate the provision of O&M service, as an activity, standing alone.

O&M agreements do, however, come under Commission review, if the contracts govern operation and maintenance of facilities utilities use for

169. 64 F.E.R.C. ¶ 61,139, at 61,994 (citing *PSI Energy, Inc.*, 63 F.E.R.C. ¶ 61,107, at 61,753 (1993)).

170. The FERC stated in the Jurisdictional Appendix that it may require utilities to file agreements that “are necessary for the Commission to exercise effective jurisdiction over transmission and sales for resale in interstate commerce.” 64 F.E.R.C. ¶ 61,139, at 61,989 n.4.

171. See 64 F.E.R.C. ¶ 61,139, at 61,988 n.3.

172. See *supra* section V parts A & D.

wholesale sales or transmission in interstate commerce. In those instances, at a minimum, while sale customers will pay for O&M in rates. The Commission, in that fashion, can tie the agreement to wholesale sales or interstate transmission service and rates. O&M service for retail or distribution facilities falls outside the FERC's scrutiny, since the Commission neither regulates such facilities, nor do wholesale customers pay for the costs of the agreements. As we saw earlier,¹⁷³ the same holds true for CIAC and pole attachments.

Finally, the discussion of O&M agreements must touch on the section 205(c) filing requirement and the category of documents covering labor agreements, and the like, that utilities must proffer on discovery in rate cases or audits. The Commission held, as I mentioned earlier, that it will assert jurisdiction over O&M agreements under which public utilities exercise control of the facility. If a public utility provides O&M service for an unregulated entity that maintains control over the facility, section 205(a) does not apply to the O&M agreement. The service itself does not become jurisdictional. The Commission stated, however, "in [our] discretion [we may] require that a public utility *receiving* service under an O&M agreement file that agreement . . . when the public utility seeks to recover the O&M costs in wholesale rates."¹⁷⁴

F. Borderline Agreements

The Jurisdictional Appendix explained that these arrangements entail "one utility (for convenience) serv[ing] the retail customers of a neighboring utility along . . . electric franchise areas common to both. The utility providing the power, in turn, bills the nominal seller."¹⁷⁵

Several utilities argued that, in practice, this amounts to retail service, falling outside the FERC's jurisdiction. The Commission ruled otherwise. Rather than view the matter from the customer's point of view, the FERC looked at it from the seller's. The utility providing the power billed its counterpart, not the retail customers. Those customers paid their own local franchised electric company for the service. Therefore, the FERC considered borderline agreements as sales at wholesale.

The FERC used its discretion in deciding how the agency would exercise its authority over these contracts. As a result, for all practical purposes, borderline agreements remain within state control. The Commission, even in holding that these sales constituted wholesale transactions in interstate commerce, adopted a pragmatic approach to regulation. Transaction under borderline agreements, apart from legal technicalities, implicate local interests.

Therefore, rather than conduct its own rate proceedings for these agreements, the Commission fashioned a short cut, the FERC held it would accept, as just and reasonable under section 205, the retail rate, as long as

173. 64 F.E.R.C. ¶ 61,139, at 61,994 n.6.

174. 64 F.E.R.C. ¶ 61,139, at 61,994-96.

175. *Id.*

the utility produced evidence of state commission approval.¹⁷⁶ In effect, utilities must file borderline agreements under section 205, but, in almost all cases, only for informational purposes.

The Commission's treatment of borderline agreements reached a proper balance, and the FERC fulfilled the requirements of section 205 in a way that placed a minimal burden on utilities. The Commission, in this instance, acted with comity toward state regulation, as it relied on retail regulation. At the same time, the requirement to file protects consumers in the few cases in which the state had not approved a rate. The FERC did not determine the procedures for regulating rates in borderline agreements if the state had not acted. That situation may rarely, if ever, actually arise.

This section of the Jurisdictional Appendix also illustrates that the Commission will take jurisdiction over a class of transactions (such as CIAC or joint ownership agreements) that inherently falls outside federal authority if it forms part of a jurisdictional service. The opposite, however, does not hold true.

Borderline agreements, in practice, equate to contracts for retail service. Yet because these arrangements, standing alone, necessitate paper transactions at the wholesale level, borderline agreements come within the FERC's jurisdiction. Though section 205(a) applies, the Commission requires a filing under section 205(c), to keep its "files current."¹⁷⁷

G. De Minimis Contracts

Those utilities seeking exemptions for "de minimis" contracts used the label to describe two situations: agreements to provide ancillary services that allegedly related only indirectly to wholesale sales of electricity or the provision of transmission service in interstate commerce; and those that concededly bore a direct relationship to jurisdictional activity, but involved a small amount of money.¹⁷⁸

As to the first, the Commission reiterated that even if an agreement, by itself, did not actually provide for a wholesale sales or transmission service in interstate commerce, the contract could come within section 205(a). If the ancillary services the document prescribes have a relationship to FERC jurisdiction, or an effect on rates wholesale customers pay, the agreement becomes jurisdictional.

On the second question, the Jurisdictional Appendix reviewed the cases and concluded that as a matter of law, it could not excuse small wholesale sales or transmission from regulation.¹⁷⁹ As a matter of discretion, however, the courts allow agencies to:

[T]ake into account circumstances peculiar to individual parties in the application of the general rule to particular cases [that argue for relaxed regulation], or even in appropriate cases . . . grant[ing] dispensation from the rule's opera-

176. See *supra* text accompanying note 154 (citing 64 F.E.R.C. ¶ 61,139, at 61,992).

177. 64 F.E.R.C. ¶ 61,139, at 61,994.

178. 64 F.E.R.C. ¶ 61,139, at 61,994-96.

179. *Alabama Power Co. v. Costle*, 636 F.2d 323, 357-58 (D.C. Cir. 1979).

tion. The need for such flexibility . . . is generally recognized, and enhances the effective operation of the administrative process.¹⁸⁰

The D.C. Circuit held that the agency bears the responsibility to show that, "the burdens of regulation yield a gain of trivial or no value."¹⁸¹ The court emphasized that the agency may not apply a *de minimis* exemption to situations which produce benefits, but in which the cost of regulation exceeds any benefits.¹⁸² The FERC then stated it would decline to exercise any discretion before it entertained a concrete case in which the applicant specifically justified a *de minimis* exemption.¹⁸³

Here lies a potential avenue of relief for the extreme situations parties fear may arise from the Commission's *Central Maine* excursion. Parties might argue that, in particular cases, regulation would serve no purpose. So far, the industry has urged that the Commission establish a monetary floor for its regulation; so far, the Commission has properly rejected that advocacy.¹⁸⁴ The FPA requires utilities to charge just and reasonable rates for jurisdictional service, both for large and small volumes and whether or not the seller sees profits from the deal.

The D.C. Circuit, however, has left open the possibility for the Commission to exempt agreements where regulation would "amount to a pointless exercise."¹⁸⁵ More likely than small transactions, that label fits transactions that bear a technical but tenuous connection to the interests the FPA seek to promote. The FERC, in the Jurisdictional Appendix, considered such decisions premature, in the absence of concrete facts. No one has presented such a case yet, or a rationale for where to draw the line.

The reader will also note that the restricted circumstances the case law allows for an administrative exemption for *de minimis* contracts, contrast with the broad band which the courts give the FERC to waive filing of "classifications, practices and regulations." This highlights the difference between sections 205(a) and 205(c). Section 205(a) establishes the Commission's rate regulation. A utility files under that provision to bring a transaction to the FERC's attention. An exemption from that filing requirement amounts to administrative deregulation of certain types of *de minimis* transactions. Such an action the Commission can take on its own only in the narrowest cases.

Section 205(c), on the other hand, deals with information that the Commission needs to fulfill its regulatory responsibilities. In this ancillary area, a waiver means that the FERC has found that, in its judgment, it can regulate without the particular 'classification, practice or regulation.' In this exercise of discretion, the courts will seldom intervene.

180. *Id.* at 360-61.

181. *Id.*

182. 64 F.E.R.C. ¶ 61,139, at 61,996.

183. *See* 64 F.E.R.C. ¶ 61,139, at 61,995-96 and cases cited.

184. 64 F.E.R.C. ¶ 61,139, at 61,995.

185. 65 F.E.R.C. ¶ 61,081, at 61,505.

VI. THE ORDER ON CLARIFICATION

As exhaustive as the industry made its comments and the Commission tried to make the Final Order, several parties sought further guidance. Specifically, they asked questions about: exchanges of power to compensate utilities for transmission losses; a reduction in or an amendment to a utility's contract with an unregulated entity; and feasibility studies for future transmission service.¹⁸⁶

On the first issue, the Commission held:

[P]aying with electricity, rather than with money, for power lost in transmission constitutes an exchange, just as paying for an entitlement to generating capacity by providing power at another time constitutes an exchange. Indeed . . . our regulations . . . treats as jurisdictional all contracts for "electric service" under which public utilities transfer electricity. . . . Just because the exchange involves that portion of the power lost in transmission, rather than the entire volume, makes no difference.¹⁸⁷

The second issue involved utilities in the Pacific Northwest purchasing from or exchanging with BPA or municipal utilities. The utility, requesting clarification, stated that the Jurisdictional Appendix arguably holds that changes in purchases as well as exchanges come within the FERC's jurisdiction. The Commission responded that:

If [the question] is referring to purchases from non-public utilities for which the public utility pays in money, we clarify that the FPA regulates sales public utilities make, not their purchases. Therefore, public utilities may buy from any seller without the need for FPA review at the time of the purchase. That also applies to changes in the amount contracted for. . . . On the other hand . . . we require public utilities to file changes in [exchange] agreements, just as our regulations . . . require public utilities to file exchanges in the first place.¹⁸⁸

The answers the FERC gave to these two questions—that utilities must file payments in kind for transmission losses or changes in exchanges—fit neatly into the rubric of the jurisdictional categories this article suggests. In addition, by explicitly describing section 205 jurisdiction as regulating sales from, but not purchases by public utilities, the Order on Clarification took a step toward reassuring companies that feared the FERC would take the opportunity of *Prior Notice* to extend the exercise of its jurisdiction over entities Congress placed beyond the FERC's reach.¹⁸⁹

The response to the third inquiry, in which the Commission took jurisdiction over transmission feasibility studies under section 205(a), does raise questions, at first blush. Pacific Gas & Electric Company (PG&E), sought

186. 65 F.E.R.C. ¶ 61,081, at 61,506.

187. 65 F.E.R.C. ¶ 61,081, at 61,507 (footnote omitted).

188. On the other hand, the FERC's modifying of the terms of a sale at wholesale in interstate commerce between a public utility and an unregulated purchaser, does not amount to an unlawful intrusion. As the Commission explained in the Jurisdictional Appendix, 64 F.E.R.C. ¶ 61,139, at 61,986, section 201(d) of the FPA, 16 U.S.C. § 824(d) (1988) gives the Commission jurisdiction over the "sale of electricity to any person for resale."

189. Motion of Pacific Gas & Electric Co. for Clarification, Prior Notice of Filing Requirements Under Part II of the Federal Power Act, at 4.

a declaration that feasibility studies for transmission service come within the FERC's jurisdiction under section 205(a) only if the studies result in the parties successfully entering into a commercial relationship. The utility argued:

Transmission study contracts relate solely to the development of information by the transmitting utility as part of its determination of the feasibility and constraints associated with the provision of services. By contrast, contracts to which [s]ection 205 notice and filing requirements have been applied have covered . . . activities and services related to the physical provision of transmission services, to the construction of facilities enabling such services to be provided, or to related financing.¹⁹⁰

According to PG&E, applying those criteria would result in the FERC declaring that feasibility studies that did not lead to service fall outside section 205. The Commission refused to go that far. It asserted jurisdiction, although it created a program to avoid the deluge that would result from requiring utilities to file all feasibility studies for transmission. The FERC held:

[C]harges for analytical or engineering studies, to determine whether sufficient capacity is available to accommodate a transmission request, are charges "for or in connection with" jurisdictional service. . . . If a public utility already is providing jurisdictional transmission service on behalf of others, agreements to perform [feasibility] studies . . . "affect or relate to" jurisdictional service the public utility currently provides. . . . Likewise, charges for such studies are "in connection with" the public utility's pre-existing [transmission] business . . . [even if nothing results from the study].¹⁹¹

The Commission created a novel regulatory scheme for these contracts. Rather than require filings in all cases, the FERC did so only if the customer filed a complaint under section 206 of the FPA (allowing parties to ask the FERC to review existing rates to determine whether they are just and reasonable).¹⁹²

In fact, one can argue, only with difficulty could a decision maker connect feasibility studies for future service with "pre-existing business." Moreover, if a feasibility study comes to naught, the cost does not become part of a jurisdictional rate. Nevertheless, at least the FERC's holding started from the correct premise, and, in that regard, the Order on Clarification remains consistent with my interpretation of the Jurisdictional Appendix. The Commission, in its own way, applied the *Prior Notice* rule to the facts of the case. The FERC, even if one disagrees with the result, tied feasibility studies to jurisdictional service: transmission for existing customers.

Moreover, the Order on Clarification explained¹⁹³ that the Commission's "principal concern is that the rates charged for a particular . . . study . . . could have the effect of discouraging, if not eliminating entirely, access to transmission." In practice, while asserting its jurisdiction in section 205

190. 65 F.E.R.C. ¶ 61,081, at 61,508 (footnote omitted).

191. *Id.*

192. *Id.*

193. *Id.*

terms, the Commission could have reached the same result through a different rationale. Therefore, in creating the special filing scheme the FERC did not overstep the bounds of its FPA jurisdiction.

In requiring utilities to file the studies only on complaint, the FERC, in effect, used its new authority under section 211 of the FPA.¹⁹⁴ That provision, which the Energy Policy Act of 1992 greatly expanded, authorizes the Commission to order transmission service on complaint that a utility has unreasonably denied access. Even though the Order on Clarification required utilities to file their studies in response to a rate complaint under section 206, a customer can bring the same issue to the Commission in a complaint under section 211.

If the complaint that a utility denied access to transmission alleges excessive rates for feasibility studies and the answer hinges on the reasonability of the rate for the study, the customer and the utility will file the information in the section 211 litigation. Therefore, the ruling on PG&E's questions suggests that, neither by design nor effect, will the *Prior Notice* proceeding result in the FERC over-reaching in its regulation of the industry, nor undermine the section 205 analysis of this article.

VII. CONCLUSION

Prior Notice comprised two aspects: the FERC's immediate concern in *Central Maine* with that utility's neglect to file until after service ceased more than a dozen contracts calling for market-based rates, and the Commission's effort to induce utilities to file cost-based rates. On the market-based rate front, the FERC acted in undeniably proper fashion. During these times of increased competition, the FERC correctly realized that utilities must be more careful to file agreements, in order to allow the agency to act on them.

Timely filing is particularly important when parties request authority to charge market-based rates. The Commission must be especially vigilant to ensure that the application meets the relevant legal standards for departing from cost-based regulation. This consideration requires utilities to make timely submissions. In a recent case, the Commission underscored the importance of advance review in market-based rate cases, as the FERC reiterated its policy of permitting waiver of notice to take effect no earlier than the date of the order.¹⁹⁵ Most involved in the industry regard the notion that utilities must file market-based rates before service expires as unexceptionable, although the FERC did soften the refund remedy to time value.

The aftermath of the FERC including in *Central Maine* cost-based rates surprised the Commission, as it seemed to overwhelm the industry. Had the Commission known the true state of affairs (I served as adviser to Commissioner Trabandt when the decision issued), perhaps the FERC might have taken things more slowly. The Commission could have estab-

194. 16 U.S.C.A. § 824j (West 1985 & Supp. 1993).

195. *Enron Power Mktg., Inc.*, 65 F.E.R.C. ¶ 61,305 (1993).

lished more firmly the classes of transactions utilities must file under section 205(a) of the FPA and enforced the requirement prospectively. This course of action would have avoided the multiple amnesty periods and the stays on ordering refunds in the various cases. The Commission will close the door to past agreements when it finishes disposing of the filings that utilities submitted during the final amnesty.

For the long-term, however, at least several benefits emerged from the two seemingly nerve-wracking years of the *Central Maine* experience. The main difficulty the industry expressed in adhering strictly to the requirements of section 205(d)—and, perhaps the main reason utilities failed to file their agreements in advance—arose from the need to transact quickly. Requiring 60-day advance filing would obstruct transactions.

The solution to that problem lies in the concept of umbrella tariffs and service agreements that the participants and the Commissioners discussed at length at the technical conference. In fact, the FERC relaxed the strict requirements of section 205(d) for utilities that instituted these arrangements. I submit that doing business under an umbrella tariff and service agreements benefits companies as well in advertising their services, for example.

The second major criticism the industry leveled at the FERC related to the uncertainty about the kinds of agreements the requirements of section 205(a) applied to. The Commission conducted an exhaustive proceeding on these issues. The FERC left itself discretion to assume jurisdiction over different types of agreements, but the orders in *Prior Notice* suggest the following guidelines for utilities:

(1) The FPA gives the FERC jurisdiction over sales, not purchases and concentrates on the seller, not the purchaser. The seller must satisfy the criteria the statute establishes for a “public utility”: a person (except for a domestic political body or a co-operative receiving loans from the Rural Electrification Administration) that owns or operates facilities engaged in selling at wholesale or transmitting electricity in interstate commerce.

(2) Transactions involving services or rates that wholesale customers will use or pay for come within section 205(a). That necessitates a full blown filing to submit the agreement for rate review. The Commission may waive the requirement only in the narrow circumstances in which no benefit from regulation results. The Jurisdictional Appendix left open the contours of such a de minimis exception. So far, utilities have failed to make a proper case for the Commission to invoke its discretion. The fact that the FERC has the discretion to grant de minimis exemptions guards against federal overreaching.

(3) Ancillary agreements or information that the FERC needs in order to carry out its responsibilities fall under section 205(c). The courts have granted the Commission wide discretion as to the extent to which utilities must file such materials.

(4) Miscellaneous matters, such as labor costs, which the Commission neither regulates nor as a rule needs in order to conduct its business, may

become issues in rate cases if parties question the costs utilities seek to recover. In those instances, the company must produce the information in discovery during the course of litigation, as it would other relevant material.

These four principles should serve to give an indication of the extent of utilities' obligations under section 205 of the FPA. Questions always arise. Utilities now know to request guidance from the FERC, either in formal declaratory orders or opinion letters of the General Counsel, on the jurisdictional status of contracts. That makes for sounder policy than the previously informal way utilities determined the agreements they needed to submit to Commission review.

Steadfastly embracing its responsibilities under the Energy Policy Act and the FPA to steer the industry toward competition, the FERC will hold utilities' feet to the fire to ensure that companies keep the Commission apprised of contracts. Most participants in the technical conference indicated they would do so. After the orders in the *Prior Notice* proceeding, utilities can more readily comply with their statutory duties.