THE DOE NATIONAL POWER GRID RECOMMENDATIONS: UNRELIABLE GUIDES FOR THE FUTURE ORGANIZATION OF THE BULK ELECTRIC POWER INDUSTRY

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DESPITE THE ADVERSE EFFECT of higher prices and conservation, summer peak demands for electricity are expected to rise from 427,887 MW in 1970 to 610,682 MW in 1989, for an average annual growth of 4.29%.[1] Net dependable generating capacity is projected to increase from 544,560 MW in the summer of 1979 to 778,058 MW in the summer of 1989.[2] Most of the new capacity will be in the form of nuclear and coal-fired units.[3]

Demand for electricity during the remainder of the century is harder to estimate with reasonable accuracy, but the prospect is further growth with a need to install substantial additional generating capacity.[4] The role of nuclear plants in meeting those needs is quite unclear since the accident at the Three Mile Island Plant.[5]

Can the bulk power industry meet those challenges without structural changes? The recent National Power Grid Study of the Department of Energy raises that very question:

> "In perspective, and for the most part, the Nation's bulk power supply system is performing well. There are, however, problems."[6]

One of the most important problems, the report says, is the need for increased coordination and integration in order to reduce the capital and fuel requirements of the utilities and to minimize in the process the adverse environmental impacts.[7] The objective is to provide needed bulk power plants and transmission lines in time, but without waste.

Efficiencies and economies of scale call for the construction of large and expensive bulk power plants.[8] As each is often larger than any one distribution system can absorb, several distributors must be interconnected with it. This calls for area planning.

There are in the contiguous United States three synchronous electric utility power supply systems that together cover the entire country.[9] They involve over 3000 individual electric utilities, including about 250 investor-owned electric utilities (which own 78% of the generating capacity and 81%

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[1]United States Department of Energy, *Electric Power Supply and Demand for the Contiguous United States, 1980-1989*, June 1980, Tables 2 and 3 (hereinafter referred to as "Electric Power Supply and Demand").

[2]*Id.* at Table V.2.

[3]*Id.* at V.3.

[4]United States Department of Energy, *Analysis Report, Energy Supply and Demand in the Midterm: 1985, 1990 and 1995* (April 1979), Figure 4.

[5]See *Report of the President's Commission on the Accident at Three Mile Island, The Need for Change: The Legacy of TMI*, October 1979).

[6]United States Department of Energy, *The National Power Grid Study*, Vol. 1, Final Report, January 1980, p. 30 (hereinafter referred to as "Power Grid Study" or "DOE Report").

[7]*Ibid.*

[8]See Casazza and Hoffman, "Relationship Between Pool Size, Unit Size and Transmission Requirements," paper 32-09, CIGRE, 1968, June 10-20.

[9]*Electric Power Supply and Demand, supra* note 1, p. II.2. The largest (the Seven-Council Interconnection) covers 39 states and 3 Canadian provinces. The next largest covers 13 western states and extends into British Columbia. The smallest (ERCOT) covers a large part of Texas.

of the bulk transmission lines), over 900 Rural Electrification Administration (REA) cooperatives, more than 1800 public non-Federal utilities (including public utility districts and municipal utilities), and 6 major Federal agency utilities.[10]

Varying degrees of coordinated planning and development of the bulk power system have been effected through 26 to 30 formal and informal power pools.[11] But whether an independent utility belongs to a pool or not, and the degree to which it participates when it does join, are matters left to its discretion.

> "Unfortunately, the entire industry does not fit neatly into any simple organizational setting. Some utilities belong to power pools, some do not; some power pools are tightly organized with formal agreements and professional staffs, some are not; although essentially all utilities belong to regional electric reliability councils, some councils are more active and better staffed than others."[12]

Essentially all of the electric power systems are voluntary members of one of nine National Electric Reliability Council (NERC) regional councils. The councils do not develop initial plans for bulk power installations, but seek to evaluate the regional impact of plans of the individual utilities or groups of utilities. NERC was created as a forum of the nine regional councils.

The informality of this structure caused one of the consultants employed in the DOE study to state:

> "Beginning in the mid-1960s the process for assuring adequate bulk power supply has become increasingly uncertain and controversial. Although extensive interconnection of transmission and cooperation in planning and operation have taken place among utilities up to the present time, various impediments and conflicts inhibit further integration. Although some of the benefits of increased integration are susceptible to engineering analysis, many critical issues in achieving further integration are institutional and political."[13]

The National Power Grid Study was initiated in 1977 at the request of the late United States Senator Lee Metcalf, in light of a bill introduced in the 95th Congress containing an interesting approach to the bulk power problem. S. 1991 proposed the establishment of a government-owned National Power Grid Corporation (NPGC) which would own and control a bulk electric power supply and extra high voltage (EHV) transmission system throughout the nation. Under the proposal, regional corporations would own and operate transmission facilities, except those of TVA (which would be one of the regional corporations). NPGC would provide power to the regional corporations which, in turn, would offer to sell bulk power to local utilities requesting such a supply. The corporations could issue up to $30 billion of

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[10]*Power Grid Study, supra* note 6, Vol. I, p. 9.

[11]*Id.* at 13.

[12]*Id.* at 18.

[13]*Power Grid Study, supra* note 6, Vol. II, Technical Study Reports, September 1979, p. 39. The Department declined to endorse the technical reports because they contained "many unsupported opinions." Nonetheless, its recommendations are based in part on those reports. (Vol. I, p. 70)

tax-exempt bonds guaranteed by the United States Government. They would have the power of eminent domain.[14]

The National Power Grid Study disclosed significant structural impediments to full coordination of the planning, construction and operation of bulk power generating and transmission facilities:

> (1) Each utility has a natural desire to exercise a great deal of self determination in its bulk power supply planning and operations.
> (2) Regional bulk power plans may not be the best alternative from the point of view of the utility which is to build a facility, or of the state public service commission which regulates the utility.
> (3) Participants in a bulk power project may not be able to agree on where to locate facilities or how to share the costs and benefits of regionally-oriented projects.
> (4) There is a lack of agreement as to forecast methods and power supply reliability criteria employed in finding the best plan for a region.
> (5) Utilities with a strong financial position may be reluctant to participate in a joint project with utilities in a weak financial position.
> (6) The large number of participants in the decision process impedes timely decisions, increases uncertainty, and adds to the construction costs.[15]

Among the possible alternatives, the idea of employing regional bulk power corporations to cope with these problems found a support which is not apparent in the Department's Final Report:

> *"Bulk Power Corporations.* It is interesting to note that both public and private power advocates have proposed bulk power supply corporations. It has been said that 15 to 30 corporations would be sufficient to serve the country. . . ."[16]

The Department found no merit in Senator Metcalf's proposal. That "grandiose" plan was not "feasible or necessary."[17] Three of the "guiding principles" employed in examining available options assured rejection of S. 1991: primary reliance should be placed on the Nation's existing pluralistic industry; risks should be spread among many utilities; and new arrangements or large-scale reorganizations should be avoided unless existing systems are not working well.[18] The Department did not find that much wrong with the existing systems, although it admitted that its "guiding principles are not so unambiguously sensible and compelling that they will be universally acclaimed."[19]

The Department presented alternative recommendations. Joint planning and operation is to be encouraged by use of "moderate" options.[20] The following roles are spelled out for the industry and for the federal and state governments:

> *Industry.* The National Electric Reliability Council and its regional councils should increase their staffing and analytical capabilities. Regional power brokering

[14] *Id.* at 33-34.
[15] *Power Grid Study, supra* note 6, Executive Summary, January 1980, pp. 12-13.
[16] *Power Grid Study, supra* note 6, Vol. II, p. 37.
[17] *Power Grid Study,* Executive Summary, p. iii.
[18] *Power Grid Study,* Vol. I, pp. 59-62.
[19] *Id.* at 63.
[20] "[I]n general, moderate proposals would tend to require relatively little change in existing institutional and physical arrangements or relatively little change in existing trends although they may yield very substantial benefits." *Id.* at 38.

centers should be established to ferret out unexploited opportunities for inter-utility exchanges of power for economy or oil conservation. Access to unused transmission capacity should be assured where technically possible. Interconnections between Texas utilities and contiguous States should be studied.[21] (It should be noted, however, that each of these objectives requires cooperative arrangements between firms which may be present or future competitors.)[22]

Governments. The Department encourages governments to initiate a search to discover regulatory impediments to economic choice, and suggests that options should be presented to appropriate State and Federal bodies to eliminate or reduce unintended penalties from regulatory lag. The States should be encouraged to explore regional approaches to bulk power problems, including use of the "interstate compact." DOE should collect data and independently assess utility planning, development and operations. The Federal government should encourage construction of minemouth coal-fired plants, and joint planning with Canada and Mexico. The proposed Energy Mobilization Board should expedite high-priority energy projects.[23]

Joint industry/government actions that the Study recommend include modification of laws restricting joint action, a search for high-payoff improvements, including "relatively minor institutional changes which will substantially improve performance in terms of interconnection, coordination, and integration"; identification of minimum requirements for information, communication, and control systems; the reform of wholesale power rate schedules to facilitate power transfers; and support for research and development efforts into high voltage overhead and underground systems, and models and methods which can improve system planning and operations.[24]

This reviewer finds a basic unrealism in these recommendations. It is assumed that if the 3000 participants in the electric industry will but work to a common end, without a material change in structure or regulatory environment, the provision of adequate bulk power supplies at the lowest cost and the least injury to the environment will be achieved in a manner that will be in the public interest. There is no basis in the published study for such a complacency.

Title II of the Public Utility Regulatory Policies Act of 1978 did strengthen the power of the Federal Energy Regulatory Commission over interconnections and wheeling of power. Nonetheless, the federal government lacks adequate authority to compel the utilities to coordinate their planning, development and operations in interstate commerce.[25] The DOE recommendations do not propose to change this. They depend on a very large number of independent private and public utilities acting in common, in a coordinated manner, and on the basis of long-term sophisticated arrangements. To achieve these objectives of the study "inappropriate institutional and legal restrictions which impede joint utility activities that yield net benefits from coordination and integration" are to be reduced or removed.[26]

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[21]*Power Grid Study, supra* note 6, Executive Summary, pp. 1-2.

[22]See *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973). See also Meeks, "Concentration in the Electric Power Industry: The Impact of Anti-trust Policy," 72 *Colum. L.Rev.* 64 (1972).

[23]Power Grid Study, *supra* note 6, Executive Summary, pp. 2-3.

[24]*Id.* at 4-5.

[25]Under Section 205(b)(2) of the Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117, 3141, the Federal Energy Regulatory Commission "may *recommend* to electric utilities that such utilities should *voluntarily* enter into negotiations when the opportunity" exists, to conserve energy, optimize the efficiency of use of facilities and resources, and to increase reliability through pooling arrangements. (Emphasis supplied.)

[26]*Power Grid Study,* Vol. I, p. 39.

Stated another way: "Anachronistic laws which restrict logical and socially desirable joint action should be appropriately modified."[27] These obviously constitute a recommendation that the supply of bulk power be exempted from the antitrust laws. No case has been made in the DOE report, however, for the assumptions that that objective is sensible and achievable.

The Sherman Act of 1890 forbids contracts, agreements and conspiracies which restrain interstate or foreign commerce, as well as monopolization and attempts to monopolize.[28] Its purpose is "to preserve the right of freedom to trade."[29] The Sherman Act has had a remarkable vitality over the years. It has been called A "charter of freedom; a law with a generality and adaptability comparable to that found to be desirable in constitutional provisions."[30]

When the Supreme Court in 1911 limited the effectiveness of the Act by holding that it applied only to "unreasonable" restraints,[31] the Congress bolstered enforcement by enacting the Clayton Act and the Federal Trade Commission Act in 1914. The Clayton Act was designed to reach restraints of trade in their incipiency, forbidding certain price discriminations, mergers, tie-in agreements and full requirements contracts which may substantially lessen competition or tend to create a monopoly.[32] The FTC was commissioned to ferret out and terminate by administrative action unfair methods of competition in interstate and foreign commerce.[33]

To cope more effectively with the court-created "rule of reason" test, the courts came to identify certain arrangements as so pernicious in effect on competition and so lacking in redeeming virtue to be forbidden without a full hearing on the economic justification for their existence.[34] These *per se* situations were described by the Supreme Court in these terms: "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210; division of markets, *United States* v. *Addyston Pipe & Steel Co.*, 85 F.271, aff'd, 175 U.S. 211; group boycotts, *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U.S. 457; and tying arrangements, *International Salt Co.* v. *United States*, 332 U.S. 392."[35]

It was assumed for a long time that the federal antitrust laws did not apply to regulated industries. Regulation was deemed a surrogate for

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[27]*Id.* at 71.

[28]15 U.S.C. §§ 1, 2.

[29]*United States* v. *Colgate & Co.*, 250 U.S. 300, 307(1919).

[30]*Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 359-360 (1933).

[31]*Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *American Tobacco Co.* v. *United States*, 221 U.S. 106 (1911).

[32]15 U.S.C. 13, 14 and 18. It has been held that electric power is not a commodity and, therefore, not subject to the price discrimination provisions of the Robinson-Patman Act, which amended section 2 of the Clayton Act. *City of Newark* v. *Delmarva Power & Light Co.*, 467 F.Supp. 763 (D.Del. 1979).

[33]15 U.S.C. §§ 41 *et seq.*

[34]"This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often fruitless when undertaken." *Northern Pacific Ry Co.* v. *United States*, 356 U.S. 1, 5 (1958).

[35]*Ibid.* While this list is a useful guide, it has to be read in the light of refinements found in subsequent court decisions, *e.g.*, *Susser* v. *Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed* 381 U.S. 125 (1965).

competition where competition was not feasible,[36] without much thought being given to the scope of the regulatory jurisdiction or the diligence with which it was exercised. The public interest was protected by the regulatory agency.[37] Decisions of the courts over the past thirty years have ventilated those notions quite thoroughly. In *California* v. *Federal Power Commission,* the Supreme Court reviewed an order issued by the FPC which effectively approved the merger of two interstate natural gas pipeline companies under the Natural Gas Act while there was pending before a United States District Court in Utah a suit brought by the Attorney General under Section 7 of the Clayton Act to prevent the necessary stock acquisition. Without deciding that a violation of the antitrust laws was involved, the Supreme Court held that the FPC should have awaited the District Court decision before acting on the merger:

> "Here, as in *United States* v. *R.C.A.,* 358 U.S. 334, while 'antitrust considerations' are relevant to the issue of 'public interest, convenience and necessity' *(id.,* at 351), there is no 'pervasive regulatory scheme' *(ibid.)* including the antitrust laws that has been entrusted to the Commission. . . . "[38]

When the Federal Power Commission was preparing its National Power Survey in the early 1960's, inquiry was made of the Assistant Attorney General in charge of the Antitrust Division as to the applicability of the antitrust laws to power pools. He responded that pool agreements restricting the resale of power to particular areas and particular customers for particular end uses would tend to raise serious antitrust problems.[39]

In 1973 the Supreme Court held that in enacting Part II of the Federal Power Act[40] Congress "rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."

> "When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. . . . . This is particularly true in this instance because Congress, in passing the Public Utility Holding Company Act, which included Part II of the Federal Power Act, was concerned with 'restraint of free and independent competition' among public utility holding companies. See 15 U.S.C. § 79(a)(b)(2).
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> Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or

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[36]"[P]ublic utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579, 595-596 (1976).

[37]In *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 310 (1963) the Supreme Court did find that the Civil Aeronautics Act of 1938 displaced the Sherman Act insofar as "questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and local carriers" were concerned.

[38]369 U.S. 482, 485(1962). In *Kansas Power and Light Co.* v. *Federal Power Commission,* 554 F.2d 1178 (D.C. Cir. 1977), the Court of Appeals directed the Commission to proceed with consideration of a statutory merger application under section 203 of the Federal Power Act, 16 U.S.C. § 824b. despite the pendency of a private antitrust suit in a United States District Court because of the difference in Commission jurisdiction over securities under the Natural Gas Act and the Federal Power Act.

[39]Letter from Lee Loevinger to Herbert Cohn, June 7, 1963. See Federal Power Commision, *National Power Survey* (1964), pt. 2, at pp. 367-369. Interestingly, Mr. Loevinger relied, *inter alia,* on a case decided under the common law: *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373 (1911), recognizing the ancient lineage of the basic antitrust principles.

[40]16 U.S.C. §§ 824(a) *et seq.*

immunize Otter Tail from antitrust regulations for refusing to deal with municipal corporations."[41]

In 1976, the Supreme Court held that the Federal Power Commission, which regulated an electric utility's wholesale rates under Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), had jurisdiction to consider allegations by a wholesale customer that proposed wholesale rates were discriminatory and noncompetitive when considered in relation to the utility's state-regulated retail rates. *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976).[42] The Court stated in an earlier decision, the ratemaking power of the FPC under Part II of the Federal Power Act "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to §§ 202 and 203, and under like directives contained in §§ 205, 206, and 207."[43]

The government might properly sanction a division of the territories served by utilities. Where that approval is absent, a territorial arrangement between utilities may be a *per se* violation of the Sherman Act, as it was held to be in *Gainesville Utilities Department* v. *Florida Power and Light Co.*, 573 F.2d 292 (5th Cir. 1978), *cert. denied*, 439 U.S. 966 (1978). The Court there reasoned:

> "The Supreme Court in *Otter Tail*, furthermore, specifically affirmed the part of the District Court's injunction preventing the defendant from entering into or enforcing any contract limiting the areas in which other power companies might sell electric service. *Id.*, 410 U.S. at 378-79. Two Circuit Courts also have held that contracts between utility companies providing for territorial divisions are per se Sherman Act violations. *Montana-Dakota Utilities Co.* v. *Williams Electric Cooperative*, 8 Cir., 1959, 263 F.2d 431; *Pennsylvania Water Power Co.*, 4 Cir., 1950, 184 F.2d 552 cert. denied 340 U.S. 906. We apply, therefore, the same per se standard in this case to insure that the market is free of territorial restraints."[44]

The Court there found a conspiracy to divide the territory, despite the absence of any document expressly setting forth a territorial agreement. "[W]hen only two companies dominate a market, it is unlikely any formal agreement is needed or would be risked."[45]

Attempts to exclude utilities from access to bulk power generating and transmission pools may be held contrary to the purposes of the federal antitrust laws (and, therefore, contrary to the public interest) in agency cases

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[41]*Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374-375 (1973). Otter Tail was found to have attempted to monopolize and had prevented communities from replacing Otter Tail's local distribution operations with a municipal distribution system by "(1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been retailing power; (2) refusals to 'wheel' power to such systems, that is to say to transfer, by direct transmission or displacement, electric power from one utility to another over the facilities of an intermediate utility; (3) the institution and support of litigation designed to prevent or delay establishment of those systems; and (4) the invocation of provisions in its transmission contracts with several other power suppliers for the purpose of denying the municipal systems access to other suppliers by means of the Otter Tail's transmission systems." (410 U.S. at 368).

[42]See also *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980), *cert. pending* No. 79-2059.

[43]*Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 758-759 (1973).

[44]573 F.2d at 300.

[45]*Id.* at 303.

involving jointly-owned hydro[46] and nuclear-powered thermal stations.[47]

Some 70 nuclear plants are now in operation. Another 86 may be completed in the next decade. The fact that no new orders for nuclear plants have been placed since Three Mile Island does not make the federal antitrust laws less relevant to this discussion.

In *Ft. Pierce Utilities Authority* v. *Nuclear Regulatory Commission,* 606 F.2d 986 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 842 (1979), the Court was concerned with the extent of the antitrust authority of the Nuclear Regulatory Commission under the Atomic Energy Act over operating licenses for nuclear reactors in bulk power plants. Writing for the Court, Judge Carl McGowan summarized the pertinent law as follows:

> "The Act as amended [in 1970], and now currently in effect, carries forward the three basic areas of antitrust authority provided for prior to 1970. First, section 105(a), which was not amended, authorizes the Commission to suspend or revoke a license if the licensee is found by a court to have violated the antitrust laws in the course of licensed activity. Second, section 105(b), also not amended, requires the Commission to report to the Attorney General any information with respect to the utilization of atomic energy indicating a possible violation of the antitrust laws.
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> Third, section 105(c), which was amended, requires the Commission, when receiving an application for a construction permit under section 103, to solicit the Attorney General's advice on antitrust matters, *id.* § 105(c)(1), 42 U.S.C. § 2135(c)(1), to publish such advice in the *Federal Register, id.* § 105(c)(5), 42 U.S.C. § 2135(c)(5), and to permit the Attorney General, where he advises 'that there may be a hearing,' to participate as a party in any licensing proceedings with regard to antitrust matters, *id.* . . . "[48]

It should be noted that licenses for hydro projects are required to be issued by the Federal Energy Regulatory Commission (which replaced the Federal Power Commission)[49] on the following condition, *inter alia:*

> "(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited."[50]

No federal agency licenses bulk power steam plants fueled with coal, such as the NRC does with nuclear-fueled plants or the FERC with hydro units. Nonetheless, new coal-fueled plants are expected to play the dominant role in meeting increased bulk power demands over the remainder of the century.[51]

Due to vertical integration, some 90% of the revenues of the electric power industry are regulated at the state and local level. Can state regulation

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[46]See *Municipal Electric Ass'n* v. *Federal Power Commission,* 414 F.2d 1206, 1209 (D.C.Cir. 1969).

[47]*Municipal Electric Ass'n* v. *Securities and Exchange Commission,* 413 F.2d 1052, 1057 (D.C.Cir. 1969).

[48]606 F.2d at 994.

[49]The basic functions of the FPC were transferred to the FERC by the Department of Energy Organization Act, 91 Stat. 567, 583, 42 U.S.C. § 7172.

[50]Section 10(h) of the Federal Power Act, 16 U.S.C. § 803(h).

[51]Of course there may be regulation by the Corps of Engineers, Environmental Protection Agency and by others. But no federal agency has the authority to examine thoroughly into the project, consider alternatives, and attach reasonable conditions to the licensing of such plants. See *Scenic Hudson Preservation Conference* v. *Federal Power Commission* 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. of New York* v. *Scenic Hudson Preervation Conference,* 384 U.S. 941 (1966).

assure that bulk power activities are in conformance with the federal antitrust laws?

In 1943, the Supreme Court found that California state regulation which displaced competition in the marketing of raisins did not violate the Sherman Act.[52] In *Cantor* v. *Detroit Edison Company,* 428 U.S. 579 (1976), a private businessman objected to a provision, which had been in Detroit Edison's tariff since 1916, under which the utility exchanged (without charge) new light bulbs for burned-out ones. The utility argued that the *Parker* rationale immunized private actions approved by a state. Rejecting the contention that "the competitive standard imposed by antitrust legislation is fundamentally inconsistent with the 'public interest' standard widely enforced by regulatory agencies," the Supreme Court asserted:

> "There are at least three reasons why this argument is unacceptable. First, merely because certain conduct may be subject both to state regulation and to federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs."[53]

To be exempt, "anticompetitive activities must be compelled by direction of the State acting as a sovereign."[54] Any claim of implied exemption must be tested by standards as severe as those applied to federal regulatory legislation.[55]

Aware of the limited jurisdiction of each State over bulk power projects which have a regional impact, the DOE Report recommends regional cooperation among the States on the bases of interstate compacts, or less formal arrangements. Assuming such arrangements to be everywhere acceptable, they cannot in themselves reconcile state regulation of the bulk power industry and the federal antitrust laws.

Interstate compacts require the consent of Congress.[56] It can reasonably be expected that Congress will attach to any interstate compact affecting the bulk power electric industry a condition, like that found in the Interstate Oil Compact, to the effect that it is not to serve to suppress competition. Article V reads:

> "It is not the purpose of this compact to authorize the states joining herein to limit the production of oil or gas for the purpose of stabilizing or fixing the prices thereof, or create or perpetuate monopoly, or to promote regimentation, but is lim-

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[52] *Parker* v. *Brown,* 317 U.S. 341 (1943).

[53] 428 U.S. at 595. The Court also stated:

"The Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." (428 U.S. at 592-593; footnotes omitted)

[54] See *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 791 (1975).

[55] *Cantor* v. *Detroit Edison Co.,* 429 U.S. at 597.

[56] U.S. Const. art. I, § 10.

> ited to the purpose of conserving oil and gas and preventing the avoidable waste thereof within reasonable limitations."[57]

To be certain that the compact does not serve as a vehicle for price fixing, the Attorney General was directed to make a report to Congress as to whether the actions of the Interstate Oil Compact Commission and the States were consistent with the purposes as set out in Article V of the compact.[58]

Congress has shown a marked reluctance in recent times to provide exemptions from the antitrust laws in the case of large energy projects. The Alaska Natural Gas Transportation Act of 1976,[59] designed to facilitate the building of a multi-billion dollar natural gas pipeline from the northern slope of Alaska to the lower-48 States, contains in Section 14 the following: "Nothing in this chapter, and no action taken hereunder, shall imply or effect an amendment to, or exemption from, any provision of the antitrust laws." (15 U.S.C. § 719 *l)* Section 13(a) requires the inclusion, in any certificate, permit, right-of-way, lease or other authorization issued or granted, of "a provision that no person seeking to transport natural gas in the Alaska natural gas transportation system shall be prevented from doing so or be discriminated against in the terms and conditions of service on the basis of degree of ownership, or lack thereof, of the Alaska natural gas transportation system." (15 U.S.C. § 719k(a))

Section 175(e) of the Energy Security Act enacted in June 1980 provides that the antitrust laws shall apply to the United States Synthetic Fuels Corporation created by the legislation "as if it were an agency of the United States."[60] The Conference Report states: "Section 175(d) [sic] is not intended to confer or imply any immunity from the antitrust laws. It is simply designed to subject the Corporation's governmental and commercial activities to those laws to the same extent as any other Federal agency."[61]

The federal antitrust laws are not "anachronistic" in their application to the bulk electric power industry, as the DOE Report suggests.[62] These laws, and the purposes they serve, are a vital part of the warp and woof of the bulk power industry as it now exists.[63] To assume that these laws can be waived aside is not a "moderate" proposal; it is a radical one, and ill advised. It would have been far more helpful had the DOE Report recognized this reality and sought to provide leadership in resolving the problems in light of it.

The courts have provided guidance as to how the federal antitrust laws and public utility regulation may be reconciled. First, the courts, and not the

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[57]81 Stat. 560, as amended.

[58]See Attorney General's Fourth Report Pursuant to Section 2 of the Joint Resolution of July 28, 1955, Consenting to an Interstate Compact to Conserve Oil and Gas (1959).

[59]90 Stat. 2903, 15 U.S.C. § 719.

[60]94 Stat. 611, 677.

[61]126 *Cong. Record* H. 5314, June 19, 1980. See *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533 (1939); *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968), *cert. denied* 393 U.S. 1000 (1968).

[62]*Power Grid Study, supra* note 6. Vol. I, p. 71.

[63]Municipalities engaged in the electric power business are vulnerable to antitrust suits where the State did not authorize or direct the municipality to act as it did. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410-413 (1978).

regulatory agencies, make the final decision as to whether the antitrust laws have been superseded by a statute enacted by Congress to regulate an industry in the public interest. Second, antitrust exemptions are not lightly inferred. Where found to exist, they are narrowly construed. Third, except where specifically delegated, the regulatory agency does not have power to enforce the antitrust laws. However, those laws cannot be ignored by the agency in determining whether a proposal meets a public interest or public convenience and necessity test. The antitrust laws must give ground only where they must if the regulatory statute is to be made to work.[64]

A few recent press clippings may help focus on the options that should be encouraged by the Department of Energy.

There are widespread claims that the bulk power industry has excess capacity. Nonetheless, it was reported in June that a public service commission in one of the midwestern states rejected an electric utility's proposal to include a $164.7 million share of a new 650 MW plant in its rate base because it was excess capacity not needed for safe and adequate service to its ratepayers. The plant had been built under a certificate of public convenience and necessity issued by the state commission. Management suggested that the ruling would threaten participation with another investor-owned utility in a nuclear plant scheduled to go on the line in 1983.[65]

The heat wave in July pushed some utilities to the point where, it was reported, rising demands for electricity were met by buying extra power from neighboring utilities, waiving safety and environmental requirements, and resorting to rotating blackouts.[66]

Twenty-four nuclear reactors were ordered out of commission by the Nuclear Regulatory Commission for three days in July 1980, to test emergency equipment in certain reactors.[67]

A General Accounting Office study requested by the Subcommittee on Nuclear Regulation of the United States Senate reported that the owner of Three Mile Island (Metropolitan Edison Company) wasn't earning enough from its other operations to pay the fixed costs of the two reactors which were shut down. "If earnings don't increase substantially in the near future, it is questionable whether the company will be able to obtain the necessary funds

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[64]*Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *California* v. *Federal Power Commission*, 369 U.S. 482 (1962). For a more detailed discussion see Miller, "Competition and the public interest in the interstate gas and electric industries," 55 *Iowa L.R.* 570 (1970).

[65]*Electrical Week*, June 40, 1980, p. 9.

[66]Emshwiller, "As heat wave drains power plants, some utilities are pushed to limit," *The Wall Street Journal*, July 18, 1980, p. 15. In *Electric Power Supply and Demand, supra* note 1, published in June 1980, it is stated (p. I.3):

> "The matter of projected additions to the bulk power supply system is of great concern to the Department of Energy. Adequacy of power supply is strongly dependent on the maintenance of a prudent balance between projected demand and projected supply. The reserve margins projected by the Regional Reliability Councils rely on continued construction, and completion on schedule, of hundreds of new generating units through 1989. Of the projected units, 86 totalling nearly 94,000 MW are nuclear. In reviewing the dates projected in the Council Reports for completion of these units, we have concluded that many of the inservice dates are highly optimistic. Our appraisal indicates the strong possibility that 53 of the nuclear units scheduled for operation by the end of 1985, with a total capability of about 57,000 MW, are not likely to be operational on the dates given in the Regional Council reports. . . . "

[67]*The Wall Street Journal*, July 8, 1980, p. 4.

to pay its share of Unit 2 (cleanup) costs and maintain its present electric power system."[68]

Concern over the industry's ability to meet its capital requirements over the years ahead has been expressed in various quarters. It was reported in the press in June that electric utilities claimed they could not afford the capital costs of conversion of bulk power steam plants from oil and natural gas to coal. A proposed $3.6 billion federal grant and loan program was thought inadequate to convert 80 plants.[69]

An analyst who canvased the equity needs of electric utilities accounting for 95% of the investor-owned segment revealed that external financing would be needed for over $75 billion of the $150 billion of new funds needed for construction over the next five years. As much as $21 billion of this might have to be in the form of equity; not an exciting prospect when the utilities in question had an estimated market value of only $47 billion on December 30, 1979 and their common stocks were reported as trading on the average at prices 30% below book value.[70]

Two relevant questions are posed by these accounts, and by the structural impediments to full coordination of the planning, construction and operation of bulk power generating and transmission facilities identified in the DOE Report. (1) What will it take to assure that the requisite bulk power facilities are planned and constructed in time at the least cost and with the least injury to the environment? (2) If the antitrust laws are an impediment to that goal, what may be done in terms of industry structure and its regulation to effect an accommodation which is most in the public interest?

The Metcalf proposal is certainly relevant in answering these questions, even if it is not the most desirable option. A government-owned National Power Grid Corporation could assure that the necessary planning was done on a regional (rather than parochial) basis. The proposal overcomes the limitations of state regulatory authority and many of the deficiencies of the present federal regulatory scheme. The needed financing would be provided. With capable management, the facilities would be installed in time. Concerns about safe management of new nuclear facilities might be allayed.[72] The antitrust laws should cause no difficulties.[73] All utilities distributing electric

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[68]*Ibid.*

[69]Jaroslovsky and Petzinger, "Drive to get utilities to switch to coal taking its lumps, faces heavy going," *The Wall Street Journal,* June 26, 1980, p. 12.

[70]Elia, "Electric utilities' growing financial needs pose an unpleasant surprise, survey shows," *The Wall Street Journal,* May 15, 1980, p. 47.

[71]See note 15, *supra.*

[72]*The Report of the President's Commission on the Accident at Three Mile Island* contains the following disturbing comment:

> "We agree that the utility that operates a nuclear plant must be held responsible for the fundamental design and procedures that assure nuclear safety. However, the analysis of this particular accident raises the serious question of whether all electric utilities automatically have the necessary technical expertise and managerial capabilities for administering such a dangerous high-technology plant. We, therefore, recommend the development of higher standards of organization and management that a company must meet before it is granted a license to operate a nuclear plant." *(Report, supra* note 5, p. 23)

[73]See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).

power at retail to the public ought to be able to get access to the bulk power they need[74] under rates "overseen" by a federal agency.[75]

The DOE Report makes it obvious that the Department is not prepared to go that far. It appears to be confident that less drastic measures can be successful,[76] building on the present structure with an exemption from the antitrust laws.

One can experience more basic misgivings about the Metcalf proposal. Can a centralized federal agency today undertake and successfully accomplish on a national basis what the Tennessee Valley Authority has done on a regional basis?[77] The choice of this remedy would aggravate the consequences of bad managerial judgment, or ad hoc Congressional interventions. It would limit severely the role of the present participants who are very capable. It would provide a large subsidy for the largest industry in the country, at a time when aid on a widespread basis is not perceived as a necessity, and the wisdom of federal intervention in the economy on other than a last-ditch basis, is widely questioned.

Another option involves an enhanced role for the investor-owned utilities who already bear the principal burden of supplying bulk power. It is not practical for the federal government to regulate the bulk power industry in its present form without doing violence to the premise that the federal government should regulate only what the state and local authorities cannot regulate. The Federal Power Commission was given jurisdiction to regulate wholesale rates in interstate commerce because there was a regulatory gap which the states could not fill.[78] It was not given jurisdiction over retail sales.

Some expansion in the application of federal regulation will be necessary if the private sector is to play a more active role in coordination, planning and operation on a regional basis without undue exposure to suits under the federal antitrust laws.[79] This can occur if the industry is induced to limit the vertical integration now characteristic of the investor-owned electric utilities and might invoke certificate jurisdiction and abandonment jurisdiction akin to that over interstate pipelines. If all of the power generated at a bulk power plant is sold under wholesale contracts, the Federal Energy Regulatory Commission will have jurisdiction over those tariffs and the rates therein.[80]

In performing its rate review duties, it can consider antitrust implica-

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[74]Public bodies and cooperatives are given a preference in the sale of bulk power from certain federal bulk power projects under present laws. See Section 5 of the Flood Control Act of 1944, 58 Stat. 887, 890, 16 U.S.C. § 825s; Falcon Dam Act of 1954, 68 Stat. 255; Section 4(a) of the Bonneville Act, 50 Stat. 731, 733, 16 U.S.C. § 832(a).

[75]See Section 5(a) of the Bonneville Act, 50 Stat. 734, 16 U.S.C. § 832d(a).

[76]*Power Grid Study, supra* note 6, Vol. I., p. 59.

[77]See Kemeny, "Saving American Democracy: the Lessons of Three Mile Island," 83 *Technology Review* 65, 72 (June/July 1980).

[78]*Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

[79]For a more detailed discussion of the interplay of federal and state regulation and the structural impediments to a more effective role by investor-owned bulk power suppliers, see Miller, "A needed reform of the organization and regulationof the interstate electric industry," 38 *Fordham L.Rev.* 635 (1970).

[80]See Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b).

tions of such agreements.[81] But, as noted earlier, no federal agency would be examining the antitrust implications of new bulk power generating plants which are coal fired.

There are economic reasons why bulk power utilities ought to rely more on wholesale contracts. There is relatively little regulatory lag in placing new rates into effect under the Federal Power Act (albeit subject to refund). The rates allowed are compensatory.[82] This should make more feasible the financing of plants built in the prospect of such wholesale rates. All of these attractions are already in place. That they have not sufficed is evidence that they are not a sufficient inducement to the industry to restructure its organization.

There appears to be little interest in setting up separate corporations to handle bulk generation and transmission and local distribution if, through corporate affiliation, it will make the enterprise subject to onerous regulation by the Securities and Exchange Commission under the Public Utility Holding Company Act.[83] Combination companies fear being forced by that agency to divest either their gas or electric business if they become subject to its regulations.[84]

One of the options noted in the DOE Report is the regional bulk power supply corporation for the generation and transmission of electricity for sale to electric utilities which is federally chartered, privately owned, and has no corporate links with its wholesale customers.[85] Styled an "ambitious" option, it is rejected along with the Metcalf proposal. It deserves better treatment. It affords a flexible device for getting the job done, with a minimum of additional regulation and a respect for the role of competition where it should play a part.

A federal enabling statute might adopt one of the several approaches, whichever, after legislative hearings, appears most apt. The "encouragements" may need modification.

1. Authorize the chartering of one or more investor-owned bulk power supply corporations in each of specified regions of the United States. The corporations would have authority to own and operate bulk generation and transmission facilities and to make wholesales of electric power and provide transmission services under regulation by the Federal Energy Regulatory Commission. The corporations would enjoy the power of eminent domain for projects approved by a speci-

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[81] *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976). See also Miller, "Some observations on the lawfulness of long-term contracts for the purchase of energy supplies by public utilities in interstate commerce," 49 *Geo.L.J.* 673 (1961).

[82] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[83] 15 U.S.C. § 79. See *Municipal Electric Ass'n* v. *Securities and Exchange Commission*, 413 F.2d 1052 (D.C. Cir. 1969).

[84] See *Securities and Exchange Commission* v. *New England Electric System*, 384 U.S. 176, 189 (1966).

[85] *Power Grid Study*, *supra* note 6, Vol. I, p. 40. The option appears in three forms:

"5. Establish regional bulk power supply corporations for the *generation* of electricity for sale to electric utilities. These joint action power supply agencies might be federally chartered, . . . privately owned, . . .

6. Alternatively or additionally, establish regional bulk power *transmission* corporations to serve as common carriers for transmitting power on behalf of electric utilities.

7. Separate generation and transmission (bulk power supply) from distribution. Abandon the present vertical integration of the industry in favor of some entities exclusively in the business of providing bulk power supply (generation and transmission) while others are exclusively involved in distributing electricity to ultimate consumers. Prohibit any single utility from performing both functions."

fied federal agency, be allowed to include construction work in progress in their rate bases, be required to serve other utilities (whether investor-owned, REA cooperatives or government utilities) on a non-discriminatory basis, and be authorized to acquire, own and operate bulk power facilities of other utilities. The corporations would be forbidden to engage in the distribution and sale of electricity to consumers.

2. Authorize only one bulk power supply corporation (with the powers set out in item 1, *supra)* for each region, but impose upon it an obligation to provide bulk power when and as needed to assure safe and adequate service in the region. In other words, make it clear that the corporation will have the duties of a public utility.
3. Authorize only one bulk power corporation as provided in item 2, *supra,* but require all investor-owned utilities not members of a power pool meeting specified planning and coordination standards to sell and transfer their bulk power generation and transmission facilities to the regional corporation under arrangements which provide the seller with securities or cash equal to the fair value of its property, after which no corporate relationship is to exist between the seller of the utility facilities and the regional corporation.[86]
4. The legislation could provide a form of advisory management, which does not amount to control of the regional corporations, by the utilities in the region. Appropriate language might be based on the experience of the National Association of Securities Dealers (a Delaware corporation), which owns and operates the NASDAQ System providing the over-the-counter market with a quotations communication service, and regulates that market under the effective oversight of the SEC.[87]

Leadership is needed if the bulk power supply problems are to be met effectively, economically, and with the least injury to the environment during the remainder of the century. The pluralistic character of the industry—which is one of its strengths—and the range of the federal antitrust laws have blunted any industry response to the challenge. It is particularly regrettable that the Department of Energy failed to recognize the vacuum and use the opportunity provided by publication of its Final Report on the National Power Grid Study to adopt a more effective role. It is not too late for the Department to recover the fumble and to urge Congress to get on with the necessary enabling legislation.

[86]This may involve a non-taxable distribution by the seller to its shareholders of any securities obtained in payment from the regional corporation.

[87]See *Handley Investment Co.* v. *Securities and Exchange Commission,* 354 F.2d 64 (10th Cir. 1965).