

# EXPANDING THE FERC'S JURISDICTION TO REVIEW UTILITY MERGERS

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## I. INTRODUCTION

Recently, there has been heavy criticism of the Securities and Exchange Commission's (SEC) regulation of public utility holding companies under the Public Utilities Holding Company Act of 1935 (PUHCA).<sup>1</sup> As the result of this criticism, Senator Dale Bumpers of Arkansas has introduced legislation (currently S.544) to transfer all regulatory oversight of PUHCA — without modification to the existing statutory language — from the SEC to the Federal Energy Regulatory Commission (FERC).<sup>2</sup> This article presents one argument in favor of that transfer.

Specifically, PUHCA section 10 vests regulatory authority over public utility holding company mergers with the SEC.<sup>3</sup> Federal Power Act (FPA) section 203 vests regulatory authority over public utility mergers with the FERC.<sup>4</sup> This dual regulatory scheme, however, permits potential utility merger applicants to choose their regulatory forum in order to escape stringent regulatory scrutiny of their proposed merger's effect on the existing competitive situation.

If two public utilities want to merge, they must file a section 203 application with the FERC. Based on past precedent, the FERC will probably apply

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1. 15 U.S.C. § 79 (1988). See *Bumpers to Push Legislation to Make FERC, Not SEC, Responsible for PUHCA*, ELECTRIC UTIL. WK., January 25, 1993, at 19. Indeed, in her written response to Senator Bumper's pre-confirmation hearing questionnaire, Secretary of Energy Hazel O'Leary stated that the "SEC's lack of interest in the Public Utility Holding Company Act had lead to ineffective regulation." *Id.* See also, *A Watered-Down Version of a Resolution on FERC/SEC Jurisdiction*, INSIDE FERC, November 18, 1991 at 5; *Is Transferring PUHCA Authority to FERC an Idea Who's Time Has Come?* INSIDE FERC, November 4, 1991, at 7.

2. 139 Cong. Rec. S2640-41, 2683 (daily ed. March 10, 1993)(statement of Sen. Bumpers). Indeed, as support for the proposed bill, Senator Bumpers quoted from President (then Governor) Clinton's 1986 testimony before the Senate Energy and Natural Resources Committee, wherein Mr. Clinton stated that: "There is an enormous gap in the present scheme for regulation of [registered holding companies.] The SEC is supposed to look after the interests of ratepayers along with the interests of the financial concerns, but they never do." *Id.*

This bill was subsequently re-introduced in its entirety before the Committee on Banking, Housing, and Urban Affairs (the Senate committee with existing jurisdiction over PUHCA issues) by Senator Riegle in a jurisdictional parliamentary dispute among Senate committees. 139 Cong. Rec. S3523 (daily ed. March 23, 1993)(statement of Sen. Riegle).

3. 15 U.S.C. § 79j (1988).

4. 16 U.S.C. § 824a (1988).

"heavy" scrutiny to this inter-corporate horizontal utility merger, setting all, if not most, of the application for hearing.<sup>5</sup>

Holding companies also need SEC approval, but past practice has shown that the SEC will take a less intrusive regulatory review. Thus, as demonstrated in the past and as attempted in two on-going mergers, utilities can elect to by-pass the FERC's regulatory scrutiny by exploiting Congress' dual regulatory scheme in the following way:

First, prospective utility merger applicants can organize themselves into a holding company structure (if not already structured in that form).<sup>6</sup> These restructurings usually receive "light" regulatory scrutiny from the FERC.<sup>7</sup>

Second, the holding companies can seek merger authority from the SEC. As explained below, while horizontal mergers should be examined carefully, the SEC will probably view this transaction with light regulatory scrutiny. This is because, *inter alia*, the SEC believes that anticompetitive concerns involving operational issues—including transmission and bulk power supplies—are best reserved for the FERC.

Third, the newly merged holding company can request section 203 authority from the FERC for the intra-corporate consolidation of its operating companies. The FERC will probably also view this transaction with light regulatory scrutiny because the FERC believes that corporate consolidations do not alter a firm's market share—only its form.<sup>8</sup>

The net result of this process can be a failure to examine, in any meaningful way, the proposed transaction's effect on the existing competitive situation. This is currently involved in two on-going mergers—i.e., (1) the hostile takeover of PSI Resources, Inc. by IPALCO Enterprises, Inc.;<sup>9</sup> and (2) the consol-

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5. See, e.g., *Entergy Services, Inc. and Gulf States Utilities Co.*, 62 F.E.R.C. ¶ 61,073, *reh'g denied*, 64 F.E.R.C. ¶ 61,001 (1993); *Northeast Utilities Service Co. (Re Public Service Co. of New Hampshire)*, 50 F.E.R.C. ¶ 61,266 (1990); *Southern California Edison Co.*, 47 F.E.R.C. ¶ 61,196, *order on reh'g*, 49 F.E.R.C. ¶ 61,091 (1989); *Utah Power & Light Co.*, 41 F.E.R.C. ¶ 61,283 (1987), *order on reh'g*, 42 F.E.R.C. ¶ 61,123 (1988).

6. In order to organize into a holding company structure, utilities must file an application under section 203 of the FPA with the FERC and show that the proposed transaction is consistent with the public interest. See *Central Vermont Public Service Corp.*, 39 F.E.R.C. ¶ 61,295 (1987); *Central Illinois Public Service Co.*, 42 F.E.R.C. ¶ 61,073 (1988).

7. See *Central Vermont Public Service Corp.*, 39 F.E.R.C. ¶ 61,295 (1987); *Central Illinois Public Service Co.*, 42 F.E.R.C. ¶ 61,073 (1988).

8. This is not to say in any way that the FERC views other affiliate transactions (i.e., other than mergers or consolidations) with light regulatory scrutiny. To the contrary, prevention of affiliate abuse has been of paramount concern to the Commission in both the electric (see, e.g., *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 F.E.R.C. ¶ 61,382, at 62,167-70 (1991); *Portland General Exchange, Inc.*, 51 F.E.R.C. ¶ 61,108, at 61,243-47 (1990)) and gas (see, e.g., *Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, Order No. 497, FERC STATUTES AND REGULATIONS [Regulations and Preambles 1986-1990] ¶ 30,820 (1988), *order on reh'g*, Order No. 497-A, FERC STATUTES AND REGULATIONS [Regulations and Preambles 1986-1990] ¶ 30,868 (1989), *order extending sunset date*, Order No. 497-B, FERC STATUTES AND REGULATIONS [Regulations and Preambles 1986-1990] ¶ 30,908 (1990), *order extending sunset date and amending final rule*, Order No. 497-C, FERC STATUTES AND REGULATIONS ¶ 30,934 (1991), *reh'g denied*, 58 F.E.R.C. ¶ 61,139 (1992), *aff'd in part and remanded in part*, *Tenneco Gas Co. v. FERC*, 969 F.2d 1187 (1992), *order on remand and extending sunset date*, Order No. 497-D, FERC STATUTES AND REGULATIONS ¶ 30,958 (1992)) industries.

9. Indeed, in its March 15, 1993, motion to lodge certain documents with the FERC in Docket No.

idation of Iowa Electric & Light Company and Iowa Southern, Inc.<sup>10</sup>

From an economic and regulatory perspective, this process makes no sense. As a consequence, this article examines in detail this emerging gap for evaluating anticompetitive concerns of utility consolidations. First, this article presents the relevant analytical frameworks for examining horizontal and affiliate consolidations and explains why it is appropriate to apply strict scrutiny to the former and light scrutiny to the latter. Second, this article examines the dual regulatory framework for public utilities Congress established in the 1930's. This article then examines the analysis the SEC applies to horizontal intercorporate holding company mergers and that the FERC applies to affiliate mergers under FPA section 203. Next, the article presents a case study of the merger between Iowa Public Service Company and Iowa Power Company to illustrate how utilities may use both Congress' dual regulatory scheme and economic theory to escape strict agency review of the effect of a proposed merger.<sup>11</sup> Finally, this article concludes that the best way to close this gap is to pass S.544 and transfer regulatory authority of PUHCA from the SEC to the FERC.<sup>12</sup>

## II. ANALYTICAL FRAMEWORK

When two competitors that are both in the same market (especially a highly concentrated market) merge—i.e., a horizontal merger—the rational to apply strict scrutiny is obvious: the merged entity may gain via the merger such a significant share of the relevant market that it could exercise monopoly power by profitably raising and maintaining prices above competitive levels for a significant period of time, or otherwise adversely affect product quality, ser-

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EC93-6-000 (the on-going Commission case adjudicating the friendly merger proposal between PSI and Cincinnati Gas & Electric Co. presently pending Commission review), IPALCO, through its FERC-jurisdictional operating company Indianapolis Power & Light (IP&L), expressly stated that:

IPALCO Enterprises' [merger] proposal would create merger of the two holding companies, and would not merge or consolidate either of the operating companies. Thus, that proposal does not require prior approval by [the FERC] under section 203 of the Federal Power Act. For that reason, IP&L is not asking the Commission to take any action, other than to receive these documents as part of the public record in [Docket No. EC93-6-000.]

*Id.* at 2.

10. The SEC approved the inter-corporate horizontal holding company merger of these utilities' parent companies in 1990. *IE Industries*, PUHCA Release No. 35-25325, 1991 SEC LEXIS 1050 (June 3, 1991). The intra-corporate operating company consolidation is presently pending FERC approval in Docket No. EC93-14-000.

11. As explained below, there were three separate administrative proceedings held throughout this transaction: (1) the SEC decisions authorizing the horizontal inter-corporate holding company merger (*Midwest Resources*, PUHCA Release No. 35-25159, 1990 SEC LEXIS 3134 (September 26, 1990)); (2) the jurisdictional dispute (*Missouri Basin Mun. Power Agency v. Midwest Energy Co. and Iowa Resources, Inc.*, 53 F.E.R.C. ¶ 61,368 (1990), *reh'g denied*, 55 F.E.R.C. ¶ 61,464 (1991)); and (3) FERC's disposition of the intra-corporate affiliate merger (*Iowa Pub. Serv. Co., Iowa Power Co., and Midwest Power Sys.*, 60 F.E.R.C. ¶ 61,048 (1992)). For administrative convenience, the entire transaction will simply be referred to as *Iowa* unless otherwise specifically noted.

12. Indeed, in his remarks on the Senate floor, Senator Bumpers specifically stated that it is administratively inefficient for both the SEC and the FERC to review merger proposals. 139 Cong. Rec. S2640 (daily ed. March 10, 1993) (statement of Sen. Bumpers).

vice or innovation.<sup>13</sup> In contrast, with a corporate consolidation, the firm's market share does not change—only its form. Therefore, it has been argued that antitrust should never interfere with any conglomerate merger, because a conglomerate merger does not put together rivals, and so does not create or increase the ability to restrict output through an increase in market share.<sup>14</sup>

Both federal courts applying the antitrust laws and the FERC when reviewing applications under section 203 of the FPA<sup>15</sup> tend to accept this view and apply light scrutiny to affiliate consolidations.<sup>16</sup> For example, in *United States v. Citizens & Southern National Bank*,<sup>17</sup> the Supreme Court held, inter alia, that the merger of two banks that were jointly controlled did not call for close scrutiny under section 7 of the Clayton Act.<sup>18</sup> Because the evidence indicated that the proposed acquisition would extinguish no past or present competitive conduct or relationships, and because neither the Federal Deposit Insurance Corporation (FDIC) or the trial court could find "any realistic prospect that denial of these acquisitions would lead the defendant banks to compete against each other," the Court held that the proposed affiliate consolidation would not violate Clayton Act section 7—which is only concerned with probable effects on competition, not with "ephemeral possibilities."<sup>19</sup>

In a related area, courts have found that affiliate transactions do not violate the Sherman Act section 1 prohibition on illegal restraints of trade.<sup>20</sup> The basis of this doctrine stems from the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, (*Copperweld*).<sup>21</sup> *Copperweld* involved a section 1 suit against a parent and its wholly-owned subsidiary for allegedly conspiring to restrain the plaintiff from competing with the defendant subsidiary. The Supreme Court ruled against the plaintiff, holding that, as a matter of law, it was impossible for a subsidiary to conspire with its parent because the two are, in reality, one unit. According to the Court:

[a] parent and its wholly owned subsidiary have a complete unity of interest.

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13. U.S. DEPT. OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 0.1 & n.6 (1992).

14. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF*, p. 248 (The Free Press 1993) In fact, Judge Bork further argues that not only do conglomerate mergers probably not threaten competition, but such mergers may also "contribute valuable efficiencies."

15. While the Commission is not responsible for enforcing the antitrust laws, the Commission must make findings related to the pertinent antitrust statutes and to weigh them along with other important public interest considerations. See, *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 760 (1973); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 959-61 (D.C. 1968); *Kansas Power & Light Co. v. FPC*, 554 F.2d 1178, 1184 (D.C. Cir. 1977); *Southern Cal. Edison Co.*, 47 FERC ¶ 61,196, at 61,674 n.22 (1984).

16. A detailed discussion of the FERC's treatment of affiliate consolidations under section 203 of the FPA is presented in Section III below.

17. 422 U.S. 86, 95 S.Ct. 2099 (1975).

18. 15 U.S.C. § 18 (1988). Section 7 of the Clayton Act provides in pertinent part that "[n]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

19. 422 U.S. at 121-22 (quoting *Brown Shoe, Inc. v. United States*, 370 U.S. 294, 322 & n. 38 (1962)).

20. 15 U.S.C. § 1 (1988). Sherman Act Section 1 provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

21. 467 U.S. 752, 104 S.Ct. 2731 (1984).

Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

The Court therefore held that: "a parent and a wholly owned subsidiary *always* have a 'unity of purpose or a common design'. They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests."<sup>22</sup>

However, although *Copperweld* established that a parent and its subsidiary cannot conspire as a matter of law because they share a "unity of purpose," *Copperweld* did not present the issue of whether two "sister" corporate affiliates share a "unity of purpose" for purpose of section 1 immunity. This question was resolved in the affirmative by the Fifth Circuit in *Hood v. Tencoco Texas Life Insurance Co.*<sup>23</sup> (*Hood*). *Hood* involved a suit against two sister insurance corporations—wholly-owned by a common parent—by a former agent who alleged that the sister corporations illegally conspired under section 1 to mutually terminate his employment. The district court granted summary judgement in the defendants' favor, and the Fifth Circuit affirmed stating that "*Copperweld* teaches us that because [the two affiliated subsidiaries] share a common purpose with [their common parent] they cannot conspire with their parent in violation of the Sherman Act . . . [b]y the same token, neither can they conspire with one another."<sup>24</sup> This view has been accepted by other courts.<sup>25</sup>

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22. 467 U.S. at 771-72 (emphasis in original). See *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984) ("Given *Copperweld*, we see no relevant difference between a corporation wholly owned by another corporation, two corporations wholly owned by a third corporation or two corporations wholly owned by three persons who together manage all affairs of the two corporations. A contract between them does not join formally distinct economic units. In reality, they have always had a 'unity of purpose or a common design'").

23. 739 F.2d 1012 (5th Cir. 1984).

24. 739 F.2d at 1015.

25. See e.g., *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473, 1480 (9th Cir. 1984); *Satellite Fin. Planning Corp. v. First National Bank of Wilmington*, 643 F.Supp 449, 451 (D. Del. 1986); *Gucci v. Gucci Shops, Inc.*, 651 F. Supp. 194, 196-97 (S.D.N.Y. 1986); *H.R.M. Inc. v. Tele-Communications, Inc.*, 653 F.Supp. 645, 647-48 (D. Colo. 1987); *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606, 611 (6th Cir. 1987). However, in an unpublished opinion in a case that reached the Supreme Court on another issue, the Ninth Circuit has recently thrown into confusion the seeming consensus that sister corporations are incapable of conspiring with each other. *McQuillan v. Sorbothane, Inc.*, 907 F.2d 154 (9th Cir. 1990) (Table) (text available on WESTLAW), *rev'd on other grounds sub nom.* *Spectrum Sports Inc. v. McQuillan*, 113 S. Ct. 884 (1993). Following its pre-*Copperweld* decision in *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), the Ninth Circuit held that, "if the [sister corporations] hold themselves out as competitors, the rule that they cannot avoid Sherman Act liability by hiding behind a common ownership and control is 'especially applicable,'" and the court affirmed a judgment entered against a corporation for violating Section 1 by "conspiring" with its sister corporation. Although the Supreme Court reversed the Ninth Circuit in this case on an issue arising under Section 2 of the Sherman Act on January 25, 1993, it subsequently denied a certiorari petition raising the *Copperweld*

In *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*,<sup>26</sup> Judge Easterbrook of the Seventh Circuit applied both the *Citizens and Southern* and *Copperweld* doctrines to a merger of two affiliated insurance companies. One affiliate provided insurance against hospital costs and the other provided insurance against physician costs. The court reasoned that the merger did not violate Clayton Act section 7 because the two affiliates had previously acted as one company and it was "therefore appropriate to treat them as if they had been one corporation all along." Because the court found that it was appropriate to treat the affiliates as a single firm under *Copperweld*, the court found no section 7 violation because the affiliates' merger would "not change the conditions of competition in the market." Moreover, the court pointed out that under the *Citizens & Southern* doctrine, "[e]ven if the two [insurance] plans' formal separation makes treatment under *Copperweld* inappropriate, the merger of firms that were jointly controlled does not call for close scrutiny."<sup>27</sup>

The Eighth Circuit has also cited both *Citizens & Southern* and *Copperweld* in a dispute involving regulated electric utilities. In *City of Mount Pleasant, Iowa v. Associated Electric Cooperative Inc.*<sup>28</sup> (*Mount Pleasant*), a municipal utility alleged, inter alia, that the defendants, a group of related corporations which comprised a rural electric cooperative, illegally conspired under sections 1 of the Sherman Act. The district court, citing *Copperweld*, granted summary judgement for the defendants, holding that the defendants were part of a single enterprise and therefore could not conspire among themselves within the meaning of the Sherman Act.

On appeal, the Eighth Circuit affirmed the district court's holding in its entirety. The Eighth Circuit held that under both *Copperweld* and *Citizens & Southern*, it must look at economic reality, not corporate form, to determine whether related entities can conspire.<sup>29</sup> The court held that the burden was therefore on the plaintiff to show specific facts which present a triable issue as to whether the defendants had pursued interests diverse from those from the cooperative itself. The court defined "diverse" as those "interests which tend to show that any two of the defendants are, or have been, actual or potential competitors, or, at the very least, interests which are sufficiently divergent so that a reasonable juror could conclude that the entities have not always worked together for a common cause."<sup>30</sup>

The plaintiff argued that defendants had conflicting and independent economic interests because, inter alia, the cooperative's individual members often internally disputed the cooperative's different rate structure for municipal util-

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issue. *Sorbothane, Inc. v. McQuillan*, 113 S.Ct. 1358 (1993). The Ninth Circuit's unpublished opinion cannot be cited as precedent (9th Cir. R. 36-3), but the fact that a court could reach this decision suggests that it may be less clear than it otherwise seems that sister corporations are incapable of conspiring with each other.

26. 784 F.2d 1325 (7th Cir.), *reh'g denied*, 788 F.2d 1223 (1986).

27. 784 F.2d at 1337.

28. 838 F.2d 268 (8th Cir. 1988).

29. *Id.* at 274-75.

30. *Id.* at 276 (citing Judge Bork's decision in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214-15 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033, 107 S.Ct. 880 (1987)).

ities and members. While the court agreed with the plaintiff that these interests were "diverse," the court held that it was not sufficient to create a fact issue on whether these companies are part of a single enterprise. The court recognized that while it will always be true that separate companies, in one enterprise, that are located in separate areas and serve separate customers, will have varying interests:

It cannot reasonably be said that they are *independent sources* of [market] power. Their [market] power depends, and has always depended, on the cooperation among themselves. They are interdependent, not independent. The disagreements we have described are more like those, among board members of a single enterprise, than those among enterprises which are themselves separate and independent.<sup>31</sup>

The plaintiff also argued that the cooperatives were actual or potential competitors because (1) they had adjoining service areas and competed for new customers who consider locating in their areas and for existing customers who can move or exchange suppliers; and (2) the cooperative competed with its generating and transmission (G&T) subsidiaries for municipal customers. Again, the Eighth Circuit disagreed. The court held that in the absence of price competition between the cooperative's members, the court failed to see how this kind of dispute tended to make the members less dependent on one another for their economic power.<sup>32</sup>

### III. CONGRESS' DUAL REGULATORY SCHEME

In response to utility financial abuses and the 1929 Depression, Congress passed the Public Utility Act. The law comprised of two titles: (1) PUHCA, regulating public utility holding company activity; and (2) the FPA, authorizing the Federal Power Commission (FPC)—the FERC's predecessor—regulation over electric utility rates and practices.<sup>33</sup> Unlike the Securities and Exchange Acts of 1933<sup>34</sup> and 1934<sup>35</sup> (which are primarily disclosure and anti-fraud statutes), PUHCA is a regulatory statute which requires the SEC to perform operational oversight over utility holding companies.<sup>36</sup>

Section 2(a)(7) of PUHCA defines "holding company" as any person that directly or indirectly owns 10% or more of the voting securities of a public

31. *Id.* at 277.

32. *Id.* See also *Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1496-97 (5th Cir. 1985) (public utility and its sister companies constituted single entity and therefore could not conspire under Sherman Act section 1 to deprive plaintiff of surplus power generated from federal flood control projects and distributed over the defendants' transmission lines); *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1367 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988) (members of electricity wholesaler which sold electricity only to members and which was formed by members as not-for-profit electric generation and transmission cooperative to supply electricity to members and which was in essence wholly-owned subsidiary of collected members, were "integrated unitary business enterprise" and "single entity" incapable of conspiring under Sherman Act Section 1).

33. See generally Joshua Z. Rokach, *Transmission Pricing Under the Federal Power Act*, 14 ENERGY L.J. 95, 98 (1993).

34. 15 U.S.C. §§ 77a-77aa (1982).

35. *Id.* §§ 78a-78jj.

36. 2 ENERGY LAW AND TRANSACTIONS § 32.02 (1992).

utility. A "public utility" may be an "electric utility company"<sup>37</sup> which, in turn, is defined as "any company which owns or operates facilities used for the generation, transmission or distribution of electric energy for sale. . . ."<sup>38</sup> However, a holding company may be exempt from SEC jurisdiction if it falls within five enumerated exception contained in section 3(a) of PUHCA.<sup>39</sup> All other public utilities engaged in the transmission of electric energy or sale of electric energy at wholesale in interstate commerce (including exempt holding companies) are subject to the FERC's jurisdiction.<sup>40</sup> If there is a conflict of jurisdiction, Congress mandated that the SEC, and not the FERC, should prevail.<sup>41</sup>

However, while both the SEC and the FERC have jurisdiction over the electric utility industry, the SEC in administering PUHCA and the FERC in administering the FPA pursue different goals. As Justice Stevens recently explained:

Congress enacted PUHCA to prevent financial abuse among public utility holding companies and their affiliates. It entrusted the SEC, the agency with the

37. PUHCA § 2(a)(5), 15 U.S.C. § 79b(a)(5) (1988).

38. PUHCA § 2(a)(3), 15 U.S.C. § 79b(a)(3) (1988).

39. The five exceptions are as follows:

- (1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company therefore organized;
- (2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and the States contiguous thereto;
- (3) such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all of the outstanding securities of such companies are owned, directly or indirectly, by such holding company;
- (4) such holding company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities; or
- (5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

15 U.S.C. § 79c(a)(1)-(5).

40. See FPA § 201(b)(1), 16 U.S.C. 824(b)(1) (1988).

41. 16 U.S.C. § 825q (1988). FPA section 318 provides in pertinent part:

If, with respect to the . . . [disposition] of any . . . facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 . . . or a rule, regulation, or order thereunder and to a requirement of this Act or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this chapter, or of any rule, regulation or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this chapter shall apply to such person.



expertise in financial transactions and corporate finance, with the task of administering the act. The SEC carries out its duties essentially by monitoring inter-affiliate financial transactions and eliminating potential conflicts of interest. Congress enacted the FPA to regulate the wholesale interstate sale and distribution of electricity. It entrusted the administration of the FPA to the [Federal Power Commission] and later the FERC as the agency with the proper technical expertise required to regulate energy transmission.<sup>42</sup>

It is with this framework that the aforementioned regulatory gap springs forth.

*A. SEC Review of Horizontal, Inter-Corporate Holding Company Mergers*

Under PUHCA section 9(a),<sup>43</sup> it is unlawful for a registered holding company or its subsidiary to acquire securities and utility assets, unless the SEC approves the proposed acquisition under PUHCA section 10. PUHCA section 10(b)(1) provides in pertinent part that the SEC shall approve such acquisition unless the SEC finds that "such acquisition will tend towards interlocking relations *or the concentration of control* of public utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors, or consumers."<sup>44</sup> If the SEC finds that a proposed merger or acquisition violates this standard, then, under PUHCA section 10(e), the SEC "may prescribe such terms and conditions in respect of such acquisition . . . as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers."<sup>45</sup> Both the courts and the SEC, however, have struggled to define the appropriate kind of anticompetitive injury necessary to violate PUHCA's prohibition of concentration of control.

In *Municipal Electric Association of Massachusetts v. SEC*<sup>46</sup> (*Municipal Electric*), the D.C. Circuit held that when evaluating cases under section 10(b)(1), the SEC must take account of federal antitrust policies.<sup>47</sup> However, *Municipal Electric* did not involve a horizontal inter-corporate holding company merger. Rather, this case involved several complaints by municipal utilities that two investor-owned utilities refused to let the municipals participate in a large nuclear generating project, and that this refusal prevented the municipals from having the ability to fairly compete for low-cost power.

The SEC noted this distinction in *American Electric Power Co.*<sup>48</sup> (*AEP*). According to the SEC, when evaluating a horizontal public utility holding company merger, it is inappropriate to rely exclusively on federal antitrust standards because PUHCA provides specific standards of review. The SEC based its decision, *inter alia*, on the fact that PUHCA contains its own stan-

42. *Arcadia, Ohio v. Ohio Power Co.*, 111 S.Ct. 415, 423 (1990) (Stevens, J., concurring) (citations omitted).

43. 15 U.S.C. § 79i(a) (1988).

44. *Id.* § 79j(b)(1) (emphasis supplied).

45. *Id.* § 79j(e).

46. 413 F.2d 1052 (D.C.Cir. 1969).

47. *Environmental Action, Inc. v. SEC*, 895 F.2d 1255, 1260 (9th Cir. 1990) (*Environmental Action*) (Federal Antitrust Policies are to inform the SEC's interpretation of section 10(b)(1)). However, *Environmental Action*, like *Municipal Electric*, did not involve a horizontal inter-corporate holding company merger.

48. PUHCA Release No. 20633, 1978 SEC LEXIS 1103 (July 21, 1978).

dards for acquisitions, and that the only mention of "competition" is found in PUHCA's preamble.<sup>49</sup> The SEC therefore concluded that:

[t]he absence of conventional antitrust standards, such as restraint on competition, in the substantive portions [of PUHCA] dealing with acquisitions reflects a deliberate recognition by the Congress that competition in the electric utility industry operates only in somewhat limited areas and under special circumstances. This does not mean that competitive considerations are irrelevant, but it does mean that they are different.<sup>50</sup>

The SEC's next major experience with this issue came in its adjudication of the horizontal inter-corporate holding company merger of Northeast Utilities with Public Service Company of New Hampshire. In *Northeast Utilities*<sup>51</sup> (*Northeast Utilities*), the SEC held that:

Given the approximate size of the Northeast-PSNH system and the resultant economic benefits discussed therein, we conclude that the Acquisition does not tend towards the concentration of control of public utilities of a kind, or to the extent, detrimental to the public interest of investors or consumers as to require disapproval under section 10(b)(1). Section 10(b)(1) is satisfied.<sup>52</sup>

As such, the SEC did not set this merger application for hearing.<sup>53</sup>

On rehearing, parties argued that the SEC failed to provide a sufficient analysis of the anticompetitive effects of the proposed merger.<sup>54</sup> These parties based their challenge, in large part, on an initial decision issued by the FERC administrative law judge (ALJ).<sup>55</sup> The FERC ALJ found that the merger of Northeast and PSNH, if unconditioned, would have anticompetitive consequences in the relevant bulk power and transmission markets. However, the ALJ found that if applicants accepted transmission access conditions, the proposed merger would be in the public interest.

In response, the SEC held that while both the SEC and the FERC have statutory responsibilities with respect to the anticompetitive consequences of mergers in the public utility industry, the SEC in administering PUHCA and the FERC in administering the FPA pursue different goals. According to the SEC:

Congress designed [PUHCA] primarily to eliminate financial abuses by public-utility holding companies. Thus, the [SEC,] as the agency with expertise in financial transactions and corporate finance, is charged with regulation of the corporate structure and financing of public-utility holding companies and their affiliates. Congress enacted the FPA to regulate the wholesale interstate sale and distribution of electricity. . . . Congress has entrusted administration of the FPA to the FERC as the agency with the technical expertise necessary to regulate the

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49. Section 1(b)(2) states that "evils result" from the "restraint of free and independent competition" inherent in self-dealing transactions between a holding company and its utility subsidiaries. 15 U.S.C. § 79a(1)(b)(2) (1988).

50. *AEP*, 1978 SEC LEXIS 1103 at \*34.

51. PUHCA Release No. 35-25221, 1990 SEC LEXIS 3898 (December 21, 1990).

52. *Northeast Util.*, 1990 SEC LEXIS 3839 at \*39-40 (footnote omitted).

53. *Northeast Util.*, 1990 SEC LEXIS 3898 at \*69-70.

54. *Northeast Util.*, PUHCA Release No. 35-25273, 1991 SEC LEXIS 421 (March 15, 1991).

55. *Northeast Util. Serv. Co.*, 53 F.E.R.C. ¶ 63,020 (1990), *aff'd in rel. part*, 56 F.E.R.C. ¶ 61,269 (1991), *reh'g denied*, 58 F.E.R.C. ¶ 61,070 (1992), *aff'd in relevant part*, *Northeast Util. Serv. Co. v. FERC*, No. 92-1165, (1st Cir. May 19, 1993).

transmission of energy.<sup>56</sup>

The SEC therefore held that:

Because the FPA is directed at operational issues, including transmission access and bulk power supply, the expertise and technical ability for resolving the types of anticompetitive issues raised by petitioners lie principally with the FERC. When the [SEC,] in determining whether there is an undue concentration of control, identifies such issues, we can look to the FERC's expertise for an appropriate resolution of these issues.<sup>57</sup>

The SEC stated that in light of this conclusion, it would condition its approval of the proposed merger upon the FERC's issuance of a final order approving the merger under FPA section 203. However, the SEC stated that it retained on-going statutory authority under PUHCA section 20(a) to rescind or condition the transaction if circumstances warrant.<sup>58</sup>

On appeal, several parties argued that the SEC's holding constituted an improper abdication of its statutory responsibilities under PUHCA section 10(b)(1). The D.C. Circuit disagreed, holding that because both the SEC and the FERC had jurisdiction over the transaction, the SEC may "watchfully defer to the proceedings held before—and the result reached by—[the FERC.]"<sup>59</sup>

#### B. FERC Review of Intra-Corporate Consolidations under FPA Section 203

##### 1. Statutory and Legal Standard

Before a public utility may merge, it must obtain the FERC's approval pursuant to section 203 of the Federal Power Act.<sup>60</sup> Section 203(a) provides that "no public utility shall sell, lease or otherwise dispose of . . . its facilities subject to the jurisdiction of the Commission" without first obtaining Commission authorization to do so. If the Commission finds the proposed merger or consolidation to be "consistent with the public interest, [then the Commission] shall approve the same."<sup>61</sup> Section 203(b), in turn, states that the Commission may approve a proposed merger "in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission."<sup>62</sup>

Under section 203, an applicant need not show that a positive benefit to the public interest will result from a proposed merger or disposition of facilities to support a public interest finding. Only a showing of compatibility with the public interest is required.<sup>63</sup> The applicant is required to make a full dis-

56. *Northeast Util.*, 1991 SEC LEXIS 421 at \*7 (footnotes and citations omitted).

57. *Id.* at \*8.

58. *Id.* at n.15.

59. *City of Holyoke Gas & Elec. Dep't v. SEC*, 972 F.2d 358, 363-64 (D.C. Cir. 1992). The court also upheld the SEC's decision not to hold a hearing in this case. *Id.* at 365.

60. 16 U.S.C. § 824b (1988).

61. *Id.* § 824b(a).

62. *Id.* § 824b(b).

63. *Pacific Power & Light Co. v. FPC*, 111 F.2d 1014, 1017 (9th Cir. 1941); *See also, Entergy Serv. Inc. and Gulf States Util. Co.*, 62 F.E.R.C. ¶ 61,073, at 61,370 (1993) reh'g denied 64 F.E.R.C. ¶ 61,001 (1993). *Iowa Pub. Serv. Co.*, 60 F.E.R.C. ¶ 61,048, at 61,178 (1992); *Pub. Serv. Co. of Colo.*, 58 F.E.R.C.

closure of all material facts and to show affirmatively that the disposition of facilities is consistent with the public interest. Moreover, the Commission does not have to determine whether the transactions involved are the only means by which the companies could accomplish the overall objective of the Federal Power Act. Rather, the FERC, after analysis of all the relative factors, need only conclude that, in the particular circumstances, the disposition of facilities or merger is consistent with the public interest.<sup>64</sup>

In *Commonwealth Edison Co. (Commonwealth)*,<sup>65</sup> the FERC's predecessor, the Federal Power Commission, adopted a non-exclusive list of factors to be considered when evaluating whether a proposed merger is consistent with the public interest. Those factors include:

- (1) the effect of the merger on operating costs and rate levels;
- (2) the contemplated accounting treatment;
- (3) the reasonableness of the purchase price;
- (4) possible coercion of the acquired entity by the acquiring entity;
- (5) the effect of the merger on competition; and
- (6) the effect of the merger on effectiveness of regulation at the state or Federal level.<sup>66</sup>

This framework has been applied to affiliate and non-affiliate mergers alike.

## 2. FERC Dispositions of Affiliated Mergers Prior to *Iowa*.

### a. *New Bedford Gas & Edison Light Co. and Cape & Vineyard Electric Co. (New Bedford)*<sup>67</sup>

Although the FERC did not expressly follow the *Commonwealth* framework, *New Bedford* nonetheless provides a useful starting point for an examination of the FERC's treatment of affiliate transactions under section 203. In *New Bedford*, two contiguous utilities, New Bedford Gas & Edison Light Company (New Bedford) and Cape & Vineyard Electric Company (Cape), both wholly-owned subsidiaries of New England Gas & Electric Association (NEGEA), sought authority from the Commission to merge Cape into New

¶ 61,332, at 62,036 (1992); *Fitchburg Gas and Elec. Light Co.*, 58 F.E.R.C. ¶ 61,201, at 61,624 (1992); *Kansas City Power & Light Co. and Kansas Gas & Elec. Co.*, 54 F.E.R.C. ¶ 61,077, at 61,251-52 (1991); *Kansas City Power & Light Co.*, 53 F.E.R.C. ¶ 61,097, at 61,282 (1990); *Northeast Util. Serv. Co. (Re. Pub. Serv. Co. of New Hampshire)*, 50 F.E.R.C. ¶ 61,266, at 61,833-34 (1990).

64. *Northeast Util. v. FERC* No. 92-1165, slip op. at 33 (1st Cir. May 19, 1993). Indeed, as the First Circuit recently recognized:

In evaluating [utility mergers,] the Commission is required to find that the entire transaction, taken as a whole, is consistent with the public interest. [As such, e]ach element of the transaction need not benefit every utility or individual which might be affected; rather, the whole transaction must be consistent with the interest of "the public." There is no reason to think that the interest of [any] individual . . . is synonymous with the "public" interest. As has already been noted, the FERC may add conditions to a proposed merger before granting approval. The [FPA] does not require, however, that the FERC establish conditions so that every effect of an approved merger could withstand the "public interest" test.

65. 36 F.P.C. 927 (1966), *aff'd sub nom.*, *Utility Users League v. FPC*, 394 F.2d 16 (7th Cir. 1968), *cert. denied*, 393 U.S. 953 (1968).

66. *Id.* at 936-42.

67. 47 F.P.C. 122 (1972).

Bedford. Prior to this application, applicants, as subsidiaries of NEGEA, had for many years coordinated their operations. In addition, most of the applicants' corporate functions were performed on an integrated system basis and applicants followed coordinated policies by virtue of their participation in regional power pools and grids. Applicants' separate corporate existence, however, necessitated separate decision-making, financing, and rate structures.

The Commission approved the proposed merger on several grounds: (1) the proposed merger would improve the financial strength of the applicants, resulting in substantial savings in financing and debt costs;<sup>68</sup> (2) the proposed merger would not affect power supply or existing power contracts because New Bedford supplied all of Cape's power needs; and (3) the merger would not increase rates or prejudice customers, employees or security holders of the merging parties. Because no interventions or protests were filed in opposition to the merger, the Commission declined to set this application for hearing.<sup>69</sup>

b. *Wisconsin Electric Power Co. and Wisconsin Michigan Power Co.*<sup>70</sup>

*Wisconsin Electric* involved a section 203 application to merge Wisconsin Michigan Power Company (Wisconsin Michigan), a wholly-owned subsidiary of Wisconsin Electric (WEPCo), into WEPCo, with WEPCo as the surviving corporation. Wisconsin Michigan was geographically separated from its parent, and was further divided into two distinct noncontiguous geographic territories. Prior to the merger, however, the transmission and generation facilities of Wisconsin Michigan and WEPCo were operated as an integrated system. In addition, the two utilities had entered into a pooling agreement whereby their entire generation and high voltage transmission plant were considered as supplying power to both companies, with each company paying its proportionate share of the operating costs. Finally, the wholesale rates of the two utilities were reviewed on a unitary basis by the Commission.

The Commission utilized a two part test to analyze the proposed merger's effect on competition: "(1) will the merger bring a significant added concentration of economic power? [and] (2) will [the proposed merger] eliminate any meaningful competition which may exist?"<sup>71</sup> The Commission answered both points in the negative, holding that (1) the merger application involved a parent and its wholly-owned subsidiary whose generation and transmission facilities were previously operated as an integrated system; (2) the parties had entered into the pooling arrangement discussed above; and (3) the Commission already reviewed applicants' wholesale rates on a unitary basis.<sup>72</sup> In light

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68. Indeed, the Commission found that "[s]ince the systems are contiguous, separate corporate structures are superfluous." *Id.* at 124.

69. *Id.*

70. 59 F.P.C. 1196 (1977).

71. *Id.* at 1199.

72. *Id.*

of these facts, the Commission declined to set this merger for hearing:

While technically a merger, this action is more in the nature of an intrasystem consolidation and does not present the potential evils which are inherent in the merger of two non-affiliated systems. Consequently, we find and conclude that for the reasons set forth above a hearing is not warranted in this case and that the proposed merger is in the public interest.<sup>73</sup>

c. *Delmarva Power & Light Co., Delmarva Power & Light Co. of Maryland and Delmarva Power & Light Co. of Virginia.*<sup>74</sup>

This case involved a petition to merge Delmarva Power & Light's (Delmarva-Del) two wholly-owned subsidiaries, Delmarva Power & Light Company of Maryland (Delmarva-MD) and Delmarva Power & Light Company of Virginia (Delmarva-VA), into itself, leaving Delmarva-Del as the surviving utility. Prior to this application, the three systems (including generation, transmission, and distribution facilities) were operated as an integrated system and were also interconnected with the Pennsylvania-New Jersey-Maryland Intertie. In addition, prior to the merger, the wholesale rates of the utilities were reviewed by the Commission on a unitary basis.

When the Commission examined the effect of the proposed merger on competition, the Commission added a prong to the two-part test articulated in *WEPCo*. The Commission, citing *Commonwealth*, held that:

[i]n the context of regulated public utilities, the 'anticompetitive effect' of a merger requires consideration of at least three different questions: (1) will the merger bring a sufficient added concentration of economic power? (2) will the merger eliminate any meaningful competition which may exist, either directly or, by example, in attracting new industries to their respective service areas, in making wholesale sales, or providing economical service? and (3) will the merger have an adverse effect on competing resources?<sup>75</sup>

In considering the first prong, the Commission held that there was no evidence that the proposed merger would in any way increase the economic power of the surviving corporation. The Commission reasoned that because Delmarva-MD and Delmarva-VA were wholly-owned subsidiaries of Delmarva-Del and that no "extra-system acquisition [was] involved," the "proposal would only simplify the Delmarva corporate structure by merging these subsidiaries into the parent."<sup>76</sup>

As to the second prong, applicants asserted that prior to the merger there was neither competition among themselves nor any competition between the individual applicants and their respective wholesale customers within applicants' service territories. Although the Commission was reluctant to exclusively rely on the applicants' representations, the Commission held that as none of applicants' wholesale customers intervened to allege an potential diminution of competition, the Commission found "no evidence of any anticompe-

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73. *Id.* at 1201.

74. 5 F.E.R.C. ¶ 61,201 (1978).

75. *Id.* at 61,438.

76. *Id.*

titive problems with regard to wholesale sales of electricity by any of the applicants.”<sup>77</sup>

In examining the third prong, the Commission held that because Delmarva-Del was a distributor of both natural gas and electricity, the Commission “must consider the effect combined operation of gas and electric facilities by a single utility could have on the preservation of competition between gas and electric utilities and the possibility that, in combined systems, one form of energy might be favored over the other.”<sup>78</sup> After review, however, the Commission concluded that the retention of Delmarva-Del’s gas distribution properties after the proposed merger would not adversely affect competition between electric and gas utilities within the Applicants service territories. According to the Commission:

This decision rests on the nature of the proposed transaction, which is a consolidation of operating utilities presently under one ownership rather than the acquisition of any additional electric or gas utility, and the Applicants’ demonstration that the opportunity for increased competition is not significant.<sup>79</sup>

Finally, the Commission set forth two reasons why the proposed consolidation should not be set for hearing. First, citing *WEPCo*, the Commission held that a hearing was unwarranted because the applicants were affiliated and were already operated as an integrated system. Second, the Commission noted that no one had intervened to protest the proposed application.<sup>80</sup>

d. *Union Electric Co., Missouri Utilities Co., Missouri Power & Light Co., and Missouri Edison Co.*<sup>81</sup>

Union Electric (Union) and its wholly owned subsidiaries, Missouri Utilities Company (MU), Missouri Power & Light Company (MPL), and Missouri Edison Company (ME), filed a joint section 203 application to merge MU, MPL, and ME into Union, with Union as the sole surviving company. However, contrary to the cases discussed above, there is no indication in the Commission’s decision that the parent and its subsidiaries’ systems were integrated or that the parent and its subsidiaries’ wholesale rates were reviewed on a unitary basis prior to the merger. Notwithstanding these distinctions, the Commission, utilizing a *Commonwealth* analysis, found the proposed merger to be consistent with the public interest.

In analyzing the proposed merger’s effect on competition, the Commission utilized the same three-prong test as *Delmarva*.<sup>82</sup> Regarding the first prong, the Commission found that there was no evidence that the proposed merger would significantly increase the economic power of the surviving corporation because (1) Union already owned all of the outstanding common

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77. *Id.*

78. *Id.*

79. *Id.* at 61,439.

80. *Id.* at 61,436.

81. 25 F.E.R.C. ¶ 61,394 (1983), *reh’g denied*, 26 F.E.R.C. ¶ 61,184 (1984).

82. *Id.* at 61,877.

stock of the subsidiaries; (2) the subsidiaries purchased the vast majority of their energy requirements from Union; and (3) the subsidiaries' assets and revenues were only a small fraction of Union's assets and revenues, the merged company's system would be very similar to existing operations. Moreover, the Commission was especially quick to point out that no extra-system acquisition was involved. Thus, according to the Commission, "the nature of this transaction [was] essentially a simplification of the system's corporate structure."<sup>83</sup>

As to the second prong, the Commission found that there was no evidence indicating that the merger would impair any competition among applicants or their customers with regard to their electric utility operations. The Commission based its conclusion on the facts that (1) the applicants' electric service areas did not overlap; (2) applicants' wholesale and retail customers would have essentially the same pre-merger competitive options available to them post-merger; and (3) none of the applicants' wholesale customers intervened to allege any diminution of competition.<sup>84</sup>

As to the final factor, the Commission found that, because the applicants operated their respective gas and electric distribution facilities for years without giving rise to competitive problems, the applicants' retention of their gas distribution properties would not adversely affect competition between electric and gas utilities within applicants' service territories. Using language very similar to *Delmarva*, the Commission expressly stated that its

[d]ecision rests on the nature of the proposed transaction, which is essentially a consolidation of operating utilities presently under one ownership rather than the acquisition of any additional electric or gas utility. The effect of this transaction on existing competition between electric and gas utility operations should be negligible.<sup>85</sup>

e. *Kentucky Utilities Co. and Old Dominion Power Co.*<sup>86</sup>

Kentucky Utilities Company (Kentucky) and Old Dominion Power Company (Old Dominion) filed, inter alia, for authorization to merge Old Dominion, Kentucky's wholly-owned subsidiary, into Kentucky. Kentucky would be the sole surviving corporation after the merger, with Old Dominion operated as a division of Kentucky. Applicants argued that the proposed merger would not have any adverse anticompetitive effects because Old Dominion's electric operations were fully integrated with those of Kentucky and, therefore, the proposed merger would cause little or no change in the operation of Old Dominion's former business. The Commission agreed.

The Commission found that the proposed merger would not increase Kentucky's economic power or eliminate any meaningful competition. As support, the Commission noted that because Old Dominion had no generating

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83. *Id.* at 61,877.

84. *Id.*

85. *Id.* at 61,878.

86. 56 F.E.R.C. ¶ 61,184 (1991).



capacity of its own, it was not a separate competitor of Kentucky in the wholesale power market. Rather, the Commission found that Old Dominion simply resold power generated or purchased by Kentucky. Second, the Commission noted that because Kentucky wholly-owned Old Dominion, Kentucky, in effect, controlled the use of Old Dominion's transmission system by other parties. As such, the Commission concluded that the proposed merger would not increase Kentucky's market power by giving Kentucky some new competitive advantage—i.e., the proposed merger would not affect the existing competitive situation because Old Dominion's transmission facilities would be used post-merger for the same purpose as they were used pre-merger.<sup>87</sup> Finally, because Kentucky owned 100% of Old Dominion's common stock, the Commission found that "coercion is simply not a relevant factor in the context of [intra-corporate or affiliate] merger[s]."<sup>88</sup>

#### IV. THE IOWA DECISIONS

##### A. Background

*Iowa* involved the merger of two holding companies, Midwest Energy Company (Midwest) and Iowa Resources, Inc. (Iowa). Midwest, an Iowa corporation, was an exempt holding company under PUHCA section 3(a)(1).<sup>89</sup> Midwest owned 100 percent of the common stock of Iowa Public Service Company (Iowa Public Service), a public utility subject to FERC's jurisdiction under the FPA. Iowa Resources was also an Iowa corporation and an exempt holding company under section 3(a)(1) of PUHCA. Iowa Resources owned 100 percent of the common stock of Iowa Power, Inc (Iowa Power), a public utility subject to the Commission's jurisdiction under the FPA.

On March 15, 1990, Midwest Energy and Iowa resources agreed to merge into one newly formed holding company—Midwest Resources, an Iowa corporation. Under the parties' agreement, 100% of the common stock of both Midwest Energy and Iowa Resources would be transferred to Midwest Resources. On May 24, 1990, Midwest Resources requested SEC authorization for the proposed merger under PUHCA sections 9(a)(2) and 10.<sup>90</sup> The merger participants believed, however, the proposed transaction did not require FERC approval—only SEC approval.<sup>91</sup>

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87. 56 F.E.R.C. at 61,656 & n.39.

88. *Id.* at 61,656.

89. PUHCA Section 3(a)(1) generally provides an exemption from the registration requirements of PUHCA for any holding company and each of its public utility subsidiaries if such companies "are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized." 15 U.S.C. § 79c(a)(1) (1988).

90. *Id.* § 79i(a)(2); 79j (1988).

91. Midwest Resources Inc., SEC Release No. 35-25, 159; 70-7707 (September 26, 1990).

*B. The SEC Decision*<sup>92</sup>

On September 26, 1990, the SEC issued an order authorizing Midwest Resources to acquire the common stock of Midwest Energy and Iowa Resources. The SEC, however, made no examination whatsoever into whether or not the proposed merger would tend towards "the concentration of control" as required by PUHCA section 10(b)(1) or whether or not the proposed merger would have any anticompetitive effects as required by *Municipal Electric and Environmental Action*. Rather, the SEC stated the following:

Due notice of the filing of the application has been given in the manner prescribed by Rule 23 promulgated under the Act, and no hearing has been requested or ordered by the Commission. Upon the basis of the facts in the record, it is hereby found that the applicable standards of the Act and rules thereunder are satisfied.<sup>93</sup>

On November 7, 1990, the parties consummated the holding company merger.

*C. The Jurisdictional Dispute*<sup>94</sup>

On May 22, 1990, approximately three months before the consummation of the holding company merger, Missouri Basin Municipal Power Agency (Missouri Basin) filed a complaint in opposition to the holding company merger under section 306 of the FPA.<sup>95</sup> Missouri Basin requested that the Commission order the merging parties to show cause why their merger, without FERC's authorization, would not violate FPA section 203. Missouri Basin argued, *inter alia*, that FPA section 318 did not exempt the holding company merger from FERC review because there was no overlap of jurisdiction between the FERC and the SEC.

In analyzing this case, the Commission framed the issue narrowly: Whether Midwest Energy or Iowa Resources, each of which was formerly a public utility holding company under PUHCA, was also a public utility under the FPA when the merger was consummated?<sup>96</sup> After review, the Commission concluded that because Midwest and Iowa neither owned nor operated the FERC-jurisdictional facilities, but only owned the common stock of public utility companies which in turn owned the FERC-jurisdictional facilities, the proposed merger did not come within the scope of section 203. As such, the Commission held that it need not reach the applicability of section 318.<sup>97</sup>

Missouri Basin responded that although applicants stated that there would be "no immediate merger or consolidation of their respective public

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92. *Midwest Resources*, Order Authorizing Acquisition of Common Stock of Electric Utility Companies, PUHCA Release No. 35-25159, 1990 SEC LEXIS 3134 (September 26, 1990).

93. *Id.* at \*6.

94. *Missouri Basin*, 53 F.E.R.C. ¶ 61,368 (1990), *reh'g denied*, 55 F.E.R.C. ¶ 61,464 (1991).

95. 16 U.S.C. § 825e (1988). Section 306 provides in pertinent part that:

Any person . . . complaining of anything done or omitted to be done by any . . . public utility in contravention of the provisions of this Act may apply to the Commission by petition . . . [and such public utility] shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time specified by the Commission.

96. 53 F.E.R.C. at 62,298.

97. *Id.* at 62,299.

utility subsidiaries,”<sup>98</sup> applicants planned to coordinate the operations of their public utility subsidiaries. According to Missouri Basin, such coordination would constitute a merger under section 203. The Commission disagreed, holding that coordination of operations between and among separate public utilities is common and does not ipso facto constitute a merger or consolidation of jurisdictional facilities. However, the Commission cautioned that any future merger or consolidation of facilities belonging to the jurisdictional subsidiaries would require Commission approval under section 203.<sup>99</sup>

On rehearing, Missouri Basin argued, *inter alia*, that unless the Commission asserted jurisdiction over the holding company merger, friendly electric utility mergers could be structured in the future so as to avoid substantive review by following a three-step process. First, Missouri Basin argued that public utilities would reorganize their corporate structure by forming holding companies. Missouri Basin argued that despite the fact that potential corporate reorganizations require the FERC authorization,<sup>100</sup> the Commission grants such authorization almost routinely and that only the subsequent rate case is set for hearing. Second, the two holding companies would merge and would, without FERC review, be able to consolidate control over their respective public utility operations. According to Missouri Basin, the issue of competition is crucial at this second step. Third, the jurisdictional utilities would then merge into subsidiaries of the holding company.

Missouri Basin argued that this scenario presents two significant problems. First, Missouri Basin pointed out that because *Commonwealth* does not require a showing of positive benefits, the Commission rarely, if ever, sets intra-corporate affiliate mergers for hearing. Second, Missouri Basin argued that it is virtually impossible to raise any anticompetitive issues in the context of such a merger because the merger of affiliated entities presumably would not involve any substantive changes in control over jurisdictional facilities.<sup>101</sup>

In response, the Commission stated that while it shared Missouri Basin’s concerns that public utility mergers accomplished through the three-step process may “complicate” its regulatory task, added complexity does not support a position that the Commission should assert jurisdiction at the second step—when holding companies seek to merge—because Congress did not give the Commission jurisdiction over that transaction.

Courts have long counselled the Commission and other agencies not to assert jurisdiction over matters outside the scope of authority delegated by Congress—even when the agency perceives the need to fill a “regulatory gap.” In any event, here there is no regulatory gap and no lack of regulatory jurisdiction over any of the three steps.<sup>102</sup>

According to the Commission, the public interest can be adequately protected under the jurisdictional arrangement promulgated by Congress. For example, the Commission stated that because it has jurisdiction over the first

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98. *Id.* at 62,296.

99. *Id.* at 62,299.

100. *See, Central Vt. Pub. Serv. Corp.*, 39 F.E.R.C. ¶ 61,295 (1987).

101. 55 F.E.R.C. at 62,528.

102. *Id.* at 62,532 (footnote omitted).

step (involving the formation of a holding company structure), it can consider the full range of *Commonwealth* factors in determining whether to grant approval, including the effect of the corporate reorganization on the existing competitive situation. Moreover, the Commission reasoned that the second step (non-jurisdictional holding company merger) does not create a "loophole in the regulatory scheme" because this transaction is within the jurisdiction of the SEC, which is charged with protecting not only the interests of the public generally, but also the interests of investors as well as all consumers. According to the Commission, "Missouri Basin's apparent displeasure with the SEC's analysis does not in itself warrant the imposition of a second layer of federal review not contemplated by Congress."<sup>103</sup> Finally, the Commission held that while the third step, like the first step, is within its jurisdiction, no party put forth any evidence that any indirect merger or consolidation of the jurisdictional operating companies had yet occurred. As such, the Commission held that its 203 jurisdiction had not yet been implicated.<sup>104</sup> However, just as Midwest Resources predicted, a merger of the FERC-jurisdictional operating companies was simply right around the corner.

#### D. *The Affiliate Merger*<sup>105</sup>

Less than six months after the FERC's disclaimer of jurisdiction over the holding company merger, the FERC-jurisdictional operating subsidiaries, Iowa Public Service and Iowa Power, filed a joint application for Commission authorization to merge into a newly formed corporation, Midwest Power Inc.—a wholly owned subsidiary of Midwest Resources—under FPA section 203. The Commission approved the proposed merger, finding that (1) no party raised the competitive impact of the proposed merger; and (2) the Iowa Utilities Board found that the proposed merger would not diminish electric power markets in this region. The Commission was quick to point out, however, that if there is any indication of future anticompetitive effects as the result of the merger, it retained the authority under FPA section 203(b) to issue supplemental or for good cause if necessary or appropriate.<sup>106</sup>

### V. CONCLUSION

The preceding discussion raises several important questions. First, was the Commission's disposition of *Iowa* correct? In light of Congress' dual statutory scheme for regulating the electric utility industry, and the federal and the FERC case law discussed above holding that intra-affiliate consolidations

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103. *Id.*

104. *Id.* at 62,532-33.

105. *Iowa Pub. Serv. Co., Iowa Power Co., and Midwest Power Sys.*, 60 F.E.R.C. ¶ 61,048 (1992).

106. 60 F.E.R.C. at 61,179. Applicants also argued that under *Copperweld*, the Commission lacked legal authority to consider the effect of the proposed affiliate utility merger on competition. The Commission did not directly refute this argument, but rather held that because it did not disclaim the right to examine the effect on the competitive situation if and when the two jurisdictional subsidiaries merge in the previous two *Missouri Basin* orders (see e.g., 55 F.E.R.C. at 62,533), it was free to examine in this proceeding the proposed intra-corporate consolidation's effect on the existing competitive situation. 60 F.E.R.C. at 61,179.

should be viewed with light scrutiny, the answer is clearly yes. However, this conclusion simply raises the larger question of whether or not *Iowa* was simply a “manipulation” of the Congressional scheme of dual regulatory protection of competition in the electric utility industry.<sup>107</sup> If the answer is “yes,” at what point, therefore, is it most appropriate to examine and regulate the transaction: (1) at the formation of the holding company structure; (2) at the inter-corporate holding company merger; (3) at the intra-corporate affiliate consolidation? In light of the federal and administrative case law outlined above, the key must be to closely examine and apply strict and effective regulatory scrutiny, to the inter-corporate holding company merger at the initial stage of the transaction.<sup>108</sup>

Which brings the question back to which agency can provide the most effective regulation at the initial stage of these transactions? Clearly, the FERC. Several arguments lead to this conclusion. First, as Senator Bumpers points out, administrative efficiency will be enhanced by consolidating regulatory review of PUHCA.<sup>109</sup> Indeed, utilities should not be permitted to forum-shop in the hope of receiving a more favorable disposition.

Second, the SEC admits that expertise and technical ability for resolving the types of anticompetitive issues raised in utility mergers lie principally with the FERC, and that they want to have nothing to do with these issues. Conversely, the FERC, in the hope of “protecting the public interest,” should not believe it necessary to extend its jurisdiction over holding company mergers pending before the SEC. If this occurs under the existing regulatory scheme, Congress’ division of regulatory authority simply has no meaning and any need for passing S.544 is rendered moot.<sup>110</sup>

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107. This analysis also raises the broader question of determining how long do the FERC jurisdictional affiliates need to be subsidiaries of the holding company in order to enjoy the affiliate “benefits” discussed above. It could involve a long period of time or a very short period of time as was the case in *Iowa*. If it is a long period of time, a persuasive argument can be made that any affiliate consolidation will clearly not affect the existing competitive situation. If it is a short period of time, it is highly probable that the affiliate merger will affect the existing competitive situation.

108. Moreover, as the cases outlined above further point out, the Commission’s holding in *Missouri Basin* that the existing regulatory status quo is acceptable (because the FERC can exercise sufficient regulatory oversight at the first and third steps and the SEC’s ineffective regulation at the second step is not a concern) cannot adequately remedy this regulatory gap. This status quo argument is flawed because (1) if the utilities were organized into holding companies since the 1930’s, then the FERC’s regulatory oversight at the first step is not even an option; (2) ineffective regulation by the SEC serves no purpose and it is the very lack of effective regulation that prompted the introduction of S.544.; and (3) the FERC should not be prompted to apply a horizontal analysis to a merger which should properly be subject to a vertical intrabrand analysis.

109. According to Senator Bumpers, dual regulation:

[j]ust doesn’t make sense. What it does is lead to inefficiency by requiring FERC to regulate some transactions and the SEC to regulate others. Sometimes both agencies are called upon to review different aspects of the same transactions, such as mergers. At a time when the administration and the voters are calling for more efficiency in government, we can no longer afford to have two agencies regulate utility companies.

139 Cong. Rec at S2640.

110. In the FERC’s recent disposition of the merger proposal between Cincinnati Gas & Electric Company and PSI Energy, Inc., *Cincinnati Gas & Elec. Co. and PSI Energy, Inc.*, 61 FERC ¶ 61,237 (1993), the Commission, citing *Missouri Basin*, held that it would not exercise jurisdiction over the public

Third, if jurisdiction is transferred to the FERC, an SEC-type review over horizontal inter-corporate holding company mergers will remain because the FERC appears to already apply a corporate simplification-justification standard when adjudicating intra-corporate consolidations. Moreover, if regulatory oversight is transferred, the FERC's authority to remedy specific anticompetitive harms resulting directly from the merger under review remains because both PUHCA section 10(e) and FPA section 203(b) provide that the regulating body may impose terms and conditions to protect the public interest.<sup>111</sup>

Finally, with the enactment of the Energy Policy Act of 1992,<sup>112</sup> Congress has already shifted a portion of regulatory oversight of PUHCA from the SEC to the FERC.<sup>113</sup> Why not finish the job? Otherwise, the regulatory gap discussed above will simply continue to grow with consequences that will be impossible to ignore.

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utility holding company merger of PSI Resources, Inc. into CINergy Corporation. However, FERC also held that because the applicants' filings indicated that their jurisdictional system will in practice be operated as a single, integrated system—despite the fact that the applicants had no plans to formally merge the operating subsidiaries—the Commission would exercise its section 203 jurisdiction over that part of the proposal which involved the transfer of ownership of a public utilities' common stock to a holding company and analyze the transaction on a single or total company basis. *Id.*, mimeo at 66-67. Whether an appeals court will view this case—as the Commission states—as a review of disposition of jurisdictional facilities or rather as a de facto review of a holding company merger remains to be determined.

111. However, if Congress passes S.544, it does not mean that the FERC should apply the same analysis it uses to evaluate merger applications under FPA section 203 (i.e., *PP&L* and *Commonwealth*) to an inter-corporate holding company merger under PUHCA because S.544 does not propose to *reform* PUHCA. Rather, S.544 only proposes to transfer regulatory authority from the SEC to the FERC with the hope of more effective regulation under existing PUHCA jurisprudence. To do more would require a change in the statutory language which is beyond the scope of the proposed bill.

112. 42 U.S.C. § 13201 (1992).

113. *See*, 15 U.S.C. § 79z-5a (1992).