THE RELATIONSHIP BETWEEN DOE AND FERC: INNOVATIVE GOVERNMENT OR INEVITABLE HEADACHE?

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OCTOBER 1980 MARKS the third anniversary of the Department of Energy ("DOE") and the Federal Energy Regulatory Commission ("FERC"). Created by the Department of Energy Organization Act ("DOE Act"),[1] the DOE was intended to consolidate in one cabinet level department major energy related functions previously vested in several different agencies, such as the Federal Energy Administration, the Energy Research and Development Agency, the Federal Power Commission, the Interstate Commerce Commission, and the Departments of Interior and Transportation. Within DOE, however, was created an "independent regulatory commission,"[2] the FERC, which was given many of the powers of the former Federal Power Commission ("FPC") over natural gas and electricity, as well as substantial additional authority to review major energy actions taken by the Secretary of Energy relating to oil pricing and allocations. The dual responsibility for energy matters vested in the FERC and the Secretary of Energy was a controversial[3] aspect of the DOE Act and was instituted by Congress contrary to the recommendation of the Carter Administration. Now that the two agencies have been in existence for some time, it is appropriate to review how the relationship is working.

During the past three years, DOE and FERC have been required to wrestle with a number of difficult issues arising out of the DOE Act. Simply determining the jurisdiction of the two agencies with respect to particular matters has been a thorny issue. For example, the DOE Act created bifurcated jurisdiction over some areas (such as natural gas imports) and the line demarking the respective roles of DOE and FERC has not been self-evident.

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[1]Pub. L. No. 95-91, 91 Stat. 565, codified at 42 U.S.C. §§ 7101, *et seq.* The Department of Energy and the Federal Energy Regulatory Commission were activated on October 1, 1977 by Executive Order No. 12009 signed by the President on September 13, 1977. 42 Fed. Reg. 46267 (September 15, 1977).

[2]DOE Act § 401(a), 42 U.S.C. § 7171(a).

[3]Divided authority between an executive department and a regulatory commission is not unprecedented. Compare, for example, the Secretary of Labor and The Occupational Health and Safety Commission, or the Postal Service and The Postal Regulatory Commission. *See generally*, Sullivan, *Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory*, 31 Ad. L. Rev. 117 (1979); and Note *The Postal Reorganization Act: A Case Study of Regulated Industry Reform*, 58 U. Va. L. Rev. 1030 (1972).

With respect to nuclear energy, Congress in 1974 split the Atomic Energy Commission into two agencies: the Energy Research and Development Agency, responsible for promoting and developing nuclear and other energy technologies, and the Nuclear Regulatory Commission, with authority to issue licenses for nuclear powerplants. *See* Energy Reorganization Act of 1974, Pub. L. No. 93-438 (Oct. 11, 1974). This division of authority was retained in the DOE Act by merging ERDA into the Department and leaving the NRC outside DOE. *See* DOE Act § 301(a), 42 U.S.C. § 7151(a). This decision caused little debate in the Congress. *Cf*, Sen. Rep. No. 95-164, *Department of Energy Organization Act, S. 826*, Report of the Senate Comm. on Government Affairs, 95th Cong., 1st Sess. (1977) 11-17.

sues relating to foreign policy, safety and environmental policy, and innovative ratemaking and financial risk sharing among pipelines and their customers. For example, relations between the United States and Canada became a principal issue in the Alaska gas pipeline proceeding.[18] The large capital requirements of these projects also raised difficult issues as to the financing plans that would be permitted, including the issues of rolled-in versus incremental pricing, allowance of construction work in progress, and pipeline tariffs which shifted some or all of the risk of project failure or cost overruns to the ultimate consumer.[19]

The issues faced by the Commission strained its resources and expertise. Procedural delays in processing its growing case load were generally deplored.[20] These problems arose, in part, because the FPC was required to make increasingly difficult decisions on politically controversial subjects based on a legislative mandate that Congress could not agree to revise. The FPC's status as an independent regulatory agency served to protect the integrity and objectivity of its decisionmaking processes, but, conversely, left the agency politically isolated when a decision, such as its 1976 wellhead price decision, proved controversial or unpopular. By 1977, therefore, both the Ford and Carter Administrations had concluded that the FPC should be absorbed into an executive agency such as DOE which would be both politically more responsive and better able to coordinate overall energy policy.[21]

B. *Emergence of the Federal Energy Administration.*

In May, 1974, following the Arab oil embargo in the Fall of 1973, Congress created the Federal Energy Administration ("FEA").[22] The FEA succeeded the Federal Energy Office which had been the principal executive branch department for coordinating energy policy.[23] The FEA was an executive agency administered by a single head or "Administrator" appointed by the President. Among other responsibilities the FEA was to administer the Emergency Petroleum Allocation Act of 1973 ("EPAA"), which imposed temporary price and allocation controls upon crude oil, residual fuel oil, and petroleum products.[24]

Concurrent regulation by the FEA of refined petroleum products and by the FPC of natural gas inevitably raised questions of overlapping and po-

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[18]See Decision and Report to Congress on the Alaska Natural Gas Transportation System, issued by the President, September 22, 1977.

[19]*See, e.g.*, Opinion No. 622, 47 F.P.C. 1624 (1972), Opinion No. 622-A, 48 F.P.C. 723 (1972); Opinion No. 786, ____ FPC ____ (Jan. 21, 1977), all issued in *Columbia LNG Corp.* Docket Nos. CP71-68, *et al.* Some of the issues raised in these proceedings are described in Pierce, *Natural Gas Rate Design: A Neglected Issue*, 31 Vand. L. Rev. 1089, 1110-1118 (1978). *See also* Aman and Howard, *Natural Gas and Electric Utility Rate Reform: Taxation Through Ratemaking*, 28 Hastings L.J. 1085 (1977).

[20]Hearings, *supra*, note 6, (Statements of Richard Dunham, Chairman FPC, at 166-168, and Robert C. McDiarmid at 222-227).

[21]President Ford submitted a detailed plan for creating a new Department of Energy in January, 1977. U.S. Executive Office of the President, *The Organization of Federal Energy Functions—A Report from the President to The Congress*, January, 1977.

[22]Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96, codified at 15 U.S.C. §§ 761-790 (1976).

[23]The Federal Energy Office was created by President Nixon shortly after enactment of the EPAA for the purpose of administering the Act. *See* Exec. Order No. 11,748, 3 C.F.R. § 822 (1973), *superseded by* Exec. Order No. 11,790, 3 C.F.R. § 822 (1974); *revoked by* Exec. Order No. 11,933, 41 *Fed. Reg.* 36641 (Aug. 31, 1976). *See* H.R. Rep. No. 748, 93d Cong., 1st Sess. 13, 15 (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 2939, 2951-52.

[24]Pub. L. No. 93-159, 87 Stat. 627, codified at 15 U.S.C. §§ 751-756 (1976). See particularly 15 U.S.C. § 753(a).

tentially conflicting responsibilities. For example, authority to allocate propane resided within FEA, but propane is a substitute for natural gas during periods of shortage.[25] In addition, allocation preferences granted to one customer class, e.g., agricultural uses, under the EPAA were relied on as an argument for granting a similar preference under quite different natural gas curtailment plans.[26] The fluctuating price differences between oil and gas during the years following the Arab oil embargo highlighted the complementary and competing nature of the two fuels.

Proceedings before the FEA also provided a marked contrast with proceedings before the FPC. FEA proceedings were relatively less formal and more abbreviated. Rulemakings were frequently relied upon to decide major questions.[27] Moreover, FEA procedures provided fewer procedural safeguards than FPC proceedings, reflecting the interim, emergency nature of the price and supply controls imposed by the EPAA.[28]

The EPAA and the FEA were both intended to deal with shortages created by the Arab oil embargo and were viewed as temporary. The FEA was to be an interim agency eventually to be replaced when an overall restructuring of federal energy responsibilities was completed by Congress. By 1977, however, FEA's limited life had been extended twice by Congress and it had assumed a wide range of responsibilities under a variety of statutes.[29] The legislation extending FEA also required that the Executive Branch submit to Congress a proposal for reorganizing federal energy functions.[30] Shortly before the Carter Administration took office in January, 1977, the Ford Administration had complied with this Congressional requirement.[31]

II. The DOE Act and its History

A. *The Administration Proposal.*

Legislation to create a cabinet level Department of Energy was for-

[25]*See* 15 U.S.C. § 752(6), and 18 C.F.R. § 2.78(c)(1). *See also* Order No. 493-A, 38 *Fed. Reg.* 30433 (Nov. 5, 1973).

[26]*See e.g.*, S. Res. 289, 93rd Cong., 2d Sess. (1974) and *Proceeding Regarding S. Res.* 289, 52 F.P.C. 139 (1974); *Southern Natural Gas Co.*, 54 F.P.C. 2298, 2306 (1975).

[27]*See generally*, Aman, *Institutionalizing the Energy Crisis: Some Structural and Procedural Lessons*, 65 Cornell L. Rev. 491, 532-536 (1980).

[28]For example, the EPAA excepted its administrators from many of the requirements of the Administrative Procedure Act, particularly those governing adjudicatory hearings. *See* 15 U.S.C. § 754(a)(1), incorporating by reference §§ 205-207, 209-211 of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, as amended by Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210 § 207(a) 85 Stat. 743.

As one commentator put it: "The fairness of the procedures first used to enforce EPAA regulations was questionable, even for a short-lived emergency program. The question of fairness became even more pronounced as the emergency program became a more permanent part of our regulatory landscape." Aman, *supra*, note 27 at 532.

[29]The FEA Act included a provision providing for its abolition on June 30, 1976. FEA Act § 30, 88 Stat. at 115. *See generally* Sen. Rep. No. 95-164, 95th Cong., 1st Sess. 7-9 (1977). The Act of June 30, 1976, Pub. L. 94-332, 90 Stat. 784, extended FEA's existence from June 30, 1976, to July 30, 1976. The expiration date of the agency was subsequently extended until December 31, 1977. Energy Conservation and Production Act, Pub. L. No. 94-385, § 112, 90 Stat. 1132. This was extended until September 30, 1978 by Section 6 of the Federal Energy Administration Authorization Act of 1977, Pub. L. No. 95-970, July 1, 1977.

The FEA's authority under the EPAA was extended and expanded by, *e.g.*, the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871; and the Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976).

[30]See Energy Conservation and Production Act, § 1626, Pub. L. No. 94-385, 90 Stat. 1125 (1976), which required that the Energy Resources Council, an interagency body created to coordinate energy policy, prepare a plan for the reorganization of the Federal government's responsibilities for energy and natural resources and submit it by December 31, 1976.

[31]See note 21, *supra*.

pendent" agency not subject to the control or direction of the President or the Secretary and not subject to executive reorganization.[80]

With respect to the Commission's jurisdiction, the DOE Act follows Section 402 of the Senate bill, although the powers delegated to the FERC were broadened slightly to conform to the House version.[81] Senate language limiting pricing jurisdiction to "direct" prices, for example, was deleted.[82] DOE would assume the FPC's authority under the Natural Gas Act to authorize imports and exports of natural gas and to establish curtailment priorities.[83] In general, the FERC would inherit all other rate, certificate and licensing functions under the Natural Gas Act.[84] In addition, the Secretary's authority to regulate exports and imports of natural gas or electricity could be assigned to FERC by the Secretary under Section 402(f)[85], and Section 402(e) permits the Secretary to assign to the Commission "any other matter which the Secretary may assign to the Commission after public notice."[86]

With respect to oil matters, the FERC acquired the authority to regulate the rates and charges of interstate oil pipelines previously vested in the Interstate Commerce Commission.[87] The Secretary and the ERA retained general authority to implement the EPAA.[88] However, the FERC may review the Secretary's decisions in two ways. Under Sections 503 and 504,[89] it is required to hear and decide appeals from remedial orders or denials of requests for adjustment issued by the Secretary.[90] And it must review major "energy actions" of the Secretary as to the pricing and allocation of oil products under Sections 8 and 12 of the EPAA.[91]

In addition, the FERC *may* review any other of the Secretary's proposed "rules, regulations and statements of policy" without restriction which the Commission determines "may significantly affect any function within the

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[80]DOE Act § 401(a), (d), 42 U.S.C. § 7171(a)(d). *See also, Conf. Report, supra,* at § 406 and p. 25, stating that for purposes of governmental reorganization, the Commission shall be deemed to be an "independent regulatory agency," thus prohibiting "the President from using the reorganization plan procedures to abolish [the Commission]." *Id.* at 71. Section 401 of the Act contains additional provisions designed to assure the independence of FERC: (1) appointment of members by the President "by and with the advice and consent of the Senate;" (2) limiting Presidential removal power of members "only for inefficiency, neglect of duty, or malfeasance in office;" (3) providing that the members, employees or other personnel of FERC "shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department;" (4) authorizing FERC to utilize its own attorneys to represent it in litigation arising under the Act except in the Supreme Court; (5) directing FERC to send directly to Congressional committees copies of "any legislative recommendation or testimony, or comments on legislation, prepared for submission to Congress" whenever it submits such matters to the Secretary, the President, or the Office of Management and Budget; and (6) requiring the Secretary, when he submits an authorization and appropriation request to "identify the portion thereof intended for the support of the Commission and include a statement by the Commission (1) showing the amount requested by the Commission in its budgetary presentation to the Secretary and the Office of Management and Budget and (2) an assessment of the budgetary needs of the Commission." *Id.* at 20.

[81]See *Conf. Report, supra,* at 74-75, and *compare* DOE Act §§ 301(b), 402, 42 U.S.C. §§ 7151(a), 7172, *with Senate Report, supra,* §§ 301, 402.

[82]*Compare* DOE Act § 402(a)(1)(B), (C), 42 U.S.C. § 7171(a)(1)(B), (C), *with Senate Report, supra,* §402(a)(2)(A), and *see Conf. Report, supra,* at 75.

[83]DOE Act §§ 301(a), 402(a)(1)(E), 402(f), 42 U.S.C. §§ 7151(a), 7172(a)(1)(E), (f).

[84]DOE Act § 402(a)(1); 42 U.S.C. § 7172(a)(1).

[85]DOE Act § 402(f), 42 U.S.C. § 7172(f).

[86]DOE Act § 402(e), 42 U.S.C. § 7172(e).

[87]DOE Act § 402(b), 42 U.S.C. § 7171(b); see also *Conf. Report, supra,* at 69-70, 79.

[88]DOE Act § 301(a), 42 U.S.C. § 7151(a); *Conf. Report, supra,* at 77-78.

[89]42 U.S.C. §§ 7193, 7195; *see generally Conf. Report, supra,* at 85-86.

[90]42 U.S.C. §§ 7193, 7195; *see generally* Aman, *supra,* note 27, at 524-526.

[91]DOE Act § 402(c), 42 U.S.C. § 7172(c); *Conf. Report, supra,* at 77-78.

jurisdiction of the Commission."[92] Thus, even as to those matters delegated to the Secretary, such as the authority to establish curtailment priorities and to regulate imports and exports, the FERC may review Secretarial rulemakings if they significantly affect matters within the Commission's jurisdiction.[93]

If the FERC reviews a DOE "energy action" or other rulemaking, the procedures set forth in Section 404 of the DOE Act apply.[94] The FERC shall, after opportunity for public comment, (1) concur in adoption of the rule, or (2) concur in adoption only with such changes as FERC recommends or (3) recommend that the rule not be adopted. The Secretary then has the option either to issue the rule in the form approved by FERC or not to issue any rule.

The Conference Committee deleted the provisions in the Senate (but not the House) bill which authorized the President to disapprove FERC rules.[95] On the other hand, the Conference Committee did retain provisions contained in the Senate (but not the House) bill which were designed to give the Secretary a role in the Commission's deliberations. Under Section 403[96] of the Act the Secretary is authorized to propose a rule with respect to any function vested in the Commission and to set "reasonable time limits . . . for the completion of action by the Commission on any such proposal." The Secretary also may, as a matter of right, intervene or otherwise participate in any proceeding before the Commission.[97]

4. Summary.

The Conference Report explained quite simply that Congress agreed with the President's desire for greater centralization of authority over major price and licensing decisions, but preferred to place this authority in an independent regulatory agency rather than in the Secretary of Energy.[98] But because the role of the Commission in energy regulatory matters "will be a large and important one,"[99] the Conferees retained provisions designed to assure the Secretary an opportunity to participate actively in the Commission's decision-making process, and to assure expeditious Commission consideration of important regulatory matters.

The anomaly of creating an independent agency within DOE capable of effectively thwarting major policy initiatives of the Energy Secretary was pointed out during debates on the Act. Congress not only rejected such concerns, but affirmatively embraced this arrangement as a protection against

[92]DOE Act § 404(a), 42 U.S.C. § 7174(a); *Conf. Report, supra,* at 83.

[93]The Commission's veto power is potentially sweeping, limited only by the view the FERC chooses to exercise of matters "affecting" its jurisdiction. The Commission's jurisdiction to implement curtailments under § 402(a)(1)(E), 42 U.S.C. § 7172(a)(1)(E), is clearly "affected" by Secretarial rulemakings relating to curtailment priorities. Thus, although the Secretary was given jurisdiction to promulgate priorities, the FERC may, nevertheless, review the priorities issued by the Secretary.

[94]42 U.S.C. § 7174, *Conf. Report, supra,* at 83.

[95]*Conf. Report, supra,* at 75.

[96]42 U.S.C. § 7173.

[97]DOE Act § 405, 42 U.S.C. § 7175.

[98]*Conf. Report, supra,* at 74-75.

[99]*Id.* at 76.

executive excess.[100] The Senate specifically sought to prevent, for example, placing the responsibility for "both proposing and setting" prices in the same individual.[101] In this respect, DOE would be limited to a prosecutorial role, much like the FERC Staff, and the FERC would be required to listen to DOE's proposals and impartially to evaluate them. But the FERC was placed within DOE because a central purpose of the DOE Act was to provide for greater centralization and coordination of federal energy responsibilities.[102] It was recognized that the FERC would thereby be exposed to the politically charged atmosphere of a cabinet department, but it was hoped that the political imperatives of its situation would be ameliorated by the requirement of openness in decisionmaking, procedural due process, and accountability to Congress.[103]

The FERC's authority over natural gas matters was intended to be quite broad. Congress was particularly concerned that authority over the wellhead pricing of natural gas be retained by FERC.[104] In contrast, assigning to FERC review authority over the Secretary's oil pricing and allocation decisions seems to have been less of an issue, and may have resulted primarily from a desire to centralize in one agency authority over natural gas and oil prices.[105] Major licensing and certificate decisions were also a focus of concern. In part, this stemmed from a recognition of the rate consequences of such decisions. For example, the FERC's authority to grant or deny rate base treatment for construction work in progress in electric cases was statutorily confirmed,[106] and the legislative history reveals some concern that the rate-making function be separated from the promotional activities of the Secretary with respect to developing new energy technologies.[107] In addition, Congress

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[100]Debate over the Moss amendment included at least one recognition that regardless of the statutory allocation of authority, an inevitable tension would exist between these two entities:

> "MR. EVANS Of Colorado. . . . It seems to me that we might have a two-headed horse, in a way. We might have a President and a Secretary of Energy who want to take a certain direction in regard to energy, and we might have an independent commission that thinks that the President and Secretary are wrong and feel that we ought to go another way. What would be the situation if this amendment passes?
>
> "MR. DINGELL. I think we have a horse with two heads or two tails—the gentleman can take his pick—where under the bill as drawn, or under the amendment as offered by the gentleman in California, in either event we have a Secretary and we have a Commission. What we are doing is defining which end of the horse is going to go which way under which particular set of circumstances at which time. Also, we lay out a set of circumstances where it will function more in the daylight and less in the dark, where there will be more public input and more public appreciation of what is going on, and less action by that two-headed horse, or two-tailed horse, in the dark. That is the basic difference.
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> "MR. EVANS Of Colorado. The problem to which the gentleman alludes is inherent within the bill?
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> "MR. DINGELL. Regardless of whether the Moss amendment is present or absent."

123 Cong. Rec. H5,313 (daily ed. June 2, 1977).

Members of both houses expressed the view that since DOE would be a new agency, Congress should take a wait-and-see attitude regarding its ultimate structure and size:

> "This has been a hard assignment, it will continue to be. I think all of us agree that it is not the final word in a Department of Energy. The Senator from Connecticut, the distinguished chairman, observed from time to time that there had to be trial and error in this kind of operation. After this department has functioned awhile and has gone through a shake-down period, we will be in a better position to determine whether any changes are necessary and will be able to deal with those issues at an appropriate time."

Id. S7,916-17 (daily ed. May 18, 1977) (remarks of Sen. Jackson).

[101]123 Cong. Rec. S6810 (daily ed. April 29, 1977) (Remarks of Sen. Ribicoff).

[102]DOE Act §§ 101(4), 102(3), 42 U.S.C. §§ 7111(4), 7112(3).

[103]See text at notes 71-77, *supra*.

[104]See text at notes 55-66, *supra*.

[105]See note 58, *supra*.

[106]DOE Act § 402(a)(1)(B), 42 U.S.C. § 7122(a)-(1)(B); *Conf. Report, supra*, at 74-76.

[107]*Senate Hearings, supra*, at 133 (statement of Senator Glenn).

was aware that the FERC's power to review rates would inevitably embroil the FERC in major policy questions, such as incremental pricing and rate design.[108] Authority to approve exports and imports and to establish curtailment priorities was vetsed initially in the Energy Secretary, but the Secretary was given ample authority to delegate these functions to the FERC.[109] In general the Act provides that the Secretary may assign virtually any matter to the Commission after public notice.[110]

The FERC was also to inherit the body of laws and precedents developed over the years by the FPC. Although the Administration's bill would not have altered the substantive requirements of the Natural Gas Act, some opponents of the bill viewed it as an attempt to achieve substantive reform under the guise of procedural reorganization.[111] These suspicions were fostered by the unwillingness of Administration spokesmen to commit the proposed new agency to follow any of the established policies or precedents of the FPC.[112] Under the DOE Act as enacted, the FERC (not the Secretary as had been proposed by the Administration) determines the procedures it

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[108]*Id.* at 220-221 (statement of Edward Berlin).

[109]DOE Act §§ 402(e), 402(f), 42 U.S.C. §§ 7172(e),(f). The authority of the Secretary to delegate functions related to imports and exports is discussed below at notes 147-192.

[110]Section 402(e), 42 U.S.C. § 7172(e).

[111]As one Senator put it:

> "I have not seen any viable reason yet advanced for shifting the certificate and ratemaking functions of the FPC to the DOE. The shift of such functions from an independent regulatory agency to an executive branch can only reflect the desire of the bill's authors to effect substantive changes in the administration of the FPA and NGA, under the guise of a reorganization bill. Under the bill's approach the consumer-protection objectives of the FPA and NGA are being jettisoned by the administration in order to achieve, inter alia, ratemaking by rulemaking (rather than by adjudication) which could enable the administration to effect a policy of deregulation of electric and gas prices by administrative fiat."

Senate Hearings, supra at 108-09 (statement of Sen. Metcalf). *See id.* at 227-28 (statement of Robert C. McDiarmid, former Assistant to the General Counsel for FPC); *id.* at 514, 527 (testimony of Alex Radin, Executive Director, American Public Power Association); *id.* at 749 (statement of George M. Stafford, Chairman, ICC); *id.* at 785-86 (letter of Judge Curtis L. Wagner, Jr., Chairman, Committee on Status and Compensation, Member of Legislative Committee, Federal Administrative Law Judges Conference).

[112]*See, e.g.,* the following colloquy between Cong. Dingell and Mr. O'Leary:

> "MR. DINGELL. Mr. O'Leary, you have comforted me greatly. Please tell me where in the bill that is.
>
> "MR. O'LEARY. Mr. Chairman, none of this is in the bill.
>
> "MR. DINGELL. I see.
>
> "MR. O'LEARY. The authority is in the Secretary to set prices.
>
> "MR. DINGELL. I am less comforted. You are asking that I take this then on which of the three great virtues: faith, hope or charity.
>
> "MR. O'LEARY. We are dealing in faith at the moment, a great deal of hope, and, as ever in your case, with some charity.
>
> "MR. DINGELL. I suspect there is very little of the last, possibly some of the second, and practically none of the first.
>
> "MR O'LEARY. Mr. Chairman, you know the great discipliner in this sort of activity is the very fact that whoever is running this agency would have from time to time to come before you and to explain his actions. I think if he were in the position of having made great gifts to the oil producing industry or the gas, more particularly to the gas producing industry under this authority, that you would cut—pull him up short in short order and knowing that would be the case, he would use great restraint and discipline . . . " *See* 123 Cong. Rec. H5312 (daily ed. June 2, 1977).

Cong. Dingell summarized his reaction in the House debates.

> "What Mr. O'Leary was saying, and I very specifically qualified him to be speaking on behalf of the administration, is that there is no—repeat—no criteria whatsoever with regard to the unfettered, untrammeled, and absolute jurisdiction that would exist here with regard to the Secretary's authority concerning wellhead prices.
>
> "A somewhat similar situation obtains with respect to the orders of general applicability.
>
> "Mr. Chairman, the age of the kings expired with the French revolution. I plead with this body, dot set up a new king here in Washington." *Id.*

will employ in implementing the Natural Gas Act,[113] and prior precedents of the FPC are preserved until altered "in accordance with law."[114]

III. Institutional and Organizational Problems Faced by the FERC.

A. *Nature of the Problems.*

At the outset, the FERC faced significant problems in defining its role within DOE. These problems were of three types: defining the FERC's statutory jurisdiction; overcoming the fragmentation and duplication of Staff responsibilities within DOE; and developing a relationship with the Energy Secretary and the Administration which was at the same time cooperative without compromising the FERC's independence.

Jurisdictional problems immediately arose as the President, the Energy Secretary, and the FERC attempted to issue orders allocating authority over the many pending and prospective matters to be inherited by the agencies.[115] Problems arose because the DOE Act divided authority between FERC and the Energy Secretary in ways which make the jurisdiction of either agency unclear. Regulation of imports and exports of natural gas is one example and will be explored in detail below.[116] Another example is DOE's authority "to establish" curtailment priorities and the FERC's authority "to enforce" those priorities.[117] Similarly, FERC's authority to review Secretarial action that "affects its jurisdiction" fails to define clearly which kinds of actions fall within the reviewable category.[118] Indeed, if FERC were to view its mandate broadly and to assert actively its authority, its veto power would paralyze Secretarial initiatives.[119] The FERC's authority to review remedial orders and exceptions under the EPAA also raised jurisdictional questions.[120]

Legislation enacted subsequent to the DOE Act both clarified and complicated the jurisdictional roles of the FERC and DOE. The Natural Gas

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[113]*Compare,* DOE Act §§ 402, 403(b), 42 U.S.C. §§ 7172, 7173(b), *with S.826, supra,* § 401(a), and *Senate Hearings, supra,* at 15. *See also* notes 38-40, *supra,* and accompanying text.

[114]DOE Act § 705, 42 U.S.C. § 7295. *Compare S.826, supra,* § 708.

[115]The President assigned regulatory functions to DOE and FERC in Executive Order No. 12038, 43 *Fed. Reg.* 4957 (Feb. 7, 1978). On October 1, 1977, the Secretary of DOE and the FERC jointly issued a rule transfering to DOE certain pending FPC matters, assigning other matters to FERC, and providing for future transfer to DOE of matters awaiting interim decision before FERC. See 10 C.F.R § 1000.1, 42 *Fed. Reg.* 55524 (Oct. 17, 1977), effective Oct. 1, 1977. Regulatory functions were transferred from the Secretary to FERC in DOE Delegation Order No. 0204-1, 42 *Fed. Reg.* 55638 (Oct. 18, 1977), effective Oct. 1, 1977. FERC issued orders in Docket No. RM78-1 instituting its functions under the DOE Act. See Order No. 1, Docket No. RM78-1, issued Oct. 6, 1977, promulgating 18 C.F.R Part 0.

[116]See notes 147-192, *infra.*

[117]The FERC has jurisdiction over the "establishment, review, and enforcement of curtailments, other than the establishment and review of priorities for such curtailments under the Natural Gas Act." DOE Act § 402(a)(1)(E), 42 U.S.C. § 7172(a)(1)(E). The intended line between issues which relate to "priorities" and those which relate to the "enforcement" or implementation of priorities was not immediately clear. For example, is the selection of a base year for curtailments an implementation issue or an issue of curtailment priorities? *Compare* Order No. 29, *infra,* note 127, at 11-13, *with,* ERA Notice of Proposed Rulemaking issued in Docket No. ERA R-79-10-A, 45 *Fed. Reg.* 45098, 45104 (July 2, 1980).

[118]DOE Act §§ 404, 42 U.S.C. §§ 7174.

[119]During its first three years, FERC has reviewed Secretarial actions on an ad hoc basis, asserting jurisdiction to review such matters as DOE's proposed natural gas curtailment priorities, but declining jurisdiction to review certain oil pricing matters. *Compare e.g.,* 45 Fed. Reg. 49087 (July 23, 1980), proposing to review ERA's proposed rule to establish natural gas curtailment priorities under the DOE Act (Docket No. ERA-R-79-10-A), with 44 Fed. Reg. 25,828 (1979), declining jurisdiction to review an ERA proposal to establish incentive prices for newly discovered crude oil.

[120]See generally, Aman, *supra,* note 27 at 536-43.

Policy Act of 1978 ("NGPA")[121] attempted to address many substantive natural gas policy questions. Ironically, Title I of the NGPA, by dictating a detailed pattern of wellhead prices for natural gas and a schedule for deregulating certain categories of gas, sharply curtailed the FERC's discretion to establish such prices under the Natural Gas Act.[122] Title II of the NGPA, on the other hand, gave the FERC new responsibility for implementing incremental pricing of natural gas.[123]

A second problem posed by the DOE Act is the intraagency fragmentation of responsibilities and personnel under the Act. The FERC exercises broad authority over wholesale electric rates and wellhead and pipeline natural gas rates, whereas ERA is initially responsible for regulating oil prices as well as the allocation of oil among various categories of buyers. Thus, the staffs of the FPC and FEA were absorbed within the FERC and the ERA, respectively. The two staffs took with them to their new agencies the expertise and biases of their former jobs. Expertise on gas and electric matters was centered initially in the FERC, whereas expertise on oil and coal were located almost exclusively within ERA. (FERC did absorb the ICC staff responsible for oil pipeline rate proceedings.) Initially, then, the FERC was not well equipped to review ERA oil pricing and allocation decisions, and the ERA had limited experience in the natural gas matters now delegated to it. Although each of the agencies obtained increased familiarity with their new responsibilities, each remained preoccupied with their historic regulatory missions. These preoccupations may have impeded common understandings with respect to multi-fuel decisions *(e.g.,* gas versus oil).

Expanding the staffs of FERC and ERA to deal with the new matters delegated to them by the DOE Act inevitably created duplication and overlapping procedures. Hearings on a major ERA rulemaking which is subject to FERC review must be conducted before both agencies. (This is usually, although not always, accomplished by conducting a single hearing before a panel consisting of representatives of both ERA and FERC.)[124] The FERC and ERA have now developed similar duplicative procedures to deal with remedial orders and adjustment requests.[125]

But perhaps the biggest challenge faced by FERC has been to reconcile its contradictory mission of being an independent agency within a cabinet department. Although it is "inside" DOE, the FERC was plainly imposed on DOE by Congress against the wishes of the Administration. The FERC was seen by Congress as an "independent" regulatory commission accountable as much to Congress as to the Executive branch. Moreover, the performance of the FERC would be compared to that of the FPC and anything less than a substantial improvement in the eyes of Congress would be subject to

[121]Pub. L. No. 95-621, 92 Stat. 3350 (Nov. 9, 1978), codified at 15 U.S.C. § 3301, *et seq.*

[122]15 U.S.C. §§ 3311-3333.

[123]15 U.S.C. §§ 3341-3348.

[124]*See, e.g.,* FERC Docket No. RM80-67, Notice, 45 *Fed. Reg.* 49087 (July 23, 1980), establishing simultaneous hearings, comment dates, and records for FERC and ERA with respect to ERA Docket No. R-79-10-A.

[125]*See* Aman, *supra,* note 27 at 538-541.

criticism. Congress would increasingly assert its views on energy policy, and no prudent Commission could overlook Congressional attitudes.

On the other hand, the substantial role of the FERC in energy regulatory matters required that it develop a harmonious working relationship with the Secretary of Energy. The respective strengths of DOE and the FERC were complementary. DOE was well suited to propose and to advocate policy but not to provide final authorization. The FERC could provide that authorization, but it could not match DOE as a source of new policy initiatives or as a public advocate for them. Despite the "independence" and ultimate authority of the FERC in regulatory matters, it was in a weak position to defend itself, particularly during its early years, if the Administration wished to paint it as obstructionist. Thus, the FERC would be instinctively drawn toward a close relationship with the Energy Secretary, if only because a coordinated national energy policy would otherwise be unachievable.

B. *Initial Attitudes of FERC and DOE.*

The different administrative character of the FERC and DOE was manifest from the outset. Like the cabinet department it was designed to be, DOE vigorously engaged in influencing and developing administration policy, proposing and winning passage of legislation, and implementing and achieving programatic goals (i.e., reduced oil imports, increased conservation, etc.). The FERC, in contrast, was preoccupied with managing its case load, defining the precedential impact of its decisions, and in general, reacting to proposals or issues brought to it by regulated utilities, their customers, DOE or Congress. The major preoccupation of DOE during the first year of its existence was obtaining enactment of the National Energy Act. A major preoccupation of the FERC during this same period was developing a new case management system to streamline decisionmaking.[126]

FERC also experienced the impact of being located within a cabinet department. Although the Secretary of Energy was the principal cabinet advisor on energy matters, it was evident that major policy would be determined in the final analysis by the President. On some issues, other cabinet departments and government agencies would have a direct interest, and their interests might occasionally prevail over the Secretary's interest. From time to time, energy policy would be influenced by the views of the Environmental Protection Agency, the Council on Wage and Price Stability, the Agriculture Department, the Transportation Department or other agencies. Thus, for example, when the Agriculture Department, supported by the President, took the position under Title IV of the NGPA that fixed base periods used by natural gas pipelines to curtail agricultural users should be abolished, the

[126]The FERC's efforts in this area are described in Lawrence & Muchow, *The FERC's Case Load Management Problems*, Pub. Util. Fort., January 18, 1979.

FERC agreed to amend its traditional policy in favor of fixed base periods rather than to provoke a confrontation.[127]

The Administration was provided an unusual opportunity to influence the initial development of the Commission through its authority to appoint five new Commissioners.[128] The Administration's appointments reflected the necessity for FERC to develop good relations on all sides. The Chairman, Charles Curtis, was a former Congressional committee staff member, and another appointee, George Hall, had been an associate of Energy Secretary James Schlesinger when the latter was Secretary of Defense. One Commissioner, Don S. Smith,[129] was a holdover from the FPC, providing a link to the old agency, and another, Matthew Holden had been a member of the Wisconsin Public Utility Commission. Georgiana Sheldon had been a Republican member of the Civil Service Commission.

Chairman Curtis immediately made it clear that the FERC would develop a close working relationship with the Energy Secretary. He regularly attended meetings with the Energy Secretary, the Deputy Secretary, and other high officials to discuss DOE administration and policy. He consulted with Administration officials and various members of Congress about enactment of Administration energy legislation.[130] On at least one occasion these activities created controversy.

In April, 1978, Senator Hansen, the ranking Republican member on the Senate Committee on Energy and Natural Resources, requested that Chairman Curtis testify in detail about his activities in connection with enactment of the Natural Gas Policy Act of 1978.[131] The Chairman testified about this subject on April 18.[132] He defended his contacts with Congressmen as appropriate.[133] With respect to his contacts with DOE officials, he emphasized that the "fundamental" purpose of the DOE Act was to consolidate within a single agency—DOE—a variety of energy functions "to provide for the co-

[127] *See* Opinion No. 29, Docket No. RM 79-15 (May 2, 1979), mimeo at pp. 6-13, implementing Section 401 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3391, which established a curtailment priority, *inter alia,* for "essential agricultural uses." The FERC had initially proposed a rule to implement Section 401 which would retain existing base periods for agricultural uses, notwithstanding a contrary proposal of the Secretary of Agriculture acting pursuant to his authority to "certify" to the FERC "essential agricultural uses." *See* Notice of Proposed Rulemaking, Docket No. RM79-15, issued January 12, 1979, at 6-13. Order No. 29 "incorporated" the USDA's choice of base year, however, and shortly thereafter President Carter announced that USDA would certify agricultural uses on the basis of "current requirements" and reject use of a fixed base period. 15 Weekly Comp. Pres. Doc. 803 (1979).

[128] The DOE Act abolished the FPC, thereby requiring the appointment of a new Commission pursuant to Section 401(b) of the Act, 42 U.S.C. § 7171(h).

[129] Commissioner Don S. Smith subsequently resigned and, after a delay of many months, was replaced by David Hughes.

[130] A description of some of the Chairman's activities during his first months in office is found in testimony presented by him to a Senate subcommittee in April 1978. See *Hearings on S.2692 Department of Energy Fiscal Year 1979 Authorization (Energy Conservation), before the Senate Subcommittee on Energy Conservation and Regulation of the Committee on Energy and Natural Resources,* 95th Cong., 2d Sess. 630-727 (1978). [Hereinafter cited as *"1978 Hearings"*].

[131] Senator Hansen sent a letter to Chairman Curtis requesting that he answer eight questions relating to meetings between himself and various Administration and Congressional personnel in connection with the natural gas portions of the Administration's National Energy Plan, then being considered by Congress. In addition, the Senator requested a written opinion of the FERC General Counsel regarding the legality of the chairman's activities and written statements from each of the other Commissioners as to their view as to the propriety of his conduct. The letter is reprinted in *1978 Hearings, supra,* at 669-671. The Chairman's written response to these questions is reprinted at pages 672-679 of the hearings.

[132] *Id.*

[133] *Id.* at 672-679, 707-725.

ordination and effective administration of federal energy policy and programs."[134] He pointed out that Congress had elected to place the FERC within, not without, DOE, and stated:

> "And here is the fundamental point: Policy can neither be effectively developed nor implemented without a single entity with an overview of all the Nation's energy related programs and needs, which can mold these efforts together into a plan[ned] and concerted effort to resolve the nation's energy problems.
>
> "Now, my conclusion as to Congressional direction . . . is that Congress has chosen not to leave this Agency outside of the Department as it did, for example, with the Nuclear Regulatory Commission. . . . [I]t hoped to achieve some coordination of policy and that achievement, while not on pending matters before us which would involve ex parte communication, would necessarily involve and should properly involve discussions between the Chairman who has the administrative responsibility to the Federal Energy Regulatory Commission and the Secretary."[135]

His role "as chairman of an independent agency within the Department must be, and is, to safeguard the integrity of the case decisionmaking process with respect to matters pending before it. . . . "[136] The Chairman observed that prohibitions on ex parte contacts between the Commissioners and parties outside the FERC extended only to matters "pending before the Commission." If a circumstance occurred where a discussion with the Secretary or other officials "may taint that decisionmaking process, I would excuse myself from the pending case which comes before me."[137]

These statements clearly reflect the view that DOE will take the lead in policy formulation and that the FERC will act as an impartial tribunal to conduct hearings on those policies. Although he might agree that Congress assigned the ultimate authority for the decision to the FERC, he does not appear to conceive of FERC's pursuing a policy line on a major issue separate from or at odds with the Secretary.

How to coordinate policy with DOE while preserving the integrity of FERC's decisionmaking process is, as the Chairman acknowledged, "a very difficult line to draw."[138] A good example is the discussion among DOE officials and representatives of the natural gas pipeline industry exploring the prospects for pipelines to form consortia to build synthetic gas plants to be financed largely through tariff mechanisms amounting to ratepayer guarantees of project debt and equity.

By early 1978, DOE had apparently decided that federal loan guarantees for such projects would not be forthcoming from Congress, and that alternative financing methods under which the FERC would require pipeline ratepayers to assume the risk of project failure should be encouraged.[139] Chairman Curtis attended a meeting on January 30, 1978, among Deputy Energy Secretary O'Leary, other DOE officials, and representatives of the

[134] *Id.* at 674.
[135] *Id.* at 715-716.
[136] *Id.* at 713.
[137] *Id.* at 714.
[138] *Id.*
[139] *Id.* at 717-718; and see text at notes 261-269, *infra*.

pipeline industry to discuss such projects.[140] Although the Chairman described this meeting as "exploratory," and did not attend any subsequent meetings,[141] the meeting he attended led directly to an application before the Commission in June, 1978, supported by DOE, to build a coal gasification plant to be financed through ratepayer guarantees.[142] Moreover, the basic application for the project had been pending before an Administrative Law Judge of the FERC at the time of the meeting, and the meeting had prompted the applicants to revise their financing plan to seek ratepayer guarantees.[143] The January meeting was described in testimony before the Administrative Law Judge in March 1978,[144] and Chairman Curtis was asked about his role at the meeting by Senator Hansen on April 18.[145] He stated that he would recuse himself from the proceeding when the amended application was filed.[146]

It is perhaps an inescapable aspect of the relationship between DOE and the FERC that major policy questions which are discussed today in an "exploratory" manner, will come before the Commission tomorrow for its decision. For the Commissioners to participate in such policy discussions and then to attempt an independent review of the policy proposed places a great strain on the integrity of the regulatory process. The FERC was created, after all, for the purpose of denying to the Secretary the power both to propose and to decide major pricing and licensing matters.

On the other hand, to ban all contact between FERC Commissioners and DOE officials except those contacts permitted in an open proceeding, would prevent the coordination sought in creating DOE. The DOE Act inevitably requires, therefore, that the individual FERC Commissioners exercise their judgment, as guided by the courts, to determine the limits of proper conduct in a particular case.

IV. Relations With Respect to Particular Cases.

The true test of how the institutional relationship between the agencies has developed must be the public actions adopted by FERC in the exercise of its appointed regulatory functions under the DOE Act and other organic statutes. The matters which have been addressed jointly by the FERC and DOE are numerous. Rather than attempt to survey all of them, a somewhat detailed account of three particular matters will be given. The examples were selected to highlight some of the problems inherent in the relationship between the two agencies.

The first example concerns the efforts of the DOE and FERC to define the scope and limits of each agency's authority over natural gas imports. The example illustrates some of the initial problems faced by DOE and

[140] *1978 Hearings, supra,* at 718-719.

[141] *Id.*

[142] *Great Plains Coal Gasification Associates, Inc.*, FERC Docket Nos. CP78-391, *et al.*, filed on June 2, 1978. See generally text at notes 263-269, *infra.*

[143] *Id.*

[144] *Id.*

[145] *1978 Hearings, supra,* at 717-719.

[146] *Id.* at 718.

FERC in defining the scope and limits of each agency's authority over a matter as to which the DOE Act bifurcated jurisdiction. The second example is the FERC's Order 30 program. This was a series of rulemaking proceedings in which the FERC adopted DOE proposals to permit large boiler fuel users to make direct purchases of natural gas to displace imported fuel oil. This example illustrates some of the difficulties in coordinating multifuel policies under the DOE Act. The third example is the decision of the FERC in the *Great Plains* coal gasification case. This case involved FERC certification of a pipeline synthetic fuel project supported by DOE and approval of novel rate and tariff features designed to facilitate financing of the project. This case illustrates the difficulties the FERC faces in trying to act as an independent regulatory commission within a cabinet department.

A. *Authority Over Natural Gas Imports.*

The decision by Congress to assign to DOE rather than to the FERC initial responsibility for regulating imports and exports of natural gas and electricity was a relatively non-controversial aspect of the DOE Act, supported by the Administration and by defenders of the Commission alike. It was generally agreed that the foreign policy and national security aspects of such transactions should be determined by the executive branch rather than by an independent regulatory commission.[147] Nevertheless, implementing the provisions of the DOE Act with regard to imports and exports proved in practice to be a thorny issue. It was not until October 16, 1978, a year after DOE was activated, that general delegation orders were issued by the Secretary clearly delineating the respective authority of ERA and the FERC over exports and imports.[148] The events leading up to issuance of those orders illustrate some of the basic problems in attempting to bifurcate jurisdiction between the FERC and DOE.

1. Nature of the Problem.

An application to import or export natural gas normally requires a variety of authorizations traditionally granted by the FPC. An authorization to import the gas must be granted under Section 3 of the Natural Gas Act.[149] In order physically to receive, transport, and sell the gas in interstate commerce within the U.S., moreover, one or more applications for a certificate to construct and operate facilities and to transport and/or sell the gas must be granted under Section 7 of the Act.[150] Finally, a permit is required to construct, operate, and maintain facilities at the U.S. border pursuant to Executive Order No. 10485.[151]

Section 402(a)(1)(D) of the DOE Act[152] transfers to the FERC authority

[147]*See Senate Hearings, supra,* at 211 (Statement of Lee C. White) and 218 (Statement of Edward Berlin).
[148]Delegation Order Nos. 0204-25 and 0204-26, 43 Fed. Reg. 47769 (Oct. 17, 1978).
[149]15 U.S.C. § 717b. *See* 18 C.F.R. § 153.1, *et seq.*
[150]15 U.S.C. § 717f. *See* 18 C.F.R. § 157.1, *et seq.*
[151]18 C.F.R. § 153.1. This authority had been exercised by the FPC.
[152]42 U.S.C. § 7-172(a)(1)(D).

to issue certificates under Section 7. Section 402(f) of the DOE Act, however, reserves for DOE specific power to authorize imports and exports:

> "No function described in this section which regulates the exports or imports of natural gas or electricity shall be within the jurisdiction of the Commission unless the Secretary assigns such function to the Commission."[153]

What, if any, authority Congress intended the Secretary to exercise under this language is subject to conflicting interpretations. Section 402(f) could be intended to give DOE primary, if not exclusive, authority to authorize imports under Section 3 of the Natural Gas Act. Alternatively, Congress may have intended not to limit DOE to the Section 3 authority since important issues relating to imports may arise under other sections of the Natural Gas Act, particularly Section 7. However, if DOE's import authority were construed too broadly, DOE would be required to decide many "nuts-and-bolts" issues relating to the transportation and sale of imported natural gas after it enters the United States—issues which the FERC is better suited to deciding. DOE's jurisdiction over the purely domestic aspects of transporting and selling imported gas might inject it into areas which Congress clearly intended be left to the FERC.[154]

These questions arose immediately in connection with several applications to import liquefied natural gas ("LNG") which had been pending before the FPC in 1977. The FPC had developed considerable expertise in evaluating LNG import applications.[155] These applications posed many of the issues normally involved in any domestic Section 7 application. Such issues included gas supply adequacy, projected market availability, financing, rate and tariff matters, engineering feasibility, safety, and environmental impact. The LNG applications also raised issues which would not arise in a purely domestic Section 7 proceeding. These issues included national defense and security of service, reliance on a particular country or countries as a supplier, international trade and balance of payments questions, and regional and national impacts of relying on LNG imports.

Because jurisdiction over imports had previously been vested completely within the FPC, the dividing line between Section 3 and Section 7-type considerations had not been a major issue.[156] It became a major issue under the DOE Act. To complicate matters, procedural issues were intertwined with policy issues. DOE was perceived to be less receptive than the FERC to LNG imports and more inclined than the FERC to impose controversial conditions on approved projects, such as the requirement that the supplemental supply be incrementally priced.[157]

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[153]42 U.S.C. § 7-172(f).

[154]The closely intertwined relationship between domestic utility issues and the issues which may arise in a major LNG import application are discussed in Pierce, *Natural Gas Rate Design: A Neglected Issue,* 31 Vand. L. Rev. 1089, 1110, 1118 (1978).

[155]Major applications to import LNG had been pending before the Commission since the early 1970's. *See* Opinion No. 622, *Columbia LNG Corp.*, Docket No. CP71-68, issued June 28, 1972, 47 F.P.C. 1624.

[156]*See generally Distrigas Corporation v. FPC,* 495 F.2d 1057 (D.C. Cir.), *cert. denied,* 419 U.S. 834 (1974), where the issue was explored most fully.

[157]See notes 170-173, *infra*.

2. Initial Attempts to Allocate Jurisdiction.

On October 1, 1977, the Secretary and the FERC jointly issued a rule transferring some pending import matters from the Commission to the Secretary and permitting others to remain in the Commission.[158] The latter category included six LNG import proceedings then in the midst of hearings before Administrative Law Judges of the FERC, which would be transferred to DOE after the issuance of the Judge's initial decision and the filing of briefs on and opposing exceptions.[159]

The division of authority between the Secretary and FERC was further defined in DOE Delegation Order No. 0204-1 issued on October 1.[160] Except with regard to the pending cases which had been assigned to the FERC by rule, FERC was prohibited from carrying out *any* functions to the extent that they were vested in the Secretary under Section 402(f) of the DOE Act.[161] However, the order provided that "the Secretary may from time to time delegate to FERC such other authority under Section 3 of the Natural Gas Act as may be determined appropriate."[162]

These orders raised as many questions as they answered. It was unclear whether the ERA (as the Secretary's delegate) would assert jurisdiction to decide all issues related to an application (both Section 3 and Section 7 issues) or whether the FERC retained jurisdiction over the Section 7 questions. These questions were raised in the first LNG import matter to arise before ERA—a petition filed on October 5, 1977, by an agency of the Indonesian government ("Pertamina") seeking a declaratory order to permit it to make a spot sale of LNG.[163] Although the petition was subsequently denied on jurisdictional grounds not relevant here,[164] the problems raised in that proceeding highlighted the overlapping responsibilities of ERA and FERC.

In December, press reports indicated that FERC and ERA officials had met several times to clarify their responsibilities over imports and exports.[165] One option reportedly being explored was a three-phase proposal. Under this three-stage process, ERA would initially make a "threshold" policy determination as to the foreign policy, security and energy policy aspects of the application. If the project was not disqualified at this initial stage, FERC would then conduct Section 7 certificate hearings, develop a complete record and make its recommendation. In the third stage, the matter would be returned to ERA to review the entire proceeding, to approve the import, and

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[158] 10 C.F.R. § 1000.1, 42 Fed. Reg. 55534-36 (Oct. 17, 1977), effective Oct. 1, 1977.

[159] *Id.*

[160] 42 Fed. Reg. 55638 (Oct. 18, 1977), effective Oct. 1, 1977.

[161] *Id.*

[162] *Id.*

[163] *Perusahaan Pertambangan Minyak Dan Gas Buri Negara (Pertamina),* Case No. DEX-0001. See 42 Fed. Reg. 55134 (Oct. 13, 1977).

[164] Decision and Order Denying Petition for Declaratory Order Authorizing Importation of Natural Gas and Request for Hearings," *Perusahaan Pertambangan Minyak Dan Gas Buri Negara ("Pertamina"),* Docket No. 77-002-LNG (Dec. 23, 1977). The ERA concluded that Pertamina, as the exporter of the LNG from Indonesia, did not constitute a person importing natural gas into the U.S. eligible to apply for import approval under Section 3 of the Natural Gas Act. Pertamina was only offering to sell LNG, it had not identified a willing buyer for the spot sale.

[165] *Inside D.O.E.,* December 12, 1977, at 2.

to adopt any conditions deemed desirable.[166] This three stage procedure was not, however, the only option under discussion. Press reports indicated that DOE had presented arguments that it alone had jurisdiction over all aspects of an import, both as to Section 3 and Section 7 matters.[167]

Discussions dragged on, and no policy was announced. During this period, decisions and statements concerning substantive policy were issued. FERC Administrative Law Judges issued a number of initial decisions approving various LNG import applications and deciding rate and tariff issues.[168] These decisions typically rejected proposals that the supplemental supply be incrementally priced.[169] Simultaneously, DOE and ERA officials were taking a somewhat different point of view. Some officials made public statements indicating a cautious, if not negative, attitude toward LNG imports, particularly imports from OPEC member countries.[170] With respect to pricing, Administrator Bardin left the clear impression that incremental pricing would be a favored policy.[171] Some of the ERA's first decisions reviewing LNG projects approved by FERC law judges denied the import licenses except on conditions opposed by the applicants.[172] One such condition was that the supply be purchased directly by local distribution companies, rather than the pipelines, thereby effectively requiring that it be incrementally priced.[173] In these opinions, furthermore, DOE appeared at times to be adopting a rather broad view of its jurisdiction over imports. Opinion No. 1 issued in December, 1977, for example, included a statement that DOE had authority over gas imports "including any ancillary function under provisions of the Natural Gas Act other than Section 3."[174] By February 1978, press reports indicated that agreement between ERA and FERC had not been reached and that LNG jurisdictional issues might simply be resolved on a case-by-case basis.[175]

3. Agreement Reached.

An agreement between ERA and FERC was reportedly reached in April 1978, and forwarded to Secretary Schlesinger for his consideration.[176] This

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[166] *Id.*

[167] *Id.*

[168] *See, e.g.,* Initial Decisions in *El Paso Eastern Co., et al.* FERC Docket Nos. CP77-330, *et al.* (Oct. 25, 1977); *Tenneco Atlantic Pipeline Co., et al.;* FERC Docket Nos. CP77100 *et al.,* (Nov. 2, 1977); *Distrigas of Massachusetts Corp.,* Docket No. CP77-216 (Nov. 18, 1977).

[169] In the *El Paso* proceeding, *supra,* pp. 70-76, and the *Tenneco* proceeding, *supra,* pp. 70-76, the proposed import was approved and proposals to adopt incremental pricing for the LNG were rejected. In the *Distrigas* case, the import was approved, but rolled in versus incremental pricing was not an issue.

[170] *See Inside DOE,* Dec. 12, 1977 at 2.

[171] See Statements of Administrator Bardin in *Pac Indonesia LNG Company,* Docket No. 77-001-LNG, Public Hearing Transcript February 22, 1978, at pp. 65-72, where he stated the DOE "should and does prefer to give great weight to the concept of incremental pricing as one of the tools of rationalizing energy policy in this country." (p. 70).

[172] *See e.g.,* Opinion No. 4, *El Paso Eastern Co.,* Docket No. 77-06-LNG, FERC Docket Nos. CP77-330, *et al.,* issued Dec. 21, 1978; and Opinion No. 3, *Tenneco Atlantic LNG Co.,* Docket No. 77-010-LNG, FERC Docket Nos. CP77-100, *et al.,* issued Dec. 18, 1978, both reversing initial decisions cited in note 168, *supra.*

[173] *Id.*

[174] Opinion No. 1, *Pacific Indonesia LNG Co.,* ERA Docket No. 77-001-LNG, FERC Docket Nos. CP75-140, (Dec. 30, 1977) at 3-4.

[175] *Inside DOE,* Jan. 16, 1978, at 4.

[176] *Id.* May 1, 1978, at 1.

agreement formed the basis for Delegation Order No. 0204-25 issued to ERA and Delegation Order No. 0204-26 issued to FERC on October 16, 1978.[176a] These orders provided that "authority over imports and exports of natural gas to the extent that they broadly concern energy policies on an international, national and interregional scale" were vested in ERA. Functions which involve "the continuing supervision of each of the interstate natural gas pipeline companies" were delegated to the jurisdiction of the FERC.[177]

Procedurally, an application would be filed simultaneously with both agencies.[178] ERA would begin an in-depth analysis of the project and make the Section 3 determination. This determination would be made by ERA only insofar as it is based on certain enumerated considerations: (1) security of the supply to be imported and the effect on U.S. balance of payments, (2) the price proposed to be charged at the point of importation or exportation, (3) consistency with DOE policy on gas imports and exports, and (4) national need for the gas.[179] There is also a catch-all provision which permits ERA to consider other matters within the scope of Section 3 which are found in the circumstances of a particular case to be appropriate to its determination.[180] If ERA approves the import, it can impose appropriate terms and conditions, including terms and conditions which would effectively require that the import be incrementally priced.[181]

Following a favorable determination by ERA, FERC would carry out its responsibilities under the Natural Gas Act. It would actually issue whatever orders, authorizations, permits, and certificates are necessary for a given project.[182] Substantively, FERC would be delegated authority to carry out the following functions with respect to the regulatory review of import/export applications: (1) functions under Section 3 to approve or disapprove construction and operation of facilities, the site at which they would be located, and the place of entry of imported gas, (2) all other functions under Section 3 not specifically assigned to ERA by the other delegation order and not previously exercised by ERA under the catch-all provision described above, and (3) "all functions under Sections 4, 5 and 7 of the Natural Gas Act."[183]

However, FERC would be in a take-it-or-leave-it situation: it must either totally accept or veto conditions imposed by ERA; it cannot change those conditions or reject them piecemeal. FERC's choice is either to deny the application entirely or to "impose additional requirements consistent with the Administrator's conditions."[184] FERC would issue the final regula-

[176a]Delegation Order Nos. 0204-25 and 0204-26, 43 Fed. Reg. 47769 (Oct. 17, 1978). Draft orders dated April 18, 1978, were reported in *Inside DOE* on May 1, 1978. These orders were accompanied by an "action memorandum" to the Secretary from Charles Curtis, Chairman of FERC, and David Bardin, Administrator of ERA, concerning imports and exports of natural gas, the text of which was reprinted in *Inside DOE*. After publication, these documents were obtained by the authors.

[177]43 Fed. Reg. at 4770.

[178]*Id.* at 47771-72.

[179]*Id.* at 47771-72, Delegation Order No. 0204-25, Section (a)(1)-(4).

[180]Order No. 0204-25, Section (a)(5).

[181]*Id.*, Section (b); see *Inside DOE, supra*, note 176 at 9.

[182]43 Fed. Reg. at 47771.

[183]*Id.* at 47772, Delegation Order No. 0204-26, Section (1)-(3).

[184]*Id.*, Section (4).

tory order on the applications.[185] An "Action Memorandum" dated April 18, and signed by FERC Chairman Curtis and ERA Administrator Bardin, explained that this division of authority was undertaken to minimize the potential for litigation arising out of the "jurisdictional muddle" created by the DOE Act.[186] Unwilling to lodge complete jurisdiction over the transaction in *either* ERA *or* FERC, they opted instead for dual proceedings before each agency.

Six months lapsed between the time that ERA and FERC reached basic agreement in mid-April and the time the agreement was finalized and implemented in mid-October. One reason for the delay is that the agreement received a negative reaction from various interest groups and in the Congress. In late May, the House Commerce Committee voiced dissatisfaction with the proposal in its report on DOE's budget authorization for fiscal year 1979. Stating that the proposal "appears to raise as many issues as it tries to resolve," the Committee Report criticized the proposal of duplicate proceedings before ERA and FERC and suggested that "consideration be given to delegating or assigning the entire function to FERC."[187]

This recommended change was not adopted, but between April and October 1978, the language of the order relating to pricing conditions was changed. The April draft had specifically delegated to ERA authority to evaluate "the manner in which the gas is to be priced in subsequent domestic transactions relative to other available gas supplies, including, if approrpiate, the requirement that it be sold or resold separately from other gas supplies" —i.e., to require that it be incrementally priced.[188] This language was deleted in Delegation Order No. 0204-25.[189] Under the final order, the ERA's authority to impose incremental pricing rests, on its authority to establish terms and conditions and to evaluate "the eligibility of purchasers and participants and their respective shares."[190] The ERA has generally attempted to impose incremental pricing by requiring that distributors directly purchase LNG.[191] More recently, ERA has asserted authority to adopt terms and conditions imposing incremental pricing at the pipeline level under Title II of the NGPA.[192] Thus, the final delegation orders deleted any direct reference to the controversial issue of incremental pricing, permitting ERA instead to impose incremental pricing under its general authority to impose terms and conditions and to determine the eligibility of particular purchasers.

4. Conclusion.

The October, 1978, delegation orders were intended to preserve for DOE the major policy role with respect to imports while delegating to the FERC

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[185] *Id.*, 43 Fed. Reg. at 47771.
[186] Reprinted in *Inside DOE, supra,* note 176 at 8-10.
[187] H.R. Rep. No. 95-1166 Part 2, Department of Energy Civilian Programs Authorization Act for Fiscal Year 1979, 95th Cong., 2d Sess. (1978) 142-143.
[188] April 18 Draft Delegation Order to ERA at 2.
[190] *Id.*, Section 2(b).
[191] *See* Opinion No. 3, *supra,* note 172 at 43.
[192] *See* Opinion No. 11, Columbia LNG Corporation, ERA Docket No. 79-14-LNG (December 29, 1979) at 54-58.

authority over only the nuts and bolts aspects of the import. Incremental pricing was apparently viewed as a major policy question to be delegated to ERA. The delegation orders did not resolve all jurisdictional issues, but they provided a framework within which the two agencies could operate. Of interest here is the difficulty encountered in reaching final agreement on jurisdiction. This history illustrates that dividing jurisdiction with respect to determinations under the Natural Gas Act is a complex process at best. With respect to the LNG cases, procedural disputes were complicated by the difficulty in transferring ongoing cases and the different policy perspectives of the two agencies.

B. *The Oil Displacement Program.*

In 1979 and 1980, the FERC conducted a series of rulemakings at the request of DOE, which resulted in orders enabling large boiler fuel users of gas to make direct purchases of gas from producers for the purpose of reducing their usage of fuel oil. This oil-displacement, or "Order No. 30" program[193] was undertaken in response to representations by DOE that the program was vitally necessary, initially, to offset a critical shortage of middle distillate fuel oil caused by the Iranian revolution,[194] and subsequently, to offset oil imports generally for national security and balance of payments reasons.[195] In agreeing to the program, however, FERC was required to depart from its traditional policies in a number of respects. The program reversed longstanding policies of the Commission discouraging or downgrading the use of gas as boiler fuel.[196] It placed large boiler fuel users, principally electric utilities, into competition with pipelines and distributors to purchase natural gas, contrary to the Commission's traditional policy of favoring utility purchasers.[197] And it represented the first decision to utilize natural gas to offset a shortage of fuel oil rather than vice versa.[198]

1. Background.

Shortly after enactment of the NGPA in November 1978, officials in the Department of Energy began speaking of the existence of a natural gas "glut" or "bubble". The "bubble" was defined as an excess of gas supply over demand and was attributed to intrastate gas flowing freely into the interstate market for the first time under the NGPA.[199] In addition, there was speculation that higher prices for new gas under the NGPA, and new

[193]FERC Docket No. RM 79-34, *Transportation Certificates for Natural Gas for the Displacement of Fuel Oil,* Order Nos. 30 (May 17, 1979), 30-A (September 12, 1979), 30-B (May 15, 1980), 30-D (August 15, 1980), and 30-E (September 26, 1980). See generally 18 C.F.R. §§ 284.200, *et seq.*

[194]*See* Order No. 30, *supra,* at 6-11; Order No. 30-A, *supra,* at 7.

[195]*See* Order No. 30-A, *supra* at 7-8; Order No. 30-D, *supra,* at 4-10.

[196]See Order No. 30, *supra,* at 5-6.

[197]*Id.* at 4.

[198]*Id.*

[199]See letter from James R. Schlesinger, Secretary of DOE to Charles Curtis, Chairman of FERC, dated February 27, 1979. This letter contained a memorandum describing the surplus and encouraging FERC to make use of the surplus to reduce imports of foreign oil. The memo stated (at p. 3): "It appears that most of the current surplus of natural gas belongs to intrastate pipelines where customers presently require less deliverability than the pipelines have under contract."

sources of gas, such as Alaskan gas and imported gas, would eventually lead to long term improvements in gas supply, justifying some expansion in gas service to new and existing users.[200] The short term gas supply "bubble" in early 1979 contrasted sharply with a short-term severe shortage in petroleum products, particularly middle distillate fuel oil used for home heating and diesel fuel. The immediate cause of the shortage was said to be a tightening world oil market caused by a cut-off in supplies from Iran.[201]

Under the DOE Act,[202] the FERC exercises federal authority under the Natural Gas Act over the sale and movement of natural gas in interstate commerce. In particular, this includes the power to certificate certain types of sales by producers and to regulate the transportation of gas by interstate pipelines under Section 7 of the Natural Gas Act.[203]

The Secretary of Energy is principally charged with administering oil price and allocation controls under the EPAA.[204] In addition, the Secretary administers the Powerplant and Industrial Fuel Use Act ("FUA").[205] Enacted as part of the National Energy Act in November 1978, FUA generally establishes a timetable and procedures to require large boilers and other large gas uses to shift from gas and oil to coal over the next decade.[206] DOE is to administer the Act, and among its powers is the right to grant temporary exemptions, lasting up to five years, from requirements of FUA limiting the consumption of natural gas or oil in boilers.[207]

Immediately after enactment of the NGPA and FUA, DOE moved swiftly to encourage greater consumption of gas so as to reduce oil imports. It acted on two fronts. *First,* it commenced proceedings in January 1979 to establish procedures to permit utilities to seek exemptions under FUA to burn additional natural gas.[208] These proceedings led to the adoption on April 4, 1979, of a rule providing an expedited mechanism under which existing

[200]See Testimony of John F. O'Leary, Deputy Secretary of DOE, April 30, 1979, Docket No. RM 79-34, Transcript pp. 19-21.

[201]*Id.* tr. at pp. 19-20, 26-27. See letter, *supra,* note 199 at 1.

[202]DOE Act, § 402(a)(1)(C), 42 U.S.C. § 7172(a)(1)(C).

[203]*Id.*, 15 U.S.C. § 717f. See also Section 311 of the NGPA permitting the FERC to, *inter alia,* authorize the transportation of gas by interstate pipelines for intrastate pipelines and local distribution companies, 15 U.S.C. § 3371.

[204]DOE Act, § 301(a), 42 U.S.C. § 7151(a).

[205]42 U.S.C. §§ 8301, *et seq.*

[206]FUA became effective on May 8, 1979. In general, FUA either automatically prohibits, or authorizes ERA to prohibit, the use of natural gas or petroleum as a "primary energy source" in certain "electric powerplants" and in "major fuel-burning installations", 42 U.S.C. §§ 8302(a). With respect to the use of natural gas as a primary energy source by existing electric powerplants. FUA imposes the following mandatory prohibitions, effective May 8, 1979: (1) gas use must be terminated on or after January 1, 1990 (42 U.S.C. § 8341(a)(1)); and (2) prior to January 1, 1990, gas may not be used unless it was consumed during 1977 and even then not in greater proportions than the yearly average proportion consumed during 1974 to 1976 (42 U.S.C. § 8341(a)(2)(3)). Since most electric powerplants experienced considerable curtailment of natural gas service during 1974 to 1976, these prohibitions would prevent increased use of gas over levels consumed during those years, unless an exemption is granted as permitted in Sections 311 and 312 of the Act, 42 U.S.C. §§ 8351-52.

[207]FUA, § 311(c) 42 U.S.C. § 8351(c). Section 311(e) provides for "temporary public interest" exemptions for existing facilities for up to five years.

[208]ERA Docket No. ERA-R-79-1, Proposed Special Rule for Temporary Public Interest, 44 Fed. Reg. 1694 (January 5, 1979).

powerplants might obtain exemptions.[209] Pursuant to this rule, ERA granted several hundred exemption requests in 1979.[210] *Second,* it proposed a rule to the FERC to encourage the purchase and consumption of gas by such users. It is this proposal which is of interest here.

2. DOE's Proposal.

On March 13, 1979, DOE formally proposed to the FERC, pursuant to Section 403 of the DOE Act, a rule to facilitate direct purchases of gas from producers by large gas users so as to displace fuel oil.[211] Pursuant to its authority under Section 403(b), DOE set a deadline for FERC action on the rule of May 17, 1979.[212] Under the proposed rule, a utility which had been granted a temporary public interest exemption under FUA and any other large user could obtain a certificate for a pipeline to transport gas purchased directly from a producer for use by the purchaser provided the gas would be used to displace fuel oil. The proposal extended, not only to the displacement of middle distillate fuel oil, but also the displacement of other fuel oil, such as residual fuel oil.[213] DOE proposed that the program be adopted for one year, subject to renewal for one year.[214]

The FERC initiated informal rulemaking proceedings on the DOE proposal on March 29, 1979.[215] A public hearing was held on April 30, 1979, and written comments were received.[216] DOE supported its proposal with written comments and with the oral testimony of Deputy Secretary of Energy John F. O'Leary and another DOE official, Finn Nielsen.[217]

The DOE witnesses argued that the gas "bubble" should be consumed as rapidly as possible to offset consumption of middle distillate fuel oil and to build domestic stocks to a level deemed safe to meet the needs of the 1979-1980 winter heating season.[218] They recognized that some of the bubble would be consumed even without the program as pipelines expanded gas purchases and began serving large industrial customers previously curtailed due to gas shortages.[219] However, they argued that a supplemental program was needed whereby the lowest priority users, particularly electric utilities,

[209]44 Fed. Reg. 21230 (April 19, 1979), effective May 8, 1979; 10 C.F.R. § 508, *et seq.* As adopted, the Special Rule was intended to provide "an expedited mechanism" under which existing powerplants can seek temporary public interest exemptions from the prohibitions on natural gas usage in FUA so as to displace usage of fuel oil—including both residual fuel oil and middle distillate fuel oil. ERA's decision to adopt the rule was based upon its view that, in the near term, "the use of natural gas and propane was to be preferred over the use of petroleum products in existing electric power plants." (44 Fed. Reg. at 21230). The rule permits exemptions of up to two years.

[210]*See e.g.*, 44 Fed. Reg. 43764 (July 26, 1979); 44 Fed. Reg. 52716 (Sept. 10, 1979); 44 Fed. Reg. 73142 (Dec. 17, 1979), and 44 Fed. Reg. 76390 (Dec. 26, 1979). These exemptions were, however, limited to powerplants that sought to displace either middle distillate or low sulfur residual fuel oil (less than 0.5% sulfur content). No action was taken by ERA with respect to petitions for exemptions to displace high sulfur residual fuel oil.

[211]The proposal came to FERC under a cover letter dated March 13, 1979. 44 Fed. Reg. 17644 (March 22, 1979).

[212]*Id.*

[213]*Id.* at 17645.

[214]*Id.*

[215]Docket No. RM 79-34, Order Commencing Rulemaking, issued March 29, 1979, 44 Fed. Reg. 21682 (April 11, 1979).

[216]Docket No. RM 79-34, Hearing Tr. dated April 30, 1979, at 17-53.

[217]Testimony of John O'Leary, *id.* at 25; Finn Nielsen, *id.*, tr. 41, 49.

[218]Testimony of Finn Nielsen, *supra* at 36-37, 46, 49.

[219]Testimony of John F. O'Leary, *supra* at 21.

would be permitted to by-pass their pipeline supplier and make direct field purchases of gas to be transported by the pipeline for the user.[220]

Based on a telephone survey of gas producers,[221] ERA witness Nielson testified that the gas surplus was about 453 Bcf or enough to displace about 264,000 barrels per day of crude oil ("b/pd") during the 2nd and 3rd quarters of 1979 and slightly less in the 4th quarter.[222] Enough gas had been purchased under existing FERC programs in the 1st quarter of 1979 to displace 207,000 b/pd.[223]

3. Opposition to the Proposal.

Opposition to the proposal was expressed by the FERC Staff, several natural gas distribution companies, and certain gas consumers or their organizations.[224] Although not presenting any additional gas supply date, the Staff argued that the "gas bubble" was the product of a temporary imbalance between producible supply and demand, while overall domestic gas resources continued their long-term decline.[225] As they explained, "the so-called excess of natural gas referred to in some reports is merely a capability of production from existing wells, which may be depleted quickly or reserved for later production.[226] They argued that the best means of reducing fuel oil consumption, while reducing the risk of curtailments to higher priority requirements, would be to assure pipeline and distribution company access to available gas supplies.[227] It was also pointed out that to encourage use of gas under utility boilers was contrary to Commission policy and that electric utility users which had applied for exemptions under FUA would use gas to displace primarily residual fuel oil, not middle distillate fuel oil.[228]

4. The Commission Orders.

On May 17, 1979, the FERC issued Order No. 30 adopting the substance of the rule proposed by DOE for a twelve month period subject to subsequent extension.[229] The Commission acknowledged that it

> "is under a clear mandate from Congress to assist in increasing interstate system supplies. Therefore, the first and most appropriate means of displacing fuel oil consumption is to increase interstate system supplies in order to reduce curtailments and thereby generally to reduce fuel oil requirements."[230]

It further observed that to encourage use of gas under boilers "appears to be in conflict with accepted energy policy."[231] But it stated that DOE's pro-

[220]Testimony of Finn Nielsen, *supra* at 42, 46-47.
[221]*Id.* at 36-37.
[222]*Id.*
[223]*Id.*
[224]*See* Statement of FERC Staff Counsel William J. Froelich April 30, 1979, Hearing Tr. at 185-235.
[225]*Id.*
[226]*Id.*
[227]*Id.* at 195-198, 207-209.
[228]*Id.* at 220-221.
[229]Order No. 30, *supra* at 22.
[230]*Id.* at 4.
[231]*Id.* at 5-6.

posal would not be inconsistent with that policy "if the displacement program is clearly articulated to *be of short-term duration and tied to current and critical fuel oil shortages.*"[232] The middle distillate shortage was said to be such a shortage, but the Commission refused to limit the program to purchases for displacing distillate fuel oil.[233] Commissioner Smith dissented from the FERC's action on the ground that there was insufficient evidence as to the adequacy of gas supplies to justify such "a major change" in the policy against encouraging boiler fuel use of gas.[234]

In subsequent orders affirming and extending the program, the Commission's rationale shifted somewhat. In Order No. 30-A, denying rehearing of Order No. 30, the Commission stated that residual fuel oil *should* be included in the program because of the country's general need to reduce reliance upon imported oil and reduce balance of payments deficits.[235] In Order Nos. 30-B[236] and 30-D,[237] issued on May 15, 1980 and August 15, 1980, respectively, the Commission extended the program for an additional year at the request of DOE after receiving written comments on the proposed extension. The projected gas surplus in 1980 was less than one-third as large as in 1979, and there was evidence that the program was not being fully utilized.[238] The middle distillate shortage of 1979 had given way to a surplus of middle distillate and residual fuel oil.[239] Nevertheless, Order Nos. 30-B and 30-D took the position that the program could be properly used to cover the general case of dependence on foreign oil imports even though no current and critical shortage of middle distillate fuel oil existed.[240] Moreover, in Order No. 30-D, the Commission found husbanding available gas supplies actually impeded development of new supplies and that increasing the demand for

[232] *Id.* at 6 (emphasis added).

[233] *Id.*

[234] *Id.* at 30.

[235] Order No. 30-A, *supra* at 7-8.

[236] See note 193, *supra.* Order No. 30-B extended the program for 3 months, from June 1, 1980, to September 1, 1980, during which time the ERA's request for a one-year extension would be considered. 45 Fed. Reg. 34364 (May 22, 1980). ERA had made this request on May 12, 1980. 45 Fed. Reg. 34299 (May 22, 1980). Prior to issuing Order No. 30-D, the FERC had convened, on April 2, 1980, an "Informal Public Conference on the Availability and Pricing of Natural Gas and Alternative Fuels" wherein the outlook for gas supply and demand was debated by experts and spokesmen for various interest groups. See Docket No. GP80-76, Hearing Transcript of April 2, 1980. The record in that proceeding was subsequently made a part of the record in the oil displacement proceeding and relied upon heavily by the Commission. See Order No. 30-D, *supra,* at 6.

[237] 45 Fed. Reg. 56046 (August 22, 1980). The program was extended through May 1981, and conditions were added to protect pipeline access to surplus supplies. Further modifications were made in Order No. 30-E issued on September 26, 1980. In early 1980, ERA had issued an order revising and extending its Special Rule under Section 311 of the Fuel Use Act providing procedures for granting temporary public interest exemptions for powerplants seeking to burn natural gas. 45 Fed. Reg. 15257 (March 10, 1980), issued February 27, 1980.

[238] *See* ERA's "Proposed Rulemaking" request to the Commission, 45 Fed. Reg. 34299 (May 22, 1980). Whereas ERA had estimated that some 453 Bcf of surplus gas would be available during the last three quarters of 1979, by 1980 only 53 Bcf per quarter were said to be available. *Id.* Lyn H. Church, Director of the Division of Natural Gas of ERA had testified before FERC that: "One thing that I think we will probably continue to see is what happened last year; in that we issued a lot of certifications that were never acted upon which we were presuming was for the reason that the companies requesting the certifications suddenly found that they had access to supplies from their historic suppliers." (June 16, 1980, hearing tr. at 11-12).

[239] *See* ERA Proposed Rulemaking, *supra* at 4-6, Order No. 30-D, *supra* at 8-10.

[240] *Id.* and see Order No. 30-E, *supra,* at 6-7.

natural gas was necessary to spur increased drilling and production by gas producers.[241]

Order No. 30-D gave clear notice that the program would not be extended again, stating that "it is not necessarily the optimum program for fulfilling the Commission's regulatory objectives."[242] It stated that by the time the program expires, it "expects to implement more effective programs to dispose of excess natural gas deliverabilities. It is our objective to reassess current policies and programs and to develop a comprehensive long term policy prior to May 31, 1981."[243]

5. Questions Raised by The Order 30 Series.

The Commission faced three types of issues in the Order 30 decisions. First, there was a factual issue as to the size of any alleged gas surplus, the reasons for that surplus, and the future impact on gas and oil supplies of drawing down on present gas deliverability. Second, there was a policy choice as to whether to encourage the use of gas to displace oil. And third, there was an implementation issue regarding the optimum means of displacing fuel oil consistent with the Commission's mandate to increase interstate pipeline supplies.

The lack of adequate factual data on the alleged gas bubble in Order No. 30 was one basis for the dissent of Commissioner Smith. The primary source of information about the gas surplus in the Order 30 record was a telephone survey of producers conducted by DOE.[244] Order No. 30 was not accompanied by any analysis of the impact of the oil displacement program on pipeline curtailments. One reason for this may have been the tight time deadline (two months) imposed by DOE on the FERC's issuance of Order No. 30. By early 1980, the Commission attempted to gain a better understanding of gas supply availability by conducting an on-the-record, gas supply-demand conference.[245] The record of that Conference was relied on to make findings in subsequent orders regarding the impact of oil displacement on long term supplies and pipeline curtailments.[246] These examples suggest that the DOE's authority to limit the time in which the FERC may consider a proposal may limit substantially the type of record on which the FERC will base its decision.

As to the choice of gas versus oil, DOE took the position that it properly should be the agency to make that determination because of its responsibility for coordinating natural energy policy.[247] The FERC did not give its views on this question. The policy choices made in the Order No. 30 series were consistently in agreement with DOE, but the orders also relied on findings based on the evidence before the Commission. In any case, it is arguable that

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[241]Order No. 30-D, *supra* at 6-8. This finding was based on the supply-demand conference held on April 2, 1980, *supra*, note 236.

[242]*Id.* at 16-17.

[243]*Id.*

[244]See note 221, *supra*.

[245]See note 236, *supra*.

[246]*Id.*

[247]Further Comments of DOE dated May 4, 1979, at 13-14, submitted in Docket No. RM 79-34.

a gas for oil policy requires a balancing of oil and gas concerns which *both* DOE *and* FERC were expected to make under the DOE Act. The FERC was given responsibility to review major actions affecting both *gas* and *oil,* and particularly to review any action of the Secretary affecting matters under its jurisdiction.

With respect to the choice of methods selected to implement an oil displacement policy, the FERC had at least two options before it in mid-1979. One option was to rely exclusively on existing programs to absorb the gas surplus and displace distillate fuel oil. An alternative was to adopt the DOE proposal. The first option would preserve the gas supply bubble for interstate pipelines to offset existing pipeline curtailments. As curtailments were reduced, service would be restored, first to small and large industrial users, and subsequently to electric utility users. In contrast, the oil displacement program, by allocating the surplus to utility boilers would upset the order of curtailment priorities, while leading to more rapid displacement of fuel oil, particularly residual (not middle distillate) fuel oil.[248]

The Commission adopted ERA's proposal but took steps to assure that the direct purchase program would not interfere with pipeline gas purchases. As more orders were issued in the Order 30 series, the FERC increasingly tailored its choice of means to support, rather than to erode, the integrity of the existing pipeline system.[249] In one sense, however, the Commission failed to examine closely the relationship between means and ends. Order No. 30 initiated the oil-displacement program based on the clear and supportable premise that a gas surplus should be used to offset a critical short term shortage of middle distillate fuel oil. The emergency circumstances in which the Order No. 30 was issued is a plausible basis for its decision given the relatively brief time devoted by the FERC to considering the program, despite the relatively radical departure from established policies which it represented.[250] But the entire premise of Order No. 30 was severely undermined by the choice of means selected to implement it—particularly the unrestricted use of the program to displace residual fuel oil which was demonstrably not in short supply.

It was not until 1980 that the Commission developed a record and made findings attempting to justify direct purchases in support of a general oil-backout policy not based on a present critical supply shortage.[251] These findings were based on a review of the curtailment status of major interstate pipelines, past experience during the first year of the program and, most notably, the finding that market expansion, rather than husbanding gas, was in the best long-term interests of existing consumers.[252] These findings were quite different than the findings of Order No. 30. Lacking such findings, Order No. 30 is a contradiction in terms and raises questions as to the

[248]See note 228, *supra*.

[249]*See* Order No. 30, *supra* at 10-11, imposing, for example, price limitations on purchases by direct users. *Compare* Order No. 30-D, *supra* at 16, and Order No. 30-E, *supra* at 3.

[250]See text at notes 212, 232-233, *supra*.

[251]*See* Order Nos. 30-D and 30-E, *supra*, at 408.

[252]*Id.*

ability of the FERC independently to appraise major gas policy initiatives proposed by DOE in an atmosphere of crisis.

C. *The Great Plains Case.*

The *Great Plains* case[253] was an adjudicatory proceeding before the FERC to determine whether to grant certificates of public convenience and necessity to a five-pipeline consortium known as Great Plains Gasification Associates, Inc. ("Great Plains"). The certificates would permit construction and operation of the first commercial-scale coal gasification facility in the United States by, among other things, authorizing rates and tariffs for the five pipelines to facilitate project financing. Under the DOE Act, the certificates were wholly within the authority of the FERC to grant or deny.[254] However, DOE actively supported the applicants and intervened in the FERC proceeding to urge approval of the certificates. The case illustrates the critical role the DOE may play under the DOE Act with respect to FERC adjudicatory proceedings conducted with full evidentiary hearings.

Of interest here is not the FERC's decision to permit construction of the project, but rather its decision to authorize the rates and tariffs sought by the applicants and DOE as a means of financing the project. The FERC approved rates and tariffs for the pipeline sponsors of the project which effectively transferred most of the financial risk of cost overruns or project failure to the pipeline ratepayers.[255] The tariffs had, as the Commission conceded, "almost no precedent in other projects under the jurisdiction of the Commission."[256]

1. DOE's Role in Developing the Financing Plan.

An application to construct a coal gas plant in Mercer County, North Dakota, was initially filed with the FPC in early 1975 by affiliates of American Natural Resources Company ("American Natural"), the parent of Michigan-Wisconsin Pipe Line Company.[257] The plant was designed to produce initially 125,000 Mcf/day of pipeline quality gas at a cost of over one billion dollars, with the possibility of expanding the plant to double that size at a later stage.[258] Traditional financing for the large capital needs of the project was not feasible because the eventual price and marketability of the coal gas were subject to considerable uncertainty and because the sponsors declined to support the project with their own corporate credit.[259] From

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[253]*Great Plains Gasification Associates, et al.*, Docket Nos. CP78-391, *et al.*, Opinion No. 69 (Nov. 21, 1979); Opinion No. 69-A (January 21, 1980).

[254]The Applicants sought certificate approvals under Section 7 of the Natural Gas Act, 15 U.S.C. 717f. Under Section 402(a)(1)(D)) of the DOE Act, 42 U.S.C. 7172(a)(1)(D), authority to authorize such certificates is vested in FERC.

[255]The tariffs of each pipeline would provide that the synthetic gas would be sold at a price sufficient to repay the costs of the project even if the project experiences massive cost overruns. In the event the project fails, a surcharge would be added to the rates for sales of gas from other pipeline sources so that the pipelines will recover all project costs over a five-year period. Opinion No. 69, *supra*, mimeo at 5-8, 60, 62, 70-75.

[256]*Id.* at 60.

[257]*Id.* at 9.

[258]Initial Decision, *Great Plains Gasification Associates, Inc.*, Docket No. CP78-391 (June 6, 1979) 19-20.

[259]Opinion No. 69, *supra* at 18-19.

the outset, therefore, the applicants planned to finance the project using federal loan guarantess.[260]

Legislation providing loan guarantees for synthetic fuel projects had been under active consideration by Congress since prior to the time the application was filed in 1975. In February, 1978 amendments to the Federal Non-nuclear Energy Research and Development Act ("FERDA") were enacted,[261] authorizing the Secretary of Energy to make loan guarantees for synthetic fuels projects including coal gas plants. However, the Act required that elaborate procedures be followed by the Secretary before he could make such a commitment and specific Congressional approval was required for any guarantee in excess of $50 million.[262]

On March 6, 1978, after hearings before an Administrative Law Judge had largely been completed on the application,[263] the applicants announced that the loan guarantee legislation was inadequate and that a major revision in their financing plan would be required. Mr. Arthur K. Seder, Jr., Chairman and President of American Natural, testified on March 6 that the project had previously had "some encouragement" from DOE to believe that DOE would "go directly to Congress and ask for authority to grant loan guarantees toward [the] project," but recent conversations with DOE officials revealed that DOE no longer proposed to do so.[264] Instead, DOE had encouraged the applicants to revise the project so as to obtain financing based on ratepayer rather than taxpayer guarantees.[265] (As discussed previously, Chairman Curtis had participated in these discussions, and eventually recused himself from participating in the *Great Plains* case.)[266]

As a result of these developments, Mr. Seder announced that a significant change would be made in the project in accordance with DOE's recommendation. Financing would be obtained, not through loan guarantees, but by rates and tariffs of the sponsoring pipelines under which the costs of the project would be repaid by ratepayers in the event of project failure.[267] Additional pipelines would participate in the project so as to obtain a broader base of ratepayer support for the financing plan.[268] Mr. Seder testified that DOE had represented that if the project were restructured in this manner, DOE would actively intervene and support the application filed by the project with the FERC.[269]

American Natural requested, and was granted, time to reformulate the project along the lines suggested by DOE, and limited proceedings on an

[260] *Id.* at 10-11.

[261] Department of Energy Act of 1978, § 207(b), Pub. L. No. 95-238, 92 Stat. 47 at 61, amending 42 U.S.C. § 5901, *et seq.* The 1978 amendments added to FERDA a new Section 19, 42 U.S.C. § 5919. *See* H. Rep. No. 95-714, 95th Cong., 2d Sess. 91 (1978).

[262] FERDA, § 19(m), 42 U.S.C. § 5919(m).

[263] *See* Opinion No. 69, *supra* at 9-10.

[264] *Great Plains Gasification Associates, Inc.*, Docket Nos. CP78-391, *et al.*, Hearing Tr. March 6, 1978, R. 2945-46.

[265] *Id.*, R. 2926, 2932, 2938-2949. Opinion No. 69, *supra*, at 11.

[266] See text at note 146, *supra*.

[267] Hearing Tr., *supra*, note 264 at R. 2950-52.

[268] *Id.*

[269] *Id.*, R. 2926.

amended application were held.[270] DOE intervened in the FERC proceeding in support of the amended application,[271] and Deputy Secretary O'Leary testified for DOE in November, 1978. He argued that a coal gasification capability was needed as a "national insurance policy" against foreign oil price increases during the latter half of the 1980's.[272] The Great Plains project would be a "national demonstration project" to establish the viability of a coal gas industry.[273] An important part of his testimony concerned possible delays in obtaining federal loan guarantees for the project. He stated that federal loan guarantees would be the most equitable means of financing the project[274] but could not be obtained before 1980.[275] Because the project was so critically important, he testified, such a delay must be avoided.[276]

2. Initial Decision Rejects Plan.

The FERC Staff opposed the project and its financing terms and presented several witnesses. Several state utility commissions and other parties also opposed the new financing package. They argued that the proposed rate and tariff measures exceeded the Commission's jurisdiction and were a radical departure from prior policy. They urged that federal loan guarantees be used since the project was a federal demonstration project designed to benefit the nation, rather than the ratepayers of the Great Plains consortium. The delay required to obtain federal loan guarantees would have little impact on national energy policy, they contended, since the project would not be constructed and in operation before the last half of the 1980's in any event.[277]

In June 1979, the Administrative Law Judge issued a decision rejecting the financing package.[278] Shortly thereafter, Congress took several actions facilitating the grant of loan guarantees for coal gasification and other synthetic fuels projects. On November 9, 1979, Congress enacted, and on November 27 the President signed, an appropriations bill for DOE permitting the Secretary to make loan guarantees of up to $1.5 billion under FERDA without seeking subsequent Congressional approval.[279] These funds would have been adequate to guarantee the debt of the Great Plains project.[280] In addition, the House, on June 26, 1979,[281] and the Senate on No-

[270]Opinion No. 69, *supra* at 11. Hearings on the Great Plains Application were held from October 31, 1978, to December 4, 1978. The hearings were limited to those aspects of the Great Plains application which were different from the earlier applications.

[271]DOE issued a notice of intervention in the Great Plains Case on June 1, 1978, pursuant to Section 405 of the DOE Act, 42 U.S.C. § 7175.

[272]Opinion No. 69, *supra*, at 43.

[273]*Id.* at 42.

[274]*Id.* at 42-43.

[275]*Id.*

[276]*Id.*

[277]*Id.* at 13-16.

[278]Initial Decision, *supra*, at 5, 29.

[279]Pub. L. No. 96-126, 93 Stat. 954 at 971 (1979). See FERDA, § 19, 42 U.S.C. § 5919. In that appropriations bill, $22 million in additional funds was made available to the Great Plains project for "preliminary work on a coal gasification facility." H. Rep. No. 96-604, 96th Cong., 1st Sess. 28-29 (1979).

[280]The cost of the project was projected by the applicants to be about $1.2 billion to be financed with 75% debt or about $890 million. Opinion No. 69, *supra*, at 4-5. It was recognized that actual project costs could escalate due to inflation and other factors. *Id.* at 32.

[281]125 Cong. Rec. H 5178-80 (Daily ed. June 26, 1979).

vember 8, 1979,[282] had enacted separate bills creating a synthetic fuels corporation and appropriating funds for the development of synthetic fuels. This legislation led to enactment of the Energy Security Act[283] which became law on June 30, 1980, providing for a Synthetic Fuels Corporation authorized to commit initially up to $20 billion for synthetic fuels development.[284]

3. Choices Facing the Commission.

It was against this background that the Commission met in October and November 1979 to decide appeals from the Initial Decision rejecting the financing plan. It is interesting to imagine the practical and institutional considerations the Commissioners faced in making their decision. Although the financing plan was supported by DOE, the applicants and other gas utilities, it had also been opposed by various state commissions and other consumer interests as well as the Commission's own Staff and the Judge. The Commission had never approved a financing plan of this type for a project of this size.[285] Although it had recently adopted a policy of permitting rate base treatment by pipelines for research, development, and demonstration projects,[286] this would be the first time the policy had been applied in a major proceeding.

In addition, adequate federal loan guarantee authority for the project had been enacted and additional authority was being debated in Conference. It had been a doctrine of longstanding under the *City of Pittsburgh* case[287] that the Commission must consider alternatives to a proposed application even if those alternatives are not directly before it. As a practical matter, if the FERC approved ratepayer guarantees, loan guarantees might never be required.[288] On the other hand, a conditional rejection of the financing plan would not itself put an end to the project. Rather, it would simply put the ball in DOE's court to decide whether and how rapidly to grant loan guarantees. A decision in the Fall of 1979 denying ratepayer financing would leave the project several months before the spring construction season to obtain alternative financing. Possibly greater delay would be caused by a decision favorable to the applicants leading to a subsequent court appeal.[289]

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[282] 125 Cong. Rec. S 16283 (daily ed. November 8, 1979).

[283] P.L. No. 96-294, 42 U.S.C. §§ 8701, *et seq.*

[284] 42 U.S.C. §§ 8751-52, 8795.

[285] The Commission acknowledged this in Opinion No. 69, *supra,* at 60. The Commission has approved from time to time rates and tariffs which passed some portion of the risk of project cost overruns to the ratepayers. These included minimum bill provisions in LNG import projects for example. *See, e.g., Trunkline LNG Co.* Docket No. CP74-138, Opinion No. 796 (April 29, 1977) at 22; Opinion No. 796-A (June 30, 1978) at 13-15.

[286] Order No. 566, Docket No. RM76-17 (June 3, 1977). Order No. 566 amended regulations issued under the Natural Gas Act to provide pipelines with a procedure to obtain advance assurance of recovering certain types of research, development, and demonstration expenditures, including expenditures for commercial demonstration projects. Order No. 566 stated, however, that "essentially all the benefits of the proposed RD&D program should flow through to [the] customers." *Id.* at 11, 18 C.F.R. § 154.38(d)(5)(iii).

[287] *City of Pittsburgh* v. *FPC,* 237 F.2d 741 (1965).

[288] In early 1979, in testimony before Congress, DOE Secretary James Schlesinger had referred to ratepayer guarantees as a "revolutionary concept" capable of significantly facilitating synthetic fuels projects. He further stated that DOE's budget request for fiscal year 1980 had been reduced $255 million to reflect the prospect that a high-Btu coal gas facility might be built with ratepayer rather than federal loan guarantees. *Hearings on Department of the Interior and Related Agencies Appropriations for 1980 before a Subcommittee of the House Appropriations Commission,* 96th Cong., 1st Sess., Pt. 8 at 751, 757 (1979).

[289] See note 299, *infra.*

In the end, however, these considerations may have been outweighed by other concerns. DOE was committed to pursuing coal gasification and was committed to pursuing this project in particular. Formation of the Great Plains consortium had been encouraged by DOE and Chairman Curtis had attended at least one meeting leading to its formation.[290] Thus, rejection of the financing plan would, at a minimum, be an embarrassment for DOE. Moreover a Congressional Conference Committee was engaged in a debate over the Administration's proposed synthetic fuels bill. A negative decision on the well-known Great Plains project might be viewed by some as obstructionist and by others as casting doubt on the need for synthetic fuel projects. Finally, approval of ratepayer financing in this case would provide a substantial additional off-budget method of financing synthetic fuel plants, and give DOE greater flexibility to foster syn-fuel projects. Indeed, if the Conferees failed to agree on a synfuels bill, DOE had only $1.5 billion in loan guaranty authority to commit.[291]

4. The Commission's Decision.

On November 21, 1979, the FERC issued Opinion No. 69 reversing the Initial Decision and approving the applicants' financing plan with minor modifications.[292] On January 21, 1980, it issued Opinion No. 69-A denying all applications for rehearing of its order.[293] Both orders were issued by a 2-1 vote and contained lengthy dissents by Commissioner Holden.[294] The majority opinions acknowledged that taxpayer financing would be more equitable, and that consumer guarantees had almost no precedent in other projects under the jurisdiction of the Commission.[295] Nevertheless, it rejected the former option as "academic" because such a proposal was not before it.[296] It required the applicants to seek taxpayer guarantees if and when they became available.[297] Commissioner Holden dissented, in part, he said, because he objected to the FERC's "end run around significant questions concerning national energy policy" by rushing to impose ratepayer guarantees at the same time that Congress was involved in an "intense political debate" over "how and on what scale the synthetic fuels industry is to be financed."[298]

Opinion No. 69 was appealed to the D.C. Circuit and reversed on December 8, 1980.[299] The Court action prevented the applicants from obtaining final loan commitments based on the Commission's Orders. During the summer of 1980, DOE actively began considering whether to provide a federal loan guarantee for the project.[300]

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[290]See text at notes 138-146, *supra*.
[291]See note 279, *supra*.
[292]Opinion No. 69, *supra*.
[293]Opinion No. 69-A, *supra*.
[294]See Opinion No. 69, *supra*, at 1; Opinion No. 69-A, *supra*, at 14.
[295]Opinion No. 69 at 45, 60.
[296]*Id.* at 45.
[297]*Id.* at 43-45.
[298]Opinion No. 69, *supra*, Dissent at 4.
[299]*Office of Consumers Councel, et al.* v. *FERC*, Nos. 80-1303, *et al.*, (D.C. Cir., Dec. 8, 1980).
[300]*Wall Street Journal*, Nov. 20, 1980 at p. 8.

In assessing the impact of the FERC's relationship with DOE on its decision in this case, it is instructive to compare the action of the Commission majority with the decision of the Administrative Law Judge. In the hearings below, the Judge closely examined the applicants, DOE witnesses, and other witnesses about the legal, equity, and policy issues arising from the proposed financing plan. His questioning mirrored the traditional concerns of a regulatory body charged with regulating the rates and tariffs of public utilities.[301] In the end, he found several aspects of the proposed plan to be unnecessary, unreasonable, or unlawful, and recommended to the Commission that government loan guarantees be relied upon rather than ratepayer guarantees. The Initial Decision stated that it had deferred to the views of DOE with respect to energy policy questions such as the nation's need for coal gasification to reduce oil imports.[302] With respect to rate and tariff questions within the FERC's jurisdiction, however, the Judge did not hesitate to reach a result contrary to DOE's recommendation.[303]

Opinion No. 69 also stated that the FERC is not bound to accept DOE's views on rate and tariff matters, but it authorized the ratepayer guarantees supported by DOE, nevertheless.[304] The decision does not suggest that DOE's views will always predominate in FERC decisions. Indeed, if one other Commissioner had agreed with Commissioner Holden, the outcome would have been reversed. The decision does illustrate, however, that FERC's relationship with DOE exposes it to institutional and political pressures which must inevitably influence its decisionmaking and reduce its independence.

V. Conclusion

The DOE Act created the FERC as an "independent" regulatory commission within the "politically charged atmosphere" of a cabinet level Department of Energy. This article has explored some of the problems created by this arrangement. The bifurcated jurisdiction over natural gas created by the DOE Act is undoubtedly a problem area which has led (at least with respect to imports and exports) to overlapping and inefficient administrative procedures. Merging the Commission into DOE has not eliminated the need to develop coordinated policies with respect to different fuels; rather it has simply put pressure on FERC to approve the policies (*e.g.,* fuel oil displacement) that the Secretary recommends.

Finally, the principal question addressed in this article is how the FERC has succeeded in maintaining its independence without frustrating the development of national energy policy. The experience of the last three years strongly suggests that, with respect to natural gas and oil matters, the Commission has emphasized cooperation with DOE rather than assert its

[301] See Initial Decision, *supra*, at 4-5, 27-30.

[302] *Id.* at 25.

[303] *Id.* at 25-30.

[304] Opinion No. 69, *supra*, at 25, 112. The FERC stated that DOE's views were not accorded "any unusual weight by virtue of its agency position" with respect to the details of the Great Plains financing plan. *Id.* at 59 n. 2. In contrast, DOE's views were viewed with great deference on issues relating to the need to develop a coal gasification technology. *Id.* at 26-27, 43.

own independence, and has deferred to the major policy initiatives of the Department even when those initiatives required a reversal of long-standing policies under the Natural Gas Act.

Whatever one's opinion of these conclusions may be, they are hardly surprising. It is a contradiction in terms to speak of the FERC as being both within DOE and independent of it. Given the ambuguity of its mandate, the Commission will always be susceptible to leadership and influence by DOE. Absent basic institutional reform which would eliminate some of the anomalous provisions of the DOE Act, it is the Commissioners themselves who must attempt to reconcile the contradictions of the DOE Act and decide in what measure the Commission will follow the leadership of the Department or assert its independent authority.