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**PUSHING THE ENVELOPE: DEVELOPMENT OF FEDERAL
ELECTRIC TRANSMISSION ACCESS POLICY**

JOSEPH T. KELLIHER

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INTRODUCTION

A current major policy goal of the Federal Energy Regulatory Commission (FERC)¹ in the field of wholesale electric regulation² is the promotion of competition among generators, both utility and

1. The Federal Energy Regulatory Commission was created in 1977 as the successor to the Federal Power Commission (FPC). Department of Energy Organization Act, Pub. L. No. 95-91, § 401, 91 Stat. 565, 582 (1977) (codified as amended at 42 U.S.C. § 7171 (1988)). FERC's responsibilities include regulating hydroelectric power, natural gas transportation and sale, and electricity transmission and sale. 42 U.S.C. § 7172 (1988).

2. See Federal Power Act of 1935 (FPA) § 201(d), 16 U.S.C. § 824(d) (1988) (defining term "wholesale" in context of wholesale electric regulation to mean sale of electric energy for subsequent resale).

nonutility,³ in order to lower rates to consumers.⁴ FERC believes

3. There are two basic classes of electric generators in the United States, namely utilities and nonutilities. In 1990, utilities generated 92% of the U.S. electric supply, while nonutilities accounted for 8% of generation. EDISON ELEC. INST., 1990 CAPACITY AND GENERATION OF NON-UTILITY SOURCES OF ENERGY 3 (1991) (reviewing sources of electric supply in United States). There are various types of electric utilities, including investor-owned utilities, publicly owned utilities, federal agencies, and rural cooperatives. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ELECTRIC POWER ANNUAL 1990 I (1992) [hereinafter ELECTRIC POWER ANNUAL 1990] (profiling structure of electric power industry in United States). In 1990, there were 3241 utilities in the United States, *id.* at 5, and although investor-owned utilities represented only 8% of all utilities, *id.*, they accounted for 71% of total generating capacity, 70% of sales, and 72% of generation. *Id.* at 3-4. Publicly owned utilities, which include municipalities, public power districts, state agencies, irrigation districts, and other state organizations, *id.* at 1, supplied 9% of generation. *Id.* at 4. Federal agencies, including the U.S. Army Corps of Engineers, U.S. Bureau of Reclamation, International Water and Boundary Commission, U.S. Department of Energy, Alaska Power Administration, and the Tennessee Valley Authority, *id.* at 1-2, accounted for 8% of electric generation in 1990. *Id.* at 4. Although numerous, rural cooperatives supplied only 4% of total generation. *Id.* at 4-5.

A fundamental difference between utilities and nonutilities is that utilities are established under state or federal law, or by franchise. See 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION 8 (1988) (noting that public utilities typically have been given exclusive franchises in return for assuming obligations of common carriers and duty to provide service). By contrast, nonutilities are privately held companies that have entered the field of electric generation without any legal mandate or charter, but rely solely on contractual relationships with utilities. See ELECTRIC POWER ANNUAL 1990, *supra*, at 2 (noting that nonutility power generators, unlike electric utilities, do not have designated franchise service area). Nonutilities are comprised of qualifying facilities (QFs) under the Public Utility Regulatory Policies Act (PURPA) of 1978, Pub. L. No. 95-617, § 210, 92 Stat. 3117, 3144-47 (codified at 16 U.S.C. § 824a-3 (1988)), and independent power producers. ELECTRIC POWER ANNUAL 1990, *supra*, at 1. Qualifying facilities under PURPA are either cogenerators or small power producers. *Id.* Cogenerators are generating facilities that produce electricity and another form of useful thermal energy such as heat or steam for industrial, commercial, heating, or cooling purposes and meet other criteria established under PURPA. *Id.* Small power producers generate electricity using waste, renewable energy sources such as water, wind, and solar, or geothermal energy as primary energy sources. *Id.* Independent power producers are nonutility electric generators other than QFs that sell at wholesale to franchised electric utilities. *Id.* Significantly, some of the independent power producers in the United States are very large firms with substantial resources. INDEPENDENT POWER REPORT, 110 INDEPENDENT POWER COMPANIES 1 (1991) (listing top 25 independent power producers, including subsidiaries of Bechtel, Dow Chemical, Enron Corporation, Mitsubishi Corporation, and Texaco). In 1990, cogenerators and small power producers accounted for 94% of nonutility generation, while independent power producers represented only 6%. EDISON ELEC. INST., *supra*, at 6.

4. See, e.g., Entergy Servs., Inc., 58 F.E.R.C. ¶ 61,234, at 61,753 (1992) (stating that competitive markets can provide greater efficiencies than traditional cost-based rate regulation in electric generation and supply); Public Serv. Co. of Ind., 51 F.E.R.C. ¶ 61,367, at 62,225 (noting that "improved supply options should allow the purchasing utilities to reduce their costs, which will benefit their ratepayers when these cost reductions are passed through in their bills"), *modified sub nom.* PSI Energy, Inc., 52 F.E.R.C. ¶ 61,260, *clarified*, 53 F.E.R.C. ¶ 61,131 (1990), *petition dismissed sub nom.* Northern Ind. Pub. Serv. Co. v. FERC, 954 F.2d 736 (D.C. Cir. 1992); Pacific Gas & Elec. Co., 38 F.E.R.C. ¶ 61,242, at 61,790 (1987) (allowing experimental competitive rates because "competition . . . encourages utilities to make efficient decisions with a minimum of regulatory intervention. Ultimately, consumers should benefit from lower prices as competition improves efficiency."), *modified*, 47 F.E.R.C. ¶ 61,121 (1989), *modified*, 50 F.E.R.C. ¶ 61,339 (1990), *modified sub nom.* Western Sys. Power Pool, 55 F.E.R.C. ¶ 61,099, at 61,319 (rejecting flexible pricing for bulk power because applicant had failed to eliminate anticompetitive effects by mitigating market power in generation or transmission), *granting stay*, 55 F.E.R.C. ¶ 61,154, *reh'g granted in part*, 55 F.E.R.C. ¶ 61,495, *appeal filed*, No. 91-1404 (D.C. Cir. Aug. 26, 1991), *modified*, 59 F.E.R.C. ¶ 61,249 (1992); Public Serv. Co. of N.M., 25 F.E.R.C. ¶ 61,469, at 62,038 (1983) (declaring that "competition penalizes a seller

that an increase in the number of potential electric generation suppliers will create competitive pressures that will improve efficiency⁵ and promote bulk power trades⁶ among utilities having different generation costs.⁷ This policy is a deliberate departure from traditional cost-based ratemaking,⁸ which is focused not on fostering efficiency but rather on preventing abuse of monopoly power.⁹ By contrast, market-based ratemaking relies on competitive forces to promote efficiency and should concentrate new electric generation in the hands of the most efficient generators.

In large part, FERC is attempting to advance trends that have al-

that is inefficient or has an unreasonable pricing strategy" and that "[c]onsumers . . . benefit because the improvements in efficiency [due to competition] lead to lower prices").

5. See *Entergy Servs., Inc.*, 58 F.E.R.C. at 61,753 (approving market-based rates for large bulk power sales because rates set via competitive forces will increase number of potential suppliers and result in cost savings to ratepayers); *Public Serv. Co. of Ind.*, 51 F.E.R.C. at 62,224-25 (stating that competitive pricing improves efficiency by creating incentives for full utilization of existing capacity and innovation).

6. See *infra* note 14 (defining bulk power trades).

7. See *Public Serv. Co. of Ind.*, 51 F.E.R.C. at 62,225 (approving market-based rates for firm wholesale power sales in order to provide less costly means of supplying new power demands); *Pacific Gas & Elec. Co.*, 38 F.E.R.C. at 61,789 (stating that "[b]ecause not all utilities are equally good at building and operating generating plants, we believe that a rational regulatory policy requires that we encourage electric utilities to engage in bulk power trades that coordinate their resources and thus produce efficiency gains") (footnote omitted); *Public Serv. Co. of N.M.*, 25 F.E.R.C. at 62,059-60 (approving experiment to promote efficiency in bulk power markets through market-based pricing of wholesale sales among utilities with differing generation costs).

8. A basic principle of traditional rate regulation is that public utility rates are based on the utility's cost of service. STEPHEN BREYER, *REGULATION AND ITS REFORM* 15-59 (1982) (examining typical justifications for regulation and methods of cost-of-service ratemaking); 1 KAHN, *supra* note 3, at 26-57 (detailing nature of cost-of-service regulation); see also *Entergy Servs., Inc.*, 58 F.E.R.C. at 61,753 (justifying agency policy change supporting market-based rate regulation by pointing out that traditional cost-of-service regulation is not always adequate to meet needs of growing competitive bulk power market); HOUSE COMM. ON ENERGY AND COMMERCE, 102D CONG., 1ST SESS., *ELECTRICITY: A NEW REGULATORY ORDER?* 132-44 (Comm. Print F 1991) [hereinafter *ELECTRICITY: A NEW REGULATORY ORDER?*] (discussing development of utility rate regulation and explaining rate methodology designed to ensure "fair return on fair value" based on operating expenses, depreciation, capital improvements, and other costs). FERC has held, however, that a departure from cost-based ratemaking is justified where an industry is experiencing "contrasting or changing characteristics." *Entergy Servs., Inc.*, 58 F.E.R.C. at 61,752 (quoting from opinion in *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1503 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984)). The FPA requires that FERC set electricity rates that are "just and reasonable." 16 U.S.C. § 824d(a) (1988). The "just and reasonable" standard is a longstanding one, having been established early in the context of government rate regulation, and the standard seeks to provide utilities a fair return on value. See, e.g., *Bluefield Waterworks & Improvement Co. v. Public Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923) (holding that governmentally imposed utility rates that are not sufficient to yield reasonable rates of return are unjust, and that public utilities are entitled to earn return on value of property employed in provision of service that is equal to return earned by other businesses facing similar risks); see also *Smyth v. Ames*, 169 U.S. 466, 546-47 (1898) (ruling that fair value of property used, costs of construction, improvements, and other expenses should be examined when calculating reasonableness of rates set by federal government for railroad).

9. See 1 KAHN, *supra* note 3, at 26-29 (describing need for regulation to restrain monopolies such as utility companies from charging higher rates than would be possible in competitive market).

ready had a dramatic impact on electric generation in the United States. Just thirteen years ago, utilities controlled over ninety-seven percent of U.S. electric generating capacity.¹⁰ In recent years, however, the growth in nonutility generating capacity has increased much more rapidly than utility additions,¹¹ and the nonutility share of total capacity is projected to nearly quadruple between 1979 and 2010.¹² Increasingly, state public utility commissions have adopted competitive bidding programs that award the construction of new generation facilities to the lowest bidder, which promotes efficiency and encourages nonutility entry into the electric generation market.¹³

One obstacle that FERC perceives as hindering greater competitiveness in bulk power markets¹⁴ is the largely unfettered control of transmission systems by individual electric utilities.¹⁵ Control of

10. See EDISON ELEC. INST., 1988 CAPACITY AND GENERATION OF NON-UTILITY SOURCES OF ENERGY 7 (1990) (detailing generating capacity in U.S. by type of producer, i.e., utility versus nonutility).

11. While utility generating capacity increased from 688,733 to 735,129 megawatts between 1985 and 1990, a rise of less than 7%, nonutility generating capacity grew from 22,920 to 45,127 megawatts, a surge of nearly 100%. See EDISON ELEC. INST., ADVANCE RELEASE OF DATA FOR THE 1991 STATISTICAL YEARBOOK OF THE ELECTRIC UTILITY INDUSTRY 4 (1992) (providing data on additions to installed generating capacity by utilities and nonutilities in 1990); EDISON ELEC. INST., STATISTICAL YEARBOOK OF THE ELECTRIC UTILITY INDUSTRY 1990 7 (1991) (showing increase in electric generating capacity of utilities and nonutilities between 1985 and 1989).

12. Compare EDISON ELEC. INST., *supra* note 10, at 7 (showing that 2.9% of total electric generating capacity in 1979 was controlled by nonutilities) with ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ANNUAL ENERGY OUTLOOK—WITH PROJECTIONS TO 2010 69 (1992) (projecting that 11% of total electric generating capacity in 2010 will be owned by nonutilities).

13. See NATIONAL INDEP. ENERGY PRODUCERS, BIDDING FOR POWER: THE EMERGENCE OF COMPETITIVE BIDDING IN ELECTRIC GENERATION 11 (1990) (stating that at least 27 states have adopted, allowed, or are considering competitive bidding for new electric generation facilities).

14. The phrase "bulk power sales" or "bulk power markets" denotes wholesale electric sales or markets. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., ELECTRIC POWER WHEELING AND DEALING: TECHNOLOGICAL CONSIDERATIONS FOR INCREASING COMPETITION 41 (1989) [hereinafter OTA, WHEELING AND DEALING]. Two categories of wholesale power sales exist: (1) requirements sales, which generally take the form of firm sales from an investor-owned utility to a publicly owned utility that has little or no generating capacity; and (2) coordination sales undertaken for reliability or economy purposes, typically involving short-term sales between investor-owned utilities. ELECTRICITY: A NEW REGULATORY ORDER?, *supra* note 8, at 68-71. For a discussion of firm and nonfirm wheeling, see *infra* note 54.

15. See Public Serv. Co. of Col., 58 F.E.R.C. ¶ 61,322, at 62,038 (1992) (noting that FERC's "fundamental competitive concern . . . is that an increase in control over key transmission facilities may lead to a greater ability to block competing lower-cost suppliers from reaching wholesale electric customers"); Northeast Utils. Serv. Co., 56 F.E.R.C. ¶ 61,269, at 62,010 (holding that restrictive transmission access conditions are necessary for approval of merger because Northeast Utilities' domination of key transmission corridors and facilities would otherwise allow it to control bulk power trade), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992); Public Serv. Co. of Ind., 51 F.E.R.C. ¶ 61,367, at 62,192 (conditioning approval of market-based rates on public utility's acceptance of open access transmission conditions, out of concern that utility's complete control of transmission assets could otherwise be used to gain advantage over competing power suppliers), *modified sub nom.* PSI Energy, Inc., 52 F.E.R.C. ¶ 61,260, *clarified*, 53

I. FERC AUTHORITY TO ORDER WHEELING WAS LIMITED

A. Federal Power Act of 1935

As originally conceived, Part II of the FPA would have imposed common carrier obligations on electric utilities by making it "the duty of every public utility to . . . transmit energy for any person upon reasonable request."²⁰ Further, the 1935 legislation would have empowered FERC's predecessor, the Federal Power Commission (FPC), to order wheeling if it found such action to be "necessary or desirable in the public interest."²¹ Enactment of this bill would have granted the FPC and its successor wide discretion to mandate wheeling. Instead, Congress deleted these broad provisions from the proposed legislation, thereby rejecting the imposition of common carrier status on electric utilities in favor of allowing voluntary action by the utilities.²² The Supreme Court recognized FERC's lack of wheeling authority in *Otter Tail Power Co. v. United States*,²³ where it held that "there is no authority granted the Commission under Part II of the Federal Power Act to order [wheeling]."²⁴

B. Public Utility Regulatory Policies Act of 1978

The Public Utility Regulatory Policies Act of 1978 (PURPA)²⁵ granted FERC limited authority to order wheeling by adding sections 211 and 212 to the FPA.²⁶ FERC authority to order wheeling under section 211 was sharply expanded by the Energy Policy Act of 1992.²⁷ For purposes of this Comment, FERC transmission access policy will be evaluated based on the standards in sections 211 and 212 before the wholesale revisions to these sections in the Energy Policy Act. Under section 211, FERC could issue a wheeling order if

20. S. 1725, 74th Cong., 1st Sess. § 213 (1935); H.R. 5423, 74th Cong., 1st Sess. § 213 (1935).

21. S. 1725, 74th Cong., 1st Sess. § 213 (1935); H.R. 5423, 74th Cong., 1st Sess. § 213 (1935).

22. S. REP. NO. 621, 74th Cong., 1st Sess. 19 (1935); H.R. REP. NO. 1318, 74th Cong., 1st Sess. 8 (1935).

23. 410 U.S. 366 (1973) (rejecting effort by federal agency to order wheeling under FPA).

24. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 375 (1973).

25. Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended at 16 U.S.C. §§ 824a-1 to a-3, 824i-k, 2601-2645, and scattered sections of 16 and 42 U.S.C. (1988)).

26. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, §§ 203-204, 92 Stat. 3117, 3136-3140 (codified at 16 U.S.C. §§ 824j-824k (1988)).

27. Energy Policy Act of 1992, Pub. L. No. 102-486, § 721, 106 Stat. 2776, 2915-16 (to be codified at 16 U.S.C. § 824j); see *infra* note 223 (describing broad grant of wheeling authority under § 721 of Energy Policy Act). The Energy Policy Act drastically revised § 212 of the FPA as well. Energy Policy Act of 1992, § 722, 106 Stat. at 2916-19 (to be codified at 16 U.S.C. § 824k).

it found that such order: (1) was in the public interest; (2) would conserve energy, promote efficiency, or improve reliability; and (3) met the criteria of section 212.²⁸ Section 212 prohibited issuance of a wheeling order if such order: (1) was not likely to result in a reasonably ascertainable uncompensated economic loss for any affected utility;²⁹ (2) would not place an undue burden on any affected utility; (3) would not unreasonably impair the reliability of any affected utility; or (4) would not impair the ability of any electric utility affected by the order to render adequate service to its customers.³⁰

As was the case with the FPA, the version of PURPA originally approved by the House contained provisions that would have granted FERC sweeping authority to order wheeling.³¹ Yet Congress again chose not to include those provisions in the version of the bill enacted into law.³² Deletion of the wheeling authority constituted an express rejection by Congress of the role of common carrier for electric utilities. Moreover, the addition of section 211 further limited FERC's authority to mandate transmission service by prohibiting a wheeling order absent a finding that "such an order would reasonably preserve existing competitive relationships."³³ As a result of this restriction on mandated wheeling, FERC has never issued a wheeling order under the authority granted in PURPA.³⁴ Essentially, sections 211 and 212 proved to be dead letters.³⁵ While

28. 16 U.S.C. § 824j(a) (1988). This subsection was deleted in lieu of substitute language in the Energy Policy Act. Energy Policy Act of 1992, § 721(2), 106 Stat. at 2915; see *infra* note 223 and accompanying text (discussing amendments to § 211 of FPA).

29. An "affected utility" is either one of the parties to a wholesale transaction, or the transmitting utility. H.R. REP. NO. 1750, 95th Cong., 2d Sess. 91 (1978), reprinted in 1978 U.S.C.C.A.N. 7659, 7825.

30. 16 U.S.C. § 824k(a) (1988). This subsection was deleted by the Energy Policy Act. Energy Policy Act of 1992, § 722(1), 106 Stat. at 2915 (amending § 212 of FPA).

31. See H.R. 8444, 95th Cong., 1st Sess. § 541(b)(1) (1977) (authorizing FPC to order wheeling whenever agency deems such action "necessary or appropriate in the public interest"). This unenacted legislation would only have precluded the FPC from issuing a wheeling order if the order would not benefit consumers by reducing electric energy supply costs or otherwise provide public benefits by ensuring that economical, environmentally sensitive supplies of electric energy were made generally available, or if the order would impose economic hardship on the transmitting utility or its customers. *Id.* § 541(b)(2).

32. See 16 U.S.C. §§ 824j-824k (1988) (failing to grant broad power to FERC to order wheeling transactions).

33. 16 U.S.C. § 824j(c)(1) (1988). This subsection was deleted by the Energy Policy Act. Energy Policy Act of 1992, § 721(4)(A), 106 Stat. at 2915 (amending § 211 of FPA).

34. See, e.g., *Southeastern Power Admin. v. Kentucky Utils. Co.*, 25 F.E.R.C. ¶ 61,204, at 61,530-39 (1983) (rejecting power company's application for wheeling order because § 211(c)(1) of PURPA prohibited issuance of any wheeling order that does not "reasonably preserve existing competitive relationships" of transmitting utility).

35. See *Florida Power & Light Co. v. FERC*, 660 F.2d 668, 676 (5th Cir. 1981) (concluding that FPA did not authorize FERC to issue wheeling orders that impose common carrier duties on utilities), *cert. denied*, 459 U.S. 1156 (1983); *New York State Elec. & Gas Corp. v. FERC*, 638 F.2d 388, 400-03 (2d Cir. 1980) (rejecting wheeling order because order had effect of expanding utility's voluntary commitment to provide transmission service), *cert. denied*,

FERC sought to encourage competition through transmission access, the agency lacked power to order wheeling for the sole purpose of enhancing competition. The Second Circuit held that sections 211 and 212 clearly indicated that wheeling cannot be ordered solely on the basis of the public interest and the enhancement of competition.³⁶ In addition, the Fifth Circuit rebuked an effort by FERC to foster competition through mandatory transmission access, stating that although its goal was "laudable," the agency "is without authority under the FPA to compel wheeling."³⁷

II. SEIZING THE BRASS RING: FERC IMPOSES OPEN ACCESS CONDITIONS IN MERGER AND RATE CASES

Upon discovering the stark limits on its authority under sections 211 and 212 to order wheeling, FERC resorted to other powers granted it under the FPA to induce utilities to provide transmission services voluntarily. The broadest grants of discretionary authority provided FERC by the FPA reside in its section 203 authority to approve and condition utility mergers³⁸ and its section 205 and 206 authority to set wholesale rates.³⁹ These powers supplied FERC with an indirect means by which to implement its transmission access policy.

A. FERC Has Imposed Transmission Access Through Its Discretionary Authority to Approve Mergers

1. FERC enjoys broad discretion to impose conditions under its section 203 merger-approval authority

Electric utilities seeking to merge must obtain, as a preliminary matter, FERC's approval of their proposed merger.⁴⁰ Such approval will only be granted if the merger is found to be "consistent with the public interest."⁴¹ Typically, a utility merger will be held to

454 U.S. 821 (1981); *Southeastern Power Admin.*, 25 F.E.R.C. at 61,530 (rejecting application for wheeling order under §§ 211 and 212 of FPA because § 211(c)(1) prohibited wheeling order that does not "reasonably preserve existing competitive relationships" of transmitting utility).

36. See *New York State Elec. & Gas Corp.*, 638 F.2d at 402 ("[I]t is clear from the express requirements of §§ 211 and 212 that the public interest and the enhancement of competition are not alone sufficient justification for compelling wheeling.")

37. See *Florida Power & Light Co.*, 660 F.2d at 677-79 (reversing FERC order compelling utility company to file amended tariff schedule for interchange transmission service, on basis that order would impermissibly impose common carrier status on utility).

38. 16 U.S.C. § 824b (1988); see also *infra* notes 40-43 and accompanying text (reviewing FERC's authority to condition approval of mergers).

39. 16 U.S.C. §§ 824c-d (1988); see also *infra* notes 103-06 and accompanying text (reviewing FERC's discretion to set rates for wholesale power sales and transmission services).

40. 16 U.S.C. § 824b(a) (1988).

41. *Id.*

be consistent with the public interest if it is deemed to be consistent with the standards of the FPA.⁴² Consistency with the public interest is a very broad mandate, and FERC therefore enjoys wide latitude in directly and conditionally approving utility mergers.⁴³

2. *FERC has imposed open access transmission through its merger authority*

Fortunately for FERC, the number of mergers in the electric utility industry increased in the 1980s.⁴⁴ For that reason, merger appli-

42. See 16 U.S.C. § 824b(b) (1988) (granting FERC explicit authority under § 203(b) to condition mergers to "secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission"). Judicial review of agency rulemakings is governed by the Administrative Procedure Act and courts may revise a rule only if the rule is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, § 706(2)(A), 5 U.S.C. § 706(2)(A) (1988). The U.S. Court of Appeals for the District of Columbia reaffirmed FERC's broad discretion to condition mergers in *Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991), holding that "[w]e set aside a decision of the FERC only if it is arbitrary and capricious or otherwise contrary to law." *Id.* at 1061. The appeals court observed that FERC may approve a merger only if the merger is found to be consistent with the public interest and explained that "the relevant 'public interest' includes both the preservation of economic competition, as expressed in the antitrust laws of general application, and the various policies reflected in the statutes specific to energy regulation." *Id.* (citations omitted). In this case, the relevant statute was the FPA, *id.* at 1059, so the policies of that act helped define the public interest to be protected.

43. See 16 U.S.C. § 824b (1988) (requiring FERC approval for proposed mergers but failing to grant express authority to FERC to impose merger conditions). Despite its lack of explicit conditioning power in § 203(a), FERC has found implicit authority to condition mergers under the section by maintaining that the power to condition merger approval is subsumed within the power to deny merger consummation. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,011-13 (defining FERC's broad authority to condition mergers in public interest under § 203(a) and (b)), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992); *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095, at 61,280 (stating that power to condition mergers is not impermissible extension of FERC's authority to deny merger requests), *clarified*, 45 F.E.R.C. ¶ 61,132, *reh'g granted*, 45 F.E.R.C. ¶ 61,500 (1988), *reh'g granted in part*, 47 F.E.R.C. ¶ 61,209 (1989), *enforced*, 51 F.E.R.C. ¶ 61,295 (1990), *remanded on other grounds sub nom. Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991). By contrast, § 203(b) of the FPA expressly authorizes FERC to condition mergers to "secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission." 16 U.S.C. § 824b(b) (1988). According to FERC, conditioning approval achieves the same end as requiring the applicant to submit a new application that resolves the concerns that caused the initial rejection of the merger proposal. *Utah Power & Light Co.*, 45 F.E.R.C. at 61,280.

Historically, the public interest findings required by § 203 have been based on the test in *Commonwealth Edison Co.* See *Commonwealth Edison Co.*, 36 F.P.C. 927, 931 (1966), *aff'd sub nom. Utility Users League v. FPC*, 394 F.2d 16 (7th Cir.) (denying petition for review of FPC order approving merger of electric and gas companies on ground that no showing was made of merger's adverse effect on competition), *cert. denied*, 393 U.S. 953 (1968). The decision established a nonexclusive list of criteria to be considered when evaluating whether a proposed merger is consistent with the public interest. See *id.* at 932 (requiring merged company to conform to purposes of both FPA and Public Utility Holding Company Act on public interest grounds). One of the central factors mentioned in the opinion as a public interest consideration is "the effect the proposed merger may have on the existing competitive situation." *Id.*

44. ELECTRICITY: A NEW REGULATORY ORDER?, *supra* note 8, at 94. Following the enactment of the Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 803 (codified as

cations represented a promising vehicle for the development of FERC's open access transmission policy through exercise of its section 203 authority. FERC has conditioned approval of utility mergers on companies' acceptance of broad obligations to provide transmission services to third parties, a practice that is otherwise known as "open access."⁴⁵ The landmark case in this method of implementation for FERC's transmission access policy is *Utah Power & Light Co.*⁴⁶ This case approved the merger of Pacific Power & Light and Utah Power & Light into a large utility holding company called PacifiCorp, whose subsidiaries would serve seven states.⁴⁷ Although FERC explicitly disavowed the precedential value of the decision,⁴⁸ the conditions imposed in *Utah Power & Light* were nevertheless adopted in *Northeast Utilities Service Co.*⁴⁹ and in several other

amended at 15 U.S.C. §§ 79a to 79z-6 (1988)), there was very little merger activity among electric utilities. ELECTRICITY: A NEW REGULATORY ORDER?, *supra* note 8, at 94. However, the pace of merger activity accelerated in the early 1980s. *Id.* at 94-95; see also U.S. GEN. ACCOUNTING OFFICE, ELECTRICITY SUPPLY: REGULATING UTILITY HOLDING COMPANIES IN A CHANGING ELECTRIC INDUSTRY 4 (1992) (noting that over 53 utilities were reported to have been merged with or acquired by utilities or utility holding companies between 1980 and 1991). Furthermore, some analysts believe that a massive consolidation is in the offing. See SCOTT A. FENN, INVESTOR RESPONSIBILITY RESEARCH CTR., MERGERS AND FINANCIAL RESTRUCTURING IN THE ELECTRIC POWER INDUSTRY 29-51 (1988) (concluding that electric utility industry is entering period of major restructuring); Edward Tirello, *Consolidation Coming to Industry Says Analyst*, ELECTRIC LIGHT & POWER, May 1987, at 17-18 (predicting industry consolidation will occur as result of continued increase in competition).

45. See Public Serv. Co. of Col., 58 F.E.R.C. ¶ 61,322, at 62,039 (1992) (approving proposed merger because applicant agreed to provide transmission access to third parties in arrangement that was deemed "generally consistent with the Commission's recently announced guidelines"); Kansas Power & Light Co., 56 F.E.R.C. ¶ 61,356, at 62,378-79 (1991) (accepting merger request that included open access transmission commitment); *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,017-24 (conditioning approval for requested merger on utility's acceptance of open access transmission service obligations); *Utah Power & Light Co.*, 45 F.E.R.C. at 61,289-95 (accepting merger between Pacific Power & Light and Utah Power & Light upon their acceptance of open access transmission service obligations).

46. 45 F.E.R.C. ¶ 61,095 (1988).

47. See *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095, at 61,269 (approving merger subject to acceptance of open access transmission service obligations by applicants), *clarified*, 45 F.E.R.C. ¶ 61,132, *reh'g granted*, 45 F.E.R.C. 61,500 (1988), *reh'g granted in part*, 47 F.E.R.C. ¶ 61,209 (1989), *enforced*, 51 F.E.R.C. ¶ 61,295 (1990), *remanded on other grounds sub nom.* Environmental Action, Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991).

48. See *Utah Power & Light Co.*, 47 F.E.R.C. at 61,733 ("[N]o inference should be drawn that the transmission access conditions set forth [in *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095 (1988)] represent Commission policy, to be applied generically in the future, regarding transmission access").

49. 56 F.E.R.C. ¶ 61,269, *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992). A number of significant differences exist between the factual situations in *Utah Power & Light* and *Northeast Utilities*. First, in contrast to *Utah Power & Light*, see *infra* note 50 (discussing prior anticompetitive practices of Utah Power & Light Company), the applicant in *Northeast Utilities* had never denied a wheeling request for anticompetitive reasons. *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,009-10. Second, FERC imposed transmission access conditions in *Utah Power & Light* partly because there was no regional power pool within the service area of the combined company that would potentially be able to prevent the company from exercising market power over transmission. *Utah Power & Light Co.*, 45 F.E.R.C. at 61,283. *Northeast Utilities*, however, operated within

merger cases.⁵⁰

It should be noted that in order to approve the proposed merger in *Utah Power & Light*, FERC reversed an administrative law judge's decision to the contrary.⁵¹ The administrative law judge had recommended that the proposed merger be rejected and specifically refused to attach conditions that would "transmogrify a statutorily unacceptable proposal into one that meets the public interest."⁵²

the New England Power Pool, which effectively prevented the utility from exercising market power. *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 61,985. Third, FERC was influenced in *Utah Power & Light* by the prospect that the merged company would control over 88% of the transmission capacity in the Northwest and Rocky Mountain areas. *Utah Power & Light Co.*, 45 F.E.R.C. at 61,286-87. FERC attempted to draw a parallel in *Northeast Utilities*, charging that the merged company would control a "transmission curtain" around Eastern Massachusetts and Rhode Island, *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,005-06, but in actuality, the merged company would control only five percent of the uncommitted transmission capacity in the region. Request for Rehearing of Applicant at 58, *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269 (1991), *reh'g granted*, 58 F.E.R.C. ¶ 61,070 (1992).

50. See *Public Serv. Co. of Col.*, 58 F.E.R.C. ¶ 61,322, at 62,034 (1992) ("Colorado . . . attempted to model the proposed tariff after transmission conditions imposed or approved by the Commission in other merger cases[.]" including *Utah Power & Light*); *Kansas Power & Light Co. & Kansas Gas & Elec. Co.*, 56 F.E.R.C. ¶ 61,356, at 62,378-79 (1991) (accepting offer of settlement that included open access transmission commitment based on conditions in *Utah Power & Light*); *Kansas City Power & Light Co. & Kansas Gas & Elec. Co.*, 53 F.E.R.C. ¶ 61,097, at 61,276 (1990) (noting that applicants are "prepared to accept extensive transmission obligations" that are "substantially similar" to those imposed in *Utah Power & Light*). But see *UtiliCorp United, Inc. & Centel Corp.*, 56 F.E.R.C. ¶ 61,031, at 61,120-22 (1991) (refusing to impose *Utah Power & Light* transmission access conditions because there is no evidence that merger will consolidate control over transmission).

The merger of *Pacific Power & Light* and *Utah Power & Light* occurred under certain unique circumstances. The most striking aspect of the merger was the sheer size of the merged company, which would span seven states. See *Utah Power & Light Co.*, 45 F.E.R.C. at 61,268-69 (describing service territory of merged company). Further, one of the applicants in the case had previously engaged in anticompetitive practices. *Id.* at 61,287 (observing that *Utah Power & Light* "exercised . . . monopoly control by foreclosing competitors from using its transmission facilities to sell power at UP&L's southern interconnections" and "consistently refused to permit the wheeling of low-cost power across its system"). *Utah Power & Light* "admit[ted] that it ha[d] never provided firm wheeling service to any major Northwest utility wishing to sell to buyers in the Desert Southwest, southern Nevada or California." *Id.* FERC used this factor to support its decision to impose conditions on the *Utah Power & Light* merger, and FERC also justified the conditions by noting that no regional power pool existed within the service area of the combined company. *Id.* at 61,283 (commenting that absence of power pool would enable merged company to exercise greater market power over coordination services because of its strategic control over transmission). Another factor that influenced FERC in *Utah Power & Light* was the prospect that the merged company would control over 88% of the transmission capacity between the Northwest and the Rocky Mountain area. *Id.* at 61,286-87.

51. See *Utah Power & Light Co.*, 43 F.E.R.C. ¶ 63,030, at 65,354 (rejecting merger request because merger would "substantially lessen competition"), *rev'd*, 45 F.E.R.C. ¶ 61,095, at 61,289-95 (approving merger subject to acceptance of open access transmission service obligations by applicants), *clarified*, 45 F.E.R.C. ¶ 61,132, *reh'g granted*, 45 F.E.R.C. ¶ 61,500 (1988), *reh'g granted in part*, 47 F.E.R.C. ¶ 61,209 (1989), *enforced*, 51 F.E.R.C. ¶ 61,295 (1990), *remanded on other grounds sub nom. Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991).

52. *Id.* (holding that FERC cannot approve proposed merger because it clearly "tends to substantially lessen competition and create a monopoly, [and] cannot be resurrected by the application of ineffective CPR conditions").

FERC showed no such reticence to allow the merger, perhaps because the merger presented a golden opportunity for the agency to develop its transmission access policy.

a. *Absolute obligation to provide firm transmission out of existing capacity*

Although FERC reserved the decision whether to expand transmission capacity for the merged company and its state regulators to make,⁵³ the agency imposed an absolute duty to satisfy firm wheeling requests⁵⁴ on the *Utah Power & Light* applicants.⁵⁵ That is, if the merged company lacks available transmission capacity to honor a request from an eligible utility beyond that needed to serve its native load customers,⁵⁶ the company is required within five years of the request to make sufficient capacity available to satisfy all such requests by reducing or altering its system use.⁵⁷ This absolute obligation to provide transmission service, even at the expense of increased costs to native load customers, is known as the "Utah Hammer."⁵⁸ The only exception FERC allows to this absolute duty

53. *Utah Power & Light Co.*, 45 F.E.R.C. at 61,294.

54. There are two types of wheeling service offered by electric utilities: "firm" and "nonfirm" wheeling. Firm wheeling may be offered in long-term contracts ranging up to 20 to 40 years in length, while nonfirm wheeling is generally of shorter duration. KEVIN KELLY ET AL., NATIONAL REGULATORY RESEARCH INST., SOME ECONOMIC PRINCIPLES FOR PRICING WHEELED POWER 330-31 (1987). FERC has defined firm wheeling as a utility's contractual obligation to be prepared to transmit a specified amount of electric power for a specified period of time, subject to the terms and conditions in a service agreement, and nonfirm wheeling as transmission service that is interruptible at the option of the transmitting utility. See *Utah Power & Light Co.*, 45 F.E.R.C. at 61,310 (defining terms that govern wheeling policy).

55. *Utah Power & Light Co.*, 45 F.E.R.C. at 61,294.

56. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,014 n.259 (defining native load customers as customers for whom utility, "by statute, franchise or contract, has undertaken an obligation to plan, construct, and operate its system to provide reliable service"), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

57. *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095, at 61,294, *clarified*, 45 F.E.R.C. ¶ 61,132, *reh'g granted*, 45 F.E.R.C. ¶ 61,500 (1988), *reh'g granted in part*, 47 F.E.R.C. ¶ 61,209 (1989), *enforced*, 51 F.E.R.C. ¶ 61,295 (1990), *remanded on other grounds sub nom.* *Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991).

58. See *Utah Power & Light Co.*, 45 F.E.R.C. at 61,295 (requiring merged company to limit low-cost off-system transactions to satisfy firm wheeling requests). An eligible utility whose request is not met within five years may institute a complaint before FERC. *Id.* at 61,294. If the complainant shows that the merged company has failed to meet its wheeling service obligation within five years of a request, the merged company will be required to reduce its use of transmission capacity for economy transactions to the extent necessary to meet all outstanding requests for firm transmission service. *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,024; *Utah Power & Light Co.*, 45 F.E.R.C. at 61,295. In *Utah Power & Light*, Commissioner Trabant sharply criticized the majority's use of the "Utah Hammer" to sanction the merged company for failure to provide transmission service, despite the company's good faith efforts to fulfill its transmission obligations. *Utah Power & Light Co.*, 47 F.E.R.C. at 61,764 (Trabant, Comm'r, dissenting). The Commissioner argued that, "[b]y definition, if the merged company exercised due diligence, that means the failure to accommodate wheeling arose from circumstances beyond its control." *Id.* Commissioner Trabant preferred to adopt a due

to wheel, even in the face of immutable constraints on utility system expansion, occurs when provision of firm wheeling on behalf of third parties will impair the reliability of service to native load customers.⁵⁹ A duty to wheel applies even where satisfaction of a transmission request is unnecessary to mitigate the anticompetitive effects of a merger, because FERC requires merged companies to honor the resale or reassignment of capacity from eligible utilities to third parties.⁶⁰ FERC imposes this absolute duty in lieu of utilities' voluntary commitments to provide transmission service.⁶¹

b. Mandatory construction of new transmission capacity to provide wheeling for third parties

FERC also imposed an absolute obligation on the merged companies in *Utah Power & Light* and *Northeast Utilities* to expand their transmission systems to meet demand from eligible utilities.⁶² FERC rejected the reservations proposed by *Northeast Utilities* on the company's voluntary commitment to construct transmission facilities, because such an exception would excuse companies' inability to expand systems after "reasonable best efforts" to do so are made.⁶³

diligence standard of review for wheeling requests rather than to impose an absolute duty on utilities to provide transmission services. *Id.*

59. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. at 61,199 (holding that *Northeast Utilities* would not be required to provide firm transmission service to third parties when immutable constraints such as siting or environmental regulations prevent expansion of transmission facilities, if wheeling would impair service to native load customers, and stressing that "under no circumstances will NU be required to provide firm wheeling service out of existing transmission capacity where doing so would impair or degrade reliability of service to native load customers"); see also *Utah Power & Light Co.*, 45 F.E.R.C. at 61,294 (affirming that merged company may refuse to wheel during transition period if honoring request would impair reliability).

60. See *Utah Power & Light Co.*, 45 F.E.R.C. at 61,295 (proscribing utility-imposed restrictions on resale or reassignment of transmission capacity to third parties).

61. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,012 (finding *Northeast Utilities*' voluntary transmission commitments insufficient to satisfy public interest), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992); *Utah Power & Light Co.*, 45 F.E.R.C. at 61,290 (reviewing public benefit of applicants' voluntary commitment to consider requests for transmission service on case-by-case basis). In *Northeast Utilities*, FERC rejected voluntary commitments that it conceded would result in improved transmission. *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,012 ("The issue is not simply whether the merged company will offer improved transmission service.").

62. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,022-24 (conditioning approval of merger in part on acceptance of duty to satisfy wheeling requests by third parties by constructing new transmission facilities); *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095, at 61,293 (requiring merged company to expand its system as necessary if sufficient lead time is provided and contract term is economically adequate to support enlarged facilities) *clarified*, 45 F.E.R.C. ¶ 61,132, *reh'g granted*, 45 F.E.R.C. ¶ 61,500 (1988), *reh'g granted in part*, 47 F.E.R.C. ¶ 61,209 (1989), *enforced*, 51 F.E.R.C. ¶ 61,295 (1990), *remanded on other grounds sub nom.* *Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991).

63. *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,022. *Northeast Utilities* had proposed the following three limitations on its voluntary commitment to build new transmission facilities:

The presiding administrative law judge in *Northeast Utilities* had approved this "due diligence" exception to the company's wheeling commitment, in light of concerns that, without the exception, native load customers would be adversely affected "where a transmission constraint that arises cannot be removed, due to siting, environmental or other regulatory impasse."⁶⁴ FERC overruled this seemingly practical standard in favor of imposing an absolute duty to satisfy all requests for system expansion.⁶⁵

FERC asserted that "five years is a reasonable maximum period of time for the merged company to obtain sufficient additional transmission capacity . . . to satisfy all bona fide requests by other utilities for long-term firm wheeling, as well as its own needs."⁶⁶ The agency position contradicts the North American Electric Reliability Council's warning that "growing obstacles to the siting and certification of new lines could make necessary expansion of the transmission systems extremely difficult."⁶⁷ Further, FERC's own Transmission Task Force reported in 1989 that completion of certain transmission projects may take as long as sixteen years, a fact that makes the agency's decision even more puzzling.⁶⁸

(1) The affected wheeling customers must commit in advance to contribute to the costs associated with such construction . . . ;

(2) NU is able feasibly to construct the[] additional facilities, consistent with local and regional reliability and siting considerations . . . ; and

(3) NU, after using *reasonable best efforts*, is able to obtain all regulatory approvals required for such construction to take place on terms that do not impair the feasibility of the project.

Id. (emphasis added). FERC accepted the first limitation proposed by Northeast Utilities, but rejected the second and third limitations and required substantial modifications. *Id.* at 62,022-24.

64. *Northeast Utils. Serv. Co.*, 53 F.E.R.C. ¶ 63,020, at 65,221-22 (1990) (accepting utility's preference for serving native load customers over satisfying third-party requests where system is constrained, because "merging companies' very existences are linked to their obligation to serve native load customers" and native load customers have borne costs of construction of transmission system), *modified*, 56 F.E.R.C. ¶ 61,269, at 62,022, *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

65. *See* *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,022-24 (overruling administrative law judge's due diligence exception and requiring applicant to satisfy *all* requests for firm transmission service within five years), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

66. *Utah Power & Light Co.*, 45 F.E.R.C. at 61,294; *see also* *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,021-22 (requiring provision of transmission service within five years of request).

67. NORTH AM. ELEC. RELIABILITY COUNCIL, RELIABILITY ASSESSMENT 1991-2000, THE FUTURE OF BULK ELECTRICITY SYSTEM RELIABILITY IN NORTH AMERICA 23 (1991) [hereinafter NERC, RELIABILITY ASSESSMENT]. Delays in transmission siting and construction are not uncommon. According to the NERC report, one transmission line between Baltimore and Washington, D.C. originally planned for completion in 1974 is 20 years behind schedule. *Id.*; *see also* NORTH AM. ELEC. RELIABILITY COUNCIL, 1990 RELIABILITY ASSESSMENT 28-29 (1990) (reviewing other cases where construction of transmission lines was delayed due to variety of factors).

68. TRANSMISSION TASK FORCE, FEDERAL ENERGY REGULATORY COMM'N, THE TRANSMIS-

3. *Transmission access conditions only imposed after limits established on FERC's authority to order wheeling*

Interestingly, FERC only imposed open access conditions in merger cases after efforts to order wheeling based on section 211 were frustrated and the severe limits of that authority became apparent.⁶⁹ Prior to the realization of these limits, FERC had not insisted on attaching open access transmission conditions to merger requests.⁷⁰ In fact, the reason FERC provided for rejecting a request that a proposed utility merger be conditioned on acceptance of open access transmission service obligations was that the agency had authority under sections 211 and 212 to order wheeling to remedy anticompetitive practices.⁷¹ FERC relied on the potential use of this remedial authority when it found that "the merger has had and appears to have no potential effect on the availability of wheeling service."⁷² This approach evaporated with FERC's growing appreciation of the limited nature of its authority under sections 211 and 212.

4. *FERC has imposed transmission access conditions beyond those necessary to mitigate mergers' anticompetitive effects*

FERC is authorized by section 203 of the FPA to condition the approval of a merger that, but for such conditions, would not be consistent with the public interest.⁷³ Although FERC may impose conditions requiring mitigation of a proposed merger's likely anticompetitive effects, the agency is not authorized to impose conditions that are not directly related to specific adverse effects.⁷⁴

SION TASK FORCE'S REPORT TO THE COMMISSION 39-43 (1989) (discussing difficulty in expanding transmission systems and providing anecdotal evidence of transmission construction problems). According to the report, the time needed to complete a transmission project ranges widely from 8 months to 16 years. *Id.* at 42. Moreover, because the report noted that only half the projects are completed within two to four years, FERC was well aware that many transmission system expansion projects would take longer than five years to construct. *Id.*

69. See *supra* notes 25-37 and accompanying text (describing limits of FERC's authority to order wheeling under § 211).

70. See *Union Elec. Co.*, 25 F.E.R.C. ¶ 61,394, at 61,875 (1983) (rejecting request by municipal agencies that proposed merger be conditioned on acceptance of general wheeling tariff on grounds that FERC possessed adequate authority under §§ 211 and 212 of FPA to order utility to accept wheeling tariff), *aff'd sub nom. City of Malden v. Union Elec. Co.*, 887 F.2d 157 (8th Cir. 1989).

71. See *Union Elec. Co.*, 26 F.E.R.C. ¶ 61,184, at 61,442, *aff'd sub nom. City of Malden v. Union Elec. Co.*, 887 F.2d 157 (8th Cir. 1989) (stating that FERC could remedy future anticompetitive practices through its authority to order wheeling).

72. *Id.*

73. 16 U.S.C. § 824b (1988); see also *supra* notes 42-43 (discussing FERC authority in § 203 of FPA to condition mergers).

74. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,012 (acknowledging FERC § 203 power to condition mergers is limited because conditions must be consistent with public interest and remedy anticompetitive effects of merger), *reh'g granted*, 57 F.E.R.C. ¶ 61,340

Despite FERC's acknowledgment that its conditioning power under section 203 is limited in this fashion,⁷⁵ the agency has not permitted this limitation to hamper its pursuit of open access. In *Utah Power & Light*, Commissioner Trabandt cautioned against FERC's overreaching the proper bounds of its section 203 authority.⁷⁶ Later, in *Northeast Utilities*, he expressed his belief that FERC had, in fact, exceeded those bounds.⁷⁷ Commissioner Trabandt also voiced suspicion that FERC's true goal in imposing transmission access in merger cases was not the mitigation of anticompetitive effects, but the promotion

(1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992); *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095, at 61,282 (recognizing limitations on FERC authority to impose common-carrier conditions in merger cases), *clarified*, 45 F.E.R.C. ¶ 61,132, *reh'g granted*, 45 F.E.R.C. ¶ 61,500 (1988), *reh'g granted in part*, 47 F.E.R.C. ¶ 61,209 (1989), *enforced*, 51 F.E.R.C. ¶ 61,295 (1990), *remanded on other grounds sub nom. Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991).

75. *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,012 (stating that "[t]he Commission may impose conditions only to the extent needed to make a proposed merger consistent with the public interest").

76. *Utah Power & Light Co.*, 47 F.E.R.C. at 61,756-59 (Trabandt, Comm'r, dissenting). Commissioner Trabandt warned FERC against improperly using its power to condition mergers as a mechanism by which to impose open access transmission service obligations on utilities, as follows:

We must not make merger cases platforms from which to launch probes in generic transmission policy. Nor must we use these adjudications as opportunities to restructure the electric utility industry along more competitive lines, as by weakening the franchise monopoly, say, in the interests of efficiency. Rather, we must inquire whether the merger will bring about anti-competitive effects and we must apply remedies limited to lessening, if not altogether eradicating, those effects.

... [A]ny conditioning pursuant to section 203(b) intended to mitigate any future adverse effect of the proposed merger on the existing competitive situation must be directly and rationally related to such a specific adverse effect. There must be a *direct nexus* between the form and substance of the condition imposed by the Commission and the prospective adverse effect on the existing competitive situation found by the Commission and sought to be mitigated. The Commission, in my judgment, clearly exceeds its statutory conditioning authority under section 203(b) to the extent that any specific condition does not have such a direct nexus to a specific prospective adverse effect. As a result, the form and substance of the condition must demonstrably be designed to mitigate that adverse effect and nothing more. A 'close' nexus, an indirect relationship or a partially rational relationship would all fail to meet the statutory test.

That conclusion is supremely important in the area of transmission access and wheeling, because, but for the merger application, the Commission would not otherwise have the requisite legal authority to impose these conditions. Thus, as a matter of law, the direct nexus of the specific condition to a specific adverse effect is the absolutely mandatory legal predicate for the Commission's authority to impose a transmission access condition of any kind, and conversely, the absence of such a direct nexus would be a totally fatal legal flaw in the Commission's order. And, again, all of the analysis of any alleged adverse effect on the existing competitive situation, and the statutorily required direct nexus to any resulting condition must be established with substantial evidence on the record of that case.

Id.

77. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,054, 62,058 (Trabandt, Comm'r, dissenting) (stating that FERC exceeded its § 203 authority by imposing wheeling conditions beyond those necessary to mitigate potential anticompetitive effects of proposed merger).

of competitive forces.⁷⁸

a. Narrower transmission conditions would mitigate any likely anticompetitive effects

In both *Utah Power & Light* and *Northeast Utilities*, FERC held that the transmission access conditions imposed were "minimum necessary" concessions to alleviate the proposed mergers' likely anticompetitive effects.⁷⁹ In *Utah Power & Light*, however, equally effective, albeit narrower, transmission conditions existed that would have mitigated the only anticompetitive effects identified by FERC that actually arose from the proposed merger.⁸⁰ FERC found that the merger posed a threat to competition because "the merged company could give preference to its own generation over that of competitors . . . (even when the latter is cheaper)."⁸¹ Rather than prescribing a narrow remedy requiring the merged company to wheel for any lower-cost rival supplier, FERC required the company to open its entire transmission system to access by competitors.⁸² Similarly, the transmission access conditions imposed in *Northeast Utilities* were broader than necessary to alleviate the anticompetitive effects of that merger. Although FERC acknowledged that its examination of the anticompetitive effects of the merger focused on certain "strategic or key transmission facilities,"⁸³ FERC required the merged company to open its entire transmission system to competitor access, and not merely these strategic facilities.⁸⁴

78. See *Utah Power & Light Co.*, 47 F.E.R.C. at 61,758 (Trabandt, Comm'r, dissenting) (arguing that "[t]he merger application . . . does not constitute a regulatory 'blank check' whereby the Commission has *carte blanche* to impose any and all conditions deemed appropriate as a matter of general policy with regard to competition in the electric utility industry").

79. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,012 (holding that FERC may impose only conditions necessary to make proposed merger compatible with public interest), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992); *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095, at 61,289-95 (asserting that short-term obligation to provide, upon request, access to remaining existing capacity and long-term obligation to provide, upon request, firm wholesale transmission service at cost-based rates are minimum necessary conditions to prohibit merged company from foreclosing transmission access to competitors), *clarified*, 45 F.E.R.C. ¶ 61,132, *reh'g granted*, 45 F.E.R.C. ¶ 61,500 (1988), *reh'g granted in part*, 47 F.E.R.C. ¶ 61,209 (1989), *enforced*, 51 F.E.R.C. ¶ 61,295 (1990), *remanded on other grounds sub nom. Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991).

80. See *Utah Power & Light Co.*, 45 F.E.R.C. at 61,288 (identifying extraction of monopoly profits through refusal to wheel low-cost power and giving of preference to utility's own generation over that of competitors as anticompetitive harms).

81. *Id.*

82. See *id.* at 61,291 (compelling merged company to provide nondiscriminatory access to transmission facilities).

83. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,005 (scrutinizing use of key transmission facilities that controlled flow of power between northern and southern New England and that could potentially be used to isolate other electrical generators).

84. *Id.* at 62,021-22, 62,024.

b. Rejection of "due diligence" standard is unrelated to mitigation of market power over transmission

FERC's rejection of a due diligence standard for evaluating utility refusals to satisfy wheeling requests⁸⁵ is at odds with court decisions recognizing that it is not anticompetitive for utilities to refuse to surrender facility use for the benefit of third parties if such use would result in economic harm to their customers.⁸⁶ Similarly, with respect to electric transmission facilities, the courts have held that it is not anticompetitive for a utility to prefer to use its transmission capacity for the benefit of its customers.⁸⁷

It is axiomatic that a due diligence standard is sufficient to prevent the exercise of market power in transmission because nonsatisfaction of a wheeling request would only be excepted if it resulted from the influence of external forces such as the denial of necessary permits and approvals by state and local agencies,⁸⁸ delays due to litigation,⁸⁹ or the requirements of state or federal environmental and public lands laws.⁹⁰ In short, a due diligence standard assures that

85. See *supra* notes 62-65 and accompanying text (describing FERC's rejection of due diligence standard in *Northeast Utilities*).

86. See, e.g., *Illinois v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1484, 1486 (7th Cir. 1991) (approving company's refusal to employ open access gas transportation policy that would have exposed customers to take-or-pay liability because "[m]onopolists needn't acquiesce to every demand placed upon them by competitors . . . [because] a monopolist's duties are negative—to refrain from anticompetitive conduct—rather than affirmative—to promote competition"), *cert. denied*, 112 S. Ct. 1169 (1992); *Oahu Gas Serv., Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 368-69 (9th Cir.) (accepting economic inefficiency as sufficient justification for utility to refuse to expand refinery), *cert. denied*, 488 U.S. 870 (1988); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (stating that "it is clear that a firm with lawful monopoly power has no general duty to help its competitors"), *cert. denied*, 480 U.S. 934 (1987); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1133, 1138 (7th Cir.) (noting that access to "essential facilities" may be denied when such access is not economically feasible or is not in public interest), *cert. denied*, 464 U.S. 891 (1983).

87. See *City of Vernon v. Southern Cal. Edison Co.*, 1991-1 Trade Cas. (CCH) ¶ 69,336, at 65,342 (C.D. Cal. 1990) (rejecting antitrust complaint based on lack of transmission access, because monopolist has no unqualified duty to cooperate with business rivals), *aff'd in part and rev'd in part*, 955 F.2d 1361 (9th Cir. 1992); *Cities of Anaheim v. Southern Cal. Edison Co.*, 1990-2 Trade Cas. (CCH) ¶ 69,246, at 64,910 (C.D. Cal. 1990) (dismissing claim by municipalities that denial of transmission access violated antitrust law as "lacking in substance"), *aff'd*, 955 F.2d 1373 (9th Cir. 1992).

88. See OTA, WHEELING AND DEALING, *supra* note 14, at 201-06 (describing difficulty of obtaining transmission siting permits from state and local agencies).

89. See NERC, RELIABILITY ASSESSMENT, *supra* note 67, at 24 (noting that judicial challenges have resulted in delays and cancellations of planned expansions of transmission systems).

90. See OTA, WHEELING AND DEALING, *supra* note 14, at 206-08 (discussing requirements for permitting transmission across federal, state, and tribal lands). A number of federal statutes contain requirements that may prevent or make impractical the expansion of transmission capacity. See, e.g., National Historic Preservation Act, 16 U.S.C. §§ 461-470 (1988) (authorizing Interior Secretary to acquire, manage, and operate property deemed to have historic or archaeological significance); Wilderness Act, 16 U.S.C. §§ 1131-1136 (1988) (designating "wilderness areas" that must remain undeveloped); Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1988 & Supp. I 1989) (restricting development of designated rivers

the subject of a wheeling request will make a good faith effort to expand its transmission system. Nevertheless, since FERC's "Utah Hammer" will fall despite good faith efforts to expand transmission facilities,⁹¹ the agency has created an affirmative duty for transmitting utilities to aid third parties.

c. Reassignment promotes competition rather than mitigates anticompetitive effects of mergers

Another condition imposed by FERC is a requirement that the transmitting utility honor the resale or reassignment of capacity from an eligible utility to other utility or nonutility electric generators.⁹² This requirement extends beyond FERC's proper exercise of section 203 authority because it is designed to promote competition rather than mitigate any anticompetitive effects caused by a merger.⁹³ Because there is no direct nexus with the anticompetitive effects to be mitigated, the reassignment condition is an improper exercise of FERC's authority to approve mergers.

B. FERC Has Imposed Transmission Access Through Its Ratemaking Authority

Another vehicle FERC employs to impose its open access transmission policy is the use of utility bids for market-based pricing of

and adjacent lands); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1988), as amended, 16 U.S.C.A. §§ 1451-1464 (West Supp. 1991) (providing for management of coastal development to protect natural resources); Endangered Species Act, 16 U.S.C. §§ 1532-1544 (1988) (authorizing regulation of land and water use to protect endangered species); Rivers and Harbors Act, 33 U.S.C. § 403 (1988) (restricting development on and obstruction of navigable waters); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988) (authorizing strict compliance standards to abate water pollution caused in part by utility companies).

91. See *supra* notes 57-58, 62-65 and accompanying text (describing impact of "Utah Hammer" and rejection of due diligence exception).

92. Utah Power & Light Co., 45 F.E.R.C. ¶ 61,095, at 61,295, *clarified*, 45 F.E.R.C. ¶ 61,132, *reh'g granted*, 45 F.E.R.C. ¶ 61,500 (1988), *reh'g granted in part*, 47 F.E.R.C. ¶ 61,209 (1989), *enforced*, 51 F.E.R.C. ¶ 61,295 (1990), *remanded on other grounds sub nom.* Environmental Action, Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991).

93. During arguments before the U.S. Court of Appeals for the District of Columbia Circuit in *Environmental Action*, FERC implied that by imposing the resale and reassignment of capacity requirement, it intended to promote competition. *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991) (rejecting petitioner's claim that failure to require non-firm wheeling would allow merged company to exercise monopoly control in bulk power markets, and accepting FERC's argument that resale and reassignment of capacity would "bring into the market many new participants with the ability to sell non-firm service" in competition with petitioner). It was for this reason that Commissioner Trabandt criticized the resale and reassignment mandate in *Utah Power & Light*: "To require wheeling [when a merged company exercising due diligence has failed to wheel due to circumstances beyond its control] crosses the line between remedying anticompetitive effects of the merger and removing a barrier to a more competitive electric utility industry generally. While one may want that as a matter of policy, the law does not allow us to impose such a requirement." *Utah Power & Light Co.*, 47 F.E.R.C. at 61,764 (affirming resale and reassignment requirements previously imposed by FERC) (Trabandt, Comm'r, dissenting).

wholesale power sales. FERC initiated this policy with a flexible pricing experiment in bulk power transactions that is known as the "Southwest Experiment."⁹⁴ This experiment was followed by a broader test in the Western Systems Power Pool, which permitted flexible pricing for not only bulk power sales but also transmission services.⁹⁵ These experiments led, through a number of cases, to FERC's development of a market-based pricing policy.⁹⁶

94. See *Public Serv. Co. of N.M.*, 25 F.E.R.C. ¶ 61,469, at 62,029-31 (1983) (approving experiment designed to produce electricity at "lowest possible cost"). Under the "Southwest Experiment," utilities made transmission services more openly available to competitors to create a more competitive market, and in return had the pricing flexibility to sustain this competitive market. *Id.* at 62,029. The heart of the experiment was pricing flexibility, or a departure from cost-of-service ratemaking. *Id.* at 62,049. Such a departure is justified when "a legitimate policy objective would be served," such as lowering rates charged consumers through spurring "potentially strong competitive forces." *Id.* at 62,050. In FERC's view, "[t]he final, and absolutely essential, ingredient is pricing flexibility." *Id.* The most common departure from cost-based ratemaking recognized by FERC is split savings rates, where the price is set midway between the seller's cost of production and the cost that the buyer saves by not producing the electricity on its own system. *Id.* at 62,049. In this manner, the buyer and seller "split" the savings. *Id.* Flexible pricing can take other forms, however, and in *Public Service Co. of New Mexico* FERC approved a price band bounded by an average cost of economy energy and average cost of firm power. *Id.* Utilities were permitted to retain some of the profits resulting from these bulk power trades. *Id.*

95. See *Pacific Gas & Elec. Co.*, 38 F.E.R.C. ¶ 61,242 (1987) (authorizing experiment intended to promote efficiency by providing energy service and transmission access on voluntary basis), *modified*, 47 F.E.R.C. ¶ 61,121 (1989), *modified*, 50 F.E.R.C. ¶ 61,339 (1990), *modified sub nom.* *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, at 61,319 (rejecting further extension of pricing experiment for bulk power because applicants had failed to mitigate market power in generation or transmission), *granting stay*, 55 F.E.R.C. ¶ 61,154, *reh'g granted in part*, 55 F.E.R.C. ¶ 61,495, *appeal filed*, No. 91-1404 (D.C. Cir. Aug. 26, 1991), *modified*, 59 F.E.R.C. ¶ 61,249 (1992).

96. See *United Illuminating Co.*, 60 F.E.R.C. ¶ 61,214, at 61,734 (1992) (approving request for market-based rates because utility lacked market power); *Entergy Servs. Inc.*, 59 F.E.R.C. ¶ 61,369, at 62,418 (1992) (rejecting market-based rates because applicant failed to mitigate market power in transmission); *Ocean State Power II*, 59 F.E.R.C. ¶ 61,360, at 62,337-38 (1992) (finding absence of affiliate abuse and approving rates on market basis); *Entergy Servs., Inc.*, 58 F.E.R.C. ¶ 61,234, at 61,752-53 (1992) (accepting market-based rates for bulk power sales); *Central Maine Power Co.*, 56 F.E.R.C. ¶ 61,200, at 61,816-17 (approving agreements for various short-term transactions priced at market-based rates), *modified on other grounds*, 57 F.E.R.C. ¶ 61,083 (1991); *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 F.E.R.C. ¶ 61,382, at 62,167 (1991) (rejecting proposed market-based wholesale rates because applicant failed to show absence of potential for self-dealing); *Cleveland Elec. Illuminating Co.*, 55 F.E.R.C. ¶ 61,172, at 61,553-54 (1991) (approving market-based rates for transaction between utilities because seller lacked market power over generation or transmission in relevant markets); *Nevada Sun-Peak Ltd. Partnership*, 54 F.E.R.C. ¶ 61,264, at 61,769 (denying request for market-based rates because applicant had not proved it lacked market power in generation), *reh'g granted in part*, 55 F.E.R.C. ¶ 61,058 (1991); *Pacific Gas & Elec. Co.*, 53 F.E.R.C. ¶ 61,145, at 61,503 (1990) (accepting market-based rates for coordination sales and transmission services upon utility's acceptance of transmission access conditions); *Dartmouth Power Assocs. Ltd. Partnership*, 53 F.E.R.C. ¶ 61,117, at 61,359-60 (1990) (affirming market-based rates because applicant lacked market power in generation or transmission); *Terra Comfort Corp.*, 52 F.E.R.C. ¶ 61,241, at 61,837, 61,841-42 (1990) (denying request for market-based rates because applicant did not demonstrate lack of potential for abuse in self-dealing, absence of market power in generation, or lack of market power in transmission); *Enron Power Enter. Corp.*, 52 F.E.R.C. ¶ 61,193, at 61,708-09, 61,711 (1990) (accepting market-based rates because no potential existed for self-dealing and applicant lacked market power over generation and transmission); *TECO Power Servs. Corp.*, 52

In cases involving utility affiliates, FERC requires applicants to demonstrate that (1) no potential exists for anticompetitive abuse through self-dealing on the part of affiliates,⁹⁷ and (2) the applicant

F.E.R.C. ¶ 61,191, at 61,697-700 (1990) (rejecting request for market-based rates for proposed transactions because applicant failed to demonstrate lack of potential for abuse through self-dealing or mitigation of market power over generation and transmission); Commonwealth Atl. Ltd. Partnership, 51 F.E.R.C. ¶ 61,368, at 62,244-46 (1990) (affirming market-based rates because no potential for self-dealing abuse was present and applicant was not dominant supplier and neither owns nor operates any transmission facilities other than interconnection capacity in relevant market); Public Serv. Co. of Ind., 51 F.E.R.C. ¶ 61,367, at 62,226 (approving request for market-based rates because applicant lacked market power over generation in relevant region and had mitigated market power over transmission by offering long-term transmission access at cost-based rates), *modified sub nom.* PSI Energy, Inc., 52 F.E.R.C. ¶ 61,260 (reducing term of open access commitment from 20 to 10 years), *clarified*, 53 F.E.R.C. ¶ 61,131 (1990), *petition dismissed sub nom.* Northern Ind. Pub. Serv. Co. v. FERC, 954 F.2d 736 (D.C. Cir. 1992); Portland Gen. Exch., Inc., 51 F.E.R.C. ¶ 61,108, at 61,245-46, 61,248 (rejecting request for market-based rates because applicant failed to eliminate potential for preferential pricing in sales from utility parent to affiliate, but approving alternative request because applicant lacked market power over generation and transmission), *clarified*, 51 F.E.R.C. ¶ 61,379, *enforced*, 53 F.E.R.C. ¶ 61,216 (1990); Chicago Energy Exch., Inc., 51 F.E.R.C. ¶ 61,054, at 61,112 (1990) (approving market-based rates because applicant did not own generation facilities or control transmission facilities directly or indirectly); National Elec. Assocs. Ltd. Partnership, 50 F.E.R.C. ¶ 61,378, at 62,157 (1990) (accepting market-based rates for power brokering because no potential for self-dealing abuse existed, and because applicant lacked market power because it owned no generation or transmission facilities and was not affiliated with any entity that controlled transmission facilities); Doswell Ltd. Partnership, 50 F.E.R.C. ¶ 61,251, at 61,757 (1990) (approving request for market-based pricing because applicant was not dominant in generation and was not directly or indirectly in control of transmission facilities); Torco Energy Mktg., Inc., 48 F.E.R.C. ¶ 61,294, at 61,947-48 (1989) (affirming market-based rates for power brokering because applicant controlled no generation or transmission facilities); Citizens Power & Light Corp., 48 F.E.R.C. ¶ 61,210, at 61,776-78 (1989) (approving market-based rates for "power marketer" because there was no potential for self-dealing and applicant lacked market power over generation or transmission); Ocean State Power, 44 F.E.R.C. ¶ 61,261, at 61,981-84 (1988) (accepting market-based rates because no evidence of self-dealing existed, applicant lacked market power over generation, and applicant did not own or control transmission capacity); Pacific Gas & Elec. Co., 44 F.E.R.C. ¶ 61,010, at 61,050-53 (1988) (approving market-based rates for coordination service upon acceptance of open access transmission conditions); Pacific Gas & Elec. Co., 42 F.E.R.C. ¶ 61,406, at 62,196-97 (accepting market-based rates for firm transactions because applicant mitigated market power over transmission through voluntary acceptance of open access conditions, and reserving approval of market-based rates for coordination services upon utility's acceptance of transmission access conditions), *clarified*, 43 F.E.R.C. ¶ 61,403 (1988); Orange & Rockland Utils., Inc., 42 F.E.R.C. ¶ 61,012, at 61,029 (1988) (approving market-based rates for purchase from independent power producers because sellers lacked market power over generation or transmission); Howell Gas Management Co., 40 F.E.R.C. ¶ 61,336, at 62,025 (1987) (accepting market-based rates for "power marketer" because applicant did not own generation, transmission, or distribution facilities); *Pacific Gas & Elec. Co.*, 38 F.E.R.C. at 61,804-05 (approving experiment in market-based pricing for both wholesale sales and transmission services because such pricing would serve objectives of FERC in administering FPA, and because prospective benefits of plan outweighed potential for anticompetitive exercise of market power); EUA Power Corp., 36 F.E.R.C. ¶ 61,017, at 61,039 (1986) (accepting market-based rates as part of settlement of purchase of additional share of nuclear power plant); Citizens Energy Corp., 35 F.E.R.C. ¶ 61,198, at 61,456 (1986) (accepting market-based rates for non-profit marketing organization because applicant did not own or operate generation or transmission facilities); Public Serv. Co. of N.M., 25 F.E.R.C. ¶ 61,469, at 62,059-60 (1983) (approving pricing experiment in bulk power transactions).

97. See *Ocean State Power II*, 59 F.E.R.C. at 62,338 (approving utility affiliate's request for market-based rates because of evidence of "lack of affiliate abuse"); *Edgar Elec. Energy Co.*, 55 F.E.R.C. at 62,167 (rejecting proposed market-based rate for sale from affiliate to parent be-

lacks market power in the electric generation and transmission mar-

cause applicant failed to show absence of potential for preferential rate treatment of affiliates); *Terra Comfort Corp.*, 52 F.E.R.C. at 61,837 (denying request for market-based rates for sale from affiliate to parent in part because applicant's proposal ignored sale of services between affiliates); *TECO Power Servs. Corp.*, 52 F.E.R.C. at 61,697-99 (rejecting request for market-based rates for proposed sale from parent to affiliate in part because of existence of financial incentives to offer rates more favorable to affiliates than to other market participants); *Portland Gen. Exch., Inc.*, 51 F.E.R.C. at 61,245-46, 61,248 (rejecting request for market-based rates because applicant failed to justify different rates to affiliate and nonaffiliate for substantially similar services).

The concern regarding self-dealing, or a transaction between a utility and an affiliated independent power producer, is that a utility will reap excessive profits either (1) by overpricing purchases from unregulated affiliate power producers, see *Ocean State Power II*, 59 F.E.R.C. at 62,337 ("In particular, when a seller like Ocean State II is seeking market-based prices for sales to one or more affiliated traditional utilities, our concern is that the transfer price—the price the seller charges its affiliated buyers for the seller's power—is too high."); *Edgar Elec. Energy Co.*, 55 F.E.R.C. at 62,167-68 (discussing prospect that utility "unduly favored the rates offered by its affiliate seller over lower rates offered by other nonaffiliate sellers"), or (2) by underpricing sales to affiliates. See *Portland Gen. Exch., Inc.*, 51 F.E.R.C. at 61,244-45 (stating that utility has incentive to charge affiliated marketer "as low a price as possible"). In this manner, the utility parent can earn higher profits than allowed by state and federal regulators. See *Edgar Elec. Energy Co.*, 55 F.E.R.C. at 62,168 (noting that utility may favor affiliate in purchase not subject to cost-of-service regulation "because the higher profits can accrue to the seller's shareholders"); *Portland Gen. Exch., Inc.*, 51 F.E.R.C. at 61,244 ("Affiliates may have the incentive to engage in such preferential transactions because they share common corporate goals—profits for stockholders that own both entities. This common interest creates the incentive to maximize profits to the affiliated marketer by having the selling utility charge the affiliated marketer as low a price as possible."); see also 1 KAHN, *supra* note 3, at 28 (noting that regulated companies can extract monopoly profits by paying excessive prices to affiliated, unregulated companies); Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 605 (1969) (stating that regulated firms have incentive to "evade the constraints of regulation" through affiliate transactions).

In fact, FERC's concern over the potential for abuse in self-dealing is so strong that approval of requests for market-based rates by utilities or their affiliates has essentially been restricted to sales to nonaffiliates. See *Central Maine Power Co.*, 56 F.E.R.C. at 61,816-17 (approving agreements for various short-term sales to nonaffiliates priced at market-based rates); *Cleveland Elec. Illuminating Co.*, 55 F.E.R.C. at 61,553-54 (approving market-based rates for sales to nonaffiliated utilities because seller lacks market power over generation or transmission in relevant markets); *Pacific Gas & Elec. Co.*, 53 F.E.R.C. at 61,503 (approving market-based rates for coordination sales and transmission services by investor-owned utility to nonaffiliated municipal authority); *Commonwealth Atl. Ltd. Partnership*, 51 F.E.R.C. at 62,245-46 (approving request for market-based rates by affiliate of California utility located in Virginia for sales of electricity to Virginia utility); *Public Serv. Co. of Ind.*, 51 F.E.R.C. at 62,226 (approving request for market-based rates for sales to nonaffiliated utilities); *Portland Gen. Exch., Inc.*, 51 F.E.R.C. at 61,245-46, 61,248 (approving market-based rates for sales by investor-owned utility to municipalities); *Pacific Gas & Elec. Co.*, 44 F.E.R.C. at 61,050-53 (approving market-based rates for sales of coordination services to nonaffiliate); *Pacific Gas & Elec. Co.*, 42 F.E.R.C. at 62,196-97 (accepting market-based rates for firm transactions and conditioning approval of market-based rates for sales of coordination services to nonaffiliate); *Pacific Gas & Elec. Co.*, 38 F.E.R.C. at 61,804-05 (approving experiment in market-based pricing for both wholesale sales and transmission services among utilities); *EUA Power Corp.*, 36 F.E.R.C. at 61,039 (accepting market-based rates for sale by utility to nonaffiliated utilities); *Public Serv. Co. of N.M.*, 25 F.E.R.C. at 62,059-60 (approving pricing experiment in bulk power transactions among four nonaffiliated utilities). But see *Ocean State Power II*, 59 F.E.R.C. at 62,337-38 (approving market-based rates for sales by utility affiliated to parent companies based on evidence of "lack of affiliate abuse"); *Ocean State Power*, 44 F.E.R.C. at 61,981-84 (conditioning affirmance of market-based rates for sales from affiliate to parent companies upon showing of lack of abuse in self-dealing).

FERC has not absolutely ruled out the prospect of allowing market-based rates for sales between a utility and an affiliate, however. In *Edgar Electric Energy Co.*, FERC identified three

kets.⁹⁸ The former showing is necessary to demonstrate that the proposed rate for an affiliate transaction does not violate the FPA by being unduly preferential or discriminatory because of self-dealing,⁹⁹ and the latter showing is needed to prove that the proposed rate is just and reasonable.¹⁰⁰ Based on its past approach to requests for market-based pricing, FERC will likely proceed with a pricing rulemaking¹⁰¹ that will include, as a safe harbor requirement, acceptance of an open access transmission tariff by utilities and their affiliates.¹⁰²

factors that demonstrate a lack of affiliate abuse. *Edgar Elec. Energy Co.*, 55 F.E.R.C. at 62,168 & n.63. The first factor is whether the affiliate competed directly with a nonaffiliate in a formal solicitation or an informal negotiation process. *Id.* at 62,168. FERC weighed this factor in *Nevada Sun-Peak*, where it rejected a request for market-based rates in part because there was no bid. *Nevada Sun-Peak Ltd.*, 54 F.E.R.C. at 61,769. The second factor is whether the price is comparable to what nonaffiliated buyers in the relevant market are willing to pay for similar services. *Edgar Elec. Energy Co.*, 55 F.E.R.C. at 62,168-69. In *TECO Power Services*, FERC rejected the applicant's assertion that the requested rate was not unduly preferential in part because there had been no public offer to determine market value. *TECO Power Servs. Corp.*, 52 F.E.R.C. at 61,699. FERC also rejected the application in *Portland General Exchange* because the rate for the proposed sale to a utility affiliate was below fully allocated cost. *Portland Gen. Exch., Inc.*, 51 F.E.R.C. at 61,245. The third factor is whether a benchmark comparison demonstrates that the price and nonprice terms of the proposed affiliate transaction are comparable to those of sales by nonaffiliated sellers. *Edgar Elec. Energy Co.*, 55 F.E.R.C. at 62,169. In *Edgar Electric Energy Co.*, the applicant relied on this third approach, but FERC held that the evidence did not show that the rates requested were just and reasonable. *Id.* Although the application was rejected, FERC stressed that "our action today should not be interpreted as barring all affiliate transactions where market-based rates are requested" and similarly does not establish a rule barring affiliate transactions at market-based rates. *Id.* at 62,170-71. The agency proved to be as good as its word in *Ocean State Power II*, where it approved a request for market-based rates based on benchmark evidence of the market value of both price and nonprice terms of the proposed transaction. *Ocean State Power II*, 59 F.E.R.C. at 62,337-38 (relying on benchmark evidence to conclude there was no abuse of self-dealing).

98. See *infra* notes 119-26 and accompanying text (discussing market power test to electric generation and transmission).

99. 16 U.S.C. § 824d(b) (1988).

100. *Id.* § 824d(a).

101. See Martin L. Allday, Chairman of the Federal Energy Regulatory Commission, Prepared Remarks at the Edison Electric Institute (Nov. 4, 1991) (on file with *The American University Law Review*) (announcing that FERC intends to develop rulemaking on market-based pricing policy). According to Chairman Allday, "I think it's time to go beyond the case-by-case approach [to market-based pricing]. The industry needs generic guidance and the certainty that guidance brings. We're developing a [Notice of Proposed Rulemaking] to do just that." *Id.*

102. See *id.* (describing need for acceptance of transmission access tariff in FERC's approval of market-based rates proposed by utilities and their affiliates). According to Chairman Allday,

I propose that we offer APPs [affiliated power producers] and IOUs [investor-owned utilities] . . . at least one safe harbor. In my mind the best safe harbor, and the one that would most speed our review, would be an acceptable open access tariff. That tariff would have to cover at least the relevant part of the transmission system belonging to the APP, the IOU, or their affiliates.

Id.

1. *FERC has broad discretion to set rates for wholesale power sales and transmission services*

Historically, wholesale rates approved by FERC under FPA section 205 authority have been based on suppliers' costs of service.¹⁰³ The FPA does not limit FERC to cost-based methodologies, however, and the courts have deferred to the agency's reasoned choice regarding ratemaking methods.¹⁰⁴ For this reason, FERC has wide discretion to consider a variety of factors in determining whether a rate is just and reasonable. FERC has used this discretion to incorporate a "zone of reasonableness" standard¹⁰⁵ into its examination of market-based pricing proposals.¹⁰⁶

103. See *supra* note 8 (discussing principles of utility rate regulation).

104. See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314-15 (1989) (refusing to adopt constitutional standard for ratemaking because standard would unnecessarily foreclose alternatives that could benefit both consumers and investors); *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517-19 (1979) (reversing Fifth Circuit decision vacating FERC order because decision encroached on agency's broad ratemaking discretion); *FPC v. Texaco, Inc.*, 417 U.S. 380, 387-90 (1974) (recognizing wide discretion afforded FPC in rulemaking); *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 306-10 (1974) (noting that Court will only reverse FPC orders when orders' results are arbitrary); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (stating that courts lack authority to set aside rates that lie within "zone of reasonableness"); *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963) (rejecting challenges to ratemaking methodologies used by agency because "no single method need be followed by the Commission in considering the justness and reasonableness of rates"); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (declaring that FPC is not bound to use any single formula or combination of formulas to calculate rates); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (noting that FERC may establish any ratemaking methodology that assures rates fall within "zone of reasonableness" bounded by investors' interest against confiscation and consumers' interest against exorbitant rates); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1501-09 (D.C. Cir.) (recognizing broad discretion granted FERC but vacating order because order lacked reasoned basis), *cert. denied*, 469 U.S. 1034 (1984).

105. See *Jersey Cent. Power & Light Co.*, 810 F.2d at 1177 (stating that "zone of reasonableness" is "bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates") (quoting *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950)); *Farmers Union Cent. Exch.*, 734 F.2d at 1502 (holding that FERC may approve rates that fall within "zone of reasonableness" where rates are neither "less than compensatory" nor "excessive"); *City of Chicago v. FPC*, 458 F.2d 731, 750-51 (D.C. Cir. 1971) (affirming that rates must be high enough to attract investors but low enough to prevent exploitation of consumers), *cert. denied*, 405 U.S. 1074 (1972).

106. See *Entergy Servs., Inc.*, 58 F.E.R.C. ¶ 61,234, at 61,752-53 (1992) ("In previous instances in which it has granted market-based rates, the Commission has made an explicit determination that the rates fell within a zone of reasonableness."); *Dartmouth Power Assocs. Ltd. Partnership*, 53 F.E.R.C. ¶ 61,117, at 61,360 (1990) (affirming rate because it falls within legally mandated "zone of reasonableness"); *Enron Power Enter. Corp.*, 52 F.E.R.C. ¶ 61,193, at 61,709-10 (1990) (stating that FERC has authority to approve rates within "zone of reasonableness"); *Commonwealth Atl. Ltd. Partnership*, 51 F.E.R.C. ¶ 61,368, at 62,246-47 (1990) (maintaining that broad discretion afforded FERC permits it to accept rates within "zone of reasonableness"); *Public Serv. Co. of Ind.*, 51 F.E.R.C. ¶ 61,367, at 62,221-27 (declaring that rates within "zone of reasonableness" are "just and reasonable"), *modified sub nom.* *PSI Energy, Inc.*, 52 F.E.R.C. ¶ 61,260, *clarified*, 53 F.E.R.C. ¶ 61,131 (1990), *petition dismissed sub nom.* *Northern Ind. Pub. Serv. Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1992); *Chicago Energy Exch., Inc.*, 51 F.E.R.C. ¶ 61,054, at 61,112 (1990) (stating that market-based rate must fall within "zone of reasonableness" to meet FERC approval); *National Elec. Assocs. Ltd. Partnership*, 50 F.E.R.C. ¶ 61,378, at 62,156 (1990) (noting broad discretion enjoyed by FERC to accept rates that are within "zone of reasonableness"); *Doswell Ltd. Partnership*, 50

2. *Efforts to use ratemaking authority to order wheeling directly have been rejected by the courts*

In the wake of the Supreme Court's decision in *Otter Tail Power Co. v. United States*,¹⁰⁷ which held that the FPC lacked an explicit mandate under the FPA to order wheeling,¹⁰⁸ the agency and its successor attempted to wield ratemaking authority vested in it through the FPA to require wheeling. In *Richmond Power & Light v. FERC*,¹⁰⁹ an electric utility challenged rates proposed by the FPC for transmission service because the agency did not mandate wheeling.¹¹⁰ The utility argued that the FPC had authority under FPA sections 205 and 206 to condition approval of rates for wholesale power upon a utility's acceptance of transmission service obligations.¹¹¹ The U.S. Court of Appeals for the District of Columbia explicitly rejected this argument, declaring that FERC may not do indirectly that which it is prohibited from doing directly.¹¹² Other requests to mandate wheeling through FERC's power to approve rates have also been rebuffed,¹¹³ even in the wake of the enactment of PURPA.¹¹⁴

F.E.R.C. ¶ 61,251, at 61,756-57 (1990) (asserting that noncost-based rates fall within "zone of reasonableness" where applicant lacks or has mitigated market power); *Citizens Power & Light Corp.*, 48 F.E.R.C. ¶ 61,210, at 61,776-77 (1989) (noting that accepted proposed rates fall within "zone of reasonableness"); *Ocean State Power*, 44 F.E.R.C. ¶ 61,261, at 61,979 (1988) (stating that rates must fall within "zone of reasonableness" to satisfy just and reasonable standard); *Orange & Rockland Utils., Inc.*, 42 F.E.R.C. ¶ 61,012, at 61,028 (1988) (noting that ratemaking methodology must serve legitimate statutory purpose and produce rates that fall within "zone of reasonableness"); *Public Serv. Co. of N.M.*, 25 F.E.R.C. ¶ 61,469, at 62,060 (1983) (declaring that rates charged by utilities in pricing experiment are just and reasonable because they fall within "zone of acceptability").

107. 410 U.S. 366 (1973).

108. See *supra* notes 20-24 and accompanying text (reviewing legislative history of FPA and concluding Congress did not grant FPC authority to order wheeling).

109. 574 F.2d 610 (D.C. Cir. 1978).

110. *Richmond Power & Light v. FERC*, 574 F.2d 610, 614 (D.C. Cir. 1978).

111. *Id.* at 620.

112. See *id.* (denying petition to condition approval of wholesale rates upon acceptance of open access obligations because "[i]f Congress had intended that utilities could inadvertently bootstrap themselves into common-carrier status by filing rates for voluntary service, it would not have bothered to reject mandatory wheeling in favor of a call for just such voluntary wheeling").

113. See *Florida Power & Light Co. v. FERC*, 660 F.2d 668, 670 (5th Cir. 1981) (rejecting FERC order requiring electric utility to file wheeling tariff including offer to perform transmission service), *cert. denied*, 459 U.S. 1156 (1983). The court rejected FERC's order because it would have involuntarily imposed a duty to wheel on the utility:

The imposition of common carrier status on FP&L, which the orders at issue accomplish, is precisely the authority which the FPA denies the Commission. The legislative history of the FPA makes clear that the Commission lacks the authority to require electric utilities to provide wheeling even on a reasonable request. Accordingly, we conclude that the Commission lacked statutory authority to issue the orders in question.

Id. at 676. Significantly, the court cautioned that "the Commission must be especially careful not to overstep its authority and require the involuntary wheeling of electricity, absent compliance with the new §§ 211 and 212 of the FPA." *Id.* at 673.

114. See *New York State Elec. & Gas Corp. v. FERC*, 638 F.2d 388, 403 (2d Cir. 1980)

3. *Exercise of discretion in ratemaking authority as means to impose transmission access*

Blocked in its efforts to mandate wheeling through its ratemaking authority, FERC relied on pricing incentives to entice utilities to voluntarily provide transmission services.¹¹⁵ The initial application of FERC's section 205 authority to induce utilities to accept transmission access obligations via pricing incentives is *Public Service Co. of Indiana*,¹¹⁶ in which a utility agreed to provide wheeling on demand in return for market-based rates for large amounts of firm power.¹¹⁷ In essence, FERC has used the prospect of higher profits from market-based pricing to encourage utilities to voluntarily provide transmission access.¹¹⁸

a. *FERC separately measures market power in generation and transmission*

In *Doswell Ltd. Partnership*,¹¹⁹ FERC adopted a three-part test to measure whether an applicant for market-based rates has market power over generation or transmission.¹²⁰ The first consideration is

(vacating and remanding FERC wheeling order issued under §§ 205 and 206 of FPA to assure consistency with FPA §§ 211 and 212), *cert. denied*, 454 U.S. 821 (1981). FERC argued that the wheeling order did not compel wheeling because it merely modified and conditioned an extant voluntary transmission agreement between the parties. *Id.* at 400. The court held that the "effect of the Commission's order will be to increase beyond [New York State Electric & Gas Corp.'s (NYSEG)] voluntary commitment the amount of power NYSEG is required to wheel," and that an expansion of wheeling obligations could only be issued consistent with the requirements of §§ 211 and 212 of the FPA. *Id.* at 400-01.

115. See *Public Serv. Co. of N.M.*, 25 F.E.R.C. ¶ 61,469, at 62,029 (1983) (approving flexible pricing experiment for coordination services). FERC noted that pricing flexibility is the quid pro quo for provision of transmission services by utilities and is "something we have limited authority to require." *Id.* The utilities that participated in the experiment were permitted to retain 25% of the profits resulting from wholesale sales under the flexible pricing scheme. *Id.* FERC observed that "[b]ecause of the limitations on our power to compel wheeling, an experiment like this probably would be impossible without the[] [utilities'] voluntary agreement to make transmission services available." *Id.* at 62,062 n.3.

116. 51 F.E.R.C. ¶ 61,367, *modified sub nom.* *PSI Energy, Inc.*, 52 F.E.R.C. ¶ 61,260, *clarified*, 53 F.E.R.C. ¶ 61,131 (1990), *petition dismissed sub nom.* *Northern Ind. Pub. Serv. Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1992).

117. See *Public Serv. Co. of Ind.*, 51 F.E.R.C. ¶ 61,367, at 62,189-90 (citing utility's commitment to provide open-access firm transmission service), *modified sub nom.* *PSI Energy, Inc.*, 52 F.E.R.C. ¶ 61,260, *clarified*, 53 F.E.R.C. ¶ 61,131 (1990), *petition dismissed sub nom.* *Northern Ind. Pub. Serv. Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1992). The ruling held that if the utility failed to satisfy all requests for firm transmission service, FERC could suspend the market-based rate and order refunds. *Id.* at 62,196-98.

118. See *Pacific Gas & Elec. Co.*, 50 F.E.R.C. ¶ 61,339, at 62,002 (1990) (noting that proposed market-based rates exceed cost-based rates by 100%); *Public Serv. Co. of N.M.*, 25 F.E.R.C. at 62,029, 62,054-55 (allowing utilities to retain 25% of profits from market-based priced sales for shareholders).

119. 50 F.E.R.C. ¶ 61,251 (1990).

120. See *Doswell Ltd. Partnership*, 50 F.E.R.C. ¶ 61,251, at 61,757-58 (1990) (establishing three-part test to determine market power); see also *United Illuminating Co.*, 60 F.E.R.C. ¶ 61,214, at 61,734 (1992) (applying three-part test and approving request for market-based

whether the applicant directly or indirectly controls transmission facilities that it could use to prevent market access by competing suppliers.¹²¹ The second criterion examines whether the applicant is a "dominant firm in any generating market that might be relevant."¹²² The third element analyzes whether the applicant "controls resources that allow it to erect any other barrier to potential competing generation suppliers."¹²³ Under this test, a seller possesses market power when the seller can significantly influence price by excluding competitors from the market.¹²⁴ This three-part test is a departure from the earlier approach to determining market power that focused on whether viable alternative sources of electricity were available to purchasers.¹²⁵ FERC offered no reasoned basis, however, for departing from its earlier approach and adopting this new

rates); Entergy Servs., Inc., 59 F.E.R.C. ¶ 61,369, at 62,417 (1992) (stating that utility applicant must show it lacks or has mitigated market power and is unable to erect or control barriers to entry); Ocean State Power II, 59 F.E.R.C. ¶ 61,360, at 62,337-38 (1992) (approving market-based rate because there is no evidence that affiliates exercised market power or erected other barriers to entry); Entergy Servs., Inc., 58 F.E.R.C. ¶ 61,234, at 61,760 (1992) (concluding, through application of *Doswell* three-part test, that utility lacks market power); Boston Edison Co. Re: Edgar Elec. Energy Co., 55 F.E.R.C. ¶ 61,382, at 62,167 (1991) (holding that under *Doswell* test, seller must present specific evidence to prove that it lacks market power); Cleveland Elec. Illuminating Co., 55 F.E.R.C. ¶ 61,172, at 61,552 (1991) (finding that three elements of *Doswell* test must be established for seller to demonstrate that it lacks or has mitigated market power); Nevada Sun-Peak Ltd. Partnership, 54 F.E.R.C. ¶ 61,264, at 61,769 (listing elements necessary to prove that market power did not influence rates), *reh'g granted in part*, 55 F.E.R.C. ¶ 61,058 (1991); Pacific Gas & Elec. Co., 53 F.E.R.C. ¶ 61,145, at 61,501 (1990) (applying three-part test to weigh market power); Dartmouth Power Assocs. Ltd. Partnership, 53 F.E.R.C. ¶ 61,117, at 61,359 (1990) (holding that potential seller must meet three-part test in order to obtain market-based rates); Terra Comfort Corp., 52 F.E.R.C. ¶ 61,241, at 61,841 (1990) (setting forth factors examined by FERC to determine whether applicant has market power over generation or transmission); Enron Power Enter. Corp., 52 F.E.R.C. ¶ 61,193, at 61,708 (1990) (examining market power through specific evidence of seller's position and activities); Commonwealth Atl. Ltd. Partnership, 51 F.E.R.C. ¶ 61,368, at 62,244 (1990) (listing evidence seller may show to prove lack of market power).

121. *Doswell Ltd. Partnership*, 50 F.E.R.C. at 61,757.

122. *Id.* at 61,758.

123. *Id.*

124. *Id.*

125. See *Ocean State Power*, 44 F.E.R.C. ¶ 61,261, at 61,981-82 (1988) (stating that market power does not exist where seller cannot deny buyer access to alternative power supply options); *Pacific Gas & Elec. Co.*, 44 F.E.R.C. ¶ 61,010, at 61,050 (1988) (finding that market power exists where "alternative suppliers are not present for a prolonged period or additional transmission access is not provided"); *Orange & Rockland Utils., Inc.*, 42 F.E.R.C. ¶ 61,012, at 61,029 (1988) (stating that independent power producers lacked market power because they could not deprive utility of opportunity to obtain power from alternative sources); *Pacific Gas & Elec. Co.*, 42 F.E.R.C. ¶ 61,406, at 62,197 (holding that market power does not exist where there are alternative power sources or where applicant provides transmission access), *clarified*, 43 F.E.R.C. ¶ 61,403 (1988); *Pacific Gas & Elec. Co.*, 38 F.E.R.C. ¶ 61,242, at 61,795 (1987) (holding that market power is defined by lack of viable alternatives, which need not be alternative transmission services), *modified*, 47 F.E.R.C. ¶ 61,121 (1989), *modified*, 50 F.E.R.C. ¶ 61,339 (1990), *modified sub nom.* *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, *granting stay*, 55 F.E.R.C. ¶ 61,154, *reh'g granted in part*, 55 F.E.R.C. ¶ 61,495, *appeal filed*, No. 91-1404 (D.C. Cir. Aug. 26, 1991), *modified*, 59 F.E.R.C. ¶ 61,249 (1992).

market power test.¹²⁶

b. Market power test has been applied more rigidly to transmission than to generation

FERC's application of the market power test in the context of electric transmission has been quite rigid where utilities or their affiliates have sought market-based pricing. In fact, despite the agency's protests to the contrary,¹²⁷ the sole form of mitigation recognized by FERC in cases involving applicants possessing transmission market power has been the applicant's acceptance of a commitment to wheel on demand.¹²⁸ Where FERC found that a utility or utility affiliate having transmission market power failed to make an open access commitment, the agency rejected the

126. See *Doswell Ltd. Partnership*, 50 F.E.R.C. ¶ 61,251, at 61,757-58 (1990) (failing to state reasons for adopting new approach to measuring market power).

127. See *Entergy Servs., Inc.*, 59 F.E.R.C. ¶ 61,369, at 62,418 (1992) ("A utility does not have to have a systemwide open-access transmission tariff on file with the Commission in order to show that it lacked transmission market power in a particular transaction.").

128. "Wheeling on demand," or an "open access commitment," may encompass the entire transmission system of an applicant provided that the utility offers transmission access at cost-based rates. See *Entergy Servs., Inc.*, 58 F.E.R.C. ¶ 61,234, at 61,737, 61,753-54 (1992) (stating that utility may mitigate its market power in transmission by offering transmission access across its system at cost and on demand); *Public Serv. Co. of Ind.*, 51 F.E.R.C. ¶ 61,367, at 62,209, 62,226 (ruling that applicant mitigated its market power over transmission by offering long-term transmission access on demand), *modified sub nom.* *PSI Energy, Inc.*, 52 F.E.R.C. ¶ 61,260, at 61,968 (reducing term of open access commitment from 20 to 10 years), *clarified*, 53 F.E.R.C. ¶ 61,131 (1990), *petition dismissed sub nom.* *Northern Ind. Pub. Serv. Co. v. FERC*, 954 F.2d 736, 738-40 (D.C. Cir. 1992) (finding judicial review precluded because FERC had not yet authorized any open access transactions).

Alternatively, the open access commitment may be limited to specific transmission corridors that competitors are obliged to use, and need not extend to a utility's entire system. See *Pacific Gas & Elec. Co.*, 53 F.E.R.C. ¶ 61,145, at 61,503 (1990) (approving application for market-based rates for coordination and transmission services upon acceptance of utility's commitment to provide specified amount of transmission access); *Pacific Gas & Elec. Co.*, 44 F.E.R.C. ¶ 61,010, at 61,044, 61,049-51 (1988) (approving request for market-based rates upon acceptance of offer to provide transmission service for 206 megawatts); *Pacific Gas & Elec. Co.*, 42 F.E.R.C. ¶ 61,406, at 62,192, 62,196-97 (accepting market-based rates based on commitment to provide firm transmission service for 176 megawatts), *modified*, 43 F.E.R.C. ¶ 61,403 (1988).

FERC found that some utilities or utility affiliates that controlled transmission facilities lacked market power in transmission because the transmission systems they controlled were not in the relevant market. See *Cleveland Elec. Illuminating Co.*, 55 F.E.R.C. ¶ 61,172, at 61,553-54 (1991) (observing that transmission facilities owned and operated by applicant are located outside relevant market and so utility lacked market power); *Commonwealth Atl. Ltd. Partnership*, 51 F.E.R.C. ¶ 61,368, at 62,244 n.49 (1990) (noting that geographic remoteness of utility's transmission lines caused it to lack market power in transmission). Alternatively, utilities or their affiliates may lack market power because the purchasers have independent control over transmission resources. See *Portland Gen. Exch., Inc.*, 51 F.E.R.C. ¶ 61,108, at 61,251 (finding that utility applicant for market-based rate lacked market power in transmission because municipalities had access to transmission system), *clarified*, 51 F.E.R.C. ¶ 61,379, *enforced*, 53 F.E.R.C. ¶ 61,216 (1990); *Ocean State Power*, 44 F.E.R.C. at 61,982 (noting that applicant cannot control transmission by denying purchasers opportunity to obtain capacity from other sources, because purchasers are members of integrated power pool that guarantees them transmission access).

application.¹²⁹

Significantly, FERC has applied the market power test more strictly in cases involving control over transmission than in cases involving control over generation. While FERC has found that a significant generation presence in the relevant market does not necessarily constitute market power,¹³⁰ it has reached the opposite conclusion with respect to control of transmission facilities.¹³¹ In contrast to cases of market power in generation, the existence in transmission cases of alternative sources of supply does not warrant relaxation of rigid application of the market power test.¹³² That is,

129. See *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, at 61,319-20 (rejecting further extension of bulk power pricing experiment because utility applicants failed to mitigate market power in generation and transmission), *granting stay*, 55 F.E.R.C. ¶ 61,154, *reh'g granted in part*, 55 F.E.R.C. ¶ 61,495, at 62,713-14 (upholding portion of earlier decision finding that applicants failed to mitigate market power), *appeal filed*, No. 91-1404 (D.C. Cir. Aug. 26, 1991), *modified*, 59 F.E.R.C. ¶ 61,249 (1992); *Terra Comfort Corp.*, 52 F.E.R.C. ¶ 61,241, at 61,837-38, 61,842 (1990) (denying request for market-based rates because applicant did not demonstrate lack of market power in transmission and lack of potential for abuse in self-dealing); *TECO Power Servs. Corp.*, 52 F.E.R.C. ¶ 61,191, at 61,697 (1990) (rejecting request for market-based rates because applicant failed to mitigate market power over transmission and potential for abuse of self-dealing).

130. See *Pacific Gas & Elec. Co.*, 53 F.E.R.C. at 61,502 (noting that applicant is "not likely to be able to exercise market power" over buyer, despite possible control of 33% of excess generation capacity); *Public Serv. Co. of Ind.*, 51 F.E.R.C. at 62,204-05 (concluding that applicant lacks market power in generation because it controls less than 20% of total generation in relevant market).

131. See *Entergy Servs., Inc.*, 59 F.E.R.C. at 62,418 (dismissing "the mere existence of alternative [transmission] paths" and rejecting utility application for market-based rates); *Nevada Sun-Peak Ltd. Partnership*, 54 F.E.R.C. ¶ 61,264, at 61,770 (suggesting that market-based rates cannot be granted if applicant has any market power in transmission), *reh'g granted in part*, 55 F.E.R.C. ¶ 61,058, (1991) (finding that credit agreement provided no basis for review); *Terra Comfort Corp.*, 52 F.E.R.C. at 61,841-42 (holding that applicant having market power in transmission had failed to mitigate market power, despite existence of direct interconnections with six other utilities); *TECO Power Servs. Corp.*, 52 F.E.R.C. at 61,700 (concluding that applicant failed to mitigate market power in transmission because company could still foreclose access to some potential suppliers). One reason the threshold for demonstrating market power in transmission is higher than that for generation may be FERC's belief that control of transmission facilities provides greater opportunity for anticompetitive behavior than does control of generation facilities. See *Citizens Power & Light Corp.*, 48 F.E.R.C. ¶ 61,210, at 61,777 (1989) (asserting that "[t]he most likely route to market power in today's electric utility industry lies through ownership or control of transmission facilities").

132. See *Nevada Sun-Peak Ltd. Partnership*, 54 F.E.R.C. at 61,770 (refusing to aver that applicant lacks market power in transmission even though proposed generating plant is located entirely in service territory of buyer and buyer is directly interconnected with eight utilities other than parent company); *Terra Comfort Corp.*, 52 F.E.R.C. at 61,841-42 (holding that applicant having transmission control failed to demonstrate lack of market power or mitigation of market power despite buyers' direct interconnections with six alternative utilities); *TECO Power Servs. Corp.*, 52 F.E.R.C. at 61,700 (concluding that applicant failed to mitigate market power in transmission because it "could have foreclosed some potential suppliers" despite direct interconnections between buyer and other utilities).

In contrast, FERC has held that market power in generation does not exist when the buyer has alternative sources. See *Cleveland Elec. Illuminating Co.*, 55 F.E.R.C. ¶ 61,172, at 61,553 (1991) (finding that utility applicant for market-based rates lacked market power in generation because buyer had three alternative sources of power); *Portland Gen. Exch., Inc.*, 51 F.E.R.C. ¶ 61,108, at 61,249 (1990) (concluding that utility applicant for market-based rates lacked market power in generation because buyers had six alternative sources of supply); *Ocean*

while *some* control of generation does not constitute market power, *any* control over transmission facilities gives rise to market power. This strict approach represents a sea change from FERC's earlier attitude toward market power over transmission¹³³ and illustrates FERC's determination to wield its discretionary authority to compel acceptance of open access. Significantly, the FERC definition of market power in transmission defies the definition of market power used by the courts¹³⁴ and the U.S. Department of Justice¹³⁵ under antitrust law, which holds that market power only exists where a company controls a large market share. Moreover, the Antitrust Division of the U.S. Department of Justice disputes the FERC approach. It held that "[a] supplier does not have market power in the relevant market for delivered power to a particular purchaser if there are alternatives equally or better situated to supply that

State Power, 44 F.E.R.C. ¶ 61,261, at 61,981 (1988) (holding that affiliate applicant lacked market power in generation because buyer had 25 other options).

133. In *Pacific Gas & Electric*, FERC rejected an appeal for imposition of open access conditions in a pricing experiment specifically because there were viable alternative transmission paths. See *Pacific Gas & Elec. Co.*, 38 F.E.R.C. ¶ 61,242, at 61,795 (1987) (defining monopoly power as involving "lack of viable alternatives"), *modified*, 47 F.E.R.C. ¶ 61,121 (1989), *modified*, 50 F.E.R.C. ¶ 61,339 (1990), *modified sub nom.* *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, *granting stay*, 55 F.E.R.C. ¶ 61,154, *reh'g granted in part*, 55 F.E.R.C. ¶ 61,495, *appeal filed*, No. 91,1404 (D.C. Cir. Aug. 26, 1991), *modified*, 59 F.E.R.C. ¶ 61,249 (1992). FERC indicated that "many Participants would be able to receive transmission service from more than one transmission owner," and maintained that market power only existed when a transmission owner could foreclose all alternative sources of electricity. *Id.* at 61,791, 61,795.

134. The courts have defined market power as "the ability of a single seller to raise price and restrict output," *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969) (providing definition of market power under antitrust law), and held that "the existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2081 (1992) (defining market power on basis of market share). The courts have held that market power only exists where the seller controls a predominant share of the market. See, e.g., *Eastman Kodak Co.*, 112 S. Ct. at 2088 (holding that control of nearly 100% and between 80-95% of two related markets creates presumption of market power); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-27 (1984) (concluding that 90% market share does not establish market power); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578 (1966) (stating that control of 52% of market constitutes dominant market position); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 551-52 (1965) (holding that control of 24% of market may create market power under some circumstances); *United States v. Continental Can Co.*, 378 U.S. 441, 459-61 (1963) (concluding that 22% market share constitutes dominant market position); *United States v. Aluminum Co. of America*, 377 U.S. 271, 278 (1963) (stating that control of 38% of market sufficed to establish dominant market position); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 (1962) (finding that 30% market share presents threat of market dominance); *Times-Picayune v. United States*, 345 U.S. 594, 612-13 (1952) (concluding that control of 40% of market does not constitute market power); see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 518.3c (Supp. 1990) (stating that it would be rare that firm with only 25-50% of market could control price for any significant period without substantial cooperation from other firms).

135. See U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, *HORIZONTAL MERGER GUIDELINES* § 2.211 (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (establishing presumption that market power may exist when firm has 35% market share); U.S. DEP'T OF JUSTICE, *VERTICAL RESTRAINT GUIDELINES* § 5.3 (1985), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,105 (stating that market power does not exist where company controls less than 30% of market share).

purchaser."¹³⁶

Further, FERC has indicated that it views market power in transmission to be an overarching measure of market power. In *Entergy Services*,¹³⁷ FERC suggested, for the first time, that market power in generation may be excused through mitigation of market power in transmission.¹³⁸ Entergy controlled virtually all installed and excess generating capacity in certain markets¹³⁹ and dominated the bulk power market in most of the rest of its service area.¹⁴⁰ Yet, despite Entergy's unquestioned market power in generation, FERC refused to reject its rate request, insisting that the utility's open access plan ensured that potential buyers would have sufficient alternatives to Entergy to fill their energy needs.¹⁴¹

In effect, this result signalled FERC's abandonment of the *Doswell* three-part test¹⁴² in favor of the earlier test of market power, which focused on whether viable alternative energy sources were available.¹⁴³ This willingness to apply different market power tests in different circumstances suggests that FERC will select the test that permits it to expand open access, because use of the *Doswell* test in *Entergy Services* would have resulted in FERC's rejection of the rate request due to Entergy's market power in generation. When equipped with a vehicle to promote its goal of open access, however, FERC instead selected the market power test that permitted it to approve the utility's request. By concluding that Entergy may mitigate market power in generation through open access, FERC argua-

136. See Memorandum from Robert D. Willig, Deputy Assistant Attorney General, U.S. Department of Justice, & Margaret Guerin-Calvert, Assistant Chief, Economic Regulatory Section, Antitrust Division, U.S. Department of Justice, to Gene C. Schaerr, Associate Counsel to the President, Office of the White House 2 (July 11, 1991) (discussing definition of market power in assessing requests for market-based rates) (on file with *The American University Law Review*).

137. 58 F.E.R.C. ¶ 61,234 (1992).

138. See *Entergy Servs., Inc.*, 58 F.E.R.C. ¶ 61,234, at 61,758-60 (1992) (approving market-based rates for wholesale power sales and noting that "[w]ithout the proposed transmission tariffs, Entergy clearly dominates, or has some market power over, nearly three-quarters of the first-tier entities in the relevant geographic markets identified by the Commission as to both installed and excess capacity"). Yet, FERC concluded that Entergy was unlikely to possess market power because of the company's acceptance of a transmission tariff based on the tariff approved by the agency in *Public Service Co. of Indiana*. *Id.* at 61,759 & n.82.

139. See *id.* at 61,759 n.80 (calculating that Entergy controlled greater than 99% of installed and 98% of excess generating capacity in eight geographic areas in its service area).

140. See *id.* (revealing that Entergy controlled between 23-45% of installed generating capacity in eight other geographic areas and between 21-51% of excess capacity in 10 markets). Entergy's control of installed capacity dropped below 20% in three areas, and control of excess capacity was less than 15% in only one market. *Id.*

141. *Id.* at 61,759.

142. See *supra* notes 119-24 and accompanying text (outlining three-part test to measure whether applicant for market-based rates has market power).

143. See *supra* note 125 (reviewing market power test applied by FERC before three-part test was established in *Doswell*).

bly found application of the market test in transmission to be the truer test of market power.¹⁴⁴

c. Market power test in transmission has been tightened

Over time, FERC has tightened the market power test in transmission. While in early cases the agency suggested that transmission market power constituted the ability to prevent access to *all* competing suppliers,¹⁴⁵ the standard was raised in *Nevada Sun-Peak Ltd. Partnership*¹⁴⁶ to sanction utilities that do not "adequately mitigate[] any ability to block the buyer from reaching other sellers."¹⁴⁷ Some members of the Commission speculate that the real reason FERC rigidly applies the market power test in transmission is to compel acceptance of open access conditions by utilities.¹⁴⁸ It is quite clear

144. See *Entergy Servs., Inc.*, 58 F.E.R.C. ¶ 61,234, at 61,759 (1992) (holding that neighboring utilities will have alternative supply options as result of Entergy's adoption of transmission tariff based on open access).

145. See *Doswell Ltd. Partnership*, 50 F.E.R.C. ¶ 61,251, at 61,757 (1990) (stating that market power in transmission is ability to prevent buyers from reaching competing suppliers).

146. 54 F.E.R.C. ¶ 61,264, *reh'g granted in part*, 55 F.E.R.C. ¶ 61,058 (1991).

147. *Nevada Sun-Peak Ltd. Partnership*, 54 F.E.R.C. ¶ 61,264, at 61,769 (emphasis added) (redefining market power in transmission to mean ability to prevent access to any other potential sellers), *reh'g granted in part*, 55 F.E.R.C. ¶ 61,058 (1991). Commissioner Moler has expressed concern over the tightening of the standard for market power in transmission. See *id.* at 61,781 (Moler, Comm'r, dissenting) (asserting that redefined market power test will be "virtually impossible" because it requires seller to demonstrate that it has mitigated any ability to block buyer from reaching other sellers). FERC's adoption of the new test of market power in transmission constitutes a rejection of FERC's earlier definition of market power, employed to rule that market power does not exist where competitors "have access to the market and can supply more of their own service quickly enough to provide customers with an alternative." *Citizens Power & Light Corp.*, 48 F.E.R.C. ¶ 61,210, at 61,777 (1989) (maintaining that market power is ability to bar access of buyer to competing sellers).

148. See *Public Serv. Co. of Ind.*, 51 F.E.R.C. ¶ 61,367, at 62,233 (1990) (Trabandt, Comm'r, dissenting in part) ("[O]ur regulatory jurisdiction under sections 205 and 206 of the [FPA] give [sic] us neither authority to compel electric utilities to open (or close) their transmission systems, nor the power to 'improve the market.'"), *modified sub nom.* *PSI Energy, Inc.*, 52 F.E.R.C. ¶ 61,260, *clarified*, 52 F.E.R.C. ¶ 61,131 (1990), *petition dismissed sub nom.* *Northern Ind. Pub. Serv. Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1992); *Citizens Power & Light Co.*, 48 F.E.R.C. ¶ 61,210, at 61,783-84 (1989) (Trabandt, Comm'r, concurring) (suggesting that logical result of FERC's holding is requirement of open access transmission service as precondition for approval of market-based rates for sales by utilities and their affiliates). Commissioner Trabandt, dissenting in *Nevada Sun-Peak*, noted that "[o]ne might conclude that part of the fault with Sun-Peak lay not only with Nevada Power's procurement, but also with the failure of [Southern California Edison Company] to open its transmission to all comers." *Nevada Sun-Peak*, 54 F.E.R.C. at 61,777 (Trabandt, Comm'r, dissenting). *But see id.* at 61,782 (Langdon, Comm'r, concurring) (disavowing that order makes any findings with respect to transmission).

Commissioner Trabandt stated his concern even more bluntly in *Pacific Gas & Electric Co.*, 53 F.E.R.C. ¶ 61,145, at 61,497 (1990), where FERC conditioned approval of a utility's request for market-based rates on acceptance of open access transmission conditions:

Today the Commission strikes yet another blow for a more open transmission system. In the opinion of the majority, greater access remains a prerequisite for creating a more competitive market for electricity in the United States (or at least northern California). Those who believe that the slogan "open transmission access" will intensify from a drumbeat to a roaring thunder as it rolls down the landscape

that FERC intends to impose open access transmission service obligations as a quid pro quo for its approval of utilities' market-based rate requests for wholesale power sales.¹⁴⁹

d. FERC concedes open access cannot be imposed on utilities that lack any market power

In *United Illuminating Co.*,¹⁵⁰ the bounds of the transmission access policy developed in the market-based rate cases were established. Initially, FERC rejected the request for market-based rates by United Illuminating Co. on the grounds that the utility had failed to mitigate market power in transmission through submission of an open access tariff.¹⁵¹ Significantly, the U.S. Department of Justice intervened in the case and requested rehearing on the basis that "the Commission is simply without statutory authority to require open access as a quid pro quo for its approval of lawful competitive market-based rates" where the applicant lacked market power.¹⁵² The Justice Department maintained that United Illuminating cannot exercise market power because it had no ability to affect the price of bulk power.¹⁵³ On rehearing, FERC conceded that United Illuminating "did not have significant market power with respect to gener-

will, no doubt, find much to cheer in this order. . . . According to that school of thought, the Commission here, as it should, takes every opportunity to create the "Brave New World."

Id. at 61,509 (Trabandt, Comm'r, dissenting).

149. See Martin L. Allday, Chairman of the Federal Energy Regulatory Commission, Prepared Remarks at the DOE/NARUC Meeting (Sept. 30, 1991) (on file with *The American University Law Review*) (containing explicit statement that FERC will use open access transmission service obligations as express condition for approval of market rates). Chairman Allday's remarks are as follows:

The biggest hurdle in getting quick FERC approval [for market rates for wholesale power sales] is and will continue to be market power in transmission. Control of transmission lets sellers shut out competitors and can prevent buyers from getting to the lowest available cost supply source. . . . I believe we should presume [electric utilities] have mitigated market power—as long as they have an acceptable open access transmission tariff on file with the FERC. That tariff must cover at least those lines that the buyer might need to reach other suppliers.

Id.

150. Priv. Ltr. Rul. ER92-397-000 (F.E.R.C. July 2, 1992) (on file with *The American University Law Review*), *rev'd*, 60 F.E.R.C. ¶ 61,214, at 61,734 (1992).

151. See *United Illuminating Co.*, Priv. Ltr. Rul. ER92-397-000 (F.E.R.C. July 2, 1992) (rejecting application for market-based rates because utility had not filed open access tariff) (on file with *The American University Law Review*), *rev'd*, 60 F.E.R.C. ¶ 61,214, at 61,734 (1992) (approving request for market-based rates because applicant lacked significant market power).

152. See Request of the United States Department of Justice for Rehearing at 14-15, *United Illuminating Co.*, Priv. Ltr. Rul. ER92-397-000 (F.E.R.C. July 2, 1992) (requesting rehearing on grounds that FERC exceeded its authority in demanding open access commitment by utility that lacked market power).

153. See *id.* at 8-9 ("The July 2 Order fails to address the uncontroverted evidence in the applications that [United Illuminating] cannot exercise market power with respect to the transmission at issue . . . [because] it has no ability to affect the price of bulk power paid by UNITIL [Power Corp.]").

ation" and approved the rate request.¹⁵⁴ The *United Illuminating* case suggests that only those utilities that lack any indicia of market power in generation or transmission may obtain market-based rates without accepting open access obligations.

III. BEYOND THE PALE: TRANSMISSION ACCESS CONDITIONS IMPOSED BY FERC ARE INCONSISTENT WITH THE FEDERAL POWER ACT

FERC's aggressive promotion of competition came at the expense of its statutory responsibilities under the FPA and, indeed, ran counter to the public interest.¹⁵⁵ Before being amended by the Energy Policy Act of 1992,¹⁵⁶ the FPA charged FERC with a number of important duties beyond the promotion of competition. The open access conditions imposed by FERC through its merger and rate authority are inconsistent with its duty to promote energy conservation¹⁵⁷ and efficiency,¹⁵⁸ to protect the interests of native load customers,¹⁵⁹ to observe limitations on mandated wheeling that allow for coordination services,¹⁶⁰ and to assure reliability of electric

154. See *United Illuminating Co.*, 60 F.E.R.C. at 61,734 (accepting market-based rates because applicant lacked market power). In its rehearing order, FERC conceded that United Illuminating's small transmission system is completely encircled by the system of a larger neighboring utility. *Id.*

155. FERC does not have unfettered discretion under the FPA to promote public welfare, but is bound by the constraints in its enabling statutes. *NAACP v. FPC*, 425 U.S. 662, 699-71 (1976) (rejecting petition for FPC rulemaking to prohibit discriminatory employment practices because discouragement of discrimination is not policy goal incorporated in FPA). The Supreme Court observed in *NAACP v. FPC* that "the use of the words 'public interest' in a regulatory statute is not a license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." *Id.* at 669. Cf. *American Paper Inst. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 404, 417 (1983) (holding that FERC did not act arbitrarily or capriciously in promulgating rule that "requires electric utilities to purchase electric energy from cogenerators and small producers at a rate equal to the purchasing utilit[ies] fully avoided cost"); *FERC v. Mississippi*, 456 U.S. 742, 749-50 (1982) (rejecting challenge to FERC regulations promulgated under PURPA because FERC has jurisdiction over interstate electric sales and regulations were consistent with basic purpose of PURPA).

156. Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 721-722, 106 Stat. 2776, 2915-19 (to be codified at 16 U.S.C. §§ 824j-824k) (amending §§ 211-212 of FPA).

157. 16 U.S.C. §§ 824a(a), 2611(1) (1988).

158. *Id.* §§ 824a(a), 2611(2).

159. *Id.* § 824k(a)(1). This subsection was deleted by the Energy Policy Act. Energy Policy Act of 1992, § 722(1), 106 Stat. at 2916 (amending § 212 of FPA). The interests of native load customers, however, are protected by the transmission pricing provisions of the Energy Policy Act. *Id.*; see *infra* notes 231-45 and accompanying text (discussing transmission pricing provisions of revised § 212 of FPA).

160. See 16 U.S.C. § 824k(a)(1)-(4) (obligating FERC to demonstrate that wheeling order will not unduly burden utility). Such requirements implicitly constitute a limit on mandated wheeling that encourages voluntary coordination. One court, in construing the requirements that FERC must meet before issuing a wheeling order, noted that even when all prerequisites for the issuance of a mandatory wheeling order are met, "the Commission is instructed to issue a *proposed* order so as to allow the parties themselves an opportunity to agree on terms and conditions." *New York Elec. & Gas Corp. v. FERC*, 638 F.2d 388, 402 (2d Cir. 1980).

service.¹⁶¹

In *Northern Indiana Public Service Co. v. FERC*,¹⁶² a utility petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review the rate order that FERC issued in *Public Service Co. of Indiana*,¹⁶³ on the ground that the wheeling requirements in the order imposed costs on the petitioner's native load customers and degraded reliability.¹⁶⁴ The court did not resolve this issue, however, concluding instead that the claims in the petition were not yet ripe for judicial review¹⁶⁵ and that the utility retained the right to challenge individual transmission service agreements in the future.¹⁶⁶

FERC's single-minded pursuit of a mandatory transmission access policy has caused it to ignore its implicit obligation under the FPA to promote voluntary provision of transmission services.¹⁶⁷ FERC's omission became particularly clear in *Western Systems Power Pool*,¹⁶⁸ where the agency's insistence on imposing transmission access conditions drove the applicants to withdraw their voluntary commitment to provide transmission services.¹⁶⁹ Ironically, Western

Subsection (a) was deleted by the Energy Policy Act. Energy Policy Act of 1992, § 722(1), 106 Stat. at 2916 (amending § 212 of FPA).

161. 16 U.S.C. §§ 824j(a)(2)(C), 824k(a)(3) (1988). These subsections were deleted by the Energy Policy Act. Energy Policy Act of 1992, §§ 721-722, 106 Stat. at 2915-19.

162. 954 F.2d 736 (D.C. Cir. 1992).

163. 51 F.E.R.C. ¶ 61,367, *modified sub nom.* PSI Energy, Inc., 52 F.E.R.C. ¶ 61,260, *clarified*, 53 F.E.R.C. ¶ 61,131 (1990), *petition dismissed sub nom.* Northern Ind. Pub. Serv. Co. v. FERC, 954 F.2d 736, 740 (D.C. Cir. 1992).

164. *Northern Ind. Pub. Serv. Co. v. FERC*, 954 F.2d 736, 737 (D.C. Cir. 1992) (reviewing basis of challenge by utility to wheeling conditions in *Public Service Co. of Indiana* rate order). Reliability is "[t]he ongoing ability of a power system to avoid outages and continue to supply electricity with the appropriate frequency and voltage to customers." See OTA, *WHEELING AND DEALING*, *supra* note 14, at 264 (defining reliability of electric power systems); see also KELLY ET AL., *supra* note 54, at 266 (defining reliability as "[t]he degree of assuredness with which the utility provides uninterrupted service to customers").

165. *Northern Ind. Pub. Serv. Co.*, 954 F.2d at 738-40.

166. *Id.* at 740.

167. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973) ("Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."); S. REP. NO. 621, 74th Cong., 1st Sess. 19 (1935) (indicating that imposition of duty on public utility to transmit energy is not preferable to voluntary coordination of electric facilities). In *Northeast Utilities*, FERC seemed to concede that a voluntary commitment by the applicants would result in increased wheeling, yet the agency rejected the voluntary offer made by Northeast Utilities. *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,012 (finding that utility's voluntary commitments did not adequately mitigate anticompetitive effects of proposed merger), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

168. 55 F.E.R.C. ¶ 61,099, *granting stay*, 55 F.E.R.C. ¶ 61,154, *modified*, 55 F.E.R.C. ¶ 61,495 (1991).

169. See *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, at 61,302-03 (describing voluntary commitment by applicants to provide transmission service to eligible utilities), *granting stay*, 55 F.E.R.C. ¶ 61,154, *reh'g granted in part*, 55 F.E.R.C. ¶ 61,495, at 62,715 (accepting withdrawal of applicants' voluntary commitment to provide transmission services), *appeal filed*, No. 91-1404 (D.C. Cir. Aug. 26, 1991), *modified* 59 F.E.R.C. ¶ 61,249 (1992). The applicants had agreed to implement long-term firm transmission service principles, called the "Exhibit C

Systems' voluntary commitment comprised the most innovative and promising transmission proposal put forward by utilities to date.¹⁷⁰

A. Transmission Access Conditions Imposed by FERC Subordinate Duty To Promote Conservation and Efficiency

1. FERC has a duty to promote conservation and efficiency

The FPA and PURPA charge FERC with promoting energy efficiency and conservation.¹⁷¹ This duty extends to the agency's limited grant of authority to order wheeling, because a wheeling order could only issue if it would "conserve a significant amount of energy"¹⁷² and "significantly promote the efficient use of facilities and

principles," *id.* at 61,302-03, but FERC chose to reject this voluntary commitment. *Id.* at 61,317-19. FERC found insufficient evidence to prove that under the agreement market power would be adequately distributed among the participants. *Id.* at 61,319. After listing its market power-related objections to the arrangement, FERC rejected the agreement without considering the possibility of further improvements in the proposal. *See id.* at 61,320 ("The . . . exhibit C principles represent the strongest transmission commitment that the transmission owners were willing to make. Therefore, we see little benefit in conditioning our approval on modifications . . ."). In dissent, Commissioner Trabandt pointed out that the majority had expressed only two valid concerns, both of which could be adequately addressed through modifications to the agreement. *Id.* at 61,338 (Trabandt, Comm'r, dissenting). FERC's review of the Exhibit C principles should have been based on a determination of whether they would result in *any increase* in wheeling, not whether the brand of transmission access championed by FERC would result in even more wheeling. As a result of FERC's refusal to compromise, the participants in the Western Systems Power Pool withdrew their voluntary commitment to provide transmission services. *Id.* at 62,715. Commissioner Trabandt expressed dismay over the lost opportunity to encourage voluntary wheeling:

[T]he majority, in rejecting [Western Systems Power Pool's offer], has seriously set back genuine progress in the name of ideological purity. Most glaring, as a result of imposing cost-based rates, the Commission must now agree to WSPP cancelling its transmission commitments. Even if WSPP could have done better (I agree they did the best they could), all must admit they represented a large concession by utilities toward voluntarily opening their systems. . . .

Moreover, today's decision in an immediate sense makes the generation market less competitive. . . .

. . . [The Commission] lets pass, and perhaps pushes away, the moment to encourage a more competitive electric industry.

Id. at 62,721-22 (Trabandt, Comm'r, dissenting).

170. *Cf. id.* at 62,721 (Trabandt, Comm'r, dissenting) (expressing view that Western Systems' voluntary commitment would make great strides toward serving public interest by facilitating purchase of cheaper electricity by consumers).

171. 16 U.S.C. § 824a(a) (1988) (charging FERC with responsibility of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources"). FERC has a similar duty to promote efficiency under PURPA. *See id.* § 2611(1)-(2). The U.S. Court of Appeals for the District of Columbia Circuit has held that FERC is charged with effecting electric generation "at the lowest possible cost to the consumer in the long run—in the economist's terms, to insure the efficient performance of an industry in which the normal forces of competition are for one reason or another not equal to the task." *NAACP v. FPC*, 520 F.2d 432, 440 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976). *See generally* *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 959 (D.C. Cir. 1968) (stating that basic goal of government regulation is to "achieve the most efficient allocation of resources possible").

172. 16 U.S.C. § 824j(a)(2)(A) (1988). This subsection was deleted by the Energy Policy

resources."¹⁷³ By contrast, until enactment of the Energy Policy Act of 1992, Congress did not authorize FERC to order wheeling in order to promote competition.¹⁷⁴

2. *Encouraging economy transactions is wholly consistent with FERC's duty to promote efficiency*

FERC remained well within FPA statutory authority when it approved several experiments in the 1980s regarding market-based pricing for wholesale power sales.¹⁷⁵ The experiments were designed to enhance energy efficiency through promotion of economy transactions.¹⁷⁶ Economy transactions, also termed economy transfers, are short-term purchases that are made by utilities because the cost of purchased power is less than that of self-generated power.¹⁷⁷ FERC correctly equates the promotion of economy trans-

Act. Energy Policy Act of 1992, Pub. L. No. 102-486, § 721(2), 106 Stat. 2776, 2915 (to be codified at 16 U.S.C. § 824j) (amending § 211 of FPA).

173. 16 U.S.C. § 824j(a)(2)(B). This subsection was deleted by the Energy Policy Act. Energy Policy Act of 1992, § 721(2), 106 Stat. at 2915 (amending § 211 of FPA).

174. See *Southeastern Power Admin. v. Kentucky Utils. Co.*, 25 F.E.R.C. ¶ 61,204, at 61,534 (1983) (examining legislative history of FPA §§ 211 and 212 and concluding that "the essential compromise [in the Conference Committee Report regarding the FPA] was that the House prevailed on having a wheeling provision in the bill to conserve energy while the Senate prevailed on not using wheeling to increase competition"); H.R. CONF. REP. No. 1750, 95th Cong., 2d Sess. 92 (1978), reprinted in 1978 U.S.C.C.A.N. 7797, 7826 ("The conferees do not intend that the Commission order wheeling which significantly alters the competitive relationship among utilities in competition with one another for the same customers."). Congressional intent to deny FERC authority to mandate wheeling in order to promote competition in bulk power markets is made plain in a reading of § 211(c)(1) of the FPA. Section 211(c)(1) of the FPA clearly stated that "[n]o order may be issued by the Commission under subsection (a) of this section unless the Commission determines that such order would reasonably preserve existing competitive relationships." 16 U.S.C. § 824j(c)(1) (1988). This subsection was deleted by the Energy Policy Act. Energy Policy Act of 1992, § 721(4)(A), 106 Stat. at 2915 (amending § 211 of FPA). One of the reasons Congress enacted the Energy Policy Act and expanded FERC authority to order wheeling was to spur competition in wholesale power sales among utilities and between utilities and nonutilities. See *infra* note 220 and accompanying text (discussing Congressional intent in enacting Energy Policy Act).

175. See *Pacific Gas & Elec. Co.*, 38 F.E.R.C. ¶ 61,242, at 61,789 (1987) (accepting proposed experiment in flexible pricing for wholesale power sales and transmission because experiment is consistent with FERC's FPA-imposed duty to encourage efficiency), modified, 47 F.E.R.C. ¶ 61,121 (1989), modified, 50 F.E.R.C. ¶ 61,339 (1990), modified *sub nom.* *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, at 61,315-19 (rejecting flexible pricing for bulk power because applicant had failed to mitigate market power in generation and transmission), *granting stay*, 55 F.E.R.C. ¶ 61,154, *rel'g granted in part*, 55 F.E.R.C. ¶ 61,495, at 62,713-15 (reasserting prior rejection of flexible pricing experiment), *appeal filed*, No. 91-1404 (D.C. Cir. Aug. 26, 1991), modified, 59 F.E.R.C. ¶ 61,249 (1992); *Public Serv. Co. of N.M.*, 25 F.E.R.C. ¶ 61,469, at 62,032-33 (1983) (approving experiment in flexible pricing for coordination services because of potential for furthering FPA goal of promoting efficiency).

176. See *Pacific Gas & Elec. Co.*, 38 F.E.R.C. at 61,789 (noting that purchasing electricity from other utilities is factor in achieving efficiency); *Public Serv. Co. of N.M.*, 25 F.E.R.C. at 62,033 (emphasizing that trading of coordination services promotes efficiency through more effective allocation of resources and lower costs).

177. See OTA, *WHEELING AND DEALING*, *supra* note 14, at 263 (defining economy transfers).

actions and coordination services with its statutory duty to encourage efficiency.¹⁷⁸ FERC is also statutorily obliged to encourage greater levels of voluntary coordination among electric utilities,¹⁷⁹ and the agency has recognized the relationship between this duty and its responsibility to promote efficiency.¹⁸⁰ Yet, the priority accorded firm transmission over nonfirm wheeling has the effect of discouraging coordination services because such services are allocated the lowest priority among competing uses of the system.

3. *Transmission access conditions imposed by FERC subordinate economy transactions to firm wheeling*

Although FERC has recognized that its duty to promote efficiency coincides with the encouragement of economy transactions, the effect of its open access policy is to subordinate economy trades to firm transmission.¹⁸¹ Moreover, FERC has demonstrated a marked preference for commitments to long terms of transmission service. While economy transactions take place with terms as short as hours,¹⁸² FERC has imposed terms of service of up to twenty years.¹⁸³ FERC's subordination of economy transactions to firm third-party wheeling may compel utilities with constrained transmission systems to abandon economy transactions and thus forfeit efficiency gains.

178. See *Pacific Gas & Elec. Co.*, 38 F.E.R.C. at 61,789 (asserting that "rational regulatory policy" requires encouraging utilities to engage in bulk power trades that coordinate resources and thus lead to efficiency gains).

179. See 16 U.S.C. § 824a(a) (1988) (dividing U.S. into regional districts to promote voluntary interconnection and coordination of electric generation and transmission facilities).

180. See *supra* notes 175-76, 178 and accompanying text (noting FERC's encouragement of economy transfers to promote efficiency).

181. FERC has expressly subordinated economy transactions to firm wheeling on behalf of third parties. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,020 ("[F]irm transmission service should be accorded priority over non-firm service, even if the latter would otherwise benefit native load customers."), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992); *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095, at 61,294 ("[T]he merged company's obligation to serve shall include a requirement that the merged company reduce its own off-system transactions to the extent necessary to meet all requests for [firm] transmission service by electric utilities."), *clarified*, 45 F.E.R.C. ¶ 61,132, *reh'g granted*, 45 F.E.R.C. ¶ 61,500 (1988), *reh'g granted in part*, 47 F.E.R.C. ¶ 61,209 (1989), *enforced*, 51 F.E.R.C. ¶ 61,295 (1990), *remanded on other grounds sub nom. Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991).

182. See KELLY ET AL., *supra* note 54, at 288 (noting that term of short-term transaction may be as short as one day).

183. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,034 (requiring utility to offer transmission service for 20 years or for term of power supply contract, whichever is longer); *Public Serv. Co. of Ind.*, 51 F.E.R.C. ¶ 61,367, at 62,193-94 (approving 20-year term for transmission service), *modified sub nom. PSI Energy, Inc.*, 52 F.E.R.C. ¶ 61,260, at 61,968 (reducing term for transmission service from 20 to 10 years), *clarified*, 53 F.E.R.C. ¶ 61,131 (1990), *petition dismissed sub nom. Northern Ind. Pub. Serv. Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1992).

B. Transmission Access Conditions Fail to Protect Native Load Customers

1. Federal Power Act protects native load customers from economic harm attributable to wheeling

Section 212(a)(1) and (a)(2) of the FPA provided that FERC could not issue a wheeling order unless it determined that such an order was (1) "not likely to result in a reasonably ascertainable uncompensated economic loss of any electric utility"¹⁸⁴ or would (2) "not place an undue burden on an electric utility."¹⁸⁵ Given this responsibility, concrete determinations that an order would not impose economic losses or undue burdens on the native load customers of a wheeling utility should have motivated FERC's decisions, rather than hope for the uncertain benefits deriving from rising competition in bulk power markets.

2. Refusal to permit full recovery of forgone benefits imposes economic burdens on native load customers

FERC recognizes that a transmitting utility incurs opportunity costs in the form of forgone revenues when the utility alters its transmission system use to serve third-party requests for wheeling.¹⁸⁶ Under the policies established in its *Northeast Utilities* rehearing order,¹⁸⁷ FERC will permit recovery of opportunity costs in certain circumstances. FERC embraced the "Staff's Proposed Transmission Pricing Proposal"¹⁸⁸ that acknowledged third-party wheeling may impose increased costs on native load customers¹⁸⁹

184. 16 U.S.C. § 824k(a)(1) (1988). This subsection was deleted by the Energy Policy Act of 1992, Pub. L. No. 102-486, § 722(1), 106 Stat. 2776, 2916 (to be codified at 16 U.S.C. § 824k) (amending § 212 of FPA).

185. 16 U.S.C. § 824k(a)(2) (1988). This subsection was deleted by the Energy Policy Act of 1992, § 722(1), 106 Stat. at 2916 (amending § 212 of FPA).

186. See *Pennsylvania Elec. Co.*, 58 F.E.R.C. ¶ 61,278, at 61,871 (1992) (noting that utility may be precluded from engaging in economy sales or purchases due to wheeling activity for third party); *Northeast Utils. Serv. Co.*, 58 F.E.R.C. ¶ 61,070, at 61,200-01 ("Opportunity costs . . . are the revenues lost or costs incurred by a utility in providing third-party transmission service when transmission capacity is insufficient to satisfy both a third-party wheeling request and the utility's own use."), *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992). One type of opportunity cost is forgone economy transactions. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. at 61,201 (noting that utility might incur costs or lose profits by limiting its own off-system purchases or sales during times of increased electricity demand).

187. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. at 61,203 (establishing broad pricing goals that tentatively allow transmitting utility to recover forgone benefits). FERC applied these pricing goals subsequent to *Northeast Utilities*. *Pennsylvania Elec. Co.*, 58 F.E.R.C. at 61,873.

188. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. at 61,203 (finding that pricing goals in "Staff's Proposed Transmission Pricing Proposal" are "fully consistent with our statutory responsibility"). The agency staff developed the pricing proposal, *Northeast Utils. Serv. Co.*, 57 F.E.R.C. ¶ 61,340, at 62,102-05 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, in preparation for the rehearing order in *Northeast Utils. Serv. Co.*, 58 F.E.R.C. ¶ 61,070, at 61,203, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

189. See *Northeast Utils. Serv. Co.*, 57 F.E.R.C. at 62,103 ("When a utility commits a portion

and concluded that the transmitting utility should recover these forgone benefits.¹⁹⁰

Limits are placed on the recovery of forgone benefits under pricing goals adopted by FERC, however. The staff pricing proposal accepted by the agency in *Northeast Utilities* established three goals that will govern transmission pricing:¹⁹¹ (1) "native load customers of the utility providing transmission service should be held harmless"; (2) "transmission customers should be charged the lowest reasonable cost-based rate for third-party firm transmission service"; and (3) "pricing should prevent the collection of monopoly rents."¹⁹² FERC maintains that it will determine transmission rates through a "balance" of these pricing goals, in light of the facts and circumstances existing at the time.¹⁹³

Clearly, there is tension between the first and second pricing goals. The goal of charging third-party wheeling customers the "lowest reasonable cost-based rate" conflicts with that of holding native load customers harmless.¹⁹⁴ Since *Northeast Utilities*, FERC has ordered the lowering of transmission rates designed to hold native load customers harmless, on the ground that the rates are not consistent with the goal of charging the lowest reasonable rate for transmission service.¹⁹⁵ Because transmission rates will be based on a balance of these contradictory goals, there is no assurance that native load customers will be "held harmless." On the contrary,

of its existing transmission system to provide wheeling service to third parties and due to a lack of capacity availability its system becomes constrained[,] the cost of providing service to its native load customers may be increased.").

190. See *id.* (offering opportunity cost pricing as way to compensate utility's native load customers for lost opportunities to engage in economy transactions). In the rehearing order, FERC embraced the principle of opportunity cost recovery. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. at 61,203 (expressing disbelief that utility's market power over transmission would be mitigated by rates that do not fully compensate utility for legitimate and verifiable transmission service costs).

191. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. ¶ 61,070, at 61,203 (establishing transmission pricing goals), *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

192. *Id.*

193. *Id.*

194. See *Pennsylvania Elec. Co.*, 58 F.E.R.C. ¶ 61,278, at 61,872 (1992) (noting disapproval of utilities' proposal to fully recover savings of lost economy transfers and suggesting that pricing goals established in *Northeast Utilities* preclude full recovery of opportunity costs, because full recovery would contravene goal of charging lowest reasonable transmission rates).

195. See *Pennsylvania Elec. Co.*, 58 F.E.R.C. at 61,873 (ordering reduction in transmission rates in order to achieve lowest reasonable rate for firm transmission service). FERC conceded that the transmission rate, jointly submitted by the parties in the case, was designed to protect native load customers by holding those customers harmless. See *id.* (finding utility's goal of ensuring that customers receive same service, priced as if no wheeling occurred, to be consistent with first pricing goal of holding native load customers harmless). Yet, FERC ordered the rate reduced because it "conflict[ed] with the second goal of charging the lowest reasonable rate for firm, third-party transmission service." *Id.*

FERC has stated that it will reject transmission rates that are based solely on the principle of holding native load customers harmless for the cost of providing third-party wheeling.¹⁹⁶ For this reason, it follows that the only native load interest expressly protected by FERC is reliability, not cost.

FERC recognizes that denial of full recovery of opportunity costs where transmission systems are constrained provides utilities an economic incentive to expand their systems. The staff pricing proposal relied on incomplete recovery of forgone benefits incurred through third-party wheeling to provide utilities an economic incentive to expand their transmission systems.¹⁹⁷ This objective also led FERC to cap recovery of forgone benefits subsequent to *Northeast Utilities*.¹⁹⁸ In effect, FERC is using the threat of shifting the cost of providing third-party wheeling onto native load customers as a club to encourage expansion of transmission systems.¹⁹⁹

To be sure, FERC's decision to permit any recovery of opportunity costs incurred through third-party wheeling marks a major departure from previous policy.²⁰⁰ This policy reversal may have more

196. See *Northeast Utils. Serv. Co.*, 59 F.E.R.C. ¶ 61,089, at 61,162 (1992) (rejecting request for rehearing of opportunity cost pricing policy because transmission rates "will be approved only if they properly reflect all three transmission pricing goals, not just the principle of holding native load customers harmless").

197. See *Northeast Utils. Serv. Co.*, 57 F.E.R.C. ¶ 61,340, at 62,104 (1991) (noting that cap on recovery of opportunity costs at incremental cost of system expansion provides "an economic incentive for the utility to expand its transmission system to recover additional revenue"), modified, 58 F.E.R.C. ¶ 61,070, reh'g dismissed as moot, 58 F.E.R.C. ¶ 61,089 (1992). FERC supported such a cap despite the fact that the pricing proposal acknowledged that "[l]egitimate opportunity costs occur only when . . . there is insufficient transmission capacity to accommodate" both native load and third-party wheeling. *Id.* at 62,103. Interestingly, FERC masked its views on capping recovery of opportunity costs but hinted that this was an issue that would be raised during consideration of future filings by *Northeast Utilities*. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. at 61,203 (specifying issues *Northeast Utilities* should address if it files proposal to recover opportunity costs, including whether opportunity costs should be capped by incremental expansion costs, whether current wheeling customers should be treated differently from future customers, and how third parties can be protected from fluctuations in opportunity costs).

198. See *Pennsylvania Elec. Co.*, 58 F.E.R.C. at 61,874 (capping recovery of opportunity costs at estimated or actual expansion costs and explaining that "we find the cap appropriate . . . because it provides an incentive for the utility to expand its system when it is efficient to do so").

199. See *Pennsylvania Elec. Co.*, 58 F.E.R.C. ¶ 61,278, at 61,874 (1982) (warning that failure to build additional transmission capacity will lead to inability to recover opportunity costs and will subject native load customers to harm).

200. See *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095, at 61,290 (finding opportunity cost recovery proposal proffered by applicants to be "overly vague and possibly unworkable" in that it could allow merged company to "collect monopoly rents associated with a scarce or constrained resource"), clarified, 45 F.E.R.C. ¶ 61,132, reh'g granted, 45 F.E.R.C. ¶ 61,500 (1988), reh'g granted in part, 47 F.E.R.C. ¶ 61,209 (1989), enforced, 51 F.E.R.C. ¶ 61,295 (1990), remanded on other grounds sub nom. *Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991). Although the administrative law judge in *Northeast Utilities* had indicated support for recovery of forgone benefits, *Northeast Utils. Serv. Co.*, 53 F.E.R.C. ¶ 63,020, at 65,221 (rejecting intervenor requests that recovery of "lost opportunity charges" be precluded), mod-

to do with the agency's zeal to promote transmission access than a desire to protect native load customers, however. FERC only changed its policy on recovery of opportunity costs after it became apparent that state regulators would disapprove the Northeast Utilities proposed merger, which would have denied the agency a prominent vehicle for development of its open access policy.²⁰¹ The desire to promote its transmission access policy may also have persuaded FERC to dissemble on whether it would cap recovery of opportunity costs.²⁰²

FERC's true purpose in denying or capping opportunity cost recovery seems to lie in a desire to spur state public utility commissions to approve expansions of transmission systems.²⁰³ FERC's imposition of an absolute duty to provide transmission service, combined with its refusal to permit full recovery of forgone benefits from third-party wheeling, provides a powerful incentive for state public utility commissions to approve expansions of transmission systems. Otherwise, significant economic costs will accrue to the customers of a transmitting utility. State regulators recognized this as an intrusion into their realm of transmission siting and construc-

ified, 56 F.E.R.C. ¶ 61,269, *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992), FERC deferred its decision on whether to allow recovery of opportunity costs partly because there was no specific proposal submitted by the applicant in the case. *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,028.

201. See Request of the Connecticut Department of Public Utility Control for Rehearing at 3, *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269 (1991) (threatening to disapprove pending merger because failure to permit recovery of forgone benefits would expose native load customers to "undue economic disadvantage"). One of the demands made by the state regulators was that Northeast Utilities be permitted to recover forgone benefits. *Id.* at 4-5.

202. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. ¶ 61,070, at 61,203 (promising to reconsider capping recovery of opportunity costs at incremental expansion costs upon refiling by Northeast Utilities), *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992). The FERC Staff's Proposed Transmission Pricing Proposal explicitly provided for capping recovery of opportunity costs, however. See *Northeast Utils. Serv. Co.*, 57 F.E.R.C. ¶ 61,340, at 62,105 (1991) (noting that capping recovery of opportunity costs at incremental costs of expanding system "provides an incentive to add capacity when it is economically efficient to do so"), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

203. FERC had earlier rejected recovery of opportunity costs for wheeling out of concern that recovery of these costs by the transmitting utility would eliminate the incentive to expand transmission capacity. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,027 (observing that recovery of forgone benefits would provide no incentive to Northeast Utilities to upgrade its transmission system); *Utah Power & Light Co.*, 45 F.E.R.C. at 61,290 (conceding that opportunity cost pricing for transmission services may "provide a useful measure of the value of scarce transmission resources," but would provide transmitting utility "no incentive to alleviate the congestion"). FERC's denial of recovery of forgone benefits would encourage state regulators to approve expansion of transmission siting where utilities could otherwise recover these costs from state regulators under cost-of-service rate regulation.

tion,²⁰⁴ an area where FERC has no authority,²⁰⁵ and accordingly sought rehearing of the *Northeast Utilities* order.²⁰⁶

C. Transmission Access Conditions Will Impair Reliability

Under the FPA, FERC cannot issue a wheeling order that would impair the reliability of the utility systems affected by the order.²⁰⁷ Yet, the transmission access conditions imposed by FERC are intended to increase the use of existing transmission capacity to the point of full loading,²⁰⁸ which raises serious concerns about the impact of open access policies on electric system reliability.²⁰⁹

204. See Request of the Connecticut Department of Public Utility Control for Rehearing at 23, *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269 (1991). The Connecticut Department of Public Utility Control (CDPUC) leveled the following charge against the "Utah Hammer":

The CDPUC submits that the entire immutable constraints mechanism, and its attendant subordination of economic transactions for the benefit of native load, is an undue intrusion into the jurisdiction over transmission siting reserved exclusively to the states under § 201 of the FPA. . . . Application of the Utah Hammer in New England thus overrides legitimate state interests in land use and environmental protection in order to promote interstate bulk power transactions. It thereby encroaches upon authority Congress reserved to the states.

Id. at 23-24.

205. FERC has authority over transmission pricing, but not siting. See 16 U.S.C. §§ 824d-824e (1988) (discussing setting of rates and charges for transmission service and wholesale power sales). Furthermore, federal regulation under the FPA "extend[s] only to those matters which are not subject to regulation by the States." *Id.* § 824(a).

206. See Request of the Connecticut Department of Public Utility Control for Rehearing at 1-2, *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269 (1991) (seeking rehearing of *Northeast Utilities* order because of concerns of impact on electric ratepayers).

207. See 16 U.S.C. § 824k(a)(3) (1988) (precluding issuance of wheeling order absent FERC determination that order "will not unreasonably impair the reliability of any electric utility affected by the order"). Although this subsection was deleted by the Energy Policy Act, Energy Policy Act of 1992, Pub. L. No. 102-486, § 722(1), 106 Stat. 2776, 2916 (to be codified at 16 U.S.C. § 824k) (amending § 212 of FPA), the new law includes comparable protection for system reliability. See *id.* § 721(3), 106 Stat. at 2915 (to be codified at 16 U.S.C. § 824j) (barring issuance of wheeling order if FERC finds that "such order would unreasonably impair the continued reliability of electric systems affected by the order").

208. This is plain in *Utah Power & Light*, where FERC required the merged company to calculate its "remaining existing capacity," or transmission capacity not needed to serve its native load and firm contract customers, and offer all of that capacity to other utilities. See *Utah Power & Light Co.*, 45 F.E.R.C. ¶ 61,095, at 61,291 (describing customer access to existing transfer capacity during transition period), *clarified*, 45 F.E.R.C. ¶ 61,132, *reh'g granted*, 45 F.E.R.C. ¶ 61,500 (1988), *reh'g granted in part*, 47 F.E.R.C. ¶ 61,209 (1989), *enforced*, 51 F.E.R.C. ¶ 61,295 (1990), *remanded on other grounds sub nom.* *Environmental Action, Inc. v. FERC*, 939 F.2d 1057 (D.C. Cir. 1991). This procedure could well result in loading of a merged company's transmission capacity to its full-rated capability. After a merger transition period, a merged company is required to meet all requests for firm service, displacing its own economy transactions with firm wheeling on behalf of third parties as necessary. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,020-24 (holding that company may not give higher priority to its own use than to requests by third parties when allocating transmission capacity), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992); *Utah Power & Light Co.*, 45 F.E.R.C. at 61,294-95 (requiring that merged company reduce its own transactions as necessary to meet electric utilities' requests for transmission service).

209. See NERC, RELIABILITY ASSESSMENT, *supra* note 67, at 21 (stating that it is more difficult to maintain reliability as transmission loadings increase); KELLY ET AL., *supra* note 54, at

Although FERC insists that reliability will not suffer as a result of the obligations it has placed on transmitting utilities,²¹⁰ no analysis appeared in *Utah Power & Light, Northeast Utilities, or Public Service Co. of Indiana* regarding the impact of open access on reliability.²¹¹ These assurances ring rather hollow in any case because they suggest that FERC can distinguish between reliability and economy transactions, although the agency concedes that no such bright line exists.²¹² Indeed, because many transactions are performed for both economy and reliability purposes, the distinction is altogether artificial, and the subordination of economy transactions will likely impair reliability of service.

IV. FERC'S AUTHORITY TO ORDER WHEELING HAS BEEN AUGMENTED BY AMENDMENTS TO THE FEDERAL POWER ACT

A. National Energy Strategy

In February 1991, the Bush administration proposed a "National Energy Strategy" (NES) designed in part to promote efficiency in electric generation by encouraging greater competition in the utility industry.²¹³ One of the legislative and regulatory reform proposals

50, 58 (indicating that operating transmission lines at or near their theoretical maximum power transfer capability threatens stability, whereas unused transmission capacity furthers reliability by backing up other transmission lines as well as generation units). In order to maintain reliability under normal operating conditions when small unplanned additional current or voltage drops disturb the balance of the system, loading should not exceed 85-95% of the theoretical limit. KELLY ET AL., *supra* note 54, at 50-51.

210. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. at 62,021, 62,024 (holding that Northeast Utilities will not be required to provide firm transmission service to third parties when immutable constraints prevent expansion of transmission facilities and wheeling would impair service to native load customers); *Utah Power & Light Co.*, 45 F.E.R.C. at 61,291, 61,294 (affirming that merged company may refuse wheeling service if satisfaction of wheeling request would impair reliability of service to native load customers).

211. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. at 61,200 (failing to analyze how utilities will maintain reliability when required to use all existing transmission capacity); *Public Serv. Co. of Ind.*, 51 F.E.R.C. ¶ 61,367, at 62,212 (concluding that reliability problems will not be enhanced by open access and may be addressed by current engineering and institutional framework), *modified sub nom.* *PSI Energy, Inc.*, 52 F.E.R.C. ¶ 61,260, *clarified*, 53 F.E.R.C. ¶ 61,131 (1990), *petition dismissed sub nom.* *Northern Ind. Pub. Serv. Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1992); *Utah Power & Light Co.*, 45 F.E.R.C. at 61,294 (failing to examine consequences of open access on reliability when merged company must reduce its own off-system transactions to meet electric utilities' requests for transmission service).

212. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. at 61,200 (noting that "[w]e . . . recognize the difficulty in demarcating transmission needed for 'reliability' purposes from transmission needed for 'economic' purposes"). Significantly, FERC ignored the requests by Northeast Utilities and intervenors for a definition of "reliability" to clarify the meaning of this exception. *Id.* at 61,197, 61,199.

213. See U.S. DEP'T OF ENERGY, NATIONAL ENERGY STRATEGY 31-32 (1991) [hereinafter NATIONAL ENERGY STRATEGY] (stating that NES proposals will allow greater competition in electric power industry, which will "ensure economic efficiency and provide the flexibility necessary to manage uncertainty").

recommended by the Bush administration was the expansion of open access for wholesale buyers and sellers and the pricing of wheeling to assure increased efficiency.²¹⁴ The NES offered no specific legislation with respect to transmission access,²¹⁵ but rather proposed that FERC fully utilize its existing statutory authority to expand transmission access and properly price transmission service.²¹⁶ During congressional consideration of energy legislation, however, administration officials expressed increased support for legislative expansion of FERC's authority to order wheeling.²¹⁷

B. Energy Policy Act of 1992

Congress enacted broad energy legislation in 1992²¹⁸ that sharply

214. See *id.* at 7-8, 32, 35 (explaining policy of using existing FERC and Department of Energy authority to expand access to transmission facilities and to properly price transmission services). Greater access also would increase competition in wholesale markets, thus guaranteeing access to electricity at the lowest reasonable cost. *Id.* at 35.

215. See H.R. 1301, 102d Cong., 1st Sess. (1991); S. 570, 102d Cong., 1st Sess. (1991) (failing to include amendments of §§ 211 and 212 of FPA in NES implementing legislation sent to Congress by Bush administration).

216. See NATIONAL ENERGY STRATEGY, *supra* note 213, at 32, 35. The NES recommended enhanced transmission access, but reserved judgment on whether legislation was needed:

Under the National Energy Strategy, the Administration supports full utilization of Department of Energy and FERC authorities to encourage more open access to electric transmission facilities for traditional utility and other suppliers of electric power, while maintaining reliability standards. The Administration also supports efforts by FERC to promote efficient pricing of transmission services. These actions will help to develop a competitive generation sector and to increase the flexibility of providers of electricity. Under the Federal Power Act, FERC can establish policies that promote these objectives. The Strategy recommends that FERC review its existing policies and programs and reexamine its authority under the Federal Power Act to ensure that transmission services and facilities are adequate for the emerging competitive generation market. *If experience shows that FERC's authority is inadequate, then the Strategy recommends legislative expansion of FERC's authority.*

Id. at 35 (emphasis added).

217. Before markup of energy legislation in the Subcommittee on Energy and Power, Secretary of Energy James Watkins expressed administration support for transmission legislation that was consistent with certain principles. Letter from James D. Watkins, Secretary, U.S. Department of Energy, to Rep. Carlos Moorhead, Ranking Minority Member, Subcommittee on Energy and Power, U.S. House of Representatives (Sept. 27, 1991) (on file with *The American University Law Review*) (discussing support of Bush administration for transmission legislation that incorporates certain principles and stating opposition to Committee Print of "Electricity Policy Act," draft legislation prepared by Subcommittee Chairman Phil Sharp, (on file with *The American University Law Review*). One of the principles advocated by the Department of Energy is that transmission access legislation "[e]ncourages the emerging competitive market in generation by creating an affirmative obligation for utilities to provide transmission service." *Id.* Later in the legislative consideration of H.R. 776, the "Energy Policy Act of 1992," Secretary Watkins reaffirmed administration support for transmission legislation that incorporated certain principles. Letter from James D. Watkins, Secretary, U.S. Department of Energy, to Rep. John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives 12-13 (Sept. 8, 1992) (stating preferences on transmission access provisions of H.R. 776) (on file with *The American University Law Review*).

218. President Bush signed H.R. 776, the "Energy Policy Act of 1992," into law on October 24, 1992. President's Statement on Signing the Energy Policy Act of 1992, 28 WEEKLY COMP. PRES. DOC. 2094-95 (Oct. 24, 1992) [hereinafter President's Statement]. The legisla-

expands FERC's power to order wheeling. The electricity reform provisions of the "Energy Policy Act of 1992"²¹⁹ are intended to promote greater competitiveness in bulk power markets²²⁰ in order to lower rates for consumers.²²¹ The bill's sponsors shared FERC's view that transmission access may be a barrier to enhanced competition in wholesale power markets²²² and removed many of the re-

tion had been approved by the sweeping margin of 363 to 60 in the House, 138 CONG. REC. H11,450-51 (daily ed. Oct. 5, 1992) (roll call vote no. 474), and by voice vote in the Senate. 138 CONG. REC. S17,658 (daily ed. Oct. 8, 1992).

219. See Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 721-722, 106 Stat. 2776, 2915-19 (to be codified at 16 U.S.C. §§ 824j-824k) (expanding FERC authority to order wheeling).

220. See President's Statement, *supra* note 218, at 2095 ("There is much that is good for America in this new law. It contains a landmark provision furthering competition in the way electricity is generated and sold, thus lowering prices while ensuring adequate supplies."); see also 138 CONG. REC. H11,428 (daily ed. Oct. 5, 1992) (statement of Rep. Dingell) ("Ultimately, as a result of [Title VII] we should see a more competitive industry, lower costs and reliable service to electricity customers."); 138 CONG. REC. H11,380 (daily ed. Oct. 5, 1992) (statement of Rep. Bliley) ("Transmission lines are the highways of commerce in the electric utility industry. Fair and open access to these lines is essential to fulfill the purposes of the electricity title of this legislation: The promotion of competition and the lowering of electric rates.").

Representative Sharp echoed these thoughts in the House debate:

H.R. 776 will also introduce historic changes to the electricity industry—increasing competition among suppliers and providing protections for consumer pocket-books. . . . The final product, a true compromise, is a stronger statement than either the House or Senate bill of the Congress' desire to see competition in the generation of electricity and the availability of access to the Nation's transmission grid for all comers without regard to monopoly or market power.

138 CONG. REC. H11,400 (daily ed. Oct. 5, 1992) (statement of Rep. Sharp). Senator Dole also praised the bill:

We are entering a brave new world of new competition that will be stimulated by the provisions of this bill. This new age of independent power producers that will now be able to build, own, and operate power plants and sell electricity on a wholesale basis to utilities and municipalities anywhere in the United States, will certainly change the electricity generation business in the future.

138 CONG. REC. S17,632 (daily ed. Oct. 8, 1992) (statement of Sen. Dole).

221. See 138 CONG. REC. S17,649 (daily ed. Oct. 8, 1992) (statement of Sen. Conrad) ("The increased competition that will result from these changes [in the Energy Policy Act] will lead to reduced utility costs, and the Department of Energy estimates that it will save \$1.8 billion per year"); 138 CONG. REC. S17,638 (daily ed. Oct. 8, 1992) (statement of Sen. Cochran) ("Under the conference agreement, consumers will benefit from the competition in the electric utility industry that will result from the deregulation of powerplant construction and power distribution."); 138 CONG. REC. S17,628 (daily ed. Oct. 8, 1992) (statement of Sen. Riegle) ("Title 7 is intended to accomplish a restructuring of the utility industry to promote greater competition for the benefit of energy customers."); 138 CONG. REC. H11,436 (daily ed. Oct. 5, 1992) (statement of Rep. Tauzin) ("We have opened the door today to competition. . . . We have opened the door in effect to consumers getting cheaper electrical power and having a better supply of electrical energy for America."); 138 CONG. REC. H11,408 (daily ed. Oct. 5, 1992) (statement of Rep. Moorhead) ("[T]his legislation would reform the regulation of electric utilities to ensure competition in both the generation and transmission of wholesale electric supplies. . . . Under this legislation, we enter into a new era of competition in wholesale electricity supplies."); 138 CONG. REC. H11,380 (daily ed. Oct. 5, 1992) (statement of Rep. Bliley) ("[T]here are great benefits to allowing competition into the wholesale electric generating industry. The Department of Energy estimates that full-fledged competition will bring savings of nearly \$3 billion per year.").

222. See *National Energy Strategy (Part 4): Hearings Before the Subcomm. on Energy and Power of*

strictions on FERC's wheeling authority in sections 211 and 212 of the FPA.²²³

1. *Protection of native load customers*

The Energy Policy Act includes provisions that are intended to protect the native load customers of affected utilities against undue harm from the provision of transmission services. Under the statute, no wheeling order can issue unless FERC finds that it (1) permits the wheeling utility to recover all costs incurred in connection with the transmission service;²²⁴ (2) is otherwise in the public interest;²²⁵ and (3) does not "unreasonably impair the continued reliability of electric systems affected by the order."²²⁶ Although the Energy Policy Act removed many of the native load protections that existed under sections 211 and 212,²²⁷ these new provisions provide assurance of native load protection.²²⁸

the House Comm. on Energy and Commerce on H.R. 1301, H.R. 1543, and H.R. 2224: Bills on Electricity Regulation and Transmission Access, 102d Cong., 1st Sess. 621-22 (1991) (statement of Rep. Sharp) (stating that FERC must have power to assure that monopoly control of transmission lines does not stifle competition); id. at 636 (statement of Rep. Moorhead) (contending that bill encourages optimal use of transmission access so that competition is increased in wholesale power market); id. at 636-37 (statement of Rep. Markey) (noting that debate has not been whether to provide greater access, but how to do so without economically harming utilities' customers or sacrificing reliability). According to Subcommittee Chairman Sharp, "[t]ransmission access is a critical tool for increasing bulk power competition. Our challenge is to determine when [sic] the Congress must do and what powers FERC must have to assure the monopoly control of transmission lines is not used to stifle competition. . . . That is why I believe that opening up the transmission system is a natural complement to . . . our overall goal of encouraging a more competitive and efficient electric [industry]." Id. at 621-22.

223. The Energy Policy Act deleted §§ 211(a)(1)-(3) and 212(a) of the FPA, which had limited FERC power to mandate transmission service under the FPA. Energy Policy Act of 1992, §§ 721(2), 722(1), 106 Stat. at 2915-16 (amending §§ 211 and 212 of FPA). Section 211(a)(1)-(3) had required FERC to make findings that a proposed wheeling order would (1) be in the public interest; (2) either conserve energy, promote efficiency, or improve reliability; and (3) comply with § 212. 16 U.S.C. § 824j(a)(1)-(3) (1988). Section 212(a) prevented issuance of a wheeling order unless FERC found that it (1) would not be likely to result in a reasonably ascertainable uncompensated economic loss to the transmitting utility; (2) would not place an undue burden on the utility; (3) would not unreasonably impair reliability; and (4) would not impair the ability of affected utilities to render adequate service to their customers. *Id.* § 824k(a). Notably, the new law also deleted § 211(c)(1), which had proved an effective bar to the exercise of FERC wheeling authority. Energy Policy Act of 1992, § 721(4), 106 Stat. at 2915; *see also supra* notes 33-35 and accompanying text (concluding that § 211(c)(1) of FPA prevented FERC from issuing wheeling orders).

224. *See* Energy Policy Act of 1992, § 721(2), 106 Stat. at 2915 (barring wheeling order that fails to comply with § 212 of FPA). The new law amends § 212, striking existing subsections (a) and (b) and inserting a new subsection (a) on transmission rates. *Id.* § 722(1), 106 Stat. at 2916. Under the new subsection (a), a wheeling order will "permit the recovery by [the wheeling] utility of all the costs incurred in connection with the transmission services and necessary associated services . . ." *Id.*

225. *Id.* § 721(2), 106 Stat. at 2915.

226. *Id.* § 721(3).

227. *See supra* notes 28-30, 33 and accompanying text (describing limits on FERC wheeling authority under §§ 211 and 212 before enactment of Energy Policy Act).

228. *See infra* notes 231-49 and accompanying text (describing provisions of Energy Policy

a. *Recovery of the cost of providing transmission service*

The Energy Policy Act attempts to ensure that a transmitting utility will recover the cost of providing wheeling for third parties.²²⁹ Other legislative proposals would only have permitted the recovery of the direct costs of providing transmission service, not both direct and indirect costs associated with the service.²³⁰ By contrast, the Energy Policy Act permits the transmitting utility to recover forgone benefits from displaced economy transactions by requiring FERC to set rates that are designed to

permit the recovery by [the wheeling utility] of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of the legitimate, verifiable and economic cost, including taking into account any benefits to the transmission system of providing the transmission services, and the costs of any enlargement of transmission facilities.²³¹

Full recovery of all forgone benefits is not assured, however, because FERC is required to assure that transmission rates "shall promote the economically efficient transmission and generation of electricity"²³² Because the promotion of transmission is best achieved through low rates, the impact of the new law on *Northeast Utilities*²³³ and *Pennsylvania Electric Co.*²³⁴ is unclear. In future proceedings before FERC, a wheeling utility could argue that the new law permits recovery of both opportunity cost and the costs of any enlargement of the utility's transmission facilities. First, FERC recognizes that opportunity costs are legitimate costs incurred by wheeling utilities,²³⁵ and the new law permits recovery of "all costs incurred in connection with the transmission services" by the wheeling utility.²³⁶ Second, the new law explicitly identifies the cost of

Act intended to recover costs of providing transmission service and protect system reliability); see also *supra* note 155 (reviewing public interest standard under FPA).

229. See *infra* text accompanying note 231 (discussing provision of Energy Policy Act that permits transmitting utilities to recover all costs incurred in connection with transmission services).

230. See, e.g., H.R. 2224, 102d Cong., 1st Sess. § 5 (1991) (allowing recovery only of prudently incurred direct costs, as determined by FERC).

231. Energy Policy Act of 1992, § 722(1), 106 Stat. at 2916 (establishing new § 212(a)).

232. *Id.*

233. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. ¶ 61,070, at 61,203 (establishing transmission pricing goals that balance principle of holding native load customers harmless against goal of setting "lowest reasonable cost-based rates"), *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

234. 58 F.E.R.C. ¶ 61,278, at 61,873 (1992) (capping opportunity cost recovery at incremental cost of system expansion).

235. See *supra* note 186-90 and accompanying text (explaining FERC's allowance of opportunity cost recovery by transmitting utilities).

236. Energy Policy Act of 1992, § 722(1), 106 Stat. at 2916.

any enlargement of transmission facilities as a cost that may be recovered by transmitting utilities.²³⁷ It could be argued that the Energy Policy Act permits recovery of both opportunity costs and enlargement cost, while *Pennsylvania Electric* capped recovery of opportunity costs at the cost of enlargement.²³⁸

Since the pricing provisions in the Energy Policy Act are hardly a model of clarity, FERC interpretation of these provisions is likely to be highly contentious. Despite the efforts by some to put flesh on the bones of the legislative history of the electricity title of the Energy Policy Act,²³⁹ FERC discretion to set transmission pricing appears to be undisturbed. The legislative history indicates that

237. *Id.*

238. See *Pennsylvania Elec. Co.*, 58 F.E.R.C. ¶ 61,278, at 61,873 (1992) (capping opportunity cost recovery at incremental cost of system expansion).

239. Significantly, the conference report was silent on interpretation of the transmission pricing provisions in § 722(1) of the Energy Policy Act. Other legislative history is at best inconsistent; at worst contradictory. During House floor debate on the conference report on H.R. 776, Representative Moorhead offered his view of the "legitimate, verifiable and economic costs" that may be recovered by a wheeling utility under the transmission pricing provisions:

In order for any cost to be recoverable, it must be legitimate; in other words, the expense has to have been necessary. The cost must be verifiable; in other words, the cost cannot be speculative, such as an unknown future economy sale that is foregone. And the cost must be economic; in other words, it must be economically efficient for all parties. Thus, the limitations in the pricing provision are guidance to the Commission to reject the recovery of costs that are designed to frustrate transmission access and competition.

I would also point out that the pricing language references by my colleague from Indiana requires FERC to determine that an appropriate share, if any, of these costs should be collected from the party requesting transmission services. For instance, in a recent proceeding, the Commission established that a party can collect opportunity costs or embedded costs, but not both. This appropriate share language is consistent with that decision. Similarly, the provision requires a cost allocation of upgrades to determine what share of upgrade costs are assignable to the applicant and what costs should be assigned to the utility's native-load customers to reflect any systemwide benefits. Finally, the pricing provision specifically directs FERC to measure these costs against the benefits received by the party providing transmission services. In other words, FERC must ascertain the net costs incurred in providing service when setting or approving rates and charges.

138 CONG. REC. H11,413 (daily ed. Oct. 5, 1992) (statement of Rep. Moorhead).

Senate conferees offered an alternative interpretation of the meaning of "legitimate, verifiable and economics costs" in § 722(1) of the Energy Policy Act, promising a higher level of protection for native load customers. Senator Johnston described the meaning of these provisions:

The conference report requires that the costs that may be recovered include, but not be limited to, all costs involved in providing the transmission service, including those of any enlargement of transmission facilities, as well as any other economic costs of performing a wheeling transaction.

This could include the pro rata share of the cost of existing facilities used to provide the transmission service. Such costs must be verifiable, but it is not necessary that the costs be incurred at this [sic] time the transmission rate is set. FERC may allow the recovery of projections of future costs, including opportunity costs, based upon the historical experience of the transmitting utility. . . . [E]xcept to the extent to which they receive benefits, native customers should not be required to pay for facilities that would not have been constructed but for a mandatory wheeling order.

Congress did not intend to overturn the pricing formula established by FERC in *Northeast Utilities and Pennsylvania Electric Co.*²⁴⁰ Yet, the

138 CONG. REC. S17,613 (daily ed. Oct. 8, 1992) (statement of Sen. Johnston). Senator Wallop commented further on the effect that wheeling orders will have:

AJ [wheeling] order shall allow the recovery of reasonably projected future costs, particularly opportunity costs, based either upon the historical experience or existing and planned arrangements of the transmitting utility, so long as an evidentiary basis exists. Actual benefits to the transmission system of providing the service may be taken into account, such as documented operational cost savings. Speculative benefits to the transmission system, such as the mere existence of facilities that would not have been constructed but for a mandatory wheeling order, are not to be credited against the costs incurred in connection with the transmission services. . . . In order to promote the economically efficient use of transmission and generation systems, rates, charges, terms and conditions and transmission services must include all costs associated with performing a transaction, including the costs of foregone alternative uses for the facilities. In cases where the relevant market for delivered bulk power is competitive, the market price will best reflect the true value of the use of facilities and promote the economically efficient allocation of resources.

Id. at S17,618 (statement of Sen. Wallop). Senator Wallop argued that § 722(1) would encourage negotiated rates:

The purpose of this language is to encourage negotiated rates, where appropriate. In cases where the relevant market—the market for delivered power—is competitive, the negotiated or market price will reflect the true value of the use of facilities and promote the economically efficient allocation of resources. In such cases, a market-based rate shall be deemed to meet all the requirements of section 212(a).

Id. at S17,647 (statement of Sen. Wallop).

The legislative history of the meaning in § 722(1) of “benefits to the transmission system” that offset recovery of costs is also very narrow. The interpretation of this language was addressed in a colloquy between Senators Wallop and Lott during floor debate on the conference report.

LOTT: [T]he conference agreement says the rates, charges, terms and conditions of wholesale transmission services pursuant to a section 211 order shall permit the recovery of costs “including taking into account any benefits to the transmission system of providing the transmission service.” What are such “benefits to the transmission system?”

WALLOP: The purpose of this language is to recognize that the electrical system of a transmitting utility is a dynamic system which must handle numerous transfers of electricity simultaneously. This phrase requires that where an order under section 211 causes benefits from reduced line losses on parts of the transmission system, the reduced losses must be taken into account in the recovery of other costs, including the costs of any increased losses in other portions of the transmission system.

138 CONG. REC. S17,647 (daily ed. Oct. 8, 1992) (colloquy between Sens. Lott and Wallop); *see also* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48.8 (5th ed. 1992) (stating that colloquy between two House or Senate members may be useful in interpreting conference reports).

240. Representatives Sharp and Moorhead engaged in a colloquy on the House floor during debate on the conference report on H.R. 776. Following is an excerpt from that floor discussion:

SHARP: Is it also the gentlemen’s view that the bill does not affect—and specifically does not contradict or overturn—any prior FERC decision, policy, or determination with respect to the pricing of transmission services?

MOORHEAD: Indeed it is. I would have been very concerned had Congress unwisely gone down the road of attempting to micromanage the normal development of agency policy. That language was replaced not because of a rejection of the balancing principle, but because of a recognition that transmission pricing is a very complex matter. Rather than establish a pricing prescription with roots in a single FERC decision, we chose to establish parameters and defer to the Commission’s discretion to work within these parameters.

SHARP: I couldn’t agree more with the gentlemen. I have to admit that personally

legislative history also suggests that Congress did not codify FERC's approach on transmission pricing.²⁴¹ The conclusion must be drawn that Congress determined to defer to the discretion of FERC

I am very much in favor of recent FERC transmission pricing policy, particularly the delicate balance it achieved in the Northeast Utilities decision. As the gentlemen know[], the House bill endorsed the analytical framework FERC laid out in that case, balancing the need to compensate native load, the goal of promoting the lowest reasonable transmission rates, and preventing the collection of monopoly rents.

MOORHEAD: I couldn't agree more with the gentlemen on the merits of FERC's approach in the Northeast Utilities case. I am especially sensitive to the challenge FERC faces in protecting consumers when it is asked to decide whether to allow compensation for so-called opportunity costs. I would have liked to have seen the House provision on this balancing test included in the bill approved by the conferees. However, I am willing to support this bill without it because I am comfortable that dropping the balancing test in no way affects, compromises, or overrules any FERC decision.

138 CONG. REC. H11,413 (daily ed. Oct. 5, 1992) (colloquy between Reps. Sharp and Moorhead); see also 2A SINGER, *supra* note 239, § 48.8 (stating that colloquy between two House or Senate members may be useful in interpreting conference reports). Representative Moorhead then commented further on the bill's language:

[A] negative inference should not be drawn from the fact that the final version of the bill omits the language from H.R. 776 proposing FPA section 212(B)(2)—the so-called Northeast Utilities language. The conferees do not intend for revised section 212 of the FPA to affect in any way existing Commission precedent applying the just and reasonable ratemaking standard to transmission pricing determinations.

138 CONG. REC. H11,438 (daily ed. Oct. 5, 1992) (statement of Rep. Moorhead). Although the statement by Rep. Moorhead merits some weight in determining congressional intent with respect to transmission pricing, it is certainly not dispositive. See 2A SINGER, *supra* note 239, § 48.13 (noting that statements by individual legislators should only be given effect if consistent with statutory language).

An earlier version of H.R. 776 approved by the House had included provisions intended largely to codify the pricing principles in *Northeast Utilities*. See H.R. 776, 102d Cong., 2d Sess. § 723(b)(1) (1992). Under the House language, transmission rates "shall be designed to—(A) compensate native load customers for legitimate and verifiable economic costs of providing the transmission service, (B) provide the lowest reasonable transmission rates for the transmission service, and (C) prevent the collection of monopoly rents by the transmitting utility and promote the efficient transmission and generation of electricity." *Id.* The House pricing formula for transmission services was very similar to the pricing principles established by FERC in *Northeast Utilities*. Compare H.R. 776, 102d Cong., 2d Sess. § 723(b)(1) (1992) (mandating criteria for pricing transmission service) with *Northeast Utils. Serv. Co.*, 58 F.E.R.C. ¶ 61,070, at 61,203 (establishing pricing principles for setting wheeling rates), *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992). Significantly, these provisions were dropped from the final version of H.R. 776 that was enacted into law. See Energy Policy Act of 1992, Pub. L. No. 102-486, § 722(1), 106 Stat. 2776, 2916 (to be codified at 16 U.S.C. § 824k).

241. During Senate floor debate on the conference report on H.R. 776, Senators Johnston and Wallop engaged in a colloquy on the meaning of the transmission pricing provisions of the new law that clarifies that Congress did not intend to codify the *Northeast Utilities* pricing principles.

WALLOP: It is my understanding that the conferees reject codifying existing or past FERC decisions regarding the pricing of electric transmission services. Is that the Senator's understanding?

JOHNSTON: Yes; that is the case. The language in the conference report does not endorse or reject present or past FERC decisions. It sets forth a new set of pricing principles—within the just and reasonable standard of the Federal Power Act—to guide the FERC in future pricing decisions.

WALLOP: In several recent decisions, including the *Northeast Utilities* case and the *Penelec* decision, the Federal Energy Regulatory Commission applied a very narrow approach to the costs which a transmitting utility can recover from a transmission

to continue to set transmission pricing policy.²⁴² Transmission rates set by FERC must continue to be consistent with the "just and

customer. I believe this approach causes native load customers to subsidize transmission services provided to others.

Does the chairman agree that this act does not endorse the Northeast Utilities decisions or other recent Commission decisions regarding pricing policies for transmission services?

JOHNSTON: I agree. The conference report neither endorses nor rejects these decisions.

138 CONG. REC. S17,612-13 (daily ed. Oct. 8, 1992) (colloquy between Sens. Wallop and Johnston); see also 2A SINGER, *supra* note 239, § 48.8 (stating that colloquy between two House or Senate members may be useful in interpreting conference reports). The interpretation of the transmission pricing provisions put forward by the Senate conferees appears to be on sounder ground. Under the rules of statutory construction, the fact that the earlier codification of the *Northeast Utilities* pricing principles was deleted from the final version enacted into law creates a presumption that Congress did not intend to embrace these principles. See 2A SINGER, *supra* note 239, § 48.04 ("[W]here the language under question was rejected by the legislature and thus not contained in the statute it provides an indication that the legislature did not want the issue considered."). This was clearly the understanding of the Senate conferees, as reflected by the colloquy between Senators Wallop and Johnston.

WALLOP: [W]ould you also not agree that the pricing provisions in the original House-passed bill, and the associated legislative history, cannot be invoked to interpret pricing provisions of the conference report?

JOHNSTON: I agree. Subsection 212(a) is a complete substitute for the House-passed transmission pricing provisions and, as a matter of law, has the full force and effect of its plain meaning.

138 CONG. REC. S17,613 (daily ed. Oct. 8, 1992) (colloquy between Sens. Wallop and Johnston).

The Senate conferees also interpreted the transmission pricing provisions of the Energy Policy Act as protecting native load customers by assuring wheeling utilities recover the full cost of providing transmission service. This issue was also raised during the colloquy between Senators Wallop and Johnston.

WALLOP: Does the distinguished floor manager agree that the provisions of subsection 212(a) do not require, nor allow any subsidization of transmission services by the native load customers of the transmitting utility?

JOHNSTON: I agree that subsection 212(a) will not allow nor require, to the extent practicable, any subsidy by the native load customers. The intent is to ensure that transmitting utilities and their customers do not subsidize the provision of transmission services for others and that transmitting utilities are fully compensated for use of their transmission system. That is precisely why the conference report adopts a complete substitute for the House-passed pricing provision to assure that there will be no subsidy of transmission services.

Id. (colloquy between Sens. Wallop and Johnston).

242. The intention of Congress to defer to FERC on transmission pricing was evident. This point was made clearly by Representative Sharp, Chairman of the House Energy and Power Subcommittee and one of the principal architects of the Energy Policy Act, during floor debate on the conference report:

I want to thank the conferees or [sic] their restraint in resisting efforts to have Congress constrain the discretion of the Federal Energy Regulatory Commission [FERC] in the area of electricity policy. I am particularly pleased that the provision concerning the pricing of transmission services maintains the traditional broad statutory approach of the original Federal Power Act [FPA]. The FERC must retain sufficient discretion to apply the traditional, time-tested FPA standards

138 CONG. REC. H11,400 (daily ed. Oct. 5, 1992) (statement of Rep. Sharp). Representative Bliley, one of the original sponsors of transmission access legislation, described how the conferees determined to defer to the discretion of FERC on pricing:

The transmission pricing provision contained in H.R. 776 are [sic] intended to ensure that transmission services are available under just and reasonable rates. Some parties have wanted us to specify detailed pricing standards that would dictate

reasonable" standard governing ratemaking for wholesale power sales and transmission rates, a point noted during floor discussion.²⁴³ Although rates must fall within the "zone of reasonableness" under the Energy Policy Act, FERC retains broad discretion to set rates within this zone.²⁴⁴ There is a suggestion in the legislative history, however, that the pricing provisions of the Energy Policy Act were intended to limit FERC discretion to set wheeling rates.²⁴⁵

results in every circumstance. But all circumstances are not alike, and it would be inappropriate for Congress to straitjacket the FERC.

Others had wanted us to endorse or condemn various pricing methodologies: opportunity cost pricing, marginal cost pricing, embedded cost pricing. We did not take this approach. Indeed, the pricing language in the legislation establishes a single guiding principle: A reaffirmation of the just-and-reasonable pricing standard that has governed electric rate setting for years. . . .

Mr. Speaker, in my view, the FERC has an affirmative responsibility under this legislation to ensure that transmission rates are set in a manner that will encourage, not stifle, competition. We are not regulators and cannot legislate pricing formulas that would be appropriate to all types of transactions. For that reason, the conferees established more general pricing guidance

Id. H11,380-81 (statement of Rep. Bliley). Representative Moorhead also commented on the effect of the pricing language:

The pricing language in existing section 212(a) allows the Commission to continue traditional embedded-cost pricing, but also gives the Commission flexibility to depart from traditional pricing and to allow recovery of opportunity costs or incremental costs—including enlargement of facilities—if the Commission determines it would result in just, reasonable, and not unduly discriminatory or preferential rates. New section 723 [sic] continues this practice. The section allows the Commission sufficient pricing flexibility to promote economically efficient transmission and generation of electricity, at the same time that it ensures that pricing does not result in the collection of monopoly rents. The conferees also intend to allow the Commission flexibility to determine the circumstances under which the costs of enlargement of transmission facilities may be recovered.

Id. at H11, 438 (statement of Rep. Moorhead).

243. Senator Wallop discussed the "just and reasonable standard" in Senate debate:

The "just and reasonable" standard referenced in section 212(a) has been well articulated by the U.S. Court of Appeals for the D.C. Circuit in its *Jersey Central Power & Light* decision. Here the Court noted that rates are bounded by a "zone of reasonableness," which is defined at the lower end by a prohibition against confiscatory rates as to the electric utility and at the upper end by a prohibition against exorbitant rates to consumers.

138 CONG. REC. S17,618 (daily ed. Oct. 8, 1992) (statement of Sen. Wallop).

244. See *supra* note 105 and accompanying text (discussing FERC discretion to set rates within "zone of reasonableness").

245. Senator Wallop commented on the parameters of FERC discretion in setting wheeling rates in Senate debate:

Th[e] formulation of the relationship between the traditional "just and reasonable" standard and the specific pricing directions or [sic] the FERC contained in section 212(a) is critical because, in the absence of the specific pricing directions, FERC would have somewhat greater discretion in setting the rates within the zone of reasonableness under otherwise applicable law. *That discretion is intentionally constrained by the specific pricing directions provided by Congress, with the resulting rate being in the zone of reasonableness.*

138 CONG. REC. S17,622 (daily ed. Oct. 8, 1992) (statement of Sen. Wallop) (emphasis added).

b. Rejection of the "Utah Hammer"

Significantly, the new law rejects the "Utah Hammer," or the absolute obligation imposed by FERC on utilities to provide transmission service within five years of a request by an eligible utility. That is, the Energy Policy Act requires FERC to terminate or modify a wheeling order if "the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State, and local laws."²⁴⁶ By requiring that a wheeling order be voided if the transmitting utility is unable to obtain the approvals to expand transmission capacity necessary in order to satisfy a third party wheeling request, after making a good faith effort to do so, the new law adopts a due diligence standard and thereby rejects FERC's "Utah Hammer."²⁴⁷

2. Maintenance of transmission system reliability

The new law attempts to assure that increased wheeling will not impair system reliability by barring issuance of a wheeling order that would "unreasonably impair the continued reliability of electric systems affected by the order."²⁴⁸ It was the intent of Congress that

246. Energy Policy Act of 1992, Pub. L. No. 102-486, § 721(5)(D), 106 Stat. 2776, 2916 (to be codified at 16 U.S.C. § 824j). The legislative history of the meaning of this language is extremely slender. Representative Moorhead was one Representative who did comment on its meaning:

This section has raised the question of what is good faith? specifically [sic], the concern is that a reluctant utility might make a half-hearted attempt at compliance, and then evade the requirement to enlarge capacity by pleading that they could not comply with the Commission's order. Under common law, a good-faith obligation imposes a higher standard of performance. Courts have recognized that good faith reflects an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law. What this means is that a utility has an affirmative obligation to pursue conscientiously and aggressively the requisite approvals that will allow it to comply with the order of the Commission. This would include making all appropriate filings and seeking review or reconsideration of adverse rulings on the same basis as if the efforts to enlarge transmission facilities where the result of an independent and voluntary decision by the utility, rather than a Commission-imposed requirement.

138 CONG. REC. H11,438 (daily ed. Oct. 5, 1992) (statement of Rep. Moorhead). *But see* 138 CONG. REC. S17,617 (daily ed. Oct. 8, 1992) (statement of Sen. Wallop) ("The requirement for a 'good faith effort' does not mean that a utility must completely exhaust every conceivable administrative, legal or financial remedy before being excused from the order; but a utility must make a reasonable attempt to obtain the necessary property rights and approvals.").

247. The legislative history on the Energy Policy Act suggests that the conferees realized they were repealing the "Utah Hammer." *See* 138 CONG. REC. S17,617 (daily ed. Oct. 8, 1992) (statement of Sen. Wallop) (interpreting "good faith effort" exemption from wheeling order and stating that "[u]nder the provisions of the Conference Report, the FERC cannot legally reinstitute the so-called 'hammer clause' of the *Utah Power & Light-PacifiCorp* merger").

248. Energy Policy Act of 1992, § 721(3), 106 Stat. at 2915.

reliability be maintained under the new regulatory regime.²⁴⁹ Given the difficulty of distinguishing between economy and reliability transactions,²⁵⁰ the effectiveness of this protection may prove of small worth.

V. PROMOTING COMPETITION AND EFFICIENCY: RECOMMENDED REGULATORY AND LEGISLATIVE INITIATIVES

A. *Native Load Customers Are Not Held Harmless Under Federal Transmission Access Policy*

Although FERC has declared that its transmission access policy is designed to hold native load customers harmless from increased utility costs resulting from wheeling,²⁵¹ closer scrutiny reveals that the policy falls short of this mark. Although the agency permits utilities to recover some forgone benefits from displaced economy transactions, full recovery is denied and native load customers are thus not held harmless.²⁵² The new law may provide greater assurance of cost recovery, because it permits wheeling utilities to recover "all the cost incurred in connection with the transmission services."²⁵³ Transmission rates that do not fully reflect costs incurred by a wheeling utility send price signals that encourage overuse of capacity.²⁵⁴ Although it is the intention of both FERC and Congress to promote increased wheeling and bulk power trades, and discounting wheeling costs serves this objective, overuse of transmission capacity poses reliability concerns when a system is

249. Senator Wallop addressed concerns of reliability in Senate debate:

FERC must assure that reliability is measured in terms of *continued conformance* with regional and national reliability standards. Reliability is of paramount importance, and is 'unreasonably impaired' under the statute when these standards are not met. . . . [I]f reliability concerns are raised the FERC as a practical matter should not issue an order under section 210 or section 211 unless it affirmatively finds that such an order would preserve the reliability of affected electric systems. Anything less than full reliability would constitute an unreasonable impairment, and would be inconsistent with the clear statutory mandate of the FPA as amended by this Act.

138 CONG. REC. S17,617-18 (daily ed. Oct. 8, 1992) (statement of Sen. Wallop).

250. See *supra* note 212 (discussing difficulty in distinguishing reliability and economy transactions).

251. See *Northeast Utils. Serv. Co.*, 58 F.E.R.C. ¶ 61,070, at 61,203 (stating that holding native load customers harmless is appropriate goal in deciding pricing of transmission services), *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

252. See *supra* notes 191-96 and accompanying text (describing limits placed on recovery of opportunity costs in *Northeast Utilities* and *Pennsylvania Electric Co.*).

253. Energy Policy Act of 1992, Pub. L. No. 102-486, § 722(1), 106 Stat. 2776, 2916 (to be codified at 16 U.S.C. § 824k); see also *supra* notes 233-38 and accompanying text (discussing cost recovery by wheeling utilities under new law).

254. See KELLY ET AL., *supra* note 54, at 163 (noting that when prices do not accurately reflect costs, decisions regarding costs of overusing system may be distorted).

constrained.²⁵⁵ Efficient use of existing capacity would be promoted by full recovery of opportunity costs, because the economic value of wheeling would be more accurately reflected in transmission rates. In order to promote efficiency in wheeling, FERC should expressly provide for full recovery of opportunity costs incurred by transmitting utilities.

B. FERC Should Rely on Pricing Incentives to Encourage Expansion of Transmission Capacity

1. FERC transmission access policy fails where capacity is constrained

FERC recognizes that lack of transmission capacity prevents full development of competitive bulk power markets.²⁵⁶ Where a transmission system is inadequate to satisfy the needs of both the transmitting utility and third parties, efficiencies are lost and competition is forestalled. FERC recognizes that transmission system expansion in constrained areas is necessary to achieve its goal of creating competitive bulk power markets,²⁵⁷ and as a result, the agency has resorted to the "Utah Hammer" and denial of full recovery of forgone benefits to encourage utilities to expand transmission capacity.

2. Pricing incentives encourage expansion in transmission capacity

Utilities' full recovery of forgone benefits encourages efficient allocation of the existing transmission system to its most valued uses. Because opportunity cost pricing is designed only to hold harmless the native load customers of a transmitting utility, however, such a pricing system does not provide incentives to expand existing transmission systems to permit expanded wholesale bulk power trading.²⁵⁸ This concern, in fact, initially led FERC to oppose recovery of opportunity costs.²⁵⁹ Later, FERC resorted to capping recovery

255. See KELLY ET AL., *supra* note 54, at 163 (explaining that "[r]elatively low wheeling prices may stimulate more demand for wheeling than the transmission system can handle").

256. In *Public Service Co. of New Mexico*, FERC stated that:

We recognize that in some sections of the country the principal impediment is probably physical rather than regulatory. Existing transmission lines are unable to carry more electricity because they are being operated at or near their maximum secure loading levels a high percentage of the time. In these areas, further exchanges cannot occur unless additional transmission lines are built.

Public Serv. Co. of N.M., 25 F.E.R.C. ¶ 61,469, at 62,036 (1983).

257. *Id.*

258. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,027 (noting that full recovery of forgone benefits would provide no incentive to utility companies to upgrade transmission systems), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

259. See *supra* notes 200, 203 and accompanying text (noting that FERC originally held that recovery of forgone benefits would provide utilities no incentive to upgrade their transmission systems).

of forgone benefits at the incremental cost of system expansion to provide utilities with economic incentives to expand their transmission systems.²⁶⁰ In cases where forgone benefits exceed the incremental costs of expansion, FERC hoped that utilities would act in an "economically rational manner" and expand their transmission capacity voluntarily.²⁶¹

In the past, FERC depended on pricing incentives to spur utilities to do voluntarily that which the agency could not order them to do.²⁶² Because FERC's broad discretion on ratemaking extends to transmission rates,²⁶³ the agency can use pricing incentives to encourage utilities to expand transmission and remove system constraints. In fact, FERC has embraced flexible pricing for

260. See *Pennsylvania Elec. Co.*, 58 F.E.R.C. ¶ 61,278, at 61,874 (1992) (explaining that when transmitting utility modifies its system use to provide service to third-party wheeling requests, opportunity costs may be incurred through forgone revenues). FERC has limited full recovery of opportunity costs for the purpose of encouraging system expansion. In *Pennsylvania Electric Co.*, the agency explained that:

Specifically, the cap at estimated or actual expansion costs gives [the utility] an economic incentive to build additional transmission capacity if opportunity costs exceed expansion costs. If [the utility] does not build, it will be unable to recover all of its opportunity costs, and, therefore, to satisfy its stated goal of keeping its native load customers harmless.

Id.

261. See *Northeast Utils. Serv. Co.*, 57 F.E.R.C. ¶ 61,340, at 62,104-05 (1991) (proposing cap on recovery of opportunity costs at incremental cost of system expansion as spur to utility to act in "economically rational manner" by expanding its transmission capacity), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992).

262. See *Pacific Gas & Elec. Co.*, 38 F.E.R.C. ¶ 61,242, at 61,794-95 (1987) (relying on pricing flexibility to encourage utilities to provide voluntary transmission access), *modified*, 47 F.E.R.C. ¶ 61,121 (1989), *modified*, 50 F.E.R.C. ¶ 61,339 (1990), *modified sub nom.* *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, at 61,319-21 (refusing to extend flexible pricing for economy transactions and transmission service due to concerns about market power), *granting stay*, 55 F.E.R.C. ¶ 61,154, *reh'g granted in part*, 55 F.E.R.C. ¶ 61,495, *appeal filed*, No. 91-1404 (D.C. Cir. Aug. 26, 1991), *modified*, 59 F.E.R.C. ¶ 61,249 (1992); *Public Serv. Co. of N.M.*, 25 F.E.R.C. ¶ 61,469, at 62,029 (1983) (permitting pricing flexibility for power sales as quid pro quo for commitment to wheel, "something we have limited authority to require").

263. FERC has the same discretion to set transmission rates as it does wholesale power rates, because ratemaking for each type of transaction is governed by identical provisions in the FPA, §§ 205-206. See 16 U.S.C. §§ 824d-824e (1988) (authorizing FERC to set and regulate rates and charges for transmission and sale of electric energy under its jurisdiction).

wheeling,²⁶⁴ including auctioning of transmission capacity,²⁶⁵ and three-way shared savings²⁶⁶ to promote efficiency through the encouragement of economy transactions.²⁶⁷ A pricing scheme based on shared savings would not encourage overconstruction because

264. See *Entergy Servs. Inc.*, 58 F.E.R.C. ¶ 61,234, at 61,768 (1992) (approving shared savings rate for non-firm transmission service); *Pacific Gas & Elec. Co.*, 53 F.E.R.C. ¶ 61,145, at 61,503 (1990) (agreeing to approve market-based rates for coordination sales and transmission services upon acceptance of open access conditions); *Baltimore Gas & Elec. Co.*, 40 F.E.R.C. ¶ 61,170, at 61,538-39 (1987) (affirming flexible pricing proposal for transmission capacity based on competitive sealed-bid auction where all potential buyers have access to same markets); *Pacific Gas & Elec. Co.*, 38 F.E.R.C. at 61,782, 61,796-98 (approving zone of reasonableness in flexible pricing for transmission services with three-way split savings ceiling); *Southern Co. Servs., Inc.*, 37 F.E.R.C. ¶ 61,190, at 61,452 (1986) (holding that split-savings rates are reasonable alternative and extending concept of equal sharing to three-party transactions to allow all utility participants to benefit).

Pricing flexibility represents a departure from cost-of-service rates, which is justified where "a legitimate policy objective would be served." *Public Serv. Co. of N.M.*, 25 F.E.R.C. ¶ 61,469, at 62,049 (1983) (approving experiment in pricing flexibility for bulk power trades). FERC has approved departures from cost-of-service ratemaking where an industry is experiencing "contrasting or changing characteristics . . ." *Entergy Servs. Inc.*, 58 F.E.R.C. at 61,753 (quoting *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1503 (D.C. Cir.), cert. denied, 469 U.S. 1034 (1984)).

265. See *Baltimore Gas & Elec. Co.*, 40 F.E.R.C. at 61,539 (concluding that auctioning transmission capacity would improve efficiency and result in lower electricity costs for consumers).

266. See *Entergy Servs. Inc.*, 58 F.E.R.C. at 61,768 (accepting three-way split savings rate for nonfirm transmission customers as reasonable); *Pacific Gas & Elec. Co.*, 38 F.E.R.C. ¶ 61,242, at 61,782, 61,796-98 (1987) (approving zone of reasonableness in pricing for transmission services with ceiling set at 33% of shared savings), modified, 47 F.E.R.C. ¶ 61,121 (1989), modified, 50 F.E.R.C. ¶ 61,339 (1990), modified sub nom. *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, granting stay, 55 F.E.R.C. ¶ 61,154, reh'g granted in part, 55 F.E.R.C. ¶ 61,495, appeal filed, No. 91-1404 (D.C. Cir. Aug. 26, 1991), modified, 59 F.E.R.C. ¶ 61,249 (1992); *Southern Co. Servs., Inc.*, 37 F.E.R.C. at 61,451-52 (accepting three-way split savings rates as just and reasonable because it is logical extension of more typical two-way split savings rate method). Split savings rates are set by dividing the difference between the seller's cost of production and the cost the buyer saves by not producing the electricity on its own system. *Public Serv. Co. of N.M.*, 25 F.E.R.C. at 62,049 (defining split savings rates pricing method). Under three-way wheeling rates, the savings are divided equally among the buyer, seller, and transmitting utility. *Southern Co. Servs., Inc.*, 37 F.E.R.C. at 61,451. FERC declared that, "[s]haring of savings from economy transactions . . . is consistent with the Commission's policy of encouraging such transactions by giving sellers an incentive to make economy energy available while providing for an equitable distribution of benefits." *Id.* at 61,453.

267. See *Pacific Gas & Elec. Co.*, 53 F.E.R.C. at 61,503 (accepting market-based rates for transmission services in order to promote efficiency through increased reliance on coordination services); *Baltimore Gas & Elec. Co.*, 40 F.E.R.C. at 61,539 (affirming that auction process for transmission service serves statutory objective of "improving] economic efficiency by encouraging the lowest cost production of power . . . [which] should result in lower consumer costs for electric energy"); *Pacific Gas & Elec. Co.*, 38 F.E.R.C. at 61,796-98 (approving market rates for transmission because they are more likely to result in efficient allocation of transmission capacity); *Southern Co. Servs., Inc.*, 37 F.E.R.C. at 61,453 (accepting economical three-way split savings rates for transmission service in name of efficiency).

FERC later rejected flexible pricing for wheeling in *Pacific Gas & Elec. Co.*, 38 F.E.R.C. ¶ 61,242 (1987), out of concern about the utility's potentially anticompetitive exercise of market power. See *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,099, at 61,319 (refusing to extend flexible pricing for coordination and transmission services because applicant had "failed to demonstrate the lack or mitigation of the transmission market power that admittedly exists in certain segments of the WSPP region"), granting stay, 55 F.E.R.C. ¶ 61,154, reh'g granted in part, 55 F.E.R.C. ¶ 61,495, appeal filed, No. 91-1404 (D.C. Cir. Aug. 26, 1991), modified, 59 F.E.R.C. ¶ 61,249 (1992).

revenue is tied to use of the system. A wheeling utility may choose to set aside a fixed share of its total transmission capacity to provide service for third parties, or establish a transmission subsidiary that would wheel on behalf of third parties and expand its system as needed to satisfy their demands.

C. Necessary Changes to Federal Transmission Access Policy

The transmission access policy developed by FERC achieved indirectly what the agency was prohibited from ordering directly. Before enactment of the Energy Policy Act, the grant of wheeling power in section 211 of the FPA was very limited, but FERC circumvented those limits by ordering wheeling through its merger and ratemaking authority.²⁶⁸ Congress had required through the FPA that any wheeling order must be consistent with the restrictive terms of sections 211 and 212,²⁶⁹ but FERC's oblique approach defied this congressional mandate. FERC manipulated the FPA to implement its own policy goals to the extent that even Commission members warned that the agency exceeded its authority and made decisions properly reserved for Congress.²⁷⁰ FERC was able to pursue its electric transmission policy aggressively in large measure because it

268. See *supra* notes 46-50, 96 and accompanying text (explaining FERC's use of its merger and ratemaking authority to expand transmission access).

269. See 16 U.S.C. § 824k(a)(1)-(4) (1988) (limiting FERC's power to order wheeling when utility may suffer uncompensated economic loss or undue burden, reliability will be impaired, and utility's ability to render adequate service to its customers will be impaired). This section was deleted from the FPA by the Energy Policy Act. Energy Policy Act of 1992, Pub. L. No. 102-486, § 722(1), 106 Stat. 2776, 2916 (to be codified at 16 U.S.C. § 824k) (amending § 212 of FPA).

270. See *Northeast Utils. Serv. Co.*, 56 F.E.R.C. ¶ 61,269, at 62,056 (Trabandt, Comm'r, dissenting), *reh'g granted*, 57 F.E.R.C. ¶ 61,340 (1991), *modified*, 58 F.E.R.C. ¶ 61,070, *reh'g dismissed as moot*, 59 F.E.R.C. ¶ 61,089 (1992). Commissioner Trabandt charged that the agency was straying into an area properly reserved to Congress:

This case comes down to transmission: how to allocate the existing system, how to expand it (including who pays for additions) and, in general, who runs the grid. The current and soon-to-resume debates in Congress about reforming the structure of the electric utility industry must come to grips with these same issues. This order throws FERC's hat in the ring for the job of arbiter of the Nation's transmission grid. Based on this order, I would throw the hat right back out.

Id.

suffered little interference from the President,²⁷¹ Congress,²⁷² or the courts.²⁷³ Congress, however, has now reentered the field of

271. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 589 (1984) (describing existence of lesser presidential control over independent agencies such as FERC than over executive agencies). Presidential control over FERC is limited, due to its status as an independent regulatory commission. *Id.* The powers and duties of the FPC were transferred to FERC by the Energy Act of 1980, Pub. L. No. 95-91, § 402, 91 Stat. 565, 583 (codified at 42 U.S.C. § 7172 (1988)). Although FERC was established nominally "within" the Department of Energy, it was created as an "independent regulatory commission." 42 U.S.C. § 7171 (1988). Significantly, beyond the preparation of annual budget requests, § 7171(j), the Department of Energy appears to lack any means of control over FERC. This limited form of control has been weakened by the congressional directive to FERC to recover its entire budget through user fees. See Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1874, 1890 (codified at 42 U.S.C. § 7178(a) (1988)) (directing FERC to "assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year"). As a testament to this limited degree of control, President Bush proposed legislation early in 1991 to restructure FERC as a regulatory agency wholly within the executive branch. S. 570, 102d Cong., 1st Sess., § 221 (1991); H.R. 1301, 102d Cong., 1st Sess., § 221 (1991).

272. Before the Energy Policy Act, Congress had not enacted any significant electric regulatory legislation in the past 10 years and has essentially left the field to FERC. Congress did repeal a number of sections of the Powerplant and Industrial Fuel Use Act of 1978 (Fuel Use Act), Pub. L. No. 95-620, §§ 101-902, 92 Stat. 3289, 3289-3349 (codified as amended at 42 U.S.C. §§ 8301-8484 (1988)) in 1987. Pub. L. No. 100-42, § 1, 101 Stat. 310, 310-14 (1987). The Fuel Use Act proscribed the use of natural gas to generate electricity in new electric powerplants. Fuel Use Act, § 201, 92 Stat. at 3298 (codified as amended at 42 U.S.C. § 8311(a) (1988)). Repeal of the Fuel Use Act was hardly a significant action, because the Department of Energy had never denied a petition for exemption from these restrictions. H.R. REP. NO. 78, 100th Cong., 1st Sess. 5 (1987), *reprinted in* 1987 U.S.C.C.A.N. 270, 274. The only other electricity statute of note enacted during the 1980s was the National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, §§ 2-11, 101 Stat. 103, 103-26 (codified as amended at 42 U.S.C. §§ 6291-6309 (1988)). This relatively unimportant legislation is limited to establishing national energy conservation standards for 12 major residential appliances. S. REP. NO. 6, 100th Cong., 1st Sess. 1-2 (1987), *reprinted in* 1987 U.S.C.C.A.N. 52, 52-53.

273. The main constraint on judicial review of FERC orders and rulemakings in the field of electric regulation is the breadth of authority granted to FERC by the FPA. See 16 U.S.C. §§ 824a-824k (1988) (granting FERC authority to regulate all electric utility companies engaged in interstate commerce). Like many of the New Deal statutes, the FPA affords FERC wide discretion and authorizes the agency to act based on a finding that such action serves the "public interest" or is "just and reasonable." See *Vermont Dep't of Pub. Serv. v. FERC*, 817 F.2d 127, 135 (D.C. Cir. 1987) (upholding FERC interpretation of electric wholesale sales contract because FPA granted agency broad discretion to oversee "just and reasonable" electric rates); *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1570-71 (D.C. Cir.) (noting that terms "just and reasonable" in statute signify great degree of discretion accorded FERC by Congress), *cert. denied*, 484 U.S. 869 (1987); Jerome Nelson, *The Chevron Deference Rule and Judicial Review of FERC Orders*, 9 ENERGY L.J. 59, 70 (1991) (noting that courts are more likely to defer to agencies in construction of statutes with ambiguous terms such as "just and reasonable" and "public interest"). As a result, courts have shown great deference to FERC orders and rulemakings issued under the FPA. See *Boston Edison Co. v. FERC*, 885 F.2d 962, 964 (1st Cir. 1989) (affirming FERC orders setting wholesale electric rates because agency has discretion under FPA regarding ratemaking); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1087-89 (D.C. Cir. 1987) (affirming FERC order construing municipal relicensing provision of FPA because interpretation of statute was reasonable), *cert. denied*, 485 U.S. 913 (1988); *Greensboro Lumber Co. v. FERC*, 825 F.2d 518, 522-23 (D.C. Cir. 1987) (affirming cogeneration rule because Congress clearly assigned administration of PURPA to FERC and construction by agency was reasonable); *Vermont Dep't of Pub. Serv.*, 817 F.2d at 135 (upholding FERC interpretation of electric transmission contract because FPA granted agency "broad discretion to oversee energy rate regulation"); *Southern Cal. Edison Co. v.*

electric regulatory policy, approving legislation that mitigates native load impact by providing for recovery of forgone benefits,²⁷⁴ requires that any wheeling order maintain reliability,²⁷⁵ abandons the "Utah Hammer" in favor of a due diligence test,²⁷⁶ and adopts a public interest standard that is intended to assure that wheeling orders will not have an undue impact on native load customers.²⁷⁷

The transmission access policy established by FERC and mirrored to some degree by Congress' actions²⁷⁸ must be changed to bring it in line with the FPA. First, full recovery of forgone benefits must be allowed in order to hold native load customers harmless, and the proposed cap on recovery of opportunity costs based on the incremental cost of system expansion must be abandoned.²⁷⁹ Second, the "Utah Hammer" should be replaced by a due diligence standard for use in FERC's review of nonsatisfaction of third-party wheeling requests.²⁸⁰ Third, some form of incentive pricing should be established to encourage utilities to expand their transmission systems,

FERC, 805 F.2d 1068, 1071-72 (D.C. Cir. 1986) (denying challenge to FERC interpretation of fuel adjustment clause because FPA "endows the Commission with broad latitude"); *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1150 (D.C. Cir. 1986) (affirming FERC interpretation because deference is owed agency in interpretation of hydropower licensing regulations); *Idaho Power Co. v. FERC*, 767 F.2d 1359, 1363 (9th Cir. 1985) (sustaining FERC decision because agency's construction of FPA hydroelectric licensing standard was "reasonable and not contrary to the Act"); *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983) (denying petition for review of wholesale electric rate order because no abuse of FERC discretion was shown), *cert. denied*, 467 U.S. 1241 (1984). *But see* *Gulf States Utils. Co. v. FERC*, 872 F.2d 487, 490 (D.C. Cir. 1989) (remanding FERC order requiring utility to provide backup power to cogeneration facility for want of coherent explanation of FERC's determination that order was required by PURPA); *American Mun. Power-Ohio, Inc. v. FERC*, 863 F.2d 70, 73 (D.C. Cir. 1988) (suspending order setting wholesale electric rate because FERC had not supplied reasoned basis for order); *Public Serv. Co. of N.M. v. FERC*, 832 F.2d 1201, 1225 (10th Cir. 1987) (remanding electric rate orders because FERC erred in ordering rates effective on date FERC issued opinions rather than on date agency accepted utility's compliance filings); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1187-88 (D.C. Cir. 1987) (vacating rate order because no evidence refuted petitioner's assertion that scheduled rate was confiscatory); *Middle S. Energy, Inc. v. FERC*, 747 F.2d 763, 772 (D.C. Cir. 1984) (overturning order suspending electric rates because FERC lacked authority under FPA to suspend rates), *cert. denied*, 473 U.S. 930 (1985).

274. Energy Policy Act of 1992, Pub. L. No. 102-486, § 722(1), 106 Stat. 2776, 2916 (to be codified at 16 U.S.C. § 824k) (permitting utility to recover "all the costs incurred in connection with the transmission services").

275. *See id.* § 721(3) (barring FERC order for electric energy wheeling if such order would unreasonably impair reliability of utility system).

276. *See id.* § 721(5)(D) (vacating wheeling order where transmitting utility fails to obtain necessary approvals or property rights after making good faith effort).

277. *See id.* § 721(2) (including public interest requirement for FERC to weigh in issuance of electric transmission orders).

278. *See supra* notes 218-34 and accompanying text (explaining new law designed to expand FERC's wheeling authority and promote competition in wholesale power markets).

279. *See supra* notes 184-99, 251-55 and accompanying text (asserting that partial recovery of forgone benefits permitted by FERC does not hold native load customers harmless).

280. *See supra* notes 86-91, 246-47 and accompanying text (reviewing objections to "Utah Hammer" and comparing it to "good faith" standard in H.R. 776).

because opportunity cost pricing only provides for the most efficient allocation of existing capacity.²⁸¹ Fourth, the separate market power tests for generation and transmission should be abandoned in favor of a unitary test measuring whether adequate alternative sources of electric supply exist.²⁸²

CONCLUSION

In its ardor to promote competition in bulk power markets, FERC has reinterpreted the FPA and established the enhancement of transmission system access as an overriding statutory responsibility, even though no such duty is assigned to the agency by the express terms of the FPA. Frustrated in its efforts to order wheeling directly through the limited grant of authority in PURPA, FERC indirectly pursued transmission access through its merger and ratemaking authority. In the process, FERC ignored other statutory responsibilities that it is obliged to meet, namely its duties to encourage conservation and efficiency, prevent harm to native load customers, promote system coordination services, and assure reliability of service. Given the importance of the transmission system to reliable electric service in the United States, these deficiencies should be corrected in an expeditious manner through rulemakings on transmission access policy. There will be an opportunity to revisit transmission access policy during implementation of the Energy Policy Act because FERC has indicated that between three and five rulemakings are needed to implement the new law.²⁸³ Finally, it is entirely possible that FERC may take a different path under the Clinton administration and place less trust in the potential macroeconomic benefits from discounting the cost of transmission services. To the extent that a greater primacy is placed on protecting native load customers, FERC in a Clinton administration may raise transmission pricing to guarantee full cost recovery by the wheeling utility.

281. See *supra* notes 256-67 and accompanying text (stating that pricing incentives encourage expansion of transmission capacity and remove system constraints).

282. See *supra* notes 119-26 and accompanying text (stating that FERC adopted new three-part test for measuring market power over generation and transmission without explaining its departure from earlier approach that focused on viable alternative sources of energy).

283. See *Energy Bill Passage Likely To Prompt Big Package of Rulemakings at FERC*, ELEC. UTIL. WK., Oct. 12, 1992, at 13 (quoting FERC General Counsel William Scherman as stating that Energy Policy Act will result in "at least two or three rulemakings just on the electric side").