

THE FEDERAL POWER COMMISSION

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The 1950s saw an unprecedented trend in public criticism of the federal regulatory commissions, not the least of which was that directed at the Federal Power Commission. In December, 1960, James M. Landis highlighted this criticism in his *Report on Regulatory Agencies to the President-Elect*.¹ While critical of most of the federal regulatory agencies, Dean Landis stated: "The Federal Power Commission without question represents the outstanding example in the federal government of the breakdown of the administrative process."² In retrospect,

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¹ J. Landis, *Report on Regulatory Agencies to the President-Elect*, Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (Comm. Print 1960).

² *Id.* at 54.

much of Dean Landis' assessment seems to have been warranted, although the situation in which the Commission then found itself was understandable. As of June 30, 1960, Commission records show that there were pending 2,313 individual producer rate cases, 2,874 producer certificate cases, 129 pipeline rate cases, 245 pipeline certificate cases, 13 hydroelectric licensing cases and 4 electric utility rate cases. By comparison, as of June 30, 1969, the records show pending 6 consolidated producer rate cases,³ 1,613 producer certificate cases, 38 pipeline rate cases, 214 pipeline certificate cases, 8 hydroelectric licensing cases and 24 electric utility rate cases.

The first section of this article will deal with developments in the Commission's activities under the Natural Gas Act.⁴ Producer regulation, a relatively new function for the Commission, created procedural and substantive problems in the processing of rate filings which led to the initiation of area rate-making in place of the individual cost-of-service basis for rate-making. Several jurisdictional questions also had to be resolved. Under the traditional pipeline regulation function, in addition to making procedural innovations to expedite proceedings, the Commission faced problems in the treatment of federal income taxes in cost-of-service rate-making, and applied the area rate-making approach to gas production by pipelines so as to put it on the same basis as production by independent gas producers. Pipeline certificate cases produced significant questions of competition, the decade showing a marked increase in competition among pipelines. Finally, the recent public concern with environmental quality and the growing importance of imported gas as a source of supply have raised new regulatory problems.

In the second section of this article developments under the Federal Power Act⁵ will be considered. During the decade the Commission's licensing jurisdiction over non-federal hydroelectric projects under Part I of the Act⁶ was greatly expanded. The Commission was called upon to give substance to the statutory phrase "net investment." In addition, the Commission took significant steps to promote recreational uses of hydroelectric project properties. The Commission's jurisdiction under Part II of the Act,⁷ governing regulation of the electric utility industry, was also expanded. The Commission's responsibilities for the regulation of rates, the interconnection and coor-

³ This decrease in the number of producer rate cases is a result of area rate-making, see pp. 691-94 *infra*.

⁴ 15 U.S.C. §§ 717-717w (1964).

⁵ 16 U.S.C. §§ 791a-825r (1964).

⁶ 16 U.S.C. §§ 791a-823 (1964).

⁷ 16 U.S.C. §§ 824-25r (1964).

dination of facilities, and the merger and consolidation of public utilities also produced considerable activity.

This article also will consider the implications of the *Scenic Hudson* case,⁸ the *National Power Survey*⁹ published by the Commission in 1964, and new problems facing the Commission arising from current concern over the reliability of the nation's electric power systems, and over the quality of the nation's environment.

I. NATURAL GAS REGULATION

A. *Producer Regulation*

1. Area Rate-Making

The major problem facing the Commission in 1960 was a product of the difficulties that had arisen in the regulation of the producing segment of the natural gas industry. Up until October, 1948, the Commission had not exercised jurisdiction over natural gas producers. At that time the Commission instituted an investigation to determine whether Phillips Petroleum Company was a "natural gas company"¹⁰ within the meaning of the Natural Gas Act.¹¹ In August, 1951, the Commission held that Phillips' activities were exempt from jurisdiction under the "production or gathering" clause of Section 1(b)¹² of the Act.¹³ That holding was reversed by the court of appeals,¹⁴ and the court of appeals was subsequently upheld by the Supreme Court.¹⁵

As a result of these decisions, the Commission reopened its investigation of Phillips' rates,¹⁶ and began to process rate filings by producers on the traditional individual cost-of-service basis. After concluding several such proceedings, the Commission, in September, 1960, found that the individual cost-of-service procedure was unworkable for independent producer regulation and that the producer's price of gas should be regulated on an area basis.¹⁷ In reaching this decision, the Commission noted that 3,278 producer rate increase filings were then under suspension awaiting hearings, and that nearly 13 years would be required to dispose of the 2,313 producer rate

⁸ *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

⁹ FPC, *National Power Survey* (1964).

¹⁰ 15 U.S.C. §§ 717(b), 717a(6) (1964).

¹¹ *Phillips Petroleum Co.*, 7 F.P.C. 983 (1948).

¹² 15 U.S.C. § 717(b) (1964).

¹³ *Phillips Petroleum Co.*, 10 F.P.C. 246 (1951). See also *Columbian Fuel Corp.*, 2 F.P.C. 200 (1940).

¹⁴ *Wisconsin v. FPC*, 205 F.2d 706 (D.C. Cir. 1953).

¹⁵ *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

¹⁶ *Phillips Petroleum Co.*, 13 F.P.C. 1527 (1954).

¹⁷ *Phillips Petroleum Co.*, 24 F.P.C. 537, 542-48 (1960).

cases pending on July 1, 1960. Moreover, the Commission acknowledged that this staggering figure did not include the estimated 6,500 additional producer rate cases which were expected to be filed during that 13-year period.¹⁸ The Commission's decision in *Phillips* was affirmed by the court of appeals,¹⁹ and by the Supreme Court in a five-to-four decision.²⁰

The demonstrated inability of the Commission to rule quickly on producer rate filings by the individual cost-of-service method was soon matched by its inability to implement area rate cases expeditiously. As a result the Commission was required to turn to interim measures—so-called “guideline” and “in-line” pricing techniques. These techniques evolved from the Supreme Court's decision in the *CATCO* case,²¹ where the Commission, after twice refusing to certify a large offshore Louisiana sale at the proposed producer price, certificated the sale at the price after representations were made that unless the Commission did so the gas would be withdrawn from the interstate market.²² In reversing the Commission's action, the Supreme Court held that, while the Natural Gas Act did not call for the determination required by the section 4²³ standard of “just and reasonable” rates in section 7²⁴ certificate proceedings, it did require that the initial price be carefully scrutinized to insure that the transaction meets the section 7 standard of “public convenience and necessity.”²⁵ Moreover, the Court held that the authority of the Commission under Section 7(e) of the Act to condition certificates should be used to “hold the line awaiting adjudication of a just and reasonable rate.”²⁶ Thus, where the proposed price was not in the public interest because it was “out of line” or because it would trigger other producer rate increases, the Commission was directed to attach such conditions as it found necessary in the public interest.

In its *Statement of General Policy No. 61-1*²⁷ the Commission set forth guideline prices for each area of the country at which the Commission would, in the absence of intervention, either grant an unconditioned initial permanent certificate for producers or suspend a producer rate filing. Since many of the guideline prices were thought

¹⁸ Id. at 545-46.

¹⁹ *Wisconsin v. FPC*, 303 F.2d 380 (D.C. Cir. 1961).

²⁰ *Wisconsin v. FPC*, 373 U.S. 294 (1963).

²¹ *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378 (1959).

²² *Continental Oil Co.*, 17 F.P.C. 880 (1957).

²³ 15 U.S.C. § 717c (1964).

²⁴ 15 U.S.C. § 717f(e) (1964).

²⁵ 360 U.S. at 390-91.

²⁶ Id. at 392.

²⁷ 24 F.P.C. 818 (1960).

by consumer interests to be excessively high, numerous interventions were filed in the newly conceived area rate proceedings.

It became clear immediately that the area rate proceedings would be lengthy and would produce massive records requiring exhaustive review before the Commission could issue its decisions. Thus, in accord with the "in-line" price rationale of *CATCO*, the Commission began to develop a formula to establish in-line rates at which permanent certificates could be granted.²⁸ In the first of such in-line proceedings, the Commission ruled that the in-line price for the sales involved in *CATCO* would be fixed by adopting the existing producer prices in the area at which substantial amounts of natural gas moved in interstate commerce.²⁹ In subsequent in-line proceedings, the Commission determined that it should exclude production cost evidence as unduly time consuming, and that it should exclude or give lesser consideration to producer prices which were "suspect," either because they were still subject to judicial review or because they were contained in temporary certificates issued on the *ex parte* representations of the producers.³⁰ Thereafter, the Commission also began to condition producer certificates so as to limit the level to which the price might be raised pending determination of just and reasonable area rates.³¹ On review, the Supreme Court generally approved this method of regulation.³²

The Commission had begun to impose a condition upon the grant of temporary certificates which barred price increases under such certificates—a practice approved by the Supreme Court in *FPC v. Hunt*.³³ This method of regulation was employed by the Commission through the mid-1960s, and as area rate proceedings were underway, the Commission, for practical purposes, ceased to grant permanent producer certificates in contested proceedings. Rather, it consolidated these proceedings pending resolution of the applicable area rate cases.

In *FPC v. Sunray DX Oil Co.*,³⁴ the Supreme Court held that the Commission correctly imposed refund obligations when it granted permanent certificates to producers who had previously been selling gas

²⁸ The cases following *CATCO* had set some basis for such an approach. *United Gas Improvement Co. v. FPC*, 290 F.2d 133 (5th Cir.), cert. denied, 368 U.S. 823 (1961); *Public Serv. Comm'n v. FPC*, 287 F.2d 146 (D.C. Cir. 1960), cert. denied, 365 U.S. 880, 882 (1961); *United Gas Improvement Co. v. FPC*, 283 F.2d 817 (9th Cir. 1960), cert. denied, 365 U.S. 879, 881 (1961).

²⁹ *Continental Oil Co.*, 27 F.P.C. 96 (1962). The actual terms of that order were amended somewhat by a later settlement of the proceeding. 28 F.P.C. 1090 (1962).

³⁰ See, e.g., *Skelly Oil Co.*, 28 F.P.C. 401 (1962), aff'd in part, *Public Serv. Comm'n v. FPC*, 329 F.2d 242 (D.C. Cir.), cert. denied, 377 U.S. 963 (1964); *Texaco Seaboard, Inc.*, 29 F.P.C. 593 (1963).

³¹ See, e.g., *Placid Oil Co.*, 30 F.P.C. 283 (1963).

³² *United Gas Improvement Co. v. Callery Properties, Inc.* 382 U.S. 223 (1965).

³³ 376 U.S. 515 (1964).

³⁴ 391 U.S. 9 (1968).

under unconditioned temporary certificates issued on an *ex parte* basis.³⁵ In generally approving the regulatory techniques used by the Commission in in-line cases, *Sunray DX* probably will stand as the final judicial pronouncement of the in-line era of producer regulation.

The culmination of the initial phase of the Commission's efforts to regulate producers on an area basis came with the decision of the first area rate case, that covering the Permian Basin, a large oil and gas reserve in New Mexico and Texas.³⁶ The complexity of this proceeding is demonstrated by the length of the hearing transcript, which is in excess of 30,000 pages, and the text of the Commission opinion, which totals 107 pages in the FPC reports. In May, 1968, the Commission's opinion in *Permian* was affirmed by the Supreme Court.³⁷ The Supreme Court held that the area rate approach was acceptable and within the Commission's statutory authority, that the price established by the Commission was appropriate, and that the 2½ year moratorium on price increases imposed by the Commission was a proper exercise of the Commission's authority.³⁸

Three years after the landmark *Permian* decision, the Commission issued its second area rate decision, which covered the South Louisiana offshore and onshore areas, and followed generally the area rate-making approach taken in *Permian*.³⁹ Petitions for review of that order are pending in the Court of Appeals for the Fifth Circuit.⁴⁰ Several other area rate cases have reached the level of decision by hearing examiners and will soon be acted upon by the Commission.

2. Producer-Pipeline Arrangements and FPC Jurisdiction

Although the effort to establish viable procedures for producer regulation would seem, in retrospect, to have been the FPC's dominant concern during the past decade, there have been other significant developments concerning producer regulation. Several of these involve

³⁵ Such certificates are provided by § 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c) (1964).

³⁶ Area Rate Proceeding (Permian Basin Area), 34 F.P.C. 159 (1965).

³⁷ Permian Basin Area Rate Cases, 390 U.S. 747 (1968), rev'g in part 375 F.2d 6, 35 (10th Cir. 1967).

³⁸ For an appraisal of *Permian*, see Gilliam, Permian Basin Area Rate Cases: New Landfalls in Rate Regulation, Natural Resources Lawyer, July, 1969, at 193; Kitch, The Permian Basin Area Rate Cases and the Regulatory Determination of Price, 116 U. Pa. L. Rev. 191 (1967); Mosburg, The *Permian* Decision—A Study in Group Regulation, 19 Okla. L. Rev. 133 (1966).

³⁹ Area Rate Proceeding (Southern La. Area), 40 F.P.C. 530 (1968), order modified on rehearing, 41 F.P.C. 301 (1969).

⁴⁰ Southern La. Area Rate Cases, No. 27492 et al. (5th Cir., filed Mar. 19, 1970). The importance of these cases to the parties may be indicated by the fact that within 90 seconds after the issuance of the Commission opinion, petitions for review were filed in the Fifth, Tenth, and District of Columbia Circuit Courts of Appeals.

jurisdictional issues with respect to contractual arrangements between producers and pipelines.

The first development occurred when a group of producers, shortly after the *CATCO* decision, withdrew their pending applications for certificates to sell their gas on a conventional basis, cancelled their sales contracts, and agreed instead to sell their leasehold interests to the pipeline-purchaser on terms similar in economic effect to conventional sales of gas. Initially, the Commission considered this lease-sale to be non-jurisdictional and issued an unconditioned certificate to the pipeline-purchaser to permit it to build the facilities necessary to receive the gas.⁴¹ This decision was reversed by the Court of Appeals for the District of Columbia Circuit because the Commission's opinion appeared to approve what the court viewed as excessive or "out of line" prices under the lease-sale agreement.⁴²

On remand, the Commission reopened the proceedings and, after further hearing, concluded that it did have jurisdiction over the lease-sale. The Commission then disapproved the lease-sale arrangement on the ground that it would be difficult, if not impossible, under this arrangement to subject the price of gas to regulatory control.⁴³ This decision was approved by the Supreme Court.⁴⁴

The second such case arose when a producer sold gas to an interstate pipeline under a contract providing that the gas would be for the latter's non-jurisdictional use. Despite the terms of this contractual provision, the gas itself entered the purchaser's pipeline and was commingled with gas destined for jurisdictional markets. In examining the jurisdictional status of this arrangement, the Commission held that FPC jurisdiction should follow the molecular flow of the gas, and consequently held the sale to be jurisdictional.⁴⁵ This decision also was affirmed by the Supreme Court.⁴⁶

In a conceptually related case in which a producer contracted with a pipeline to transport gas from the producer's fields in Texas and Louisiana to the producer's refinery in New Jersey, the Commission held that there was no jurisdictional sale by the producer.⁴⁷ The

⁴¹ *Texas Eastern Transmission Corp.*, 21 F.P.C. 860 (1959).

⁴² *Public Serv. Comm'n v. FPC*, 287 F.2d 143 (D.C. Cir. 1960).

⁴³ *Texas Eastern Transmission Corp.*, 29 F.P.C. 249 (1963).

⁴⁴ *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392 (1965), rev'g 336 F.2d 320 (5th Cir. 1964). See also *Continental Oil Co. v. FPC*, 370 F.2d 57 (5th Cir. 1966), cert. denied, 383 U.S. 910 (1967); *Pan American Petroleum Corp. v. FPC*, 339 F.2d 694 (10th Cir. 1964), rev'd, 381 U.S. 762 (1965).

⁴⁵ *Lo-Vaca Gathering Co.*, 26 F.P.C. 606 (1961).

⁴⁶ *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), rev'g 323 F.2d 190 (5th Cir. 1963). See also *FPC v. Amerade Petroleum Corp.*, 379 U.S. 687 (1965).

⁴⁷ *Transcontinental Gas Pipe Line Corp.*, 33 F.P.C. 237 (1965), aff'd sub nom. *Public Serv. Elec. & Gas Co. v. FPC*, 371 F.2d 1 (3d Cir. 1967).

producer's gas was commingled, as in *Lo-Vaca*, with gas transported by the pipeline for jurisdictional sales. Unlike *Lo-Vaca*, however, the arrangement involved no transfer of title from producer to pipeline, since the producer owned the gas both at the beginning and at the end of the journey. In this respect, the court distinguished a bailment from a sale in determining FPC jurisdiction under the Natural Gas Act.

3. FPC Jurisdiction over Royalty Owners

Another development in producer regulation arose from a private suit between a royalty owner and a producer. In that case, the district court held that the proper interpretation of the subject royalty contract required royalty payments computed on a higher price than the producer received under its gas sales contract with its pipeline-purchaser.⁴⁸ The court of appeals, however, requested a ruling by the Commission on the question whether the FPC has jurisdiction over royalty owners under the Natural Gas Act.⁴⁹ The Commission found that the interest of a royalty owner was not sufficiently unlike that of a co-owner of the gas to make any difference in legal status and, accordingly, held that the royalty owner was subject to the Commission's jurisdiction.⁵⁰

4. Pricing Policies and Gas Supply

The Commission recently departed significantly from the existing area rate methodology in seeking to establish just and reasonable rates for the Appalachian and Illinois Basin Areas. In October, 1969, the Commission proposed to avoid the lengthy hearing procedures characteristic of the other area rate proceedings by issuing a rule-making proposal which would, in effect, employ as just and reasonable rates the alternative costs of purchasing southwestern-produced gas at delivery points in the Appalachian and Illinois producing areas.⁵¹ The significance of this proposal is twofold: first, it departs from utilizing cost as the basis for producer pricing by recognizing the locational value and market price history of the gas; and second, it

⁴⁸ *Denman v. J.M. Huber Corp.*, 251 F. Supp. 746 (N.D. Tex. 1964). Thus, the court held that the contract entitled the royalty owner to a royalty payment of up to one-fourth of a market value of 23 cents per Mcf for gas which was sold in interstate commerce at 4 to 11 cents per Mcf. *Id.* at 750.

⁴⁹ *J.M. Huber Corp. v. Denman*, 367 F.2d 104 (5th Cir. 1966).

⁵⁰ *Denman v. J.M. Huber Corp.*, Opinion No. 562 (F.P.C. July 23, 1969), petition for review now pending in consolidated proceedings, *Mobil Oil Corp. v. FPC*, No. 23 463 (D.C. Cir., filed Sept. 12, 1969). Nine petitions were consolidated; of these, one has been dismissed.

⁵¹ 1 Dkt. No. R-371, 34 Fed. Reg. 17341 (1969).

eliminates the necessity for an evidentiary hearing by employing rule-making techniques in area pricing.

In both respects this proceeding illustrates trends in producer regulation which provide challenges for the Commission in the next decade. The functional effectiveness of the rates established in the existing area rate proceedings will have to be examined objectively in the light of the contention by all segments of the gas industry that the Commission's pricing policies have resulted in a decline in production which adversely affects the viability of the industry. From the outset the Commission anticipated that a practical test of the functional effectiveness of area rates would be necessary, and in *Permian* it stated:

The separate price we fix herein for new gas-well gas in the Permian Basin should serve to furnish a practical test of whether in fact it will result in bringing forth additional supplies.⁵²

To the extent that available gas supplies are inadequate to meet projected demand, and to the extent that a consequent shortage of gas may be shown to be related to the Commission's pricing policies of the past decade, the Commission will have failed the test which it anticipated in *Permian*. This would raise the question whether past pricing policies have been responsive to the economic realities of the marketplace and to the dynamics of the gas supply problem. Indeed, the future may require a shift in regulatory emphasis from the equity pricing principles employed in traditional utility regulation to functional pricing, which has as its primary objective not the adjustment of economic equities between the producer and consumer, but the desire to induce additional gas production.

The problem of producer regulation in a period of gas surplus, which was characteristic of the past decade, is of entirely different dimensions than that in a period of tight supply. Irrespective of the answer to present contentions concerning the projected inadequacy of gas supply in the decade of the seventies, it is certain that the Commission must be apprised more fully and more quickly of the supply and demand dynamics of the gas market. Functionally effective prices are more directly related to economic factors than accounting costs, regardless of the sophistication of the costing methodology employed. Broadening the rationale for producer regulation, such as giving recognition to the locational value of gas, is a response to only part of the problem. The methodology of producer regulation must also be changed to permit an effective and timely response to changes in supply and demand in order to avoid serious national consequences.

⁵² 34 F.P.C. at 188.

In the next decade the Commission will not be afforded the luxury of gathering multitudinous volumes of cost data during unduly time consuming area rate proceedings. Alternatives must be considered to the existing controversies concerning cost analysis and costing methods. One promising alternative would be the establishment of an index based upon both cost and supply-demand factors which would serve as a guide for acceptance or suspension of rate proposals similar to that employed by the Interstate Commerce Commission in its regulation of area rates in the transportation industry. Irrespective of the technique which is ultimately adopted, it seems certain that the Commission is obliged to extricate itself from the strictures of the existing methodology of producer regulation as it continues to discharge this difficult regulatory task in the next decade.

B. Pipeline Regulation

1. Rate Regulation

Pipeline rate proceedings during the past decade have been expedited by a procedural innovation adopted by the Commission in April, 1960.⁵³ Under Section 4(e) of the Natural Gas Act,⁵⁴ a proposed rate increase may be suspended by the Commission for a period not to exceed five months. After the period of suspension, on the motion of the pipeline company the rate increase becomes effective subject to refund, with interest, of the portion found not justified. Since most rate proceedings take longer than the five-month suspension period, pipelines in the past generally put increased rates into effect during the subsequent period of regulatory lag. This caused considerable practical difficulties for both the Commission and the pipelines in matters of rate design and refunds. As a result, the Commission proposed that in future proceedings certain issues, such as rate of return, be severed from the remaining issues for expedited hearing and decision. This expedited procedure was first implemented in *Southern Natural Gas Co.*,⁵⁵ and *Tennessee Gas Transmission Co.*⁵⁶ The Supreme Court, in approving the Commission's expedited procedure in the latter case, found it to be in the "best tradition of effective administrative practice."⁵⁷

Most of the significant substantive developments in pipeline rate

⁵³ *Panhandle Eastern Pipe Line Co.*, 23 F.P.C. 646 (1960).

⁵⁴ 15 U.S.C. § 717c(e) (1964).

⁵⁵ 24 F.P.C. 26 (1960).

⁵⁶ 24 F.P.C. 204 (1960). But see *FPC v. Natural Gas Pipe Line Co.*, 315 U.S. 575 (1942); *Panhandle Eastern Pipe Line Co. v. FPC*, 236 F.2d 606 (3d Cir. 1956); *State Corp. Comm'n v. FPC*, 206 F.2d 690 (8th Cir. 1953), cert. denied, 346 U.S. 922 (1954).

⁵⁷ *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 155 (1962).

regulation during the past decade have concerned the appropriate regulatory treatment of federal income taxes in cost-of-service rate-making. In *Alabama-Tennessee Natural Gas Co.*,⁵⁸ the Commission found that where a jurisdictional pipeline company with a growing or stable rate base uses liberalized depreciation in computing its federal income taxes, tax savings in fact accrue to the company. Those savings, the Commission reasoned, should be passed on to the pipeline's customers rather than being retained for the benefit of its stockholders.⁵⁹

Following *Alabama-Tennessee*, the Commission took a further step in the same direction. In *Midwestern Gas Transmission Co.*,⁶⁰ the Commission held that where a jurisdictional pipeline company elected to use liberalized depreciation in computing its federal taxes, but decided after the *Alabama-Tennessee* decision to revert to straight-line depreciation, the company's cost-of-service should be computed "as if" the company remained on liberalized depreciation. Thus, the Commission concluded that the savings which accrued from this imputed liberalized depreciation also should be passed on to the pipeline's customers. Applying similar principles in *United Gas Pipe Line Co.*,⁶¹ the Commission held that if a jurisdictional pipeline company realizes tax savings by using the tax losses of its affiliate in filing consolidated tax returns, these tax savings should be reflected in the pipeline company's cost-of-service to the benefit of its customers.

In *Texas Eastern Transmission Corp.*⁶² the Commission resolved the long-standing problem of determining the appropriate means by which producer refunds should be allocated among pipelines, distributors, and ultimate consumers. The Commission held that the initial pipeline-purchaser was not entitled, as a matter of law under section 4(e), to retain the monies refunded by the producer-seller. Specifically, the Commission held that the ultimate consumers were the "proper beneficiaries" of these refunds, and accordingly established procedures designed to pass on producer refunds to them.⁶³ The Commission made clear that in the future, pipelines which do not file rate increases to track those filed by the producers from whom they

⁵⁸ 31 F.P.C. 208 (1964), aff'd, *Alabama-Tennessee Natural Gas Co. v. FPC*, 359 F.2d 318 (5th Cir.), cert. denied, 385 U.S. 847 (1966).

⁵⁹ *Alabama-Tennessee* represented a reversal of FPC policy with respect to flow through of liberalized depreciation. See, e.g., *El Paso Natural Gas Co.*, 22 F.P.C. 260 (1959); *Amere Gas Util. Co.*, 15 F.P.C. 760 (1956).

⁶⁰ 36 F.P.C. 61 (1966), aff'd, *Midwestern Gas Transmission Co. v. FPC*, 388 F.2d 444 (7th Cir.), cert. denied, 392 U.S. 928 (1968).

⁶¹ 31 F.P.C. 1180 (1964), aff'd, 386 U.S. 237 (1967), rev'g 357 F.2d 230 (5th Cir. 1966).

⁶² 39 F.P.C. 630 (1968), aff'd, 414 F.2d 344 (5th Cir. 1969).

⁶³ 39 F.P.C. at 638.

purchase gas would be precluded from retaining the producers' refunds. Thus, the Commission assured ultimate consumers that they would be entitled to producer refunds under the policy and statutory scheme set forth in the Natural Gas Act.

2. Gas Production by Pipelines

The Commission recently moved to regulate natural gas produced by pipelines in the future on the same basis as that produced by independent producers. While gas produced by independent producers has been treated since 1960 on an area rate basis, pipeline-produced gas has been treated, as are other components of a pipeline's jurisdictional operations, on an individual company cost-of-service basis.⁶⁴ In *Pipeline Prod. Area Rate Proceeding* (Phase I),⁶⁵ the Commission determined that, as to gas from leases acquired after the date of the opinion,⁶⁶ the logic of the area rate approach, together with the lack of prejudice to any party, combined to make it appropriate for pipelines to account for their own production on the basis of the area rate. The Commission concluded that such a policy would encourage pipelines to increase their activity in the search for and production of gas, without increasing the overall cost of gas to the consuming public.

3. Competition Among Pipelines

The significant developments in pipeline certificate cases during the past decade have been dominated by issues concerning competition. The Commission has dealt with these issues in a number of cases, notably, *Transwestern Pipeline Co.*,⁶⁷ where a third pipeline was denied entry to the Los Angeles market area; *Columbia Gulf Transmission Co.*,⁶⁸ where a second pipeline was approved for the Washington, D.C., and Richmond, Virginia, market areas; *City of Hamilton, Ohio*,⁶⁹ where the City was permitted to obtain gas supply from a new

⁶⁴ See, e.g., *Panhandle Eastern Pipe Line Co. v. FPC*, 324 U.S. 635 (1945); *Cities Serv. Gas Co.*, 3 F.P.C. 459 (1943), aff'd, 155 F.2d 694 (10th Cir.), cert. denied, 329 U.S. 773, (1946); *Canadian River Gas Co. v. Public Serv. Comm'n*, 3 F.P.C. 32 (1942), aff'd sub nom. *Colorado Interstate Gas Co. v. FPC*, 142 F.2d 943 (10th Cir. 1944), aff'd, 324 U.S. 581 (1945); *City of Cleveland v. Hope Natural Gas Co.*, 3 F.P.C. 150 (1942), aff'd sub nom. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), rev'g 134 F.2d 287 (4th Cir. 1943).

⁶⁵ Opinion No. 568 (F.P.C. October 7, 1969).

⁶⁶ The period in question is Phase I of the proceeding. Phase II, which deals with leases acquired prior to the date of the Phase I opinion, will soon go to hearing.

⁶⁷ 36 F.P.C. 176 (1966), aff'd sub nom. *Southern Cal. Edison Co. v. FPC*, 387 F.2d 619 (3d Cir. 1967), cert. denied, 392 U.S. 909 (1968).

⁶⁸ 37 F.P.C. 118 (1967), aff'd sub nom. *Atlantic Seaboard Corp. v. FPC*, 397 F.2d 753 (4th Cir. 1968).

⁶⁹ 37 F.P.C. 209 (1967), aff'd sub nom. *Cincinnati Gas & Elec. Co. v. FPC*, 389 F.2d 272 (6th Cir.), cert. denied, 393 U.S. 826 (1968).

supplier rather than from its existing supplier; *Alabama-Tennessee Natural Gas Co.*,⁷⁰ where the city of Corinth, Mississippi, was permitted to change suppliers; and *Cincinnati Gas & Elec. Co.*,⁷¹ where a distributor was not permitted to obtain an additional source of supply. As a result of this dynamic period of competition, most major market areas today have two or even three sources of pipeline gas supply.

In a series of decisions involving the issue of whether an industrial customer in the City of Fulton, Missouri, should purchase gas from the city-owned gas distribution system or directly from the pipeline which served the City, the Commission made clear its policy "to favor service to industrial customers by local distributors."⁷² Thus, the Commission stated, "unless economic conditions preclude it,"⁷³ interstate pipelines will not be permitted to compete with local distributors for increments of industrial load in the distributors' franchise areas. This conclusion, the Commission found, was in keeping with the historical structure of the gas industry under which pipelines serve the function of transporting gas from production areas to distribution markets where the gas is purchased and resold by companies authorized by law to engage in local distribution to the public.

Another aspect of the Commission's authority to deal with issues of competition was highlighted by *Algonquin Gas Transmission Co.*⁷⁴ There, the Commission, for the first time at the commencement of a section 7(c) certificate proceeding,⁷⁵ issued on its own motion an order to show cause under section 7(a). Section 7(a) provides:

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company . . . to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public⁷⁶

Faced with a situation where Algonquin proposed to construct facilities necessary to serve Hartford Gas Company, and where it seemed that

⁷⁰ 38 F.P.C. 1069 (1967); *Alabama-Tennessee Natural Gas Co. v. FPC*, 417 F.2d 511 (5th Cir. 1969).

⁷¹ 41 F.P.C. 530 (1969).

⁷² *Panhandle Eastern Pipe Line Co.*, 39 F.P.C. 581, 585 (1968).

⁷³ *Panhandle Eastern Pipe Line Co.*, 36 F.P.C. 1107 (1966).

⁷⁴ 37 F.P.C. 1128 (1967).

⁷⁵ 15 U.S.C. § 717f(c) (1964).

⁷⁶ 15 U.S.C. § 717f(a) (1964).

Tennessee Gas Transmission Company could perform that service more economically, the Commission, after hearing, ordered Tennessee to serve Hartford. In doing so, the Commission stated:

This decision should not be misunderstood as signaling the institution of a 7(a) proceeding every time a pipeline files a certificate application. This is not our intention. We expect the pipelines and their customers to continue to plan for future needs and to prepare and submit the best method they can conceive for accommodating those needs. We further expect that their proposals will be best suited to the public interest and that there will be few occasions to exercise our authority under Section 7(a) to consider alternatives.⁷⁷

The facts brought forth in this proceeding justified extraordinary action. Because the Commission thought that its earlier decisions relating to competition in the Northeastern markets might have been incorrectly interpreted by affected parties as having created a de facto division of markets between Algonquin and Tennessee Gas, the Commission found it desirable to take action designed to emphasize that it favored vigorous pipeline competition in the Northeast.

The 1960s saw a marked increase in competition among pipelines. In light of this manifest trend toward aggressive pipeline competition, it seems highly probable that the decade of the Seventies will see even stronger competitive forces motivating pipeline marketing practices. Moreover, it seems likely that recent technological advances in cryogenics will make liquified natural gas (LNG) a viable competitor of the pipeline industry. The technology exists today for tanker transport of LNG to compete directly with pipeline-transported gas in several major markets on the East and West Coasts. If there is a further industrial commitment to reduce the cost of LNG technology in the future, it is clear that LNG has the potential to alter substantially the competitive relationships within the gas industry in the United States.

4. The "End Use" Issue

In *FPC v. Transcontinental Gas Pipe Line Corp.* (the *X-20* case),⁷⁸ the Supreme Court upheld the Commission's authority to consider the "end use" of natural gas in issuing pipeline certificates. The *X-20* case involved a field purchase of natural gas by Consolidated Edison Company of New York for the purpose of consumption as boiler fuel in the production of electricity. Consolidated Edison con-

⁷⁷ 37 F.P.C. at 1138.

⁷⁸ 365 U.S. 1 (1961).

tracted with Transcontinental to transport the gas from the Southwest production area to New York. In denying Transcontinental's application for authorization to transport Consolidated Edison's gas, the Commission characterized the proposed end use of the gas as "inferior" to other potential uses of this resource.⁷⁹ Although the end use issue has been raised in several subsequent proceedings, there has been no case in which the Commission denied authorization for the single reason that the proposed end use would be inferior.

The recent public concern with environmental quality will in all likelihood make end use a more frequently raised issue in pipeline proceedings. Natural gas is virtually sulfur free. As public pressure continues to mount against industrial pollution, particularly against sulfur dioxide emissions by electric utilities and other high-sulfur fuel users, it seems likely that pipelines will be called upon to provide natural gas as a substitute for these high-sulfur fuels. The question whether this substitution would put natural gas to an "inferior" use, that is, one which could be performed adequately by another fuel, or on the other hand to a "superior" use, because of its social value in combatting air pollution, will be one which the Commission clearly will face in the near future.

5. Import Regulation

During the 1960s, Canadian gas reserves began to take on significance as an additional potential source of gas supply for the United States, particularly markets in the Midwest and Northwest. El Paso Natural Gas Company imported substantial volumes of gas to the Pacific Northwest region, and Pacific Gas Transmission Company imported large volumes to Northern California. At present, as various pipelines seek additional sources of gas supply, attention is focusing increasingly on Canada's gas reserves. In view of this, it seems probable that in the decade of the seventies the Commission and Canadian officials as well will be called upon to evaluate natural gas resources on a continental, rather than a national, basis. Should this in fact become an issue, a seemingly unparalleled demand for creative regulation will indeed face regulators in both the United States and Canada.

While in the past natural gas has been imported from Canada and Mexico by pipeline only, proposals are now being made that natural gas be imported into the United States in liquid form by cryogenic tankers. Although the international movement of liquified natural gas has been practiced by several European countries, the United States has just recently begun to enter this field. In 1968 two shiploads of LNG were imported from Algeria to Boston, Massachu-

⁷⁹ Transcontinental Gas Pipe Line Corp., 21 F.P.C. 138 (1959).

setts, and in 1969 El Paso Natural Gas Company and the Algerian government made public their plans to begin the importation of natural gas to the East Coast during the early 1970s. It seems likely that in the Seventies such proposals will become commonplace.

6. Pipeline Competition and the Antitrust Laws

Throughout the 1960s, both the Commission and the courts faced the issue of pipeline competition under the antitrust laws. In 1957 El Paso Natural Gas Company, then the sole supplier of gas to the California market, purchased the stock of Pacific Northwest Pipeline Corporation, a stock acquisition which did not require FPC approval under the Natural Gas Act. Pursuant to section 7(c),⁸⁰ however, El Paso subsequently applied to the Commission for approval of its proposed acquisition of the assets of Pacific Northwest. In December, 1959, the Commission authorized the merger of assets.⁸¹ This decision was affirmed by the court of appeals,⁸² but was subsequently reversed by the Supreme Court.⁸³ The Supreme Court held that since an action challenging the acquisition filed by the Department of Justice under Section 7 of the Clayton Act⁸⁴ was pending in the courts, the Commission should have stayed its hand until after the courts resolved the antitrust issue. Thus, the Supreme Court found that the Natural Gas Act, unlike other regulatory statutes, did not give the FPC primary jurisdiction to conclude whether a merger is in the public interest. Rather, jurisdiction to decide the antitrust aspects of the merger, under the Natural Gas Act, remains exclusively with the courts.

In 1964 the Supreme Court ruled that El Paso's acquisition of Pacific Northwest's stock violated Section 7 of the Clayton Act.⁸⁵ Despite the Supreme Court's mandate that there be "divestiture without delay," the Court found that the two divestiture decrees subsequently entered by the district court were unacceptable.⁸⁶ In view of the entanglement of this merger and divestiture with administrative and judicial procedures throughout the decade of the sixties, it appears probable that there will be continuing efforts to resolve the interrelationship of the FPC and the courts regarding pipeline mergers by legislation which in the future will give the Commission primary jurisdiction over these mergers.

⁸⁰ 15 U.S.C. § 717f(c) (1964).

⁸¹ *Pacific Northwest Pipeline Corp.*, 22 F.P.C. 1091 (1959).

⁸² *California v. FPC*, 296 F.2d 348 (D.C. Cir. 1961).

⁸³ *California v. FPC*, 369 U.S. 482 (1962).

⁸⁴ 15 U.S.C. § 18 (1964).

⁸⁵ *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

⁸⁶ *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

THE FEDERAL POWER COMMISSION

The Court of Appeals for the District of Columbia Circuit, in *Northern Natural Gas Co. v. FPC*,⁸⁷ recently emphasized that the Commission must consider national antitrust policies in exercising jurisdiction over pipeline construction proposals. In *Northern Natural Gas Co.*, the Commission authorized construction of a new pipeline, which was the joint venture of Trans-Canada Pipe Lines, Limited and American Natural Gas Company.⁸⁸ The court of appeals reversed because the Commission failed to consider adequately whether Trans-Canada's earlier application, which that company later withdrew, to construct the proposed pipeline as an independent venture would have created a viable pipeline capable of competing beneficially with American Natural Gas Company in Wisconsin and Michigan. Considering the impact of *Northern Natural Gas* upon industry and regulators alike, it is clear that as competition among pipelines continues to increase in the future, antitrust policies will become key factors in defining a number of important aspects of national energy policy.

II. ELECTRIC POWER REGULATION

A. Part I of the Federal Power Act⁸⁹

1. FPC Licensing Jurisdiction over Hydroelectric Projects

The 1960s was a decade of significant activity under Part I of the Federal Power Act. In the context of rapidly changing technology, the Commission's licensing authority over non-federal hydroelectric projects, its oldest regulatory activity and one which dates back to the Federal Water Power Act of 1920,⁹⁰ was substantially broadened. The basis of the new impetus given to the Commission's jurisdiction was a series of decisions which expanded the number of projects subject to federal licensing and increased the responsibilities of the licensees.

In the *Taum Sauk* case,⁹¹ the Supreme Court departed from earlier determinations and looked beyond the issue of navigability in defining the Commission's jurisdiction over the interstate power operations of the licensee. Although the license at issue related to a pumped storage project on a non-navigable stream, the Court held that where a project uses the headwaters of a non-navigable river to generate electric power for an interstate power system, a license must be obtained for its construction, operation and maintenance. The impact of this

⁸⁷ 399 F.2d 953 (D.C. Cir. 1968).

⁸⁸ Great Lakes Gas Transmission Co., 37 F.P.C. 1070 (1967).

⁸⁹ 16 U.S.C. §§ 791a-823 (1964).

⁹⁰ 41 Stat. 1063 (1920), now part of the Federal Power Act, 16 U.S.C. §§ 791-825r (1964).

⁹¹ *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965), rev'g 326 F.2d 535 (8th Cir. 1964).

decision can be measured by the numerous applications for licenses filed in response to the Supreme Court's ruling.⁹²

In two cases in which the developers of hydroelectric generation sites claimed immunity from FPC jurisdiction on the basis of an act of Congress promulgated before 1920, the Court found that FPC jurisdiction nevertheless attached because of the construction of additional facilities and the redevelopment of original facilities.⁹³ Another important development in the Commission's licensing authority centered on the appropriate license term to be accorded a project which was constructed prior to the 1935 amendments to the Federal Power Act⁹⁴ and operated thereafter on navigable water without a license. This was the subject of the *Androscoggin* decision,⁹⁵ where the Commission announced the policy that where an existing project was constructed, operated, or maintained without a license in violation of the law,⁹⁶ it would assign the project an earlier effective license date.

A further aspect of the Commission's licensing jurisdiction over hydroelectric projects was examined in several significant cases dealing with the issue of "primary lines."⁹⁷ These lines are the only transmission lines associated with hydroelectric projects which are subject to FPC jurisdiction. In an earlier case, the Commission applied the "primary use" test in order to determine primary lines.⁹⁸ In *Georgia Power Co.*,⁹⁹ however, the Commission reexamined the primary use

⁹² *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200 (4th Cir. 1967), aff'g 36 F.P.C. 119, (1966), considered and rejected the contention that cases decided by the Commission prior to the holding in *Taum Sauk* clothed the developer with immunity from ever being subjected to Commission jurisdiction.

⁹³ *Minnesota Power & Light Co. v. FPC*, 344 F.2d 53 (8th Cir. 1965), aff'g 31 F.P.C. 592 (1964); *Northwest Paper Co. v. FPC*, 344 F.2d 47 (8th Cir. 1965), aff'g 31 F.P.C. 593 (1964).

⁹⁴ For purposes of these cases, the most significant amendment to the Federal Power Act was § 23(b) of Part I, which requires any person proposing to construct a hydroelectric project on non-navigable waters to secure a license from the FPC for that project if the Commission finds that "the interests of interstate or foreign commerce would be affected by such proposed construction . . ." 16 U.S.C. § 817 (1964).

⁹⁵ *Public Serv. Co.*, 27 F.P.C. 830 (1962), order modifying orders on rehearing, 31 F.P.C. 417 (1964).

⁹⁶ See *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153 (D.C. Cir. 1967), aff'g 29 F.P.C. 1290 (1963), 31 F.P.C. 1549 (1964), 32 F.P.C. 125 (1964), 32 F.P.C. 1404 (1964); *Bangor Hydro-Elec. Co. v. FPC*, 355 F.2d 13 (1st Cir. 1966), aff'g 33 F.P.C. 278 (1965); *Central Me. Power Co. v. FPC*, 345 F.2d 875 (1st Cir. 1965), aff'g 32 F.P.C. 344 (1964).

⁹⁷ "Primary lines" are defined by § 3(11) of the Federal Power Act, 16 U.S.C. 796(11), as those lines "transmitting power [from the project] to the point of junction with the distribution system or with the interconnected primary transmission system, and are, by statute, licensed by the Commission as part of the project."

⁹⁸ *Montana Power Co. v. FPC*, 112 F.2d 371 (9th Cir. 1940).

⁹⁹ 37 F.P.C. 620 (1967), order granting rehearing for purpose of giving further consideration, 37 F.P.C. 986 (1967).

test, and in *Western Mass. Elec. Co.*,¹⁰⁰ the Commission resolved the primary lines issue. In enunciating the "basic purpose" test to be applied in these cases, the Commission stated:

It is clear from Section 3(11) that in determining whether a line is a primary line, the test to be applied is that of the basic purpose of the line in relation to other facilities. In determining which of the many purposes of any given line is the basic purpose we must, therefore, look to the specific facts before us.¹⁰¹

By applying this test the Commission found that the transmission lines in question were "conceived and designed to function as an important segment of a regional transmission grid,"¹⁰² and were, therefore, not subject to FPC licensing as primary lines. The approach formulated in this case is significant because it departs from the practice of basing findings on highly involved and technical power flow data and simplifies the otherwise difficult task which the utilities and the Commission would be compelled to perform.

2. "Net Investment"

In a recent decision, the Commission was called upon to give substance to the statutory phrase "net investment."¹⁰³ Although this phrase was used in the Federal Water Power Act of 1920, it was not until after nearly 50 years of regulation that the Commission faced the issue of its statutory meaning. Sections 14¹⁰⁴ and 15¹⁰⁵ of the Federal Power Act provide that on the expiration of a license the Commission has authority to recommend that the license be taken over either by the federal government or by a new licensee. If a project is taken over, the original licensee must be paid "the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken . . ."¹⁰⁶ "Net investment" is defined in section 3(13);¹⁰⁷ however, the vagueness of that definition created serious problems of statutory construction. Presented with a substantial number of project licenses due to expire in 1970, the Commission in 1966 issued a notice of proposed rule-making to define "net investment." In September, 1968, the Commission promulgated a

¹⁰⁰ 39 F.P.C. 723 (1968), aff'd, *Municipal Elec. Ass'n v. FPC*, 413 F.2d 1052 (D.C. Cir. 1969).

¹⁰¹ 39 F.P.C. at 731.

¹⁰² Id. at 732.

¹⁰³ 16 U.S.C. § 807 (1964).

¹⁰⁴ 16 U.S.C. § 807 (1964).

¹⁰⁵ 16 U.S.C. § 808 (1964).

¹⁰⁶ 16 U.S.C. § 807 (1964).

¹⁰⁷ 16 U.S.C. § 796(13) (1964).

rule,¹⁰⁸ but thereafter postponed its application pending rehearing.¹⁰⁹ On August 4, 1969, the Commission vacated this rule and issued a *Statement of Policy* adopting a different approach to the problem.¹¹⁰

The *statement* provides that for licensees subject to the provisions of Section 10(d)¹¹¹ of the Federal Power Act, the Commission will estimate the net investment for a project as "equal to the project original cost, less the amount accumulated in the project depreciation reserve, subject to a maximum potential further deduction of the balance accumulated in the project amortization reserve account."¹¹² This includes a computation for each year from the commencement of the 21st year of operation.

3. Recreation Facilities and Fish and Wildlife Protection at Licensed Projects

The rule-making technique was also employed where, as part of its hydroelectric licensing responsibilities, the Commission has sought to create recreational facilities and protect fish and wildlife. Until the 1960s it was the Commission's practice to write general terms and conditions into licenses requiring the licensees to provide for these features. However, commencing in the mid-1960s the Commission took positive action to require license applicants to assume primary responsibility for developing comprehensive plans and programs, in consultation with appropriate federal, state and local agencies, for using project properties for outdoor recreation, and in the interest of fish and wildlife.

The first important step occurred in 1963, when the Commission revised its regulations to require license applicants to file an Exhibit R, a recreational use plan for full public recreational use of project water and adjacent lands, as part of applications for unconstructed major projects or for relicense.¹¹³ Subsequently, the Commission set forth policies to promote the development of outdoor recreation at licensed projects.¹¹⁴ The Commission also required that applications for both major and minor projects include an Exhibit S relating to the protection and enhancement of fish and wildlife resources.¹¹⁵ This exhibit, which provides for consultation with the Fish and Wildlife

¹⁰⁸ Order No. 370, 40 F.P.C. 938 (1968).

¹⁰⁹ Order No. 370-A, 40 F.P.C. 1351 (1968).

¹¹⁰ Order No. 387, 42 F.P.C. 329 (1969).

¹¹¹ 16 U.S.C. § 803(d) (1964).

¹¹² 42 F.P.C. at 330-31.

¹¹³ Order No. 260-A, 29 F.P.C. 777 (1963). Order No. 292, 33 F.P.C. 32 (1965), specified with more particularity the information to be furnished under Exhibit R.

¹¹⁴ Order No. 313, 34 F.P.C. 1546 (1965).

¹¹⁵ Order No. 323, 35 F.P.C. 1038 (1966); Order No. 350, 37 F.P.C. 1125 (1967); Order No. 358, 39 F.P.C. 78 (1968).

Service of the Department of the Interior and appropriate state fish and wildlife agencies, requires an analysis of the effect of the project upon fish and wildlife resources in the project area and the measures essential to conserve and, where possible, enhance such resources. The Commission's Uniform System of Accounts also was amended to prescribe accounting by the licensees for expenditures relating to fish, wildlife and recreation.¹¹⁸

In issuing a license to the Rumsford Falls Power Company,¹¹⁷ the Commission, responding to the court's order, took a significant step toward promoting the full use of project waters when it clarified a license article pertaining to multiple uses of project works for water supply purposes by permitting other parties to use the project water for reasonable compensation. Moreover, in 1967 the Commission adopted a rule prohibiting discrimination at licensed project recreational facilities.¹¹⁸ This regulation requires that employees of the licensee and any persons who lease or manage its recreational facilities be instructed to comply with the regulation, and that notices be posted at recreational sites showing that the facilities are open to all members of the public.

A complete inventory of existing and potential recreational facilities at all hydroelectric projects operating under Commission licenses was established in 1966.¹¹⁹ *Order No. 315*¹²⁰ adopted new regulations designed to strengthen inspection procedures relative to licensed hydroelectric projects, and *Order No. 384*¹²¹ set forth the Commission's regulations governing procedures for the relicensing or takeover of projects which, in effect, implemented the provisions of Public Law 90-451.¹²² That Act established a more efficient procedure for determining whether existing hydroelectric projects should be relicensed or taken over by the United States.

Notwithstanding these rule-making proceedings, the Commission continued to employ specific conditions in project licenses requiring the licensee to consult with appropriate governmental agencies and to provide for the protection of archeological, historical, and environ-

¹¹⁸ Order No. 343, 37 F.P.C. 813 (1967).

¹¹⁷ Opinion 465-A, 36 F.P.C. 605 (1966). The order granting the license was originally issued on May 14, 1965, 33 F.P.C. 1016 (1965). On July 12, 1965, the Commission denied rehearing in Opinion No. 465, 34 F.P.C. 27 (1965). On review, the Court of Appeals for the First Circuit found that the article pertaining to multiple uses of project works for water supply purposes was not clear and remanded for clarification in *Rumsford Falls Power Co. v. FPC*, 355 F.2d 683 (1st Cir. 1966).

¹¹⁸ Order No. 341, 37 F.P.C. 775 (1967).

¹¹⁹ Order No. 330, 36 F.P.C. 1030 (1966).

¹²⁰ 34 F.P.C. 1551 (1965).

¹²¹ 42 F.P.C. 135 (1969).

¹²² 16 U.S.C. §§ 800, 803, 807, 808 (Supp. IV, 1969).

mental values, as well as fish and wildlife resources.¹²³ In a recent license,¹²⁴ the Commission, in allowing additional cooling water to be used by a hydroelectric project, modified the project license to require the licensee to finance a multi-agency study to determine the extent of thermal pollution caused by operation of the project and its effect on fish and wildlife resources.

B. *Part II of the Federal Power Act*¹²⁵

The Commission's activities under Part II of the Federal Power Act have been dominated by the issues of jurisdiction, interconnection and rates. The regulation of the electric utility industry also took on an added dimension as a consequence of the growing concern with the reliability of the nation's electric power supply following the massive Northeast power failure on November 9, 1965.

1. FPC Jurisdiction over Electric Utility Industry

The scope of the Commission's jurisdiction over interstate wholesale sales of electricity expanded significantly during the decade. In 1964 the Supreme Court upheld the Commission's decision in *City of Colton v. Southern Cal. Edison Co.*,¹²⁶ which established FPC jurisdiction over a wholesale sale by Southern California Edison to Colton despite the fact that the California Public Utilities Commission had exercised jurisdiction over the sale for many years.¹²⁷ The Court reasoned that a case by case analysis of the need for FPC jurisdiction was unnecessary under the Act, since Congress had intended "to draw a bright line easily ascertained, between state and federal jurisdiction"¹²⁸

Until the mid-1960s, it was widely accepted that the Commission could subject a utility to its jurisdiction only upon the basis of a tracing of the physical flow of power. If this tracing disclosed interstate transmission, or that a wholesale sale included electricity transmitted in interstate commerce, then FPC jurisdiction attached. In 1965, however, the Commission held that where a public utility participates in and receives energy from an integrated interstate power pool, further tracing studies are unnecessary. In this instance, all of the

¹²³ The license was issued to the Power Authority of the State of New York for its Blenheim-Gilboa pumped storage project, 41 F.P.C. 712 (1969).

¹²⁴ License issued to Arkansas Power & Light Co., Project No. 271, 40 F.P.C. 522 (1968).

¹²⁵ 16 U.S.C. §§ 824-825r (1964).

¹²⁶ 26 F.P.C. 223 (1961).

¹²⁷ FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964), rev'g 310 F.2d 784 (9th Cir. 1962).

¹²⁸ 376 U.S. at 215.

utility's wholesale sales were found subject to FPC jurisdiction.¹²⁹ This development spared the Commission from the time consuming and, for complex systems, sometimes impossible burden of tracing power flows to establish federal jurisdiction.

In another important decision relating to the scope of FPC jurisdiction, the Commission, in *Dairyland Power Coop.*,¹³⁰ concluded that jurisdiction under Part II does not encompass cooperatively owned generation and transmission electric systems financed in whole or in part by the Rural Electrification Administration (REA). In *Dairyland*, the Commission, while admitting that legislation enabling it to exercise jurisdiction over major generation and transmission cooperatives would be in the public interest, decided that REA-financed cooperatives are not subject to FPC jurisdiction.¹³¹

2. Regulation of Electric Rates

The regulation of electric rates was another area of major activity, and because of the dramatic decrease in unit costs during the past decade the Commission accepted for filing a record total reduction in wholesale electric rates. Of the more than 16,000 wholesale rate schedule filings, rate reductions totalled more than \$36 million compared with less than \$6 million in rate increases during the same period. Most of the rate reductions were the result of filings submitted by the electric utilities on their own initiative. In many instances rate reductions were filed following completion of cost-of-service studies by the Commission's staff which indicated that rates were excessive. In some cases proceedings were instituted to resolve the rate level issue on a formal record.

In proceedings involving the issue of discrimination between cooperative wholesale customers and other wholesale customers, the Commission ruled that utilities are not required to extend to investor-owned and municipally-owned purchasers similar rate levels afforded to cooperatively-owned systems. The holding was based, in part, upon the rationale that if a lower rate to the cooperatives were not per-

¹²⁹ *Indiana & Mich. Elec. Co.*, 33 F.P.C. 739 (1965), *aff'd*, 365 F.2d 180 (7th Cir.), *cert. denied*, 385 U.S. 972 (1966). Other important cases in furtherance of this principle include *Arkansas Power & Light Co.*, 34 F.P.C. 747 (1965), *aff'd*, 368 F.2d 376 (8th Cir. 1966); *Cincinnati Gas & Elec. Co.*, 33 F.P.C. 108 (1965), *aff'd*, 376 F.2d 506 (6th Cir.), *cert. denied*, 389 U.S. 842 (1967); *Public Serv. Co.*, 34 F.P.C. 1513 (1965), *aff'd*, 375 F.2d 100 (7th Cir.), *cert. denied*, 387 U.S. 931 (1967). See also *Florida Power & Light Co.*, 37 F.P.C. 544 (1967), *rev'd Florida Power & Light Co. v. FPC*, No. 24956 (5th Cir. July 13, 1970).

¹³⁰ 37 F.P.C. 12 (1967). See also *Salt River Project Agricultural Improvement & Power Dist. v. Colorado-Ute Elec. Ass'n*, 37 F.P.C. 68, *aff'd*, 391 F.2d 470 (D.C. Cir.), *cert. denied*, 393 U.S. 857 (1968).

¹³¹ But see *City of Paris v. FPC*, 399 F.2d 983 (D.C. Cir. 1968).

mitted, the resultant construction of duplicating facilities would result in a detriment to all consumers.¹³²

In addition to ruling on rate levels and discrimination, the Commission considered the appropriateness of specific terms and conditions of wholesale power contracts. In one such case, it held unlawful, under sections 205¹³³ and 206,¹³⁴ a resale load ceiling provision restricting Georgia Power Company's municipal customers from reselling power for industrial loads above certain specified sizes.¹³⁵ This decision permitted municipal customers to compete more effectively for all industrial loads.

3. Interconnection and Coordination

The Commission has no power under Part II of the Federal Power Act to require electric utilities to add to or enlarge electric generating facilities. Section 202(a)¹³⁶ of the Act provides, however, that it shall be the duty of the Commission to promote and encourage voluntary interconnection and coordination of the facilities of the various companies. Acting under this section, the Commission has attempted to promote and encourage electric utilities voluntarily to engage in widespread interconnection and coordination. This objective was substantially advanced through participation by all segments of the industry in both the regional and national studies which led to the publication in 1964 of the *National Power Survey*.¹³⁷ Thus, the preparation and subsequent updating of the *Power Survey* have oriented planning toward greater coordination and cooperation among all sectors of the industry.

There have been instances in which historic conflicts between publicly and privately owned systems have proved too great to be overcome voluntarily. In some of these cases, the Commission has exercised its authority, where the requisite application has been made, under section 202(b).¹³⁸ This section empowers the Commission, under certain conditions, to direct a public utility to establish physical connection of its transmission facilities with the facilities of others, and

¹³² *St. Michaels Utils. Comm'n v. Eastern Shore Pub. Serv. Co.*, 35 F.P.C. 591, 1027 (1966), *aff'd sub nom. St. Michaels Utils. Comm'n & Comm'rs of St. Michaels, Md. v. FPC*, 377 F.2d 912 (1967); *Southwestern Pub. Serv. Co.*, 33 F.P.C. 343, 891, 34 F.P.C. 841 (1965), *appeal dismissed sub nom. Community Pub. Serv. Co. v. FPC*, No. 22708 (5th Cir. 1965) (not reported).

¹³³ 16 U.S.C. § 824d (1964).

¹³⁴ 16 U.S.C. § 824e (1964).

¹³⁵ *Georgia Power Co.*, 35 F.P.C. 436 (1966), *aff'd*, 373 F.2d 485 (5th Cir. 1967).

¹³⁶ 16 U.S.C. § 824(a)(a) (1964).

¹³⁷ FPC, *National Power Survey* (1964).

¹³⁸ 16 U.S.C. § 824(a)(b) (1964).

to sell energy to or exchange energy with such persons. There were several such proceedings¹³⁹ during the sixties.

In an opinion issued in November, 1968, the Commission ordered Florida Power Corporation to interconnect its facilities with those of the City of Gainesville, Florida, which was operating in electrical isolation.¹⁴⁰ In addition to directing the interconnection, the Commission prescribed the terms and conditions of the interconnection. This decision is significant not only because it set out the responsibilities of both parties under the interconnected operation when the parties could not agree to a voluntary coordination plan, but also because it held that a party seeking an interconnection should not be economically penalized for being the most recent system connected to a network.

In another proceeding, the Village of Elbow Lake, Minnesota, filed a complaint with the Commission requesting that Otter Tail Power Company be required to interconnect with the village and to deliver power to it from another source. In a decision issued in 1968,¹⁴¹ the Commission expressed concern over the reliability of electric service provided to the customers of Elbow Lake, and directed Otter Tail to establish an interconnection with the village.

Another significant interconnection decision¹⁴² was rendered by the Commission in August, 1967. Following a request by the City of Paris that Kentucky Utilities Company be directed to interconnect with the city and to deliver to it power generated by a third party cooperative, the Commission ordered the interconnection but refused to require the privately owned utility to wheel energy generated by the REA cooperative to the city. The Commission reasoned that REA-financed cooperatives were federal instrumentalities and, under Section 201(f)¹⁴³ of the Federal Power Act, the Commission could not order a utility to transmit the power of a government instrumentality. On review, the Court of Appeals for the District of Columbia Circuit held that REA-financed cooperatives, as currently administered, are not federal instrumentalities within the meaning of Section 201(f) of

¹³⁹ See *Shrewsbury Municipal Light Dep't v. New England Power Co.*, 32 F.P.C. 373 (1964), *aff'd sub nom. New England Power Co. v. FPC*, 349 F.2d 258 (1st Cir. 1965), where the FPC ordered direct service to a municipality and eliminated an affiliated middleman; *Crisp County Power Comm'n v. Georgia Power Co.*, 67 P.U.R. 3d 75 (FPC 1966), marked the first time in more than a decade that the Commission used its authority under § 202(c) of the Federal Power Act, 16 U.S.C. § 824(a)(c) (1964), and ordered an emergency interconnection.

¹⁴⁰ *Gainesville Util. Dep't v. Florida Power Corp.*, 40 F.P.C. 1227 (1968), *aff'd in part, rev'd in part*, *Florida Power Corp. v. FPC*, No. 27404 (5th Cir., May 1, 1970).

¹⁴¹ *Village of Elbow Lake v. Otter Tail Power Co.*, 40 F.P.C. 1262 (1968), petition for review pending, *Otter Tail Power Co. v. FPC*, No. 19628 (8th Cir., filed Jan. 1, 1969).

¹⁴² *City of Paris v. Kentucky Util. Co.*, 38 F.P.C. 269 (1967).

¹⁴³ 16 U.S.C. § 824(f) (1964).

the Act.¹⁴⁴ In its opinion on remand, issued in January, 1969,¹⁴⁵ the Commission decided that it does not have authority to order a privately owned utility to transmit electric power generated by a third party. Consequently, the Commission ordered the utility to continue to provide the city with electricity.

4. Mergers of Electric Utilities

The Commission's authority to rule on the disposition, merger or consolidation of facilities by public utilities subject to FPC jurisdiction, and on the acquisition of securities by public utilities¹⁴⁶ was another area of significant activity during the decade. In December, 1966, the Commission, in *Commonwealth Edison Co. & Central Ill. Elec. & Gas Co.*,¹⁴⁷ elucidated the criteria it will apply in considering proposed mergers of electric utilities. Because the case provided a wide cross-section of various single issues usually raised in merger proceedings, the Commission used *Commonwealth Edison* as a vehicle to set forth general policy guidelines.

The scope of the Commission's authority over mergers and consolidations was the basis of a decision which involved the acquisition of the local distribution facilities of Clemson University by Duke Power Company.¹⁴⁸ The Commission found that Duke Power's acquisition of Clemson's facilities constituted a merger or consolidation within the meaning of Section 203¹⁴⁹ of the Federal Power Act. On appeal, however, the Court of Appeals for the District of Columbia Circuit reversed the Commission on the ground that the Federal Power Act does not require an interstate utility to obtain FPC approval of an acquisition of facilities used exclusively for the local distribution of electricity.¹⁵⁰

¹⁴⁴ *City of Paris v. FPC*, 399 F.2d 983 (D.C. Cir. 1968).

¹⁴⁵ *City of Paris v. Kentucky Util. Co.*, 41 F.P.C. 45 (1969).

¹⁴⁶ Transactions subject to SEC approval under the Public Utility Holding Company Act are exempted from the Commission's Part II authority. 16 U.S.C. § 825q (1964).

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

¹⁴⁸ *Duke Power Co.*, 36 F.P.C. 399 (1966).

¹⁴⁹ 16 U.S.C. § 824(b) (1964).

¹⁵⁰ *Duke Power Co. v. FPC*, 401 F.2d 930 (D.C. Cir. 1968). In another proceeding, the Commission faced the problem of having approved an acquisition where there was no dispute among the parties as to the facts, but where an intervening party, which had opposed the acquisition in its petition to intervene and pleadings, had not been granted a formal hearing on the matter. The Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision and ruled that the information in the various filings and pleadings fully developed all the salient facts of the controversy in such detail and depth that the matter was clearly presented. It reasoned that under the circumstances the Commission could arrive at a decision on the merits and, therefore, did not abuse its discretion in not granting a formal hearing. *City of Allegan*, 39 F.P.C. 99 (1968), *Consumers Power Co.*, 39 F.P.C. 103 (1968), rehearing denied, 39 F.P.C. 390 (1968), aff'd, *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969).

III. *Scenic Hudson* AND ITS IMPLICATIONS

A decision having significance not only to the Federal Power Commission, but to administrative law generally, is that of the Court of Appeals for the Second Circuit in *Scenic Hudson Preservation Conf. v. FPC*.¹⁵¹ *Scenic Hudson* has posed problems for the administrative process which are similar in scope and impact to those created by the enunciation of the *Ashbacker* doctrine.¹⁵² In *Scenic Hudson*, the court of appeals remanded an order of the FPC which granted a license to Consolidated Edison Company to construct a pumped storage hydroelectric plant at Storm King Mountain on the Hudson River. After the hearing record was closed, but prior to the Commission's decision, conservation interests sought, but were denied, leave to intervene in order to present evidence of possible alternatives to the pumped storage project and to demonstrate the effects of the proposed project upon conservation values. The court's remand was based upon the Commission's failure to discharge its affirmative obligation to consider alternatives and to investigate the issues raised by the conservation interests. Since that time, *Scenic Hudson* has been cited for the proposition that the Commission is obliged to decide cases upon a full hearing record, and that if the record does not satisfactorily explore all reasonable alternatives suggested in the proceedings, then the Commission is responsible for appropriately expanding the record.¹⁵³

The problems posed by *Scenic Hudson* concern the extent to which the staff of the Commission must investigate the alternatives advanced by other parties, and the scope of the staff's obligation to develop alternatives independently. *Pacific Gas Transmission Co.*¹⁵⁴ illustrates an effort by the staff of the Commission in a major pipeline certificate proceeding to discharge what it conceived to be its responsibility under *Scenic Hudson*. In that case, El Paso Natural Gas Company and Pacific Gas Transmission Company applied for FPC certification of pipeline facilities proposed to supply additional gas to California from the Texas-New Mexico area and Canada, respectively. The Commission's staff opposed both proposals and instead proposed an alternative 42-inch diameter pipeline from the Delaware

¹⁵¹ 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

¹⁵² *Ashbacker Radio Corp. v. FPC*, 326 U.S. 327 (1945). See generally Seder, Regulatory Activism—The Aftermath of *Scenic Hudson*, ABA Public Utility Law Section Ann. Rep. (1969).

¹⁵³ *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 973 (D.C. Cir. 1968); *Aberdeen & Rockford R.R. v. United States*, 270 F. Supp. 695 (E.D. La. 1967); *Freight Forwarders Institute v. United States*, 263 F. Supp. 460, 467 (S.D.N.Y. 1967). See also *Udall v. FPC*, 387 U.S. 428 (1967).

¹⁵⁴ 40 F.P.C. 1147 (1968), aff'd *California Gas Producers Ass'n v. FPC*, 421 F.2d 422 (9th Cir. 1970).

Basin in Texas and New Mexico to the Arizona-California border. The staff contended that the economies of scale inherent in its 42-inch pipeline proposal provided a more desirable alternative for the public. The Commission rejected this proposal because it found that the staff alternative could not be constructed in time to meet the needs of the California gas market.

This expanded record, while offering the Commission the opportunity to make a more informed judgment based upon an alternative other than those submitted by the applicants, necessarily delayed the progress of the proceeding. For a Commission with a limited staff, a delay in formal proceedings often creates undesirable time pressures and necessarily increases the backlog of cases. It would appear, therefore, that the Commission in the future will seek to resolve many broad policy questions which otherwise would be the subject of ad hoc proceedings by rule-making, as suggested by the Supreme Court in *FPC v. Texaco, Inc.*,¹⁵⁵ and by using consultative and advisory techniques. By employing these techniques, it may be possible to establish many regulatory policies in advance, thus permitting a complete record on the remaining issues and achieving reasonable timeliness in all cases.

An example of the FPC's use of rule-making to satisfy more expeditiously the requirements of the *Scenic Hudson* doctrine is reflected in the policy statement adopted by the Commission in June, 1968.¹⁵⁶ This policy requires all applications for construction and operation of pipeline facilities in Offshore Louisiana to be filed by September 1 of the year preceding the proposed construction, and also requires the submission of the applicants' studies of possible joint use of the subject facilities of two or more pipelines. Also, the Commission concurrently established a Technical Advisory Committee on Transmission Facilities for Offshore Natural Gas.¹⁵⁷ This committee, through consultative and advisory processes, is designed to assist in the study and development of standards and proposals for transporting gas from offshore fields. During the next decade, it is likely that the further use of rule-making and the consultative process will assist the Commission in achieving expeditious and comprehensive administrative procedures under the doctrine of *Scenic Hudson*.

¹⁵⁵ 377 U.S. 33, 44 (1964).

¹⁵⁶ Policy with Respect to the Issuance of Certificates of Public Convenience and Necessity to Pipeline Companies in the Southern Louisiana Off-Shore Area, Order No. 363, 39 F.P.C. 925 (1968).

¹⁵⁷ Order Establishing Technical Advisory Committee on Transmission Facilities for Off-Shore Natural Gas, 39 F.P.C. 998 (1968).

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IV. NATIONAL POWER SURVEY¹⁵⁸

A significant achievement of the Commission during the Sixties was the publication, in December, 1964, of the *National Power Survey*. The *Survey* represented a major effort to meet the Commission's statutory responsibility under the Federal Power Act to promote and encourage the interconnection and coordination of facilities for the generation, transmission and sale of electric energy with the greatest possible economy and with regard to proper utilization and conservation of natural resources.¹⁵⁹ In this publication, the Commission set forth general guidelines for the economic growth of the electric utility industry to 1980. The *Survey* suggested means for the nation's electric power systems to move from isolated or segmented operations, and from existing pools of limited scope, to participation in fully coordinated power networks covering broad regional areas. The major purpose of the *Survey* was to highlight possible patterns of expansion that could reduce utility costs and to indicate the magnitude of potential cost savings.

The rapid rate of load growth, technological developments in such fields as extra-high-voltage transmission and nuclear power, and problems such as the reliability and adequacy of generating and transmission capacity have prompted the Commission to update the *National Power Survey* in order to assess these developments. This updated revision will provide an analysis of the probable development of the industry to 1990, including load projections, and of the transmission, fuel, generating and pooling requirements essential to meet these loads while achieving reliable service and economies of coordinated construction and operation. While the economics of the electric power industry was the chief concern of the *National Power Survey* in 1964, it seems certain that the new concerns of reliability and continuity of service, and the capacity of the industry to meet its load projections without degrading the integrity of the environment will serve as the focal points for the *Survey*, industry, and regulation in the next decade.

V. NEW DIMENSIONS OF REGULATION

In addition to developments in the areas of traditional concern to the Commission, there evolved during the past decade several new dimensions of Federal Power Commission responsibility. These resulted from incidents such as the Northeast power failure and changing public attitudes toward the quality of the nation's environment.

¹⁵⁸ FPC, *National Power Survey* (1964).

¹⁵⁹ 16 U.S.C. § 824(a) (1964).

A. Reliability

The *National Power Survey* did not focus in depth on the reliability of the nation's electric power systems. Less than a year after its publication, however, the problem of electric power reliability became an issue of national significance. On November 9, 1965, the date of the massive Northeast power failure,¹⁰⁰ the foundation was laid for heretofore unexpected changes in both industry and regulatory attitudes concerning the direction of the electric power industry. Industry and regulators, both state and federal, faced unprecedented challenges to assure the public that electric power service would remain uninterrupted. The Northeast power failure and the events which followed, including an initial response by the Federal Power Commission proposing a legislative solution,¹⁶¹ accelerated the pace of regional planning and coordinated operations within the industry. These events led to the creation of regional reliability councils, which coordinate regional power planning, and a National Electric Reliability Council which serves to coordinate inter-regional planning for reliability. The participation of the Commission in the work of the regional and national reliability councils, and the reporting of information concerning system reliability and planning is proposed in a pending rule-making proceeding.¹⁶²

The regional aspects of electric power reliability have stimulated the development by state regulators of a regional apparatus designed to deal with reliability issues. Following the extensive Pennsylvania-New Jersey-Maryland cascading power failure in 1967, the regulatory commissions of each of these states jointly established a planning organization to insure that the state regulatory process would be equipped to participate effectively in the resolution of common regional reliability problems.

At the federal level, Congress, which has not acted upon a number of legislative proposals introduced each year following the Northeast power failure, appears to be tolerant of the efforts of the electric power industry and regulatory agencies, both federal and state, to

¹⁰⁰ At the request of the President, the Commission initiated an immediate inquiry and submitted its initial report to the President in December, 1965. Its final report, the "Prevention of Power Failures," was released in July, 1967. This report summarizes utility actions to increase power reliability, describes the need for further improvement, and emphasizes the need for stronger transmission networks and regional coordinating mechanisms.

¹⁶¹ Electric Power Reliability Act, S. 1934, H.R. 10727, 90th Cong., 1st Sess. (1967).

¹⁶² Proposed FPC Reg. R-362. Statement of Policy, Order No. 383, June 25, 1969; Order Granting Further Consideration of Order No. 383, October 21, 1969. Reporting of major electric power interruptions was required in FPC Order No. 331, 36 F.P.C. 1084 (1966). On June 23, 1969, the Commission in Docket No. R-361 issued notice of a proposed change in its rules which would amplify Order No. 331.

deal with the problem of electric power reliability on a consultative basis. Electric power reliability is a problem which can be solved only by the technological expertise of the industry, stimulated perhaps at times by creative regulation within the framework of the consultative process. Planning in general, and power system planning in particular, is a dynamic process which does not lend itself to the traditional forms of regulatory overview. Hence, the challenge of the next decade is to develop the apparatus for effective coordination between regulators and industry planners—an apparatus which will assure the reliability of electric power service for the nation.

B. Environment

Closely related to the problem of electric power reliability is the increased public concern with environmental quality. The inability of electric utilities to locate necessary generating capacity and construct essential transmission lines because their efforts become involved in protracted litigation can result in consequences more serious to the public than a cascading power failure. This, too, is an aspect of electric power reliability, that is, reliability must include the adequacy of bulk power supply. Thus there is an unqualified need for the establishment of an effective procedural apparatus within which the utility industry, government, and the public will be able to resolve the substantive issues of environmental quality raised by the construction of generating and transmission facilities.

During the past decade, the Commission became increasingly involved in a variety of new issues concerning environmental quality. In several instances pipeline certificate proceedings have included issues raised by the proposed use of natural gas as boiler fuel in the generation of electricity for the purpose of relieving air pollution. Moreover, the Commission's staff made studies of the availability of natural gas in the Minneapolis-St. Paul and Washington, D.C. areas, and, together with the National Air Pollution Control Administration and local officials, developed an emergency air pollution control plan involving the use of natural gas in power plants to reduce air pollution levels in the St. Louis and Chicago areas. And in September, 1968, the Commission published a report which deals comprehensively with the relationship between air pollution and the nation's utilities.¹⁶³

Water pollution problems are becoming increasingly significant in the design, location and operation of larger thermal electric plants. The Commission's staff participated with the Office of Science and Technology in the preparation of a report which dealt with thermal

¹⁶³ FPC, *Air Pollution and the Regulated Electric Power and Natural Gas Industries* (1968).

pollution.¹⁶⁴ The staff also participated in the preparation of the Water Resources Council's *First National Assessment*,¹⁶⁵ issued in 1968, which provides estimates of future water requirements for condenser cooling at steam electric plants. The staff also recently completed a report dealing with the sources and amounts of waste heat disposal, the effects of thermal discharges on streams and water uses, and power plant aesthetics.¹⁶⁶

The Commission participated in the preparation of several major reports dealing with the preservation and enhancement of aesthetic and other environmental values.¹⁶⁷ Since the publication of these reports, the Commission has issued two notices of proposed rule-making which, if adopted, will require greater consideration of aesthetic and other environmental values in the Commission's licensing and certificate activities. The Commission also proposed guidelines for the construction and maintenance of natural gas pipeline rights-of-way,¹⁶⁸ and proposed that applicants for hydroelectric project licenses demonstrate that adequate efforts have been made to preserve and enhance aesthetic values in planning project works including transmission lines covered by the license.¹⁶⁹ The guidelines proposed in these rule-making proceedings, if adopted, will provide an initial regulatory response to the recent concerns regarding aesthetics and environmental quality. These concerns, which did not emerge until the close of the Sixties, will inevitably generate increased regulatory activity in the next decade.

CONCLUSION

The regulatory issues confronting the Commission in the Seventies are no less formidable than those which gave rise to the strong criticism by Dean Landis in 1960. The regulation of the field price of natural gas within the context of a projected demand which exceeds available supply provides a challenge which extends beyond the procedural problem which faced the Commission in 1960. Inflation and the availability of capital to the utilities to meet projected demands are problems which have been raised to an unprecedented extent. National concern regarding the reliability and adequacy of the nation's electric power systems was relatively minor in 1960. These problems will continue to occupy the agenda for the future.

¹⁶⁴ Energy Policy Staff, U.S. Office of Science and Technology, Exec. Office of the President, *Considerations Affecting Steam Power Plant Site Selection* (1968).

¹⁶⁵ Water Resources Council, *First National Assessment* (1968).

¹⁶⁶ FPC, *Problems in Disposal of Waste Heat from Steam-Electric Plants*.

¹⁶⁷ Report of President's Council on Recreation and Natural Beauty (1968); Report of Working Committee on Utilities (1968).

¹⁶⁸ Proposed FPC Reg. R-360, 34 Fed. Reg. 12115 (1969).

¹⁶⁹ Proposed FPC Reg. R-365, 34 Fed. Reg. 12718 (1969).

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The products of increasingly innovative technology, however, will most likely offer the Commission its greatest challenges. Liquefied natural gas and coal gasification hold the potential to alter radically the supply-demand relationship for natural gas, as well as the historic institutional structure of the gas industry. Whether the Commission can encourage the development of this and other new technologies to serve the collective interests of the public will be a crucial test of the Commission's success.

But the FPC's most difficult and yet potentially rewarding task will be to synthesize the public's concern for environmental quality with the continued development of the nation's natural gas and electric power resources. The Commission, not unlike other agencies of government, has crossed the threshold of a new era. The siting of electric generating plants and the location of gas and electric transmission rights-of-way have become issues which affect all sectors of the nation. Serious questions concerning the ecological effects of electric power production and transmission on the nation's air, water, and land resources have spurred conservationists, academicians, and government to act. Intelligently defining and implementing the Commission's responsibilities in preserving and enhancing environmental quality can have far-reaching and long-range consequences beneficial to the nation at large. Whether the Commission can meet these challenges without generating another Landis Report in 1980 will be a test of the Commission's success in the next decade.