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PLANNING FOR WHOLESALE CUSTOMER LOADS IN A COMPETITIVE ENVIRONMENT: THE OBLIGATION TO PROVIDE WHOLESALE SERVICE UNDER THE FEDERAL POWER ACT

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I. INTRODUCTION

In the development of the common law, certain businesses were deemed to be "affected with the public interest" so that special rules were necessary to govern the relationship between the businesses and their customers. The obligation of public utilities to serve their customers had its origins in this area of the common law. Most states have promulgated statutes addressing the service obligation of public utilities, incorporating in varying degrees the common law service obligation at the retail level. However, under the Federal Power Act (FPA), the Federal Energy Regulatory Commission¹ has plenary jurisdiction over the sale for resale and the transmission of electric energy by public utilities in interstate commerce.² Congress has preempted state regula-

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1. The terms "FERC" and "Commission" are used interchangeably in this article to refer both to the Federal Energy Regulatory Commission and its predecessor the Federal Power Commission.

2. See *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). A public utility is defined as "any person who owns or operates facilities subject to the jurisdiction of the Commission under" Part II of the FPA; that is, facilities for the transmission or sale of electric energy for resale in interstate commerce. Part II does not apply to the United States, a state, or any political subdivision. Federal Power Act §§ 201e-201f, 16 U.S.C. §§ 824e-824f (1982).

tion in this area³ with a comprehensive statutory scheme covering wholesale sales and transmission of electricity.⁴ Therefore, the wholesale service obligation—to the extent that it exists under federal law—is governed by Part II of the FPA⁵ and by the contracts between a public utility and its customers.⁶

This article analyzes the existing FERC and court precedent addressing the wholesale electric service obligations of public utilities under the FPA and the obligations of customers of the utility to take wholesale service under federal law. The purpose of our analysis is to provide a legal background for the current debate over expanding the role of competition in the electric industry. Historically, large, vertically integrated suppliers have undertaken to supply the electric needs of customers in a defined service area, and those customers have looked to that supplier to meet their needs. Some have suggested that this structure should be replaced by a structure in which customers can shop for alternative sources of power supplies, aided by some form of open transmission access policy. If such a new industry structure is to be considered it is essential to understand what, if any, residual obligation the traditional utility retains to serve those customers who wish to avail themselves of the opportunity to shop for alternatives. To the extent that the obligation to serve is retained, the ability of utilities to plan rationally for future loads could be significantly undermined. Moreover, many customers, primarily residential and small commercial and industrial customers, will have limited, if any, opportunities to shop for alternative supplies. These customers may have to bear the costs associated with stranded investments made by the utility to meet, in part, the requirements of others who have the opportunity and ability to take advantage of off-system supply opportunities.⁷

3. *California Edison*, 376 U.S. at 210; *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349, 2356-57 (1986).

4. *City of Milwaukee v. Illinois*, 451 U.S. 304, 316-17 (1981) (comprehensive statutory scheme developed by Congress supplants federal common law).

5. 16 U.S.C.S. §§ 824-824k (Law. Co-op. 1978 & Supp. 1987).

6. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 339 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956) (The Natural Gas Act and the Federal Power Act contemplate a regulatory scheme under which services and rates are established contractually by the parties with the Commission functioning to review such services and rates to determine if they are just and reasonable.).

7. An exhaustive review and analysis of state laws obligating electric utilities to provide service to retail customers is beyond the scope of this paper. However, we have reviewed the applicable state laws addressing the obligation to provide retail service in approximately one-half of the 50 states. Based on our review of these states' laws, we have reached several basic conclusions that we are confident would be borne out by an expanded review and analysis of all the states. First, virtually all states have either encouraged or mandated a structure in which each electric utility is expected to provide retail electric service in an identifiable service area. Second, with a few exceptions that are of limited practical significance, state law imposes on each utility the obligation to serve all existing and future customers located in its service territory and to plan for and acquire the facilities that it requires to serve those customers adequately and reliably in the future. Although this obligation is stated more explicitly in the statutory and case law in some states than in others, the obligation is understood to exist and, in fact, is discharged universally. In one highly publicized instance in which a utility was found not to have made adequate provision for future load growth, its state regulatory commission held that the utility had failed to meet its legal obligations as a public utility and reduced the utility's return on equity to the lower end of the zone of reasonableness as a penalty for "failure to address adequately its public service obligations." D.P.U. No. 85-266-A, 85-271-A (Mass. Dep't of Pub. Utils., June 26, 1986). Third, in the states that we reviewed we did not find any legal basis for concluding that a utility's service obligation would be diminished in the case of a customer that

Analysis of the wholesale obligation to serve under existing interpretations of the FPA is important for several reasons.⁸ First, to the extent that existing obligations are inconsistent with a system of free and fair competition for electric services, the Congress and the FERC must address the issue as part of any efforts to reshape the industry. Although wholesale sales currently represent a small percentage of total utility sales, wholesale customers are among those most readily able to shift between power supply sources. Moreover, the percentage of wholesale sales is increasing, and if state-imposed obligations to serve retail customers were to be relaxed, additional incentives may be created to transform retail service into wholesale service.⁹ Second, the FERC has had numerous opportunities to address the tension that exists between treating wholesale customers in part as customers in the traditional sense (in which an obligation to serve and to take service exists) and in part as competitors in wholesale and retail markets. To the extent that FERC has been unable to put in place rules and policies that adequately resolve this tension, a new and hard look must be taken at the supplier-customer relationships that are intended to exist in the proposed new competitive environment.

A. Overview

Congress chose not to impose a common carrier obligation on public utilities for services regulated under the FPA. It decided that wholesale electric and transmission services should be established primarily by voluntary private contracts between public utilities and their customers. Nonetheless, the FPA has been construed as providing the Commission with relatively broad authority to require utilities to provide wholesale electric service, and recent amendments to the Act afford the Commission some additional authority to require utilities to provide wholesale services. Moreover, the Commission's decisions demonstrate that the Commission may seek to compel the provision of wholesale services not voluntarily provided in circumstances where the Commission believes the "public interest" so requires.

During recent years, the Commission has had limited occasion to address the utility obligation to serve at wholesale, because alternative generation has been in plentiful supply. However, its decisions from the 1970s and early 1980s indicate that, should shortages of generating capacity again appear, the Commission may seek to impose *de facto* service obligations on utilities to take on new wholesale customers and loads and to continue to serve existing wholesale customers beyond the expiration of filed rate schedules, notwithstanding Congress' determination to have wholesale electric sales be governed

leaves the system and later seeks to return. A fundamental inconsistency appears to exist between existing state-imposed obligations to serve and policies currently under consideration that would permit or encourage retail customer bypass of the local utility.

8. As used in this paper, the term "wholesale" is applied to electric service rates for power relied upon by the customer to serve its retail customers. Coordination or "opportunity" transactions between self-sufficient utilities are not within the scope of this analysis.

9. This transformation can be accomplished by, among other things, establishment of new distribution utilities or the expansion of an existing distributor's service area. Examples exist of such "expansion" being accomplished by the acquisition of token facilities at the site of a large industrial load. See, e.g., *Gulf States Utils. v. City of Lafayette*, No. 84-132B (M.D. La. filed Feb. 3, 1984).

by voluntary agreement. The Commission's actions may, in many instances, be subject to legitimate challenge in the courts, but the outcome of any such challenge is uncertain. Utilities, therefore, have no meaningful assurance that they will not have some obligation to serve wholesale customers who request firm service, including customers who have left the system voluntarily or given notice of termination under applicable power purchase contracts. The rules of the game are, simply, unclear. In light of the body of law represented by the FERC opinions and the decisions of the federal courts construing the FPA, a change in existing law—in the form either of legislation or a decisive reversal of some existing precedents—would be necessary to provide the kind of assurance that could serve as a foundation for utility planning.

The Commission has not recognized a complementary obligation on the part of wholesale customers to take service. The Commission generally has viewed wholesale customers as "competitors" in wholesale and retail markets, which are entitled to protection from larger utility suppliers that enjoy monopoly power. When faced with efforts by wholesale customers to abandon their traditional suppliers, the Commission generally has taken the position that the filed wholesale service agreement governs and has made it the responsibility of the serving utility to protect itself contractually from customer service and load changes. Even so, the Commission has acknowledged only recently the need for adequate contractual provisions that provide for stability of wholesale services, and it has imposed on the serving utility the obligation to demonstrate in each case the reasonableness of such provisions. Utilities apparently must live with older long term "fixed rate" contracts that were entered into in a different industry environment and that do not contain adequate protective provisions.

We have reached the following specific conclusions regarding the obligation to provide wholesale electric service under the Federal Power Act:

1. The Commission has asserted substantial authority under section 202(b) of the FPA to require utilities to provide wholesale electric services, and the appellate courts generally have upheld that authority. The statutory limits on the Commission's section 202(b) authority, as these limiting provisions have been construed by the Commission, may not be sufficient to prevent adverse economic impacts on existing native load customers.

2. The Public Utility Regulatory Policies Act of 1978 (PURPA) provides additional, essentially untested authority for the Commission to order wholesale sales.

3. The Commission apparently believes that it has some authority under sections 205 and 206 of the FPA to require utilities to initiate wholesale electric service to a new customer to prevent undue discrimination or anticompetitive effects. Existing appellate court decisions do not resolve this question definitively.

4. The Commission has found that it has broad authority under sections 205 and 206 of the FPA to require utilities to modify or expand existing services, in cases where the Commission believes that such modification or expansion is necessary in the "public interest" or to prevent undue discrimination or anticompetitive effects.

5. Even where service agreements provide for termination of service, the Commission has held that wholesale service cannot be terminated except upon application under section 205 of the FPA and a Commission determination that termination is consistent with the "public interest." Commission decisions indicate that an application to terminate service will be denied if the Commission believes that adequate, economic alternative power supplies are not available to the wholesale customer.

6. The Commission does not recognize a reciprocal "right to serve" in favor of utilities faced with stranded investment problems. The Commission has stated that utilities must rely upon service contract provisions, *e.g.*, provisions for notice prior to initiation or termination of service.

7. The Commission has not addressed squarely the question whether customers that choose to terminate, in whole or in part, requirements service in favor of firm purchases from third party suppliers have the right to come back to their former supplier on a requirements basis. To date, the Commission has indicated that this question should be decided at the time the customer seeks to return to the system.

II. OBLIGATION OF A JURISDICTIONAL PUBLIC UTILITY TO INITIATE WHOLESALE ELECTRIC SERVICE

A. *The Commission's Authority Under Section 202(b) of the Federal Power Act*

Section 202 of the original bill which was to become the FPA provided that "[i]t shall be the duty of every public utility to furnish energy to, exchange energy with, and transmit energy for any person upon reasonable request therefor. . . ."¹⁰ This language, which would have made public utilities "common carriers," was stricken in subsequent drafts and was not incorporated into the final bill. Congress omitted the common carrier provisions in Part II of the FPA in order to preserve the voluntary action of utilities.¹¹

Nonetheless, Congress granted the Commission specific, albeit limited, authority to require public utilities to provide wholesale service where the public interest so requires. Under section 202(b) of the FPA,¹² the Commission may direct an electric utility to establish a physical connection of its transmission facilities with the facilities of another entity engaged in the transmission or sale of electric energy, and may order the utility to sell to or exchange energy with such other entity, or both, as the public interest requires. The Commission cannot, however, order interconnections on its own motion, compel the enlargement of generating facilities, or compel the

10. S. 1725 and H.R. 5423, 74th Cong., 1st Sess. (1935) (Wheeler-Rayburn Bill). For a detailed discussion of the legislative history of the FPA as it relates to the wholesale obligation to serve, see *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374-75, 385-87 (1973).

11. *Otter Tail*, 410 U.S. at 373-74; *Florida Power & Light Co. v. FERC*, 660 F.2d 668, 672-73 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983). "The legislative history of the FPA makes clear that Congress did not intend the Commission to have power to compel wheeling" nor did it intend to require utilities to provide wheeling upon request. *Id.* at 672. *Richmond Power & Light v. FERC*, 574 F.2d 610, 619-20 (D.C. Cir. 1978).

12. 16 U.S.C. § 824a(b) (1982).

sale or exchange of energy when to do so would impair the utility's ability to render adequate service to its customers.¹³

In *New England Power Co. v. FPC*,¹⁴ the court held that section 202(b) provides the Commission power to order a utility to sell energy at wholesale and to establish a physical interconnection for this purpose even where an interconnection through the facilities of another utility already exists.¹⁵ The court stated that, except for the limitations stated in section 202(b), the Commission's authority to require wholesale sales under section 202(b) is "plenary."¹⁶

The one case under section 202(b) to reach the Supreme Court involved an interconnection between a large utility and a smaller municipal utility with generation in excess of its load. The Supreme Court affirmed the FPC's interconnection order, which was contested on grounds that the Commission did not provide adequate compensation to the large utility, but did not find it necessary to decide whether the Commission can require an interconnection and sale of power under section 202(b) in circumstances where benefits accrue solely to the entity receiving service.¹⁷

In a series of proceedings captioned *Village of Elbow Lake v. Otter Tail Power Co.*,¹⁸ Elbow Lake sought an interconnection with Otter Tail Power under section 202(b) of the FPA and an order directing Otter Tail to provide wholesale service. In Opinion No. 551, the Commission ordered Otter Tail to interconnect temporarily with Elbow Lake pending a determination on whether a permanent interconnection was warranted. In so ruling, the Commission rejected Otter Tail's argument that the requested section 202(b) order would place an undue burden on it. The Commission held that "[a] careful reading of the [FPA] leads us to the conclusion that the term 'undue burden' as used [in section 202(b)] refers to a physical burden upon the facilities and not to an economic burden upon the company."¹⁹ The Commission concluded that the question of economic burdens should be addressed by the imposition of appropriate charges for service.²⁰ Otter Tail's argument that the proposed interconnection could erode its retail business was found to be a consideration to be weighed by the Commission in making its "public interest" findings.

In Opinion No. 603,²¹ the Commission ordered Otter Tail to interconnect

13. *Id.*

14. *New England Power Co. v. FPC*, 349 F.2d 258 (1st Cir. 1965), *aff'g*, *Shrewsbury Mun. Light Dep't v. New England Power Co.*, 32 F.P.C. 373 (1964).

15. *New England Power*, 349 F.2d at 263.

16. *Id.*

17. *Gainesville Utils. Dep't v. Florida Power Corp.*, 402 U.S. 515, 529 (1971).

18. *Village of Elbow Lake v. Otter Tail Power Co.*, 40 F.P.C. 1262 (1968) [hereinafter *Opinion No. 551*], *aff'd*, *Otter Tail Power Co. v. FPC*, 429 F.2d 232 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); 46 F.P.C. 675 (1971) [hereinafter *Opinion No. 603*], *aff'd in part and rev'd in part*, *Otter Tail Power Co. v. FPC*, 473 F.2d 1253 (8th Cir. 1973). These cases involve the same nucleus of facts that underlies the Supreme Court's decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

19. *Opinion No. 551*, 40 F.P.C. at 1270.

20. *Id.*

21. *Opinion No. 603*, 46 F.P.C. 675 (1971).

permanently and to provide firm wholesale service to Elbow Lake, which was unable to provide reliable service to its customers without Otter Tail's assistance. The Commission directed Otter Tail to provide wholesale full requirements service to Elbow Lake priced on the basis of fully-allocated system average costs.²²

In another early decision, the FPC declined to order a utility to sell wholesale power pursuant to section 202(b). In *Indiana & Michigan Electric Co.*,²³ the FPC denied a request by the City of Richmond, Indiana, for an order under section 202(b) of the FPA requiring Indiana & Michigan Electric (I&M) to sell a full range of interchange services across an existing interconnection. The Commission distinguished Richmond's request from the *Gainesville*²⁴ case on the basis that Richmond's request would not provide any reciprocal benefits to I&M or improve the quality of service in the areas served by either utility. The Commission acknowledged that granting Richmond's request would afford Richmond an opportunity to purchase low cost power, but held that this factor was insufficient to justify a "public interest" finding under section 202(b). At the same time, however, the Commission held that I&M was compelled to provide emergency and scheduled maintenance services to Richmond pursuant to both section 202(b) and the anti-discrimination provisions of section 206 of the FPA. The Commission distinguished the latter two services on the bases that these services were necessary to permit Richmond reliably to serve its retail customers and were of limited duration.²⁵

In one recent case, an administrative law judge interpreted the Commission's authority under section 202(b) to require a utility to interconnect to supply firm, full requirements service. In *Central Virginia Electric Cooperative v. Appalachian Power Co.*,²⁶ Central Virginia Electric Cooperative (CVEC) filed a section 202(b) petition requesting firm, full requirements service from Appalachian Power Company (APCO) at four of its sixteen delivery points. At the time of the request, CVEC was receiving ninety-two percent of its power from Virginia Electric Power Co. and eight percent from the Southeastern Power Administration. In ordering the interconnection, the presiding judge relied heavily on the fact that the amount of power in dispute was only approximately ten megawatts.²⁷ The judge rejected APCO's argument that an interconnection order would result in a flood of similar applications. He stated that the relevant inquiry was the impact on APCO's current customers and not the potential problem of meeting the needs of prospective customers

22. *Id.* at 680-81. The Commission also would have required Otter Tail to give Elbow Lake a credit reflecting the value of Elbow Lake's own generating capacity. This requirement was overturned on appeal on the grounds that it was inconsistent with the prohibition against forced expansion of a utility's generation under section 202(b). *Otter Tail*, 473 F.2d at 1257.

23. *Indiana & Michigan Elec. Co.*, 59 F.P.C. 1383, 1393-96 (1977).

24. *See supra* note 17 and accompanying text.

25. *Indiana & Michigan*, 59 F.P.C. at 1392-93.

26. *Central Virginia Elec. Coop. v. Appalachian Power Co.*, 24 F.E.R.C. ¶ 63,118 (1983). Because there were no exceptions taken to the Initial Decision, the Commission issued a Notice of Finality of Decision. 25 F.E.R.C. ¶ 61,218 (1983).

27. *Central Virginia*, 24 F.E.R.C. at 65,198, 65,199, 65,201.

in the future.²⁸ He concluded that APCO had failed to refute the logical conclusion that an eight-to-ten megawatt load would have little if any impact on a 2,300-megawatt system. Moreover, he found that there was no showing of detrimental effect on the system's reliability levels, no impairment of service to existing customers, and no need to enlarge APCO's generating facilities as a result of providing service to CVEC.²⁹

Important issues concerning the scope of the Commission's authority under section 202(b) remain unanswered. It is unclear to what extent the statutory prohibition against requiring the enlargement of generation as a result of a section 202(b) order actually limits the Commission's authority. Typically, wholesale customer loads are not large in relation to the supplying utility's system load, and it may be difficult for the utility to establish that the provision of new wholesale service causes the need for new generating capacity. In addition, the statute is not clear whether the Commission is required to take a forward look at the impacts of providing additional wholesale service, as contrasted with determining whether the utility's existing generation is sufficient to serve the new wholesale loads at the time of the section 202(b) application. Similarly, the requirement that the Commission's order not impair service to the utility's customers appears to have been interpreted in *Central Virginia* to mean only that the utility has adequate generation and transmission capacity at the time of the application for service. Once a customer has obtained a right to firm service, it likely would be considered part of the native load for which the utility must plan and install adequate capacity to provide reliable service.

B. Other Provisions of the Federal Power Act Which Authorize the Commission to Require Wholesale Services

Sections 210, 211, and 212 of the FPA, which were added to the FPA by the Public Utility Regulatory Policies Act of 1978,³⁰ also authorize the Commission to order interconnections and the sale or exchange of energy³¹ under

28. *Id.* at 65,201.

29. *Id.* at 65,201-02.

30. PURPA, Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 26, 30, 42, 43 U.S.C. (1982)).

31. Sections 210 and 212 of the FPA, describe the procedure to be followed by the Commission when an electric utility, federal power marketing agency, qualifying cogenerator, or qualifying small power producer applies for an order requiring a public utility to make an interconnection. 16 U.S.C.S. §§ 824i, 824k (Law. Co-op. 1978 & Supp. 1987). Section 210 provides that, upon application for an interconnection order, the Commission shall issue notice to certain specified parties and to the public, afford an opportunity for an evidentiary hearing, and issue an order approving the application only if it determines that approval meets the requirements of § 212 of the FPA, is in the public interest, and would (a) encourage overall conservation of energy or capital, (b) optimize the efficiency of use of facilities and resources, or (c) improve the reliability of any electric utility system or federal power marketing agency to which the order applies. 16 U.S.C.S. § 824i(b), (c) (Law. Co-op. 1978 & Supp. 1987). Section 212 of the FPA provides that the FERC can issue an interconnection order under § 210 only if it determines that the interconnection is not likely to result in a reasonably ascertainable uncompensated loss for any electric utility, qualifying cogenerator, or qualifying small power producer, impose an undue burden on any such facility, unreasonably impair the reliability of any electric utility, or impair the ability of any electric utility to supply adequate service to its customers. 16 U.S.C.S. § 824k(a) (Law. Co-op. 1978 & Supp. 1987).

certain limited conditions. Consistent with section 202(b), the Commission cannot order interconnection or wheeling under these PURPA provisions on its own initiative, and cannot issue such an order if it would require the enlargement of generating facilities.³² Under the authority provided in the PURPA amendments, the Commission must address a variety of specific impacts of an interconnection or wheeling order that are not required to be addressed under section 202(b) of the FPA. The PURPA provisions, however, were not intended as a limitation on the Commission's pre-existing authority under section 202(b) of the Act.³³

Section 207 of the FPA provides that whenever the Commission, upon the complaint of a state commission and after notice and opportunity for hearing, finds that any interstate service of a public utility is "inadequate or insufficient," the Commission shall determine the proper, adequate or sufficient service by order or rulemaking.³⁴ As in the case of section 202(b), the Commission cannot order the provision of wholesale service when to do so would require the enlargement of generating facilities or would impair service to other customers. On the few occasions when states have invoked section 207, it has been in the context of challenging the sufficiency of an ongoing service rather than requesting an order to initiate service.³⁵ There are no reported cases defining the scope of the Commission's section 207 authority.

Under section 202(c) of the FPA, the Commission has broad authority to require the provision of wholesale electric service where it determines that an emergency exists "by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes."³⁶ The Commission can order the provision of emergency service on a temporary basis without prior notice or hearing and may, after hearing, supplement its order to prescribe the just and reasonable terms of emergency service.³⁷ In *Richmond Power & Light v. FERC*,³⁸ the D.C. Circuit upheld the Commission's determination that energy shortages occasioned by the 1973 oil embargo did not create an "emergency" within the meaning of section 202(c) of the FPA. The court did not set forth standards to be applied by the Commission in making this determination but suggested that Congress intended to limit these cases to extreme and temporary emergency conditions.³⁹

Section 206 of PURPA amends section 202 of the FPA by adding a new

32. 16 U.S.C.S. §§ 824i(a), 824j(a), 824k(a) (Law. Co-op. 1978 & Supp. 1987).

33. See PURPA § 214(a), 92 Stat. 3149, 16 U.S.C.S. § 824 (Law. Co-op. 1978 & Supp. 1987).

34. 16 U.S.C. § 824f (1982).

35. See, e.g., *Central Power and Light Co.*, 59 F.P.C. 1665 (1977) (request by Oklahoma commission for the FERC to institute investigation under section 207 to determine whether the adequacy of service was affected by the disconnection of service between West Texas Utilities and the Public Service Co. of Oklahoma). See also *Mississippi Power Co.*, 45 F.P.C. 269 (1971); *Municipal Light Boards v. Boston Edison Co.*, 43 F.P.C. 951, 952 (1970).

36. 16 U.S.C. § 824a(c) (1982).

37. *Id.*

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

39. *Id.*

subsection (g).⁴⁰ This provision gives the Commission authority to obligate utilities "to insure continuity of service to customers of public utilities" by, among other things, accommodating shortages of electric capacity and energy in a manner that "provide[s] that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage."⁴¹ It is not clear whether this provision provides the FERC authority, in addition to section 202(c), to require utilities to share scarce capacity and energy with other utilities (*i.e.*, former wholesale customers) during periods of electric power shortages. This provision was cited recently in a decision of the U.S. Court of Appeals for the District of Columbia Circuit for the proposition that "public utilities are under statutory obligations to plan and build the facilities necessary to meet the projected needs of their customers."⁴²

C. The Commission's Authority to Compel Wholesale Electric Sales to Remedy Anti-competitive Behavior or Undue Discrimination

Section 205(b) of the FPA provides that no public utility shall, with respect to a jurisdictional sale or transmission of electricity, grant any undue preference or maintain any unreasonable differences in rates, charges, facilities, or services as between localities or classes of service.⁴³ Under section 206(a) of the FPA the Commission, after hearing, has the authority to determine if a rate or practice is unduly discriminatory and to set just and reasonable rates or practices to be observed thereafter.⁴⁴ A few federal court decisions can be interpreted to support the view that the Commission has the power under sections 205 and 206 of the FPA to compel the initiation of wholesale electric service in order to prevent undue discrimination and/or to redress "anti-competitive" conduct. In addition, the Commission on several occasions has exercised jurisdiction under sections 205 and 206 to enlarge or modify a utility's voluntary agreement to provide service. The precise scope of the Commission's powers under sections 205 and 206 has not been established.⁴⁵

The Commission's general authority to consider and redress anti-competitive and discriminatory conduct under sections 205 and 206 of the FPA has been clearly established by the courts. The Supreme Court has directed the

40. 16 U.S.C.S. § 824a(g) (Law. Co-op. 1978 & Supp. 1987).

41. *Id.*

42. *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1171 (D.C. Cir. 1987).

43. 16 U.S.C. § 824d(b) (1982).

44. 16 U.S.C. § 824e(a) (1982).

45. In its June 18, 1987, Order No. 474 in the Construction Work in Progress (CWIP) rulemaking proceeding, the Commission stated: "Absent a showing under section 202(b) of the Federal Power Act, however, the Commission has serious reservations concerning its ability to require service where the utility has not contractually obligated itself to provide service in a filing under section 205." 52 Fed. Reg. 23,948 at 23,960 (1987) (to be codified at 18 C.F.R. § 35). The Commission's intended meaning is unclear, however. To the extent the Commission is saying that it does not believe it has any authority to order the provision of new wholesale services under sections 205 and 206, the statement appears inconsistent with its other decisions as discussed *infra*. In particular, it is unclear whether this statement is intended to apply to cases where the utility is already providing the same service to another customer under a filed rate, and/or where it is already providing a different wholesale service to that customer.

Commission "to consider, in appropriate circumstances, the anti-competitive effects of regulated aspects of interstate utility operations" in exercising its regulatory authority over the issuance of securities by electric utilities, and the Court indicated that consideration of anti-competitive conduct is also relevant to the Commission's deliberations under sections 205 and 206 of the Act.⁴⁶ In considering whether wholesale rates are just and reasonable, the Commission is required also to consider whether those rates are unduly discriminatory or anti-competitive in relation both to other wholesale services and to retail electric rates.⁴⁷

In *Central Iowa Power Cooperative v. FERC*,⁴⁸ the D.C. Circuit stated, in dictum, that the Commission has the authority to order utilities to provide additional jurisdictional services in circumstances where the refusal to provide a service is unduly discriminatory or anti-competitive. The court was addressing the assertions of the South Dakota Public Utilities Commission that the Mid-Continent Area Power Pool (MAPP) agreement should be expanded to include services not voluntarily provided under the MAPP agreement. The court first addressed the provisions of the FPA, principally section 202(a), which evince a Congressional determination that coordination among utilities should be voluntary. The court stated, however, that the Commission has the authority pursuant to section 206 of the Act to order changes in the pooling agreement, "including the addition of pool services" if the absence of such services rendered the pooling agreement unjust, unreasonable, or unduly discriminatory.⁴⁹

Citing *Central Iowa*, the Commission stated recently that "[i]t appears that the Commission may order the expansion or modification of services under some circumstances if the refusal to do so is unduly discriminatory or anticompetitive."⁵⁰ The case involved assertions by the City of Vernon, California (Vernon), that Southern California Edison Co. (Edison) should be compelled to provide interruptible wholesale service to Vernon because such service was provided by Edison to its retail customers. The Commission held that Vernon had not made an adequate showing of undue discrimination or anti-competitive effects and stated that it need not finally decide whether the Commission had the authority pursuant to sections 205 and 206 to order service under the facts of that case.⁵¹

In a recent administrative law judge's (ALJ) decision under the Natural Gas Act, *Transcontinental Gas Pipe Line Corp.*,⁵² Transcontinental Gas Pipe

46. *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973); see also *Otter Tail Power Co. v. United States*, 410 U.S. at 374.

47. *FPC v. Conway Corp.*, 426 U.S. 271 (1976); *Cities of Bethany v. FERC*, 727 F.2d 1131 (D.C. Cir.), cert. denied, 469 U.S. 917 (1984).

48. *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979).

49. *Id.* at 1168.

50. *Southern California Edison Co.*, 38 F.E.R.C. ¶ 61,040, at 61,112, reh'g denied, 39 F.E.R.C. ¶ 61,046 (1987).

51. The Commission indicated that Vernon might have proceeded under section 202(b) of the FPA, in which case the Commission would have decided the case under the broader "public interest" standard. *Id.* at 61,113.

52. *Transcontinental Gas Pipe Line Corp.*, 33 F.E.R.C. ¶ 63,035 (1985).

Line Corp. (Transco) was ordered to expand the availability provisions in its tariff to provide interruptible transportation service. Transco had adopted a policy of denying interruptible service whenever such service would displace a sale which would otherwise be made by Transco. The ALJ reasoned that, regardless of whether the Commission has authority to force a pipeline to provide service, the Commission is empowered to modify the terms of a voluntary tariff filing. Relying on *Central Iowa*, the ALJ stated that once a tariff or agreement is on file, the Commission has the authority under sections 4 and 5 of the Natural Gas Act to establish just and reasonable terms and conditions of service—including provisions related to the rendering of service that the utility does not wish to provide.⁵³

In the FPC's *Indiana & Michigan*⁵⁴ decision, the Commission ordered I&M to provide emergency and scheduled maintenance interchange service to a neighboring municipal utility. In addition to finding that the provision of service was necessary in the public interest (under section 202(b)), the Commission also found that I&M should provide these interchange services "on a parity with other customers so as to eliminate undue discrimination under section 206 of the Federal Power Act."⁵⁵

As noted above,⁵⁶ the legislative history of Part II of the FPA reveals that parallel provisions requiring electric utilities to provide wholesale power and wheeling service were considered and rejected by Congress. Therefore, the decisions addressing the Commission's power to order wheeling to redress discrimination or anti-competitive conduct are also relevant to the issue addressed here.

Whether the Commission has authority to order the provision of wheeling services under sections 205 and 206 to remedy discriminatory or anti-competitive conduct has not been established with certainty. In *Richmond Power & Light v. FERC*,⁵⁷ a panel of the D.C. Circuit Court of Appeals indicated in dictum that the Commission could compel the expansion of a voluntary wheeling commitment upon a showing that the utility's own service restrictions are unreasonably anti-competitive or discriminatory.⁵⁸ In *Florida Power & Light Co. v. FERC*,⁵⁹ the Fifth Circuit noted the D.C. Circuit's dictum in the *Richmond* case, but explicitly decided not to address the scope of the Commission's authority to order wheeling to redress anti-competitive effects because the Commission had not grounded its decision on a specific finding of anti-competitive effects.⁶⁰

In *New York State Electric & Gas Corp. v. FERC*,⁶¹ the Second Circuit

53. *Id.* at 65,129-30.

54. *See supra* notes 23-25 and accompanying text.

55. *Indiana & Michigan*, 59 F.P.C. at 1393.

56. *See supra* notes 10-13 and accompanying text.

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

58. *Id.* at 623-24.

59. *Florida Power & Light Co. v. FERC*, 660 F.2d 668 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983).

60. *Id.* at 678.

61. *New York State Elec. & Gas Corp. v. FERC*, 638 F.2d 388 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981).

addressed the issue of whether the limitations placed by sections 211 and 212 of the FPA on the authority of the Commission to order wheeling should extend to a FERC order, issued under sections 205 and 206, thus expanding a utility's voluntary, pre-existing commitment to wheel. The court reasoned that "the public interest and the enhancement of competition are not alone sufficient justification for compelling wheeling."⁶² The court noted that under section 211 the Commission must assess specific aspects of private interests as well, and must, among other things, make a determination that the wheeling order "would reasonably preserve existing competitive relationships."⁶³ It concluded that the Commission's modification of a voluntary wheeling rate schedule amounted to an order compelling wheeling which, in the absence of the requisite findings under sections 211 and 212 of the FPA, was inconsistent with Congressional intent.⁶⁴ In essence, the court reached its decision by reading sections 205 and 206, applied in the wheeling context, together with the newly-enacted section 211. Although, in our view, the result should be no different if the issue were to involve wholesale power sales, the *New York State Electric & Gas* decision does not speak explicitly to the wholesale power issue.

The Commission has not taken a position as to whether it has the authority to compel wheeling under sections 205 and 206 since the decisions of the courts of appeals discussed above.⁶⁵ However, in *Southeastern Power Administration v. Kentucky Utilities Co.*,⁶⁶ the Commission expressed doubt that it possesses this authority: "[a]t present it is not entirely clear whether we may order wheeling pursuant to sections 205 and 206 even to remedy anticompetitive conduct."⁶⁷ Nor has the Commission explicitly addressed the reasons why it believes it has broader authority under sections 205 and 206 to order utilities to provide wholesale electric service than it does to compel them to wheel.

62. *Id.* at 402.

63. *Id.*

64. *Id.* at 402-03.

65. It has been argued that the Commission's responsibility to redress undue discrimination and anti-competitive conduct under sections 205 and 206 of the FPA necessarily implies the authority to order the provision of wholesale electric and transmission services, and that the *Florida Power & Light* and *New York State Elec. & Gas* cases, to the extent that they suggest otherwise, are incorrect. Reiter, *Competition and Access To The Bottleneck: The Scope of Contract Carrier Regulation Under the Federal Power and Natural Gas Acts*, 18 LAND & WATER L. REV. 1 (1983). This author argues that the authority to require access to service and facilities in these circumstances is not inconsistent with Congress' decision not to impose a wholesale common carrier obligation under the Federal Power Act. A panel of the D.C. Circuit Court of Appeals recently adopted this reasoning in the context of upholding, in part, the Commission's Order No. 436 regarding open access transmission of natural gas. *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987). However, the court distinguished between the FPA and the Natural Gas Act on the basis that Congress explicitly rejected the inclusion of a "common carrier" provision in its deliberations preceding promulgation of the FPA. *Id.* at 28.

66. *Southeastern Power Admin. v. Kentucky Utils. Co.*, 25 F.E.R.C. ¶ 61,204 (1983), *reh'g denied*, 26 F.E.R.C. ¶ 61,127 (1984).

67. *Id.* at 61,542 n.26.

III. ABILITY OF A JURISDICTIONAL UTILITY TO LIMIT ITS WHOLESALE SERVICE OBLIGATION ONCE UNDERTAKEN

In the great majority of cases, the Commission's consideration of a customer's or potential customer's request for wholesale electric service will take place in a context where the utility already is providing some form of wholesale service and the issue involves use of that service in a manner, or by a type of customer, not contemplated by the utility at the time that it undertook to provide the service, or involves termination of the service.

A. *Use of Service in a Manner or by a Type of Customer Not Contemplated by the Utility*

In two important cases in which this issue has arisen, the Commission has invoked its power, under sections 205 and 206 of the FPA, to regulate changes in service to require the utility to provide a service that the utility did not wish to provide. In both cases, the Commission reached this result without addressing section 202(b) of the FPA and without deciding whether it has the authority to compel the initiation of wholesale services under sections 205 and 206.

In *Florida Power & Light Co.*,⁶⁸ Florida Power & Light (FPL) had filed with the Commission several years earlier a tariff containing Rate Schedule SR-1, which made wholesale electric service generally available. This rate schedule was intended, however, to govern the terms and conditions of service to municipal and cooperative utilities that had either no generation or inadequate generation to meet the needs of their customers. When the tariff was filed, FPL did not anticipate that small utilities that were self-sufficient in generating capability would request wholesale service under Rate Schedule SR-1 in lieu of operating their own facilities. However, the substantial dislocations in oil and gas markets in the mid-1970s created such incentives. FPL made a filing to clarify its tariff, both to distinguish between full requirements and partial requirements services and to limit the availability of its proposed requirements rate schedules to existing wholesale customers. FPL proposed to offer self-sufficient municipal systems, which had not in the past been wholesale customers, power provided on the basis of the costs of newly-installed generating capacity.⁶⁹

The Commission held that, by previously filing a tariff which could be construed to extend requirements service to such systems, FPL had voluntarily undertaken that obligation, and that the tariff could not be changed without Commission approval, which required a demonstration by FPL that the changes were in the public interest. The Commission articulated its disposition of the issue before it as follows: "Under sections 205 and 206 of the Federal Power Act, a utility must receive Commission approval to replace one service to a wholesale customer with another service."⁷⁰

FPL sought to justify its proposed limitations on full and partial require-

68. *Florida Power & Light Co.*, 8 F.E.R.C. ¶ 61,121 (1979), *reh'g denied*, 9 F.E.R.C. ¶ 61,015 (1980).

69. *Id.* at 61,449-54.

70. *Id.* at 61,450.

ments availability in terms of operational constraints. Specifically, FPL asserted that future power supply was too uncertain to allow unlimited access to its requirements service. According to FPL, self-sufficient customers could swing on and off the system, leaving FPL with the obligation of maintaining excess capacity with no assurance that such capacity would be used, thereby increasing rates to all customers.⁷¹

The Commission held that, although FPL might well face fuel supply problems, it had failed to demonstrate that regulatory requirements and financial difficulties would render it incapable of expanding its generating capacity as needed in the future. The Commission concluded that FPL's restriction on service would increase its strategic dominance in retail and wholesale markets by denying certain municipal customers access to base load generation. The Commission emphasized that it was not holding that a utility with market power is precluded *per se* from amending its tariff to propose conditions which limit service availability. Rather, the Commission found that the FPA gives the utility the opportunity to demonstrate that its proposed change is just and reasonable, a showing that the Commission found FPL had not made under the circumstances.⁷² The Commission did find, however, that FPL's proposal to establish separate full and partial requirements wholesale rates, which reflected more precisely the different costs of serving the different customer groups, was a reasonable proposal.⁷³

In *Kentucky Utilities Co.*,⁷⁴ Kentucky Utilities sought to replace an existing rate schedule (under which Kentucky Utilities had given notice of termination) with a new schedule under which service would be limited to full requirements wholesale customers. Its wholesale customers, who had apparently always taken their full requirements from Kentucky Utilities in the past but were exploring obtaining some power from other sources, asserted that this was an unreasonable change in service and claimed that, until Kentucky Utilities filed a partial requirements rate, they should be able to take partial requirements service under the proposed full requirements rate schedule.⁷⁵ Comparing the existing service contracts with the proposed contracts, and without deciding whether the existing contracts offered the customers partial requirements service, the Commission found that the service offered in the proposed contracts was more limited than the service offered in the existing contracts. The Commission held, therefore, that Kentucky Utilities would have to justify the change in service before the Commission would approve the new rate schedule.⁷⁶

In attempting to justify the limitation of service to full requirements service, Kentucky Utilities advanced three arguments, all of which were rejected by the Commission. First, it claimed that the rate it was offering in the new

71. *Id.* at 61,465.

72. *Id.* at 61,448-49.

73. *Id.* at 61,467.

74. *Kentucky Utils. Co.*, 23 F.E.R.C. ¶ 61,317, *aff'd in part*, 25 F.E.R.C. ¶ 61,205 (1983), *remanded in part*, *Kentucky Utils. Co. v. FERC*, 766 F.2d 239 (6th Cir. 1985).

75. *Id.* at 61,665.

76. *Id.*

schedules was designed for full requirements service only and was, therefore, inappropriate for any other type of service.⁷⁷ The Commission rejected this argument on the ground that Kentucky Utilities offered no evidence to support the assertion. Second, Kentucky Utilities claimed that it was unreasonable to require it to design rates for all types of partial requirements services before customers even requested such services. The Commission found that Kentucky Utilities was only under an obligation to provide the service agreed to by the parties in their existing contracts and that it need not design and file different partial requirements rates.⁷⁸ In other words, Kentucky Utilities was bound by the service provisions of its expired contracts, even though it had exercised its contractual right to terminate service thereunder, unless it could demonstrate that new, more limited provisions were just and reasonable and in the public interest.

Finally, Kentucky Utilities argued that it was unreasonable to require it to plan for its customers' full requirements, while allowing the customers to swing on and off the system. The Commission found that Kentucky Utilities' concern was legitimate but could be cured by adequate notice of termination provisions⁷⁹ rather than by offering only full requirements service.

The *Florida Power & Light* and *Kentucky Utilities* decisions present significant potential difficulties for utilities which seek to limit wholesale service obligations, once some form of service obligation is undertaken. The few attempts that have been made, to date, by utilities to limit or decline to provide wholesale requirements services based on system average costs have not fared well before the Commission.⁸⁰

Moreover, in a very recent decision, the Commission has reaffirmed its view that, when faced with a proposal to change existing service arrangements, it has broad authority to structure a utility's wholesale power sale arrangements. In *Tapoco, Inc.*,⁸¹ the Commission held that it has authority under sections 205 and 206 of the FPA to afford a remedy which includes compelling a utility to sell wholesale power when it is presented with a proposal to change an existing set of contracts and finds such remedy "reasonable and directly related to an explicit and broad statutory mandate such as the 'just and reasonable' standard."⁸² The Commission distinguished between section 202(b) of the FPA, which it concluded applies to new supply arrangements, and sections 205 and 206, which apply to the modification of existing arrangements. The Commission concluded:

[W]e recognize that the remedy we are ordering could lead to Tapoco having to sell power to Nantahala. However, we conclude that the presence of section 202(b) in the FPA does not undermine our authority under sections 205 and 206 to order a remedy that could lead to such a result. Section 205 applies in these

77. *Id.* at 61,666-67.

78. *Id.* at 61,667.

79. *Id.* The Commission's treatment of the issues concerning the notice provisions is discussed *infra* notes 125-30 and accompanying text.

80. See also *Louisiana Power & Light Co.*, 17 F.E.R.C. ¶ 63,020, *aff'd*, 17 F.E.R.C. ¶ 61,230 (1981), *aff'd sub nom. on other grounds*, *City of Winnfield v. FERC*, 744 F.2d 871 (D.C. Cir. 1984).

81. *Tapoco Inc.*, 39 F.E.R.C. ¶ 61,363 (1987).

82. *Id.* at 62,171.

circumstances to utility proposals to change an *existing* situation, while section 202(b) applies when a person wishes to establish a *new* arrangement. Thus, entirely independent of whether in this case the Commission could order sales under section 202(b), the Commission has a responsibility (and concomitant authority) to ensure that a proposed change in existing arrangements is just and reasonable and to order any necessary remedy not otherwise prohibited or inconsistent with the FPA.⁸³

B. *Obligation of a Utility to Continue Service After Expiration of a Wholesale Service Contract*

As discussed above, Congress chose to make wholesale electric sales and transmission service in interstate commerce subject primarily to voluntary contracts between utilities, and interposed the Commission for the purpose of ensuring that such transactions are just, reasonable, and not unduly discriminatory. The Commission, however, has interpreted its authority under sections 205 and 206 of the FPA to permit it to regulate the termination of wholesale and transmission services, even where the voluntary contract calls for such termination. The Commission requires utilities to justify service terminations as being just and reasonable and consistent with the public interest. The Commission has consistently held that sections 205 and 206 of the FPA, the regulations promulgated thereunder, and the Supreme Court's decision in *Pennsylvania Water & Power Co. v. FPC (Penn Water)*⁸⁴ require the utility to demonstrate that a termination pursuant to the provisions of the contract is consistent with the public interest.⁸⁵

83. *Id.* at 62,172. In support of its decision, the Commission cited, *inter alia*, to its decision in Middle South Energy, Inc., 31 F.E.R.C. ¶ 61,305, *reh'g denied*, 32 F.E.R.C. ¶ 61,425 (1985), *aff'd sub nom. Mississippi Indus. v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987). There the Commission ordered the reallocation of costs associated with the Grand Gulf Nuclear Plant among the members of the Middle South system. The Commission rejected the argument that any change in Grand Gulf cost responsibility and entitlements would constitute a forced purchase or sale of power, finding that "the issue . . . is not whether a company should be forced to purchase or sell power, but rather is the appropriate allocation of costs among integrated companies owned by the same parent." *Id.* at 61,643.

84. *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952).

85. *Kansas Gas & Elec. Co.*, 24 F.E.R.C. ¶ 61,377, at 61,787 (1983) (proposed cancellation of Rate Schedule F, under which no customers take service, is a change in service under section 205(d) of the FPA; propriety of cancellation set for hearing with utility bearing burden of persuasion); *Kansas Gas & Elec. Co.*, 19 F.E.R.C. ¶ 61,210, at 61,410 (1982) (even though Service Schedule T for transmission service to City of Chanute had not been used for some time, such termination could deny partial requirements customers access to alternate sources of power and therefore termination was set for hearing); *Louisiana Power & Light Co.*, 17 F.E.R.C. ¶ 61,230, at 61,442 (1981) (under 18 C.F.R. §§ 35.15 and 2.4 and the *Penn Water* decision, LP&L could terminate its service to Winnfield only by filing a notice of termination and only after the Commission's order permitting the termination); *Indiana & Michigan Elec. Co.*, 12 F.E.R.C. ¶ 61,007 (1980) (termination of a rate schedule may be accomplished only by following the requirements of sections 205(d) and (e) of the FPA and a FERC order permitting termination); *Public Serv. Co.*, 10 F.E.R.C. ¶ 61,277, at 61,537 (1980) (after official notice of termination required by 18 C.F.R. § 35.15 is submitted, Commission may undertake investigation under section 205(e) of the FPA to determine whether termination comports with public interest); *Florida Power & Light Co.*, 3 F.E.R.C. ¶ 61,199, at 61,551 (1978) (pursuant to sections 205 and 206 and the Commission's regulations, Commission ordered a hearing to determine whether proposed cancellation of service to Ft. Pierce was in public interest). *See also* *Florida Power & Light Co.*, 3 F.E.R.C. ¶ 61,265, at 61,714 (1978); *City of Liberty v. Gulf States Utils. Co.*, 31 F.P.C. 195, 195 n.2 (1964); *South Carolina Generating Co.*, 16 F.P.C. 52, 58 n.8 (1956).

The statutory bases for such authority and the Supreme Court's decision are discussed below, followed by brief comments on an argument, advanced by some commentators, that neither the FPA nor *Penn Water* provides the Commission with authority to prevent the automatic termination of service upon the expiration of the underlying contract.

Under section 205(d) of the FPA, a utility cannot change a "rate, charge, classification, or service"⁸⁶ or any contract relating thereto except on 60 days notice. The Commission's regulations indicate that the FERC considers the termination of service by operation of a contract to be a change in service requiring statutory notice.⁸⁷ Once the notice is filed, section 205(e) authorizes the Commission to suspend the effective date of the proposed change for up to five months and to conduct a hearing concerning the lawfulness of such "rate, charge, classification or service."⁸⁸ Section 206(a)⁸⁹ authorizes the Commission to determine, after hearing, "the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed" and to fix the same by order.

The Commission's interpretation of sections 205 and 206 respecting service terminations is based on the Supreme Court's decision in *Penn Water*. In *Penn Water*, several interested parties petitioned the Commission to investigate the allegedly excessive rates that Penn Water was charging to Consolidated Gas Electric Light & Power Co. (Consolidated) for residual energy from an integrated system of which the two companies were members. The Commission ordered Penn Water to file reduced rates.⁹⁰ Penn Water requested a rehearing, claiming that the contracts under which it provided service to Consolidated were void as the result of Consolidated's material breach of their coordination agreement. The Commission found that its order requiring the filing of reduced rates was not dependent on the legality of the underlying contracts.⁹¹

Meanwhile, in a related proceeding, the Fourth Circuit ruled that the coordination agreement at issue violated the Sherman Act.⁹² On appeal of the Commission's order, the D.C. Circuit found that the Fourth Circuit's antitrust decision did not relieve Penn Water from its obligation under the FPA to continue the services.⁹³ In upholding the decision of the D.C. Circuit, the Supreme Court held that Penn Water's duty to continue its coordinated oper-

86. 16 U.S.C. 824d(d) (1982) (emphasis added).

87. See 18 C.F.R. §§ 2.4 and 35.15 (1987). Section 2.4 of the regulations provides that cancellations or notices of termination are included in the changes in service the Commission may suspend under section 205(e) of the FPA. Section 35.15 provides that, whenever a rate schedule is proposed to be cancelled or is to terminate by its own terms and no new rate schedule is to be filed in its place, each party required to file such schedule must notify the Commission at least 60 but not more than 120 days prior to the proposed termination or cancellation date.

88. 16 U.S.C. § 824d(e) (1982) (emphasis added).

89. 16 U.S.C. § 824e(a) (1982).

90. *Pennsylvania Water & Power Co.*, 8 F.P.C. 1 (1949).

91. *Pennsylvania Water & Power Co.*, 8 F.P.C. 170, 175 (1949).

92. *Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co.*, 184 F.2d 552 (4th Cir.), cert. denied, 340 U.S. 906 (1950).

93. *Pennsylvania Water & Power Co. v. FPC*, 193 F.2d 230, 236 (D.C. Cir. 1951), aff'd, 343 U.S. 414 (1952).

ations with Consolidated “springs from the Commission’s authority, not from the law of private contracts.”⁹⁴ The Court found that if Penn Water wished to discontinue some or all of the services that it had rendered for 20 years, sections 205(c) and (d) of the FPA would afford a basis to do so, “provided Penn Water can prove that its wishes are consistent with the public interest.”⁹⁵ Thus, the Court apparently held that the obligation to serve, once undertaken by a utility, exists apart from the terms of an underlying service agreement, and that the utility must satisfy the public interest requirements of the FPA before terminating service.

The Commission has interpreted *Penn Water* as granting it the authority to make a public interest determination before a public utility will be permitted to terminate wholesale service. To this end, the Commission has refused to approve proposed contract provisions that would prevent the exercise of its authority by allowing automatic termination of service upon the happening of an event, or upon a date certain,⁹⁶ and has refused to permit a utility’s customers to agree voluntarily to waive notice of termination in an agreement for services.⁹⁷ The Commission has even indicated its intent to exercise its authority over service terminations when the contract has expired under its own terms and no customer has requested service under it.⁹⁸

Although no final Commission opinions have been issued addressing the standards for termination, the Commission has discussed, in the context of termination suspension orders, the circumstances under which termination might not be appropriate.⁹⁹ In one case, the Commission stated that termina-

94. *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 421-22 (1952).

95. *Id.* at 423.

96. *Union Elec. Co.*, 26 F.E.R.C. ¶ 61,147, at 61,369 (1984) (service agreement provision that would allow the company automatically to terminate service if three monthly bills are outstanding rejected as contravening 18 C.F.R. § 35.15 and § 205 of the FPA); *Central Illinois Pub. Serv. Co.*, 17 F.E.R.C. ¶ 61,090, at 61,187 (1981) (tariff provision permitting utility to discontinue firm transmission service within 10 days if account is delinquent 15 days or more summarily rejected for noncompliance with 18 C.F.R. § 35.15 and § 205 of the FPA); *Missouri Utils. Co.*, 14 F.E.R.C. ¶ 61,108, at 61,200 (1981) (tariff provision allowing utility unilaterally to terminate wholesale service if account is delinquent for 15 days is contrary to § 205 of the FPA and §§ 35.15 and 2.4 of the regulations); *Cleveland Elec. Illuminating Co.*, 7 F.E.R.C. ¶ 63,030, at 65,163 (1979), *aff’d*, 11 F.E.R.C. ¶ 61,114 (1980) (utility presented no evidence to demonstrate that a tariff authorizing termination of service upon future action of NRC is in public interest; Commission’s statutory duty to review the propriety of any tariff modification or cancellation must be fulfilled independently of any action by the NRC in the licensing proceeding); *Florida Power & Light Co.*, 3 F.E.R.C. ¶ 61,081, at 61,231 (1978) (any provision of the service agreement which by its own terms would effect a termination of service to Ft. Pierce is inconsistent with the public interest).

97. *Pacific Gas & Elec. Co.*, 25 F.E.R.C. ¶ 61,142, at 61,381 (1983) (termination is a change in service for which notice is statutorily required; joint request of the parties for “pre-grant” of termination denied); *cf. Cliffs Elec. Service Co.*, 32 F.E.R.C. ¶ 61,372, at 61,838 (1985); *Delmarva Power & Light Co.*, 23 F.E.R.C. ¶ 63,001, at 65,003 (1983) (staff opposition to proposed settlement agreement permitting notice of termination to cancel the agreement without further action of the Commission resulted in clarification that provision did not operate to extinguish any obligation of Delmarva to continue transmission or partial requirements service after termination of service agreement). *But see Public Serv. Co.*, 25 F.E.R.C. ¶ 61,469, at 62,043 (1983) (Commission approved automatic two-year termination of service for experimental rate for companies proposing a voluntary competitive market experiment for two types of bulk power, finding that such termination would be in the public interest).

98. *See Indiana & Michigan Elec. Co.*, 12 F.E.R.C. ¶ 61,007 (1980).

99. Typically, when a utility files a notice of termination that is opposed, the Commission suspends

tion of service would not be in the public interest if the wholesale customer's ability to render reliable and economic service to its own customers would be adversely affected.¹⁰⁰ In *Kansas Gas & Electric Co.*,¹⁰¹ partial requirements customers argued that termination of a transmission schedule, which they had not used for some time, would not be in the public interest because termination would deny them access to alternate sources of power. Although the Commission never reached the merits of this claim,¹⁰² it considered such potential denial of access to other power sources sufficient to set the proposed cancellation for hearing. Similarly, on at least two occasions the Commission considered allegations of anti-competitive motives as a sufficient basis to set the termination issue for hearing.¹⁰³

Two initial decisions by Commission administrative law judges have addressed whether a proposed termination of service would be in the public interest. In *Nevada Power Co.*,¹⁰⁴ the record indicated that Nevada Power had experienced tremendous growth in the early and mid-1970s and was faced with the problem of obtaining capacity to meet the requirements of its customers when it was allegedly financially unable to do so. For this reason, it decided to terminate service to a wholesale customer, California-Pacific, at a particular delivery point.¹⁰⁵

The ALJ began with the premise that, although Nevada Power was under a legal duty to serve all retail customers in its territory, its obligation to serve wholesale customers stemmed from contracts freely entered into by the utility. The ALJ then found that, because of Nevada Power's extremely poor financial posture and the resulting inability to attract capital, its retail customers faced the prospect of an inadequate electric supply to meet their needs. Further, he ruled that Nevada Power was not obligated to demonstrate that alternative supplies were available to California-Pacific in order to justify a finding that the public interest requires approval of the termination of service. The ALJ observed, however, that an alternate power supply, albeit at a much higher cost, was available and that Nevada Power had agreed to wheel power on behalf of California-Pacific from that alternate supplier. Moreover, he found

the effect of the notice for five months and orders the utility to continue providing service under the contract for five months pending its public interest determination. See, e.g., *Union Elec. Co.*, 3 F.E.R.C. ¶ 61,146, at 61,437 (1978); *Florida Power & Light Co.*, 3 F.E.R.C. ¶ 61,199 (1978).

100. See *Union Elec. Co.*, 3 F.E.R.C. at 61,437 (order instituting hearing procedures to determine whether cancellation is in public interest). The Commission never addressed the merits of this case because the notice of cancellation was withdrawn. See *Union Elec. Co.*, 4 F.E.R.C. ¶ 61,034 (1978) (Order Granting Motion to Accept Withdrawal of Notice of Cancellation and to Terminate Proceedings).

101. *Kansas Gas & Elec. Co.*, 19 F.E.R.C. ¶ 61,210 (1982).

102. Before a hearing was conducted, the Commission approved a settlement between the parties. *Kansas Gas & Elec. Co.*, 24 F.E.R.C. ¶ 61,225 (1983).

103. See *Public Serv. Co.*, 10 F.E.R.C. ¶ 61,277 (1980); *Florida Power & Light Co.*, 3 F.E.R.C. ¶ 61,199 (1978). Both of these cases became moot before an initial decision on the merits of the termination question was issued. See *Public Serv. Co.*, 21 F.E.R.C. ¶ 61,366 (1982) and *Florida Power & Light Co.*, 8 F.E.R.C. ¶ 63,039 (1979), *aff'd*, 9 F.E.R.C. ¶ 61,097 (1979).

104. *Nevada Power Co.*, 1 F.E.R.C. ¶ 63,004 (1977).

105. Evidence also demonstrated that Nevada Power's high debt/equity ratio prohibited it from issuing additional bonds and preferred stock, that its common stock was selling at fifty percent of book value, and that its earnings were low and trending downward.

that the burden that the continued sale would place on Nevada's customers far outweighed the higher cost that California-Pacific would have to pay for alternative power. Therefore, he ruled that the public interest required termination of the service. The *Nevada Power* case became moot before the Commission issued an opinion.¹⁰⁶

In 1976, the Commission directed that an investigation be instituted concerning a complaint filed by 10 municipalities alleging that Indiana & Michigan Electric Co. (I&M) threatened to discontinue wholesale service.¹⁰⁷ The order instructed the presiding ALJ to consider, *inter alia*, whether I&M, and its parent company, American Electric Power Co. (AEP), were attempting to remove themselves from the wholesale electric business and whether the Commission had legal authority to deal with this issue. The presiding ALJ judge in *City of Mishawaka v. American Electric Power Co.*,¹⁰⁸ found that the public interest dictated continuance of service, although it was unclear as to whether the service was to be under the terms of the pre-existing contract or whether AEP could continue to provide service on a day-to-day basis.¹⁰⁹ A controlling factor in his decision seemed to be the lack of alternate supplies available to the wholesale customers.

AEP had publicly stated its intention to withdraw from the wholesale service business where alternate wholesale supplies were available because it did not have the level of revenues required to finance the expansion of necessary generating plant. AEP gave notice of termination to its customers under the terms of the applicable service agreements. After the termination, however, it continued to supply its customers on a day-to-day basis.¹¹⁰

The presiding ALJ found that, although no wholesale customers of AEP had been denied service, the actions taken by AEP had created justifiable apprehension and potential prejudice with respect to future continuity of service. Further, he found that the fact that wholesale customers may "theoretically" have a greater ability to obtain alternate sources of power than retail customers, "does not appear to be a valid criteria [sic] for differentiating between these classes of customers within the meaning of section 205(b) [of the FPA]."¹¹¹

According to the ALJ, AEP had not demonstrated that the termination of service to wholesale customers was in the public interest. He distinguished the *Nevada Power* case on the ground that the municipal complainants in the case before him were total requirements customers of AEP with no practical alternative to AEP power. Further, the ALJ found that, in light of the energy crisis, it would be inconsistent with the public interest to require the municipalities to construct their own high cost generation.¹¹² The ALJ ordered AEP

106. *Nevada Power Co.*, 1 F.E.R.C. ¶ 61,325 (1977) (order authorizing exchange of electrical facilities and terminating proceedings).

107. *City of Mishawaka v. American Elec. Power Co.*, 56 F.P.C. 1193 (1976).

108. *City of Mishawaka v. American Elec. Power Co.*, No. E-9548 and E-9549 (FPC May 10, 1977) (initial decision unpublished).

109. *Id.* at 17.

110. *Id.* at 14.

111. *Id.* at 16.

112. *Id.* at 17.

to refrain from taking any action that would have the effect of singling out any class of customers with respect to continuity of service.¹¹³ The proceeding was settled before the Commission reviewed this initial decision.

Notwithstanding the Commission's longstanding interpretation of its authority, commentators have suggested that the Commission has misconstrued the *Penn Water* decision and that the FPA does not require Commission approval of a termination of service where the wholesale service contract provides for such termination. The Natural Gas Act provides that Commission approval must precede an abandonment of jurisdictional facilities and services,¹¹⁴ and the legislative history of the FPA indicates that Congress considered and rejected including analogous abandonment provisions in the FPA.¹¹⁵ The Supreme Court did not discuss the lack of abandonment authority under the FPA in *Penn Water*, and the Commission has yet to address this issue directly.¹¹⁶

In a recent law review article, two authors contend that the Commission has misconstrued the *Penn Water* decision and that the final resolution of the issue of the Commission's termination authority must await review of this issue by the appellate courts.¹¹⁷ The authors provide a well reasoned argument that the *Penn Water* decision should be limited to cases where the Commission is considering termination in connection with its authority under section 202(b) of the Federal Power Act.¹¹⁸

Although reasonable arguments can be advanced that the Commission has overstepped the bounds of its authority in the termination area, utilities must proceed on the assumption that wholesale service obligations will not necessarily terminate upon the expiration of the service contract. As a practical matter, the Commission is not likely to alter its consistent position on this issue, and any utility that challenges the Commission in the courts must convince the court that the Commission's longstanding interpretation of *Penn Water* is incorrect.¹¹⁹ Further, because the Commission has an arguable statu-

113. *Id.* at 20.

114. Natural Gas Act § 7(b), 15 U.S.C. § 717f(b) (1982).

115. The original Wheeler-Rayburn bill contained an abandonment provision, but the final bill reported out of committee failed to incorporate such provision because the committee was "of the opinion that for the present there is no imminent danger of excessive extension that would prove disadvantageous to consumers." S. REP. NO. 621, 74th Cong., 1st Sess. 20 (1935).

116. In *Massachusetts Mun. Wholesale Elec. Co.*, 30 F.E.R.C. ¶ 61,323, *rehearing granted*, 32 F.E.R.C. ¶ 61,194 (1985), in the context of a decision construing the Niagara Redevelopment Act, the Commission recognized that "[i]ndeed, . . . the Commission's authority to approve abandonment of service stems from the provisions of the NGA. . . . [W]e should not ignore the presence of abandonment authority in the NGA and its absence in the FPA." 32 F.E.R.C. at 61,448 (citations omitted). The Commission's statement about its lack of abandonment authority under the FPA was not essential to the decision, and this interpretation of its authority appears difficult to reconcile with the position the Commission has taken in the cases in which a utility has sought to terminate electric service under a contract.

117. See Norton & Spivak, *The Wholesale Service Obligation of Electric Utilities*, 6 ENERGY L.J. 179, 189-96 (1985).

118. *Id.* at 194.

119. On its face, the Supreme Court's decision in *Penn Water* appears to support the Commission's position. In their article, Norton and Spivak found it necessary to perform a significant amount of historical reconstruction in order to present their contrary position.

tory basis for its position and has consistently defined a cancellation as a rate change subject to section 205, a reviewing court could give some deference to the Commission's longstanding interpretation of its authority under the FPA.¹²⁰

IV. RECIPROCAL OBLIGATION OF A WHOLESALE CUSTOMER TO TAKE SERVICE AFTER THE TERMINATION OF A SERVICE AGREEMENT

Although the Commission holds that utilities may not unilaterally terminate service, even where the underlying service agreement expires, it does not impose a reciprocal obligation on wholesale customers to take service where termination by the customer imposes a hardship on the supplying utility. In *Public Service Co. of New Hampshire (PSNH)*,¹²¹ the only case squarely presenting the issue, the Commission was unwilling to impose on a customer who terminated service under the terms of its wholesale service contract a reciprocal obligation to take service pending a public interest determination.¹²² Although the Commission recognized that the utility bears a burden to plan for the requirements of customers who could decide to switch off the system after the utility has begun to invest in facilities to serve their loads, the Commission indicated that the utility's remedy is to protect itself by contract.¹²³

Public Service Co. of New Hampshire (PSNH) requested the Commission to declare that termination of service by two of its customers, Exeter and Hampton Electric Co. and Concord Electric Co. (E&C) was "improper under the terms of their contracts and unjust and unreasonable under sections 205 and 206 of the Federal Power Act."¹²⁴ E&C had submitted a two-year notice of termination in accordance with the service contract. PSNH claimed that the two-year termination would be unjust and unreasonable because PSNH was obligated to supply E&C's power requirements from its generating capacity, which included the Seabrook nuclear plant, scheduled for completion in 1986, in which PSNH had a thirty-two percent ownership share. PSNH estimated that loss of E&C's load would transfer to the company and its remaining customers increased revenue requirements approximating \$212 million through 1992, the year PSNH could begin profitably to sell its capacity elsewhere. PSNH asserted that the Commission should not permit E&C to avoid costs incurred specifically on their behalf by PSNH, and requested the Commission to exercise its jurisdiction under the Federal Power Act to order that E&C's termination of service could not be carried out in a two-year period.¹²⁵

120. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (courts accord considerable weight to agency's construction of the statutory scheme it is entrusted to administer); *United States v. Public Utils. Comm'n*, 345 U.S. 295, 314-15 (1953) (courts accord weight to established administrative agency interpretation of its own authority under statute).

121. *Public Serv. Co.*, 31 F.E.R.C. ¶ 61,267 (1985).

122. *Id.* at 61,547.

123. *Id.* at 61,548 n.9.

124. *Id.* at 61,545. PSNH further requested the Commission to find that any termination of service should be delayed until November 1, 1993, or until such time as PSNH could make compensatory sales of the capacity dedicated to E&C.

125. *Id.* at 61,546.

In a decision based strictly on an interpretation of the contract language, the Commission denied PSNH's petition for declaratory relief.¹²⁶ PSNH petitioned for rehearing claiming, among other things, that the Commission failed to discuss PSNH's contention that the Commission may use its FPA authority independent of the contract to prohibit unjust and unreasonable termination by the customers.¹²⁷ The Commission found that it has no authority to compel a wholesale customer to continue taking service once that customer gives contractual notice of termination.¹²⁸ Moreover, the Commission found that before PSNH made substantial investments on behalf of E&C, PSNH could have protected itself by filing to amend the contract prospectively, presumably to include a more favorable notice provision.¹²⁹

In advocating the imposition of a reciprocal duty, PSNH argued that under *Penn Water* the Commission has authority to refuse to approve the termination based on the public interest, and that the public interest could be harmed just as much by a precipitous customer termination as by a termination initiated by a utility.¹³⁰ It contended that the Commission had focused exclusively upon the rights of those customers leaving the system and had ignored the \$212 million burden that such an outcome would place upon PSNH and its remaining customers. In refusing to impose reciprocal obligations, the Commission stated that the FPA "protects customers from unjust and unreasonable terminations by requiring *utilities* to file changes in service under section 205."¹³¹ Further, the Commission noted that all of the cases addressing termination of service dealt with "terminations *by a utility* required by the FPA to file changes in service for prior review by the Commission."¹³²

The Commission apparently has concluded that it has no authority to protect a utility from the threat of stranded investment, except to enforce notice provisions contained in the contract between the utility and the customer. In *Kentucky Utilities Co.*,¹³³ the Commission referred to contractual notice of termination provisions as the appropriate method for allowing the utility to plan for customer loads. There, the Commission found that Kentucky Utilities was justified in increasing the contract notice of termination period from three to five years.¹³⁴ The Commission recognized that if a cus-

126. *Id.* at 61,547.

127. *Public Serv. Co.*, 32 F.E.R.C. ¶ 61,251 (1985).

128. *Id.* at 61,598. The Commission distinguished PSNH's case from the situation where a customer requests that service continue once a contract has expired. In the latter instance, the FERC stated that it has the final authority to determine the terms under which the utility will provide the service, including the length of the contract term. The Commission added that such a determination would bind the customer.

129. *Id.*

130. Petition of Public Service Company of New Hampshire for Declaratory Order, No. EL85-15-000, at 8-11 (FERC filed Dec. 11, 1984); Application for Rehearing, No. EL85-15-000, at 12-13 (FERC filed July 5, 1985).

131. 32 F.E.R.C. at 61,598 (citing *Penn Water*, 343 U.S. at 422-23) (emphasis in original).

132. *Id.* at 61,598 (emphasis in original).

133. *Kentucky Utils. Co.*, 23 F.E.R.C. ¶ 61,317, at 61,672 (1983), *modified*, *Kentucky Utils. Co.*, 25 F.E.R.C. ¶ 61,205, at 61,544 (1983).

134. The Commission found that three years was the appropriate cancellation period for any load termination up to 25 MW, with an aggregate limit of 25 MW which could be cancelled within any three-year period. *Kentucky Utils.*, 25 F.E.R.C. at 61,544. On appeal, the Sixth Circuit found that only the five-

tomers decreases its requirements or leaves the system after a utility begins to build facilities to meet its load, unneeded capacity and high energy costs will result. Therefore, the Commission found that an "acceptable measure" for notice would be the period between the time the utility makes major capital commitments and the time the generating unit is completed.

The Commission tacitly recognized that one effect of extending the service obligation beyond the contract term could be to nullify the effectiveness of even the most favorable contract termination provision, because a customer would be able to terminate the contract yet still be entitled to receive service until it decided to leave the system. For the utility, to protect itself from "bad faith" terminations by customers, the Commission again recommended a contract remedy. The Commission suggested that the utility require the terminating customer to submit an affidavit from its new supplier stating that it, in fact, has agreed to supply service as of a specified date. Then, if unforeseen circumstances forced the customer to require service from the utility for a period after contract termination, the Commission indicated, in dictum, that it would be willing to approve an incremental cost rate to ensure that the customer would pay for any increased costs of serving it after the utility's obligation to plan for the customer's load had ceased.¹³⁵

The *PSNH* and *Kentucky Utilities* cases indicate that, in the Commission's view, there is no "right to serve" in the wholesale context. On the other hand, the Commission, at least as currently constituted, appears prepared to permit utilities to obtain some measure of protection by inclusion of appropriate provisions in their service agreements with wholesale customers. The difficulties with this situation are that: (1) many existing contracts, entered into in an entirely different environment, do not contain adequate notice provisions; and, (2) the ability of a utility initially to include notice provisions in a contract and, in the event a customer attempts to terminate such contract, to enforce the provisions is subject to Commission regulation. As has been discussed above, in times of turmoil in energy markets—when such notice provisions are most important—the Commission has exhibited a strong tendency to protect customers, even from the consequences of their own mistakes.

V. THE OBLIGATION TO SERVE A RETURNING CUSTOMER

As a consequence of the availability of excess generating capacity in most regions of the country, many wholesale customers in the past few years have purchased firm capacity and energy from third parties to replace capacity and energy formerly provided as wholesale requirements service from their historical utility suppliers. This raises a question of whether the former requirements supplier remains obligated to take the wholesale customer back on a requirements basis and, if so, whether the returning customer would be entitled to rates based on traditional system average embedded cost ratemaking princi-

year period requested by Kentucky Utilities was supported by the record. *Kentucky Utils. Co. v. FERC*, 766 F.2d 239, 250 (1985). On remand, the Commission found the five-year notice period to be appropriate for all customers. *Kentucky Utils. Co.*, 37 F.E.R.C. ¶ 61,299 (1986).

135. See *Kentucky Utils.*, 23 F.E.R.C. at 61,679-80.

ples.¹³⁶ Thus far, the Commission has declined to decide the question, leaving the former requirements supplier with a contingent wholesale service obligation.

In the *Kentucky Utilities* case, discussed above, Kentucky Utilities argued that requiring it to maintain rates for partial requirements service applicable to customers that had purchased off-system capacity and energy meant that it would have to serve the customers on a requirements basis when their off-system purchases terminated. The Commission termed this concern "imaginary."¹³⁷ It stated that Kentucky Utilities would have no obligation to plan for these customers' loads once they left the system and that any service obligation would require an order by the Commission under section 202(b) of the FPA, in which case the availability of adequate capacity to serve these customers at the time would be an "important consideration." The Commission noted also that the rates applicable to such returning customers *might* be "different."¹³⁸

In a recent order involving a rate filing by Commonwealth Edison Co.,¹³⁹ the Commission rejected a proposed transmission tariff provision to the effect that if a customer were to terminate transmission service, Commonwealth Edison would have no obligation to provide requirements service to the customer.¹⁴⁰ The Commission acknowledged that the tariff provision at issue involved "important policy questions regarding a utility's duty to serve" returning customers, but decided that the question could be resolved at the time a customer sought to return. The Commission concluded that its action would not prejudice Commonwealth Edison because one year's notice was required in order to terminate transmission service.¹⁴¹

The Commission also recently addressed the rights of returning customers in connection with its CWIP rulemaking proceeding.¹⁴² In Order No. 474, the Commission concluded that wholesale customers should be permitted to avoid paying for CWIP in rates in circumstances where the customer has provided reasonable notice to its supplier that it intends to meet all or a portion of its requirements by acquiring its own alternative power supplies. In the event that a customer later seeks to return to its former supplier, the Commission concluded that it should be "treated as any other new customer seeking service or any existing customer seeking additional service from the utility at that time."¹⁴³ Thus, as indicated by its order in the CWIP proceeding, the Commission does not appear amenable to the proposition that the rules of the game

136. The circumstances are the same where a wholesale customer, alone or in association with other utilities, constructs its own generation to replace wholesale requirements purchases.

137. *Kentucky Utils.*, 23 F.E.R.C. at 61,667.

138. *Id.*

139. Commonwealth Edison Co., 38 F.E.R.C. ¶ 61,141, at 61,381 (Feb. 6, 1987).

140. The request to reject the provision was made by two former full requirements customers of Commonwealth Edison that are currently purchasing their generating requirements from Commonwealth Edison's system. They argued that the provision was discriminatory and anti-competitive.

141. *Commonwealth Edison*, 38 F.E.R.C. at 61,384. The Commission did not explain how one year's notice could be considered adequate to meet Commonwealth Edison's needs. Clearly, it is not.

142. Order No. 474, *supra* note 45.

143. 52 Fed. Reg. at 23,961.

might be different for a former customer that chose to sever its traditional supplier-customer relationship in order to compete in wholesale markets for a lower cost power supply. Even if the then current costs of serving the returning wholesale customer are the same as the costs to serve a new customer, treating the returning and new customers on an equal basis effectively shields the returning customer from any risks associated with its earlier decision to purchase power in the marketplace.¹⁴⁴

These Commission decisions are of little or no assistance to a utility faced with the task of planning resource additions in circumstances where wholesale customers have the option to seek power supplies from alternative suppliers. In the case of Commonwealth Edison for example, which has in effect a tariff for wholesale service, the utility is left with the burden either of withdrawing or narrowing the applicability of its tariff—a task which must be undertaken in the face of the *Florida Power & Light* decision discussed above¹⁴⁵—or of persuading a future Commission that a returning customer, eligible for service under the terms of the tariff, should not be permitted to avail itself of the tariff because it earlier chose to leave the system. Moreover, even if the tariff problem were to be surmounted, the utility would face the risk that it would be required to resume service, either pursuant to section 202(b) or under the Commission's authority, under sections 205 and 206, to remedy undue discrimination.

Current Commission precedent regarding undue discrimination prohibits differences in rates unless justified by differences in the current costs to serve different customers or other factors.¹⁴⁶ The Commission's statements concerning potential different rate treatment for returning customers must, therefore, be considered in light of section 205(b)'s proscription against undue preferences in rates. Moreover, customers are most likely to return when generation is not plentiful and, as several of the cases discussed earlier in this Article demonstrate, the Commission is most likely to impose a service obligation in situations where alternatives are limited. Nothing in the Commission's decisions to date indicates that the Commission is prepared to consider the soundness of a wholesale customer's past power supply decisions in evaluating a supplying utility's obligation to serve that customer when it seeks to return to the fold. Perhaps most fundamental, the planning imperatives facing a utility are not addressed meaningfully by any rule that pretermits the issue of a wholesale customer's right to return for regulatory determination at the time that the customer seeks to return.

144. The Commission also indicated that its analysis of the rights of the returning customer would depend, in part, upon the competitiveness of the bulk power markets at the time a customer seeks to compel the utility to provide service. 52 Fed. Reg. at 23,960. The Commission apparently equates the "competitiveness" of power markets with the degree of availability of service from alternative sources. However, fully competitive markets for goods or services can be "tight" in the sense that demand temporarily exceeds supply. See Pace, *Wheeling and the Obligation to Serve*, 8 ENERGY L.J. 265 (1987).

145. See *supra* notes 68-79 and accompanying text.

146. *E.g.*, *St. Michaels Utils. Comm'n v. FPC*, 377 F.2d 912 (4th Cir. 1967).

VI. CONCLUSION

The Commission recently stated that it has never determined whether there is an obligation to provide wholesale requirements service.¹⁴⁷ Our analysis of the cases indicates that the prevailing interpretation of the FPA is difficult to square with Congress' determination not to impose a "common carrier" obligation on electric utilities providing wholesale service. From the perspective of a utility planner, a *de facto* obligation to serve at the wholesale level currently exists. To the extent that there are limitations on this service obligation, they have not been stated with sufficient precision to enable utilities to make rational planning decisions with respect to current and future wholesale loads. The rules of the game are unclear and subject to various interpretations in individual cases. The prevailing interpretation of the Act would be more manageable for utility planners if the Commission were to address and resolve the inconsistencies associated with treating wholesale customers concurrently as customers (to whom a service obligation exists) and as competitors in wholesale and retail markets. We suggest that any Commission-prompted move toward increased competition in the industry should be preceded by a review and redefinition of the roles and obligations of wholesale suppliers and customers under the Federal Power Act.¹⁴⁸

147. 52 Fed. Reg. at 23,960.

148. Although it is beyond the scope of this Article, we believe that such review should encompass reconsideration of a number of pricing and cost allocation standards that were first developed in the context of regulating full requirement rates to dependent customers, and that, in many instances, have been applied in contexts when the wholesale customer is a utility with a myriad of power supply options.